Mediation Matters

By Ishana Tripathi

The Indian Viewpoint on Mediation

orporate insolvency and debt-recovery processes in India have seen several scattered laws. This has led to a decade of misuse by promoters and management and large-scale corporate insolvencies, which has heavily impacted the credit and business markets. In 2016, the Insolvency and Bankruptcy Code (IBC) was passed to consolidate the several laws that had been passed by the Indian legislature over four decades. Before the IBC, corporate insolvencies were under the winding-up process with a debtor-in-possession (DIP) regime.

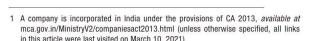
In 2002, Indian civil procedural law was amended to introduce mediation as a formal process for resolution for certain cases based on a court's discretion. This led to the setup of court-connected mediation centers where mediation for commercial disputes was possible. While the amendment was a bold legislative move, in the case of winding up of companies¹ on account of an *inability to pay debts* (corporate insolvencies), there has not been any consistency or success. This article will trace the history of various laws and how mediation has been factored in to support corporate insolvency resolu-

tion and restructuring of companies incorporated under the laws of India.

Corporate Insolvency Laws: A Brief History

In India, out-of-court methods (or mediation) have played a very limited role as a preferred use for corporate insolvency resolution, and heavy reliance has been placed on court litigation. Mediation has also found relevance only when a "litigation first, then court reference" hybrid model is adopted.

As a starting point, disputes related to an *inability to pay debts* were covered by the Companies Act 1956 (CA 1956) and were provided for under the winding-up and liquidation chapter.² It was engineered in the form of single-creditor filings, allowing for corporate debtors to defend any petition for winding up using the balance-sheet or cash-flow tests. Under CA 1956, the court could determine the consolidation of claims. However, CA 1956 did not build in a mechanism where only one filing was permitted against a particular corporate debtor. For example, if multiple claims were filed against the same corporate debtor, the



2 See CA 1956, supra fn.1 (website link).



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Indian Corporate Insolvency Law: Evolution Diagram

Court Method: CA 1956 (repealed by CA 2013) winding up on grounds of inability to pay debts. No special courts.

Out-of-Court Method: Sick Industrial Companies Act 1986 establishes the Board for Financial and Industrial Reconstruction, which is aimed at reviving and rehabilitating sick companies.

Court Method: Recovery of Debts Due to Financial Institutions Act 1993 establishes new tribunals for debt-recovery cases, winding up cases on account of an *inability to* pay debts, stays with High Courts. **Court Method:** CA 2013 establishes Company Law Tribunal — court for corporate insolvency petitions.

Hybrid Method: Civil Procedure Code (Amendment) Act 2002: Introduction of reference to mediation provision by the courts. However, pre-mediation was introduced many years later.

Out-of-Court Method:
Securitization and Reconstruction of
Financial Assets and Enforcement
of Security Interest 2002: Outof-court resolution for secured
creditors only.

Hybrid Method: In 2016, CA 2013 was amended by the IBC to consolidate law on corporate insolvency resolution. This law incorporates the restructuring of corporate debtors.

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