

SALE AS A GOING CONCERN IN LIQUIDATION

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1. Introduction

Insolvency laws around the globe are focused on Re-organization of the debtor's business and provide a well-laid mechanism for doing so. However, there exists another phase of insolvency which is a step beyond resolution and is termed as 'Liquidation/ Bankruptcy'. While the most common form of the process is usually either of the two, there exists another approach which lies between a resolution and liquidation. An attempt to preserve the value, rescue the business yet resulting in the assets changing hands.

Sale as a going concern during liquidation is the hybrid approach which strikes a balance between liquidation and re-organization which has been discussed in the UNCITRAL Legislative Guide on Insolvency Law⁶. It related this concept to the economic theory of preserving the value by keeping the essential components of a business together instead of breaking them into fragments⁷. The mention of liquidation as going concern as the third possibility, in case a firm default, can be found in The Report of the Bankruptcy Law Reform Committee, Volume I: Rationale and Design under the head titled as 'The key economic question in the bankruptcy process'; suggests that liquidation as going concern is not a new concept⁸.

A Going Concern approach entails the sale of business of the company including all its assets and properties on as is where is basis. When the company goes into liquidation, prior to the amendment in IBC the liquidator had limited options and he could either sell the assets as piecemeal or slump sale but after incorporation of Section 32(c) in the Code the liquidator also has the option to sell the company with all its assets i.e selling the business as a whole without bifurcating its properties and liabilities. Thus, one of the essential objectives of Insolvency and Bankruptcy Code, 2016 was to ensure speedy completion of the process but in numerous cases it is seen that due to delay in liquidation process there was a loss to the

⁶ UNCITRAL Legislative Guide on Insolvency law, (https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf).

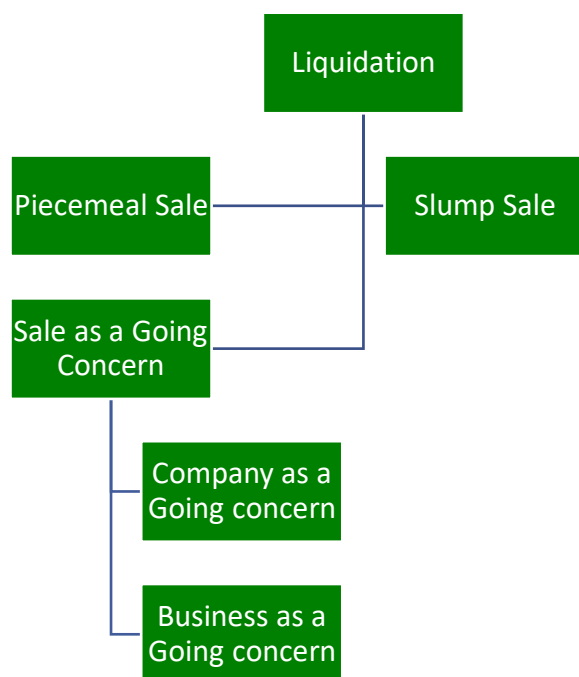
⁷ UNCITRAL Legislative Guide on Insolvency Law, Page-11.

⁸ Ashmika Agrawal, *Liquidation As Going Concern Under Insolvency And Bankruptcy Law*, 3, (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3527389).

company, its employees, workers. Now the company can be sold as a going concern which has the potential to ensure better utilization of resources of the company.

This concept note strives to discuss the perspectives of debtors and creditors during a going concern sale, challenges that could occur and various theories/ approaches that emerged within this concept by drawing inferences from various judicial and legal provisions of India as well as other counterparts across the globe.

1. Liquidation Strategies Adopted Worldwide



- 1. Piecemeal Sale:** There can be various classes of assets which may be related or unrelated. Under this strategy, the liquidator tries to sell the assets separately (piece-by-piece) by way of separate transactions. This strategy is best suited for assets that are impaired assets or assets unrelated to the business activity and yet may be in possession of the debtor.
- 2. Slump Sale:** It is a mode of sale where a group of assets or even a division is sold for a lump-sum consideration. There can be a division or a business line with the debtor which no one is willing to buy and operate as a going concern as part of the complete business buy-out, while it may also not be feasible to sell its assets under a piecemeal strategy. Then the slump sale of that division/ undertaking can be a beneficial strategy.
- 3. Sale as a going concern:** By a literal reading of this term, it appears that the business comprising of all the assets, liabilities and rights stands transferred to a person who seeks to run the organization as a going concern (normal operating scenario). However, the laws are evolving and this concept is further being bifurcated into-

- a. Sale of a Company as a going concern
- b. Sale of business as a going concern

3. How it all started - The Going Concern Assumption.

The term 'Going Concern' has been interpreted by various judgements, professional guidance and standards, academicians etc.

Accounting Standard -1 describes going concern as- *"When it is assumed that the enterprise has neither the intention nor the need to liquidate or curtail materially the scale of its operations"*⁹

The Insolvency Law Committee in its report of March 2018 describes the term as –

*"The phrase "as a going concern" implies that the corporate debtor would be functional as it would have been prior to initiation of CIRP, other than the restrictions put by the code."*¹⁰

In a round table of Insolvency and Bankruptcy Board of India ("IBBI") held on 21st May 2018, several issues were brought up and the term 'Going Concern' was discussed at length and described as-

*"Going Concern means all the assets, tangibles or intangibles and resources needed to continue to operate independently a business activity which may be whole or a part of the business of the corporate debtor without values being assigned to the individual asset or resource."*¹¹

There have also been various judicial interpretations of the term 'Going Concern'. In *re Indo Rama Textile Limited*,¹² the Delhi High Court held that a company is said to be transferred as a going concern when the assets and liabilities being transferred constitute a business activity capable of being run independently for a foreseeable future.

The term going concern was examined in the case of *Rajashri Foods Pvt Ltd*¹³, where it was observed that:

"A going concern is a concept of accounting and applies to the business of the company as a whole. Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business. Such transfer of business as a whole will comprise comprehensive transfer of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc."

⁹ AS-1 - Framework for the Preparation and Presentation of Financial Statements, (<https://resource.cdn.icai.org/56169asb45450.pdf>).

¹⁰ Report of the Insolvency Law Committee, March 2018, Page-37, (http://www.mca.gov.in/Ministry/pdf/ReportInsolvencyLawCommittee_12042019.pdf).

¹¹ IBBI Agenda, (https://ibbi.gov.in/Agenda_03_26062018.pdf).

¹² re Indo Rama Textile Limited, 4 CompLJ 141 (2013) (Del).

¹³ Advance Ruling No. KAR ADRG 06 / 2018.

4. Difference between the two – Huge or Small?

*"If the business is owned by a company there is a choice of buying the assets from the company, or buying the whole company itself by acquiring its shares from its shareholders."*¹⁴

1. Sale of the debtor (company) as a going concern-

It is normally understood in the context of ownership of the debtor. The equity shareholding of the debtor gets transferred, and the purchaser takes over the undertaking along with all the assets, including all contracts, licenses, concessions, agreements, benefits, privileges, rights or interests which were registered in the name of the debtor¹⁵. The prime difference being the survival of the debtor's legal entity which gets transferred to the acquirer. Hence, unlike a liquidation or winding up, there is no estate formed, assets are realised and paid to the creditors as per the priority rule set out in law and finally, the company is dissolved.

In a going concern sale, the company as a legal entity will itself form a part of the liquidation estate on an "as is where is" basis. In this case, the liabilities would not be transferred as liquidation sale is a special situation, unlike ordinary business sale. In liquidation, the liabilities as on the Liquidation Commencement Date have to be settled in the priority order listed in the law (Section 53 in case of IBC). The proceeds from the sale of the company and its assets are realised and further distributed¹⁶.

The Corporate Debtor will also issue shares to the acquirer and the existing shares may not get transferred and shall stand extinguished. Another important aspect of this mode of sale is that the, the acquirer is expected to carry on the business of the corporate debtor after the acquisition.

2. Sale of the Debtors' business as a going concern-

¹⁴ Steeles Law Solicitors, *A Guide to Buying or Selling a Business*, 5 (<https://www.steeleslaw.co.uk/wp-content/uploads/2017/07/A-guide-to-buying-or-selling-a-business-print-1.pdf>).

¹⁵ Dr. Binoy J. Kattadiyil and CS Nitika Manchanda, *Liquidation As A Going Concern: Ivrc Ltd - A Case Study Analysis*, (September 25, 5:15 PM), (<https://icsiip.com/Portals/0/LIQUIDATION%20AS%20A%20GOING%20CONCERN%2C%20IVRCL%20LTD%20-%20A%20CASE%20STUDY%20volume9-issue5%284%29-2020.pdf>)

¹⁶ Resolution Services Team, Vinod Kothari & Company, *Enabling Going Concern Sale In Liquidation*, 11 (<http://vinodkothari.com/wp-content/uploads/2019/06/Enabling-Going-Concern-Sale-in-Liquidation.pdf>).

This is in the nature of “second-best option” where the going concern sale of the company itself is not possible¹⁷. There may be scenarios when the acquirer is not interested in the corporate entity of the debtor but only its business.

A debtor may have a different line of businesses and each business may have the potential to be sold separately as a going concern. There may also be some assets which are not related to the business and these can be sold using other liquidation strategies like piecemeal.

For liabilities and its settlement, the same process is followed as mentioned above and these are settled according to the realisations from the Liquidation estate.

Buyers and Sellers Perspective in determining either of the two strategies

A buyer may have a different set of needs while a seller may have different interests in selling the business. It is then that both the parties discuss their commercial judgement on a table and a transaction happens.

So whether to sell the debtors legal entity or only business as a going concern will, in most cases depend on the positions and interests of both the parties.

What does a buyer want?

The general rule of thumb for a company sale is that a buyer will normally prefer to buy the assets of a business and the seller will prefer to sell the shares¹⁸. When the business is sold as a going concern the seller is a company but when the entity is sold as a going concern the sellers are none other than the owners which are shareholders (Priority will be given to creditors during insolvency).

The buyer is generally interested in the assets and goodwill of a company, and this enables him to pick those assets/ business which he wants to acquire. All other liabilities will be left with the seller. The cost of Due Diligence during the acquisition of a business would be much lower than the case when the entity is purchased. The buyer may be interested in purchasing the legal entity if the name of the entity carries a huge brand value.

What does a seller want?

If the legal entity along with a business is sold, then the shareholders go for a complete breakup of the company in terms of assets as well as liabilities and warranties. However, the buyer

¹⁷ Umang Mehta and Rishab Murli, *Beneficial Liquidation: Sale as a Going Concern*, (Apr. 02, 2020, 10:24 PM) (<https://tauruslegal.co.in/2019/11/13/beneficial-liquidation-sale-as-a-going-concern/articles/852/>).

¹⁸ Steeles Law Solicitors, *A Guide to Buying or Selling a Business*, 6 (<https://www.steeleslaw.co.uk/wp-content/uploads/2017/07/A-guide-to-buying-or-selling-a-business-print-1.pdf>).

would always insist on not taking some pecuniary liabilities and contractual indemnities of the company, which will continue to bind the shareholders even after the sale. (IBC has introduced section 32A, whereby the promoters remain responsible for the criminal liabilities even after the ownership of corporate debtor has been transferred).

Deal as viewed from the tax authorities perspective

The perspective of tax authorities becomes important to decide the right liquidation strategy to avoid a long-lasting battle in tax tribunals and courts and determining the right amount of tax liability.

The Gujarat High Court in the case of *ACIT v. Patel Specific Family Trust*¹⁹ has held that where there is a sale of the entire business including all assets and liabilities, as a going concern and it is not possible to bifurcate the consideration received on account of transfer, the transfer does not give rise to Capital Gain.

However, a contrary view has been given by the Hon'ble Supreme Court of India. In the case of *CIT vs Equinox Solution Pvt. Ltd.*²⁰ the Apex court has analysed the taxability of sale of the business on a going concern basis and held that the sale is a slump sale and not the sale of depreciable assets covered under section 50(2) of the Income-tax Act, 1961. Similar view has also been held in the case of *CIT vs Artex Manufacturing Company*²¹. The Hon'ble Supreme Court of India has confirmed that sale of a business carried on for long-term, on a going concern basis is a slump sale, and thus, should be liable to be taxed as long-term capital gains.

When it comes to indirect taxes in India, In the Central Goods and Services Tax Act, 2017 there is a specific provision for transfer of a business as a going concern. Item 4 of Schedule II clearly states that if the transfer of goods happens as a part of a transfer of a business as a going concern, then there will be no levy of GST on such a transfer.

5. Transfer of Liability – Yes/ No?

The question of liabilities does not arise in cases when a going concern sale is made during liquidation. There are various factors attributed to this analogy.

1. Claims:

The primary reason being that the insolvency laws require various kinds of liabilities (existing or contingent) to convert into claims and on the basis of the list of claims, all the claimants are paid as per the priority rule established under the law. The liabilities which stand together on

¹⁹ *ACIT v. Patel Specific Family Trust*, (Guj) [2011] 330 ITR 397.

²⁰ *CIT vs Equinox Solution Pvt. Ltd.*, TS-149-SC-2017 (India).

²¹ *CIT vs Artex Manufacturing Company*, [1997(6) SCC 437 CIT]/ [1997] 93 Taxman 357 (SC).

the balance sheet become strangers to each other because the liquidation laws usually discriminate them based on 'secured' and 'unsecured'.

The liabilities are also not allowed to be transferred because they may not be in line with the section governing distribution under the law (Section 53 for IBC). And even if a liability get transferred to the acquirer, where would the claimants go? Will they file a fresh claim with the new owner and if yes, under what law?

As has been rightly argued in the case of *Gupta Global Resources Pvt Ltd*, that if the liabilities are transferred to the buyer, then the various claimants who have a claim on the liquidation estate would have dual claims – a claim on the liquidation estate, as also a claim on the buyer of the going concern, which is not contemplated under IBC. However, the liquidator was directed to follow the procedures as laid down in Regulations prescribed under the Code.

2. Contradiction with existing laws of India:

The regulation 39C of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, provides that,

*"Where the committee recommends sale as a going concern, it shall identify and group the assets **and liabilities**, which according to its commercial considerations, ought to be sold as a going concern under clause (e) or clause (f) of regulation 32 of the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016."*

Would this regulation make it mandatory for the liquidator to get the liabilities transferred? Making liability as part of the block will degrade them leading to degradation of marketability of assets which are already stressed.

3. Value:

Will the value of the assets transferred in going concern be enough to cover all the liabilities? If the sale could not fetch enough then the residual value would have to be part of the liquidation estate.

4. Creditors Rights:

In case of liquidation, the secured creditors have the right under Section 52 of the IBC to either enforce their security interest or to relinquish the same in favour of the liquidation estate. However, if the going concern strategy is adopted then they may have to necessarily relinquish their charge on the assets.

As has been held in the matter of *Edelweiss Asset Reconstruction Co. Ltd. Vs. Reid and Taylor India Limited*²² where the applicant Financial Creditor claiming sole first charge over the fixed assets and first pari-passu charge over the current assets of the Corporate Debtor sought permission of the Adjudicating Authority to realise the security interest by selling the secured assets of the Corporate Debtor on "as is where is" basis as a going concern as per section 52 of the Code read with regulation 37 of the IBBI (Liquidation Process) Regulations, 2016. Another Financial Creditor had objected to this stating that section 52 of the Code does not empower a secured creditor to stand outside the liquidation process to enforce its security to the exclusion of other secured creditors having same ranking pari-passu charge over the same security interest, more particularly when the issue of priority of charges had not been adjudicated. The Adjudicating Authority held that only the first charge holder/ the secured creditor with first pari-passu charge can stay outside the liquidation process and realize his security interest and allowed the applicant being the first charge holder to realise security interest under section 52.

6. Some Judicial Precedents in India

1. One of the first cases to be attempted under sale as a going concern was in the matter of *Gujarat NRE Coke Limited*²³ where the Kolkata bench of NCLT observed that the liquidation has severe consequences on several of its stakeholders, especially the workmen. To protect the livelihood of the workmen of the debtor, the tribunal directed the liquidator to attempt the sale as a 'going concern' through a slump sale. It further observed that a slump sale is nothing more than the transfer of the whole or part of a business concern as a going concern.
2. Further, the transfer of sale is not a new concept in India. in the case of *M.C.T.M. Chidambaram Chettiar vs The Official Receiver, High Court*²⁴, the assets of the Madras Chemical Industries Limited, which was in the process of being wound up, was ordered to be sold as a going concern.
3. In the matter of *Edelweiss Asset Reconstruction Company Ltd. v Bharati Defence and Infrastructure Ltd.*²⁵ Hon'ble NCLT held that, considering the national importance attached to product line of the company, the customers explicitly Ministry of Defence, Indian Coastguard, Customs etc, order book size, advances paid by various Government

²² Edelweiss Asset Reconstruction Co. Ltd. Vs. Reid and Taylor India Limited, MA-1392/2019 in CP No.382/IB/MB/MAH/2018

²³ Gujarat NRE Coke Limited, C.P No 182/2017

²⁴ M.C.T.M. Chidambaram Chettiar vs The Official Receiver, High Court, (1943) 1 MLJ 123

²⁵ Edelweiss Asset Reconstruction Company Ltd. v Bharati Defence and Infrastructure Ltd., MA 170/2018 in CP292/I&B/NCLT/MAH/2017

Departments, the work in progress stalled at various stages of production and huge number of workforce (around 850 employees) we direct that the Liquidator shall endeavour to sell the Corporate Debtor company as a going concern.

4. The Supreme Court in *Allahabad Bank v ARC Holding*²⁶ held that if the company is sold off as a going concern, then along with the assets of the company, if there are any liabilities relevant to the business or undertaking, the liabilities too would be transferred.
5. Recently in the matter of *Bharat Heavy Electricals Ltd. v Anil Goel, The Liquidator of Visa Power Ltd.*²⁷ Hon'ble NCLAT set a tone for the process to be followed for going concern sale. The court noted that the requirement of preparation of Information Memorandum and Evaluation Matrix as per section 25(2)(h) is not not applicable in the course of Liquidation process, unless corporate debtor or its business is being disposed of on going concern basis. The objective behind this statement of the Appellate Tribunal was to clarify that the disposal of assets cannot be done without having any intelligent criteria being applied for eligibility of bidders.
6. In *Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar*²⁸, it was held that a company can be sold off as a going concern only when the company is continuing its operations.
7. In the matter of *National Tannery Co Ltd*, a committee was formed to run the company until its sale on going concern basis and, eventually the Government of West Bengal offered to acquire the company on a going concern basis, pay consideration, and also agree to pay the wages of the workmen.
8. **IVRCL Limited:** IVRCL is widely reported as the first case under Liquidation to be successfully sold as a going concern. While reporting the quarterly financial results as of June 30, 2020 the company made disclosures to stock exchange that the Company on February 27, 2020, has received a bid under E-Auction process for the sale of the Company as going concern from Gabs Megacorp Limited at a price of INR 1654.77 Crore. The Bid is approved by the stakeholders of the company and the bidder has paid required Earnest Money Deposit (EMD) and the balance bid amount with interest thereon was to be payable

²⁶ Allahabad Bank v ARC Holding , AIR 2000 SC 3098

²⁷ Bharat Heavy Electricals Ltd. v Anil Goel, The Liquidator of Visa Power Ltd. and Agrawal Structure Mills Pvt. Ltd., Company Appeal (AT) (Ins) No.22 of 2020.

²⁸ Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar , AIR 1983 Bom 364

on or before 2nd September 2020. However, due to COVID-19 Pandemic situation, the successful bidder of the Corporate Debtor, has filed an application before the Hon'ble NCLT, Hyderabad on 18th day of August 2020, for seeking extension of three months w.e.f. from 03.09.2020 to pay the balance bid amount without any interest from 03.07.2020 to 31.12.2020 and the order is reserved.²⁹

Meanwhile in same case of IVRCL, in the matter of *Siripuram Developers and others v Andhra Bank*³⁰ Hon'ble NCLT ordered Andhra Bank not to proceed and sale the properties of the Corporate Guarantor (also a subsidiary) of the Corporate Debtor mortgaged with the respondent till the completion of the Liquidation process as the enforcement of security by the bank would diminish the value of the Corporate Debtor which would further impact the sale as a going concern. This presents a case where the judiciary applied its wisdom and ruled in favour of rescuing a company rather than breaking it into fragments.

9. Despite the Hon'ble NCLT giving out directions to attempt the Corporate Debtors sale as a going concern under Liquidation in multiple cases, recently in the matter of *Invest Asset Securitisations & Reconstructions Pvt. Ltd. v Mohan Gems & Jewels Pvt. Ltd.*³¹ the Adjudicating Authority turned down the sale of the Corporate Debtor as a Going Concern. According to the tribunal the regulations permitting the Liquidator to attempt the sale of Corporate Debtor are inconsistent with the code and rules issued under section 239 of the code. The tribunal noted that after the Liquidation there is a requirement of dissolution of the Corporate Debtor which would not be complied with if the Corporate Debtor is sold at this stage.

Though such order is passed almost after two years since the regulations were amended to incorporate this as a mode of sale, this order may have far reaching consequences not only on the transaction concerned in the case but also the transactions that are in the stage of conclusion.

7. Changes Recommended by the report of the Insolvency Law Committee, 2020

Chapter 2 of the report of the Insolvency law Committee released in February, 2020 has recommended some important changes in matters of sale of business as going concern during liquidation.

²⁹ <https://www.bseindia.com/xml-data/corpfiling/AttachHis/3e368ce2-8aa3-408f-bd09-73f252822dea.pdf>

³⁰ *Siripuram Developers and others v Andhra Bank*. IA No. 355 of 2020 in CP(IB) No. 294/7HDB/2017

³¹ *Invest Asset Securitisations & Reconstructions Pvt. Ltd. v Mohan Gems & Jewels Pvt. Ltd.*, I.A No. 1490/2020 in CP.(IB)-590(PB)/2018.

Going concern sale should not be mandated

The committee observed that the liquidator has been mandated to attempt a going concern sale of the business prior to disposing the assets of the Corporate debtor in any other manner. As per committee, it may not be a feasible option for every corporate debtor, especially where the business is unviable. Therefore, the committee recommended that it is the liquidator who is best placed to assess the relevant factors and after consulting the stakeholder's consultation committee decide whether a going concern sale should be attempted or not. As per the committee the going concern sale should not be mandated during the liquidation.

Sale of Corporate Debtor as a going concern

The committee observed that the liquidation is envisaged as the state at the end of insolvency resolution period, where neither creditors nor debtors can find a commonly agreeable solution by which to keep the entity as a going concern. Therefore, the committee noted that it would be contrary to the scheme of the Code to allow a corporate debtor to be sold as a going concern after the conclusion of its liquidation process, which envisages a dissolution of the corporate entity. However, where the business of the corporate debtor can be sold as a going concern, the liquidator may attempt the same.

8. Indian and International Provisions

1. India

In India, the Insolvency and Bankruptcy Code, 2016 and the IBBI (Liquidation Process) Regulations, 2016, govern the process of liquidation of a company.

Regulation 32 of the regulations (Supra) specifies the manner of sale during liquidation. According to the regulation,

The liquidator may sell-

- (a) an asset on a standalone basis;*
- (b) the assets in a slump sale;*
- (c) a set of assets collectively;*
- (d) the assets in parcels;*
- (e) the corporate debtor as a going concern; or*
- (f) the business(s) of the corporate debtor as a going concern"*

[Provided that where an asset is subject to security interest, it shall not be sold under any of the clauses (a) to (f) unless the security interest therein has been relinquished to the liquidation estate.]

2. Italy

In the context of an insolvency procedure, the bankruptcy receiver has to comply with the main criterion of block selling the entire business, its branches, its assets or its legal relationships when it turns out that this option allows creditors a better satisfaction. Otherwise, the bankruptcy receiver must carry out the liquidation of individual assets. If the bankruptcy receiver considers the sale of the entire business to be more appropriate, he or she may alternatively evaluate, in the liquidation plan:

- the immediate sale of the business;
- or the continuation of the business and the subsequent sale of it (eg, if this option allows them to sell the business at a higher price).

If the bankruptcy receiver decides to carry out the liquidation of individual assets, there are different procedures for the sale of the debtor's immovable or movable assets: an auction sale of immovable assets to protect creditors' interests in bankruptcy proceedings and a private sale for movable assets and assignment of claims. The procedures are subject to the supervision of the court and in some cases to the (nonbinding) opinion of the creditors' committee³².

The transfer of a business as a going concern (or a branch thereof) implies the transfer of all those assets that are organised to carry out that business or that branch of the business (including real property, plants and machinery, stocks, trade receivables goodwill and contracts (including employment contracts)).

If a transaction qualifies as a transfer of a business as a going concern, certain provisions of the law concerning contracts, employment, liabilities and receivables pertaining to the business become applicable. While the parties may agree to derogate from such laws in many respects they will be unable to derogate from the law in relation to certain rights of third parties (ie, employees and creditors).

The transferor remains liable to the creditors after the transfer of the business for the debts that exist at the time of the transfer unless the creditors have given their consent to the transfer. The transferee is jointly liable along with the transferor for the debts and liabilities of the business, if and to the extent such debts and liabilities are recorded in the accounts of the transferor. In general terms, this rule is aimed at protecting the creditors' interest, and cannot be derogated from the parties.

However, according to case law, the parties may contractually exclude the debts and liabilities from the transfer of the business, with the stipulation that such exclusion shall be effective only between the parties and not as regards the creditors.

The Insolvency Act and Law No. 270/1999 provide for specific rules on the matter, according to which:

³² Raffaele Lener and Giovanna Rosato, *Restructuring & Insolvency 2019*, 264, 265, (<https://gettingthedealthrough.com/area/35/restructuring-insolvency/>).

- unless agreed otherwise, the transferee of a business as a going concern is not liable for the business debts arising before the transfer; and
- the bankruptcy receiver or the extraordinary commissioner may provide for the transfer of the business as a going concern or assets or receivables by way of contribution to one or more companies, with the exclusion of liability on the transferor for the liabilities arising from the carrying out of the business prior to the transfer.

According to Law No. 270/1999, the sale of a business as a going concern (or part thereof) or the sale of a group of assets of the insolvent company is made in accordance with specific provisions, pursuant to which, inter alia:

- the transferee must undertake to continue the same business activity for at least two years
- the transferee must maintain the employment level established at the time of the transfer for at least two years. Insofar as the employees are concerned in the framework of the trade unions' consultations applicable in the transfer of a business as a going concern (the consultations), the extraordinary commissioner, purchaser and employees' representatives may agree on certain exceptions to Italian law on the protection of employees transferred by way of a transfer of a business as a going concern (TUPE legislation);
- in the framework of the consultations, or after the unsuccessful conclusion of the consultation, the extraordinary commissioner and the transferee may agree to transfer only parts of the businesses as a going concern with the identification of the employees in those parts of the business to be transferred to the transferee;
- the extraordinary commissioner may also proceed with the disposal of assets and liabilities initiated by the insolvent company, with the exclusion of the transferor from the liabilities related to the exercise of the business prior to the disposal; and
- the existing liens and guarantees in favour of the transferor maintain their validity and rank in favour of the transferee

3. Peru

In August 2018, the Insolvency Law was amended by means of Law No. 30844. The amendments introduced by Law No. 30844 have been in force since 29 August 2018 and mainly refer to the term of liquidations as a going concern and the mechanisms for the sale of assets. In the case of liquidation proceedings, it is possible to sell specific assets or the entire business as a going concern. In both cases, the purchaser will acquire the assets 'free and clear' of liens as it is expressly stated in the Insolvency Law³³. This shows that third world countries like Peru, that are developing are also making reforms to their insolvency laws

³³ Rafael Corzo de la Colina, Renzo Agurto Isla and Patricia Casaverde Rodríguez, *Restructuring & Insolvency 2019*, 365, (<https://gettingthedealthrough.com/area/35/restructuring-insolvency/>).

4. Malaysia

The Malaysian Guide on Transfer of Business as a Going Concern ("TOGC")³⁴ stipulates that transfer may involve the transfer of a whole or part of a business as a going concern from a taxable person to another taxable person and in the case where only part of the business is transferred, that part of the business must be able to operate on its own. For there to be a transfer capable of being treated as a TOGC it must include the transfer of business assets. For TOGC provisions to apply it is important that the assets, whatever they are and however many are to be transferred, put the purchaser in possession of a business, rather than simply assets.

9. What other modes of restructuring allow for sale as a going concern

1. Pre-packaged Sales:

A rising trend in major jurisdictions across the globe is to allow a "pre-packaged" sale, where a business is sold as a going concern to the directors or promoters. This route is adopted before the formal administration process begins. In a pre-pack, the deal is negotiated and the company is sold quickly and confidentially with the involvement of creditors.

2. Open market sale:

The company markets itself through a sale advisor to seek controlling investors or to sell out its divisions/ business. The process is executed by preparing a scheme and filing with the company tribunals.

The primary difference between all these methods and liquidation sale as a going concern lies in the fact that the entity is under a liquidation stage after having failed the administration process and this is seen as a last resort to rescue the business.

10. Issues that can be addressed by the legislature, regulator and judiciary:

Irrespective of how developed a legislation is, there are bound to be changes in the ecosystem which continuously require certain regulations to be amended to meet the changes with time. There are some issues that need an answer and prospective amendments in law because these may create a hindrance in execution of this mode of sale under Liquidation. Following is an illustrative list of such issues that may arise over time.

1. **Applicability of Section 29A:** While Liquidators as a matter of practise require the bidders to furnish an affidavit under section 29A of the code the same is not yet required by law for an asset sale under Liquidation. If the objective of section 29A is to be achieved

³⁴ Royal Malaysian Customs, *Guide On Transfer Of Business As A Going Concern*, (http://gst.customs.gov.my/en/rg/SiteAssets/specific_guides_pdf/TOGC_24052016v2.pdf).

in entirety then there is a need of amendment to the act restricting bidders in an e-auction to buy the assets of the company.

2. **CCI Approval:** While the objective of Anti-trust authority is to encourage a fair play in the market, the question arises if the Adjudicating Authority will require approval of Competition Commission of India before approval of the sale. Another aspect is whether the Commission will apply failing firms defence to such transactions.
3. **Features of a resolution plan:** Regulation 37 of IBBI (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 allow the measures like curing or waiving of any breach of the terms of any debt due from the corporate debtor, reduction in the amount payable to the creditors, obtaining necessary approvals from authorities along with other measures to be incorporate in a resolution plan. The question to be looked into by the legislature, regulator and the judiciary would be whether such benefits would be available to the bidder of the Corporate Debtor who comes with an intent to revive the company under Liquidation.

11. Conclusion

The concept of going concern sale under Liquidation is still evolving in India as well as other jurisdictions. Though the intention is to rescue the failing companies, it completely depends upon the market how they perceive this method and weigh the business in terms of value that can further be distributed among the creditors. Though we have seen increasing trend across benches of the Adjudicating Authority encouraging the Liquidators to attempt a going concern sale, some issues may tend to arise which would need to be dealt proactively to make this rescue mechanism successful. In the end it is the Adjudicating Authority who will have to consider the viability of the transaction and approve it keeping the interests of all the stakeholders in mind.