

## **Insolvency and Bankruptcy Board of India**

### **Subject: Dealing with Avoidance Transactions**

The resolution professional or the liquidator is obliged under the Insolvency and Bankruptcy Code, 2016 (Code) and the Regulations made thereunder to file applications in respect of avoidance transactions or vulnerable transactions (preferential transactions, undervalued transactions, extortionate transactions and fraudulent transactions) found by him during corporate insolvency resolution and liquidation processes to the Hon'ble Adjudicating Authority (AA) seeking appropriate relief permissible under the Code. Regulation 35A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (CIRP Regulations) requires the Resolution Professional (RP) to form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66 on or before the 75<sup>th</sup> day of the insolvency commencement date (ICD). Where the RP is of the opinion that the corporate debtor (CD) has been subjected to any transactions covered under those sections, he shall make a determination, on or before the 115<sup>th</sup> day of the ICD, under intimation to the Board. Further, he shall apply to the AA for appropriate relief on or before the 135<sup>th</sup> day of the ICD.

2. According to information made available by IPs till 28<sup>th</sup> February, 2019, a total of 215 applications in respect avoidance transactions valued at Rs.1,05,703 crore have been filed with AA. Of these, only a handful of applications have been disposed of by the AA. Few appeals have been filed against the orders of the AA disposing of applications. Several issues on the way to conclusion of avoidance transactions have cropped up requiring deliberation. The Governing Board considered a Board Note in this regard in the meeting held on 28<sup>th</sup> December, 2018. It broadly agreed with the approach suggested therein and authorised the Chairperson to formalize a framework for dealing with such transactions in consultation with the MCA. The matter has been discussed further with MCA and also in three roundtables – one each in Delhi, Kolkata and Mumbai - with stakeholders.

3. This note considers various issues and proposes a standard operating procedure (SOP) to deal with avoidance transactions in harmony with the provisions in the Code and regulations made thereunder, and the deliberation of the Bankruptcy Law Reforms Committee (BLRC)

and the principles enunciated in the UNCITRAL Legislative Guide on the Law of Insolvency. The following four annexures throw light into such transactions:

Annexure	Content
A	Relevant Extracts from BLRC Report
B	Relevant Extracts from the UNCITRAL Legislative Guide
C	Relevant Provisions in the Insolvency and Bankruptcy Code, 2016 and in the IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
D	Pronouncements of the Adjudicating Authority

4. The AA may pass any or all of the following orders in the application dealing with avoidance transactions:

**(a) Order in case of preferential transaction (Section 44)**

- (i) property transferred to be vested with the CD;
- (ii) proceeds of the sale of property or the money so transferred to be so vested;
- (ii) release or discharge of any security interest created by the CD;
- (iii) pay any sum in respect of benefit received from the CD;
- (iv) financial debt or operational debt of a guarantor to be revived or to be a new debt, where any such debt was released or discharged;
- (v) providing security or charge on any property for the discharge of any financial or operational debt and also the same priority as a security or charge on the property, where security or charge released or discharged while giving priority; and
- (vi) extend to which a person whose property is vested in the CD or on whom financial or operational debt is imposed by order of the AA, to be proved in the CIRP or liquidation process.

**(b) Order in case of undervalued transaction (Section 48)**

- (i) property to be vested with the CD;
- (ii) release or discharge of any security interest created by the CD;
- (iii) pay any sum in respect of benefit received from the CD; and
- (iv) payment of such consideration for the transaction as determined by an independent expert.

**(c) Order in case of transaction defrauding creditors (Section 49)**

- (i) restoration of the position as it existed before the undervalued transaction entered into by the CD under section 45(2); and

(ii) protecting the interests of persons who are victims of such undervalued transaction, where such transaction was entered into deliberately for keeping the assets of the CD beyond the reach of any persons entitled to make a claim against it or in order to adversely affect the interests of such persons.

**(d) Order in case of extortionate credit transaction (Section 51)**

- (i) restore the position as it existed prior to the transaction;
- (ii) set aside the whole or part of the debt created on account of extortionate transaction;
- (iii) modify the terms of such transaction;
- (iv) payment of amount received by any person to be paid back to the CD; and
- (v) relinquish any security interest created as part of the extortionate credit transaction.

**(e) Order in case of fraudulent or wrongful trading (Sections 66 and 67)**

- (i) make liable such parties to contribute to assets of the CD; and
- (ii) any debt of such person to CD shall rank in priority under section 53 after all other debts.

It is clear from the above that the Code provides civil remedies in respect of avoidance transactions.

5. While the RP/liquidator may have filed an application with the AA based on his determination, it may not always be possible for the AA to consider and dispose of the application during the tenure of the CIRP or the liquidation process. The application may remain pending with the AA for disposal, when the corporate insolvency resolution/liquidation process comes to an end and consequently, the IRP/RP/liquidator is relieved. Section 26 of the Code clarifies that the filing of an avoidance application by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process. However, section 36(3)(f) provides that the liquidation estate shall comprise any asset or their value recovered through proceedings for avoidance of transactions. Further, the application may have been disposed of when the process was on, but an appeal against the order disposing the application may be pending when the process comes to an end. The issue that arises for consideration is by whom and how the applications would be taken to logical conclusion.



6. In view of the above, the specific issues that arise for consideration and the suggested way to deal with them are as under:

No.	Issue	Suggested Approach
1	<p>a. Who would pursue (including the decision to file an application or an appeal) the matter (application / appeal) before the authorities (NCLT, NCLAT, Supreme Court or any other), if the CIRP ends with a Resolution Plan? Who would bear the expenses?</p> <p>b. Who would pursue the matter before the authorities, if the CIRP ends with an order for Liquidation? Who would bear the expenses?</p> <p>c. Who would pursue the matter before the authorities, the NCLT, the NCLAT or the Supreme Court, if Liquidation Process ends? Who would bear the expenses?</p>	<p>Resolution Applicant; the cost shall be borne by it.</p> <p>Liquidator; the cost shall be part of liquidation process cost.</p> <p>The IBBI. The cost would be defrayed from the Insolvency and Bankruptcy Fund.</p>
2	<p>a. Who would implement the orders of the authorities in disposal of the matter? Who would bear expenses?</p> <p>b. Who would be beneficiaries of the gains arising from the order of the authorities in disposal of the matter? Who would bear expenses of realizing and sharing the benefits?</p>	<p>In case of 1(a), Resolution Applicant. In case of 1(c), the IBBI. In any other case, Resolution Professional or Liquidator during the CIRP or Liquidation Period, as the case may be.</p> <p>As provided in the Code, the beneficiaries shall bear the expenses on pro rata basis; In case of liquidation, the benefits will be dealt with in the manner provided in section 53; The excess recoveries and unclaimed amounts would be credited to the Insolvency and Bankruptcy Fund under section 224 of the Code.</p>
3	Who would take follow up action (gathering information and filing prosecution) against the miscreants, if any, observed in the order of the authorities? Who would bear expenses?	<p>The IBBI, if the underlying amount is upto Rs.100 crore; the expenses shall be borne from the Insolvency and Bankruptcy Fund.</p> <p>In any other case, the IBBI shall refer the matter to the Central Government; the expenses shall be borne by the Central Government.</p>

4	How would IBBI discharge the responsibilities?	<p>IBBI may create a separate Division to deal with avoidance transactions. This Division shall:</p> <ul style="list-style-type: none"> <li>a. monitor compliance with regulation 35A;</li> <li>b. keep track of the matters and maintain a confidential database;</li> <li>c. collect the material and records from the RP / Liquidator and any other source, as are necessary to pursue the matter before the authorities and implement their orders, where the IP is moving out;</li> <li>d. pursue the matter before the authorities, by impleading itself before the authorities, and implement / execute their orders;</li> <li>e. investigate the transactions, the corporate debtor, its promoters and management in respect of the transactions found to be of avoidancenature by the authorities if the underlying amount of the transactions is upto Rs.100 crore;</li> <li>f. refer the matter for investigation in respect of the transactions found to be of avoidancenature by the authorities, if the underlying amount of the transactions exceeds Rs.100 crore;</li> <li>g. credit the excess or unclaimed amounts to the Insolvency and Bankruptcy Fund under section 224 of the Code; and</li> <li>h. debit the expenses of pursuing the matters to the Insolvency and Bankruptcy Fund.</li> </ul>
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7. The above approach needs changes in the Code to provide for the following:

- To enable the IBBI to file applications, where the RP / Liquidator has failed to file applications;
- Enable the Resolution Applicant to pursue the matter, in case the CIRP has ended in approval of resolution plan;
- Enable Liquidator to pursue matters which were initiated by the Resolution Professional;
- To enable the IBBI to pursue matters and implement orders in respect of avoidance transactions before the authorities;

- To enable the IBBI to investigate the transactions, the corporate debtor, its promoters and management in respect of the transactions found to be avoidance by the authorities if the underlying amount of the transactions is up to Rs.100 crore and refer the matter for investigation in respect of the transactions found to be avoidance by the authorities, if the underlying amount of the transactions exceeds Rs.100 crore;
- To amend and operationalise the Insolvency and Bankruptcy Fund under section 224 of the Code, for which a separate Board Note has been placed for consideration of the Governing Board; and
- To allow closure of liquidation by dissolution of the CD, even if the matters relating to avoidance transactions are yet to be disposed of;
- To allow distribution of recoveries after dissolution as per waterfall in section 53 of the Code and the excess recoveries and unclaimed amounts to be credited to the Insolvency and Bankruptcy Fund.

8. It is submitted for consideration of the Governing Board.



### Relevant Extracts from the BLRC Report

While discussing the duties of an IP, the BLRC observed:

*“The IP makes sure that assets are not stolen from the company, and initiates a careful check of the transactions of the company for the last two years, to look for illegal diversion of assets. Such diversion of assets would induce criminal charges.”*

2. As regards the recovery from the vulnerable transactions, the BLRC observed as under:

***“Treating recoveries from vulnerable transactions.***

*The Committee discussed the possibility of identifying and recovering from vulnerable transactions. These are transactions that fall within the category of wrongful or fraudulent trading by the entity, or unauthorized use of capital by the management. There are two concepts that are recognized in other jurisdictions under this category of transactions: of fraudulent transfers, and fraudulently preferring a certain creditor or class of creditors. If such transactions are established, then they will be reversed. Assets that were fraudulently transferred will be included as part of the assets in liquidation. The Committee recommends that all transactions up to a certain period of time prior to the application of the IRP (referred to as the “look-back period”) should be scrutinised for any evidence of such transactions by the relevant Insolvency Professional. The relevant period will be specified in regulations. At any time within the resolution period (or during the Liquidation period if the entity is liquidated) the relevant Insolvency Professional is responsible for verifying that reported transactions are valid and central to the running of the business. There should be stricter scrutiny for transactions of fraudulent preference or transfer to related parties, for which the “look back period” should be specified in regulations to be longer. The Code will give the Liquidator the power to file cases for recovery. Some jurisdictions set such recoveries aside for payment to the secured creditors. Given the extent of equity financing in India, all recoveries from such transactions will become the property of the trust, and will be distributed as described within the waterfall of liabilities.”*

### Relevant Extracts from the UNCITRAL Legislative Guide

Chapter F of Section II of Part two of the Legislative Guide on Insolvency Law with the avoidance proceedings as under:

Sl. No.	Clause	Heading	Provision
1	12(c)	Definition: Avoidance Provisions	<i>“provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors.”</i>
2	148	Introduction	<i>Insolvency proceedings (both liquidation and reorganization) may commence long after a debtor first becomes aware that such an outcome cannot be avoided. In that intervening period, there may be significant opportunities for the debtor to attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends or pay certain creditors to the exclusion of others. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position. The result of such activities, in terms of the eventual insolvency proceedings, generally disadvantages ordinary unsecured creditors who were not party to such actions and do not have the protection of a security interest.</i>
3	151		<i>Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor’s assets consistent with established priorities and preserving the integrity of the insolvency estate. Avoidance provisions may also have a deterrent effect, discouraging creditors from pursuing individual remedies in the period leading up to insolvency if they know that these may be reversed or their effects nullified on commencement. Transactions are typically made avoidable in insolvency to prevent fraud (e.g. transactions designed to hide assets for the later benefit of the debtor or to benefit the officers, owners or directors of the debtor); to uphold the general enforcement of creditors’ rights; to ensure equitable treatment of all creditors by preventing favouritism where the debtor wishes to advantage certain creditors at the expense of the rest; to prevent a sudden loss of value from the business entity just before the supervision of the insolvency proceedings is imposed; ...</i>
4	157	Objective Avoidance Criteria	<i>One approach emphasizes the reliance on generalized, objective criteria for determining whether transactions are avoidable. The question would be, for example, whether the transaction took place within the suspect period or whether the transaction evidenced any of a number of general</i>



			<i>characteristics set forth in the law (e.g. whether appropriate value was given for the assets transferred or the obligation incurred, whether the debt was mature or the obligation due or whether there was a special relationship between the parties to the transaction). While such generalized criteria may be easier to apply than criteria that rely upon proof, for example, of intent, they can also have arbitrary results if relied upon exclusively.</i>
5	158	Subjective Avoidance Criteria	<i>Another approach emphasizes case-specific, subjective criteria such as whether there is evidence of intention to hide assets from creditors, whether the debtor was insolvent when the transaction took place or became insolvent as a result of the transaction, whether the transaction was unfair in relation to certain creditors and whether the counterparty knew that the debtor was insolvent at the time the transaction took place or would become insolvent as a result of the transaction. This individualized approach may require detailed consideration of the intent of the parties to the transaction and of other factors such as the debtor's financial circumstances at the time the transaction occurred, the financial effect of the transaction on the debtor's assets and what might constitute the normal course of business between the debtor and particular creditors.</i>
6	171	Types of transaction subject to avoidance	<i>To achieve as much clarity and certainty as possible and avoid unnecessary overlap it is desirable that, in determining the categories of transaction to be subject to avoidance provisions, an insolvency law specify the particular characteristics of a transaction (including the effect of the transaction) that are essential for it to be avoided, rather than relying on broader labels, such as "fraudulent" or "preferential".</i>
7	172	Transactions intended to defeat, hinder or delay creditors	<i>Transactions intended to defeat, hinder or delay creditors involve the debtor transferring assets to any third party with the intention of putting them beyond the reach of creditors. The effect of such transactions will generally be to disadvantage all unsecured creditors. These transactions generally cannot be avoided automatically by reference to an objective test of a fixed period of time in which the transactions occurred because of the need to prove the intent of the debtor. That intent is rarely proven by direct evidence, but rather by identifying circumstances that are common to these types of transaction.</i>
8	175	Undervalued transactions criteria	<i>An important question in respect of these types of transaction is what constitutes a sufficient "undervalue" for the purposes of avoidance and how it can be determined. In many States, it is left to the courts to determine by reference to standards such as reasonable or market value prevailing at the time the transaction occurred on the basis of appropriate expert evidence. Where the relevant amounts in a transaction may not be certain, one approach to assist the court may be for the insolvency representative to provide the court with an estimated valuation of such amounts, which could be disputed upon the presentation of further evidence by the counterparty</i>



			<p>to the transaction. The court might also be given a power to specify a mode of determining the valuation rather than necessarily having to determine the value itself. Given the difficulties in proving undervalue, in some jurisdictions it may be easier to avoid a transaction on the grounds of preferential effect if it was entered into at a time when the debtor was unable to pay its due debts. Further, some laws presume less than fair, or no, consideration to be evidence of a transaction intended to defeat, hinder or delay creditors.</p>
9	178	Preferential transactions criteria	<p>Examples of preferential transactions may include payment or set-off of debts not yet due; performance of acts that the debtor was under no obligation to perform; granting of a security interest to secure existing unsecured debts; unusual methods of payment, for example, other than in money, of debts that are due; payment of a debt of considerable size in comparison to the assets of the debtor; and, in some circumstances, payment of debts in response to extreme pressure from a creditor, such as litigation or attachment, where that pressure has a doubtful basis. A set-off, while not avoidable as such, may be considered prejudicial when it occurs within a short period of time before the application for commencement of the insolvency proceedings and has the effect of altering the balance of the debt between the parties in such a way as to create a preference or where it involves transfer or assignment of claims between creditors to build up set-offs. A set-off may also be subject to avoidance where it occurs in irregular circumstances, such as where there is no contract between the parties to the set-off.</p>
10	186	Effect of avoidance: void or voidable transactions	<p>Where a transaction falls into any of the categories of transactions subject to avoidance, insolvency laws either render it automatically void or make it voidable, depending upon the test that is adopted in respect of each category of transaction.</p>
11	198 – 201	Satisfying the criteria for avoidance	<p>198. .... Whichever approach an insolvency law adopts to satisfying the avoidance criteria, it is highly desirable that the law state precisely which parts of the criteria have to be proved by which party, so that it is clear what is required of the insolvency representative in seeking to avoid a particular transaction and what is required of the counterparty seeking to defend a transaction from avoidance.</p> <p>199. In some laws, the onus is on the debtor to prove that the transaction did not fall into any category of avoidable transactions and, for example, was a transaction in the ordinary course of business. Other insolvency laws provide that the insolvency representative or other person permitted to challenge the transaction, such as a creditor, is required to prove that the transaction satisfies the requirements for avoidance. Where these elements include intent, it will often be very difficult to prove and the party with the burden of proof</p>



		<p>will most often lose. To overcome this difficulty, some laws allow the burden of proof to be shifted to the counterparty where, for example, it is difficult for the insolvency representative to establish that the debtor's actual intent was to defraud creditors except through external indications, objective manifestations, or other circumstantial evidence of such intent. As a practical matter, however, the debtor's inability to satisfactorily explain the commercial purpose of a particular transaction, which extracted value from the estate, may point to the requisite intent.</p> <p>200. Another approach is to provide that the requisite intent or bad faith is deemed or presumed to exist where certain types of transaction are undertaken within the suspect period and the counterparty to the transaction will have the burden of proving otherwise. These types of transaction may include, for example, transactions with related persons, payment of unmatured debts and payment of gratuitous or onerous transactions. A further approach is to provide that where a certain type of transaction occurred within the suspect period and had a certain effect, such as conferring a preference, a rebuttable presumption as to intention to prefer will arise. Unless the counterparty can rebut the presumption, the transaction will be avoided and the insolvency representative can recover the assets involved in the transaction or obtain judgement for the value of the asset involved.</p> <p>201. Where the counterparty's knowledge of the debtor's insolvency is a required element of avoidance, some insolvency laws include a presumption that the counterparty knew of the poor financial condition of the debtor if the transaction entered into with that person had certain characteristics. These may include that the repayment was in respect of an unmatured debt or made in an unusual manner, or that the transaction occurred within a short period before an application for commencement or before commencement of insolvency proceedings.</p>
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## Relevant Provisions in the Code and Regulations

Sl. No.	Section	Provision
1	26	<b>Application for avoidance of transactions not to affect proceedings.</b> The filing of an avoidance application under clause (j) of sub-section (2) of section 25 by the resolution professional shall not affect the proceedings of the corporate insolvency resolution process.
2	36(3)(f)	(3) Subject to sub-section (4), the liquidation estate shall comprise all liquidation estate assets which shall include the following: - (f) any assets or their value recovered through proceedings for avoidance of transactions in accordance with this Chapter;
3	43	<b>Preferential transactions and relevant time.</b> (1) Where the liquidator or the resolution professional, as the case may be, is of the opinion that the corporate debtor has at a relevant time given a preference in such transactions and in such manner as laid down in sub-section (2) to any persons as referred to in sub-section (4), he shall apply to the Adjudicating Authority for avoidance of preferential transactions and for, one or more of the orders referred to in section 44. (2) A corporate debtor shall be deemed to have given a preference, if— (a) there is a transfer of property or an interest thereof of the corporate debtor for the benefit of a creditor or a surety or a guarantor for or on account of an antecedent financial debt or operational debt or other liabilities owed by the corporate debtor; and (b) the transfer under clause (a) has the effect of putting such creditor or a surety or a guarantor in a beneficial position than it would have been in the event of a distribution of assets being made in accordance with section 53. (3) For the purposes of sub-section (2), a preference shall not include the following transfers— (a) transfer made in the ordinary course of the business or financial affairs of the corporate debtor or the transferee; (b) any transfer creating a security interest in property acquired by the corporate debtor to the extent that — (i) such security interest secures new value and was given at the time of or after the signing of a security agreement that contains a description of such property as security interest, and was used by corporate debtor to acquire such property; and (ii) such transfer was registered with an information utility on or before thirty days after the corporate debtor receives possession of such property: Provided that any transfer made in pursuance of the order of a court shall not, preclude such transfer to be deemed as giving of preference by the corporate debtor. <i>Explanation.</i> – For the purpose of sub-section (3) of this section, “new value” means money or its worth in goods, services, or new credit, or release by the transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the liquidator or the resolution professional under this Code, including proceeds of such property, but does not include a financial debt or operational debt substituted for existing financial debt or operational debt. (4) A preference shall be deemed to be given at a relevant time, if—



		<p>(a) It is given to a related party (other than by reason only of being an employee), during the period of two years preceding the insolvency commencement date; or</p> <p>(b) a preference is given to a person other than a related party during the period of one year preceding the insolvency commencement date.</p>
4	44	<p><b>Orders in case of preferential transactions.—</b></p> <p>(1) The Adjudicating Authority, may, on an application made by the resolution professional or liquidator under sub-section (1) of section 43, by an order:</p> <p>(a) require any property transferred in connection with the giving of the preference to be vested in the corporate debtor;</p> <p>(b) require any property to be so vested if it represents the application either of the proceeds of sale of property so transferred or of money so transferred;</p> <p>(c) release or discharge (in whole or in part) of any security interest created by the corporate debtor;</p> <p>(d) require any person to pay such sums in respect of benefits received by him from the corporate debtor, such sums to the liquidator or the resolution professional, as the Adjudicating Authority may direct;</p> <p>(e) direct any guarantor, whose financial debts or operational debts owed to any person were released or discharged (in whole or in part) by the giving of the preference, to be under such new or revived financial debts or operational debts to that person as the Adjudicating Authority deems appropriate;</p> <p>(f) direct for providing security or charge on any property for the discharge of any financial debt or operational debt under the order, and such security or charge to have the same priority as a security or charge released or discharged wholly or in part by the giving of the preference; and</p> <p>(g) direct for providing the extent to which any person whose property is so vested in the corporate debtor, or on whom financial debts or operational debts are imposed by the order, are to be proved in the liquidation or the corporate insolvency resolution process for financial debts or operational debts which arose from, or were released or discharged wholly or in part by the giving of the preference:</p> <p>Provided that an order under this section shall not –</p> <p>(a) affect any interest in property which was acquired from a person other than the corporate debtor or any interest derived from such interest and was acquired in good faith and for value;</p> <p>(b) require a person, who received a benefit from the preferential transaction in good faith and for value to pay a sum to the liquidator or the resolution professional.</p> <p><i>Explanation-I:</i> For the purpose of this section, it is clarified that where a person, who has acquired an interest in property from another person other than the corporate debtor, or who has received a benefit from the preference or such another person to whom the corporate debtor gave the preference, -</p> <p>(a) had sufficient information of the initiation or commencement of insolvency resolution process of the corporate debtor;</p> <p>(b) is a related party,</p> <p>it shall be presumed that the interest was acquired, or the benefit was received otherwise than in good faith unless the contrary is shown.</p> <p><i>Explanation-II.</i> – A person shall be deemed to have sufficient information or opportunity to avail such information if a public announcement regarding the corporate insolvency resolution process has been made under section 13.</p>



5	45	<p><b>Avoidance of undervalued transactions.</b></p> <p>(1) If the liquidator or the resolution professional, as the case may be, on an examination of the transactions of the corporate debtor referred to in sub-section (2) determines that certain transactions were made during the relevant period under section 46, which were undervalued, he shall make an application to the Adjudicating Authority to declare such transactions as void and reverse the effect of such transaction in accordance with this Chapter.</p> <p>(2) A transaction shall be considered undervalued where the corporate debtor—</p> <p>(a) makes a gift to a person; or</p> <p>(b) enters into a transaction with a person which involves the transfer of one or more assets by the corporate debtor for a consideration the value of which is significantly less than the value of the consideration provided by the corporate debtor, and such transaction has not taken place in the ordinary course of business of the corporate debtor.</p>
6	46	<p><b>Relevant period for avoidable transactions. –</b></p> <p>(1) In an application for avoiding a transaction at undervalue, the liquidator or the resolution professional, as the case may be, shall demonstrate that –</p> <p>(i) such transaction was made with any person within the period of one year preceding the insolvency commencement date; or</p> <p>(ii) such transaction was made with a related party within the period of two years preceding the insolvency commencement date.</p> <p>(2) The Adjudicating Authority may require an independent expert to assess evidence relating to the value of the transactions mentioned in this section.</p>
7	47	<p><b>Application by creditor in cases of undervalued transactions. –</b></p> <p>(1) Where an undervalued transaction has taken place and the liquidator or the resolution professional as the case may be, has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, as the case may be, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect in accordance with this Chapter.</p> <p>(2) Where, the Adjudicating Authority, after examination of the application made under sub-section (1), is satisfied that –</p> <p>(a) undervalued transactions had occurred; and</p> <p>(b) liquidator or the resolution professional, as the case may be, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority, it shall pass an order-</p> <p>(a) restoring the position as it existed before such transactions and reversing the effects thereof in the manner as laid down in section 45 and section 48;</p> <p>(b) requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.</p>
8	48	<p><b>Order in cases of undervalued transactions. –</b></p> <p>(1) The order of the Adjudicating Authority under sub-section (1) of section 45 may provide for the following: -</p> <p>(a) require any property transferred as part of the transaction, to be vested in the corporate debtor;</p> <p>(b) release or discharge (in whole or in part) any security interest granted by the corporate debtor;</p>



		<p>(c) require any person to pay such sums, in respect of benefits received by such person, to the liquidator or the resolution professional as the case may be, as the Adjudicating Authority may direct; or</p> <p>(d) require the payment of such consideration for the transaction as may be determined by an independent expert.</p>
9	49	<p><b>Transactions defrauding creditors.</b></p> <p>(1) Where the corporate debtor has entered into an undervalued transaction as referred to in sub-section (2) of section 45 and the Adjudicating Authority is satisfied that such transaction was deliberately entered into by such corporate debtor –</p> <p>(a) for keeping assets of the corporate debtor beyond the reach of any person who is entitled to make a claim against the corporate debtor; or</p> <p>(b) in order to adversely affect the interests of such a person in relation to the claim, the Adjudicating Authority shall make an order-</p> <p>(i) restoring the position as it existed before such transaction as if the transaction had not been entered into; and</p> <p>(ii) protecting the interests of persons who are victims of such transactions:</p> <p>Provided that an order under this section –</p> <p>(a) shall not affect any interest in property which was acquired from a person other than the corporate debtor and was acquired in good faith, for value and without notice of the relevant circumstances, or affect any interest deriving from such an interest, and</p> <p>(b) shall not require a person who received a benefit from the transaction in good faith, for value and without notice of the relevant circumstances to pay any sum unless 47 he was a party to the transaction.</p>
10	50	<p><b>Extortionate credit transactions.</b></p> <p>(1) Where the corporate debtor has been a party to an extortionate credit transaction involving the receipt of financial or operational debt during the period within two years preceding the insolvency commencement date, the liquidator or the resolution professional as the case may be, may make an application for avoidance of such transaction to the Adjudicating Authority if the terms of such transaction required exorbitant payments to be made by the corporate debtor.</p> <p>(2) The Board may specify the circumstances in which a transactions which shall be covered under sub-section (1).</p> <p>Explanation. – For the purpose of this section, it is clarified that any debt extended by any person providing financial services which is in compliance with any law for the time being in force in relation to such debt shall in no event be considered as an extortionate credit transaction.</p>
11	51	<p><b>Orders of Adjudicating Authority in respect of extortionate credit transactions.</b></p> <p>Where the Adjudicating Authority after examining the application made under subsection (1) of section 50 is satisfied that the terms of a credit transaction required exorbitant payments to be made by the corporate debtor, it shall, by an order –</p> <p>(a) restore the position as it existed prior to such transaction;</p> <p>(b) set aside the whole or part of the debt created on account of the extortionate credit transaction;</p> <p>€ modify the terms of the transaction;</p> <p>(d) require any person who is, or was, a party to the transaction to repay any</p>



		<p>amount received by such person; or</p> <p>€ require any security interest that was created as part of the extortionate credit transaction to be relinquished in favour of the liquidator or the resolution professional, as the case may be.</p>
12	66	<p><b>Fraudulent trading or wrongful trading.</b></p> <p>(1) If during the corporate insolvency resolution process or a liquidation process, it is found that any business of the corporate debtor has been carried on with intent to defraud creditors of the corporate debtor or for any fraudulent purpose, the Adjudicating Authority may on the application of the resolution professional 56 pass an order that any persons who were knowingly parties to the carrying on of the business in such manner shall be liable to make such contributions to the assets of the corporate debtor as it may deem fit.</p> <p>(2) On an application made by a resolution professional during the corporate insolvency resolution process, the Adjudicating Authority may by an order direct that a director or partner of the corporate debtor, as the case may be, shall be liable to make such contribution to the assets of the corporate debtor as it may deem fit, if-</p> <p>(a) before the insolvency commencement date, such director or partner knew or ought to have known that there was no reasonable prospect of avoiding the commencement of a corporate insolvency resolution process in respect of such corporate debtor; and</p> <p>(b) such director or partner did not exercise due diligence in minimizing the potential loss to the creditors of the corporate debtor.</p> <p><i>Explanation.</i> – For the purposes of this section a director or partner of the corporate debtor, as the case may be, shall be deemed to have exercised due diligence if such diligence was reasonably expected of a person carrying out the same functions as are carried out by such director or partner, as the case may be, in relation to the corporate debtor.</p>
13	67(2)	<p>Where the Adjudicating Authority has passed an order under sub-section (1) or (2) of section 66, as the case may be, in relation to a person who is a creditor of the corporate debtor, it may, by an order, direct that the whole or any part of any debt owed by the corporate debtor to that person and any interest thereon shall rank in the order of priority of payment under section 53 after all other debts owed by the corporate debtor.</p>
14	35A of CIRP Regulations	<p><b>Preferential and other transactions.</b></p> <p>(1) On or before the seventy-fifth day of the insolvency commencement date, the resolution professional shall form an opinion whether the corporate debtor has been subjected to any transaction covered under sections 43, 45, 50 or 66.</p> <p>(2) Where the resolution professional is of the opinion that the corporate debtor has been subjected to any transactions covered under sections 43, 45, 50 or 66, he shall make a determination on or before the one hundred and fifteenth day of the insolvency commencement date, under intimation to the Board.</p> <p>(3) Where the resolution professional makes a determination under sub-regulation (2), he shall apply to the Adjudicating Authority for appropriate relief on or before the one hundred and thirty-fifth day of the insolvency commencement date.</p>
15	39(2)	<p>The resolution professional shall submit to the committee all resolution plans</p>



	of CIRP Regul ations	which comply with the requirements of the Code and regulations made thereunder along with the details of following transactions, if any, observed, found or determined by him:- (a) preferential transactions under section 43; (b) undervalued transactions under section 45; (c) extortionate credit transactions under section 50; and (d) fraudulent transactions under section 66, and the orders, if any, of the adjudicating authority in respect of such transactions.
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**Pronouncements of the Adjudicating Authority**

The Hon'ble NCLT, vide order dated 16<sup>th</sup> May, 2018 in the matter of IDBI Bank Ltd. Vs. Jaypee Infratech Ltd., observed as under:

*“..... Sub-section 3 of Section 43 of the I&B Code excludes transfer made in the ordinary course of business or financial affairs of the corporate debtor or the transferee. The word “or” used in the sub-section makes it clear that each instance of exclusion is independent. In the instant case, the impugned mortgage was created in the ordinary course of business or financial affairs of the corporate debtor. However, in any case, it cannot be disputed that such mortgages were created in the ordinary course of business or financial affairs of the transferee/lenders.*

*.....Therefore, it is clear that the said transactions have been done not only without the consent of the Joint Lender Forum but also contrary to the decision of the JLF.*

*Avoidance proceedings are one of the crucial measures in saving the value of the insolvent entity under liquidation.”*

2. The Hon'ble NCLT, vide order dated 6<sup>th</sup> February, 2019 in the matter of Orchid Pharma Ltd. Vs. Hospira Healthcare India Pvt. Ltd. and Ors., observed as under:

*“.....we must make it clear that the word “fraud” coined in the section requires to reflect an element of intention to deceive another party by making a false promise without any intention to perform it or any such act or omission as the law specifically declares to be fraudulent. The elementary difference between Section 66 and other avoidance transactions is, fraudulent intention to defraud the creditors has to be proved by the person asserting such allegation. Intention is the element of difference in this section.*

*..... One thing is evident from this section that the burden is cast upon the RP to prove that fraud is committed by the director/partner.....”*

3. In the matter of SumitBinani RP Vs. Excello Fin Lea Ltd, the Hon'ble NCLT observed:

*..... A preference occurs when a company pays specific creditor or group of creditors and by doing so makes the creditor “better off” than the majority of other creditors before the company going into insolvency.”* It discussed comparative provisions in the US, UK and India in respect of preference. It directed that the first respondent shall restore entire transferred amount and the second respondent shall restore transfers made on 28<sup>th</sup> October, 2016 and 31<sup>st</sup> March, 2017 aggregating to Rs.2.84 crore along with 12% interest till the date of realisation to the CD, within 30 days of the date of order