

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 1

2024

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The Notion of Liquidation as a Going Concern under Insolvency and Bankruptcy Law

SREEJIT NAIR¹

ABSTRACT

The Insolvency and Bankruptcy Code of 2016 (hereafter referred to as IBC, 2016) has been passed in order to put into operation a very time-bound procedure for the resolution of insolvency for corporate entities, partnership businesses, and individuals. In accordance with the IBC, 2016's framework, an Interim Resolution Professional is responsible for continuing the company's business activities as a going concern until the Committee of Creditors suggests a resolution plan that would allow the company to continue operating after an insolvency resolution. If the resolution approach is unsuccessful, the corporate person is liquidated.

However, when a corporate person is liquidated by selling the company's debtor or its business as a continuing concern, the person is not dissolved and continues to exist in the market as a going concern firm. The Insolvency and Bankruptcy Board of India (Liquidation Process) (Amendment) Regulations, 2018 added the initial provision for this liquidation feature under Regulation 32, which dealt with "Manner of sale."

This research will analyse the "going concern" accounting concept and how it relates to insolvency and bankruptcy law, with a particular emphasis on the necessity of the notion of liquidation as a going concern under insolvency and bankruptcy law.

Keywords: resolution plan, company's debtor, liquidation, going concern.

I. INTRODUCTION

Going concern is a notion in accounting rather than a legal concept. Going concern, thus, denotes the absence of a corporate person's liquidation status.

The IBC, 2016, includes the idea of going concern in two different types of provisions.

The term "going concern" is mentioned in the Act's clauses (13) and (26) of Section 5 and Section 206. These rules suggest that the IBC's 2016 implementation has no bearing on the goal of maximizing asset value.²

¹ Author is a student at Symbiosis Law School, India.

² http://www.mca.gov.in/Ministry_hn/notification/pdf/AS_1.pdf

There is a distinction between rules intended for liquidation as a going concern and insolvency resolution as a going concern. The following part will address the necessity for the notion of "liquidation as going concern" since this study concentrates on the latter concept and its regulations. There are other requirements that the IBC 2016, does not state but that are crucial prerequisites for such liquidation to occur.

(A) Research questions

Q1. What elements and conditions make it necessary to take liquidation as a continuing concern into account during insolvency and bankruptcy procedures, and how does this strategy help debtors, creditors, and the financial system as a whole?

Q2. What are the current trends and best practises in international insolvency law for treating liquidation as a going concern?

(B) Literature review

1. Policy Suggestions and Future Directions:

K.R Patel (2019)³ take a forward-looking stance and offer policy ideas to improve the efficacy of liquidation as a going concern, including changes to judicial procedures and bankruptcy legislation.

Future-looking viewpoints, like those covered by **Anil Khurana, (2020)**⁴, consider how new technologies, including blockchain and AI, may best be used to conduct going concern liquidations.

2. Diverse jurisdictional structures and legal frameworks:

Ian F. Fletcher (2020)⁵ looked at the legal systems regulating liquidation as a going concern in numerous countries, and they found that there were variations in statute provisions, creditor rights, and judicial procedures.

Cullen and Norton's (2017) analysis examines the effects of international insolvency law, concentrating on the UNCITRAL Model Law and how it affects how going concern sales are handled in cross-border bankruptcy proceedings.

³ K. R. Patel, *Corporate Insolvency Resolution Process under the IBC* (Eastern Book Company, 2019) Chapter 5

⁴ Anil Khurana, "Revisiting the Impact of the IBC on Corporate Debt Resolution in India," 9 *Indian J L & Econ* 45, 2020.

⁵ Ian F. Fletcher "Current Developments in International Insolvency Law," 68 *The American Journal of Comparative Law* 537 (2020).

II. JUDICIAL APPROACH

In the Insolvency and Bankruptcy Law framework, this concept of transitioning liquidation procedures into resolution has only been used in a very small number of instances. The nature and conditions under which a company might be disposed off as a continuing concern during the liquidation of the firm are clarified by a number of precedents under the legal framework related to the winding up of the Company under Section 433 of the Companies Act, 1956. Here are a few examples:

In re *IndorRama Textile Limited (2013) 4 CompLJ 141 (Del)*⁶, the Delhi High Court ruled that a corporation is said to be ceded as a going concern when the assets and liabilities that are transferred represent a commercial activity which may be operated independently for the foreseeable future.

According to the Supreme Court's ruling in the *Allahabad Bank v. ARC Holding AIR 2000 SC 3098 ("Allahabad Bank Case")*⁷, if a corporation is sold off as a going concern, its liabilities are transferred together with its assets, if any of them are pertinent to the business or enterprise.

According to the ruling in *Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar (AIR 1983 Bom 364)*⁸, a firm may only be sold as a continuing concern while it is still in operation.

Additionally, the Karnataka High Court noted in *IAE International Aero Engines AG and Ors. vs. United Breweries (Holdings) Limited and Ors ILR 2017 KARNATAKA 2225*⁹ that a business cannot be auctioned off as a continuing concern if the business has already ceased operations.

III. ANALYSIS

A1. In insolvency and bankruptcy procedures, liquidation as a continuing concern becomes necessary when a number of essential features and circumstances are satisfied. First of all, it is used when there is a realistic expectation that the struggling company can continue to operate sustainably and make money for everyone involved. By avoiding the possible fire-sale pricing associated with conventional liquidation techniques, this strategy is crucial for maintaining the enterprise's real worth.¹⁰

⁶ Re IndorRama Textile Limited (2013) 4 CompLJ 141 (Del)

⁷ Allahabad Bank v. ARC Holding AIR 2000 SC 3098 ("Allahabad Bank Case")

⁸ Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar (AIR 1983 Bom 364)

⁹ IAE International Aero Engines AG and Ors. vs. United Breweries (Holdings) Limited and Ors ILR 2017 KARNATAKA 2225

¹⁰ Linda J. Rusch, Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope - Stepping into

Additionally, it plays a crucial role in preserving jobs by keeping the workforce employed and fostering social and economic stability. Compared to asset liquidation, which can result in large losses for creditors, liquidation as a going company potentially provides greater recovery rates. Additionally, this method assists in preserving the stability of the financial system by preventing unanticipated supply chain disruptions, market shocks, and systemic risks associated with corporate failures.¹¹ Therefore, liquidation as a continuing concern serves as a balanced solution that aligns the interests of debtors, creditors, and the larger financial system by maintaining value, jobs, and economic stability.

A2. A rising understanding of the significance of liquidation in a globalised economy is reflected in present patterns and best practices in international bankruptcy law for handling it as a going concern. First, cross-border collaboration and harmonisation are clearly prioritised. Going concern sales in international situations can be carried out effectively because measures like the UNCITRAL Model Law and local frameworks that aim to streamline insolvency legislation across countries.¹²

Secondly, rescue funding is becoming a more important instrument. Giving access to finance to failing companies during insolvency proceedings enhances the likelihood that going-concern sales will be successful, giving suffering companies a shot at survival.¹³

Pre-packaged insolvency strategies are also gaining popularity. These pre-insolvency arrangements shorten the procedure and hasten the sale of a company as a continuing concern.¹⁴

IV. CONCLUSION

The principle of liquidation as a going concern seeks to strike a balance between two Insolvency and Bankruptcy Law procedures that don't result in practical solutions because of things like the company's nature of business (if it's focused on the public sector), the number of workers it employs, and its current, fully or partially going concern, nature of operations.

All of the stakeholders in the business operation, including creditors, workers, and the community at large, are affected by a cascade of factors that are listed above. This practice, which serves as a third line of defence when a default occurs, may be inferred to be applied infrequently and only in extraordinary situations. Nevertheless, it needs to be included in

the Fourth Dimension, 55 MONTANA LAW REVIEW 9–42 19 (1994)

¹¹ Sumant Batra *Corporate Insolvency: Law and Practice* 40 (2017 1st ed.)

¹² UNCITRAL Legislative Guide on Insolvency law.

¹³ Nirosh Kuruppu et al., The efficacy of liquidation and bankruptcy prediction models for assessing going concern, 18 MANAGERIAL AUDITING JOURNAL 577–590 (2003)

¹⁴ Sale of company as a going concern – second chance at preserving the legal existence of the company - insolvency/bankruptcy – India.

insolvency and bankruptcy law since it allows for the conversion of legal actions from liquidation to resolution, which attempts to maximise value.

V. REFERENCES

(A) Books

- K. R. Patel, Corporate Insolvency Resolution Process under the IBC (Eastern Book Company, 2019) Chapter 5
- Corporate Insolvency: Law and Practice by Sumant Batra (2017)

(B) Research articles

- Robert R. Sterling, *The Going Concern: An Examination*, 43 THE ACCOUNTING REVIEW 481–502 481 (1968)
- Anil Khurana, "Revisiting the Impact of the IBC on Corporate Debt Resolution in India," 9 Indian J L & Econ 45, 2020.
- Ian F. Fletcher "Current Developments in International Insolvency Law," 68 The American Journal of Comparative Law 537 (2020).
- Linda J. Rusch, Bankruptcy Reorganization Jurisprudence: Matters of Belief, Faith, and Hope - Stepping into the Fourth Dimension, 55 MONTANA LAW REVIEW 9–42 19 (1994)
- Nirosh Kuruppu et al., The efficacy of liquidation and bankruptcy prediction models for assessing going concern, 18 MANAGERIAL AUDITING JOURNAL 577–590 (2003)
- Sale of company as a going concern – second chance at preserving the legal existence of the company - insolvency/bankruptcy – India.

(C) Case laws

- Re IndorRama Textile Limited (2013) 4 CompLJ 141 (Del)
- Allahabad Bank v. ARC Holding AIR 2000 SC 3098 ("Allahabad Bank Case")
- Jayaprakash Shyamsundar Mandare v. Laxminarayan Murlidhar (AIR 1983 Bom 364)
- IAE International Aero Engines AG and Ors. vs. United Breweries (Holdings) Limited and Ors ILR 2017 KARNATAKA 2225

(D) Acts/code

- Insolvency and Bankruptcy Code, 2016

- The Sick Industrial Companies (Special Provisions) Act, 1985

(E) Websites

- www.mca.gov.in
