TIMELY RESOLUTION OF CASES UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

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Abstract
The research paper focuses on the aspects of the practical implementation of the Insolvency and Bankruptcy Code 2016 in India. The timelines have been drastically changed to tackle the delay in settlement of cases under the said law; however its practical impact is a matter of assessment and therefore the need for present research. The researchers have drawn a comparison of insolvency and bankruptcy legal procedures from other countries too such as Singapore and United Kingdom. The findings are further strengthened through assessment tool which was used to capture data from the stakeholders. The researchers conclude by highlighting the advantages and benefits of the 2016 law as well as the reasons why the law cannot be said to have achieved its objectives completely.

Keywords: Insolvency and Bankruptcy Law, resolution of disputes, resolution of cases, Insolvency and Bankruptcy Code 2016

Introduction:
According to a World Bank report, it takes an average of 4.3 years to wind up a company in India. In comparison, it takes 0.8 years in Singapore and 1 year in London[1]. Also, the recovery of the debt is under 25.7 cents on one dollar in India, while it is 71.9 dollars in other countries with strong insolvency laws. If a free market economy is to work in an efficient way, providing a way for the exit of the company is as important as ease of entry. Easy exit ensures the survival of the fittest in the market and leads to optimum allocation of capital.[2]

The reason for selecting the comparison of insolvency laws between India and that of the United Kingdom and Singapore is because these countries follow the common law system. The Law of Insolvency in origin, originates in the United Kingdom, because the concept of the limited liability company structure originated here. India and Singapore both follow the common law structure, largely due to the fact that they both are also Commonwealth countries[3]. However, despite following the same system, there is a long way to go for India in terms of its 'Insolvency Resolution'. As per the World Bank’s Doing Business Report, India ranks at 108 in its Insolvency Resolution, while Singapore ranks at 27 and the United Kingdom ranks at 14[4]. All the above-mentioned countries are at different stages of reforms in their respective insolvency laws. The United Kingdom has already undertaken two rounds of significant reforms, the first one in 1986 based on the Cork Committee report of 1982. The second reform was in 2002. In Singapore, the Insolvency Law Reform Committee (ILRC), which was set up in 2010, submitted its recommendations in 2013. India initiated its major reform in 2014, when the Ministry of Finance constituted the BLRC[5].

Until the passing of the Insolvency and Bankruptcy Code, 2016[6] (hereinafter referred to as ‘the Code’), no single legislation governed corporate insolvency proceedings in India. For the first time, the Code made a clear distinction between insolvency and bankruptcy, i.e. the former is a short-term inability to meet liabilities during the normal course of business, while the latter is longer term view of the business. The Financial Sector Legislative Reforms Commission, constituted under the Chairmanship of Mr. B.N Srikirishra drafted the ‘Indian Financial Code’ which replaced the bulk of the existing financial laws in India[7]. However, this was not the draft law which was adopted by the Government. In November, 2015 the Report of the Bankruptcy Law Reforms Committee Volume I: Rationale and Design, the Government finally had a draft Code, resembles the Code as it exists today. 3 years since the passing of this legislation, this paper seeks to analyze the effectiveness of the code in comparison to its common law counterparts, UK and Singapore with special emphasis on the timeliness of the resolution of cases under the Code. The analysis is in two parts. The first section compares the legislative provisions of the countries in order to identify fields of operation that effect the timeliness of the resolution proceedings. Secondly, once the legislative The question that is to be answered is whether passing of the Code has actually lead to faster insolvency resolution procedures. But as Ravi points out in her article[8], there has been few empirical studies in India in the area of insolvency law and practice as she explores the judicial innovations and weak institutions that have lead to tremendous delays in the resolution of cases under the earlier Code.

With the advent of a new regime in Insolvency and Bankruptcy law in India, the efforts of Chatterjee ed al.[9] in their empirical analysis of the insolvency cases disposed, provides a step in the right direction to reviewing the effectiveness of the Code. This paper deals with the working of the mechanism with respect to the enhancement of rights of the creditors. The current research focuses on the effectiveness of the Code in meeting one of the prime objectives of the Code which is the timely disposal of cases.

As Pahwa [10] states in his analysis, the Code is a mature and effective legislation. But while identifying practical issues such as insolvency of promoters, Resolution plan and the concept of a growing concern, his paper does not address the issue of the drastic shift in timelines and whether it is converting into the
practical removal of delays in the Insolvency resolution proceedings. This is precisely the area of the current research.

Comparison of Insolvency and Bankruptcy laws of United Kingdom, Singapore and India:
The process of comparing the insolvency procedures across UK, Singapore and India is challenging in that there are various differences and a lot of variety in their respective workings. Therefore, the researcher has prepared a rough framework whereby these procedures can be compared against each other so as to understand the differences or the similarities between the procedures. The following table shows the various procedures that are existing in the three countries and lists out the various common factors whereby the processes in these three countries shall be compared against some fixed factors:

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Factor</th>
<th>Description</th>
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<tbody>
<tr>
<td>1</td>
<td>Initiation of process: Who can initiate</td>
<td>Generally, it is the debtors who initiate the process for reorganisation. Creditors are usually the ones that initiate insolvency process. However there can be a reversal of this process to. Furthermore, creditors may be of different types, i.e. financial, secured, unsecured, etc. The trigger of an insolvency is based on determination of insolvency or a default by the entity.</td>
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<td>2</td>
<td>Control: Who retains control?</td>
<td>Usually it is the BOD/management that retains control of the firm. However, it may happen that Debtors are more likely to opt for reorganisation of the firm. This is time-consuming. On the other hand, creditors are more likely to suggest measures which are quick, for e.g. sale of assets or the entire business so as to liquidate the firm. The influence of the class of creditors is usually seen from the adoption of the plan.</td>
</tr>
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<td>3</td>
<td>Other elements:</td>
<td>Moratorium provides that the rights of the firm are suspended during the period in which moratorium is declared. In this period, there are negotiations between the firm and its creditors. As far as possible, the priority of debts to be repaid should be identical to the priority of debts. An exit which is clearly defined enables freeing up of capital in the market thereby making the firms distress-free.</td>
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<td>4</td>
<td>Implementation mechanism:</td>
<td>Professionals having specialised knowledge and providing specialised services are required to aid the resolution process of firms. The nature and the extent of the involvement of the Court affects the cost of the process as well as the time taken.</td>
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There exist procedures for formal reorganisation, as well as, liquidation. The United Kingdom and Singapore still retain some of these procedures. However, in India, by virtue of the Insolvency and Bankruptcy Code, 2016, the SICA was repealed and hence, reorganisation as envisioned by the SICA is no longer possible. However, the Companies Act, 2013 provides for a Scheme of Arrangement between the company and its creditors, under Section 230 which deals with the power to compromise or make arrangements with creditors and members.

The next table compares the procedures in the three countries in view of their reorganization procedures:
### Table 2: Comparison of reorganisation procedures across the United Kingdom, Singapore and India:

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<tbody>
<tr>
<td>1)</td>
<td>Initiation of the process:</td>
<td>The person holding a floating charge or the company, or its Board.</td>
<td>The company, its Board or its creditors. A JM can be blocked if a company appoints a Receiver.</td>
<td>The members or the creditors.</td>
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<tr>
<td></td>
<td>Who can initiate the process</td>
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<tr>
<td></td>
<td>How is the process initiated</td>
<td>Insolvency is required to be established.</td>
<td>There should be enough evidence to show that the company is unable to pay its debts but is capable of being rehabilitated.</td>
<td>A meeting of all creditors and members are called.</td>
</tr>
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<td>2)</td>
<td>Control:</td>
<td>The Board loses control and the Administrator steps into their shoes.</td>
<td>The management is displaced and the Judicial Manager replaces them.</td>
<td>The Board of Management retains control, subject to changes after the order of the Tribunal.</td>
</tr>
<tr>
<td></td>
<td>Who retains control?</td>
<td></td>
<td></td>
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<tr>
<td>3)</td>
<td>Who proposes a plan?</td>
<td>The administrator proposes and prepares the plan.</td>
<td>The Judicial Manager manages the company.</td>
<td>The company, its creditors members may suggest to make a compromise or arrangement.</td>
</tr>
<tr>
<td></td>
<td>How is the plan adopted?</td>
<td>By a vote of the creditor’s committee.</td>
<td>By a vote of the creditor’s committee.</td>
<td>By a vote of the creditor’s committee.</td>
</tr>
<tr>
<td>4)</td>
<td>Other elements: Is there a moratorium?</td>
<td>Yes, for a duration of the entire process, while lasts for 18 months.</td>
<td>There is an Automatic and immediate moratorium.</td>
<td>No moratorium during the process.</td>
</tr>
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<td></td>
<td>Priority of distribution</td>
<td>The priority is defined.</td>
<td>The priority is defined.</td>
<td>There is no distribution since assets of the company are not divided.</td>
</tr>
<tr>
<td></td>
<td>Exit</td>
<td>Through implementation of the plan, or by liquidation.</td>
<td>Through implementation of the plan, or by liquidation.</td>
<td>There is no liquidation.</td>
</tr>
<tr>
<td>5)</td>
<td>Implementation mechanism: Role of IP</td>
<td>The IP here is usually the Administrator who manages the firm, proposes the reorganisation plan and take any action which is in the interest of the creditors. The administrator is usually appointed by the Board.</td>
<td>The Judicial Manager manages the firm, proposes the reorganisation plan and can take any action which is in the interest of the creditors</td>
<td>There is no involvement of the IP but that of the Tribunal which supervises the process.</td>
</tr>
<tr>
<td>6)</td>
<td>Role of Court</td>
<td>The Court oversees the process through the Administrator, who is the officer of the Court and is often consulted for guidance, etc.</td>
<td>The Judicial Manager is appointed by the Court after judging the insolvency of the company.</td>
<td>The Tribunal supervises the entire proceedings from start to finish.</td>
</tr>
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</table>
The main differences in the above processes across the three countries are as follows:

- In the United Kingdom, there should be actual insolvency which needs to be established in order to kick-start the procedure. In Singapore, there is the need to show inability to pay debts. In India, a company can make a compromise or arrive at an arrangement with its creditors or members in relation to the outstanding payments of the company.

- In the United Kingdom, there is a provision for interim financing, whereby the Court allows the company to access funds on a priority. In India, the Board initiates the process, while in Compulsory Liquidation, the company, any creditor, director, member, etc. can initiate it by making a petition to the Court.

- In the United Kingdom, the Administrator is appointed by the Board. However, in Singapore, the Judicial Manager is appointed by the Court. In India however, there is no person who is appointed during the proceedings under the Scheme of Arrangement. The proceeding happens under the supervision of the Court.

- In the United Kingdom, the involvement of the Court in the proceedings is minimal. Sometimes, an entire administration can actually complete without any judgment or order from the Court. In Singapore, the Court plays an important part, where it can amend the rescue or resolution plan, adjourn meetings, etc. In India, the entire proceedings take place under the supervision of the Court, i.e. the Tribunal.

The above Table compared the procedures in the three countries in respect of their reorganisation. The next yardstick where the three countries shall be compared is on the basis of their insolvency processes. Since the introduction of the Insolvency and Bankruptcy Code, 2016 in India, there are quite a lot of similarities between the procedures of the three countries in respect of their insolvencies. The next table shall compare the similarities and the differences and the author shall then list out the deficiencies in the Code.

### Table 3: Comparison of insolvency procedures across the United Kingdom, Singapore and India:

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<tbody>
<tr>
<td>1)</td>
<td>Initiation of the process:</td>
<td>CVL - Board initiates the process, while in Compulsory Liquidation, the company, any creditor, director, member, etc. can initiate it by making a petition to the Court.</td>
<td>In CVL procedure, the Board initiates the process, while in compulsory liquidation, the company, any creditor, director, etc. can initiate it by making a petition to the Court.</td>
<td>The creditors, who are divided into financial creditors and operational creditors or the company itself.</td>
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<tr>
<td></td>
<td>Who can initiate.</td>
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<tr>
<td></td>
<td>How is the process initiated.</td>
<td>In CVL - Shareholder resolution. In CL, default on an undisputed debt of GBP750 or inability to pay debts.</td>
<td>In CVL – a shareholder resolution. In CL, default in excess of SGD 10,000 within three weeks of demand or inability to pay debts.</td>
<td>There should be an occurrence of a default minimum of Rs. 1,00,000/-.</td>
</tr>
<tr>
<td>2)</td>
<td>Control:</td>
<td>In CVL - Liquidator retains control monitored by the creditors. In CL, the liquidator is monitored by the Court.</td>
<td>In CVL – Liquidator retained control monitored by the creditors. In CL, the liquidator is monitored by the Court.</td>
<td>Interim Resolution Professional (IRP) and Insolvency Professional replace the management and the Board.</td>
</tr>
<tr>
<td></td>
<td>Who retains control?</td>
<td></td>
<td></td>
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<tr>
<td>3)</td>
<td>Implementation: Moratorium</td>
<td>In CVL – There is no automatic stay on proceedings. In CL – There is automatic stay.</td>
<td>Stay is imposed only post winding up order.</td>
<td>Moratorium is declared on the commencement of insolvency.</td>
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<tr>
<td>4)</td>
<td>Role of IP</td>
<td>Reviews assets and claims of creditors. May also carry on the business of the company.</td>
<td>Reviews assets and claims of creditors. May also carry on the business of the company.</td>
<td>The Insolvency Professional manages the affairs of the company after appointment, till the submission and approval of the resolution plan or the liquidation of the company.</td>
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<tr>
<td>5)</td>
<td>Role of Court</td>
<td>In CVL – Court has a supervisory role. In CL – The Court oversees the procedure.</td>
<td>There is involvement only in the initial stages of the proceedings.</td>
<td>The Adjudicating Authority accepts or rejects the resolution plan submitted by the resolution applicant. Upon rejection of the plan, the company goes into liquidation and a Liquidator is appointed to oversee the liquidation proceedings.</td>
</tr>
</tbody>
</table>
TIMELY RESOLUTION OF CASES UNDER THE INSOLVENCY AND BANKRUPTCY CODE, 2016

- In the United Kingdom, in a CVL procedure, the Board initiates the process, while in Compulsory Liquidation, the company, its creditor, director, member can initiate it. In Singapore, there exists a similar system. In India, it is the creditors, who are divided into operational creditors and financial creditors, who can initiate the insolvency process or the company itself can initiate it.

- In the United Kingdom, the CVL process is initiated by passing a shareholder resolution, while in the CL process, a default on an undisputed debt of GBP 750 or more is required to be shown. The system in Singapore is similar except that the limit in the CL proceeding in Singapore, default in excess of SGD 10,000 which has not been paid within three weeks of demand or an inability to pay debts. In India, insolvency process can be initiated on the occurrence of default of Rs. 1,00,000/- or more.

- In the United Kingdom and in Singapore, the Liquidator retains control monitored by the creditors or the Court, depending upon the type of process. In India, an Interim Resolution Professional is appointed, first for a period of 30 days, to later replaced by the Resolution Professional, who carries on the entire process of insolvency. This Resolution Professional replaces the Board of the Company and is in-charge of taking the day-to-day decisions of the company pertaining to its affairs.

- In the United Kingdom, the involvement of the Court in the proceedings is minimal. Sometimes, an entire administration can actually complete without any judgment or order from the Court. In Singapore, the Court plays an important part, where it can amend the rescue or resolution plan, adjourn meetings, etc. In India, the Tribunal is approached at every stage of the proceeding and the entire proceeding also takes place under a strict watch from the Court. Further, parties are at a liberty to approach the Court for the slightest relief. This leads to further choking up of the system, since the parties have to approach the Tribunal even for seeking minor relief.

- In the end, this takes a toll on the timeline of the case and the proceedings are unable to be completed in the stipulated time. The National Company Law Tribunal is not an authority to recover dues of the company. It is a Court established with a view to resolve companies which are facing cash flow problems, or have turned non-performing. The Supreme Court has echoed the same view in its judgment in K. Kishan v. M/s Vijay Nirman Company Pvt. Ltd. [15] where it has held that "it becomes clear that operational creditors cannot use the Insolvency Code either prematurely or for extraneous considerations or as a substitute for debt enforcement procedures. The alarming result of an operational debt contained in an arbitral award for a small amount of say, two lakhs of rupees, cannot possibly jeopardize an otherwise solvent company worth several crores of rupees."

Data Collection methodology and fields collected in the data set:
The first set of analysis is pertaining to the hand collected data from the questionnaires sent to the lawyers, professionals, etc. who have filed insolvency cases. The second set of analysis is pertaining to the hand collected data from the questionnaire sent to the insolvency professionals who have handled insolvency cases, either in the capacity of an Interim Resolution Professional or a Resolution Professional.

The specific timelines in the Code that have been regularly breached
The specific timelines in the Code that have been regularly breached.

These fields have been analyzed to estimate the pulse of the system with respect to meeting its objective of resolution of cases in a timely manner. The comparative analysis of the legislation and the system of Insolvency proceedings with that of UK and Singapore[17] has enabled us to identify specific metrics for consideration for this analysis.

Analysis of timeliness of resolution of cases under the IBC, 2016:
The responses reveal some startling facts. Almost 85% of the persons responded that the timeline of 14 days specified in the Code itself is not being adhered to. This is the first step in the entire process which leads to delays. All the responses received state that the Petition takes from 7-14 days from date of filing till the Petition comes up for hearing before the Bench. However, this observation is limited only to the Mumbai Bench of the NCLT and not all the other benches functioning across the country. From the responses received, it is apparent that a majority of the responders feel that the Code is not achieving its object of timely resolution.

The questions and their responses are recorded bel
As per Section 7 (4) for financial creditors and Section 9 (5) for operational creditors, the Adjudicating Authority must admit or reject the Application within 14 days of receipt of the Application. Is this timeline being adhered to?

Yes 14%

Cases filed on behalf of financial creditors.

Cases filed on behalf of operational creditors.
A whopping 86% of the responses reveal that the timeline stipulated by the Code itself is not being adhered to, for various reasons which have been recorded below.

As the responses suggest, the most important reason why this timeline is not being adhered to is because of gross understaffing of the Adjudicating Authority in comparison to the amount of cases that are filed. This leads to a pile up of cases and defeats the very purpose of the Act. However, the Hon’ble Supreme Court, in its judgment in Surendra Trading Co. v. Juggilal Kamlapat Jute Mills Co. Ltd [18] has held that this period is directory and not mandatory. 86% of the lawyers answering this question have had this timeline of 180 days of 270 days has been breached, which means that the Code is failing in its objective of achieving timely resolution, the very reason for which the Code was passed. The reasons for this are multi-fold, but the most important one is the insufficiency of members, as well as support staff.

As is apparent from above, the 180 day period as well as the 270 day period have been breached, thereby defeating the very purpose of the Code.
57.1% of the responses reveal that the proceedings usually get stuck at the hearing stage. This is important, since there are a lot of issues involved in this stage, whereby the company undergoes a moratorium, the Resolution Professional replaces the Board of Directors of the Company and manages the day-to-day affairs of the company. This leads to a lot of bottlenecks being created by the employees so as to not co-operate with the Resolution Professional and delay the proceedings, thereby causing the value of the assets to diminish.
Cases that have ended in successful resolution.

- Less than half: 43%
- More than half of the cases: 29%
- All of them: 14%
- 3 cases (14%)

Cases that have ended in liquidation

- Less than half: 72%
- All of them: 14%
- None: 14%
Some cases are also settled before the pre-admission stage itself. The researcher feels that the cases that get settled at the pre-admission stage are cases which are filed only to recover money from the company. This is not what the framers of the Code envisioned for the Code. However, there are some cases, which are purely pertaining to recovery. However, the company is dragged through the insolvency proceedings, so as to recover dues of some creditors. This also clogs up the system thereby leading to delays. Further the reason for setting cases at pre-admission stage are also pertaining to the length of the proceeding. The responses reveal that some lawyers are of the opinion that the Code is being misused by some unscrupulous creditors, only to recover their dues. This is not what the Code was envisioned.

As is clear from the above, a majority of the Insolvency Professionals face challenges after their appointment. The kinds of challenges are discussed in the further questions. As can be seen from above, the major challenge that the Insolvency Professionals face is that of lack of co-operation from the employees of the company undergoing insolvency or resolution. This creates undue delays in the entire process thereby leading to delays in the entire resolution/insolvency process. The major problem here is that the employees do not provide books of accounts, other electronic information, so as to not give a clear financial picture of the company. This also leads to frustration of the entire objective of the Code.

As is clear from the above, the need for the approval of the Committee of Creditors for the smallest of things, also leads to delays in
the entire insolvency/resolution process.

Are there delays in the process after appointment?

Are there delays in the process after formation of the Committee of Creditors?

This again goes to show that even after the formation of the Committee of Creditors, the problems of the Insolvency Professionals are far from over. They further face problems from the Committee of Creditors, which mainly comprises of financial creditors, who try and influence the decisions in their best interests, instead of ensuring that the process is fair and transparent.

Conclusion:
As per a recent report studied by the researcher and the data available on the Insolvency and Bankruptcy Board of India website, in the 30 months since the Code has come into existence, about 1858 cases have been filed. Out of those, over 700 cases have been closed, which means that they were either closed in appeal, withdrawn, have ended in liquidation or in successful resolution. However, 1143 cases still remain pending having breached their timelines, as set out in the Code. The introduction of the Insolvency and Bankruptcy Code has changed the entire landscape of the Indian economy. The same is apparent from the recent judgment of the Supreme Court in the Swiss Ribbons Case[19] wherein the Court has observed how claims of almost Rs. 1,20,390 crores have been settled in out-of-court settlement between the companies and its creditors. Almost 80 cases are being or have been resolved.
since the Code came into existence. The value of the liquidation in these 80 cases amounts to Rs. 29,788.07 crores. Furthermore, almost Rs. 60,000/- crores have been realized only from the resolution process, which is a whopping 202% of the liquidation value. This has resulted in more credit to the commercial sector, which has jumped from Rs. 4952.24 crores to Rs. 9161.09 crores in only one year, i.e. from 2016-17 to 2017-18. The total flow of resources in the commercial sector has also increased from Rs. 14530.47 crores to Rs. 18469.25 crores. Most importantly, the Court states that the defaulter’s paradise is lost. In its place, the economy’s rightful position has been regained.

However, a lot of work still remains to be done. There were four aspects of infrastructure which were to simultaneously operate along with the Code. The authority, i.e. the National Company Law Tribunal, was already in place. The Insolvency and Bankruptcy Board of India became operational on 1st October, 2016. The other elements like the Insolvency Professional Agencies, IPAs, have also become operational. However, the Information Utilities, which were supposed to augment the creditors in obtaining relevant information of the company, have not become operational yet.

Due to the Order of both the NCLAT and the Supreme Court[20], the time spent by a company in litigation is now deducted from the 270 day timeline set by the Code. This has resulted in endless litigation for companies, where each and every Order is challenged in the higher Court, finally culminating in an Appeal to the Supreme Court. This results in asset devaluation and in some cases, can lead to an entire change in the industry itself. This affects value realisation. However, if the litigation period is not excluded from the overall time period, then there can be better implementation of the law.

The Code has laid down the entire process which is to be followed after the petition is admitted. However, due to the new and evolving jurisprudence, there is a lack of clarity on some aspects, and therefore the Adjudicating Authority is being approached at each and every stage of the proceeding. This is a short-term problem and shall evolve in the long run, as the Code settles the law on most of the ambiguities.

A problem which has been consistently seen is that there is a hesitation on the part of the Adjudicating Authority to liquidate the company. However, that is not the objective of the Code. The Code stipulates that if the company cannot be resolved in 270 days, the company shall be liquidated. This is also one of the major reasons why the entire working of the Code has slowed down, since the Adjudicating Authority is reluctant to pass an order for liquidation.

Also, as can be seen from the empirical study, there are various areas where the Code can be further improved particularly in terms of its vacancies. The Adjudicating Authority should be sufficiently staffed with enough members and also technical staff, so as to ensure that the pre-filing formalities are completed and the petition comes up for hearing at the earliest.

Another area where the Code can be improved is the lack of information. The lenders, NCLT, IPs, IBBI, etc. all have contrasting information which gives rise to lack of accurate information and confusion in the market. The Information Utility was supposed to address this problem, but has been unable to do so until now.

From the analysis of the Questionnaire the probability of case completion within 180 days is less than 5%, the probability of case completion within 270 days is 22% and the probability of case completion within 360 days is 45%. From these figures, it can be said that overall, the objective of the Code is not being achieved.