

# Mediation Matters

By ISHANA TRIPATHI

## The Indian Viewpoint on Mediation

Corporate 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 companies<sup>1</sup> 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.<sup>2</sup> 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



Ishana Tripathi  
Jindal Global Law  
School; New Delhi, India

Ishana Tripathi is a professor of corporate insolvency law at Jindal Global Law School in New Delhi, India.

<sup>1</sup> A company is incorporated in India under the provisions of CA 2013, available at [mca.gov.in/MinistryV2/companiesact2013.html](http://mca.gov.in/MinistryV2/companiesact2013.html) (unless otherwise specified, all links in this article were last visited on March 10, 2021).

<sup>2</sup> See CA 1956, *supra* fn.1 (website link).

### Indian Corporate Insolvency Law: Evolution Diagram

