

Critically Analysing Insolvency of Virtual Digital Assets vis-à-vis a Cross-Jurisdictional Comparison

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ABSTRACT

The emergence of crypto assets has become a harbinger of novel opportunities and complexities. The occurrence of insolvency in the crypto industry is one such complexity. Understanding the probable effects of insolvency on digital assets is crucial owing to the increasing popularity and usage of cryptocurrencies. Owing to the absence of any comprehensive legislation or judicial authorities concerning the specific subject matter in the country, it is to be noted that the present research article is an introductory study. Through this article, the authors aim to provide an overall view into the nature of virtual digital assets- whether they fall under the category of property or not for initiating insolvency and what the cross-jurisdictional progress is instead of the insolvency of these virtual digital assets. The aim is also to identify the several potential issues that might arise in the insolvency process of such virtual assets and what can be the possible solutions to overcome those hurdles.

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TABLE OF CONTENT

<i>I.</i>	<i>Introduction.....</i>	<i>89</i>
<i>II.</i>	<i>Nature of Virtual Digital Assets – Property or not?</i>	<i>90</i>
<i>III.</i>	<i>Scenario in Different Countries with regards to Insolvency of Virtual Digital Assets</i>	<i>94</i>
	<i>A.Russia</i>	<i>94</i>
	<i>B.New Zealand.....</i>	<i>95</i>
	<i>C.Singapore</i>	<i>96</i>
<i>IV.</i>	<i>Issues Identified in the Insolvency of Virtual Digital Assets.....</i>	<i>99</i>
	<i>A.Traceability of owner</i>	<i>99</i>
	<i>B.Cross-border insolvency</i>	<i>100</i>
	<i>C.Identification of assets</i>	<i>101</i>
	<i>D. Preservation of assets.....</i>	<i>101</i>
	<i>E.Insolvency Resolution Process</i>	<i>102</i>
	<i>F. Treatment of creditors</i>	<i>104</i>
<i>V.</i>	<i>Possible Solutions to the Issues Identified in the Insolvency of Virtual Digital Assets</i>	<i>104</i>
<i>VI.</i>	<i>Conclusion</i>	<i>107</i>

I. INTRODUCTION

The virtual currency market, especially cryptocurrencies, has managed to disrupt the traditional financial landscape in India, attracting over 115 million active users.¹ Virtual digital currency is a digitally tradable type of value that employs encryption to verify transactions denominated in the given currency and is used as a platform of exchange or a repository of wealth. Some of its characteristics include being decentralised, expeditious, and innominate. Most transactions in India occur on virtual currency exchanges like Coin DCX, Wazir X, Unocoin, ZebPay, etc. These exchanges function as trading platforms where participants can either buy new VC using paper currency or bring their existing VCs to the site for trade. With the country's economy standing firmly poised on the doorstep of a digital revolution, the Union Finance Minister, in the 2022 budget session, announced the launch of Central Bank Digital Currency by the Reserve Bank of India.² It is described as a digital alternative to the fiat physical currency based on blockchain and other technologies and is supposed to provide a 'boost to the digital economy' and 'result in a more efficient currency management system'.

¹ Shashank Bharadwaj, '33 percent of the estimated 115 mn crypto users in India are worried about regulations' (forbesindia.com) <<https://www.forbesindia.com/article/crypto-made-easy/33-percent-of-the-estimated-115-mn-crypto-users-in-india-are-worried-about-regulations/79243/1>> accessed 19 February 2023.

² Subrata Panda, 'Union Budget 2022 proposes to introduce digital rupee to be issued by RBI' *Business Standard* (Mumbai, 1 February 2022) <https://www.business-standard.com/budget/article/union-budget-2022-proposes-to-introduce-digital-rupee-to-be-issued-by-rbi-122020100982_1.html> accessed 17 February 2022.

Legal and regulatory control of crypto assets is generally regarded to be lagging. Having said that, lawmakers are quickly strengthening current or creating new legal and regulatory regimes in response to the crypto asset market's exponential expansion and capitalisation. For instance, the government recently acknowledged the application of anti-money laundering provisions on cryptocurrencies or virtual assets through a gazette notification. Recognising the possible effects of insolvency and bankruptcy on digital currencies and their owners is crucial as cryptocurrencies increase in popularity and application.

II. NATURE OF VIRTUAL DIGITAL ASSETS – PROPERTY OR NOT?

Before examining the procedural implications of insolvency proceedings concerning digital assets, it is imperative to determine the preliminary question of the application of the Code on the said assets. Digital assets must first be acknowledged as an item of property to be regarded as the subject of insolvency. Section 3(27) of the Insolvency and Bankruptcy Code, 2016³ (“**IBC**”) defines “property” to “*include money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property*”. This reflects the wide amplitude of the

³ Insolvency and Bankruptcy Code 2016 (IBC 2016), s 3(27).

expression as also highlighted in the Report of the Insolvency Law Committee dated 20-02-2020.⁴

Moreover, traces of deliberation upon this contention can be found in international jurisprudence. The House of Lords established the property litmus test in ***National Provincial Bank Ltd v. Ainsworth*** (**Ainsworth case**).⁵ It was decided that every interest or right must first meet the following criteria in order to be considered as property:

- (i) *“definiteness;*
- (ii) *identifiable by third parties;*
- (iii) *capable, by nature, of being assumed by third parties; and*
- (iv) *capable of some degree of permanence.”*

The Ainsworth tests have been reiterated by courts in a multitude of jurisdictions to establish that virtual assets are a type of property. In ***Quoine Pte Ltd v. B2C2 Ltd***⁶, the Singapore International Commercial Court held that digital assets might assume the form of property under the golden rule outlined in Ainsworth. Quoine (the virtual currency exchange platform) was sued by trader B2C2 for alleged breaches of contract and confidence. B2C2 started trading Ethereum against the market rate of one Ethereum for 0.04 of a Bitcoin in exchange

⁴ Insolvency Law Committee, ‘Report of the Insolvency Law Committee’ (2020) para 8.5.

⁵ *National Provincial Bank Ltd v Ainsworth* [1965] 2 All ER 472 [Ainsworth].

⁶ *Quoine Pte Ltd v B2C2 Ltd* [2020] SGCA(I) 02.

for 10 Bitcoins. Quoine reversed the trades after discerning that B2C2 had sold Ethereum for an amount above two hundred and fifty times its original market value, which sparked the disagreement. In light of the factual matrix, the Court observed that digital assets cannot be termed legal tender because they are not money issued by the government.

*Ainsworth*⁷ was also cited in ***AA v. Persons Unknown & Others Re Bitcoin***,⁸ wherein an insurance business' IT system was compromised, and a Bitcoin ransom was requested before the company could regain access to its data. 96 Bitcoins were transferred as ransom out of the 109.25 Bitcoins demanded, and they were transmitted to a wallet connected to the Bitfinex cryptocurrency exchange. Regarding Bitcoins that served as ransom money, Bitfinex was the target of a private injunction. The High Court of Justice decided that owing to the fulfilment of the criteria, Bitcoin can be designated as property and thereby, granted an interim injunction. It was made absolute that believing there are just two types of properties, "choices in possession" and "choices in action" would be incorrect. Even if Bitcoin does not fit into one of these categories, it is still considered property, and more specifically, an intangible type of property.

The standing in India is unclear but not untested. In ***Internet and Mobile Association of India v. Reserve Bank of India***⁹

⁷ *Ainsworth* (n 5).

⁸ *AA v Persons Unknown & Others Re Bitcoin* [2019] EWHC 3665 (Comm).

⁹ *Internet & Mobile Assn of India v RBI* (2020) 10 SCC 274.

(“**IMAI**”), an RBI circular “ring-fencing” Digital Assets, ie, advising financial entities not to deal with Digital Asset related services, was set aside by the Supreme Court following an analysis of the nature of Digital Assets. The verdict, which deals with Digital Asset regulation rather than insolvency or liquidation, gives a thorough analysis of how Digital Assets are handled internationally. Although describing virtual currencies as ‘commodity’, ‘property’, ‘non-traditional currency’, or ‘money’ may be accurate descriptions, the Court ruled that none of these constitutes the complete truth. Although the Court agreed with the notion that digital assets are property, it also recognised that their nature can vary in different circumstances.

In my opinion, digital assets must be handled similarly to intangible property in insolvency or liquidation situations. As they can be identified, exchanged on a platform, transferred, and are sufficiently stable to have their history made available via blockchain technology, (ie, while the values of cryptocurrencies can change, the actual units behind the values are the same and cannot change in character. The blockchain is a permanent record of transparent, transactions that have involved a cryptocurrency unit, building up its provenance and chain of ownership), digital assets display the qualities of the property. The four conditions outlined in *Ainsworth* are met by Digital Assets. The existence of the phrase ‘any description’, which permits Digital Assets to be incorporated into the definition of property, further broadens the reach of Section 3(27) of the IBC. Digital Assets are thus recognised as property under the IBC and common law.

III. SCENARIO IN DIFFERENT COUNTRIES WITH REGARDS TO INSOLVENCY OF VIRTUAL DIGITAL ASSETS

A. *Russia*

Courts are compelled to deal with actual disputes while regulatory and legislative agencies take their time establishing legal frameworks for the operation of the cryptocurrency market. This is especially true in the context of insolvency cases, where several questions could come up. For instance, how should different kinds of the debtor's digital assets be handled and tracked in situations when the debtor refuses to acknowledge their existence, transfers them to third parties, or merely denies the insolvency practitioner or court access to them? Additionally, how should they be disposed of, and at what rate of exchange, if any?

Several of the aforementioned concerns were raised in Mr Tsarkov's most recent bankruptcy case, which was heard by the Commercial Court of Moscow (Russia) in March 2018.¹⁰ The insolvency practitioner ("IP") in this case submitted a motion to the court requesting that it be ordered that the contents of Mr Tsarkov's allegedly owned cryptocurrency wallet at www.blockchain.info be included in the insolvency estate. The IP additionally asked for the wallet's key to be given to him. The IP claimed that Bitcoin was an asset and that it should be included in the insolvency estate because the main goal of the bankruptcy process was to sell the debtor's assets and maximise the value to creditors. Mr Tsarkov objected,

¹⁰ *The case of Mr Tsarkov* Case No A40-124668/2017 [Tsarkov].

arguing that bitcoin relationships were not covered by current Russian legislation and that cryptocurrencies could not be considered an object of property (civil) rights.

The court essentially presented two arguments, resolving the conflict and declining to recognise Bitcoin as an asset for insolvency law. First, it stated that it is impossible to determine the legal status of cryptocurrencies through analogy. The decentralised structure of most cryptocurrencies, operating without a central authority, does not align well with traditional financial assets or currencies that are typically regulated by central banks or governments. The underlying blockchain technology and cryptographic principles behind cryptocurrencies are fundamentally different from other forms of property or assets, making direct comparisons difficult. The cryptocurrency ecosystem is evolving rapidly, with new types of tokens and use cases emerging regularly. This fast pace of change makes it challenging to apply static legal analogies.

Second, and more problematic from a practical standpoint, the court correctly noted that it is difficult to determine who owns the cryptocurrency stored in a wallet because of the inherent anonymity in the use of (some) crypto wallets (for instance, registration at www.blockchain.info is free and only requires email verification). Contrary to popular belief, Mr Tsarkov did not contest ownership of the relevant Bitcoins in the current case; there was no disagreement over this. Yet the court remained unconvinced.

B. New Zealand

The most recent authority on the matter is ***David Ruscoe and Malcolm Moore v. Cryptopia Ltd***¹¹ (“**Cryptopia case**”). After 14% of its bitcoin was stolen, the cryptocurrency exchange platform Cryptopia Ltd was put into liquidation.

Following a thorough examination of the aforementioned cases, the Court determined that:

- (i) VCs are property because they meet all of the requirements outlined in the *Ainsworth* case¹² and,
- (ii) Account holders are the actual owners of the VCs traded on Cryptopia, having held those VCs in “trust” for them.

Using terminology from Cryptopia’s Terms and Conditions, such as “your coin balances”, “your cryptocurrency coins”, and “control back of their money”, it was determined that the company intended to establish a trust where “*account holders would be depositing, buying, selling, and owning their cryptocurrency*”.¹³ As a result, cryptocurrencies were dispersed to account holders upon liquidation and could not be classified as the company’s assets.

C. Singapore

¹¹ *David Ian Ruscoe and Malcolm Russell Moore v Cryptopia Limited* [2020] NZHC 728 [Cryptopia].

¹² *Ainsworth* (n 5).

¹³ *Ainsworth* (n 5), paras 27, 176-178, 191.

The Bored Ape Yacht Club¹⁴ (“BAYC”), the Singapore High Court’s latest ruling concerned a particular collection of Ethereum-based Bored Ape NFTs. The Court considered whether the BAYC can create proprietary rights that can be enjoined. The court stressed that blockchain-stored virtual assets are only a system of codes that are considered information. Intangible assets are not “things in possession” because they cannot be owned like chattels. Consensus and smart contracts power their decentralised system. Bitcoin assets are not “things in action”.

Common law courts rarely treat simple information as property since it is not a “thing in possession” or “thing in action”. After considering judicial precedents and opinions on property, the Court expanded its position and declared that information has been referred to as a piece of knowledge that informs the reader. The Court proceeded to analyse the nature of Non-Fungible Tokens (“NFTs”) in detail. It noted that each NFT is characterised by a unique identification code and associated metadata, which together define its distinct attributes. The Court explained the technical aspects of NFT ownership and control, highlighting that digital wallets are used to store and manage NFTs. These wallets employ a system of private keys that are linked to specific blockchain addresses, allowing the wallet owner to access and control their NFTs. The Court emphasised the significance of private keys in the NFT ecosystem. It clarified that possession of the private key equates to control over the asset, much like physical possession of cash. This private

¹⁴ *Janesh s/o Rajkumar v Unknown Person (“CHEFPIERRE”)* [2022] SGHC 264 [Janesh].

key enables the owner to initiate transfers of NFTs between digital wallets. The Court underscored the permanence and irreversibility of these transfers, comparing them to cash transactions. In its legal analysis, the Court applied the criteria established in the *National Provincial Bank v Ainsworth*.¹⁵ case to determine whether NFTs could be considered property. After careful consideration, the Court concluded that NFTs satisfied all the necessary conditions outlined in *Ainsworth*. This conclusion formed the basis for the Court's decision to grant a proprietary injunction, effectively recognising NFTs as a form of property that can be subject to legal protection and enforcement.

Approaches of the judiciary to cryptocurrency and other digital assets arising in the context of insolvency proceedings vary widely between jurisdictions, including the following: In Russia, the Moscow Commercial Court took a conservative stance when it refused to recognise Bitcoin as an asset for insolvency. The court cited both the inability to determine the legal status of cryptocurrency by analogy and practical difficulties in establishing ownership given wallet anonymity.¹⁶ In New Zealand, The court's approach in the case of *Cryptopia*¹⁷ was more progressive. It identified virtual currencies as property under the *Ainsworth* criteria, defining account holders and not the exchange platform as the true owners of the cryptocurrencies. What that did in substance was to treat the cryptocurrencies as trust property. In Singapore, The High Court gave a fairly balanced judgment in the case of

¹⁵ *Ainsworth* (n 5).

¹⁶ *Mr Tsarkov* (n 10).

¹⁷ *Cryptopia Limited* (n 11).

the Bored Ape Yacht Club.¹⁸ The court, although at first considering blockchain-stored assets simply as information, eventually regarded NFTs as a type of property that could be subject to proprietary injunction. Private keys, it underlined, played a role in establishing control and ownership. These divergent approaches tend to underscore the challenge that courts everywhere are still confronted with in how to apply traditional legal frameworks to unique-characteristic digital assets. Indeed, such evolving scenes in cryptocurrency will probably inform future legislative and regulatory efforts toward the achievement of consistent, internationally recognised frameworks on how to handle digital assets when there is an insolvency proceeding.

IV. ISSUES IDENTIFIED IN THE INSOLVENCY OF VIRTUAL DIGITAL ASSETS

A. Traceability of owner

One of the primary complications identified in the *Cryptopia* case is tracing the ownership of digital assets during CIRP. This issue is rooted in the anonymity attached to the owner of such assets and specifically, ascertaining the actual or corporate person owning them. Umpteen virtual currency exchange platforms in India, upon acknowledging this issue, have imposed Know-Your-Customer and other identification mechanisms, seen evidently in their terms and conditions. The said measures are aimed towards preventing financial crimes linked to the

¹⁸ *Janesh s/o Rajkumar* (n 14).

anonymity that VCs offer. Apart from this, they also allow a quick fix for any traceability problems that are likely to occur during the resolution or liquidation procedure.

B. Cross-border insolvency

A weighty problem that the Indian courts or the Adjudicating Authority may run into is cross-border insolvency. Users and account holders on virtual currency exchanges are spread worldwide and a majority of cryptocurrencies function on distributed ledger technology. This means that the blockchain is not concentrated and further engenders concerns regarding jurisdiction. The key inquiries in this regard are: firstly, place of initiation of insolvency proceedings, and secondly, which nation's insolvency laws would be relevant?

The English courts have considered that crypto assets are located where the person or company who owns the crypto asset is domiciled,¹⁹ but it is possible that other courts would do otherwise. For instance, a foreign court might nonetheless uphold the validity of a security even though under English law it was illegitimate because it had not been registered over crypto assets in England. It may be required to enforce judgements across borders, possibly against parties whose identities are only publicly related through social media accounts, even in the absence of competing processes.

¹⁹ *Osbourne v Persons Unknown & Ors* [2023] EWHC 340 (KB).

Moreover, finding a corporate debtor's Centre of Main Interest ("COMI") is necessary to allay these worries. Due to the global reach of blockchain technology, determining a digital exchange's COMI might be challenging. The existing cross-border process in India is much less effective and takes longer since it necessitates bilateral agreements between India and other nations²⁰ or letters of request from the Adjudicating Authority to the judicial bodies in countries where the assets in dispute are located.²¹

C. Identification of assets

Numerous factors such as the number of bank accounts, the volume and frequency of cash transactions, as well as transfers including terms or transactions indicative of crypto exchange, are mandated to be reviewed by insolvency practitioners during the process of identifying cryptocurrency among insolvency assets. Additionally, the presence of software related to the usage of virtual currency, huge files indicating blockchain download, and evidence of cloud technology use, are to be sought to substantiate the claims advanced.

D. Preservation of assets

Practitioners would have to take control of discovered crypto assets right away by transferring them to a dedicated cold wallet. Nonetheless, regardless of whether the wallet is hot or cold, practitioners should take

²⁰ IBC 2016, s 234.

²¹ IBC 2016, s 235.

precautions to prevent hacking, and it should only be available to the relevant parties. The risk of the asset being lost exists if someone else has access to the wallet's key. Since it is immutable and cannot be returned, extra caution is to be exercised to ensure transfer to the right wallet.

E. Insolvency Resolution Process

In the case of bankruptcy of a cryptocurrency exchange, one of the most important questions is whether owners of accounts at the exchange should return the digital assets to their owners or use them for the repayment of creditors to the exchange. The two categories of creditors furthered by the Code are – Financial and Operational creditors. It can be alluded that a digital asset exchange does not embody a financial debt, given the absence of debt being disbursed against the consideration for the time value of money between the account holders and exchanges. Further, with regards to operational debt, the two below-mentioned arguments can be advanced:

- (i) According to Section 5(21) of the IBC,²² a claim regarding the provision of goods or services is referred to as “operational debt”. According to the Sale of Goods Act, 1930,²³ “goods” are “*all kinds of moveable property, excluding money and actionable claims.*”²⁴ Furthermore, since the definition explicitly excludes any type of “movable property” that shares

²² IBC 2016, s 5(21).

²³ Sale of Goods Act 1930 (SoGA 1930).

²⁴ SoGA 1930, s 2(7).

the characteristics of actionable claims and money, goods are a distinct subset of “property”. Because they are both movable property and financial instruments, virtual currencies have a hybrid nature that has also been duly sanctioned by the Apex Court in *IMAI*. Hence, since digital assets cannot be regarded as “goods”, claiming them as operational debt is incorrect.

- (ii) Secondly, it is to be noted that such assets are not owned by the VC exchange, but by the account holders. The ‘Terms of Use’ between VC companies and account holders are solely contractual agreements. The usage of phrases like “lose your cryptocurrency assets”, “your digital assets”, and “your cryptocurrency assets” by the aforementioned VC exchanges in their “Terms and Conditions of Use” emphasises that VCs only belong to account holders and users.

In *M/s Embassy Property Developments Pvt Ltd v. State of Karnataka and Ors*,²⁵ the highest court ruled that the definition of “assets” under the Explanation to Section 18 explicitly excludes an asset owned by a third party but not in the corporate debtor’s possession due to contractual agreements. Contractual agreements, as described in Section 3(6) of the IBC, are particularly important in this context because they give birth to the “right to payment”, which is an essential component of a claim. Account holders, users, and consumers can lodge claims about the CIRP and are required to receive what they genuinely

²⁵ *Embassy Property Developments (P) Ltd v State of Karnataka* (2020) 13 SCC 308.

possess. It should be highlighted that unlike creditors, who are paid from an insolvent party's property, VC exchanges are handicapped from paying the account holders because they do not have cryptocurrency.

F. Treatment of creditors

It is significant to note that digital asset platforms are characterised by the absence of safeguards such as investor protection funds. For instance, in the ***Celsius Network case***²⁶, according to the company's terms and conditions, terms such as "unsettled" and "unguaranteed" have been employed to describe the treatment of the digital assets of the clients during an insolvency proceeding. It further implies that such customers can be treated as unsecured creditors resulting in a complete loss of their respective assets. Further, a ruling furnished by a bankruptcy judge in the said company's case, provides that the deposits in yield-producing accounts belong to the firm itself and not the separate account holders. Therefore, substantial ambiguities surrounding this matter can engender grave biases against the creditors.

V. POSSIBLE SOLUTIONS TO THE ISSUES IDENTIFIED IN THE INSOLVENCY OF VIRTUAL DIGITAL ASSETS

While conducting restructuring operations involving cryptocurrencies, insolvency professionals face many difficulties due to the absence of

²⁶ *In re Celsius Network LLC* 22-10964 (MG) (Bankr SDNY Feb 29, 2024).

legislation and identification of cryptocurrencies. Determining whether the debtor has bitcoin assets is one of these issues. The Companies Act of 2013's Schedule III²⁷ now requires corporations to register their Bitcoin holdings, making it easier for insolvency specialists to locate them.

Crypto assets' bankruptcy is compounded by their offline storage on "cold wallets", where no central authority or bank may send you a notice of appointment to transfer or freeze them. "Hot wallets" store cryptocurrencies on exchanges, making them accessible to administrators, liquidators, and trustees. What happens if the wallet owner forgets the key? Many cryptocurrency assets are kept in decentralised wallets that are inaccessible to anyone since the key has been lost and cannot be restored. To secure and attempt to rekey crypto assets, it is necessary that the IP consults with experts.

Once appointed, IPs must act proactively to identify any digital assets and their location by consulting with the company's directors, officers, and any service providers involved in the liquidation. Asset dissipation is a problem that exists regardless of the type of asset, but it is heightened by the ease with which crypto assets can be transferred. IPs have to:

- i. Recognise and protect crypto assets, and should cooperate with the people in charge of the linked cryptocurrency wallets' private encryption keys.

²⁷ Companies Act 2013, sch III.

- ii. Transfer digital assets from private addresses (not, for instance, accounts owned by services or exchanges) to addresses for which the liquidators hold the private keys. By not doing this, IPs run the risk of others discovering the private keys to their addresses, allowing them to move the money without their knowledge and maybe exposing themselves to a future lawsuit.²⁸

Without the owner's participation, it would be exceedingly difficult, if not impossible, to reclaim the money from a wallet, even if its physical location could be determined and it could be taken. A clear corporate governance law that prohibits a CEO or other executive of a crypto company from having exclusive access to the company's cryptocurrency funds may be the best option in this situation. When one person has sole access, there's no system of checks and balances to prevent misuse or mistakes. If something happens to that individual (death, incapacitation, or criminal activity), the company could lose access to all its funds. Further, Exclusive control makes it difficult for other stakeholders, including investors and regulators, to verify the company's financial status. A trusted cryptocurrency custodian's service, using a digital wallet that operates with multiple signature addresses and needs more than one private key to authorise a transaction or other options that guarantee the

²⁸ Louise Abbott and Matthew Hennessy-Gibbs, 'Recovering Crypto Assets in Insolvency' (*keystonelaw.com*, 17 February 2023) <<https://www.keystonelaw.com/keynotes/recovering-crypto-assets-in-insolvency>> accessed 10 March 2023.

open and secure accessibility of a company's funds could all be used for this purpose.

VI. CONCLUSION

When navigating the resolution process involving cryptocurrency, insolvency professionals around the world face significant hurdles due to the improper identification and regulation of crypto assets. The government has made an effort to create regulations for the cryptocurrency sector, but so far little real progress has been made.

The market will become more aware of the necessity for a comprehensive framework of law intended to address the insolvency or bankruptcy of corporate debtors trading in crypto assets as the use of cryptocurrency continues to rise. Hence, it would be beneficial for all parties involved if all nations developed strong obligations for handling such situations through careful consideration and active engagement of the legislative and judiciary. The prevalence of cases involving cryptocurrencies is expected to prompt the needed modifications to the rules and regulations currently in place. With this in mind, the main challenge is to strike a balance between the effects of current legislation and the nuances of digital assets to create a steady regulatory framework for handling them.

Nonetheless, there has been a significant shift in how the world views global finance and its future. Someday, a worldwide framework may be created thanks to the speed with which international institutions and the World Bank are offering newer policy suggestions on cryptocurrencies.