

Cryptocurrency: the challenge to insolvency professionals

The legal status of cryptocurrencies is proving to be a significant emerging challenge for many areas of financial governance, with the insolvency profession being no exception.

At the heart of mounting concerns is whether holdings of cryptocurrencies such as Bitcoin constitute legal assets that can play a role in any bankruptcy proceeding. Furthermore, there are concerns that use of the controversial currency could also enable bankrupt businesses to hide and preserve assets, thus rendering them immune to any insolvency action.



Andrew Spring

“The advent of cryptocurrency definitely throws up a raft of potentially huge challenges for insolvency practitioners,” explains Jirsch Sutherland Partner [Andrew Spring](#). “There’s definitely a fear that this is making it a little bit easier for businesses to move assets and keep them hidden. There’s also been a fair bit of discussion around how an insolvency practitioner, whether engaged in a personal or corporate insolvency scenario, could even identify whether bankrupt parties hold any form of cryptocurrency.

“Even if practitioners are able to identify the cryptocurrency held by the bankrupt, unless the bankrupt is willing to assist in providing their private key to access their virtual wallet, the practitioner has no recourse to access the wallet, resulting in the funds being inaccessible by the estate.”

Digital wallets and nebulous assets

The issue of cryptocurrency and insolvency is complex and nebulous, with the legal status and treatment of the blockchain technology-based innovation varying across different jurisdictions. For example, cryptocurrencies are treated as an asset in countries like Brazil, Canada and Finland, and a means of payment in Japan, the Philippines and Sweden. In Argentina, they’re considered money (though not a legal currency), while Pakistan views them as a commodity. The UK has, as yet, no settled approach, while cryptocurrencies are banned completely in countries including Bolivia, Ecuador and Iceland. Australia, meanwhile, regards them as money.

However, even in countries where cryptocurrencies are recognised, Andrew says the actual identification of any such assets involves major difficulty.

“The concerning part for us is that the borderless element of the digital world means that we may well be trying to trace money or an asset through jurisdictions that are not immediately accessible to our insolvency regime,” he says. “That’s the number one concern among the insolvency profession.

“We have no ability to compel a foreign jurisdiction to cooperate with our insolvency process without having their courts acknowledging our appointment. We don’t have an ability to compel every single registry to tell us whether they hold a digital wallet or not. Even understanding where the asset’s gone would be difficult. To follow the paper trail would be extremely challenging. So, there’s a clear ability for anybody who wanted to avoid or frustrate that sort of detection process.”

Legal appeal leads to Russian precedent

The recent Tsarkov bankruptcy case before the Moscow Arbitraz Court highlights the nature of a rapidly-evolving legal and regulatory landscape. During initial proceedings, it was argued that cryptocurrency should be included in any insolvency estate as an asset. The court disagreed. However, a subsequent appeal saw the decision reversed, with cryptocurrency then declared a legal asset that can indeed form part of a debtor’s bankruptcy estate. Debtors are therefore compelled, at least in Russia, to divulge relevant cryptocurrency passwords.

On the Australian front, Andrew believes the use of cryptocurrency as a form of business asset is still in its early days. And although believing it’s probably more relevant to Jirsch Sutherland’s personal insolvency arm at this point in time, he nonetheless has some thoughts as to how such a case might play out in a corporate setting.

“The key is identifying that someone’s actually dealing in cryptocurrency,” he says. “I think the only way to do that is by engaging the greater stakeholder group. I think we’d ask creditors if they’ve had any dealings with the insolvent party through cryptocurrencies. If they have, there’s got to be some sort of paper trail. We’ll then know where it’s come from and which registries were used. Then we’d have an opportunity to delve deeper. But without a focus point, it’d be like looking for a needle in a haystack.”