

ENABLING GOING CONCERN SALE IN LIQUIDATION

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Editor's Note: *The reasons/ events due to which a company goes into liquidation does not necessarily mean that the business itself was not viable. It may have so happened that the company became insolvent due to factors like weak administration and management, unavailability of workforce. The intent of the Code is not to end the business, but the business entity. Hence, in order to keep going the viable and profitable business, the Code enables going concern sale in liquidation.*

The basis of the concept of going concern sale, its presence in our global counterparts and its impact have been discussed herein below:

1. Background:

An economic unit may be either a going concern or a gone concern. Easiest analogy can be a live tree, versus a dead tree. A going concern goes into distress – presumption is that the entity can still be revived, with a bit of help from all stakeholders and a bit of judicial protection. This is the key objective of insolvency laws all over the world – to the extent an economic enterprise can be saved, it must be saved. There is too much of loss of economic value in destroying an enterprise that it is burden on the society to let entities be demolished, whether by creditor action or otherwise. However, protectionism has its limitations and we cannot, forever, continue to keep entities on the ventilator. Therefore, when the entities are beyond repair or restoration, they are taken the demolition route, which is the bankruptcy or liquidation process.

Presumably, an entity is going concern in insolvency, and is a gone concern when it goes into liquidation. The classic jurisprudence of winding up or liquidation laws has been that the liquidator can keep the entity as a going concern, only to the extent required for beneficial liquidation.

It is also a settled economic argument that for lots of entities, there is much better value as a going concern, and too much of a loss of value if the assets of a business are disposed of. In fact, the whole argument of liquidation, which is a collective remedy, rather than enforcement of security interest by creditors, which is an individual remedy, is that a slump sale or a going concern sale by the liquidator as a fiduciary for all creditors is likely to fetch better value for all stakeholders. The unique feature of a going concern sale is that, since the business of the corporate debtor can be transferred as a going concern, there exists a possibility of transfer of a whole lot of intangibles forming part of a business – contracts, leases, licenses, concessions, operational assets, manpower, technology, and so on. If all that is transferred is the assets of a business, several of these assets either may not be transferable at all, or may require third party concurrence for each such transfer, which may be a great hassle in liquidation.

With this viewpoint the Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016, was amended to permit sale of the corporate debtor as a going concern. Subsequently, a

further amendment, IBBI (Liquidation Process) (First Amendment) Regulations, 2018, was made to introduce the concept of “sale of the business of the corporate debtor as a going concern”.

Though after a series of amendments, the Liquidation Regulations still do not clarify as to what is a going concern sale, what are the determinants of a going concern sale, how will the liabilities and employees be tacked in a going concern sale and what will happen to the legal entity of the corporate debtor in case of a going concern sale. It is not clear as to whether there will be an order of the AA in case of a going concern sale, and what are the statutory powers under which the AA can pass such orders. Notably, there is nothing equivalent to Section 31 of the Code in case of a liquidation proceeding.

All these questions have so far substantially limited the scope for going concern sales in liquidation. There have been scattered examples of going concern sales in liquidation, but their success or adaptability, replicability or precedent value, is limited. Also, as a matter of policy, it is much better to draw up clear rules as far as possible, because in absence of statutory clarity, depending on adjudicatory discretion is leaving a room for substantial confusion, which takes a long time to resolve,

2. History of going concern sale in winding up in India

[The Eradi Committee Report](#), 2000 seems to have made the first recommendation for explicit provisions in the Companies Act to permit going concern sale in liquidation. The Committee recommended as follows:

7.5. The Tribunal shall have the power to direct the sale of business of the company as a going concern or at its discretion to sell its assets in a piece-meal manner.

Pursuant thereto, an amendment was made in Section 457(1) (ca) of Companies Act, 1956 by the Companies (Amendment) Act 2002 as follows:

(ca) to sell whole of the undertaking of the company as a going concern;

However, it is well known that the Amendment of 2002 remained unenforced, until the Companies Act, 1956 itself was repealed. Therefore, the aforesaid provision found its inheritor in Companies Act, 2013 in sec 282 (2). Once again, these provisions of this Act 2013 were also never enforced, as the IBC was introduced in the meantime. In the IBC itself, there is no explicit provision permitted going concern sale in the statute, since, apparently, the BLRC was inspired by the UK Act rather than the amended Companies Act, 1956 or Companies Act, 2013 itself.

The gap in the statute was purportedly filled in by the amended Liquidation Process (Second Amendment) Regulation cited above.

3. Relevant Provisions of the Code

Section 35(1)(f) of the Code lays down the powers and duties of the liquidator, one of it being, to sell the immovable and movable property and actionable claims of the corporate debtor in liquidation by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels in such manner as may be specified.

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Regulation 32 of the Liquidation Regulations specifies the manner of sale, wherein 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.

4. Relevance of Going Concern Sale

The quintessential feature of a going concern sale is that it aims at value preservation of the undertaking including intangible assets.

- a. The acquirer who acquires the undertaking will have a smooth transition, as it works well with the existing template.
- b. There are numerous soft and intangible assets in every company. These include leases, licenses, concessions, trademarks, registrations, contracts and vendor registrations. All of these are reduced to zero value if the entity is taken into liquidation. On the contrary, as the legal entity survives in a going concern sale, the value of the above intangibles will be preserved.
- c. A going concern sale helps achieving synergy as the collective value of the assets (taking them with a view to generate future potential returns) would be higher than salvage value of assets disposed separately.

5. Meaning of Going Concern:

While the Code recognises going concern sale as one of the methods of sale, however, it does not provide for the definition of “going concern”. The meaning of the term has been provided in AS-1, analysed by the insolvency law reform committee, and has also been interpreted in various rulings. The same is discussed below:

a. Insolvency Law Committee Report:

Reference may be made to the report of the [Insolvency Law Committee](#) dated 26.03.2018, where in the committee examined the term “going concern” as follows:

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.

b. [Note of the Insolvency and Bankruptcy Board of India](#)

One round table of the Insolvency and Bankruptcy Board of India was held with stakeholders on 21.05.2018, referring to the case of [Gujarat NRE](#), to understand difficulties in selling corporate debtor as a going concern, and several challenges were brought up, pursuant to which a note was published by IBBI, defining “going concern”, as follows:

“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.”

In this regard, it was also mentioned that the corporate debtor may be sold as a going concern, as provided in the extant regulations. As the company survives, there will be no need for dissolution of the company in terms of Section 54 of the Code. The assets along with all attendant claims, limitations, licenses, permits or business authorizations remain in the company. The company survives as it was; the ownership of the company is transferred by the liquidator to the acquirer. The liquidator shall make an application to the Adjudicating Authority for approval of the sale of the corporate debtor as a going concern and the Adjudicating Authority may pass an order with respect to:

- (i) Sale of the corporate debtor to the intended buyer as a going concern;
- (ii) Transfer of shares of the corporate debtor to the intended buyer;
- (iii) Transfer of the going concern of the corporate debtor to the buyers;
- (iv) Continuation of the authority, powers and obligations of the Liquidator to complete the liquidation process as provided under the Code and the regulations including the control, operations and continuation of the liquidation bank account of the corporate debtor;
- (v) Payment to stakeholders in accordance with Section 53 from the liquidation bank account; and
- (vi) Protection of the intended buyer from all claims and liabilities pertaining to the period prior to the sale of the corporate debtor as a going concern.
- (vii) It was further proposed that in case of going concern sale, the final report of liquidator, as required under clause (3) of Regulation 45, shall form part of the application for the closure of the liquidation process of the corporate debtor and not for the dissolution of the corporate debtor.

c. Accounting Standards:

Although the definition of “going concern” may not be much of relevance from accounting perspective, but considering that the term was conceptualised from the accounting principles, it is important to draw reference to the same. Going concern is defined in AS- 1 as follows:

“The enterprise is normally viewed as a Going Concern, that is, as continuing in operation for the foreseeable future. It is assumed that the enterprise has neither the intention nor the necessity of liquidation or of curtailing materially the scale of the operations.”

The term going concern was examined in the case of [Rajashri Foods Pvt Ltd](#), 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.”

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Also, in [International Standard on Auditing 570](#), various parameters have been laid down for the auditor to determine whether an entity is a going concern. *Under the going concern assumption, an entity is ordinarily viewed as continuing in business for the foreseeable future with neither the intention nor the necessity of liquidation, ceasing trading or seeking protection from creditors pursuant to laws or regulations.*

d. Income Tax Act, 1961:

The transfer of business as a going concern is a well-known concept, and has been analysed in various tax rulings as well. Demerger of an undertaking into another undertaking usually happens by transferring the undertaking to a new company on a going concern basis. The said condition has been interpreted by the Delhi High Court in of [In Re IndorRama Textile Limited \(2013\) 4 CompLJ141](#), as meaning if assets and liabilities being transferred constitute a business activity capable of being run independently for a foreseeable future.

In [KBD Sugars & Distilleries Ltd., Bangalore v. Asstt. Commissioner of Income- Tax\(30.10.2013\)](#), ITA Nos 1362 & 1362 of 2011, it was held that going concern always means to say 'alive', whether profit-making or not.

Also, the Income Tax Appellate Tribunal (ITAT) held in the above case, for a going concern to mean, that *the undertaking constituted a business activity capable of being run independently for the foreseeable future*. Similar view was taken in the case of [Hindustan Engineering by ITAT, Kolkata \(16.03.2016\) I.T.A No.330/Kol/2013](#).

e. Central Goods and Services Tax Act, 2017:

In the Central GST Act, there is a specific provision for transfer of a business as a going concern. If the transfer of goods happens as a part of a transfer of a business as a going concern, then there is no GST on such a transfer (Item 4 of Schedule II).

f. Distinction between sale of corporate debtor as a going concern and sale of business of corporate debtor as a going concern

It is crucial to identify the distinguishing factor between sale of corporate debtor as a going concern [Regulation 32(e)] and sale of business of corporate debtor as a going concern [Regulation 32(f)]. Under both the clauses, the assets are not sold by way of slump sale or piecemeal sale, the acquirer buys the business with the assets. The business can either operate under the existing brand and structure of the Corporate Debtor or not. Seemingly the only difference between "the corporate debtor as a going concern" and "the business(s) of the corporate debtor as a going concern" is that in the former situation, the corporate debtor itself will be retained, will not be dissolved, and will be transferred along with the assets. However, in the latter case, the business will be transferred as a going concern, without transferring the legal entity, and therefore, the legal entity will be taken for dissolution.

6. Going Concern Sale under the Companies Act, 1956/2013

The transfer under winding up provisions of the Companies Act, 2013 took place under the supervision of the court. The court would give an order, mostly based on a mutual compromise.

In the matter of [AMCO](#), the winding up court emphasised on the interests of the employees and keeping the economic activities intact:

“as the Court considered the interest of the workers to be of paramount importance and a matter to be considered along with the interest of the Company, inasmuch as it was the hard labour of the workers which was created the Company to exist all these years. Now that the Company faced closure, it would not be right to throw them out on the street, when there is an offer for the Company to run, and an offer made to re-employ all the workers who had been on the payroll...factory should be sold in running condition so that the factory workers should not be thrown out of work and / or employment.”

In the matter of [National Tannery Co Ltd](#) a committee of management was formed to run the company until its sale on going concern basis and, eventually the West Bengal Government offered to acquire the company on a going concern basis, pay consideration, and also agree to pay the wages of the workmen.

The general judicial impression of going-concern sales was that the employees will be passed on to the acquirer. Several rulings have actually noted that if the entity was shut for some time, it should first be run at least for a day before transfer, and then transferred as a going concern. The impracticality involved in the process has been noted in a Supreme Court ruling in [Allahabad Bank v. ARC Holding and another](#) (26.09.2000), C.A. Nos. 5411-5413 of 2000 [Arising out of SLP (C) Nos. 4084-4086 of 1999], wherein the Apex Court observed as follows:

“But subsequent order directs sale of the entire assets of the company as a ‘going concern’. This means revive the company first to make it operational, re-employ its employees, which would involve huge investment by the prospective buyer, a Herculean task, making execution practically infructuous.”

In most cases of going-concern sales in winding up proceedings, the acquirer will come with some kind of a compromise with the stakeholders- including workmen, and the final settlement would be filed for a consent decree before the court.

7. Global Examples of Going Concern Sale

The concept of going concern sale is not unique to India. Reference to going concern sale has been made in UK [Value Added Tax \(Special Provisions\) Order 1995](#), wherein when a business in the UK is transferred, the sale will qualify as a ‘transfer of a going concern’

(TOGC) for VAT purposes, where the transfer is regarded as neither a supply of goods nor a supply of services under the VAT rule given under Article 5. Hence, VAT need not be charged on the sale consideration. There are various rulings in UK which have discussed the concept of going concern. [The Central Goods and Services Tax Act 2017](#) also recognizes the concept of going concern sale, and provides for certain tax benefits on sale as going concern. Below we discuss some of the rulings and laws on going concern:

- 7.1 In the case of [HCL Equipment Ltd v. Revenue and Customs](#), in ascertaining whether VAT was applicable or not, the UK VAT & Duties Tribunal had first determined whether the sale was a transfer of the business or a transfer of assets of a business. The court observed that the test

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would be to ascertain whether the purchaser carries on, after the purchase, a similar kind of business. It is not necessary that the two businesses are identical, merely that there is a reasonable resemblance between them. It was held that HCL took over a going concern and hence, VAT was not due on the consideration paid for it.

72. Again, in *Farm Facilities (Fork Lift) Ltd v. Customs and Excise Commissioners (1987) VATTR 80*, it was held that the mere fact that there are differences between the manner in which the business was carried on before the sale, and the manner in which it is conducted after the sale, does not preclude the conclusion that there has been a takeover of a going concern.

Provisions in Malaysian Jurisdiction:

73. [The GST Act of Malaysia](#) also provides for sale of going concern under Section 3 which says that the disposition of a business as a going concern is a supply made in the furtherance of business, subject to the Second Schedule. Section 68 specifically deals with the Transfer of Going Concern, specifying that in case of sale of going concern, the transferee shall be treated as having carried on the business before as well after the transfer. When a business is transferred as a going concern, any liability that exists at the date of transfer to furnish a return or to account for or pay tax under Section 41, shall become the liability of the transferee.
74. [The Malaysian Guide on Transfer of Business as a Going Concern](#) stipulates that Transfer of Business as a Going Concern (TOGC) may involve the transfer of a whole or part of a business as a going concern, 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. Below are examples of common transfers, but the list is not exhaustive:
- (i) There is a sale of business assets or part of business to a person who carries on the business as a going concern; or
 - (ii) The assets may be transferred to another legal entity.

For there to be a transfer capable of being treated as a TOGC it must include the transfer of business assets. Where the assets are transferred from one person to another, the transfer may, subject to the fulfilment of the conditions, be covered by the TOGC provisions. 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.

75. The Malaysian Guide on TOGC, also provides illustrative list of conditions which may be referred for considering whether transfer of business assets can be regarded as a TOGC. Such conditions include:
- (i) The business transferred must be a going concern before and immediately after the transfer. Any business which has actually ceased operation on or before the transfer date does not qualify for TOGC. However, a short period of break or temporary closure immediately after the transfer to facilitate the smooth transfer might be permissible.

- (ii) The assets necessary for the carrying on the business must be transferred to the transferee. The transferee must use the transferred assets to continue with the same kind of business of the transferor.
 - (iii) If only part of the business is sold or transferred, that part of business must be capable of separate operation. However, for the new owner, it does not matter whether the transferred business will be operated separately from any other businesses that he is already operating. There must be an actual or current operation. The agreement to dispose of a business yet to commence or a dormant business is not a going concern. The business transferred to the transferee must be in the capacity to continue.
 - (iv) Business or part of the business transferred as a going concern shall be an income earning activity on the transfer date.
 - (v) The transferor shall transfer all the essential and necessary assets to the transferee for the transferee to be able to carry on the business, without which the transferee cannot continue the same kind of business.
 - (vi) The transferor must ensure that he has transferred to the transferee any license(s) related to the operation of the business that is being transferred as a going concern, without which the transferee cannot operate the business lawfully. If the transferor is not able to transfer the license(s) or the licenses are held to be non-transferable, it must be surrendered.
- 7.6. The Guide on TOGC also provides for instances where the transfer of a business will not come within the scope of TOGC, such as follows:
- (i) **A mere sale or transfer of capital assets:** A sale or transfer of capital assets which does not result in the purchaser taking over the business of the seller is not a TOGC.
 - (ii) **Transfer of shares which do not change the entity of the business:** A mere transfer of shares from one shareholder in a limited company to another shareholder or person does not constitute a TOGC as the ownership of the business assets still remains within same business entity.
 - (iii) **A series of immediate consecutive transfers of the same business:** A purchaser of a business who made an immediate sale of the business to another party is deemed to have not carried out the business of the first vendor. This would make both his purchase and subsequent sale to be outside the scope of TOGC.
 - (iv) If the transferor fails to transfer any one or more business assets to the transferee, then the transfer of business cannot be concluded as a TOGC.

Provisions in United Kingdom:

- 7.7. Article 5 of the VAT (Special Provisions) Order 1995 provides for the meaning and characters of a TOGC, wherein a transfer of business as a going concern is the sale of a business

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including assets which must have the following conditions as per the [HM Revenue and Customs Guidelines](#):

- (i) The assets must be sold as part of a 'business' as a 'going concern'.
- (ii) The purchaser intends to use the assets to carry on the same kind of business as the seller.
- (iii) Where only part of a business is sold it must be capable of separate operation.
- (iv) There must not be a series of immediately consecutive transfers.

78. The approach to determining whether or not a TOGC has occurred has been developed through a number of cases- *ZitaModes Sàrl v Administration de l'Enregistrement et des Domaines (C-497/01)*, *Finanzamt Lüdenscheid v. Schriever (Case C-444/10) [2012] STC 633* and *Staatssecretaris van Financiën v. X BV (Case C-651/11) [2013] STC 1893*. The following principles were extracted from these cases, which was summarised in the Upper Tier decision in *Intelligent Managed Services Ltd (FTC/27/014)*:

- (i) In order to be a transfer of a totality of assets, or part thereof, the assets transferred must together constitute an undertaking capable of carrying on an independent economic activity.
- (ii) This is to be distinguished from a mere transfer of assets.
- (iii) The nature of the transaction must be ascertained through an assessment of the factual circumstances including the intention of the transferee (as determined by the objective evidence) and the nature of the economic activity which is sought to be continued using the assets.
- (iv) The transferee must intend to operate the business, or the part of the undertaking, transferred without the intention to simply liquidate the activity concerned immediately.
- (v) The nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.

79. In the case of **Edward James Caunt (MAN/83/160)** the tribunal decided that there was no TOGC due to a change in the nature of business after the transfer.

For a transfer of a business as a going concern, there must be a consensus between vendor and purchaser. In cases where evidence of consensus may be lacking, the expression "transfer of a going concern" must be interpreted as meaning the succession by way of continuity of the previous business, succession by itself not being conclusive.

7.10. In **Intelligent Managed Services Ltd ([2015] UKUT 0341 (TC [2015] UKUT 0341 (TCC)C)**, Mr Justice Barling reiterated that point and held- "*although succession to the business is not a condition but a consequence of the application of the no-supply rule, the nature of the transaction must be such as to allow the transferee to continue the independent economic activity previously carried on by the seller.*"

8. Different modes of asset disposal in liquidation and their comparative view

8.1. Piecemeal/ Standalone sale of the assets:

There may be different classes of assets, which are unrelated, and thus, may or may not be sold together. The Liquidator has the option of selling the assets individually, piece by piece, to one or more buyers, by way of separate transactions.

Further, even if the Liquidator sells the corporate debtor or the business of the corporate debtor as a going concern, there may be certain peripheral assets/ scraps, which may be sold separately. This is indicatively the purpose of distinguishing between sale of corporate debtor as a going concern and sale of business of the corporate debtor as a going concern.

8.2. Slump Sale of the assets:

In this case, there is transfer of assets of the corporate debtor including all rights, title and interest in the undertaking of the corporate debtor. It means sale for a lump sum consideration, without assigning separate values to individual assets for the computation of such consideration, and without precluding, after such computation of agreed consideration has been done, the appropriation of such lump sum consideration to items of assets contained in such slump sale.

Slump sale has been defined in the Income Tax Act as follows:

“Section 2(42C)- slump sale means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales.”

Further, as per Explanation 1 to Section 2(19AA), *“undertaking shall include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.”*

Therefore, a sale in order to constitute a slump sale must satisfy the following tests:

- (i) Assets are sold off as a whole;
- (ii) Sale is for a lump-sum consideration; and
- (iii) Material available on record do not indicate item- wise value of the assets transferred.

Notably, slump sale and sale as going concern are two different concepts and may or may not necessarily be used as a combination strategy for sale of the assets of the corporate debtor. Every slump sale might not be a sale as going concern. A going concern sale, however entails slump sale of the assets of the corporate debtor, whether including or excluding non-business assets.

8.3. Sale of the corporate debtor on going concern basis:

There already existed the option of slump sale, however, the amended Liquidation Regulations now permits the liquidator to cause a sale of the corporate debtor on going concern basis as well. The only potential meaning of the going concern can be that the equity shareholding of the corporate

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debtor gets transferred, and the acquirer takes over the undertaking of the corporate debtor, with all the licenses, assets, entitlements, etc.

Here, the term “undertaking” shall include the whole of the undertaking of the corporate debtor, its businesses, assets, properties, rights, titles and benefits, whether movable or immovable, real or personal, in possession or reversion, whether corporeal or incorporeal, whether tangible or intangible, whether present or contingent and including but without being limited to land and building (whether owned, leased, licensed), all fixed and movable plant and machinery, vehicles, fixed assets, work in progress, current assets, investments, reserves, provisions, licenses, registrations, copyrights, patents, trade names, trademarks and other rights and licenses in respect thereof, applications for copyrights, patents, trade names, trademarks, leases, licenses, tenancy rights, premises, ownership, flats, hire purchase and lease arrangements, computers, office equipment, telephones, telexes, facsimile connections, internet connections, communication facilities, equipment and installations and utilities, electricity, water and other service connections, benefits of agreements, contracts and arrangements, powers, authorities, permits, allotments, approvals, consents, privileges, liberties, advantages, easements and all the right, title, interest, goodwill, benefit and advantage, deposits, advances, receivables, deposits, and all other rights, benefits of all agreements, etc, in connection/ relating to the corporate debtor and other claims and powers, of whatsoever nature and where so ever situated belonging to or in the possession of or granted in favour of the corporate debtor, excluding any cash or bank balances, provided that any liabilities, obligations, dues or claims against the Corporate Debtor shall be settled from out of the liquidation estate, in terms of the Code.

The corporate debtor survives, as only the ownership of the corporate debtor is moved by the liquidator to the acquirer i.e. transfer of all rights, title and interest in the undertaking of the corporate debtor, and, shall include transfer of the legal entity of the corporate debtor as well. Thus, the very basic difference between a going concern sale and slump sale is that in the former case, the foremost condition is that the acquirer shall carry on the business of the corporate debtor, and in the latter, no such pre-condition exists.

Further, in a normal liquidation method, the assets become a part of the so-called liquidation estate. These assets, whether collectively or separately or in a set, are sold. The realisations are then distributed to the stakeholders in terms of the priorities envisaged under Section 53 of the Code. Once, the pool is exhausted, the liquidator files an application for dissolution of corporate debtor, and, so far as the liabilities are concerned, the part unsettled under Section 53 is automatically extinguished, as the maximum possible value out of the liquidation estate has already been extracted. In a going concern sale, *the company as a legal entity will itself be a part of the liquidation estate*. All the assets of the company are still a part of the liquidation estate. A general feature of going concern sale is transfer of liabilities along with transfer of assets. However, a going concern sale *in liquidation* has to be distinguished from a going concern sale in general. In a going concern sale in liquidation, there cannot be a question of the liabilities being a part of the undertaking, as that will be a case of business transfer, and not a case of liquidation. In bankrupt liquidation, there has to be a case of settling the liabilities in the priority order listed in Section 53. Hence, the business of the company as well as its assets becomes part of the liquidation estate. The legal entity continues and gets transferred to the acquirer. The proceeds realised by transfer of both of these are used by the liquidator to settle the claims, in the manner provided in Section 53.

Considering the above, going concern sale will be the most apt method of sale, since the same will result in maximization of value of assets of the corporate debtor, as compared to that under piecemeal sale, or for that matter, in case of slump sale. If the corporate debtor is sold as a going concern, it will have social and economic benefits, the employees will retain their jobs, and a better value will be available for the stakeholders. Further, any acquirer aiming to run the business of the corporate debtor will be at an upper hand if he can acquire the entity as a going concern, as the formalities or compliances will be less if the corporate debtor is transferred as a going concern than having to obtain fresh permits/ licenses business authorizations for the entity.

8.4. Sale of Business(s) as a going concern:

Vide the IBBI (Liquidation Process) (First Amendment) Regulations, 2018, the Liquidator was permitted to sell the corporate debtor as a going concern. Subsequently, the Second Amendment Regulations introduced the option of selling the business(s) of the corporate debtor as a going concern. The amendments have been made considering that the acquirer may or may not want to continue with the same legal entity, and may or may not be interested in one or more business(s) of the corporate debtor. Essentially, a corporate debtor may have multiple line of business and each business can be sold separately as a going concern. Also, the assets of the corporate debtor can be categorized as “business assets” and “non-business assets”. While the business assets will have to be sold along with the business, the non-business or the peripheral assets may be sold separately on piece meal basis or otherwise.

9. Indicators of Going Concern Sale:

The following elements, although may not be necessary pre-conditions for going concern sale, but may definitely serve as indicators to determine whether a sale may be regarded as a going concern sale or not:

- a. **Continuity of former business**: The business that is transferred need not be a flourishing business, but must be in existence at the time of the transfer. Even if the business has been scaled down because of financial difficulties or in anticipation of a sale, there may still be a TOGC. (*Baltic Leasing v CCEVATTR 2088 (LON/84/198)*). The principle that a business which is in financial difficulties including liquidation, receivership or bankruptcy can still be a going concern was confirmed in *Dearwood (STC 327/1987)*. In this case, although the intention of Dearwood was to change the nature of the business acquired, what it had acquired was a business capable of being continued. The High Court found that a dying business, in liquidation, was nevertheless transferred as a going concern.
- b. **Stock**: Transfer of stock is often a fundamental part of the transfer of a business. If a business is transferred, all of a large part of the stock is usually sold to the purchaser of the business.
- c. **Premises**: Transfer of premises is significant in two cases. Firstly when some businesses are so closely linked to the premises from which they are run that if they are not transferred, it would be unlikely that the business gets transferred. Secondly, if

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goodwill is attached to the premises such that their transfer is a good indication of a TOGC.

- d. **Plant and equipment:** If the equipment transferred is needed to carry on the business, its transfer would be an indication of a TOGC.
- e. **Staff:** One of the possible indications of a TOGC would be if the new business takes over the contracts of existing staff. Transfer of Undertakings- Protection of Employees Act (TUPE)⁵² exist to protect staff involved in takeover situations, including takeovers in the event of insolvency.
- f. **Business name:** The transfer of business name, although not mandatory, is an indication of goodwill being sold and hence, a TOGC.
- g. **Goodwill:** Transfer of goodwill, whether through transfer of business name/ premises/ trademarks etc. is an important factor in determining whether a TOGC has taken place.

10. Requisites of Going Concern Sale

On the basis of the aforesaid discussions, the following may be considered to be the basic conditions of a going concern sale:

- a. **Retention of legal entity:** In case of sale of the corporate debtor as a going- concern, the legal entity continues, forms part of the liquidation estate, and is transferred to the acquirer, i.e. the entire undertaking of the corporate debtor, including all contracts, licenses, concessions, agreements, benefits, privileges, rights or interests may be transferred, whether based on an order of the Adjudicating Authority, or otherwise. In case of sale of business of the corporate debtor as a going concern, the entity may be dissolved, however, the business assets including intangibles still stands transferred to the acquirer.
- b. **Capital contribution by the acquirer:** In case of sale of the corporate debtor as a going-concern in liquidation, the consideration which the acquirer pays to acquire the business concern and its assets will be split into share capital and liabilities, based on a capital structure that the acquirer decides. To the extent of the share capital, there will be an issuance of shares by the legal entity being transferred. This cannot be a case of transfer of existing shares, as existing shareholders become claimants in the process of liquidation, though they are the last in the waterfall provided in Section 53. In case of sale of business of the corporate debtor as a going concern also, the shares are extinguished.
- c. **Variation in terms of employment:** Since the liquidation commencement is deemed to be notice of discharge of employees, there is no transfer of employees, however, for running the acquisition, if the acquirer intends to retain the employees, he may negotiate on the terms and conditions of employment. Any changes, which should

⁵²<http://www.legislation.gov.uk/ukxi/2006/246/contents/made>

necessarily be compliant with statutory employment rights, must be agreed with employee or trade union representatives.

- d. **Fate of encumbered assets:** On sale as a going concern, a question may arise as to whether the encumbrances which existed on the asset prior to the sale shall pass on with the entity to the acquirer. The liquidator does not have much of the role where the secured creditors decide to realise the security interest all on their own. However, where the security interest is relinquished, there is no question of passing of the encumbrances on the assets of the entity, against the interest of the acquirer.
- e. **Transfer to be carried out by a slump sale, not by itemized sale:** The sale must be of the assets put together, i.e. all such assets which constitute an integral business activity or enterprise must be transferred, and the consideration must be for the entire undertaking as a whole, and must not be for each of the assets individually.
- f. **Liquidation without dissolution:** It is well-settled that a liquidation can occur without a formal or legal dissolution. A company can go through the entire process of ceasing business operations, selling its assets and paying off creditors while not formally dissolving. A business may do this if it wants to keep the legal identity of a business for use in another venture. For example, the business may have a name with strong brand recognition that it wants to preserve or may simply want to reuse the current legal structure between the owners for a new venture⁵³.
- g. **Transfer of liabilities:** If there are any liabilities, obligations, dues or claims against the corporate debtor shall be settled from out of the liquidation estate, in terms of the Code.
- h. **Idea must be to run the business:** The idea of a going concern is normally equated with that of a running concern. If the concern in question has long stopped its operations, the general notion is that the corporate debtor cannot be sold as a going concern, since it is hard to conceive as to how the undertaking could be a going concern. However, the object with which the acquirer acquires the corporate debtor should be kept in mind while analysing whether it is a going concern sale, i.e. if the acquirer is intending to run the business, and not to dismantle or cannibalise it, the sale should be categorised as “going concern” sale.

The differentiating factors between the various modes of sale are summarised as below:

Sl. No.	Points of Discussion	Piecemeal Sale	Slump Sale	Sale of corporate debtor as going concern	Business of as going concern
a.	Transfer	Any one or more assets of the	Assets of the corporate debtor	The corporate debtor itself	Any one or more

⁵³<https://bizfluent.com/info-8282875-differences-liquidation-dissolution.html>

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	corporate debtor gets transferred	getstransferred as a whole, without assigning separate value to individual assets.	gets transferred. There might be several peripheral assets, which may be sold separately.	business(s) of the corporate debtor may be sold. The assets relevant to the particular business has to be sold along with the business. However, non-business assets may be sold separately
b.	Equity shareholding of the corporate debtor	Gets extinguished once the distribution is done as per Section 53 of the Code	Gets extinguished once the distribution is done as per Section 53 of the Code	The equity holding gets transferred. Gets extinguished once the distribution is done as per Section 53 of the Code
c.	Retention Business as going concern	The liquidator may carry on the business of the corporate debtor to the extent required for its beneficial liquidation.	The liquidator may carry on the business of the corporate debtor to the extent required for its beneficial liquidation	The acquirer is expected to carry on the business of the corporate debtor after acquisition. The business of the corporate debtor is to be continued by the acquirer.
d.	Discharge of the employees	Liquidation order amounts to automatic discharge of employees from the liquidation commencement date	Liquidation order amounts to automatic discharge of employees from the liquidation commencement date	The going concern decision is taken by the liquidator after liquidation process has been initiated. Therefore, the discharge would have happened here as well. However, in order for smooth transition to the

				the acquirer, employees the employees may be re-may be re-engaged.
e. Liabilities	All the liabilities are settled from the sale proceeds, in accordance with Section 53.	All the liabilities are settled from the sale proceeds, in accordance with Section 53.	All the Liabilities are settled from the sale proceeds, in accordance with Section 53.	All the Liabilities are settled from The sale proceeds, in accordance with Section 53.
f. Encumbrances on the Assets	The assets were sold after relinquishment of security interest by the secured creditors, hence there is no question of passing on the encumbrances after the conclusion of sale.	These assets were sold after relinquishment of security by the secured creditors, hence, there is no question of passing on the encumbrances after the conclusion of sale.	After relinquishment of security interest by the secured creditors, there exists no question of continuance of encumbrance.	After relinquishment of security interest by the secured creditors, there exists no question of continuance of encumbrance.
g. Dissolution of Legal Entity	The assets are sold and the corporate debtor is dissolved, once the liquidation is complete.	The assets are sold and the corporate debtor is dissolved, once the liquidation is complete.	As the corporate debtor is acquired, the legal entity of the corporate debtor survives.	Since only the business(s) of the corporate debtor is transferred, the corporate debtor may be dissolved.

11. Amendments required in the Code

- a. If the corporate debtor is sold as a going concern, the company survives, and therefore, there will be no need for dissolution of the corporate debtor in terms of Section 54. Accordingly, there may have to be an order pertaining to sanction of sale of the corporate debtor as going concern, issue of shares, settlement of all existing claims and liabilities pertaining to the period up to the completion of liquidation. Requisite amendment is required to be made in the Code to facilitate liquidation without dissolution, in case of sale of corporate debtor as going concern.
- b. If the corporate debtor is transferred as a going concern, there is no question of disposal of the assets of the company, either by way of a piecemeal sale or a slump sale. Therefore, it may be argued that the waterfall mechanism stipulated under

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Section 53 of the Code also does not apply. However, in a going concern sale in liquidation, there cannot be a question of the liabilities being a part of the undertaking, as that will be a case of business transfer, and not a case of liquidation. In bankrupt liquidation, there has to be a case of settling the liabilities from the realisations, as per the priority set out in Section 53, and the liabilities shall stand extinguished once the distribution is made to the best extent possible. Accordingly, once sale is concluded and distribution is also done, an application may be made to the Hon'ble NCLT, along with the final report of the liquidator, to pass necessary orders for extinguishment of liabilities. The provisions of the Code should accordingly be amended in line of the same.

- c. Possible definition of going concern sale for the purpose of liquidation regulations:

Placing reliance on the above, it is proposed that the definition of going concern sale may be included in the Code itself. The suggestive definition is as follows:

“a sale of the assets of the Corporate Debtor, where, pursuant to order of the Adjudicating Authority or otherwise, the legal personality of the Corporate Debtor is retained and is transferred to the acquirer, or it is otherwise provided in the terms of sale that all the contractual rights of the Corporate Debtor, including any rights or benefit under contract, license, concession, entitlement, privilege, lease, etc., are transferred to the acquirer.”

Suggested: ‘sale as going concern’, for the purpose of these Regulations, whether of the corporate debtor or of the business of the corporate debtor, shall mean a sale of either whole or part of the undertaking of the corporate debtor capable of being operated independently, which may or may not provide for dissolution of the legal entity of the corporate debtor, as may be approved by an order of the adjudicating authority.
