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# **PROTECTING THE HEALTH OF BUSINESSES DURING COVID-19 A LEGAL ANALYSIS OF THE REFORMS TO THE INSOLVENCY AND BANKRUPTCY CODE, 2016 IN INDIA**

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## **ABSTRACT**

The outbreak of the Novel Coronavirus has severely affected the economy and the financial health of businesses across the world amidst the disruption of supply chains and logistical issues, negligible cash flows, dynamic economic effects on different industries on account of the nature of business/trade and the staggered periods of lockdown measures leading to a total shutdown of business activities considering the effect of new waves of the virus. Across the world we are witnessing proactive government measures vis-à-vis Corporate and Financial Legislative Reforms with the twin objective of protecting viable businesses and industries along with an effort to soften the economic blow faced by these companies. In light of the above-mentioned, this research paper aims to provide an insight into the amendments made to the Insolvency and Bankruptcy Code, 2016 by the Government of India as a mitigating measure in the wake of the Novel-Coronavirus whilst assessing the co-relation between the reforms to the Legislations analysed above with the overall changes to the corporate and financial policy measures undertaken by the Indian Institutions. The paper concludes by providing a way forward in light of the current stage of the pandemic by adopting a predictive and comparative study.

## INTRODUCTION

The objective of the said research paper is to analyse the effect of Indian Corporate & Financial Legal Response to the pandemic and assess its viability. The paper has restricted its focus specifically to the legislative amendments to the Insolvency and Bankruptcy Code, 2016 in light of Covid-19.

The researcher has undertaken extensive Review of Literature in pursuance of the research objective vis-à-vis the proposed study. Primarily, the literature includes Government Sources such as the Amended Legislations<sup>1</sup>, Press Releases<sup>2</sup> and Reports of the Ministry of Corporate Affairs<sup>3</sup>. Additionally, the Government reports give a picture by tracking the number of companies thrown into insolvency, in duration and on account of the Covid-19 pandemic.<sup>4</sup> Legal Commentaries such as A Ramaiya's Guide to Companies Act<sup>5</sup> and G.K. Kapoor's Company Law and Practice<sup>6</sup> have been referred so as to understand the legal provisions and the historical context vis-à-vis the law prior to the pandemic.

Rajat Jain<sup>7</sup> has observed that, "*The lockdown owing to the Covid-19 outbreak is causing a ripple effect in the economy and significantly affecting business operations, business profits, cash flow and supply chain of entities*" due to which the businesses have been continuously pleading to the Government to undertake necessary steps in the nature of directions and waivers to protect their health, viability and survival.

The research focuses upon is the Insolvency and Bankruptcy Code, 2016. The Government

<sup>1</sup> The Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021 No. 3 of 2021; see also Ministry of Corporate Affairs, Acts & Rules, MCA <<https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks/notifications.html>> accessed: 31 July, 2021.

<sup>2</sup> Ministry of Corporate Affairs , MCA amended Companies Act 2013 to mitigate blow by COVID-19 pandemic, PIB.GOV.IN (February 09, 2021), <<https://pib.gov.in/PressReleasePage.aspx?PRID=1696538#:~:text=MCA%20amended%20Companies%20Act%202013%20to%20mitigate%20blow%20by%20COVID%2D19%20pandemic&text=The%20Ministry%20of%20Corporate%20Affairs,circulars%20from%20time%20to%20time>> accessed 01 August, 2021 .

<sup>3</sup> Ministry of Corporate Affairs, Standing Committee on Finance: Implementation of Insolvency and Bankruptcy Code-Pitfalls and Solutions (Thirty-Second Report), IBBI (August, 2021) <<https://www.ibbi.gov.in/uploads/whatsnew/fc8fd95f0816acc5b6ab9e64c0a892ac.pdf>> accessed 01 August, 2021.

<sup>4</sup> Ministry of Corporate Affairs, Bankrupt Companies after lockdown was imposed due to COVID-19 pandemic, PIB.GOV.IN (March 22, 2021), <<https://pib.gov.in/PressReleasePage.aspx?PRID=1706640>> accessed 01 August, 2021.

<sup>5</sup> A Ramaiya, Guide to The Companies Act, (19<sup>th</sup> Ed., LEXISNEXIS BUTTERWORTH, 2020).

<sup>6</sup> G.K. Kapoor & Sanjay Dhamija, Company Law and Practice, (23<sup>rd</sup> Ed., TAXMANN, 2018).

<sup>7</sup> Rajat Jain, Impact of Covid-19 on Businesses and Economy – Expounding Some Tax Issues, (2020) TAXMANN.COM 117, 954.

vide the amendment ordinance, 2021 to the IBC has suspended Section 7, 9 and 10 of the code and declared that no proceeding under the code can be initiated for a default during the said lockdown/pandemic period.<sup>8</sup> The said change was coupled with the moratorium on debt collection imposed by the RBI<sup>9</sup> in order to bring a “*calm period*” for the businesses.<sup>10</sup> The author attempts to analyse the amendments to IBC in the wake of Covid-19 and discusses various judicial dictums explaining the legislative intent of the amendment.<sup>11</sup> Researchers that have already undertaken a study of the effect of the pandemic on the IBC have argued that post-covid the number of disputes will see an upward trajectory however the settlements will see a downward trend.<sup>12</sup> Further, it is argued that the said measures are against the interests and not viable for the MSME’s.<sup>13</sup> The author argues that the changes carried out by the Government were necessary however they alone are not enough to help recovery of businesses. The suspension of the Code was a step in the right direction however at this stage there is a requirement to re-vamp the Code in accordance with the socio-economic circumstances and remove the suspension on the Insolvency and Bankruptcy Code. The changes and amendments must prove to be beneficial to the debtors and MSME’s by looking at measures such as pre-pack insolvency packages.<sup>14</sup> In light of the same, the impact of pre-pack insolvency as a future step is assessed. The paper studies the opportunities and challenges that pre-packed insolvency will face.<sup>15</sup> Further, the research undergoes an international comparative analysis vis-à-vis Insolvency Regimes across jurisdictions.<sup>16</sup>

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<sup>8</sup> The Insolvency and Bankruptcy Code (Amendment) Ordinance 2021 No. 3 of 2021

<sup>9</sup> Reserve Bank of India, COVID-19—Regulatory Package, RBI/2019-20/186, RESERVE BANK OF INDIA (March 27, 2020), <<https://www.rbi.org.in/scripts/NotificationUser.aspx?Mode=0&Id=11835>>, para. 2> accessed 30 July, 2021.

<sup>10</sup> Anirudh Burman, India’s Sustained Economic Recovery Will Require Changes to Its Bankruptcy Law, CARNEGIE INDIA (April 2021), <<https://carnegieindia.org/2021/04/05/india-s-sustained-economic-recovery-will-require-changes-to-its-bankruptcy-law-pub-84234>> accessed 30 July, 2021.

<sup>11</sup> Shruthi Manohar, AN ANALYSIS OF CORPORATE INSOLVENCY RESOLUTION IN INDIA IN THE WAKE OF COVID-19 CRISIS, [2020] G L.J., 107.

<sup>12</sup> Ram Singh and Hiteshkumar Thakkar, Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19, [2021] THE INDIAN ECON. JOUR., 568.

<<https://journals.sagepub.com/doi/pdf/10.1177/00194662211013218>> accessed on 02 August, 2021.

<sup>13</sup> Ram Singh and Hiteshkumar Thakkar, Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19, [2021] THE INDIAN ECON. JOUR., 568,

<<https://journals.sagepub.com/doi/pdf/10.1177/00194662211013218>> accessed on 02 August, 2021.

<sup>14</sup> Anirudh Burman, India’s Sustained Economic Recovery Will Require Changes to Its Bankruptcy Law, CARNEGIE INDIA (April 2021), <<https://carnegieindia.org/2021/04/05/india-s-sustained-economic-recovery-will-require-changes-to-its-bankruptcy-law-pub-84234>> accessed 30 July, 2021.

<sup>15</sup> Rakhi Sharma & Sakshi Ajmera, The Pre-Pack Ordinance 2021 - The Challenges And Way Forward (2021) TAXMANN.COM 127, 409.

<sup>16</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

The review of literature shows that previously there is a lacuna in literature as the research does not adequately address the impact that the said amendments have had which is attributable to them being carried out at the nascent stages of the pandemic, however at this stage having dealt with the pandemic for over a year the said impact can be assessed to a certain extent. Furthermore, there is a requirement to dive into an international comparative analysis amongst other jurisdictions. The previous literature does not provide a wholesome picture of the cause-effect relation between the specific legislative changes identified by the researcher on the Indian Economy. The proposed study seeks to provide a complete legal analysis for the Indian way forward by identifying spaces left by the legislature and the propose suggestions for the future.

## CHAPTER OVERVIEW

The said Research Paper is divided into three chapters. The First Chapter titled “IMPACT OF COVID-19 ON THE FINANCIAL AND CORPORATE HEALTH OF BUSINESSES” tracks the economic devastation that has been caused due to Covid-19 in order to understand the need for reforms in the Corporate and Financial Laws.

In the Second Chapter titled “IMPACT OF THE LEGISLATIVE & POLICY RESPONSE BY THE GOVERNMENT OF INDIA TO MITIGATE THE ADVERSE ECONOMIC IMPACT OF COVID-19” lists and analyses the changes that have been brought about in the Insolvency and Bankruptcy Code, 2016 in order to mitigate the damage and protect viable businesses especially shielding the MSME Sector. Though, the steps taken by the Government are bold and necessary, there is need to critique the said changes in order to move towards an improved set of policy decisions.

The Final Chapter titled “Future Course of Action” discusses the benefits of Pre-Packaged insolvency as a future option for the purpose of protecting viable businesses. The said method has already seen many benefits in European nations and must now be adopted by India in the wake of the Covid-19 situation.

## RESEARCH METHODOLOGY

The legal research methodology adopted for the proposed study is a combination of doctrinal and non-doctrinal/empirical research including both primary and secondary sources of

information.

Primary sources of information include relevant legislations including amendments, rules, regulations, Government policy documents and authoritative decisions of the Court of law whilst secondary sources of information in the nature of legal commentaries, scholarly research papers, and working papers along with Articles published in different journals, books and news reports from leading newspapers have been relied upon. The sources of information used are not limited to one jurisdiction with the aim of carrying out a comparative analysis.

The researcher undertakes an explanatory, analytical, applied and comparative approach to the research to comprehensively and in an evolutionary manner analyse the said relevant amendments carried out by the Government, understand the cause and effect of such legal measures and in light of the same propose suggested reforms.

## **RESEARCH QUESTIONS**

1. What is the impact of Covid-19 upon the Corporate and Financial sector in India?
2. What is the Indian Corporate & Financial Legal Response adopted by the Government of India for protecting the health and viability of businesses in light of Covid-19?
3. Whether the amendments to the Insolvency and Bankruptcy Code, 2016 are sufficient to tackle the economic onslaught caused by Covid-19?
4. How can India better the Corporate & Financial Legal Response to protect its businesses and industries?

1. IMPACT OF COVID-19 ON THE FINANCIAL AND CORPORATE HEALTH OF BUSINESSES

The entire world is going through unprecedeted times on account of Covid-19. No country has been left unaffected by the Covid-19 Pandemic and during the first phase of the pandemic almost 60% of the entire human population had to undergo partial and/or complete restrictions on physical movement/lockdowns.<sup>17</sup> The effect of the Pandemic has been felt throughout the

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<sup>17</sup> D. Indrakumar, Covid-19 and its Impact on Micro, Small and Medium Enterprises in India, [2020], MANPOWER JOURNAL, 75 <<http://iamrindia.gov.in/writereaddata/UploadFile/5.pdf>> accessed 29 October, 2021.

corporate and financial sector. The staggered lockdowns imposed by the Government coupled with the restrictions on physical movement has impacted all businesses, big and small.<sup>18</sup> The above-mentioned factor has resulted in a chain reaction causing harm to business operations, profits and supply chains.<sup>19</sup> Accordingly the world economy saw a contraction by 3% in 2020 as compared to the previous year which is even worse than the growth rate during the Global Financial crisis of 2008.<sup>20</sup> Particularly in India an already struggling economy with a GDP of 4.2% on 31<sup>st</sup> March, 2020 has had to face another setback.<sup>21</sup> According to Goldman Sachs the Indian Economy has contracted by around 45% in 2020<sup>22</sup>. A large number of companies are finding it tough to honour their contractual obligations<sup>23</sup>, especially the Small enterprises on account of lack of resources to tackle with the economic and financial onslaught caused by the pandemic.<sup>24</sup> In a Press Release of the Ministry of Finance it was stated that, “*As per the Estimates of Gross Domestic Product (GDP) for the First Quarter (Q1) of 2020-21 released by the National Statistical Office (NSO), Ministry of Statistics & Program Implementation (MoSPI), the real GDP in India contracted by 23.9 per cent during the first quarter of 2020-21 (as against 5.2 per cent growth in Q1 of 2019-20).*”<sup>25</sup> As per the data of the Reserve Bank of India the GDP is set to contract by 7.5% in 2020-21.<sup>26</sup>

The MSMEs account for the largest source of employment second only to agriculture;<sup>27</sup> however their inability to handle the pandemic has already led to unemployment at a massive

<sup>18</sup> Ram Singh and Hiteshkumar Thakkar, Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19, [2021] THE INDIAN ECON. JOUR., 568, <<https://journals.sagepub.com/doi/pdf/10.1177/00194662211013218>> accessed on 02 August, 2021.

<sup>19</sup> Rajat Jain, Impact of Covid-19 on Businesses and Economy – Expounding Some Tax Issues, (2020) TAXMANN.COM 117, 954.

<sup>20</sup> D. Indrakumar, Covid-19 and its Impact on Micro, Small and Medium Enterprises in India, [2020], MANPOWER JOURNAL, 75 <<http://iamrindia.gov.in/writereaddata/UploadFile/5.pdf>> accessed 29 October, 2021.

<sup>21</sup> Jayati Ghosh, A critique of the Indian Government’s Response to the Covid-19 Pandemic, [2020] JOURNAL OF INDUSTRIAL AND BUSINESS ECONOMICS, 519.

<sup>22</sup> Asit Ranjan Mishra, India’s GDP to shrink 45% in Q1FY21: Goldman Sachs, LIVEMINT, (18 May, 2020) <<https://www.livemint.com/news/india/indian-economy-may-contract-by-45-in-june-quarter-goldman-sachs-11589728732340.html>> accessed 28 October, 2021.

<sup>23</sup> Ram Singh and Hiteshkumar Thakkar, Settlements and Resolutions Under the Insolvency and Bankruptcy Code: Assessing the Impact of Covid-19, [2021] THE INDIAN ECON. JOUR., 568, <<https://journals.sagepub.com/doi/pdf/10.1177/00194662211013218>> accessed on 02 August, 2021.

<sup>24</sup> Rajat Jain, Impact of Covid-19 on Businesses and Economy – Expounding Some Tax Issues, (2020) TAXMANN.COM 117, 954.

<sup>25</sup> Ministry of Finance, Steps taken by Government to ameliorate impact of COVID-19 pandemic on Indian economy, PIB.GOV.IN (03 Feb, 2021) <<https://pib.gov.in/PressReleseDetailm.aspx?PRID=1696278>> accessed 28 October, 2021.

<sup>26</sup> Ministry of Finance, Steps taken by Government to ameliorate impact of COVID-19 pandemic on Indian economy, PIB.GOV.IN (03 Feb, 2021) <<https://pib.gov.in/PressReleseDetailm.aspx?PRID=1696278>> accessed 28 October, 2021.

<sup>27</sup> Maurice Kugler and Shakti Sinha, The impact of Covid-19 and the policy response in India, BROOKINGS (13 July, 2020) <<https://www.brookings.edu/blog/future-development/2020/07/13/the-impact-of-covid-19-and-the-policy-response-in-india/>> accessed 28 October, 2021.

scale.<sup>28</sup> In 2020 the unemployment rate in India was at the worst level in 29 years reaching 7.11%.<sup>29</sup> According to a report of the New Indian Express, “*Since April 2020, at least 4,900 owners have listed their businesses for sale with restaurants, fashion, gyms, cloud kitchen and event management companies dominating the space, according to data shared by online dealmaking firm SMERGERS.*”<sup>30</sup>

Therefore, in light of the economic mayhem that has been brought on by Covid-19, Governments across the globe have taken temporary measures in order to protect businesses and companies. The Indian Government has too in a pro-active manner brought about certain amendments, notifications etc. in order help viable businesses and companies survive the revenue shortfall faced across the spectrum on account of the Pandemic.

In the following chapter titled ‘*Impact of the Legislative & Policy Response by the Government of India to Mitigate the Adverse Economic Impact of Covid-19*’ the author has enumerated and explained the measures undertaken by the Government of India to mitigate the Economic Impact of Covid-19 vis-à-vis the Insolvency and Bankruptcy, 2016 i.e. in line with the scope of the present study. The said chapter explores the changes brought about internationally to tackle the *economics* of Covid-19 and finally concludes by analysing the impact of the said changes to the health and viability of businesses in India.

## **2. IMPACT OF THE LEGISLATIVE & POLICY RESPONSE BY THE GOVERNMENT OF INDIA TO MITIGATE THE ADVERSE ECONOMIC IMPACT OF COVID-19**

The Government of India has reacted to the adversity of times that Covid-19 has brought to the business world by initiating certain legislative amendments and policy responses.<sup>31</sup> In Chapter 2 the said changes have been listed out and analysed in order to achieve the purpose of the said paper.

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<sup>28</sup> D. Indrakumar, Covid-19 and its Impact on Micro, Small and Medium Enterprises in India, [2020], MANPOWER JOURNAL, 75 <<http://iamrindia.gov.in/writereaddata/UploadFile/5.pdf>> accessed 29 October, 2021.

<sup>29</sup> <https://www.bustoday.in/jobs/story/india-unemployment-in-2020-at-worst-level-in-29-years-shows-study-297195-2021-05-28>

<sup>30</sup> Business Today, India's unemployment in 2020 at worst level in 29 years, shows study, BUSINESS TODAY (28 May, 2021), <<https://www.newindianexpress.com/business/2021/jun/18/small-businesscarnage-4900-covid-hits-msme-firms-up-for-sale-figures-double-up-in-second-wave-2317904.html>> accessed 27 October, 2021.

<sup>31</sup> Taxation & Notification, Relief measures by Government of India for Business During Covid-19, RAZORPAY (6 May, 2020) <<https://razorpay.com/learn/government-schemes-during-covid-19/>> accessed 28 October, 2021.

## 2.1 CHANGES TO THE INDIAN INSOLVENCY REGIME

The pandemic has forced Governments around the world to amend their corporate insolvency laws.<sup>32</sup> The Indian Insolvency law was likewise amended on March 25, 2020 resulting in

- (i) Insertion of Section 10A in the Insolvency and Bankruptcy Code wherein fresh initiation of insolvencies was suspended for any default arising on or after 25<sup>th</sup> March, 2020 for a period of six months, subject to extension upto one year.<sup>33</sup> The said relaxation was in line with the moratorium extended by the Reserve Bank of India.<sup>34</sup>
- (ii) The Government has increased the minimum threshold to initiate the process of insolvency under the act from Rs. 1,00,000 to Rs. 1,00,00,000 for a period of six months starting from the 25<sup>th</sup> March, 2020 which may be subject to further extension to 1 year.<sup>35</sup>
- (iii) Section 66 (3) has been inserted as a non-obstante clause in Article 66 i.e. Fraudulent Trading or Wrongful trading in order to shield the directors of the corporate debtor.<sup>36</sup> The sub-section reads as follows:

*“(3) Notwithstanding anything contained in this section, no application shall be filed by a resolution professional under sub-section (2), in respect of such default against which initiation of corporate insolvency resolution process is suspended as per section 10A”<sup>37</sup>*

- (iv) Regulation 40C has been amended to provide relaxation in timeline to complete the Insolvency resolution process in adherence with Section 12 of the IB Code and reads as under:

*“40C. Special provision relating to time-line.*

*Notwithstanding the time-lines contained in these regulations, but subject to the provisions in*

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<sup>32</sup> Priya Misra, Challenges to Corporate Insolvency Law in the times of COVID 19 An evaluation of Indian experience [2021] TAXMANN.COM, 34.

<sup>33</sup> The Insolvency and Bankruptcy Code (Second Amendment) Act No. 17 of 2020 Section 2.

<sup>34</sup> Priya Misra, Challenges to Corporate Insolvency Law in the times of COVID 19 An evaluation of Indian experience [2021] TAXMANN.COM, 34.

<sup>35</sup> Lokesh Bulchandani & Akash Keshari, Global Impact of Covid-19 on Insolvency Laws, [2020] TAXMANN.COM 118.

<sup>36</sup> Cyril Shroff & Dhananjay Kumar, Indian Insolvency Law Responds to the Covid-19 Pandemic-Part II, IndiaCorporateLaw, (10 June, 2020) <<https://corporate.cyrilamarchandblogs.com/2020/06/indian-insolvency-law-responds-to-the-covid-19-pandemic-part-ii/>> accessed 30 October, 2021.

<sup>37</sup> The Insolvency and Bankruptcy Code (Second Amendment) Act No. 17 of 2020 Section 3.

*the Code, the period of lockdown imposed by the Central Government in the wake of COVID19 outbreak shall not be counted for the purposes of the time-line for any activity that could not be completed due to such lockdown, in relation to a corporate insolvency resolution process.”*

The intention of the Legislature whilst amending the Insolvency law was clearly to protect and prevent firms from being rendered insolvent due to the failures on account of the Pandemic.<sup>38</sup> The Judicial Construction of the said amendment came through the NCLT benches of Kolkata and Chennai.<sup>39</sup> Vide *Foseco India Ltd. v. Om Boseco Rail Products Ltd.*<sup>40</sup> and *Arrowline Organic Products Pvt. Ltd. v. Rockwell Industries Ltd.*<sup>41</sup> it has been clarified that the said changes will be treated as prospective in nature.<sup>42</sup> Hence, it was of the utmost importance defaults culminating due to the onset of Covid-19 not be considered under the code<sup>43</sup> especially for the MSME sector which has faced a massive reduction in ‘cash flow’ and ‘market operations’.<sup>44</sup> The steps incorporated by the Government of India under the umbrella of the IB Code provides ‘breathing space’ to companies which are otherwise viable businesses.<sup>45</sup> It is at this point pertinent to take a look at the response by other nations to its insolvency regime post the Covid-19 outbreak to understand the global implications of Covid-19 on the Insolvency laws. Additionally, looking at the global insolvency response will be of assistance in evaluating the implications of India’s response.

## 2.2 GLOBAL INSOLVENCY RESPONSE TO COVID-19

The Pandemic has affected economies across the world, it would serve the purpose of the research objective to analyse the global response and impact of Covid-19 on the Insolvency

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<sup>38</sup> Anirudh Burman, India’s Sustained Economic Recovery Will Require Changes to Its Bankruptcy Law, CARNEGIE INDIA (April 2021), <<https://carnegieindia.org/2021/04/05/india-s-sustained-economic-recovery-will-require-changes-to-its-bankruptcy-law-pub-84234>> accessed 30 July, 2021.

<sup>39</sup> Shruthi Manohar, AN ANALYSIS OF CORPORATE INSOLVENCY RESOLUTION IN INDIA IN THE WAKE OF COVID-19 CRISIS, [2020] G L.J., 107.

<sup>40</sup> CP(IB)No. 1735/KB/2019.

<sup>41</sup> CP(IB)1031/CB/2019.

<sup>42</sup> Shruthi Manohar, AN ANALYSIS OF CORPORATE INSOLVENCY RESOLUTION IN INDIA IN THE WAKE OF COVID-19 CRISIS, [2020] G L.J., 107.

<sup>43</sup> Vibhuti Deshmukh, Developments in Insolvency & Bankruptcy Code during COVID-19 Pandemic, [2020] TAXMANN.COM 117.

<sup>44</sup> PARAM AGARWAL, The IBC (Amendment) Ordinance, 2020: A Dereliction in Economic Crisis, [2020] TAXMANN.COM 117.

<sup>45</sup> Vibhuti Deshmukh, Developments in Insolvency & Bankruptcy Code during COVID-19 Pandemic, [2020] TAXMANN.COM 117

Laws:

(a) United States of America: The outbreak of Covid-19 brought the Small Businesses Reorganization Act into effect.<sup>46</sup> The effect of SBRA was that a new subchapter 5 got added to the US Bankruptcy Code and the more costly elements of Chapter 11 were removed.<sup>47</sup> Subsequently the CARES Act being the largest economic and emergency aid in the history of the U.S. of about \$2 Trillion was given Presidential assent.<sup>48</sup> The act also amended the definition of “*income*” in the Code to remove the payments related to coronavirus from its ambit for the purposes of filing bankruptcy.<sup>49</sup> The said amendment has benefited the small businesses and enabled them to make a new beginning.<sup>50</sup>

(b) United Kingdom: Similar to India, the United Kingdom has also provided a moratorium to companies in order to buy them time from their creditors while protecting the supplies in order to assist the companies in trading.<sup>51</sup> The said measures were already in the pipeline, they have just been accelerated due to the onset of Covid-19.<sup>52</sup> Furthermore, the Government of United Kingdom has temporarily suspended initiation of insolvency attributable to Covid related reasons.<sup>53</sup> Furthermore, the new rules ‘*temporarily suspend the wrongful trading provisions*’ which results in the Court making the assumption that the director is not liable for the deteriorating financial position of the company thereby removing the threat of personal liability and enabling the director to work towards the best possible solutions.<sup>54</sup>

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<sup>46</sup> Lokesh Bulchandani & Akash Keshari, Global Impact of Covid-19 on Insolvency Laws, [2020] TAXMANN.COM 118.

<sup>47</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>48</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>49</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>50</sup> Lokesh Bulchandani & Akash Keshari, Global Impact of Covid-19 on Insolvency Laws, [2020] TAXMANN.COM 118.

<sup>51</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>52</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>53</sup> Lokesh Bulchandani & Akash Keshari, Global Impact of Covid-19 on Insolvency Laws, [2020] TAXMANN.COM 118.

<sup>54</sup> Lokesh Bulchandani & Akash Keshari, Global Impact of Covid-19 on Insolvency Laws, [2020] TAXMANN.COM 118.

(c) Australia: The Federal Government of Australia has on 23<sup>rd</sup> March 2020 introduced the Economic Response Package Omnibus Bill 2020 (Economic Response Bill) which aimed to provide temporary relief for businesses undergoing financial stress.<sup>55</sup> The threshold for initiation of insolvency was increased to \$20,000 from the existing threshold of \$5,000 and the time of response from the debtor company has been extended from 21 days to six months by amending Section 5(1) of the Bankruptcy Act, 1966 and Regulation 4.02AA of Bankruptcy Regulations, 1996.<sup>56</sup> Further similar to many other jurisdictions even Australia has given relief to the director from personal liability for insolvent trading by inserting Section 588GAAA to the Corporation Act, 2001.<sup>57</sup>

(d) Singapore: The Government of Singapore through its Law Ministry has undertaken reforms to defer and suspend the obligations to a later date by imposing a '*organised moratorium*' to assist the SMEs and small business owners/retailers.<sup>58</sup> Interestingly, the bill tabled in Singapore proposes that disputes be settled by an assessor appointed by the Law Ministry considering the facts of the case to reach a "*just and equitable outcome*" that shall be treated as final and non-appealable.<sup>59</sup> Also, there is a prohibition on "*taking court or insolvency proceedings; seeking enforcement of security over property used in business or trade; a construction contract; and termination of lease of non-residential premises*"<sup>60</sup> Lastly, the directors are given relief from the obligations to of "*trading while insolvent*" with fraud as the sole exception for criminal liability.<sup>61</sup>

(e) Germany: The German Parliament in a bid to reduce the aftermath of the Covid-19

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<sup>55</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>56</sup> Lokesh Bulchandani & Akash Keshari, Global Impact of Covid-19 on Insolvency Laws, [2020] TAXMANN.COM 118.

<sup>57</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>58</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>59</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>60</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>61</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

retrospectively introduced a law on 25<sup>th</sup> March, 2020 to be effective from 1<sup>st</sup> March, 2020 wherein the obligation to file for insolvency imposed upon the creditors and the manager of the company under Section 15A of the German insolvency act was suspended until 30<sup>th</sup> September, 2020.<sup>62</sup> Further contractual obligations were suspended for small business owners.<sup>63</sup>

Similar laws have been passed in Russia, France and Spain wherein insolvencies have been suspended, postponed and prohibited and the threshold limits increased coupled with generous fiscal stimulus packages announced by almost all governments across the globe.<sup>64</sup> Even though the decision by the Governments across the world including India was necessary and brave, however there are certain apprehensions specifically with regards to India that have been dealt with in the sub-chapter herein below.

### **2.3 AN ANALYSIS OF THE LEGISLATIVE & POLICY RESPONSE TO THE INSOLVENCY REGIME**

While the intent of the Indian Government is laudable however the long period of suspension on the commencement of the insolvency proceeding may in turn create a '*defaulters paradise*'.<sup>65</sup> In *Ramesh Kymal vs M/S. Siemens Gamesa Renewable*, The Hon'ble Supreme Court held that, "*The expression "shall ever be filed" is a clear indicator that the intent of the legislature is to bar the institution of any application for the commencement of the CIRP in respect of a default which has occurred on or after 25 March 2020 for a period of six months, extendable up to one year as notified.*"<sup>66</sup>

The legislative intention of bringing the Insolvency and Bankruptcy Code in 2016 was for the purpose of providing relief to the creditors; however the said blanket suspension may be detrimental to the interests of the creditor in cases wherein corporate debtors misuse the said

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<sup>62</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>63</sup> Mohd. Ali Khan & Urvashi Shahi, Impact of Covid-19 on Global Insolvency Regimes, IICA, <[https://iica.nic.in/images/Impact\\_of\\_Covid-19\\_on\\_Global\\_Insolvency\\_Regimes.pdf](https://iica.nic.in/images/Impact_of_Covid-19_on_Global_Insolvency_Regimes.pdf)> accessed 04 August, 2021.

<sup>64</sup> Lokesh Bulchandani & Akash Keshari, Global Impact of Covid-19 on Insolvency Laws, [2020] TAXMANN.COM 118.

<sup>65</sup> Priya Misra, Challenges to Corporate Insolvency Law in the times of COVID 19 An evaluation of Indian experience [2021] TAXMANN.COM, 34.

<sup>66</sup> Civil Appeal No. 4050 of 2020

suspension as there are no adverse consequences for non-repayment of debt.<sup>67</sup> In *Arcelor Mittal India (P.) Ltd. v. Satish Kumar Gupta*, the Hon'ble Supreme Court held that "*The only reasonable construction of the Code is the balance to be maintained between timely completion of the corporate insolvency resolution process, and the corporate debtor otherwise being put into liquidation.*"<sup>68</sup> The Corporate Debtor must not be given respite forever, rather a set timeline must be set for repayment even if the default arises during the suspension.<sup>69</sup>

The corporate debtors may also be put in a precarious position wherein the ban on filing voluntary bankruptcy under Section 10 of the Code may lead to the objective of the Code to keep the business as an '*on-going concern*' be defeated.<sup>70</sup> Thereby, the legal protection that IBC was meant to provide to debtors i.e. of an '*exit-route*' in a situation where the debtor is unable to keep the business as an '*on-going concern*' is taken away.<sup>71</sup> Therefore, the said blanked ban may in turn hamper the interests of the stake-holders.

As per the Information from the Insolvency and Bankruptcy Board of India in the period between 01.04.2020 to 31.12.2020 :

- "i. 283 firms were admitted into corporate insolvency resolution process (CIRP).*
- ii. 76 CIRPs ended in resolution, 128 CIRPs were closed due to withdrawal/appeal or settlement and 189 CIRPs ended in liquidation.*
- iii. 30 corporate persons were dissolved/ sold as a going concern/undergone compromise or arrangement under section 230 of Companies Act, 2013 under liquidation process.*
- iv. Further, 59 corporate persons were dissolved under voluntary liquidation process."*<sup>72</sup>

According to Ms Sahoo (Chairperson, IBBI)<sup>73</sup>, the ordinance treats differently defaults arising

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<sup>67</sup> Priya Misra, Challenges to Corporate Insolvency Law in the times of COVID 19 An evaluation of Indian experience [2021] TAXMANN.COM, 34.

<sup>68</sup> *Arcelor Mittal India (P.) Ltd. v. Satish Kumar Gupta* (2019) 2 SCC 1

<sup>69</sup> Vibhuti Deshmukh, Developments in Insolvency & Bankruptcy Code during COVID-19 Pandemic, [2020] TAXMANN.COM 117.

<sup>70</sup> PARAM AGARWAL, The IBC (Amendment) Ordinance, 2020: A Dereliction in Economic Crisis, [2020] TAXMANN.COM 117.

<sup>71</sup> Vibhuti Deshmukh, Developments in Insolvency & Bankruptcy Code during COVID-19 Pandemic, [2020] TAXMANN.COM 117

<sup>72</sup> Ministry of Corporate Affairs, Bankrupt Companies after lockdown was imposed due to COVID-19 pandemic, PIB.GOV.IN (Delhi, 22 March, 2021)

<<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1706640>> accessed 31 October, 2021.

<sup>73</sup> Radhika Merwin, 'Covid impact will not derail IBC', THEHINDU (19 June, 2020),

<<https://ibbi.gov.in/uploads/resources/d710f5e800ca901b7ce129e861316fcc.pdf>> accessed 31 October, 2021.

out of Covid related factors. He argues that companies, who have not defaulted prior to Covid, will not misuse the relaxations and wilfully default during the suspension. Furthermore, he states that even though the Code is suspended, the creditors have a '*menu of options*' for resolution as well as recovery such as the Companies Act, RBI directives and the debt recovery forums due to which he does not contemplate a rise in the cases before NCLT when the suspension is lifted. However, the Code is now required to make a comeback otherwise all creditors especially operational would start approaching the Civil Courts for the recovery of their money.<sup>74</sup>

Considering the above-mentioned factors it may not be wise to suspend Section 10 of the Code as the companies that are unable to continue must be allowed to initiate their legal right to file for bankruptcy.<sup>75</sup>

Temporarily the measures to the Insolvency Regime in India have served their purpose of attempting to save viable businesses. However, at this juncture i.e. two years into the Pandemic, the erstwhile insolvency regime must come back into place with certain permanent amendments with due regard to the prevailing economic market today. For example, increasing the threshold for initiating insolvency. However, companies that have not been able to survive the downfall in revenue due to Covid-19 must now be allowed to initiate bankruptcy proceedings and the erstwhile timelines must be placed back into the law.

### 3. FUTURE COURSE OF ACTION

The Government of India has started the process to introduce Pre-Pack Insolvencies vide the promulgation of the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021<sup>76</sup> modelled on the Report of the Sub-Committee of the Insolvency Law Committee on Pre-packaged Insolvency Resolution Process.<sup>77</sup> Pre-Pack insolvency refers to a restructuring plan based on consensus between the debtors and creditors before the filing of insolvency.<sup>78</sup> Similar

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<sup>74</sup> Priya Misra, Challenges to Corporate Insolvency Law in the times of COVID 19 An evaluation of Indian experience [2021] TAXMANN.COM, 34.

<sup>75</sup> Vibhuti Deshmukh, Developments in Insolvency & Bankruptcy Code during COVID-19 Pandemic, [2020] TAXMANN.COM 117

<sup>76</sup> Insolvency and Bankruptcy Code (Amendment) Ordinance, 2021

<sup>77</sup> MCA, REPORT OF THE INSOLVENCY LAW COMMITTEE ON PRE-PACKAGED INSOLVENCY RESOLUTION PROCESS, IBBI. Gov.IN (July, 2021)

<<https://ibbi.gov.in/uploads/resources/65b114e356eacaaa2dbd25b210f845da.pdf>> accessed on 31 October, 2021.

<sup>78</sup> UTKARSH MEHROTRA, Pre-Pack Insolvency: A Brief Study [2021] TAXMANN.COM, 124.

provisions regarding pre-pack insolvency already exist in multiple European nations.<sup>79</sup> The said move could be a game-changer for MSME's who are already struggling on account of the Covid-19 Pandemic.<sup>80</sup> The pre-pack insolvency regimen in India could be a breath of fresh air especially after the last year wherein the process of initiating insolvency was suspended.<sup>81</sup> The future course of action would certainly lie in adopting the pre-pack insolvency regime which would create benefits such as timely resolution, cost-effectiveness, lower burden on Courts and resolutions based on consensus and understanding.<sup>82</sup>

In course of this research paper the author has analysed the need for initiating amendments and changes to the existing corporate and financial laws due to the onset of the pandemic, secondly the author has analysed the changes that have been brought about/undertaken by the Government of India whilst highlighting the global change in insolvency regime. The author has also analysed the pros and cons of the said changes to Companies Act, 2013 and Insolvency and Bankruptcy Code, 2016 along with providing a future course of action.

To conclude, even though the said relaxations provided to entities is important however they must not be misused by fraud or wilful default. The said considerations must be taken into account by the Legislative and Judicial wing whilst dealing with such matters of corporate compliance and/or IB Code in the future.

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<sup>79</sup> V.S. Datey, Pre-Packaged Insolvency Resolution Process (PIRP) for MSME [2021] TAXMANN.COM 126.

<sup>80</sup> V.S. Datey, Pre-Packaged Insolvency Resolution Process (PIRP) for MSME [2021] TAXMANN.COM 126.

<sup>81</sup> Anmol Mahajan & Abhigyan Tripathi, A multi - jurisdictional analysis of the Indian pre - packaged Insolvency regime [2021] TAXMANN.COM, 127.

<sup>82</sup> UTKARSH MEHROTRA, Pre-Pack Insolvency: A Brief Study [2021] TAXMANN.COM, 124.