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IBC AVOIDANCE TRANSACTIONS

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Introduction

The Insolvency and Bankruptcy Code, 2016 (the "Code" or "IBC") was enacted to maximise the value of a corporate debtor's assets, balance the interests of stakeholders and promote time-bound resolution. Central to value maximisation is the integrity of the asset pool available for distribution. In the period preceding insolvency, a financially distressed company is often the site of value leakage: assets are siphoned to favoured parties, security is created for old debts on the eve of default, transactions are entered into at gross undervalue, and related entities extract benefits at the expense of the general body of creditors. Left unchecked, such conduct depletes the estate before the formal process even begins.

The avoidance provisions of the Code, i.e., Sections 43 to 51, deal with preferential, undervalued and extortionate credit transactions, read with Section 66 on fraudulent and wrongful trading. These are the statutory antidote to this leakage. They empower the adjudicating authority, on the application of the resolution professional ("RP") or liquidator, to look back at the corporate debtor's recent dealings, set aside those that unfairly prejudiced creditors, and claw value back into the estate. Their purpose is restorative rather than punitive: to restore creditors to the position they would have occupied had the offending transaction not taken place.

For practitioners advising investors, lenders, resolution applicants and stressed promoters alike, avoidance jurisprudence is no longer a peripheral concern. The reported recoveries remain modest relative to the quantum of applications filed, yet the stakes in individual matters, as the DHFL resolution vividly demonstrates, can run into thousands of crores. The questions that have animated the courts are deceptively simple to state but consequential in effect: What makes a transaction a "preference"? How should related-party dealings be scrutinised? Can avoidance applications survive the conclusion of the resolution process? And, perhaps most contentiously, once value is recovered, who is entitled to keep it? This article examines how the jurisprudence has evolved on each of these fronts and draws out the commercial implications for those who structure, fund and contest insolvency outcomes.

Statutory Framework: A Brief Overview

The Code identifies four categories of vulnerable transaction, each with its own ingredients, look-back period and consequence. The framework may be summarised as follows:

Provision	Transaction	Look-back period	Core test
Section 43-44	Preferential transaction	2 years (related party); 1 year (others), pre-insolvency commencement date	Transfer for an antecedent debt that puts the beneficiary in a better position than under the Section 53 waterfall
Section 45-48	Undervalued transaction	2 years (related party); 1 year (others)	Gift or transfer for significantly less than the consideration provided by the debtor
Section 50 (r/w Section 51)	Extortionate credit transaction	2 years	Credit terms requiring exorbitant payments or grossly unfair to the debtor
Section 66	Fraudulent / wrongful trading	No fixed look-back; conduct during business	Carrying on business to defraud creditors, or continuing to trade without reasonable prospect of avoiding insolvency

Two structural features deserve emphasis at the outset. First, the look-back periods are materially longer for related parties (two years) than for unrelated parties (one year) in the case of preferences and undervalued transactions - a deliberate legislative recognition that insiders are better placed to extract value and harder to detect. Second, Section 66 sits apart from the Chapter III avoidance provisions. It is found in Chapter VI, addresses fraudulent or wrongful trading rather than the reversal of a specific transfer, and fixes personal liability on those knowingly party to the conduct. As discussed below, this textual separation has become decisive in the jurisprudence on who benefits from recoveries.

Procedurally, the RP is under a statutory duty under Section 25(2)(j) to determine whether the corporate debtor has been subject to avoidable transactions and to apply to the adjudicating authority for appropriate relief. Regulation 35A of the CIRP Regulations sets out an indicative timeline, the RP is to form an opinion within 75 days and make a determination within 135 days of the insolvency commencement date, though, as the courts have clarified, these timelines are directory rather than mandatory.

Evolution of Judicial Interpretation

Although the statutory architecture is relatively compact, its application has generated a substantial and still-developing body of case law. The courts have been required to give content to open-textured concepts, to police the boundary between legitimate commercial dealing and value extraction, and to resolve questions the Code does not expressly answer. The discussion below traces four strands of that evolution.

What Constitutes a "Preference"?

A preferential transaction under Section 43 has three essential ingredients. There must be (a) a transfer of property or an interest of the corporate debtor; (b) made to a creditor, surety or guarantor; (c) for or on account of an antecedent financial or operational debt, the effect of which is to put that party in a more beneficial position than it would have occupied in the distribution under Section 53. Where these are present, and the transfer falls within the relevant look-back period, the law deems it preferential, subject to the carve-outs in Section 43(3) for transfers made in the ordinary course of business and for new value given to the debtor.

The leading authority remains the ***Supreme Court's decision in Anuj Jain v. Axis Bank (2020) (the Jaypee Infratech matter)***, which laid down a structured, sequential enquiry. The adjudicating authority must first ask whether the transaction answers the description of a preference at all i.e., whether there is a transfer for an antecedent debt conferring a beneficial position. Only if that threshold is crossed does the authority proceed to consider the statutory exceptions. The Court was emphatic that the "ordinary course of business" exception cannot be invoked where the transaction was never part of the debtor's ordinary commercial activity to begin with; the exception protects routine dealings, not bespoke arrangements dressed up as routine.

Two practical points follow. The intent of the parties is largely irrelevant to the preference enquiry under Section 43 - unlike fraudulent trading, a preference does not require dishonesty. The test is objective and effects-based: did the transfer improve the recipient's position in the waterfall? Equally, the burden of bringing a transaction within an exception lies on the party resisting avoidance, and courts have been unwilling to allow the ordinary-course carve-out to swallow the rule. For transactional advisers, this means that even a commercially defensible payment to a single creditor on the eve of insolvency carries avoidance risk if it disturbs pari passu distribution.

Related Party Transactions: Heightened Judicial Scrutiny

The Code treats related parties with conspicuous caution, and the courts have reinforced that posture. The doubled look-back period for related parties is only the starting point. In substance, transactions involving connected persons attract a more searching examination because the ordinary assumption of arm's-length dealing does not hold, and because insiders typically possess the information and influence to time and structure transfers to their advantage.

The jurisprudence has expanded protective scrutiny in two notable directions. First, i***n Phoenix ARC Pvt. Ltd. v. Spade Financial Services (2021)***, the Supreme Court looked through the formal status of certain claimants to find that parties acting in collusion with the corporate debtor, or whose conduct revealed the hallmarks of a related-party relationship in substance, could be excluded from the committee of creditors. The Court was willing to examine the real nature of the relationship rather than accept its documentary label, signalling that related-party characterisation turns on substance over form.

For avoidance purposes, the consequence is that transactions with promoters, group companies, directors and their relatives are the most exposed category. Where a transfer to a related party confers a preference or is at undervalue, the longer look-back, the evidentiary inferences available against insiders, and the courts' readiness to pierce formal arrangements combine to make such transactions difficult to defend. Investors conducting diligence on a target with a history of intra-group dealings should treat these as a primary area of avoidance exposure, and resolution applicants should price the litigation risk accordingly.

Avoidance Proceedings Beyond CIRP

Perhaps the most practically significant question to have arisen is temporal: can an avoidance application survive the conclusion of the corporate insolvency resolution process ("CIRP")? Because avoidance enquiries involve contested questions of fact and law, they are rarely concluded within the compressed CIRP timeline. If the answer were that they abate on plan approval, a successful applicant could simply outlast the process and retain the fruits of the impugned transaction. The point was litigated to a head in the Venus Recruiters / Bhushan Steel proceedings.

The background lay in the CIRP of Bhushan Steel Limited, resolved by Tata Steel. The RP had filed an avoidance application under Section 43 in respect of an onerous arrangement before the resolution plan was approved, but the application remained undecided when the plan took effect and the new management assumed control. ***In Venus Recruiters Pvt. Ltd. v. Union of India (2020)***, a Single Judge of the Delhi High Court held that an avoidance application could not survive beyond the conclusion of the CIRP: once the plan was approved, the RP became functus officio, and proceedings to unwind earlier transactions were rendered infructuous. The decision, though textually defensible on a narrow reading, produced an unsatisfactory result. It effectively rewarded delay and allowed beneficiaries of suspect transactions to escape scrutiny by running out the clock.

That position was reversed on appeal. In ***Tata Steel BSL Ltd. v. Venus Recruiters Pvt. Ltd. (2023)***, a Division Bench of the Delhi High Court set aside the Single Judge's judgment and clarified the law in terms that have since shaped practice. The key holdings were:

- Avoidance proceedings are independent of CIRP. CIRP and avoidance applications are, by their nature, separate sets of proceedings. The adjudication of an avoidance application is ancillary and need not stall, nor be stalled by, the resolution of the corporate debtor. Such applications can therefore be heard and decided even after the CIRP has concluded and the resolution applicant has stepped into the promoter's shoes.

- Regulation 35A timelines are directory. The timelines for filing avoidance applications are directory, not mandatory. To treat them as mandatory would render the avoidance provisions redundant whenever a transaction came to light late, defeating their purpose.

- The RP is not wholly functus officio. While the RP's role qua the resolution of the corporate debtor ends on plan approval, the RP (or a person designated for the purpose) is not functus officio with respect to the pursuit of avoidance applications, the manner and remuneration for which the adjudicating authority may determine.

- Section 60(5)(c) confers wide jurisdiction. The phrases "arising out of" and "in relation to" in Section 60(5)(c) are of wide import, so the NCLT (and NCLAT on appeal) is the appropriate forum to hear such applications notwithstanding the conclusion of CIRP; a writ petition was not the correct remedy

- Recoveries benefit creditors, not the new management. Because the monies in question are, in substance, public money lent by creditors, the benefit of avoidance recoveries must flow to the creditors and not to the corporate debtor in its new avatar, which has paid for the company on a going-concern basis without reference to these contingent recoveries.

The Venus Recruiters appeal thus settled the survival question in favour of continuation, while leaving open two issues it could not fully resolve: the absence of any outer time limit for deciding such applications, and the allocation of the cost of pursuing them post-approval. Both remain live concerns, addressed further in the sections on practical challenges and reform below. Importantly, the Division Bench's observation that recoveries belong to creditors set the stage for the next and most contested question.

Treatment of Recoveries: Who Ultimately Benefits?

If an avoidance application succeeds and value is clawed back, who is entitled to it, the creditors who suffered the loss, or the successful resolution applicant who took over the company and may have to fund the recovery litigation? The Code does not answer this directly, and the resulting uncertainty came to a head in the resolution of Dewan Housing Finance Corporation Limited ("DHFL").

In DHFL, the administrator had filed applications for preferential, undervalued, extortionate and fraudulent transactions running to some ₹45,000 crore. While these were pending, the committee of creditors ("CoC") amended the request for resolution plans to provide that recoveries from Section 66 (fraudulent / wrongful trading) applications would accrue to the successful resolution applicant, who would pursue them, while recoveries from the Chapter III avoidance applications (Sections 43-50) would go to creditors. Piramal Capital emerged as the successful applicant, ascribed a notional value of ₹1 to the Section 66 recoveries, and built that allocation into its commercial bid. The plan was approved by an overwhelming majority of the CoC.

63 Moons Technologies Ltd., a creditor, challenged the arrangement, arguing that all avoidance recoveries, including Section 66. must enure to creditors and that allowing the resolution applicant to retain them amounted to unjust enrichment. The NCLAT accepted that objection, relying on Venus Recruiters to hold that recoveries from both Chapter III and Section 66 transactions belong to creditors, and remitted the plan to the CoC for reconsideration. The matter then reached the Supreme Court.

In ***Piramal Capital & Housing Finance Ltd. v. 63 Moons Technologies Ltd. (2025)***, the Supreme Court allowed Piramal's appeal and restored the resolution plan as approved by the CoC and the NCLT. The Court drew a clear and now-authoritative distinction between the two categories of recovery:

- Chapter III avoidance transactions (Sections 43-51) are avoidance transactions in the strict sense. They reverse specific transfers that depleted the estate, and the recoveries enure to the benefit of the creditors so as to enlarge the pool available for distribution.

- Section 66 fraudulent/wrongful trading stands apart. It is not an avoidance provision in the Chapter III sense but a distinct mechanism fixing personal liability on those who carried on business fraudulently or traded wrongfully. Recoveries under it are speculative, often require the applicant to fund and prosecute complex litigation, and may therefore be dealt with as a commercial term of the plan, including by assigning them to the resolution applicant, provided the CoC has consciously and transparently decided to do so.

Applying that distinction, the Court held that there was nothing improper in the CoC ascribing a notional ₹1 to the Section 66 recoveries and permitting Piramal to retain them, since the allocation was disclosed, factored into the bid, and approved by the requisite majority. The NCLAT had transgressed its jurisdiction under Section 61 by substituting its own view for the commercial wisdom of the CoC, which, following Essar Steel and K. Sashidhar, is not justiciable save where the plan contravenes Section 30(2) or is otherwise perverse or illegal. The Court also rejected the objections of fixed-deposit holders to their treatment and confirmed that ex-promoters whose board had been superseded by the regulator had no right to participate in the CIRP.

The 63 Moons ruling is the most consequential recent development in avoidance jurisprudence. Its practical significance is twofold. For resolution applicants, it confirms that the right to pursue and retain Section 66 recoveries can be bargained for as part of a plan, lending certainty to bids that would otherwise have to ignore or heavily discount such claims. The Court's clear guidance is that applicants who intend to claim such recoveries should ensure the allocation is disclosed and reflected in the bid amount to avoid post-approval litigation. For creditors, it confirms that Chapter III recoveries remain theirs, while Section 66 recoveries are a matter for collective commercial decision. The decision did not, however, disturb the treatment of Chapter III recoveries, leaving room for future contest if a plan were to attempt to assign those to the applicant as well.

Practical Challenges in Avoidance Proceedings

Notwithstanding the clarifications above, avoidance proceedings remain difficult to prosecute effectively, and the gap between applications filed and value recovered is striking. Several recurring challenges explain the shortfall:

- Absence of an outer time limit. Having established that avoidance applications survive CIRP, the courts have left them without any statutory deadline for disposal. The result is prolonged uncertainty: applications can remain pending for years, the recipients of suspect transfers retain the disputed value in the interim, and stakeholders cannot quantify their ultimate recoveries.

- Who funds the litigation. Once the plan is approved, the question of who bears the cost of pursuing avoidance applications is unsettled. The IBBI's discussion paper suggested the resolution applicant bears it where the CIRP ends in resolution and the IBBI where the process ends in liquidation, but the courts have largely left the point to be worked out case by case, and the economics often deter diligent pursuit.

- Evidentiary and forensic burden. Establishing that a transaction is preferential, undervalued or fraudulent requires forensic audits, reconstruction of transaction trails and, frequently, tracing through layers of intermediaries and related entities. The RP's ability to assemble this within the CIRP timeline is constrained by incomplete records and limited resources.

- Plan silence and lost beneficiaries. Where a resolution plan is silent on the treatment of pending avoidance applications, often because the information was not available when the plan was framed, there is ambiguity about who pursues them and who benefits. Venus Recruiters held that creditors may still benefit in such cases, but the absence of an express mechanism creates friction.

- Low realisation rates. Even successful adjudication does not guarantee recovery: the counterparties may be shell entities, the assets may have been dissipated, or enforcement may lag. The historically modest aggregate recoveries relative to the quantum of applications filed reflect this realisation gap.

These challenges are not merely administrative. They feed directly into commercial behaviour: bidders discount contingent recoveries heavily, creditors cannot rely on avoidance proceeds in their recovery modelling, and the deterrent effect of the provisions on pre-insolvency misconduct is blunted by the perception that adjudication is slow and recovery uncertain.

Avoidance Transactions vs. Fraudulent Trading

The 63 Moons decision makes it essential for practitioners to keep the two regimes analytically distinct. Although they are often pursued together and colloquially bracketed as "PUFE" applications (preferential, undervalued, fraudulent, extortionate), the avoidance provisions of Chapter III and the fraudulent / wrongful trading provision of Section 66 differ in purpose, ingredients and consequence.

Feature	Avoidance (Section 43-51, Chapter III)	Fraudulent / wrongful trading (Section 66, Chapter VI)
Nature	Reverses a specific transfer or transaction that depleted the estate	Fixes personal liability for a course of conduct in carrying on business
Mental element	Largely objective; preference under Section 43 needs no proof of intent or dishonesty	Requires intent to defraud (fraudulent) or absence of reasonable prospect of avoiding insolvency (wrongful)
Who is liable	The counterparty/beneficiary of the transaction	Any person (typically directors/promoters) knowingly party to the conduct
Look-back	Fixed statutory windows (1 or 2 years)	No fixed look-back; tied to conduct of business
Treatment of recoveries	Enure to creditors to enlarge the estate (per 63 Moons)	May be assigned to the resolution applicant as a disclosed commercial term, subject to CoC approval (per 63 Moons)

The distinction is not academic. As the Supreme Court recognised, Section 66 recoveries are typically speculative and litigation-intensive, establishing fraud or wrongful trading is harder than demonstrating the objective ingredients of a preference, and the targets are individuals whose assets may be difficult to reach. That is precisely why the Court was willing to permit their assignment to a resolution applicant prepared to fund the pursuit, while insisting that Chapter III recoveries, which restore identifiable value to the estate, remain with creditors. Practitioners structuring resolution plans should map each pending application to the correct regime and address its treatment expressly, rather than relying on a blanket "PUFE" clause.

Final Thoughts

Avoidance jurisprudence under the IBC has matured considerably from its early uncertainty. The courts have confirmed that avoidance applications are independent proceedings that survive the conclusion of the CIRP, that the timelines for filing them are directory rather than fatal, and that the broad jurisdiction of the adjudicating authority extends to deciding them even after a resolution applicant has assumed control. Most significantly, the Supreme Court in 63 Moons has drawn a principled line between Chapter III avoidance recoveries, which enure to creditors, and Section 66 fraudulent-trading recoveries, which the committee of creditors may, in its commercial wisdom, assign to a resolution applicant willing to pursue them.

Taken together, these developments reflect the Code's twin commitments: protecting the integrity of the asset pool against pre-insolvency value leakage and respecting the primacy of creditor commercial judgment in shaping resolution outcomes. Yet the framework is not complete. The absence of an outer time limit, the unsettled allocation of litigation cost, and the persistent gap between applications filed and value actually recovered continue to blunt the deterrent and restorative purpose of the provisions. Closing these gaps through targeted legislative clarification, institutional capacity-building and disciplined transactional practice is the next stage in the evolution of this area.

For practitioners, the immediate lesson is one of precision and foresight: to characterise each vulnerable transaction correctly, to address its treatment expressly in plans and bids, and to build the avoidance dimension into diligence and structuring from the earliest stage. In a regime where recoveries can run to thousands of crores and where commercial certainty is at a premium, careful handling of avoidance transactions is no longer a specialist afterthought but a central feature of insolvency practice.

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www.indiajuris.com

Our Offices

New Delhi
Lajpat Nagar-1 New Delhi
newdelhi@indiajuris.com

Gurugram
Sohna Road, Gurugram
gurugram@indiajuris.com

Bengaluru
Indira Nagar, Bengaluru
bengaluru@indiajuris.com

Mumbai
Andheri East, Mumbai
mumbai@indiajuris.com

GIFT CITY, Gujarat
FF-38, Pragya Accelerator
Processing Area GIFT SEZ, GIFT CITY
giftcity@indiajuris.co.in