

Key Takeaways from Addresses of Dignitaries in the International Conference (Virtual) on “Avoidance Transactions under IBC-Improving Outcomes” on March 29, 2023

Indian Institute of Insolvency Professionals of ICAI (IIPI) organized an International Conference (Virtual) on “Avoidance Transactions under IBC-Improving Outcomes” on Wednesday, 29th March 2023.

Shri. Sudhaker Shukla, Whole Time Member (WTM), Insolvency and Bankruptcy Board of India (IBBI) graced the Conference as Chief Guest and Mr. Paul Bannister, Head-Policy, Insolvency Services, Government of UK was present as the Guest of Honour. Dr. Ashok Haldia, Chairman-IIPI, delivered Welcome and Opening Address. On this occasion, a publication titled “Avoidance Transactions Under IBC 2016-Improving Outcomes”, which is based on the Report of a Study Group constituted in this regard by IIPI was also released.

The Inauguration Session was followed by Special Addresses and Panel Discussion wherein domain experts from India, the United Kingdom, Singapore, and Hong Kong shared their experiences and best practices related to Avoidance Transactions and Avoidance Proceedings in their respective jurisdictions. Hereinbelow, we present highlights from addresses of dignitaries in this program.



Welcome and Opening Address

Dr. Ashok Haldia

Chairman, Governing Board-IIPI

1. Avoidance Transactions are often held responsible for under-realization of values and delays in resolution of the Corporate Debtor.
2. With the support and confidence of over 63% Insolvency Professionals (IPs) of India, IIPI has

continuously maintained its status as the largest Insolvency Professional Agency (IPA) of the country. This also casts a responsibility upon IIPI to ensure excellence, independence, and integrity of the entire IBC ecosystem in terms of what they deliver and how they deliver.

3. IIPI is working closely with the IBBI and Insolvency Committee of ICAI, in providing to IPs the experiences and platform for Continuous

- Professional Education (CPE) of the IPs. We have also provided a platform 'Discussion Forum' on our website to resolve their problems on a day-to-day basis where they can raise their individual issues and concerns. Besides, we organize Executive Development Programs (EDPs) where they can exchange their views and discuss issues and challenges freely with fellow IPs and distinguished faculties.
4. We have brought out more than 10 research publications based on the Study Groups constituted by IIIPI. These Study Groups conduct several rounds of deliberations among stakeholders including experts, experienced professionals and faculties. These reports also include recommendations to resolve the challenges in different areas of insolvency profession.
 5. Besides adversely affecting value realization of the corporate debtors, Avoidance Transaction causes value deterioration due to litigation related delays. Low realization of value from Avoidance Applications filed by Resolution Professionals under the IBC, 2016 is also a matter of major concern among stakeholders.
 6. We have requested the bankers including the IBA (Indian Banks' Association) to prepare a checklist for Avoidance Transactions.
 7. ICAI has done exceptional work in the areas of forensic audit reports in terms of education to Chartered Accountants (CAs) and also in terms of bringing out Guidance and Standards. We will be in touch with IBBI and ICAI for improvement in streamlining the forensic audit under the IBC.
 8. I believe the UK's experience in dealing with Avoidance Transactions can be of great help for India. If the professionals of the UK, Hong Kong and Singapore can work together a common procedure can be developed to deal with Avoidance Transactions across jurisdictions.
 9. The publication titled "Avoidance Transactions Under IBC 2016-Improving Outcomes" released today is based on the report of a Study Group constituted by IIIPI in this regard. I am grateful to Mr. Sudhaker Shukla, WTM, IBBI who has also given input to this Report. The Draft Report was circulated among the professionals at large and suggestions were incorporated. The recommendations are largely related to improve the forensic audit process, improve template/ format of forensic audit and make it more effective and transparent. This is a collective and collaborative effort of the profession, and we hope that it will be useful for professionals and other stakeholders.



Guest of Honour

Mr. Paul Bannister

Head-Policy, Insolvency Services,
Government of the UK

1. Avoidance Transaction is a very complex and difficult topic. It is one of the core components of insolvency resolution that includes Personal Insolvency as well as Group Insolvency. Improving outcomes of Avoidance Transaction is probably one of the difficult areas because of the complexity. The need for investigation to track and trace Avoidance Transaction has made it very expensive.
2. The UK's system of dealing with Avoidance Transaction is very old dating back to year 1376 and replicated in several jurisdictions around the world. The creditors are generally victims of Avoidance Transaction and various rules, and important tools are recognized to investigate Avoidance Transaction in insolvency firms.
3. UK Framework identified six areas under Avoidance Transaction and holds office holder responsible for it viz. Undervalued, Preferential, Avoiding/ Floating Charges, Disposition, Extortionate, and Fraudulent.
4. The UK government is also reviewing its framework for Avoidance Transactions to make it more effective.
5. The cost and time are very important and might have a negative impact on covering outcomes and even office holders may feel disincentivized to recover the amount if not financially justifiable.
6. The Office Holders of Insolvency Process need to be incentivized to go after Avoidance Transactions.



Chief Guest

Shri. Sudhaker Shukla

Whole Time Member (WTM)
Insolvency and Bankruptcy Board
of India (IBBI)

1. I hope the outcomes of today's conference would have everlasting impact on realization process which is wanting in absence of clear goals about how we treat the Avoidance Transactions.
2. Most have started to realize that there are only two types of companies – *firstly*, those who have breached and know it and *secondly*, those who have been breached but do not know. Thus, to trace and realize the transactions are very different. In doing so one must keep the intention of the doer in mind.
3. Creditors should be alert all the time as promoters have access to a balance sheet so are well informed about the financial condition of the company. If there is a large time-gap in initiation of the process, the erring management may be incentivized to put the value away.
4. In some cases the NCLTs have imposed an 'interim moratorium' and used 'inherent powers' put to prevent stakeholders from taking away assets of the CD. This jurisprudence may also be applied by Resolution Professionals to prevent Avoidance Transactions and value erosion.
5. In terms of value maximization and haircuts, the explicit factors are quality of assets and time value of assets. Delays in insolvency processes are inversely proportional to the outcomes, which is always troubling. The implicit factors are – treatment of guarantors and handling of twilight zones.
6. The provision of 'Fraudulent Transaction' in IBC is based on Section 242 of the UK Insolvency Act 1986. Besides, some ideas of Section 213 of this Act have been borrowed in the matters of Liquidation. The diversion of assets could also invoke criminal charges.
7. The landmark judgement in the case of *Jaypee Infratech* regarding the Avoidance Transaction has beautifully defined various aspects. There is need for a detailed discussion on duties and responsibilities of the Resolution Professional to trace and claw back value lost in Avoidance Transactions.
8. The response to the red flags which are being raised by the front-line regulator – IIPI and the IBBI will give some credible results. If you dive deeper into the data, it will give the required results. Forensic Standards in India is still in nascent stage which needs to be developed into a robust framework.
9. In the matter of *Venus Recruiters Pvt. Ltd.*, the Division Bench has now clarified that CIRP and Avoidance Process are two distinct and independent processes, and also the Resolution Professional will not become *functus officio*.
10. Right now, the regime says that the Resolution Professional will have to form an opinion on Avoidance Transaction, but the Insolvency Law Committee (ILC) has said that this is not good enough we will have to amend Section 25 (2) to make it a responsibility and investigative power of the Resolution Professional for investigation in this regard. Further, to bring the regime at par with the international standards, the moratorium granted to PG needs to be adequately addressed and Section 101 and Section 104 are required to be amended.
11. Quality of reports being filed with the NCLTs needs to be improved. You will have to apply due diligence and be prudent.
12. The framework for Avoidance Transactions has been streamlined in India but there are still some grey areas for which the Ministry of Corporate Affairs (MCA) is working to sort out through amendments in near future. As per the data with IBBI, so far 847 Avoidance Transactions applications have been filed amounting to ₹2.82 lac crore out of which 143 cases have been settled and ₹0.05 lac crore has been clawed back, which is very less and a major concern for all of us.



Special Address

Shri. P. S. Prasad

Hon'ble Member (Judicial)
NCLT, Delhi

1. The reason behind the low recovery of Avoidance Transaction is that the applications are filed without judging whether there is an occasion for filing the PUFÉ transactions or not.
2. RPs should carefully go through the forensic audit report, conduct independent evaluation of the forensic report and make assessment of related documents before filing application to claw back PUFÉ transactions. Besides, every PUFÉ transaction should be supported by an internal note of the IRP/RP on whether or not the transaction in question

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is a PUFÉ transaction. This will increase the chances of recovery. Here the exercise has to be done and more duty is cast upon the Resolution Professional.

3. In the matter of *TATA Steel BSL Ltd. Vs. Venus Recruiters Pvt. Ltd.* and *Jaypee Infratech Limited (JIL)*, it is very clear the exercise that ought to be was not done. If the exercise was done more properly, the recovery would have improved.
4. Secondly, after filing the Avoidance Transaction application, the RP moves very fast to assail the same either for some consideration or no consideration or for future consideration. When you assail a debt of ₹100 to ₹10, you will definitely get less recovery. The assailment should be done only in those cases where the Resolution Professional is fully confident that recovery is not possible in the near future.
5. Among the PUFÉ transactions, Undervalued transactions are easy to recover. This is because you know where the value has gone and can easily trace

and recover the value. Besides, evidence of preferential transactions can easily be traced in the Account Books of the Corporate Debtor. The Resolution Professional should invest some more time in identifying and tracing such transactions.

6. The institute should develop a 'Model Checklist for Avoidance Transactions' to be used by Resolution Professionals. This will give confidence to the NCLT to move faster in the matter of PUFÉ Transactions.
7. The RPs should take care in preparation of Information Memorandum (IM) and also in preparing 'Request for Resolution Plan'. If preparation of IM and Request for Resolution Plan is done with due care, the approval of the Resolution Plan becomes quite easy. The loopholes in preparing these documents give rise to several IAs (Interlocutory Application). I suggest the institute to develop separate checklists for preparation of IM and Request for Resolution Plan in consultation with the NCLT.



Special Address

CA. Rajesh Sharma
Former Hon'ble Member
NCLT

1. The promoters and sometimes senior management also have vested interests to conceal the information related to PUFÉ transactions. As the Resolution Professional is bound to complete the CIRP in time bound manner and resolve the Corporate Debtor, getting back the PUFÉ transactions is not his/her primarily responsibility. Similarly, the CoC members are also not much interested because bankers hardly conduct mandatory verification of stocks of debtors. Thus, in present circumstances under the IBC regime, almost no stakeholder is

interested to claw back the PUFÉ transaction.

2. Forensic reports are also not very helpful in tracing the PUFÉ transactions because they are often filled with several disclaimers.
3. The first judgement in the matter of *Venus Recruiters Pvt. Ltd.* has made it mandatory to dispose of all the IAs before approval of the Resolution Plan. Thus, there was a ban in dealing with IAs after approval of the Resolution Plan. But the situation has changed after the judgement of the double bench.
4. Today, the question is who will pay the cost for pursuing Avoidance Transactions applications after approval of the Resolution Plan. Therefore, the recovery for such PUFÉ transaction applications becomes next to impossible.

Panel Discussion

Moderator: CA. Gyan Chandra Misra, Insolvency Professional, Chairman, CIBC-ICAI & Director, IIIPI

Panellists:

Ms. Kanika Kitchlu-Connolly, Insolvency Lawyer & Partner, TLTL LLP, London

Ms. Veronica Chan, Solicitor, Tanner De Witt, Hong Kong

Ms. Shreya Prakash, Foreign Associate, BlackOak LLC, Singapore

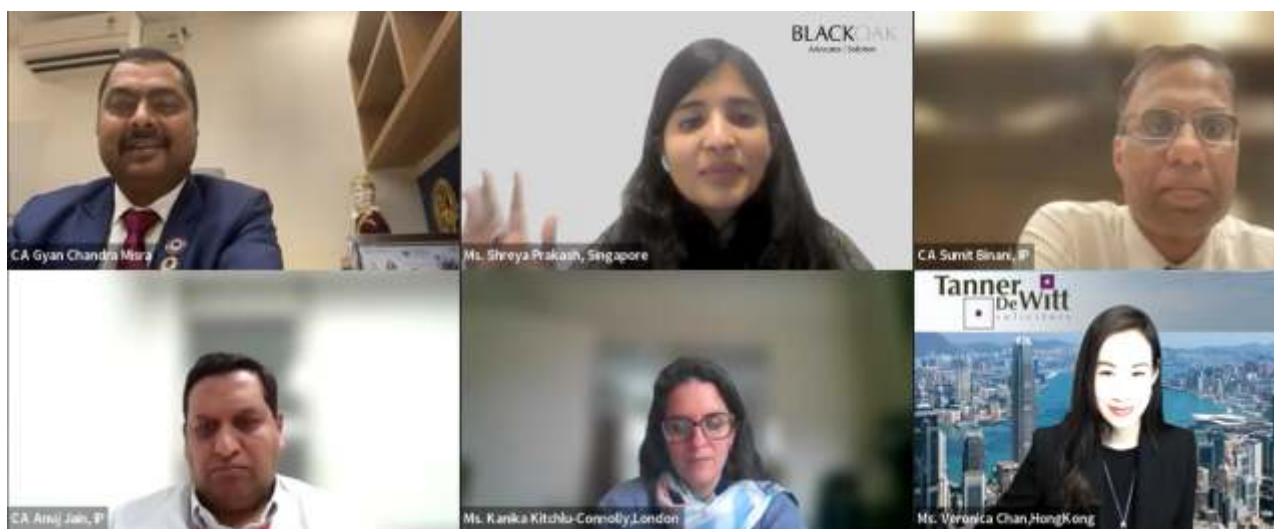
CA. Sumit Binani, Insolvency Professional, IIIPI

CA. Anuj Jain, Insolvency Professional, IIIPI

1. In the past over six years, 847 Avoidance Applications amounting ₹2.82 lac crores have been filed till December 2023 out of which 143 applications involving amounts of ₹0.41 lac crore have been disposed of. However, the recoveries are merely ₹0.05 lac crore. The average time taken in disposing Avoidance Applications has been 323 days. Thus, Avoidance Transactions have tremendous potential in maximizing value in relation to the liquidation value and resolution value of the Corporate Debtors.
2. IBC, 2016 differentiates regarding Avoidance Transactions whether the counter party is 'Related Party' or 'Unrelated Third Party' of the Corporate Debtor. In the case of 'Related Party' any past

to apply for PPIRP. It is learnt that the Ministry of Corporate Affairs (MCA) is planning to delete or amend this provision.

5. The main objective of the Resolution Professional under the IBC is to resolve the Corporate Debtor in a time bound manner. Therefore, burdening the Resolution Professional with forensic audit and reports etc. may compromise the main purpose of the IBC. Therefore, this task may be given to 'other Professionals'. The role of Resolution Professional should be of a facilitator in terms of providing data. This will make the entire process more effective.
6. The recovery of about ₹5,000 crore Avoidance Transaction in the case of Jaypee Infratech Ltd (JIL)



transaction that occurred in the two-year period prior to the Insolvency Commencement Day (ICD), will be avoided while this period for 'Unrelated Third Party' is one year. The reason behind this differentiation is that the promoters are more likely to siphon off money/ value through the 'Related Party' over which they have control. The transactions which are made in the normal course of business are excluded from Avoidance Transactions.

3. IBC and related IBBI Regulations empower Resolution Professional and Liquidator to investigate into the Avoidance Transactions of the Corporate Debtor, form an opinion in a time bound manner, submit before CoC and file Avoidance Applications before the Adjudicating Authority.
4. The MSMEs applying for PPIRP are required to make a declaration that there has not been any PUFÉ transactions. This often acts as deterrent for MSMEs contributed significantly to value maximization and ultimately a better realization for creditors through Resolution Plan.
7. The first challenge on tracing the PUFÉ transaction lies in lack of data. Besides, the senior management of the Corporate Debtor is not willing to provide the data. There is often lack of segregation between quantification of accounts or incorrect accounts vs. actual loss of value.
8. IBC provides that lenders can also file PUFÉ applications against the Corporate Debtor but there is hardly any such incidence. Besides, the CoC is also not much interested in filing PUFÉ applications, and they leave it completely on Resolution Professional.
9. If the evidence is clinching, it becomes easy to get judicial orders to claw back the PUFÉ transactions that too in a speedy way.

10. If the beneficiary of PUFÉ transaction is willing to pay back, there is no guideline or provision for settlement. This involves a huge time in litigation and resources to claw back the amount/ value lost through PUFÉ transactions. Besides, it may also be kept in mind that not all PUFÉ beneficiaries are intentional.
 11. All the PUFÉ transactions are not illegal. This is because some business practices such as transaction and guarantee with related party/parties, which are legal in normal condition, are considered PUFÉ if the Corporate Debtors undergoes IBC processes.
 12. Worldwide and also in the UK, the promoters and senior management sometimes use Avoidance Transactions as part of their business strategy, which becomes difficult to realize.
 13. The insolvency laws in Hong Kong are similar to the English Laws particularly in terms of the insolvency proceedings. Here unsecured creditors share equal treatment in liquidation or unsecured creditors equally share available assets and proceeds accordingly. The law recognizes three kinds of Avoidance Transactions namely Undervalued Transaction, Preferential Transaction and Fraudulent Transaction. As per the law, a Liquidator is appointed to look into each and every transaction of the company, which is dubious and determine whether they are Avoidance Transactions or not. If the company is able to prove on reasonable grounds that the transaction in question was in good faith and carried on in the larger interest of the business, it is not considered as Avoidance Transaction otherwise it might attract criminal liability.
 14. Though Hong Kong has not adopted UNCITRAL Model Law, it is reflected in various provisions of its insolvency law including Avoidance Transactions.
- Article 23 provides an umbrella term to cover all the Avoidance Transactions.
15. The framework for Avoidance Transaction in Singapore is somehow similar to that of India. However, there are three special features in Avoidance Transaction of Singapore (a) third parties are welcome to fund recovery/ realization of Avoidance Transaction (b) courts are highly proactive and pronounce judgements in pretty short period of time which preserves the value of the company (c) PUFÉ transactions are actually complimented by other corporate insolvency tools. Thus, the process of tracking and tracing Avoidance Transaction starts much earlier.
 16. Avoidance Transaction should not be filed just for the sake of filing. We all should accept that the market practice and profession is still evolving. As we gain knowledge and experience, these things will be streamlined. However, there is need to extend the look back period under the IBC, there should be some provision for funding litigations related to Avoidance Transaction, the options of mediation and settlement should also be explored.
 17. It is important to empower the Insolvency Professional to go ahead to trace or assign the Avoidance Transactions with the approval of the CoC so that funding can be ensured to claw back the value. The lenders should put money and resources to claw back the value lost in Avoidance Transactions.
 18. The panelists shared their practical experiences including the scope of mediation and arbitration in the context of Avoidance Transactions and other processes under the IBC.
 19. Concluding the Panel Discussion, CA. Misra assured the panelists that their suggestions will be taken care of by the institute.



Vote of Thanks
CA. Rahul Madan,
MD-IIPI

1. We certainly had incredibly insightful sessions, today. The legal framework under the IBC requires a professional to establish a fair and transparent conduct of Avoidance Process.
2. Though the outcomes are not encouraging enough, we may learn a lot from best practices abroad like the UK, Hong Kong, and Singapore.
3. The deliberations of the conference will go a long way in augmenting the framework for Avoidance Transaction. IIPI will do the needful to pursue the suggestions with policy makers.