The Social Dynamics of Corporate Insolvency Law and Workers/Employees of Distressed Companies: Comparing Select Asian Jurisdictions

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O. P. Jindal Global University

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Keywords: insolvency laws, corporate rescue, employment preservation, reorganisation, social justice, workmen- employees

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ABSTRACT

The recent rise of the modern state and market-driven economies in Asia has been accompanied by a modernisation of their insolvency laws. The centerpiece of such laws has been improved inclusivity, time-bound resolution of corporate distress, and a growing emphasis on viable rescue, social welfare, and preservation of the human (social) capital. In this vein, it has become more and more recognised that the collapse of a corporate entity may have substantial and across-the-board effects on a number of people associated with it, their life and livelihoods. While the notion of 'public interest' is an important element of various areas of law, as far as its interface with insolvency law is concerned, it has received minimal attention. Going beyond the paradigm of neoclassical economics, which treats workmen like any other factor(s) of production, this research focusses on the human and social dynamics of corporate insolvency laws, in their applicability to the employees of the distressed companies.

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I. Introduction

I	II	III	IV	V
'The ship was cheered, the harbour cleared, Merrily did we drop Below the kirk, below the hill, Below the lighthouse top.	And now the STORM-BLAST came, and he Was tyrannous and strong: He struck with his o'ertaking wings, And chased us south along.	At length did cross an Albatross, Thorough the fog it came; As if it had been a Christian soul, We hailed it in God's name.	Water, water, every where, And all the boards did shrink; Water, water, every where, Nor any drop to drink.	About, about, in reel and rout The death-fires danced at night; The water, like a witch's oils, Burnt green, and blue and white.

The poem "The Rime of the Ancient Mariner" by Samuel Taylor Coleridge is a poignant and striking inscription, capturing the trials and travails of a ship on voyage. The aforementioned tabulated columns allude to five different stages in the journey of the said ship, as narrated by an ancient mariner, leading up to the sinking of the ship (refer "*dancing of the death- fires*" in column V). An analogy may be drawn with this narration to the series of events leading up to the liquidation of M/s ABG Shipyard Limited (ABGSL), the appearance of an albatross as an alleged saviour (insolvency professional/ liquidator), and the financial woes of its workmen and employees (W&E) in that process. ABGSL, one of India's largest private sector shipyard firms (shipbuilding and ship repairing), oiled the wheels of seaborne trade for decades. Its specialised labour contributed to domestic heavy manufacturing, the military gears, numerous suppliers of finished goods and services in domestic economy, and local and regional employment. It was also one of the "dirty dozen" (twelve large defaulting accounts) that were first referred to the insolvency resolution process, ostensibly at the instance of the Indian Prime Minister's Office (PMO).[1]

Ailing for over a decade, the Supreme Court of India (SC), last year, in *Sunil Kumar Jain and others v. Sundaresh Bhatt and others*,[2] turned the tide for ABG's W&E. The apex court of India confirmed and upheld the social welfare character of the Indian insolvency law (Insolvency and Bankruptcy Code, 2016- IBC) to protect and preserve the rights of the ABG's first set of affected stakeholders *viz.*, W&E in relation to the payment of their provident fund, pension, and gratuity fund dues. Pertinently, equivalent to the scenario in column IV above, "…water, water, everywhere, …nor any drop to drink…", eight hundred and seventy-three employees and ex-employees of ABG became the "lost souls of insolvency law"[3]; not paid their salaries with outstanding dues for almost three years, despite ABG's INR 2000-crore worth of hard

[1] Sucheta Dalal, "ABG Shipyard Exposes Bankruptcy Law: Write-off Wonderland or Debt Recovery Disaster", , (*Moneylife,* December 22, 2023) <available at: https://www.moneylife.in/article/abg-shipyard-exposes-bankruptcy-law-write-off-wonderland-or-debt-recovery-disaster/72913.html> accessed March 27, 2024

[2] (2022) 7 SCC 540

[3] FI Finch Corporate Insolvency: Perspectives and Principles (3rd ed, 2017, Cambridge University Press) at 778.

assets that could be sold.[4] In a similar instance, recently, Vietnam state-owned shipbuilding company Shipbuilding Industry Corporation (SBIC), formerly known as Vinashin, also sunk into an "ocean of debts".[5] SBIC has been saddled with massive debt owing to mismanagement, cost overflows, and opacity. According to the Vietnamese bankruptcy laws, the funds obtained from the liquidation of the SBIC and assets will be utilised, for debt repayment, salary payment, and social insurance for the workers.[6]

Basis the foregoing explication, it cannot be gainsaid that law is a function, part of a larger societal whole. A humane, compassionate, equitable, and diverse legal function is essential to building public trust and advancing the common good. Humanisation is the foundation stone of the law's ability to ensure public welfare, reinstate public trust, and a return to the common good of public interest. This is germane considering the times we live in where corporate law has transcended the traditional shareholder wealth maximisation paradigm and espoused a 'heterodox stakeholder" approach[7]; palpable in most of the Global South jurisdictions having entwined the elements of, inter alia, sustainability (economic, social, and environmental), erosion of limited liability for stakeholder protection, social and distributive justice, in the fabric of their corporate legislations. These 'legal grafts' have redefined and broadened the corporate social purpose, as it exists in the modern commercial milieu of the Asian economies.

An offshoot of the broadening corporate social purpose is to gauge the viability (sustainability) of an enterprise, at the right time, when it no longer serves the public good, and to revive or recycle its resources for the societal benefit(s). In modern market economies, this is achieved primarily through the apparatus of insolvency and bankruptcy laws. Such laws stand at the forefront fostering innovation and entrepreneurship, preserving the 'going concern' value of the firm, eventually affecting all the stakeholders of the corporate debtor (CD) in the ecosystem, beginning with its creditors, shareholders, its employees, traders, etc. In fact, the recent rise of the modern state and market-driven economies in Asia has been accompanied by a modernisation of their insolvency laws. The centerpiece of such laws has been improved inclusivity, time-bound resolution of corporate distress, and a growing emphasis on viable rescue, social welfare, and preservation of the human and social capital.

In this vein, it has become more and more recognised that the collapse of a corporate entity may have substantial and across-the-board effects on several people associated with it, their life and livelihoods. The insolvency of an enterprise may prove traumatic not only for the workmen and employees, who have devoted years of their time, expertise, and efforts in the company, [8] but also circuitously for all the other stakeholders (e.g., in the supply chain). Appositely, how a company navigates its relationships with its workforce and the societies in which it functions, has also become a central question behind the "S" in ESG (Environmental,

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[4] https://www.thenewsminute.com/money/abg-shipyard-bank-scam-employee-left-lurch-3-years-salary-dues-pending-161661

[5] https://maritime-executive.com/article/vietnam-s-state-shipbuilding-company-faces-bankruptcy

[6] ibid.

[7] Mariana Pargendler, "Corporate Law in the Global South: Heterodox Stakeholderism", ECGI Working Paper Series in Law, Working Paper N° 718/2023, August 2023, available at https://ssrn.com/abstract=4495515 , accessed March 27, 2024>

[8] Vanessa Finch, Corporate Insolvency Law: Perspectives and Principles, Cambridge University Press, 2017; *See also* Jennifer Gant, 'Social Policy and Insolvency: Struggles towards Convergence' (2014) 2(4) Nottingham Insolvency and Business Law e-Journal 49; Zhaodi Yu, An Analysis of the Multiple Aims of Insolvency Law: From the Internal and External Perspectives, Law and Economy, Dec 2022 Vol. 1 No. 5

Social, and Governance) related discourse- the social aspect of sustainability.[9] By ensuring a debtor's survival, corporate insolvency laws do not merely serve an economic function, but a social function of a "saviour of jobs"[10] and preservation of human capital whilst upholding their rights and access to legal entitlements. In India, for instance, the Insolvency and Bankruptcy Code, 2016 (Code/ 'IBC') has been credited with securing a revenue of Rs 31,651 crore, with employee salaries of around Rs 2,350 crore.[11] As a rescuer of employment and income by resolving the stress in a viable CD, insolvency laws prioritise and nurture "holistic well-being" of its workforce (beyond physical parameters to emphasise on emotional, financial, social, and purpose-oriented). While the notion of 'public interest' is an important element of various areas of law, as far as its interface with insolvency law is concerned, it has received minimal attention.

Going beyond the paradigm of neoclassical economics which treats workmen like any other factor(s) of production, this research focusses on the *human* and social dynamics of corporate insolvency laws, in their applicability to the W&E of the distressed companies. Employing empirical research methodology in a comparative frame, it provides the *first and most comprehensive contemporary review* of the status and perspectives of W&E in the Asian insolvency systems. It discusses the prevailing normative insolvency policies juxtaposed against the theory of creditors' wealth maximisation and "creditors' bargain".[12] It foregrounds and assesses how effectively Asian insolvency laws serve the notions of social justice and policy against purely fostering "economic efficiency". An exploration of the interplay between social policy and insolvency laws qua the claims/ rights/ entitlements of the W&E as non-consensual "creditors" of an insolvent firm is undertaken (for outstanding wages, accrued annual leave(s), superannuation, redundancy payments, and other entitlements). In the context of improving the labour-capital relations, it assesses the feasibility of integrating "employee participation" in the rubric of decision-making towards insolvency resolution.

Aligned with this milieu, this research paper is structured as follows. Part II outlines the nature of insolvency and bankruptcy laws intertwined with the dynamic construct of social welfare, particularly, on the effect of financial distress on the welfare of W&E. Beginning with a discussion on the vitality of human capital, for companies generally, and the ones which are distressed, it steers the discourse towards assessing insolvency regimes basis the social welfare outcomes captured by them. It concludes that when it comes to stakeholder- employee data, most regimes and businesses "measure inputs rather than outcomes".[13] Part III exposits on the challenge of balancing corporate rescue with employment protection in select Asian economies. This section discusses the legal framework in select Asian jurisdictions and undertakes a qualitative assessment of the laws. It also traces the judicial trends in the treatment

[9] What is the "S" in ESG?, S & P Global, available at https://www.spglobal.com/esg/podcasts/on-the-ground-at-climate-week-nyc-the-challenge-of-scope-3-emissions (last accessed on September 30, 2023)
[10] Sapan Gupta, View: India's insolvency law as creator of jobs, The Economic Times, May 4, 2019, available at https://economictimes.indiatimes.com/industry/banking/finance/banking/view-indias-insolvency-law-as-creator-of-jobs/articleshow/69167701.cms?from=mdr (last accessed on September 30, 2023)
[11] ibid.
[12] Barry Adler, The Creditors' Bargain Revisited, 166U.PA.L.REV. 1853, 1854 (2018); Medha Shekar and A. Guru, Theoretical Framework of Insolvency Law, https://www.ibbi.gov.in/uploads/resources/9ce9ccf9f114750879b68c8a33235ca6.pdf
[13] Kotsantonis, Sakis, and George Serafeim. "Human Capital and the Future of Work: Implications for Investors and ESG Integration." Journal of Financial Transformation 51 (April 2020): 115–130.

of workmen's dues and employees' wages under various provisions of the compared jurisdictions. Unlike much of the extant literature[14] that emphases on the duties of directors qua only the "financial creditors' of a distressed company, this research advances a novel interpretation of such a framework. It explicates on the 'creditor duty' of directors of an insolvent company qua the W&E as 'service/ operational/ internal creditors' of a CD, owing to a change in their legal status *ex post* during the process of insolvency resolution and liquidation, from *ex ante* (pre-insolvency). This aspect has largely bypassed the attention of the researchers. On this ground, it espouses a multi-objective theory of insolvency law and disproves the creditors' bargain theory. It discusses the rationale and options for affording "special treatment" to the employees of distressed businesses, beyond their status as mere non-consensual or involuntary or 'operational creditors'. Part IV concludes with findings and policy recommendations, enunciating effective pathways for addressing policy gaps.

II. The Nature of Insolvency Laws and Social Welfare

> "…*Suppose that a bankruptcy judge has two options in a bankruptcy proceeding of a factory. First, the judge could reorganize (sic) the factory, resulting in a $1,000,000 payment to creditors and keeping the factory largely intact. Second, the judge could liquidate the factory, resulting in a $1,500,000 payment to creditors and the loss of 1,000 jobs as the factory is shuttered. What should the bankruptcy judge choose*?"[15]

It isn't about what *causes* the distress; it is how we *respond* to the distress that matters. This dichotomy between the "cause" and the ensuing "response" to it, sums up the ballgame of corporate insolvency resolution laws. The aforesaid scenario of a factory (a CD) offers an interesting exemplar of this dichotomy. Here, the 'response' in the form of a decision by the judicial officer to resolve the 'cause' of distress, shall pave the way for the perceived outcomes to unfurl in insolvency resolution, i.e., continuation or liquidation of the factory. While both the legal outcomes lead to some realisation(s) by one of the interested stakeholders, *viz.,* the creditors, only the former, i.e., the continuation of a CD on a 'going concern' basis leads to positive outcomes for the other stakeholders- workmen and the employees of the concerned factory. Both the routes foster "freedom to exit" the cycle of failure, securing socio- economic as well as individual freedom to the corporate entity and its stakeholders.

Pertinently, the fact that both the exit routes ostensibly lead to primarily 'creditor- centric' outcomes (protection of the rights of creditors and maximising their returns), leads us to re-evaluate the nature, role, and goals of insolvency law in the socio-legal discourse, as to how effectively it serves the notions of social justice. This entails an assessment of its legitimate aim in terms of securing 'socio- economic' outcomes (or pursuing external aims), in contrast

[14] John Quinn and Philip Gavin, "The creditor duty post Sequana: lessons for legislative reform", Journal of Corporate Law Studies, 2023, Vol. 23, No. 1, 271–296; *See also* Aurelio Gurrea-Martinez, "Towards an optimal model of directors' duties in the zone of insolvency: An economic and comparative approach" (2021). Journal of Corporate Law Studies. 21, (2), 365-395. Available at: https://ink.library.smu.edu.sg/sol_research/3642

[15] Liscow, Zachary D., Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules (November 2, 2016). Columbia Law Review, Vol. 116, 2016, Available at SSRN: https://ssrn.com/abstract=2530212 or http://dx.doi.org/10.2139/ssrn.2530212

to realising purely 'economic' ones (internal aims).[16] The former is centered around maximising the value of assets of the CD whilst balancing the interests of *all* the stakeholders. The latter typifies the creditor's bargain theory whereby the principal purpose of insolvency law is to maximise the wealth and collective return to creditors through an enforced collective system, basis the *ex-ante* status of creditors' rights. This system aimed at maximising group welfare by means of collectivisation[17] to solve the 'common pool' of assets problem arising from diverse claims to a limited asset pool of the CD.

In this vein, Prof. Baird identified two competing camps with 'traditionalists', on one side, and 'proceduralists' on the other.[18] The traditionalists espouse that insolvency laws perform a significant social function by saving a distressed entity. In this way, such laws are instrumental in securing varied "societal interests" whilst preserving employment as a substantive social goal.[19] Creditors' interests must be considered, certainly, but in consort with those of the other stakeholders. The 'proceduralists', on the other hand, refute the magical character of insolvency laws in saving a CD. They focus on the significance of the procedure and believe that preservation of CD is not an independent good in itself.

Over the years, there has been a convergence of these approaches in the form of various theories underpinning the social welfare character of insolvency laws vis-à-vis the W&E. Beginning with the "communitarian vision" that lays emphasis on the interest of the community (employees, suppliers, government, customers, and the local community) associated with the CD in addition to the creditors' interests; to the 'multiple values'/ value-based theory by Warren and Korobkin (Warren, 1987; Korobkin, 1991), emphasising that insolvency resolution is a multidimensional phenomenon and not merely an instrument of maximising economic gains or efficiency.[20] It entails a resolution of political, social, and moral issues arising from financial distress,[21] whilst addressing the concerns of the stakeholders interested in the 'going concern' status of the CD; to the 'explicit value approach'[22] galvanised around attributes like ' fairness', 'accountability', 'efficiency', and 'expertise' to gauge the legitimacy of the law- balancing the

[16] The distinction between internal and external aims of insolvency law has been applied from stellar research- Zhaodi Yu, An Analysis of the Multiple Aims of Insolvency Law: From the Internal and External Perspectives, Law and Economy, (2022), Dec 2022, Vol. 1 No. 5- whereby internal aims of insolvency law encompass "…consolidating the commercial attributes of insolvency and eliminating stigma, maximizing the interests of creditors, and establishing an effective mechanism for assessing the viability of a business…" and external aims comprise "…protecting employees' rights and interests, promoting the sound development of capital markets, and reducing the costs and geographical barriers to insolvency..."

[17] Robert E. Scott, Sharing the Risks of Bankruptcy: Timbers, Ahlers, and Beyond, 1989 COLUM. BUS. L. REV. 183 (1989); Due to a narrow conception of the law in CB theory, Jackson and Scott in 1989, propounded an expansive account of the creditors' bargain in the form of the sharing of risk theory. Here, the claim-holders partake in some part of the collective risk(s) of the distressed entity, emanating from exogenous and endogenous sources. Insolvency laws provide a manner of regulating this risk-sharing for the claimants to yield an optimum value; *see* Adegbemi Babatunde Onakoya and Ayooluwa Eunice Olotu, Bankruptcy and Insolvency: An Exploration of Relevant Theories, International Journal of Economics and Financial Issues, 2017, 7(3), 706-712

[18] Douglas G. Baird, "Bankruptcy's Uncontested Axioms", 108 Yale Law Journal 573 (1998)

[19] ibid.

[20] Altman J (2011) A Test Case in International Bankruptcy Protocols: the Lehman Brothers Insolvency. *San Diego Int. Law J* 12:463–495

[21] Babatunde and Olotu; Korobkin asserted that insolvency law "…should consider the distributional impact of corporate collapse on those who are not technically creditors and who have no formal legal rights to the assets of the business.".

[22] Supra note 8

'trade-offs' apropos the interests of each stakeholder; to the egalitarian "authentic- consent" approach focussing on the 'choice- position' of the parties in an insolvency resolution.[23]

The foregoing discussion assumes relevance considering that W&E form the *élan vital* of an enterprise, and the precarious position they find themselves in when their employer becomes insolvent. The immediate necessity for such stakeholders is for their service-related claims to be addressed- like salaries and wages. Secondly, the need to preserve employment becomes paramount. It becomes germane to address their rights and entitlements in the resolution plan or in the event of a beneficial liquidation of the CD. For this reason, in the last two decades, there has been a world-wide shift in the approach of insolvency regimes regarding the protection afforded to W&E.

While business failures occurred throughout the course of history, the socio-economic milieu post- 2007-08 financial crisis, proved to be a mainspring for such reform of insolvency regimes around the world. During this time and in its aftermath, various Asian nations embraced a novel approach to corporate failure and insolvency. At the very heart of the working of such insolvency laws is the 'humanisation' imperative. A paradigm shift was palpable whereby emphasis was placed on rescuing rather than liquidating insolvent entities with an aim to prioritising the 'human equation' by a 'people first' approach. For people are, have been, and should be at the epicentre of any developmental legislative intercession. Complemented by a regime focussed on social components of sustainability, insolvency law today recognises other interests (including those of workmen and employees) worthy of protection rather than maximising returns only for the creditors. For, economic aims cannot be realised at the cost of compromising the social welfare aspect of the law.

The legal sites of protection for employees in Asian insolvency laws range from them being conferred the status of a creditor (in countries like India, Singapore, Vietnam) entitled to initiate a legal proceeding for insolvency resolution of their employer entity. In some countries (Singapore, Vietnam), representative(s) of the employees participates in the meetings of the creditors' committee- a pivotal decision-making institution assessing the feasibility and viability of a resolution plan. In the ranking for the repayment of debt, the dues of W&E creditors have been accorded a priority reflecting their preferential status in the list of claimants (India, Vietnam, Singapore). Employee creditors stand prior to the floating security creditors in beneficial liquidation of a CD. In some jurisdictions, specific Insolvency funds have been carved out (Hong Kong) to offer relief to the W&E.

As succinctly observed by the Indian apex court in *Swiss Ribbons*, the Code is a beneficial legislation which puts the CD "back on its feet", not being a mere recovery legislation for creditors.[24] The primary focus of the legislation is to ensure revival and continuation of the CD. It provides a device to bind the claims of all the creditors to a resolution plan sanctioned by a court or a tribunal. This integrated approach to assemble and subsequently distribute the

[23] Mokal, Rizwaan Jameel, "The Authentic Consent Model—Justifying the Collective Liquidation Regime", Corporate Insolvency Law: Theory and Application (Oxford, 2005; online edn, Oxford Academic, 1 Jan. 2010), https://doi.org/10.1093/acprof:oso/9780199264872.003.0003.

[24] Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17; Babulal Vardharji Gurjar vs. Veer Gurjar Aluminium Industries Pvt. Ltd. & Anr., (2020) 15 SCC 1

realisations becomes key to the success of a resolution plan. Such a plan is essentially a 'contract' which must provide for a combination of commercial, legal, social, and management features which should afford a reasonable assurance of sustainable viability of the CD over the period of recuperation from distress. If the plan is not implemented, it is the W&E, who are the worst sufferers.[25]

2.1 Workmen and Employees in International Soft-law Discourse

The World Bank Report, 2015, titled as "Principles for Effective Insolvency and Creditor/Debtor Regimes" states:[26] "…C12.4 *Workers are a vital part of an enterprise, and careful consideration should be given to balancing the rights of employees with those of other creditors*." Likewise, the United Nations Commission on International Trade Law (UNCITRAL) in its 2005 *Legislative Guide on Insolvency Law* notes:

> "3. The purpose of reorganisation is to maximise the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of *preserving jobs for employees* and trade for suppliers."[27] (emphasis supplied)

The International Labour Organization's (ILO) approach is more pro-workers than that of the World Bank and UNCITRAL. The ILO in 1949 adopted the Protection of Wages Convention (C 95). Article 11 of the C 95 provides that workers' wages due for services provided during a certain period prior to the liquidation or up to a certain amount should be treated as a privileged debt, although details of the nature of that privilege are left to the discretion of the ratifying nations. In addition, in 1992, the Protection of Workers' Claims (Employer's Insolvency) Convention ('C 173'), was adopted by the ILO. C173 has the objective to strengthen the protection afforded to workers' claims by requiring ratifying countries to either protect workers claims by affording them some form of preference or privilege over other claims, or by the increasingly common approach of some form of institution to guarantee workers' claims.[28]

2.2 Assessing Insolvency Regimes: Theorising data about social welfare.

Well-designed insolvency regimes may impact labour productivity growth through a diversity of channels. Firstly, if insolvency regimes can differentiate *ex-ante* between viable and non-viable firms, they can fortify market selection by enabling the exit of the former and successful internal reorganisation of the latter. Secondly, such regimes can reduce the possibility of "zombie- congestion" or resources being trapped in inefficient firms. An efficient insolvency and bankruptcy law deftly balances the interests of all the stakeholders by employing the

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[25] State Bank of India and others v The Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch, Successful Resolution Applicant of Jet Airways Limited and another, Company Appeal (AT) (Insolvency) No. 129 and 130 of 2023, Judgment dated March 12, 2024

[26] Essar Steel Judgment p. 87; World Bank, *Principles for Effective Insolvency and Creditor/Debtor Regimes* (World Bank Publications, 2016) ttp://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf>.

[27] Essar Steel Judgment, Para 34, p. 52

[28] Jean van Rensburg, 'Employee Protection in Case of Employer Insolvency' (2001) 9(2) Juta's Business Law 78; M. P. Olivier & O. Potgieter, 'The Legal Regulation of Employment Claims in Insolvency and Rescue Proceedings: A Comparative Inquiry' (1995) 16 Indus LJ (Juta) 1295

principles of fairness, transparency, and equity in its design and implementation. This indicates that all the recognised creditors get a minimum fair share from the resolution or liquidation of the CD.[29] In this vein, to understand the social welfare character of the law, it becomes paramount to assess the impact of insolvency regimes on W&E as a distinct class of creditors of a CD.

For undertaking such an assessment, insolvency regulators in some jurisdictions like Colombia and Australia, publish statistical socio- economic stakeholder data. Such data indicates the various areas of interests for stakeholders, for example, the unpaid employee entitlements, number of employees in insolvent businesses etc. There are several important sources of insolvency data in diverse jurisdictions. However, none of these sources provide a full account of the tools needed to evaluate and design insolvency systems. This is germane considering that the policymakers and researchers across the globe have embraced the importance of data for evidence-based policy making. A data-driven approach to the design, measurement, and implementation of insolvency regimes for gauging the impact on stakeholders has been embraced. [30] Such a development fosters the momentum towards reforms that improve the efficiency, both *ex-ante* and *ex-post*, of insolvency frameworks.

The availability of functional data on the debtors, creditors, and the extent of claims for measurement of the indicator "time to discharge" has turned out to be valuable in assessing the efficiency of debt resolution mechanisms and insolvency regimes. Having said that, however, no research on stakeholder data captures the phenomenological experience of the W&E beyond the numeric figures. The number of insolvent enterprises in a specific period, the stakeholder(s) initiating the process, the levels of debt, and realisations etc., are well documented but little is known about the *ex-post* consequences of resolutions beyond such numeric points. A recent study observed that workers of companies appearing before high-pro-labour courts experience 4.5% lower annual labour earnings in the post-bankruptcy period, relative to the workers of companies appearing before low-pro-labour courts within the same judicial district.[31] Another research study shows that bankruptcy is accompanied with large employee costs and estimated that in the United States, an employee's annual earnings decrease by 10% in the year of bankruptcy and 67% over a five-year period after the bankruptcy.[32] In another study, the researchers employed Swedish administrative data and documented that financially distressed firms lose their most skilled employees, although they did not examine the effect on employee

[29] Report of the Working Group on Tracking Outcomes under the Insolvency and Bankruptcy Code, 2016, November 10, 2021

[30] Garrido J. et al (2019), The Use of Data in Assessing and Designing Insolvency Systems, IMF Working Paper No. 19/ 27, February 28, 2019

[31] A. Araujo et al., "The Labor Effects of Pro-labor Bias in Bankruptcy", National Bureau of Economic Research, Working Paper No. 28640, June 2023, DOI 10.3386/w28640; *See also* A. Araujo et al., "The labour effects of judicial bias in bankruptcy", Journal of Financial Economics 150 (2023) 103720

[32] Graham, John Robert and Kim, Hyunseob and Li, Si and Qiu, Jiaping, Employee Costs of Corporate Bankruptcy (March 1, 2022). FRB of Chicago Working Paper No. 2022-09, Available at SSRN: https://ssrn.com/abstract=4072857 or http://dx.doi.org/10.2139/ssrn.4072857

wages.[33] Another research focused on entry to entrepreneurship for employees of distressed firms.[34]

Contrastingly, in the Indian insolvency law discourse, a recent study on post-resolution performance of the firms, stated "…There is around 50% increase in the average employee expenses in the three years post-resolution- indicating a higher employment intensity in the resolved firms (listed) in the post-resolution period. The total employment across listed firms have also shown a substantial increase in the post-resolution period.".[35] Another study which examined, inter alia, "the real effects of IBC in terms of impact on employment", concluded "IBC positively impacted industry growth, although this occurred by altering the capital-labour mix in favour of the latter…IBC has tilted industry growth towards labour-driven process."[36]

The following section discusses the data about the outcomes realised under the insolvency laws of some of the Asian jurisdictions discussed in this research paper.

2.2.1 Hong Kong

The Protection of Wages on Insolvency Ordinance (PoWIO), which came into effect on April 19, 1985, provided for the institution of Protection of Wages on Insolvency Fund Board (PoWIFB). Wage Security Division of the Labour Department and the PoWIFB administer the Protection of Wages on Insolvency Fund (PoWIF). The PoWIO authorises the Commissioner for Labour to make *ex gratia* payment from the PoWIF to the employees whose employers have become insolvent. The PoWIF enables employees to obtain, without having to wait until the completion of the time-consuming insolvency proceedings, prompt payment of the arrears of wages, wages in lieu of notice, pay for untaken/ unclaimed annual leave, pay for untaken statutory holidays and/or severance payment owed to them. Through constant efforts and commitment to the cause of employees, the PoWIF provides timely assistance to the employees distressed by their distressed employers, through duly discharging their functions as a social safety net.

The Annual Report, 2022-23 of the PoWIF, makes publicly available the five-year data (2018-19 to 2022-23) (See Figures 1, 2, and 3) pertaining to the number of applications received from the employees whose employer became insolvent during the applicable range. The data is delineated across the industries and the economic sector(s), providing an itemisation of applications by the outcome of their determination by the PoWIF, whether approved, refused, or withdrawn. The PoWIF provides payment of the arrears of wages, wages in lieu of notice, severance payment, etc. and the data pertaining to the same, which reflects a mix of service and welfare claims of the employees. It also furnishes a breakdown of cases received by the size of the employer and the employment statistics- diverse ranges- less than twenty employees

[33] Ramin P. Baghai & Rui C. Silva & Viktor Thell & Vikrant Vig, 2021. "Talent in Distressed Firms: Investigating the Labor Costs of Financial Distress," Journal of Finance, American Finance Association, vol. 76(6), pages 2907-2961, December.

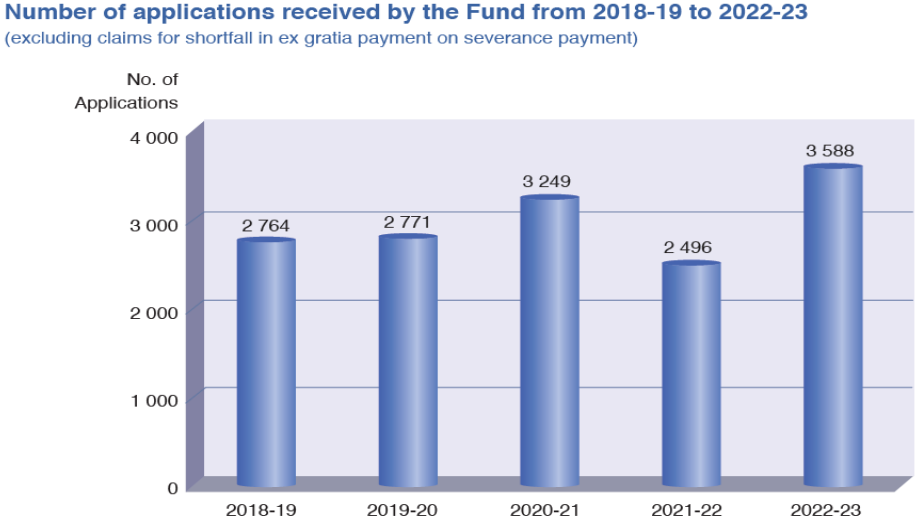
[34] Tania Babina, "Destructive Creation at Work: How Financial Distress Spurs Entrepreneurship", The Review of Financial Studies, 33 (2020) 4061–4101

[35] M. P. Ram Mohan and Balagopal Gopalakrishnan, "Effectiveness of the Resolution Process: Firm Outcomes in the Post-IBC Period", August 2023, available at: https://ibbi.gov.in/uploads/whatsnew/59f737b213b4700cc16428aefd62869a.pdf

[36] Ghosh, S. "Financial dependence, labour regimes and industry growth: Do creditor rights matter?" J. Soc. Econ. Dev. 25, 277–292 (2023). https://doi.org/10.1007/s40847-023-00244-1

to hundred and more employees. The remedy wise payments disbursed by the PoWIF and the period of outstanding wages for which the payment has been made is also made publicly available. The data with respect to 'severance payment' and allied terminal benefits reflects the amount along with the length of service for which the claim is made by the aggrieved employee. The PoWIF also makes publicly available the type of legal remedy availed of by the employee, in terms of either the presentation of bankruptcy petition or a winding-up petition.

During 2022-23, the PoWIF received a total of 3588 applications, showing a considerable increase of 43.8% as compared to the figure of 2496 during 2021-22. The Fund approved a total of 2958 applications with a total payout of USD 102.6 million of *ex gratia* payment.[37] It is also worthwhile to mention that the Office of the Official Receiver, Hong Kong, releases statistical data regarding company liquidations. In January 2024, there were a total of 67 compulsory company liquidation petitions, an increase of 63.4% on the month and 48.8% from a year ago, closing in on the 68 cases in May 2020 and April 2022 when the waves of COVID-19 outbreak peaked in Hong Kong.[38]



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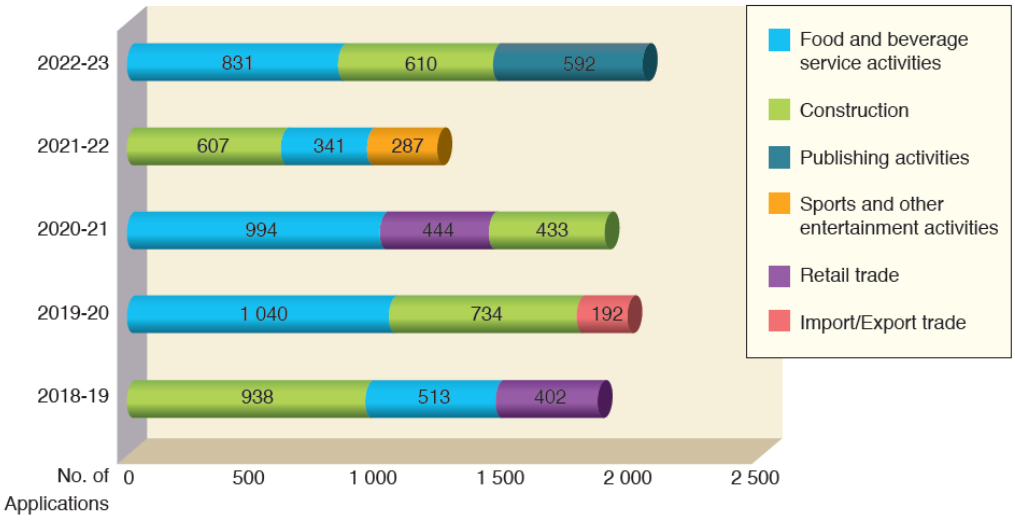
[37] Annual Report of the Protection of Wages on Insolvency Fund Board, 2022-23.
[38] https://www.rfa.org/english/news/china/hong-kong-china-economy-bad-debt-bankruptcy-02262024021035.html
[39] Figure 1

First three industries with the largest number of applications received from 2018-19 to 2022-23
(excluding claims for shortfall in ex gratia payment on severance payment)



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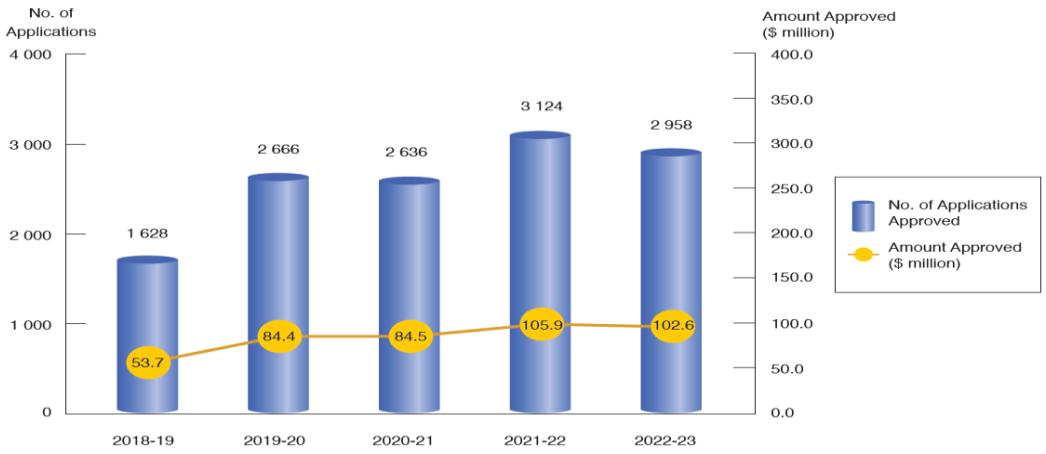
Number of applications and amount of ex gratia payment approved from 2018-19 to 2022-23
(excluding claims for shortfall in ex gratia payment on severance payment)



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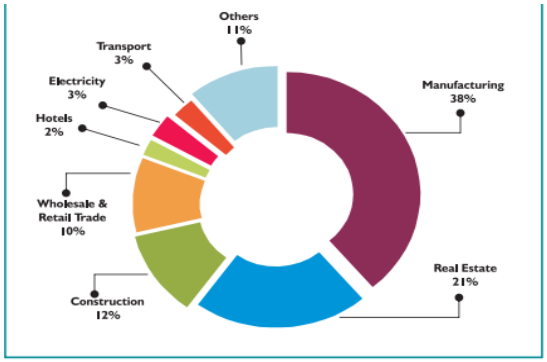
2.2.2. India

As per the Reserve Bank of India, amongst the myriad channels utilised by banks to resolve their stressed assets, the Insolvency and Bankruptcy Code (IBC) remained the dominant one, with a share of forty-three percent in the total amount yielded during FY 2022-23.[42] This is complemented by the data pertaining to outcomes leading to financial realisations, as released by the Insolvency and Bankruptcy Board of India (IBBI), on a quarterly basis. According to the said data, as at the end of September 2023, creditors have, on an average, realised 31.85 per cent of their admitted claims and 169 per cent (rounded off from 168.61 per cent) of the liquidation value in the cases resolved under IBC. IBBI also provides data apropos sectoral

[40] Figure 2
[41] Figure 3
[42] IBBI Newsletter, October- December 2023

distribution of the CDs undergoing CIRP. A conspectus of the said data unveils that the CDs in the manufacturing sector lead the numbers in admission, yielding resolution plans, commencement of liquidation, and settlements/ withdrawals/ appeals/ reviews, followed by other sectors like real estate, renting, and business activities, and construction (Figures 4-7).



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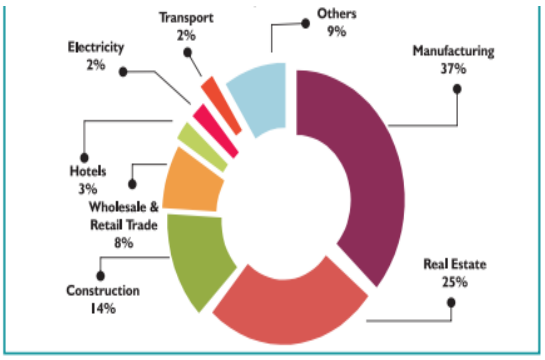

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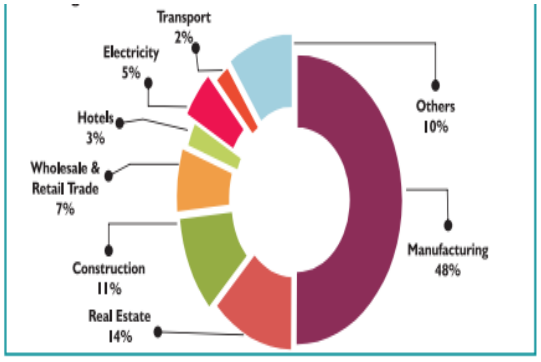

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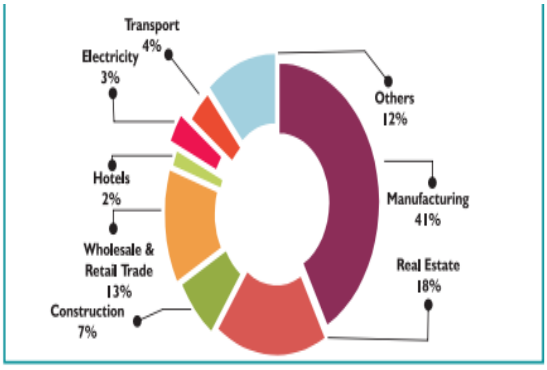

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Figure 1: Sectoral Distribution of CDs

For India, as on December 31, 2023, a total of 7325 cases of corporate insolvency resolution were admitted. Out of these, 891 CIRPs yielded resolution plans, resulting in a realisation of INR 3.21 lakh crore.[47] An examination of the timeline of the ongoing CIRPs in India unveils that till December 2023, out of the admitted matters, 1899 CIRPs have been ongoing. Out of these 1899, 1295 CIRPs have been ongoing for more than the stipulated statutory timeline of 270 days, which totals to approximately 68 per cent.[48]

It is also useful to delve into the data pertaining to the stakeholder wise utilisation of the IBC process. Here, the IBBI data reveals that most actively, OCs commenced 48.68 per cent of the CIRPs followed by 45.08 per cent by the FCs and remaining 6.24 per cent by the CDs; Therefore, when compared the number of involuntary applications (filed by either financial or operational creditors) exceed the voluntary ones (filed by debtors). Dissecting through the stakeholder data from the figures of "claims in liquidation process", the following is discernible:

[43] Figure 4: Sectoral Distribution of CIRPs as on December 31, 2023
[44] Figure 5: Sectoral Distribution of CIRPs- Appeal/ Review/ Withdrawn/ Settled
[45] Figure 6: Sectoral Distribution of CIRPs- Resolution Plans
[46] Figure 7: Sectoral Distribution of CIRPs- Commencement of liquidation
[47] IBBI Newsletter- October- December, 2023, Vol. 29
[48] Id.- Figure 14

a. Of the 830 liquidations where final report has been submitted, the highest number of claimants (7422) have been the ones under Sec 53 (1) (f). However, the amount of claims (INR 131227.64 crore) admitted have been the highest for claimants under Sec 53 (1) (b). But the amount distributed has been woefully minuscule for both the former (INR 93.48 crore) and the latter (INR 5826.39 crore)- leading to huge haircuts for the workmen.
b. The amount of claims admitted (INR 164.72 crore) and the amount distributed (INR 10.72 crore) to the claimants (4235) under sec 53(1) (c), has been abysmally dismal- leading to huge haircuts for the employees.
c. Of the 1219 ongoing liquidations, total claimants under sec 53 (1) (b) and (c) have been 45260 and 37001, with amount of admitted claims touching INR 7,47,149.77 crore.

(Amount in ₹ crore)

Stakeholders under Section	Number of Claimants	Amount of claims Admitted	Liquidation Value	Amount Realised	Amount Distributed
830 Liquidations where Final Report Submitted					
52	86	10486.45	635.63	622.28	599.31
53 (1) (a)	NA	NA			627.57@
53 (1) (b)	5905	131227.64			5826.39
53 (1) (c)	4235	164.46			10.72
53 (1) (d)	1456	18009.85	7910.63	6754.87#	172.14
53 (1) (e)	946	10619.87			30.50
53 (1) (f)	7422	12049.43			93.48
53 (1) (g)	0	0			0
53 (1) (h)	163	860.22			9.77
Total (A)	**20213**	**183417.92**	**8546.26**	**7377.15#**	**7369.88**

Basis the foregoing the following is pertinent:

- The IBC encompasses the expression 'time-bound manner' in the Preamble to emphasise on the essence of time for the timely reorganisation of a CD through maximising the value of its assets for the benefit of all the stakeholders including the W&E. However, the data reveals that the process under the IBC continues to be marred by delays[49], thereby leading to an erosion of the value of assets of the CD. Such an erosion leads to significant haircuts[50] taken by the creditors, including the W&E.
- The statistics do not exist regarding the number of employees affected annually by each form of liquidation- voluntary or failure of CIRP. The prevailing statistical data

[49] Delay may be caused due to "the evolving jurisprudence related to the Code; litigation tactics adopted by some corporate debtors, lack of effective coordination among the creditors, bottlenecks in the judicial infrastructure"- https://www.business-standard.com/economy/news/delays-in-ibc-erodes-value-of-assets-says-rbi-governor-shaktikanta-das-124011100928_1.html

[50] refers to "the shortfall in recovery of the creditors in comparison to their claims submitted before the insolvency professional, as part of the insolvency resolution process of a borrower."- Debajyoti Ray Chaudhuri, "The haircut that never was: Need to factor in whether a loan account had become an NPA while assessing haircut from its resolution under IBC", The Financial Express, August 6, 2021.

primarily reflects the status of outcomes regarding financial recovery. It is myopic to gauge the success of the rehabilitation exercise only in terms of the numeric realisations for the financial creditors.

- No doubt realisations from insolvent companies are beneficial from the perspective of the lenders, thereby improving their financial health and balance sheets. It surely does add to the capacity of the lenders to lend for future growth and leads to the increased availability of credit. But, more significantly, a time-bound process of corporate rescue will ultimately result in retaining the much-needed jobs, create new employment opportunities; thus, protecting the W&E and their families from the catastrophic multiplier effect of losing their means of support.
- There is no estimate or data on the number of jobs saved or created as a result of the cases resolved under the IBC (or the other jurisdictions compared in this research). But as this process moves forward, the regulator or the government may consider collating data on this aspect.
- Data about CIRP costs incurred to manage the affairs of a CD on a going concern basis, specifically the amount spent by the RP towards the payment of wages and salaries need to be provided.

2.2.3 Thailand

In 2023, there were a record-breaking number of distressed businesses seeking rescue via rehabilitation proceedings. According to the public database of the Central Bankruptcy Court, the Thai competent authority with jurisdiction over insolvency issues, as at the end of 2023, more than 30 companies (five of them listed entities) had filed for rehabilitation proceedings to restructure debts worth more than THB 100,000 million (or approximately USD 3000 million) in total. This was considered as the highest number of rehabilitation proceedings relative to those that occurred during the COVID-19 pandemic era.[51]

In 2022, the number of insolvency cases filed with the Central Bankruptcy Court, the Thai competent authority with jurisdiction over insolvency issues, remained stable. There were 8,223 bankruptcy filings in 2022, compared to 9,235 cases in 2021. There were 25 business rehabilitation proceedings initiated in 2022, marking a slight increase, compared to 18 cases in 2021.[52]

III. Workmen and Employees and Insolvency Laws- Comparing select Asian Jurisdictions

On the world atlas, Asia is the world's largest continent. It is symbolised by a diversity in its social and legal systems. The exchanges and enculturation between the cultures, historical similarities, customs and ethnicities in the region have created a favourable milieu for the systems in this region to have legal complementarities and similarities. The countries have developed their own procedures and practices basis their social, political, cultural, and business milieu. This certainly holds true for their insolvency and bankruptcy laws. This section discusses and compares the insolvency laws of five Asian nations, namely, Hong Kong, India,

[51] Thailand Newsletter, Chandler MHM, February 13, 2024

[52] Chambers and Partners, Insolvency 2023, Contributed by: Nathee Silacharoen, Supalerk Rugsarigorn and Norrapat Werajong, Chandler MHM Limited

Singapore, Thailand, and Vietnam, as they work towards the realisation of the claims for W&E and their employment preservation. It explicates and assesses the efficacy of the insolvency frameworks on various parameters primarily revolving around the applicable mechanisms for the stakeholders who can initiate the proceedings, the timeline, the equitable treatment meted to W&E, the post-resolution/ liquidation status.

Appreciating the differences between the legal systems (three countries- Hong Kong, India, and Singapore with a common law legal system and two- Thailand and Vietnam with a civil law legal system), the section distils best practices from the canvas of similarities and variances between the laws of all these jurisdictions. This divergence also offers a comparative and a fertile ground for planting the seeds of future insolvency law reforms.[53]

3.1 The Applicable Legal Framework

It cannot be gainsaid that effective implementation of a law hinges on defining the broad goals that it is meant to pursue, forming the governing scope/ Preamble of such laws. Such an enunciation reflects the vision and values of the lawmakers and acts as a lodestar guiding the development of the law in that spirit. The normative impact of such an enunciation becomes apparent in its socio-economic justice-oriented outcomes and the creation of a values framework for regulators, corporate entities, W&E, communities, and nations alike. In India, the Preamble of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016/ Code), sets out in clear terms the broad social policy objectives of the law as relating to "…reorganisation and insolvency resolution" of CDs in a time bound manner; the definite regulatory intent to achieve the regulatory outcome(s) of "…maximisation of value of assets of such persons…. For "balancing the interests of the diverse stakeholders."; and describes what the society and the regulated entities can reasonably expect from the working of the law- "…promote entrepreneurship, availability of credit, and balance the interests of all the stakeholders…".[54]

A similar exposition is found in the 'Governing scope' of the Vietnamese Law on Bankruptcy 2014[55] (LoB, 2014) reading as determining "…measures for *preservation of assets in the course of resolution* of bankruptcy; procedures for recovery of business operations…".[56] The emphasis on 'preservation of assets' for resolution may serve a pivotal social function of salvaging the source of livelihood for the W&E. Likewise, for Singapore, the Preamble of the Singaporean Insolvency, Restructuring, and Dissolution Act 2018 (IRDA), states it to be "an Act to amend and consolidate the written laws relating to the making and approval of a *compromise or an arrangement with the creditors of a company*…"

While the IBC mentions the term 'stakeholders' five times across the statute, it does not define the expression. In business terms, stakeholders are "individuals or organisations with a vested interest in a company's success…", aligned with a vital business object: value creation.[57]The

[53] India, Singapore, and Hong Kong have a rich common law heritage while Thailand and Vietnam have a predominantly civil law legal system. India recognises the principles of judge-made law and *stare decisis*.
[54] This is in tune with the constitutional imperative comprised in Article 43 of the Constitution of India; "labour" belongs to the Concurrent List under the Constitution of India (i.e., where both the Union and State governments can legislate), it is possible for state governments to regulate labour by either passing its own labour laws, or even amending the Union labour laws, as applicable to the state.
[55] no. 51/2014/QH13
[56] Article 1- Law on Bankruptcy, 2014
[57] https://online.hbs.edu/blog/post/how-do-businesses-create-value

expression includes both internal (employees, workers, owners, etc.) and external stakeholders (customers, suppliers) involved in value-based decision-making. Employees and workmen do constitute a major part of the stakeholders.[58] The IRDA and the LoB, 2014 do not explicitly employ the term 'stakeholder' while defining the scope of their principal insolvency statutes. However, the IRDA defines a 'creditor' in an expansive manner, including within its fold the employees of a CD. The LoB, 2014 recognises the status of an employee of a company considered as "being insolvent" as the creditor of the company, entitled to initiate bankruptcy process for unpaid wages/ salary and other benefits.[59]

In all the aforesaid economies (except Hong Kong), the insolvency resolution process (designated as bankruptcy procedure in Thailand[60] and Vietnam) for a CD[61] commences, at the instance of any of its recognised creditor-stakeholders (includes W&E in some nations),[62] when it is deemed unable to pay its debts[63] or becomes insolvent[64] or commits a default or fails to perform the obligation to repay a debt. For some jurisdictions, like India, Thailand, the initiation, and its admission thereof, is subject to meeting the threshold stipulated for filing the petition under the respective laws. In such a scenario, all the efforts are channelised towards reorganisation or 'resolution' of the insolvency of the CD in a 'time-bound manner'. In all the economies, CDs are granted an automatic debt moratorium, affording them an opportunity to optimise outcomes for their key stakeholders like the employees and shareholders.

The liquidation process starts in case the insolvency resolution process fails or the committee of creditors (CoC) resolves to liquidate the CD at any time during the resolution (CIRP in India). Once the proceedings commence, the powers of the existing board of directors are suspended and, during the CIRP, a creditor- approved IP is appointed to manage the CD as a going concern. The IP functions under the overall control and supervision of the CoC, which generally comprises of the FCs of the CD. For maximising the value of assets of a CD for the benefit of the creditors and all other stakeholders, the Code provides a moratorium protection[65] or "calm period" against individual or collective legal actions against the CD during the CIRP. Insolvency resolution under the IBC is achieved by way of a Resolution Plan in India which may be proposed by any eligible person, and which needs to be approved by the CoC, as an institution of public trust, and, thereafter, by the AA. In Singapore, a debt restructuring plan may be entered into between the CD and its creditors.

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[58] Kishore K. Lonkar v. Hindustan Antibiotics Ltd. [CA (AT) (Ins.) No. 934 of 2021]
[59] Article 5.2 of LB-2014
[60] Corporate Insolvency is principally governed by the Bankruptcy Act 1940 and the Civil and Commercial Code (CCC).
[61] "Debtor who is a juristic person"- Thailand; 'insolvent company'- Singapore and Hong Kong; Corporate debtor- India; insolvent enterprise- Vietnam;
[62] Only the Vietnamese law defines the substantive character of the right of a stakeholder-creditor as 'the right to require an enterprise or cooperative to perform an obligation to repay a debt.'
[63] Section 125(2); In *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd* [2021] 2 SLR 478, Singapore's Court of Appeal held that the cashflow test is now the "sole and determinative test" when assessing whether a company is deemed insolvent. Under this test, solvency is determined by the company's ability to meet all debts as and when they fall due within a 12-month period.; None of these laws explicitly employ the term 'insolvent' qua a corporate entity adjudged as a debtor; insolvency is a 'condition' defined in various ways and means (symptoms) across all the legal schemes of corporate rescue;
[64] Section 9- Thailand Bankruptcy Act, 1940
[65] Section 14 of the IBC

Currently, there is no statutory/ formal insolvency resolution or corporate rescue procedure under the Hong Kong law. However, it is possible for creditors of a Hong Kong company to explore the possibility of negotiating an informal contractual restructuring agreement with the CD. The complementary statutory framework for regulating the affairs of insolvent companies in Hong Kong is the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32 of the Laws of Hong Kong) (WUMP) and the Companies (Winding Up) Rules (Cap. 32H).[66]

3.2 **Workmen and Employees: Connotation and Standing**

A major percentage of the internal stakeholders of a CD across all the compared jurisdictions are represented by its W&E. They are recognised in some jurisdictions as 'internal creditors'[67] or 'service creditors' (in contradistinction to 'money' or financial creditors)[68] of the company and empowered to initiate the resolution process for payment of their debts. In the Indian insolvency law context, the IBC creates a class within a class by a differential usage of the terms- "workmen" and the "employees" of a CD.[69] The classification of a member of the workforce as either an employee or a workman (gender-neutral- "worker") can have significant consequences with respect to their obligations and protections in the event of the beneficial liquidation of a CD.

Such a scheme of classification has not been adopted by the legislative framework comprised in the IRDA, the LoB, 2014, and the Thai BA, 1940 which employs the term 'employees'. The legal effect is the omnibus nature of reliefs available only to the 'employees' of a CD. Interestingly, the Hong Kong WUMP employs five different terms- clerk, servant, labourer, workman, employee. This is in respect of stipulating the preferential payments from the Protection of Wages on Insolvency Fund under section 18 of the Protection of Wages on Insolvency Ordinance (Cap. 380) to the specified stakeholders.

The IBC defines a "workman" in section 3 (36), to have the "same meaning as assigned to it in clause (s) of section 2 of the Industrial Disputes Act, 1947.".[70] Pertinently, despite its usage, the term "employee" has not been defined in the IBC, BA-1940, and the LoB, 2014. Only the IRDA defines it as "an individual who has entered into or works under a contract of service with an employer and includes a subcontractor of labour".[71] The said definition of an "employee" concerns itself with more than just the wage/ salary received for the services

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[66] https://www.lw.com/admin/upload/SiteAttachments/IRHB_LathamWatkins_Article_EN.pdf; Sections 228A, 237, 246, 254

[67] Arturo S. Bronstein, 'The Protection of Workers' Claims in the Event of the Insolvency of Their Employer - From Civil Law to Social Security' (1987) 126 Int'l Lab Rev 715;

[68] ibid.

[69] India is socialist democracy wherein the workmen are both skilled and unskilled. Considering the large industrial workforce throughout the length and breadth of the country, India has provided priority of payment of debt(s) to workmen for their dues. This is largely because it may not be as difficult for the employees and officers of a CD to search for and secure another employment, in case of liquidation; however, it will be laborious for the workmen to search for an alternative source of livelihood and employment.

[70] The said provision defines a "workman" as "any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute."

[71] Section 203(3)- IRDA

provided. The contract of service is the foundational document forming the basis of a claim by an employee for the unpaid wages/ salaries from an insolvent company.

It is also paramount to understand the legal standing of both "employees" and "workmen" in both reorganisation or liquidation vis-à-vis their rights and enforcement of their claims. A point of departure in this regard is the report of the Bankruptcy Law Reforms Committee (BLRC), which led to the inclusion of W&E as operational creditors (OCs) in IBC. The BLRC delineated the 'structure of liabilities' of a CD, into those arising out of "financial contracts" and the ones emanating from the "operational contracts". The latter were defined to "involve an exchange of goods and services for cash." and includes "wages and benefits to employees.".[72] For an entity undergoing liquidation, the BLRC adverted to the 'assets held in trust', to include the funds and securities held for employees' pension.[73] The intent behind such an inclusion was to "…empower the workmen and employees to initiate insolvency proceedings, settle their dues fast and move on to some other job instead of waiting for their dues for years together as is the case under the existing regime.".[74]

In pursuance thereof, section 5(20) of the IBC defines an OC to mean "…a person to whom an operational debt is owed". And the expression "operational debt" has been defined in section 5(21) of the IBC to mean "…a claim in respect of the provision of goods or services including employment…". As OCs, the IBC emboldens the "workmen" and "employees" to initiate corporate insolvency resolution process (CIRP) by filing an application under section 9 of the IBC before the Adjudicating Authority (AA) under the IBC (after serving a demand notice[75] calling upon the employer-CD to satisfy their/her debts 'on the occurrence of default').[76] Similar to the Indian law, the Vietnamese law,[77] Thai law,[78] and the IRDA confers a right on the employees of a company to petition as a "creditor" the respective Courts for commencing insolvency resolution proceeding in respect of an insolvent company. The rationale for such a recognition is to correct the adverse imbalance between the employer and the W&E due to the *postnumeratio* status of their contract.[79] Due to such a status, the obligation to pay the remuneration arises only after the rendering of the labour or service by the W&E.

In Vietnam, from the date of filing the petition, as per article 27(4), the employees or trade union representatives have the same rights and obligations as creditors. In both Singapore[80]

[72] Para 4.3.3., the Report of the Bankruptcy Law Reforms Committee, Volume 1, November 2015, available at https://ibbi.gov.in/BLRCReportVol1_04112015.pdf
[73] Box 5.19, BLRC Report
[74] Ibid.
[75] Section 8(2) of the IBC
[76] Suresh Narayan Singh (Authorised representative of 284 workers) v. TAYO Rolls Limited, C. P. (IB) No. 701/KB/2017, Order dated April 5, 2019; Nitin Gupta v. M/s Applied Electro-Magnetic Pvt. Ltd., NCLT New Delhi, [2018] 142 CLA 527 (NCLT), IB 334(ND)/2017; Mr. N. Subramanian v. M/s Aruna Hotels Limited, C.P. No. 597/(IB)/CB/2017.
[77] Section 5.2
[78] Section 90/1 says "creditor" means the secured creditor or unsecured creditor; Section 90/2 read with section 90/4(1)- The creditor …may file a petition for the reorganisation of the debtor's business, with a definite amount of debt of not less than ten million Baht"; may as well lead to a joint petition by employees as creditors for the non-payment of their salaries to the tune of the specified amount.
[79] supra note 66.
[80] Sec 116 of the IRDA

and Vietnam[81], trade union representatives (if a trade union is recognised by the employer) are one of the primary form of employees' representation as 'creditors' of a CD involved in restructuring. In tandem with the prevailing international practice, in 2019, the Indian apex court granted judicial recognition to the right of a trade union, representing the W&E of a CD to initiate a CIRP, as an OC.[82] The Court reasoned the recognition by observing that that such a Union collectively represented its members who are workers to whom dues (operational debt) may be owed by the employer, for services rendered by each workman in its individual capacity.[83]

It is also worthwhile to mention that unlike India where the CoC comprises only of all the financial creditors of the CD,[84] in Singapore and Vietnam "representatives of employees" form an integral part of the CoC and participate in its meetings as creditors.[85] For this purpose, the trade unions in Singapore enjoy a multitude of legal entitlements.[86]

3.3 Service Claims of Workmen and Employees

"Our employees are our most important asset" proclaimed the Annual Review, 2019, of ArcelorMittal India Private Limited (ArcelorMittal).[87] The company (ArcelorMittal) steered the resolution of Essar Steel (CD) and completed its acquisition in partnership with Nippon Steel. In *Committee of Creditors of Essar Steel India Limited (through authorised signatory) v. Satish Kumar Gupta and others*,[88] the SC of India observed "*the CIRP of the corporate debtor in this case will take place in accordance with the resolution plan of ArcelorMittal dated 23.10.2018, as amended and accepted by the Committee of Creditors on 27.03.2019*.".[89]The judgment is historic considering what lies underneath the said rhetorical statement for a majority of corporate bodies, who still deem- and administer- their employees as "costs".[90] It is unprecedented for honouring the payment *in full* of the 'service-related claims' or W&E's outstanding wages/ salaries amounting to INR eighteen (18) crore (USD 2.8 billion) by ArcelorMittal, the successful resolution applicant in the matter. It thereby, created value for W&E by balancing the financial, manufactured, intellectual, natural, human, and social capital.[91]

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[81] Article 5.2 read with Article 27 of the LoB, 2014

[82] J. K. Jute Mill Mazdoor Morcha v. Juggilal Kamlapat Jute Mills Company Limited through its Director, (2019) 11 SCC 332- Judgment dated April 30, 2019

[83] Ibid. Para 17 at p. 340

[84] Sub-section (2) of section 21 of the IBC

[85] Also see articles 79 and 81.2 of LoB, 2014- The quorum: creditors representing at least 51% of the total value of unsecured debts of the distressed company- decision is only when more than half of the unsecured creditors (by number) attend the meeting and creditors representing at least 65% of the total value of unsecured debts approve the decision;

[86] They have been statutorily entitled to represent any such employees at a meeting of creditors; they may make representations to the judicial manager on behalf of those employees, in respect of any matter connected with or arising from the continuation or termination of their contracts of employment,

[87] Section 2.4 at p. 60- Message of Bart Wille, Executive Vice President, Head of Human Resources, ArcelorMittal

[88] (2020) 8 SCC 531.

[89] Id. Para 103 at pp. 163-164

[90] Laurie Bassi and Daniel McMurrer, "Maximizing Your Return on People", Harvard Business Review, March 2007

[91] In Industrial Services v. Burn Standard Company Ltd. & another, the appellants challenged the order passed by the AA approving a resolution plan submitted by the corporate applicant. The plan did not provide for the revival

Indubitably, the commencement of insolvency resolution process can have devastating consequences for the W&E of the CD.[92] It challenges the premise of labour laws where the remuneration earned by the W&E is considered sacrosanct.[93] It entails a loss of emoluments/ wages/ salary and the concomitant benefits that have been earned by them. While they may seem stranded in such situations, it is important that they act promptly in order to protect their rights.[94] In this regard, in India, the W& E of the CD/ their authorised representative is required to submit their claim(s) ("Proof of debt" in Singapore) with proof in person, by post, or electronically using Form D, to the IP.[95] The claims are to be accompanied by documents and records [from information utility (if available), or any other evidence of debt, employment contracts, notices of demand] substantiating the claim. A similar pre-requisite is required to be satisfied by the employees petitioning for the commencement of bankruptcy procedure in Vietnam. Such a petition must be accompanied with the total amount of wages and other due debts which the enterprise or co-operative has failed to pay to its employees along with the evidence proving the wages and other due debts.[96]

Generally, the claims of W&E may be classified as, 'service-related' or 'service claims' which arise during the subsistence of employment, for the service rendered, including the salary, wages, bonus dues etc.; and 'welfare claims' (terminal benefits) which arise after the cessation of the employment,[97]infusing the principles of social welfare and security, vis-à-vis the twin stakeholders. From amongst the classes of creditors of a CD, some Asian jurisdictions (For example, India) acknowledge the contribution of W&E, by according them a '*pari passu*' (*par conditio creditorum*) status or a position superior than even the secured creditors, on a case-to-case basis. Such an elevated standing, referred to as 'preferential' status[98], safeguards the realisation of their claims, prior to those of other categories of creditors, subject to fulfilment of the desired criteria, stipulated under the law or pronounced judicially.

In most jurisdictions, W&E wages/salaries and benefit claims are mostly specified as "priority" unsecured debts. Such claims, though paid prior to the floating secured creditors and overall

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of the CD but its closure and retrenchment of all the workers. The NCLAT held that the resolution plan is against the objective of the IBC and the application under section 10 of the IBC was filed with the intent of closing the CD for a purpose other than for the resolution of insolvency or liquidation. It directed the CD to ensure that the company remains a going concern and employees are not retrenched.

[92] Federico M. Mucciarelli, 'Employee Insolvency Priorities and Employment Protection in France, Germany, and the United Kingdom' (2017) 44 JL & Soc'y 255; *See also Yury Y. Karaleu,* European Milestones in the Protection of Workers' Claims in the Case of Insolvency, Financial Sciences, Year 2021, vol. 26, no. 1; Yury Karaleu, Social Responsibility Aspects of Companies' Insolvency, Journal of Corporate Responsibility and Leadership, (2018) Vol. 5 Issue 4, 7-26; doi: http://dx.doi.org/10.12775/JCRL.2018.020

[93] supra note 66

[94] In such a scenario, various employees knocked the doors of the AA to recover their salaries- https://www.businesstoday.in/latest/corporate/story/employees-using-insolvency-law-to-recover-unpaid-salaries-ibc-bankrptcy-code-87684-2017-12-18

[95] Regulation 9- Claims by Workmen and Employees of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations)

[96] Article 27 of LoB, 2014

[97] Kishore K. Lonkar v. Hindustan Antibiotics Ltd. [CA (AT) (Ins.) No. 934 of 2021]

[98] This is a very old method with its legal basis recognised in the civil law; Paul G. Kauper, Insolvency Statutes Preferring Wages Due Employees, Michigan Law Review, Feb., 1932, Vol. 30, No. 4 (Feb., 1932), pp. 504-530; Gavin Barrett, 'The Effect of Insolvency on the Contract of Employment' (1996) 18 Dublin U LJ 15; Sergei A. Davydenko and Julian R. Franks, Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany, and the U.K., The Journal of Finance, Apr., 2008, Vol. 63, No. 2 (Apr., 2008), pp. 565-608

unsecured debts (debts that have no statutory priority and are not, secured by a collateral), are realised only after the costs/expenses of managing the proceedings and the secured creditors. In some other jurisdictions like Thailand and Hong Kong, service-related claims are secured by a third party, an institution "wage- guarantee fund' or a Board which oversees the "Protection of Wages on Insolvency Fund" which supersedes the liabilities of the insolvent employer and addresses such claims of W&E in this behalf.

In India, for example, the apex court has held that if during the CIRP, the CD was running as a going concern,[99] and it is proved that W&E actually worked during that time (and contributed to maintaining that status for its revival)[100], the wages/salaries of such W&E shall be included in the CIRP costs (which ranks first in the order of priority[101]).[102] In this way, the 'service claims' of the W&E have been juridically secured, regardless of them proving their standing as an OC, and also irrespective of whether the CD is resolved or liquidated. On the flipside, fearing the loss of employment on the liquidation of the CD, may also lead the W&E to assist the IP and contribute to revive the company.[103] In this behalf, the Vietnamese law makes it obligatory for the employees to protect the assets of the insolvent enterprise and not take any action(s) intended at concealing or disposing of the assets of the said entity. In effect, similar to the Indian duty on IP of running the CD as a 'going concern' such an obligation cast on employees in Vietnam improves the prospects of its resolution and preserves the enterprise value of the entity.

A crucial cog in the moving wheels of resolution of a CD is the 'resolution plan'[104] which is a contract binding all the stakeholders of a CD, if approved by the CoC, after exercising its commercial wisdom, and thereafter, by the AA. It is essentially a plan for "insolvency resolution of the CD as a going concern.".[105] Section 30 of the IBC, read with Regulation 37 of the CIRP Regulations mandates that such a plan must provide for measures, inter alia, for the revival of a CD and the mode in which payments shall be made towards the payment of service claims or the wages/ salaries of the W&E[106], in a fair and equitable manner.[107] Such

[99] During this time, section 20 of the IBC affixes a responsibility on the IP to make every effort to ensure the continuity of operations of the CD or its "going concern" status for its successful resolution, by affording protection and preservation of the value of assets/ property of a CD.
[100] Upon the commencement of the CIRP in respect of a CD, with the appointment of an IP, the Board of Directors are suspended. That does not, however, entail the suspension of the entire machinery of the CD. All the W&E of the CD, top to bottom, its erstwhile directors, are required to continue functioning under the guidance and control of the IP, and assist her to manage the affairs of the CD for continuity of business during the moratorium: *See* State Bank of India v. Essar Steel India Ltd. [C.P. (I.B) No. 40/7/NCLT/AHM/2017)]; Subasri Realty Pvt. Ltd. v. N. Subramanian & Anr. [CA (AT) (Ins.) No. 290 of 2017]
[101] Section 53(1) (a)- IBC
[102] Para 9- Sunil Kumar Jain Judgment at p. 28; as per sec 5 (13) of the IBC "insolvency resolution process costs" means- "…(c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern.".; Such costs are to be factored in and borne by the resolution applicant.
[103] https://www.livemint.com/Companies/04P8yHyOvSKbi0lScFw3lK/Lenders-bidders-for-IBC-cases-looks-to-keep-employees-happy.html; Bhushan Steel- Gujarat NRE Coke
[104] Rehabilitation plan in Vietnam prepared by the debtor herself and not an unrelated 'resolution applicant, as is the case in India as per section 29A of the IBC
[105] Sec 5 (26) of the IBC
[106] Either as CIRP costs or as payment of debts to W&E as OCs; To be ascertained on a case-to-case basis and there cannot be a blanket presumption to this effect;
[107] Section 30(2) (b) of the IBC

debts rank second and third[108] in the waterfall of liabilities enunciated under section 53 (1) (b) and (c) of the IBC, respectively (*See also* section 296- IRDA). The rationale for such an inclusion is welfare- orientation of the law qua the service claims of the W&E as OCs.[109] However, in Thailand, certain employee payments rank at number six in the order of distribution.[110]

A similar provision exists in Vietnamese Bankruptcy law for the rehabilitation of the business,[111] by a rehabilitation plan. Such a plan must provide for the repayment of debt as per the "order of ranking" stipulated under Article 54. In the said waterfall, similar to the ranking in sec 53(1) (b) of IBC, the unpaid wages, severance allowances, social insurance, and health insurance and other employee benefits of the labour creditors, rank second in the order of distribution. However, unlike India and Singapore where debts, in the nature of interim finance[112] or rescue financing, respectively[113], if utilised for the purpose of 'business recovery' of the CD, enjoy a preferential status or super priority[114](rank first in the waterfall), they rank third in Vietnam. It must be noted that infusion of interim finance or rescue financing leads to beneficial outcomes for the CD and for the society. It reposes trust in the minds of the employees about the sound liquidity quotient of the CD and renews faith of the market in the viability of an enterprise to be turned around.[115] The multiplier effect of the financing leads to a preservation of employment and continuity of operations of the CD.

3.4 Welfare claims of Workmen and Employees

The 'welfare claims' of W& E *viz.*, provident fund, pension, and gratuity, are terminal benefits, which become due and payable in the event of liquidation of the CD or when the resolution leads to a downsizing of the workforce or when the workmen/ employee decide to exit the

[108] Under the IRDA, a company may be wound up by a court order if an application for winding-up is presented by the company, any director of the company, any creditor (including contingent or prospective creditors), any shareholder, the liquidator, the minister for finance or a judicial manager.; Similar to the Indian scheme comprised in section 53 (1) (c), "wages and salaries of employees up to a maximum of five months' salary or S$13,000 (whichever is less)" rank third in the waterfall; followed by retrenchment benefits and ex-gratia payments, ranked fourth in the order of priority, compensation to employees for injuries suffered in the course of employment, all amounts due in respect of contributions payable to provident funds during a period of 12 consecutive months- starting not earlier than 12 months before and ending not later than 12 months after the commencement of the winding-up; remuneration to employees in respect of vacation leave; gratuity and retrenchment benefits under Section 47 of the Employment Act

[109] Cases of ABG Shipyard, Jet Airways- The W&E of the CD may not have been paid their salaries or allowances for a significant period of time. In various instances, despite being on the payrolls of the CD, when their employment contracts have not been terminated or without any retrenchment or lay-off, the wages/salary of W&E remained outstanding

[110] Section 130 of the Bankruptcy Act, 1940 (Thailand)

[111] During this time, the distressed company shall continue to carry out its business operations under the supervision of the judge and the asset management officer. It shall continue paying the wages to the employees.

[112] Forms part of the IRP costs in terms of section 5 (13) of the IBC;

[113] Section 67 of the IRDA

[114] It is a 'financial debt' raised by an IP in terms of sec 5(15) of the IBC; Rationale is to encourage lenders to come forward to lend through various incentives such as giving super priority to their claims, over other debts of the CD, both in resolution plan and during settlement of debts in liquidation.

[115] Gurrea-Martinez, A. Debtor-in-Possession Financing in Reorganisation Procedures: Regulatory Models and Proposals for Reform. *Eur Bus Org Law Rev* 24, 555–582 (2023). https://doi.org/10.1007/s40804-023-00289-z

resolved entity in search of better opportunities. They include benefits such as payment of gratuity, encashment of accumulated leaves, superannuation benefits and dues/ pension, provident fund dues, compensation for the closure of the entity, etc. Such claims are mostly dependent on the tenure of the employment. They are essentially employees' dues under diverse statutory provisions, amassed through contributions to the dedicated funds, out of the monthly wages/ salaries- expenditure head- "workmen/employees' cost" by a company.[116]

In India, while both the stakeholders- W&E are entitled to initiate the resolution process as OCs, for the realisation of their service and welfare claims, their rights and entitlements differ in statutory terms, in the event of liquidation of a CD. In this respect, the report of the Joint Committee on IBC 2015 is relevant. The said report observed that workers "…were the nerve center of any company..." and "in the event of any company becoming insolvent or bankrupt, the workmen get adversely affected and therefore, priority must be given to their outstanding dues.".[117] Resultantly, the proceeds from sale of liquidation estate shall be distributed in accordance with a 'waterfall of liabilities' enunciated under Section 53 of the Code.

Following the report of the JC-IBC it was decided, workmen's dues shall be reckoned for the preceding twenty-four months from the liquidation commencement date.[118] In the said waterfall, such dues have been placed second on the priority list, only after the CIRP costs. They rank *pari passu* with the debts owed to floating secured creditors, in the event such creditor(s) has relinquished its security.[119] The dues of employees, other than the workmen, for the preceding twelve months is ranked third above even the general unsecured creditors.[120]

In case of liquidation of the CD, the dues towards the wages and salaries of such workmen/employees who actually worked when the CD was a going concern during the CIRP, being a part of the CIRP costs are entitled to have the first priority and they have to be paid in full first as per Section 53(1)(a) of the IB Code.[121] The rests of the claims towards the wages/salaries of the workmen/employees shall be governed by Sections 53(1)(b) & (c) of the IBC.[122] For the purpose of sec 53, the term "workmen's dues" has to be interpreted in terms of section 326 (Explanation) of the Companies Act, 2013.[123] As per the said provision such dues would cover an aggregate of the sums due to the company, namely, inter alia, wages and salaries, accrued holiday remuneration, workmen's compensation, and all sums due from the

[116] For PF, the contributions are placed with the EPFO or with the exempted PF Trust. For Pension, Gratuity, dedicated funds are created either internally (plan funds) or with trust created for management of these funds.
[117] Report of the Joint Committee on the Insolvency and Bankruptcy Code, 2015 was prepared and presented in Lok Sabha on April 28, 2016
[118] Moser Baer Karmachari Union through President Mahesh Chand Sharma v. Union of India [WP (C) No.421 of 2019 and Ors. WPs]
[119] Section 53 (1) (b) of the IBC
[120] Section 53 (1) (c) of the IBC
[121] Para 9- Sunil Kumar Jain Judgment at p. 28
[122] Ibid.
[123] Explanation (ii) to Section 53

PF, the pension fund, the gratuity fund, or any other fund for the welfare of the workmen, maintained by the said company.[124]

It is worthwhile to mention about the recent judgment of the National Company Law Appellate Tribunal (NCLAT) in the matter of Jet Airways Limited.[125] It became the first company in the aviation industry, which has been resolved under the IBC. However, despite the resolution plan being approved, its implementation was not taking off as expected and the payment of terminal benefits of some of the W&E was not addressed. The Association of Aggrieved Workmen of Jet Airways (India) Ltd. prayed for various reliefs before the NCLAT, primarily pertaining to the non-payment of their welfare claims, leading to great hardship and misery. Although the resolution plan was approved in 2021, W&E were not paid their PF and gratuity dues, amounting to INR 12 crore[126]reckoned till the insolvency commencement date, by the successful resolution applicant (SRA).

The NCLAT while directing that out of the first tranche payment of INR 350 crores, payments shall be made to the W&E and observed, "*...If the Plan could not be implemented, i****t is the workers and employees, who are the worst sufferers. The implementation of the Resolution Plan not only revives the Corporate Debtor, but it brings along with revival, new employment, generation of revenues etc. By non-implementation of the Plan, direct sufferers are the workers and employees, who have not received the payments***." … *"We hope and trust that Lenders shall now play a positive and collaborative role to take steps, so that different milestones under the Resolution Plan should be achieved and Corporate Debtor be revived, so that hopes of many, including the workmen and employees be not belied."*[127] (emphasis supplied)

In Singapore, on company's liquidation, its employees may have the following claims: (1) outstanding wages or salary; (2) retrenchment benefits; (3) amounts due in respect of work injury compensation; and (4) amounts owed in relation to the employee's retirement fund. These are preferential claims that rank ahead of the general unsecured debts of the company. In addition, if the employee has suffered an injury which is covered by the company insurance, then the liquidator has to pay such amount as necessary to discharge that liability out from the insurance policy, rather than from the company's assets.[128]

In Thailand, normal employee claims (e.g., severance pay) will arise if an employment is terminated during the reorganisation proceeding and payment in lieu of notice. The procedure for termination during the reorganisation proceeding is then in accordance with Thai labour

[124] Amended provision also comprised in the Eleventh Schedule to the IBC; *see* Paul M. Secunda, 'Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States' (2014) 41 Fordham Urb LJ 867

[125] State Bank of India and others v. The Consortium of Mr. Murari Lal Jalan and Mr. Florian Fritsch, Successful Resolution Applicant of Jet Airways Limited and another, Company Appeal (AT) (Insolvency) No. 129 and 130 of 2023, Judgment dated March 12, 2024; Data point to be captured- "Delays (number of days) in the release of dues to employees or workmen of the CD, pre- and post-resolution.", tracking well-being- as to whether employees retained their pre-CIRP commencement pay structures, post-retirement benefits, health insurance cover, etc.

[126] Ibid. Para 114

[127] Ibid.

[128] Section 296 of the IRDA

laws. Employees must file an application for repayment in the reorganisation proceedings. Also, no specific remedy exists for employees' pension claims/ plans or schemes, which do not have any priority in the bankruptcy or reorganisation proceedings. Pension creditors must file an application for repayment of debt in the reorganisation proceedings.

In Hong Kong, welfare claims are addressed by the PoWIF, from where *ex gratia* payment is made to the employees whose employers have become insolvent. Under the PoWIF Ordinance, the employees who are owed wages, wages in lieu of notice, severance payment, pay for untaken annual leave and/or pay for untaken statutory holidays by their insolvent employers may apply for *ex gratia* payment from the PoWIF. Such an application needs to be filed within a period of six months from the employee- applicant's last day of service, duly substantiated with a statutory declaration.[129]

3.3 Directors Duties vis-à-vis the Workmen and Employees as Creditors

> "…a practical and broad assessment of the financial health of the company should be undertaken to decide when . . . the pendulum should swing towards the interests of the creditors.'[130]

In India, the principal duty of a director of a company is to act, in good faith, and "to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community, and for the protection of environment.[131] This provision generally applies when a corporate entity is solvent- in sound financial health. However, when in a state of insolvency, or when a company is edging on the precincts of insolvency, the common law jurisdictions maintained that the fiduciary duties of the directors shift towards the creditors of the company.[132]

Unlike much of the extant literature[133] that emphases on the duties of directors qua only the "financial creditors' of a distressed company, this research advances a novel interpretation of such a framework. In this milieu, it is germane to swing the pendulum towards expanding the scope of the aforementioned duty owed by a director to the W&E of a distressed company, who become its 'creditors' on its insolvency- leading to a change of their legal status *ex post* from the one *ex ante*. This is in tandem with the legal status of such stakeholders, as discussed in the previous sections in different jurisdictions, that recognise W&E as creditors- operational or service or internal creditors of a distressed company. In ultimate analysis, it forms part of the duty(ies) of the directors to act in the best interests of the W&E, as creditors of the insolvent corporate entity, leading to best outcomes for the community and the society as a whole.

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[129] John Kong Shan Ho & Rohan Price, 'Moral Hazard, Insolvency and Employees as Creditors: What Governance Lessons Can Be Learned from the Hong Kong Model' (2011) 11 J Corp L Stud 525

[130] *Dynasty Line Ltd (in liquidation) v. Sukamto Sia* [2014] 3 SLR 277

[131] Section 166 (2) of Indian Companies Act, 2013

[132] John Quinn and Philip Gavin, The creditor duty post Sequana: lessons for legislative reform, Journal of Corporate Law Studies, 2023, Vol. 23, No. 1, 271–296; *See also* Aurelio Gurrea-Martinez. Towards an optimal model of directors' duties in the zone of insolvency: An economic and comparative approach. (2021). Journal of Corporate Law Studies. 21, (2), 365-395. Available at: https://ink.library.smu.edu.sg/sol_research/3642

[133] Ibid.

In the United Kingdom, the judgment in *BTI 2014 LLC v. Sequana SA*[134] (Sequana judgment) provided an all-embracing perspective of the directors' duties towards the creditors of an insolvent company. In Singapore, at the time of insolvency, the directors owe a duty to consider the best interests of the creditors of a company, contrasted with that of its shareholders. Recently, in a landmark judgment, the Singapore Court of Appeal, expanded the Sequana judgment in *Foo Kian Beng v. OP3 International Pte Ltd (in liquidation)*[135] apropos the scope of the 'creditor duty' of directors of an insolvent company. The Court upheld the decision of the Singapore High Court *OP3 International Pte Ltd (in liquidation) v. Foo Kian Beng*.[136] It observed that the "…creditor duty is a fiduciary duty that directors owe to the company. This duty is not one that directors owe directly to creditors.".[137] The HC had observed that creditor duty is first engaged when a company is "financially parlous", a state of affairs less severe than being "on the verge of insolvency".

3.4 Preserving employment- Sale on a going concern basis in liquidation

> "…However, last but not the least, we request the creditors and the Resolution Professional to somehow see that the Company is sold as a going concern and the interest of workers/ employees be protected to their level best."[138]

The aforesaid observations were made by the AA- Mumbai Bench, whilst accepting a proposal by an unregistered union of a premium apparel brand to take over the firm thereby obstructing liquidation. The company had around twelve hundred employees and a plant in Mysuru, which was running at under 30 percent of its installed capacity and thus, incurring cash losses. Accepting the interest of the employees to take over the company[139] and thus stall liquidation which the creditors desired, the AA noted "...liquidation will get only a meagre value, the creditors will be most affected and the workmen will be losing their livelihood...". The AA, therefore, ordered for sale of the company on a going concern basis for its beneficial liquidation.

Increasingly, keeping the objects of the IBC in mind, the business of the CD is being continued as a going concern, to preserve value and protect employment, even in liquidation. Even the apex court referred to Regulation 32 of the Liquidation Process Regulations which states that the Liquidator may also sell the CD as a 'going concern'.[140] Therefore, revival of the CD in liquidation is being encouraged, either through a scheme of arrangement or compromise or sale of the CD or its business as a going concern (as opposed to a piecemeal sale of assets). The company is not dissolved in terms of Section 54 of the Code and the acquirer takes over the legal entity along with its assets, licenses, entitlements, etc. The undertaking includes the business of the CD excluding the encumbrances and liabilities.[141]

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[134] [2022] UKSC 25
[135] [2024] SGCA 10- judgment dated March 28, 2024
[136] [2022] SGHC 225
[137] Para 60
[138] Edelweiss Asset Reconstruction Co. Ltd. v. Reid Taylor (India) Ltd., C.P. (IB)-382/MB/2018
[139] This is similar to an old precedent- Navnit R. Kamani v. R.R. Kamani AIR 1989 SC 9
[140] Arcelor Mittal India Private Limited supra note
[141] Ramesh Chaudhary and another v. Anju Agarwal, Liquidator, in the matter of M/s Shree Bhawani Paper Mill Limited, IA No. 195/2023 in CP (IB) No. 110/ALD/2017, order dated May 26, 2023

Hence, in such cases, the liquidation order would not operate as an automatic discharge of the CD's employees and workers.[142] The Company survives and is retained as it was; the ownership of the Company is transferred by the Liquidator to the intended buyer or acquirer.[143] Such a sale would lead to a preservation of their employment, should they decide to continue working with the 'buyer' entity. In the alternative, they become legally entitled to receive 'terminal benefits' from the successful auction purchaser. In Bombay Garage Ltd. v. Industrial Tribunal,[144] the Hon'ble High Court of Bombay held that "an employer cannot deprive his employees of the benefits that have accrued to them by reason of past services merely by transferring his business to another person or to another limited company." Hence, it is established that the legal entitlements of the W&E cannot be washed-out.

At common law, the contracts of employment of employees were automatically terminated upon the insolvency of the employer and the subsequent sequestration or liquidation.[145] In Singapore, the general rule is that the appointment of the judicial manager does not result in the automatic termination of the employment of the employees. An employer has obligations under the Employment Act, 1968, including to inform/consult employees on the sale of a business. These statutory obligations are considered when there is a "disposition of a business as a going concern" and therefore do not apply where an insolvent company is not sold as a going concern.[146] Similarly, in Thailand, there is generally no requirement to inform or consult employee representatives in relation to the sale of an insolvent business, unless a collective agreement provides otherwise. However, in Hong Kong, if the sale of an insolvent business materialises, the employees and employee liabilities are not automatically transferred by law, and employee consent is required in order to transfer them with the business.

Under the Vietnamese law, when an enterprise becomes insolvent and is ruled bankrupt by a competent court, the employment contracts signed with its employees will be automatically terminated (i.e., no consultation with the employee representatives is required). From the effective date of the court's decision, the enterprise must settle all its outstanding payments to the employees. In case, employees are to be transferred to the buyer in case of a business sale, their employment contracts should be amended to reflect the new employer.[147]

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[142] Milind Dixit & Another v. M/s Elecon Engineering Company Ltd. & Others [Company Appeal (AT) (Insolvency) No. 500 of 2019

[143] Andre Boraine & Stefan Van Eck, 'The New Insolvency and Labour Legislative Package: How Successful was the Integration' (2003) 24 Indus LJ (Juta) 1840

[144] (1953) 1 Lab LJ 14 (Bombay)

[145] Tapiwa Givemore Kasuso and Kudakwashe Sithole, Protection of the Rights of Employees in Insolvency Law: A Zimbabwean Perspective, Journal of African Law, 65, 1 (2021), 47–68, SOAS University of London, 2020; doi:10.1017/S0021855320000273

[146] Section 18A of the Employment Act 1968 (Singapore) Where an insolvent company is put under receivership, management or judicial management with a view to preserving the company and its business, the sale of such an insolvent company can be treated as "a disposition of a business as a going concern". In this regard, the provisions of the EA relating to the transfer of employment on the sale of a business will apply; *See also* Tripartite Guidelines on Fair Employment Practices and the Employment (Retrenchment Reporting) Notification 2019, where an employer with its business registered in Singapore and with ten or more employees must notify the Ministry of Manpower via a prescribed online form if the employer has notified any employee of their retrenchment.

[147] Employees with at least twelve full months' service may be entitled to a job-loss allowance if they resign in the context of the business or asset sale.

IV. Conclusion

In material science and engineering, 'shape memory alloys' (SMAs) are truly remarkable materials with boundless possibilities. They exhibit two properties, super elastic effect (SE) and the shape memory effect (SME). The SE is their ability to fully recover from significant deformation, and the SME allows them to "remember" their original shape and return to it when heated, overheated, after being deformed; thereby, enabling exceptional functionalities. Between an austenite (high temperature) and a martensite (low temperature) phase, the SMAs undergo considerable stress, which brings them to their original form.

One can draw an analogy of SMAs with the W&E of a distressed company. Much like the SMAs the W&E exhibit the twin attributes of SE and SME, whereby, a condition of stress leading to their deformation, may as well lead them back to their original form. They 'remember' their pre-insolvency shape and dedication coupled with commitment to the cause of their employers. Insolvency laws, with a focus on quick resolution of insolvent enterprises on a going concern basis[148] are catalytic in offering a significant hope of a successful turnaround, to the W&E, crucial to preserve their source of livelihood.

Having said that, however, the instrumental role played by the economic actors is also relevant. The W&E of distressed companies carry extraordinary levels of continuous stress, feelings of vulnerability relating to actual or anticipated job loss, pay reductions, spillover effects on family etc. How they manage in such a perpetual state of stress has a direct impact on their performance and, by extension, on the revival prospects of the organisation. For, a turnaround is a transformation dreadfully delayed. Here, an IP's role, as a socio-economic actor, an officer of the Court, is paramount to avoid any disruption in the operations of a CD, if W&E turn hostile. The IP has to tread cautiously, as any move against the W&E can lead to, for example, resignations and further non-cooperation, making it tougher for her to function and ultimately, resolve the CD. The support from the W&E is vital. In many cases, the resolution applicants agree[149] to pay all or almost all the dues of the W&E. In response to the negative psychological effects W&E experience, IPs need to gain a better understanding of the impact across diverse levels. The preferred option is to negotiate and open lines of communication with key workers and unions, encouraging them to cooperate.

Maximisation of 'assets' of a CD must be given an expansive interpretation so as to mean and include the value augmentation of not merely of the tangibles, but also the intangibles for the blood, sweat, loyalty, time, efforts, and labour of the W&E, in keeping the CD afloat as a 'going concern'. This can be achieved by giving them what is due and payable to them. The laudable objective of such an interpretation is to recognise the invisible but easily perceivable contribution of the human capital of the CD. Encouraging employees to act as a team and to work with the IP is a positive and useful approach. Constant mediation, wherever possible, can also help to foster an atmosphere of cooperation.

[148] In accordance with Section 21 of the IBC
[149] Supra note 87

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