PAYCHECKS TO PINK SLIPS: RETRENCHMENT IN CIRP AND LIQUIDATION – NAVIGATING THE LEGISLATIVE BLUR

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There are ample provisions in the Insolvency and Bankruptcy Code ('IBC' or 'Code') regarding the recovery of dues owed to the employee by the Corporate Debtor. The position of employees with respect to gratuity, pension, provident fund and other such dues, is very clear. Provisions in Labour Laws are complemented by parallel provisions in the IBC. However, the gaping legislative inadequacy is with respect to the retrenchment of workers as part of the Corporate Insolvency Resolution Process ('CIRP') as well as during liquidation. This inadequacy may be summed up in three main issues. Firstly, there is an evident lack of provisions dealing with retrenchment during the CIRP. This issue is amplified due to some legal elements of the Committee of Creditors, and the Resolution Plan being hostile towards employee rights. Secondly, there is a labyrinth of uncertainty regarding primacy of the IBC over retrenchment provisions and procedures in the Industrial Disputes Act ('ID Act') during liquidation, owing to the presence of Section 238 in the IBC. Thirdly, there is no legislation that comprehensively deals with retrenchment during insolvency driven restructuring, addressing the ranking of payment of retrenchment compensation in the waterfall mechanism. All of these create multiple complications and set the stage for uncertainty and exploitation. Navigating through these legislations and judicial rulings, uncovers the gaps in the insolvency regime in India and its failure to address concerns of retrenchment. This paper proposes to delve into the aforementioned issues, navigating through the legal ambiguity, and suggests proposals to change this precarious position in India.

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I. INTRODUCTION

In the summer of 2023, the National Company Law Tribunal admitted Go First's voluntary plea to initiate the insolvency resolution process.[1] The firm filed the application, requesting to kickstart the Corporate Insolvency Resolution Process ('CIRP') against it. In what was seen as a relief to employees of Go Air as well as workers across the country, the Tribunal championed the rights of employees and ordered that the Insolvency Resolution Professional must not turn to retrenchment as a matter of course. The Tribunal ensured that such decisions of retrenchment are regulated by ordering that they must be brought to the attention of the Tribunal.

While this case represents a step in the right direction, voicing employee rights, it also exposes a crucial yet under-discussed issue - the legislative framework surrounding retrenchment in the insolvency proceedings. There is an inherent pressure to maximise value for creditors, often pushing for knee-jerk reactions towards layoffs and mass retrenchment. Add to this legislative uncertainty and we have before ourselves unfolding concerns about responsible corporate governance in the realm of employee welfare. There is an increasing need to strike an equilibrium between financial well-being of the firm and economic wellbeing of employees, in the interest of long-term sustainability and social responsibility. With the emerging facets of corporate governance, this stance becomes all the more necessary.

II. RETRENCHMENT IN INSOLVENCY: SETTING THE SCENE

Employees may be interpreted to fall under the ambit of non-shareholder stakeholders. They possess claims paramount to proprietary interest over the firm. An employee's rights in relation to the corporate may be differentiated from

[1] Pallavi Mishra, 'NCLT Delhi Admits Go Airlines Into Insolvency, Directs IRP To Ensure Employees Are Not Retrenched' (*LiveLaw*, 10 May 2023) <https://www.livelaw.in/ibc-cases/nclt-chennai-adjudicating-authority-appropriate-forum-revocation-attachment-ed-251939> accessed 12 February 2024.

that of a creditor.[2] The *Swiss Ribbons* case dealt extensively with the differential treatment of the class of creditors i.e., operational and financial creditors.[3] Such differential treatment is justified on the grounds of intelligible differentia. However, the notion of arbitrary retrenchment, as well as unfettered trampling of employee rights in the insolvency process, remains unjustified.

To briefly elucidate on the concept of retrenchment, it translates to termination of employees done for reasons not attributable to the employee. This may include termination owing to economic reasons. Termination as a result of disciplinary action, or inadequacy of performance of the employee is not deemed retrenchment. Retrenchment can come about in two possible situations in the insolvency process. Retrenchment may be done to resolve insolvency during the CIRP by way of suggestion in the resolution plan. In addition, retrenchment may happen when the corporate debtor enters liquidation. Firstly, retrenchment in the process of CIRP is discussed, later moving to retrenchment in the event of liquidation.

III. RETRENCHMENT IN THE CIRP: RESOLVE TO REVIVE OR RETRENCH?

Two of the most crucial elements of the CIRP are the resolution plan and the Committee of Creditors ('CoC'). Both of these tools that stand as the crucial aids in reviving the company during the CIRP can turn into roadblocks for employees, paving the way for unlawful retrenchment.

The resolution plan ('Plan'), stands as a proposal that seeks to address the corporate debtor's insolvency.[4] This plan is then approved by the CoC. The plan, envisioned by the IBC, must seek to reflect the true spirit of the Code, to breathe life to the dying Corporate Debtor. The final goal of every resolution process must be to ensure that the company remains a 'going concern', securing the interests of employees.[5] The 2019 NCLAT decision of *Y Shivram Prasad v S Dhanapal and Others* highlighted that liquidation must be the last resort.[6] The *Swiss Ribbons* case, called for the corporate debtor *revival over dissolution.* The

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[2] Vidushi Puri, 'Distinction in Treatment of Financial Creditors vs. Operational Creditors' (*IBC Laws*, 9 January 2023) <https://ibclaw.in/distinction-in-treatment-of-financial-creditors-vs-operational-creditors-by-vidushi-puri/> accessed 20 February 2024.

[3] ibid.

[4] Insolvency and Bankruptcy Code 2016, s 5(26) ('IBC').

[5] *KN Rajakumar v Nagarajan & Ors*, Civil Appeal No 1792 of 2021 (SC).

[6] *Y Shivram Prasad v S Dhanapal and Others* (2019) Company Appeal (AT) (Insolvency No 224 of 2018).

landmark judgement delved into the objective of the code, being revival of the corporate debtor, urging creditors and stakeholders to work towards this end.

A growing concern may be noted in this regard. There have been instances of Corporate Debtors, approaching the NCLT, filing resolution plans with the intent of shutting down the company, and not the resolution of its insolvency. This leaves scope for the use of insolvency proceedings as a justification to retrench, downsize, and even arbitrarily fire employees without legal repercussions. Corporates tend to use the resolution plan as a shield to flout provisions for lawful retrenchment, and in some cases, even avoid compensation for retrenchment in the name of financial distress. The scope for this misuse is amplified owing to the presence of Section 238 of the IBC.[7] This is elaborated upon, in detail, in the following sections.

In the case of *Industrial Services v Burn Standard Company Limited and Others*,[8] the appellant contended that the resolution plan was contrary to law. The plan did not provide for the revival of the Corporate Debtor, but in fact, advocated closure and subsequent retrenchment of the entire workforce of the Debtor. The Tribunal, in this case, championed the cause of the distressed employees and set aside the order for the closure of the company as well as the retrenchment order. The Tribunal strongly reaffirmed that employees are not to be retrenched and that such a plan calling for the firm's closure is against the intent of the Code.

Often resolution plans are drafted vaguely, leaving ample room for exploitation. The case of *Edelweiss Asset Reconstruction Company Ltd v Bharati Defence and Infrastructure Ltd* also holds relevance in this regard.[9] The resolution plan in this case called for the rightsizing of employees, but did not indicate the approximate number of employees to be terminated. The resolution proposed to terminate all existing contracts with the employees and enable the company to later enter fresh contracts with only those employees who had been retained. The irony that stood as a distinguishing factor in this case was that even the suspended directors, who usually support such actions, strongly opposed this proposal. The resolution applicant sought an unfettered power to handle the termination or retainment of employees. The applicant also sought exclusion

[7] IBC, s 238.

[8] *Industrial Services v Burn Standard Company Limited and Others* [2006] 11 SCC 181.

[9] *Edelweiss Asset Reconstruction Company Ltd v Bharati Defence and Infrastructure Ltd* (2017) SCC OnLine NCLT 2060.

from the compliance of labour laws. The Tribunal in this case, favoured the employees, and rejected the resolution plan. The *Edelweiss* case reflects one of the many issues related to retrenchment stemming from the resolution plan. A resolution plan that calls for retrenchment, leaving the clause open-ended, is a recipe for misuse and potential abuse. Such ambiguous plans, once approved, act as a grant of unfettered power with the Resolution Professional. Employees are kept outside the approval process of such resolution plans, bringing us to the next crucial step in the CIRP: the CoC.

The CoC represents a collective of stakeholders united by a single concern: a dying debtor. Collective action has always found an integral, and effective role in the insolvency realm. IBBI's Quarterly Newsletter christened 'CoC Dharma',[10] highlighted the role of the CoC in following due process of law, emphasising fairness towards all the stakeholders, *including* employees. The CoC is equipped with a public function, with its duties, powers and composition laid down in the Code.[11] The CoC shares the same objective as that of the Code, to ensure that the distressed firm remains a going concern. From approving the process costs and raising finance to fixing the professional fees for the Insolvency Professional, the CoC is the primary decision maker, determining the fate of the corporate debtor and its employees.

As mentioned before, employees are designated as operational creditors under the Code. The Code provides that Operation Creditors would be given representation, only if there are no Financial Creditors.[12] This presents a slightly contradictory position with respect to the IBC's treatment of employees, given that the Code also calls for prioritising dues of operational creditors over that of the financial creditors. This exclusion from the most important decision-making body, places the employees in a precarious situation. It is to be noted that employees and workmen are allowed to send a representative to the CoC, in merely one instance, that is, if the Committee is made up of entirely Operational Creditors. The CoC often determines the fate of employees. Calls for

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[10] 'IBBI reminds lenders of CoC dharma, says should balance the interest of all' (Economic Times, 20 December 2021) <https://bfsi.economictimes.indiatimes.com/news/industry/ibbi-reminds-lenders-of-coc-dharma-says-should-balance-the-interest-of-all/88254750> accessed 10 March 2024.

[11] *Numetal Ltd v Satish Kumar Gupta and Ors* (2018) 209 Comp Cas 181.

[12] Deevanshu Jaswani, 'Operational Creditors and their Exclusion from the Committee of Creditors under the IBC' (IndiaCorpLaw, 7 October 2021) <https://indiacorplaw.in/2021/10/operational-creditors-and-their-exclusion-from-the-committee-of-creditors-under-the-ibc.html> accessed 27 February 2024.

retrenchment are made and passed in this forum, without the consultation of the affected persons. This default exclusion paves the way for uncontested decisions of retrenchment. It must be considered that calls for retrenchment could take place in the CoC even when it is entirely made up of Financial Creditors alone. Both the resolution plan and the decisions of the Committee are kept out of reach of the employee. This presents employees with increased uncertainty regarding their fate, with decisions being made in a closed room.

Further, once the CoC approves the Plan, and submits it to the NCLT, the modification or withdrawal of the Plan is not possible.[13] It may only be done when the Plan is contrary to the mandate of the IBC.[14] This leaves employees' concerns regarding retrenchment neither heard nor addressed. The lack of representation in the CoC and the arbitrary drafting of Plans, collectively affect employees negatively in aspects of retrenchment.

IV. RETRENCHMENT IN THE EVENT OF LIQUIDATION

Liquidation is initiated by way of order of the court, when all the other viable options for revival of the debtor fails. Both the resolution professional as well as the adjudication authority view liquidation as the final resort, owing to the fact that the very objective of the IBC is to prevent liquidation. Termination or retrenchment is one of the many ramifications of a liquidation order being issued. The liquidation order by itself serves as a notice of discharge to the employees. It is however to be noted that termination of employees cannot be done through mere implication. Relevant provisions under labour statutes must be complied with.

The IBC as mentioned before, presents a gaping lack of provisions with respect to discharge of employees, or their retrenchment. In fact, there is only a singular section that deals with discharge or retrenchment. Section 33(7) of the Code addresses the discharge of employees in the event of liquidation.[15] The meaning of the Section was reiterated in the case of *BMV Financial Services*

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[13] *SREI Multiple Asset Investment Trust Vision India Fund v Deccan Chronicle Marketeers & Others* [2023] SCC OnLine SC 298.

[14] Sumit Attri, Devarshi Mohan and Priyanshu Pandey, 'No Room for Change- How Final is the Final Resolution Plan, Exploring the Practical Repercussions' (*Cyril Amarchand Mangaldas Corporate Blogs*, 10 January 2024) <https://disputeresolution.cyrilamarchandblogs.com/2024/01/no-room-for-change-how-final-is-the-final-resolution-plan-exploring-the-practical-repercussions> accessed 26 February 2024.

[15] IBC, s 33 (7).

Private Limited v SK Wheels Private Limited.[16] The Tribunal held that once the liquidator issues the public announcement of the fact that the Corporate Debtor has entered liquidation, the very announcement will then be deemed a notice of discharge. The only exception to this provision is when the business of the company continues beyond the date of the order. In such an event, the order would not be deemed as notice of discharge.

There are numerous provisions under various labour laws of India, regarding dismissal, discharge and retrenchment of employees. Section 25-F of the ID Act requires that a one-month notice must be issued compulsorily before retrenchment.[17] With this provision in mind, a few crucial questions are raised. Does the liquidation order need to be issued a month before retrenchment, to ensure compliance with the ID Act? And the larger question: do the Labour Laws in India need to be complied with, under all circumstances, in the process of insolvency? This brings us to the crucial and controversial intersection of the IBC and labour laws.

V. BATTLE OF LEGISLATIONS: EMPLOYEE, THE HELPLESS PAWN?

The preceding parts of the paper brought to light the legal complexities surrounding retrenchment in both liquidation and CIRP, highlighting the potential ambiguities, owing to the glaring lack of specific legislation. The paper will now examine the conflicts between the IBC and labour laws. This conflict of the IBC, with not just the labour legislation, but almost all other statutes, stems from Section 238 of the IBC.

Section 238 lays down that the provisions of the Code would have effect, regardless of inconsistency in any other law in force. Courts have, time and again, upheld the supremacy of Section 238 over various legislations.[18] By virtue of Section 238, the IBC is held to have primacy over the Limitation Act,[19] SARFAESI Act[20] etc. Section 238 vests the IBC with supremacy over any other

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[16] *BMV Financial Services Private Limited v. SK Wheels Private Limited* (2018) CP (IB) No 4301/2018.

[17] The Industrial Disputes Act 1947, s 25F.

[18] M Ramesh, 'When IBC Does Not Override Other Laws', (The Hindu Business Line, 1 May 2022) <https://www.thehindubusinessline.com/business-laws/when-ibc-does-not-override-other-laws/article65363124.ece> accessed 3 March 2024.

[19] *M/s Platinum Rent A Car Private Limited v M/s Quest Offices Limited* [2023] SCC OnLine NCLAT 53.

[20] *JM Financial Asset Reconstruction Company v Indus Finance Limited* [2017] 139 CLA 236 (NCLT).

law, in the event of the other law being inconsistent with the IBC.[21] The Supreme Court has clarified that the IBC would override anything inconsistent in *any other enactment.* [22] This sets a dangerous precedent, prone to abuse.

In the 2018 case of *Unitech Machines Karmchari Sang v Mr Vivek Raheja RPC*,[23] an observation was made holding significant relevance to this discussion. A representative, on behalf of 92 workmen, filed an application before NCLT Delhi. The application prayed to declare invalid a layoff notice, which was passed by the Interim Resolution Professional without ensuring compliance with the procedure under the ID Act. The applicant claimed that Sections 25C and 25M of the ID Act had not been complied with. The Court, however, held that the layoff was valid and rationalised the same on the basis of Section 238 of the IBC. However, in a recent development, the Appellant challenged this order of the NLCT. A few significant points were raised, which would be noteworthy in our discussion of retrenchment and the overriding of the IBC. The Appellant challenged the Section 238-based justification of the NCLT and its overriding of the provisions of the ID Act. It was contended that such social welfare legislations, which merely strive to protect the interests of the employees and workmen, would not stand in conflict with the IBC.[24] While the decision is awaited in this case, a few points in favour of the employees come to mind.

The contention of the Appellant seems to stem from a valid legitimate logic. The objective of Section 238 is to ensure that there is no clashing between the IBC and other statutes. It strives to uphold the IBC, in the event that there is inconsistency.[25] This section therefore cannot be used as a means to evade the application of crucially relevant legislations. The issue at hand is that the IBC makes no provision pertaining to retrenchment, or retrenchment compensation. In the event of such a lack of provisions in the IBC, the only way through which

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[21] Parul Sharma, ' A Study on Section 238 of IBC, 2016', (IBC Laws) <https://ibclaw.in/a-study-on-section-238-of-ibc-2016-by-ms-parul-sardana/?print-posts=pdf> accessed 27 February 2024.

[22] Karthika KJ, 'An Overview Of The IBC's Precedence Over Actions Under Allied Laws' (*LiveLaw*, 16 June 2021) <https://www.livelaw.in/columns/precedence-over-actions-under-allied-laws-insolvency-bankruptcy-codeibc-175801> accessed 20 February 2024.

[23] *Unitech Machines Karamchari Sangh v Vivek Raheja* [2023] SCC OnLine NCLAT 2201.

[24] Ritu, 'NCLAT Issues Notice In Appeal Against NCLT's Rejection of Challenge to Lay-Off Notice Under Industrial Disputes Act' (*SCC Online*, 14 November, 2023) <https://www.scconline.com/blog/post/2023/11/14/nclat-issues-notice-in-an-appeal-against-nclts-rejection-of-challenge-to-lay-off-notice-scc-blog/> accessed 24 February 2024.

[25] Vishvesh Vikram and KS Jhunjhunwala, 'The Non-Obstante Nuisance: A Critique of Section 238 of the Insolvency and Bankruptcy Code' (2023) 7(3) Indian Law Review 322.

employee welfare can be ensured is through compliance with Labour Laws. Even in matters of pension, provident fund, gratuity etc, there is a possibility of arising of conflict between the IBC and labour laws, as the same has been covered by the IBC. However, considering that the IBC does not contain provisions on retrenchment upon insolvency, there is little or no scope for 'inconsistency' with the ID Act. The provision to Section 238 clearly provides that overriding would take place, *only* in the event that there is an inconsistency.

It has already been upheld that there would be no overriding effect of the IBC, with respect to the Employees Provident Fund Act. In the case of the *Tourism Finance Corporation of India,*[26] the Supreme Court held that there is no conflict between the IBC and the EPF Act.[27] This decision clears the way for employees, in their claims of pension, provident funds etc. Retrenchment on the other hand, is addressed only in the ID Act. So far, there are no clear decisions holding that the IBC would not override the ID Act, and there is a strong need for such legislative clarification. In the absence of this clarification, Section 238 will be subject to prolonged abuse, by corporate debtors, to flout provisions of the ID Act, setting up a safe haven for illegal retrenchment.

Thus, there is a need to uphold that Section 238 would not be used to trample upon social welfare legislations, especially the ID Act, put in place to uphold the rights of employees. With the IBC being silent on retrenchment procedures, and compensations, the only door of recourse available to employees, in essence labour legislations, must not be shut tight.

VI. THE WAY FORWARD FOR RESPONSIBLE AND EQUITABLE REGULATION OF INSOLVENCY-DRIVEN RETRENCHMENT

The contentious relationship between retrenchment and insolvency has been meticulously examined. From the potential of resolution plans to aid in unlawful retrenchment, to the deadly clashes between the IBC and labour laws, various aspects that demand critical attention have been identified. Moving towards a more equitable approach to this pressing issue of insolvency driven retrenchment, there is a need to borrow best practices from other jurisdictions,

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[26] *Tourism Finance Corporation of India Ltd v Rainbow Papers Ltd* Company Appeal (AT) (Insolvency) No 354 of 2019.

[27] Sumit Attri, Satatya Anand and Shrey Singh, 'Treatment of Employees Provident Fund Dues under the IBC' (*Cyril Amarchand Mangaldas Corporate Blogs*, 30 May 2023) <https://corporate.cyrilamarchandblogs.com/2023/05/treatment-of-employees-provident-fund-dues-under-the-ibc/> accessed 11 March 2024.

as well as introspect existing laws to address the problem. This concluding section will delve into specific proposals that seek to foster a comprehensive and humane approach to employment concerns during insolvency proceedings.

Addressing the concerns of employee exclusion from the CoC, the very obvious, yet effective solution of increased representation of employees in the CoC comes to mind. In the case of *TATA Steel Ltd v Liberty House Group Pte Ltd & Ors,*[28] The Tribunal noted that the Committee must consider the impact of the resolution plan on other creditors as well, including 'unsecured creditors', 'government dues' as well as 'employees'. In this case, the Operational Creditors (within which category employees fall) submitted that they were kept outside the meetings of the creditors and were not allowed to have representation in the same. Following this, an interim order was passed by the Tribunal, seeking to ensure that representatives of the OCs were admitted into the CoC meetings.

The prayer of the (Corporate Debtor's) employees in the previously discussed case of *Edelweiss*, is relevant. The employees prayed before the Tribunal to provide for their representation in the CoC. This plea resonates with profound significance, as this highlights a potential solution to the retrenchment conundrum. From such similar judgements, it is possible to infer that there have been calls for representation of employees in the Committee meetings. Such representation could pave the way for employee friendly resolution plans that do not lead to arbitrary and unsanctioned mass retrenchment. It is to be noted that 'representation' entails giving a seat at the table, for not just employees from the middle management or top management, but also the lower tiers of the company. All levels of employees must be provided with adequate representation in the committee to address their varied stances on retrenchment.

With respect to resolution plans, the very inclusion of retrenchment measures in the plan is unwelcome. But the advocacy for its complete exclusion may not serve the best interests of the Corporate Debtor, neither does it seem like an achievable goal. A more constructive approach would strive to ensure transparency and detailed and restricted planning around such retrenchment actions. Resolution plans must include a detailed course of action, addressing crucial questions of retrenchment. The Plan must justify resorting to retrenchment with clear reasons, backed with the showcasing of the absolute necessity of this measure for the company's revival. Approval of a plan calls for

[28] *TATA Steel Ltd v Liberty House Group Pte Ltd & Ors* [2019] SCC OnLine NCLAT 13.

revival of the debtor, not rebirth. This implies that the employment per se of the workmen would be continued, with changes taking place only with regards to the management.

The IBBI Regulations, 2016, under Chapter X,[29] lays down the contents that must be compulsorily included in the resolution plan. The plan must include information regarding the course of action to address the interests of *all* stakeholders. The intent of the Code can be inferred from its emphasis on the inclusion of 'all stakeholders'. The Regulation proceeds to clarify that such stakeholders include both financial and operational creditors. This stresses the need to clearly and accurately address the fate of the employees in the resolution plan.

The Bankruptcy Law Reforms Committee,[30] in its 2015 Report, strongly asserted that the resolution plan must address protections for operational creditors, including employees. Such addressing would not only regulate retrenchment, but also pave the way for faster, and more effective enforcement of employee claims post retrenchment.[31] Demonstrably fair criteria to determine which employees would be retrenched, must be specified in the resolution plan. Such regulations would ensure that the plan is not used as a weapon to carry forward unlawful retrenchment. Plans calling for retrenchment must be in strict compliance with the ID Act, in line with Section 30(2)(e) of the IBC.[32] This Section provides that the Plan must not contravene any existing laws. Judicial decisions must ensure that plans with retrenchment measures, only propose lawful procedures as laid down under the ID Act.

VII. LEGISLATIONS FROM THE WORLD: BLUEPRINTS FOR INDIA?

While generic solutions such as inclusion in the CoC and oversight of resolution plans may be proposed, solid change may be brought about only through statutory intervention and revision. There is a strong need to bring in legislative mandates that would ensure that resolution plans comprehensively address employee concerns, and compulsory inclusion of employees in CoC meetings.

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[29] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016.

[30] Report of the Bankruptcy Law Reforms Committee, Vol I: Rationale and Design [2015].

[31] Ramachandra Madan, 'Have the IBC Doors Shut for Workmen & Employees?'(*SCC Online*, 22 April 2020) <https://www.scconline.com/blog/post/2020/04/22/have-the-ibc-doors-shut-for-workmen-employees> accessed 10 March 2024.

[32] Insolvency and Bankruptcy Code 2016, s 30(2)(e).

There are legislations across the world, the best of which may be taken, and modified to create a suitable mosaic for India. The following legislations from other jurisdictions are suggested to be incorporated in the Indian legal landscape, to comprehensively address the issue of retrenchment.

The Transfer of Undertakings (Protection of Employment) Regulation 1981 ('TUPE') stands as an important piece of legislation in the United Kingdom, that ensures employee rights during mergers, acquisitions of a company.[33] The TUPE regulations apply to insolvency proceedings as such proceedings often involve selling the distressed firm, or mergers and restructuring.[34] These regulations would not be deemed relevant in cases where proceedings result in liquidation of the company. The core reasons behind enacting TUPE are important to our discussion. The TUPE was brought into force to ensure that employees do not face loss of livelihood or non-consensual transfers, detrimental to their employment. Considering the gaping legislative dearth in India on issues of retrenchment, continued employment during restructuring and resolution processes etc., the need for a TUPE-like legislation is strong.

The TUPE, however, is not free of faults. The legislation in the UK has been heavily criticised for its constant overpowering over insolvency institutions and resolution procedures. The critics strongly suggest that the legislation undermines the resolution process, in the name of upholding employee rights. In line with such criticisms, it may be noted that India requires a balanced, toned-down version of TUPE, which doesn't undermine the IBC, but compliments it.

One of the commendable provisions TUPE incorporates is that of the right to information and consultation. The legislation lays down that both the new employer, as well as the outgoing employer, must consult with the employees being transferred, before the same is carried out. This provision could aid in curbing the untimely, and unregulated retrenchment carried out by employers.

Another legislation India could incorporate into its legal framework, to bring forth clarity and equity in retrenchment during insolvency is the Fair Entitlements Guarantee Act ('FEG'). The FEG, stems from the legal landscape of

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[33] Transfer of Undertakings (Protection of Employment) Regulation 1981.

[34] Lee Nair, 'Insolvency and TUPE' (*Lewis Silkin*, 4 January 2023) <https://www.lewissilkin.com/en/insights/insolvency-and-tupe> accessed 28 February 2024.

Australia. This could prove to be an extremely relevant, and crucial legislative reference India could consider, alongside TUPE, to address legislative coverage of retrenchment issues in our insolvency framework.

The FEG Act plays the role of a 'safety net' and has profound significance with respect to employees who have lost jobs, owing to their employer's insolvency. [35] In fact, the entire Australian framework governing employee rights and entitlements in the event of insolvency is commendable. The three Acts, the Bankruptcy Act 1966, the Corporations Act 2001, and the FEG Act, provide a comprehensive addressing of employee rights in insolvency.

FEGA covers not just unpaid wages, and salary, but also includes retrenchment and redundancy compensation under the ambit of dues. This makes the FEGA particularly relevant to our discussion. In the event of liquidation, the FEGA lays down that employee entitlements would take precedence over other unsecured creditors. This is already reflected in the IBC. However, what is required to be incorporated is regarding retrenchment compensation, which the IBC is silent on. The FEGA Act lays down a separate waterfall mechanism for the payments for an employee. With wages, superannuation contributions and superannuation guarantee charges etc, taking the top-most priority, redundancy and retrenchment compensation occupies the second position in priority. This type of ranking for employee dues separately is much needed in the Indian framework and could bring great clarity to the issues of retrenchment.[36] There is a strong need to include 'retrenchment compensation' within the meaning of 'employee dues' and address it in the IBC. The ID Act provides retrenchment compensation for every employee who has been in continuous service for at least one year.[37] The calculation of this

[35] Christopher Darin, 'Fair Entitlements Guarantee (FEG): A Safety Net for Employees of Insolvent Employers' (*Worrells*, 30 May 2023) <https://worrells.net.au/resources/news/fair-entitlements-guarantee-feg-a-safety-net-for-employees-of-insolvent-employers> accessed 24 February 2024.

[36] ibid.

[37] Sunil Kumar and Bhanu Harish, 'Mandatory Requirements for Retrenchment under Employment Laws in India' (Manupatra Newsletter) <https://www.manupatrafast.in/NewsletterArchives/listing/ILU%20RSP/2015/Nov/MANDATORY%20REQUIREMENTS%20FOR%20RETRENCHMENT%20UNDER%20EMPLOYMENT%20LAWS%20IN%20INDIA.pdf> accessed 22 February 2024.

compensation is '15 days of average pay for every completed year of continuous service or any part thereof in excess of six months.[38]

It is to be noted that retrenchment compensation is, in essence, payment of what the employee would have earned had he continued employment. Average pay constitutes the basic salary, dearness allowance, and any other payments that the worker is entitled to. Considering that the retrenchment compensation is composed of and calculated based on elements such as salary, it can be deemed an employee 'entitlement'. Thus, there is a strong need to bring the same under the ambit of employee dues.

While retrenchment compensation need not be explicitly excluded from the liquidation estate, like other entitlements such as gratuity, there is a need to include it in the list of dues toward the employee. The International Labour Organisation, in its Convention numbered 173,[39] provides clarity on what would be included under the umbrella of a worker's claim.[40] Amongst others, severance pay upon termination of an employee is deemed a crucial element of a worker's wage claim. This is to be reflected in the Indian framework. Pension and gratuity dues are deemed employee's assets, to be paid back compulsorily. However, the employee is not provided with any guarantee about severance pay or retrenchment compensation. The European Social Charter is yet another document relevant to employee rights. The Charter stresses the importance of 'guarantee funds' to address employee entitlements in the cases of insolvency.

The Indian framework requires a harmonious integration of relevant provisions from the TUPE and FEG Act into the existing laws. Additionally, the TUPE and the FEG Act are complementary in nature. While the TUPE addresses concerns of transfer of employees during insolvency proceedings, the FEG Act provides a minimum guaranteed compensation in cases of liquidation or insolvency driven retrenchment. The aforementioned suggestions aside, it is crucial to note that retrenchment as a result of insolvency must only be a last resort. Such inclusion of provisions to regulate retrenchment in insolvency must

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[38] Soumyadipa Banik, ' Retrenchment Compensation as per the Industrial Dispute Act, 1947' (*CorpBiz*, 5 May 2023) <https://corpbiz.io/learning/retrenchment-compensation-as-per-the-industrial-dispute-act-1947/> accessed 13 February 2024.

[39] International Labour Organization Protection of Workers' Claims (Employer's Insolvency) Convention (adopted 3 June 1992) ILO C 173.

[40] ibid.

not become a statutory justification for distressed firms to turn to retrenchment as a means to aid in the resolution of insolvency.

Time and again, the Adjudicating Authority has upheld the liquidation of firms with a sale as a 'going concern'. Such sales would ensure continued employment, guaranteeing employee welfare. The case of Reid and Taylor, saw the NCLT witnessed the interests of employees being held in priority.[41] The Court also stressed upon the fact that liquidation would result not only in the loss of livelihood for employees, but would also reduce the value recoverable by creditors. Keeping the same in mind, the court ordered for liquidation as a going concern. These court rulings directing sale of the company as a going concern, have its reasons originating from concerns of loss of employment. This approach of 'going concern sale' is much required, in more and more instances in the Indian insolvency framework.

With all the aforementioned suggestions and an appeal to move towards a more comprehensive regime, the issues of retrenchment in insolvency could be addressed effectively. Retrenchment owing to insolvency is a serious issue plaguing employees and workmen across the nation, and the impacts of the same are multi-fold. When a big tree falls, and a huge company is liquidated or decides to retrench in mass, thousands of employees are thrown out to the streets, looking for jobs. This sudden inflow of resources reduces demand, making it all the more arduous for employees to find another job. To address such domino effects, a hue of social welfare must be painted over the IBC. There is a need for a multi-stakeholder approach towards responsible retrenchment in the insolvency regime. The Code must be harmonised with the various labour laws in India. There is a need for a legislation that serves as a panacea tackling the human cost of corporate rescue.

[41] Rajesh Kurup, 'Employees of Bankrupt RTIL Join Hands to Revive Company' *Business Line* (Mumbai, 31 December 2018) <https://www.thehindubusinessline.com/companies/employees-of-bankrupt-rtil-join-hands-to-revive-company/article25873476.ece> accessed 15 February 2024.