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THE IMPACT OF CRYPTOCURRENCIES ON THE GENERAL POWERS AND
DUTIES OF INSOLVENCY PRACTITIONERS

by

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MINI DISSERTATION

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# TABLE OF CONTENTS

1. INTRODUCTION .................................................................................................................. 1
2. PROBLEM STATEMENT ....................................................................................................... 2
3. DIGITAL CURRENCIES FEATURING IN INDUSTRY 4.0 ................................................. 3
4. BITCOIN IN SOUTH AFRICA .......................................................................................... 5
5. THE LEGAL CHARACTERISATION OF CRYPTOCURRENCIES .......................... 11
6. GENERAL POWERS AND DUTIES OF INSOLVENCY PRACTITIONERS .......... 23
7. RECOMMENDATIONS AND CONCLUSION ................................................................. 26
8. BIBLIOGRAPHY ................................................................................................................ 34
PLAGIARISM DECLARATION

I, Sidasha Naidoo, hereby declare that this mini dissertation submitted by me, in partial fulfilment of the requirements for the degree LLM (Commercial Law), complies with the Plagiarism Policy of the University of Johannesburg. I further confirm that this is my own, independent, original work and has not been submitted for any other module or degree at this university or at any other university.
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I would also like to express my deepest appreciation to my husband and my parents for their unwavering love, support and encouragement.

All of these positive contributions have led to the completion and success of my dissertation.
1 INTRODUCTION

The rapid development of new technologies are referred to as “Revolutions”. The steam engines of the 18th century, the creation of electricity during the 19th century and the invention of computers and internet facilities of the 20th century, ushered in the digital era of the 21st century, coined the Fourth Industrial Revolution (Industry 4.0).¹ The development of artificial intelligence, robotics, virtual reality and cryptocurrencies,² have been introduced to elevate efficiency in mankind’s living, working and communication experiences.³ However, these highly advanced innovations can pose challenges too.

The main focus of this dissertation is cryptocurrencies in relation to corporate insolvency law (insolvency law). Industry 4.0 forces us to look at these correlated concepts from a new perspective.

This dissertation outlines problems that exist in our law due to the rise of Industry 4.0. It focusses on cryptocurrencies and the impact it has on the powers and duties of insolvency practitioners.⁴ In evaluating these issues, the dissertation addresses the South African position on cryptocurrencies. It also engages in a comparative analysis of how selected international courts have dealt with cryptocurrencies falling within insolvent estates and also considers how certain international jurisdictions have dealt with the issues highlighted in the problem statement below. The analysis aims to assist in developing the current insolvency law regime to meet the demands of Industry 4.0. This dissertation considers various sources, including contributions from both local and international authors, case law, textbooks, journals, articles and internet sources.

² Schwab (n 1) 2.
³ See online module on “Understand the impact of the Fourth Industrial Revolution on society and individuals” 1 and 4 https://trailhead.salesforce.com/en/content/learn/modules/impacts-of-the-fourth-industrial-revolution/understand-the-impact-of-the-fourth-industrial-revolution-on-society-and-individuals (26-03-2020); Schwab (n 1) 3.
⁴ “Insolvency practitioner” is the generic term used in this dissertation to refer to a liquidator and/or a trustee, as the context may require, under South African insolvency law.
2  PROBLEM STATEMENT

A challenge for insolvency practitioners, is that Industry 4.0 contains innovations, such as cryptocurrencies, which present difficulties in insolvency law. Although cryptocurrencies, such as Bitcoin, are not recognised as legal tender under South African law, this has not prevented entities from engaging in the cryptocurrency market.

The general problem is that there is no proper legal characterisation of cryptocurrencies, resulting in insolvency practitioners being unable to effectively carry out their duties in terms of the Companies Act 61 of 1973 (1973 Act). Insolvency practitioners are consequently ill-equipped to deal with businesses in possession of cryptocurrencies.

Kokorin and Jeffrey have identified pertinent questions relating to cryptocurrencies within the context of insolvency, as follows:

a) How do insolvency practitioners treat “cryptoassets” in an insolvent estate?

b) Can creditors prove their claims based on cryptocurrencies?

c) Will insolvency practitioners be aware of cryptoassets?

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7 While s 224(1) of the Companies Act 73 of 2008 (2008 Act) repeals the 1973 Act, s 224(3) of the 2008 Act, preserves the transitional arrangements set out in Schedule 5. Therefore, the 1973 Act is still relevant. These transitional arrangements allow for Chapter XIV of the 1973 Act to govern the winding up of insolvent companies. Accordingly, the 1973 Act is applicable, when determining the general powers and duties of insolvency practitioners.


9 Kokorin (“When Bitcoin meets insolvency” (n 8)); Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)); Jeffery (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)).

10 Kokorin (“When Bitcoin meets insolvency” (n 8)); Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)); Jeffery (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)).
d) If an insolvency practitioner is aware of cryptoassets, which are capable of being exchanged, at what rate does he dispose of same, to pay creditors?11

The courts have been at the forefront of these disputes, since answers to these questions are not readily available within the statutory framework.

The specific problem is that insolvency practitioners do not have legislative guidance to assist them in dealing with cryptocurrencies. Consequently, the international courts have attempted to close the gap between the legislature and Industry 4.0.12

3 DIGITAL CURRENCIES FEATURING IN INDUSTRY 4.0

To assess the impact that cryptocurrencies have on the general powers and duties of insolvency practitioners, a basic understanding of digital currencies is imperative. This chapter looks at the categories of digital currencies and highlights Bitcoin, as a popular virtual currency.

Digital currencies form a broad category of electronic currencies. They are different to our traditional forms of currency, as they are non-tangible.13 Besides digital fiat currencies,14 digital currencies encompass virtual currencies, which include cryptocurrencies.15

Virtual currencies are either “centralised or decentralised, and convertible or non-convertible”.16 Non-convertible centralised virtual currencies only hold value within a virtual space, for example, gaming.17 These virtual currencies cannot be used for ordinary day to day transactions, as it holds no value in reality.18 Convertible virtual currencies can be converted, either in a centralised or decentralised manner, into traditional currencies.19

12 Kokorin (“When Bitcoin meets insolvency” (n 8)) 2; Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)) 1.
14 Fiat currency refers to currency which is issued by the government and recognised as legal tender. Refer to INSOL International “Cryptocurrency and its impact on insolvency and restructuring INSOL special report” 2019 file:///C:/Users/sidashan/Downloads/Special%20Report%20Cryptocurrency%2029%20May%202019%20FINAL%201.pdf (10-10-2019) (hereinafter referred to as the INSOL Special Report).
15 Digital & Virtual Currencies (n 13).
16 SARB Policy Paper (n 5) 2.
17 Digital & Virtual Currencies (n 13); SARB Policy Paper (n 5) 2.
18 Digital & Virtual Currencies (n 13); SARB Policy Paper (n 5) 2.
19 SARB Policy Paper (n 5) 2.
Thus, just as one can convert a Pound, for several Rands, one can also exchange a convertible virtual currency, such as certain cryptocurrencies, for several Rands or Pounds, as applicable.

Cryptocurrencies are mathematically based concepts designed so that consumers may have more autonomy by working off a decentralised financial system (independent of a bank) and trading electronically with a network of peers.\textsuperscript{20} The value of cryptocurrencies are based on the theory of supply and demand, which contributes to its volatile nature.\textsuperscript{21} It is different to traditional currencies where values are based on the macroeconomics and political influences of a country.

Bitcoin, created by a person/s using the alias Satoshi Nakamoto, who released the Bitcoin white paper entitled, “Bitcoin: A Peer-to-Peer Electronic Cash System”, on 1 October 2008 (Bitcoin White Paper), is a popular example of a cryptocurrency.\textsuperscript{22} The Bitcoin White Paper, outlines Bitcoin transactions on blockchain technology. Sayer defines blockchain technology as:

\begin{quote}
\textquote{an incorruptible digital ledger of economic transactions that can be programmed to record not just financial transactions but virtually everything of value.} \textsuperscript{23}
\end{quote}

Blockchain technology allows for an electronic payment system where consenting parties enter into transactions, without a financial institution verifying payments.\textsuperscript{24} Sayer explains that these transactions are:

\begin{quote}
\textquote{verified by a majority of unrelated participants (called nodes – sometimes referred to as miners). It is a peer-to-peer network whereby data is distributed amongst equally privileged nodes, each with its own copy of the ledger and predefined rules to facilitate consensus and ensure authenticity of the data.} \textsuperscript{25}
\end{quote}

\textsuperscript{22} Ryznar “The future of Bitcoin futures” 2019 Houston Law Review 539 542.
\textsuperscript{25} Ryznar (n 22).
As with other cryptocurrencies, Bitcoin can be bought, traded or earned/mined on certain platforms.²⁶ This will become increasingly difficult to do as there is a cap of 21 000 000 Bitcoins to be generated by the year 2035.²⁷ Nieman suggests that the last few Bitcoins will be the most “…expensive and difficult to mine”.²⁸

Bitcoin is a digital decentralised electronic payment system, where transactions are instantaneous, irreversible and unaffected by the user’s geographical location.²⁹ The user’s exact identity cannot be directly traced through their transactions,³⁰ but can be viewed by anyone who has access to the software, as Bitcoin operates off a public network and is recorded on a digital ledger.³¹ Lastly, only the holder of a Bitcoin wallet can access the Bitcoin.³² The private key to the “wallet” is essentially a series of numbers, known only to the holder, which allows the Bitcoin to be spent.³³

4 BITCOIN IN SOUTH AFRICA

This chapter analyses South Africa’s position in relation to virtual currencies and crypto assets. It unpacks the legal tender status of cryptocurrencies, including the steps to be taken to incorporate crypto assets within the existing regulatory framework. Central to this chapter, are the following papers:

a. The SARB Policy Paper;

b. The User Alert: Monitoring of virtual currencies dated 18 September 2014 (User Alert);

c. The Intergovernmental Fintech Working Group (IFWG) Crypto Assets Working Group (CARWG) Consultation paper on policy proposals for crypto assets; and

d. The IFWG CARWG Position paper on crypto assets.

²⁸ Nieman (n 27).
²⁹ SARB Policy Paper (n 5) 3; See (n 24) above; De Mink (n 20) 3.
³⁰ See (n 26) above.
³¹ Sayer (n 23).
³² Frankenfield (n 21).
4.1 **SARB Policy Paper**

Traditional currency and legal tender are managed in terms of the South African Reserve Bank Act of 1989 (SARB Act).\(^{34}\) Thus, the SARB is the only organisation, permitted to issue legal tender.\(^{35}\) Accordingly, a creditor is obliged to accept payment in South African fiat currency in order to discharge payment obligations.\(^{36}\) Payment in Bitcoin cannot be used to discharge any financial obligation since it is not recognised as legal tender.\(^{37}\)

The SARB Policy Paper refers to the definition of E-money as an “electronically stored monetary value issued on receipt of funds and represented by a claim on the issuer”.\(^{38}\) Two reasons exist for not recognising Bitcoin as E-money.\(^{39}\) Firstly, the disbursement of E-money falls within the business of a financial institution,\(^{40}\) which only relates to fiat currency. Secondly, unlike decentralised convertible virtual currencies, such as Bitcoin, E-money can be converted into physical cash, and transferred into a bank account on demand, while Bitcoin can only be exchanged for cash.\(^{41}\)

Since there is no regulatory framework, those who participate in the Bitcoin market do so at their own risk, with no legal recourse.\(^{42}\) This lack of regulation can create opportunities for illegal activities such as money laundering,\(^{43}\) tax evasion,\(^{44}\) financing of terrorism,\(^{45}\) and eluding exchange control regulations.\(^{46}\)

The SARB Policy Paper identifies certain risks involved for those who continue to engage with decentralised convertible virtual currencies. Besides the price volatility, other risks *inter alia* include:

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\(^{34}\) SARB Policy Paper (n 5) 4; s 14 of the SARB Act.

\(^{35}\) SARB Policy Paper (n 5) 4.

\(^{36}\) SARB Policy Paper (n 5) 4; De Mink (n 20) 3.

\(^{37}\) SARB Policy Paper (n 5) 5.


\(^{39}\) SARB Policy Paper (n 5) 5.

\(^{40}\) SARB Policy Paper (n 5) 5.

\(^{41}\) SARB Policy Paper (n 5) 5.

\(^{42}\) SARB Policy Paper (n 5) 6; De Mink (n 20) 3; Govender (n 21) 2.

\(^{43}\) SARB Policy Paper (n 5) 5; De Mink (n 20) 1.

\(^{44}\) De Mink (n 20) 3; Nieman (n 27) 1992.

\(^{45}\) SARB Policy Paper (n 5) 5; De Mink (n 20) 1.

\(^{46}\) SARB Policy Paper (n 5) 10.
a. fraudulent Bitcoin transactions being irreversible without legal recourse for the Bitcoin holder, in cases where the incorrect amount of Bitcoins are transferred or where there is a delay in implementing a transaction;\footnote{SARB Policy Paper (n 5) 10.}

b. no insurance protection to Bitcoin holders when Bitcoin wallets becoming inaccessible;\footnote{SARB Policy Paper (n 5) 10.}

c. no legal recourse to Bitcoin holders and end users, when a business ceases to exist and has committed itself to providing liquidity;\footnote{SARB Policy Paper (n 5) 7; Nieman (n 27) 1989.} and

d. that the law will not be subjecting Bitcoin to any freezing or seizure actions.\footnote{SARB Policy Paper (n 5) 7; Nieman (n 27) 1990.}

While the SARB does not regulate virtual currencies, it reserves the right to change its position.\footnote{SARB Policy Paper (n 5) 13.} Nieman notes that National Treasury confirms a lack of regulatory intervention in the User Alert.\footnote{Nieman (n 27) 1991.}

4.2 Consultation Paper and 2020 Position Paper

IFWG was established in 2016, for purposes of understanding financial technology (fintech) and its regulatory impact on the economy, including the financial sector.\footnote{Consultation Paper (n 6) 5.} IFWG then formed CARWG, to study crypto assets.\footnote{Consultation Paper (n 6) 5.}

The Consultation Paper recognises that, with the rise of crypto assets, there is a need to develop regulations and policies, as they do not fit within our existing legal regime.\footnote{Consultation Paper (n 6) 5.} This is attributable to, \textit{inter alia}, the lack of a universally accepted definition for crypto assets.
While cryptocurrencies are not a recognised form of legal tender, the Consultation Paper acknowledges that it may perform functions similar to traditional currencies, securities and commodities. The proposed definition for crypto assets, in the Consultation Paper is as follows:

“Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralised entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange, and/or unit of account and/or store of value within a community of crypto asset users.”

The Consultation Paper identifies the need to regulate crypto assets, as there is no unified approach in regulating these assets. In countries where crypto assets are heavily regulated, there is a risk of users being inclined to operate within jurisdictions which have little or no regulation of these assets in place. It is, however, difficult to regulate these assets effectively, due to the anonymity of the transactions.

The Consultation Paper also suggests a three-pronged approach to developing a regulatory framework:

a. **Crypto asset service providers (CASPs) to be registered.** The aim of registering CASPs is to assess those involved in crypto asset markets. The Consultation Paper noted that the SARB was supposed to publish a policy paper in 2019 in relation to the registration process, which should have been implemented in early 2019. This policy paper, referred to as the 2020 Position Paper, is an extension of the Consultation Paper, which proposes the legal parameters within which crypto assets can operate, and the necessary regulatory changes which are required in order for
these parameters to be implemented. The 2020 Position Paper provides a list of 30 recommendations which either aim to accommodate crypto assets within the existing framework or which strives to include regulatory safeguards. The salient recommendations inter alia include:

i. **CASPs be regulated**: Those CASPs engaging in trading platforms, issuing tokens, crypto asset funds or derivative services, digital wallets or custodial services in relation thereto, should be regulated.66

ii. **CASPs as accountable institutions**: CASPs should be considered accountable institutions as contemplated in the Financial Intelligence Centre Act 38 of 2001 (FICA). This will impose a statutory duty on CASPs to adhere to the relevant anti-money laundering and prevention of financing of terrorism regulations contained therein. It will impose further duties in relation to risk management and compliance in terms of FICA. CASPs will be forced to comply with the relevant “know your customer” checks and to conduct the necessary due diligences on their clients and monitor suspicious activities.70

iii. **Status of crypto assets**: It is still recommended that crypto assets do not constitute legal tender or E-money.71

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65 2020 Position Paper (n 64) 23.

66 2020 Position Paper (n 64) 24; Govender (n 64); IFWIG Media Statement (n 64).

67 2020 Position Paper (n 64) 24; Govender (n 64); IFWIG Media Statement (n 64).

68 2020 Position Paper (n 64) 25.

69 2020 Position Paper (n 64) 25.

70 2020 Position Paper (n 64) 25; Govender (n 64); IFWIG Media Statement (n 64).

71 2020 Position Paper (n 64) 26.
iv. **Crypto assets services recognised as financial services:** The 2020 Position Paper recommends that CASPs be recognised as financial services in terms of the Financial Sector Regulation Act\(^ {72} \) and that it should be a licenced activity in terms of the Conduct of Financial Institutions Bill.\(^ {73} \)

IFWG’s proposed definition of crypto assets is:

> “…a digital representation of value that is not issued by a central bank, but is traded, transferred and stored electronically by natural and legal persons for the purpose of payment, investment and other forms of utility, and applies cryptography techniques in the underlying technology.”\(^ {74} \)

The term “crypto asset” is preferred over “cryptocurrency”, as it is more generic and all-encompassing in terms of the potential functions of crypto assets.\(^ {75} \)

The 2020 Position Paper is still a work in progress. Upon conclusion of the consultation process, a final position paper will be released.\(^ {76} \)

b. **Implementation of new regulatory requirements or amendments to existing regulations:**\(^ {77} \) Once the registration phase is complete, the regulatory requirements will be reviewed to ascertain if the current legal framework suffices, or whether it is necessary to initiate amendments to the existing regulations;\(^ {78} \) and

c. **Assessment of regulatory actions implemented:**\(^ {79} \) This phase will assess if the regulatory changes have met the objectives set out in the Consultation Paper which includes, *inter alia*, promoting technological advancement, preventing tax evasion, money laundering, financing of terrorism and circumventing exchange control regulations, promoting consumer/investor protection and reducing regulatory loopholes.\(^ {80} \)

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\(^{72}\) 9 of 2017.
\(^{73}\) 2020 Position Paper (n 64) 27.
\(^{74}\) 2020 Position Paper (n 64) 8.
\(^{75}\) 2020 Position Paper (n 64) 8; Govender (n 64); IFWIG Media Statement (n 64).
\(^{76}\) 2020 Position Paper (n 64) 32.
\(^{77}\) Consultation Paper (n 6) 26.
\(^{78}\) Consultation Paper (n 6) 26.
\(^{79}\) Consultation Paper (n 6) 20.
\(^{80}\) Consultation Paper (n 6) 20.
5 THE LEGAL CHARACTERISATION OF CRYPTOCURRENCIES

This chapter evaluates jurisdictions such as Russia, the Netherlands, the United States of America, the United Kingdom and New Zealand. Singapore is also analysed within the context of characterising cryptocurrency as property. A popular Japanese case, in relation to determining the valuation date of cryptocurrencies, is highlighted, for purposes of insolvency law.

These jurisdictions were selected as information is readily available from articles, case law and case notes. This study undertakes an international comparison to determine if there is any case law in these jurisdictions that could be used to improve South Africa’s legal framework. This mini dissertation does not assert to be a comprehensive analysis of all information contained in the selected jurisdictions, or any other jurisdictions, due to practical considerations. This study also in no way claims to establish the legal characterisation of cryptocurrencies, but serves to analyse the different international responses thereto.

5.1 Money/Currency

Money fulfils an economic function within society. The INSOL Special Report notes that money can be defined with reference to its ability to maintain value (i.e. store of value), be used as a medium of exchange for goods and services and be used as a unit of account.

This chapter explores the international responses as to whether cryptocurrencies constitute money/currency.

5.1.1 Russia

In terms of the Russian Constitution, the Rouble is the only recognised legal tender. Any other “currency surrogates”, such as cryptocurrencies, are likely to be prohibited.

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81 INSOL Special Report (n 14) 11.
82 INSOL Special Report (n 14) 11.
84 Dmitriev et al (n 83) 8.
5.1.2 European member states

Brown notes that the European member states have, in terms of their financial regulations, elected to classify cryptocurrencies as currencies. The foundation of this decision is based on the case of Skatterverket v David Hedqvist, where the court held that Article 135(1)(e) of the VAT Directive, dealing with VAT exemptions for traditional currencies, applies to cryptocurrencies in the case of exchange transactions, as such transaction constitutes “without being legal tender – a means of payment accepted by the parties to a transaction, and vice versa”.

In the Netherlands, like in Russia, cryptocurrencies are not recognised as legal tender. The Dutch Central Bank has based its decision not to consider cryptocurrency as money on the high price volatility associated therewith and because cryptocurrencies do not adequately meet the uses of money as set out in the economic theory, “that money should be a unit of account, a store of value and a medium of exchange”.

5.1.3 United States of America

United States of America v Anthony R Ulbricht et al Defendants, dealt with a platform called Silk Road, an online black market, wherein payments took place in Bitcoin. The court dismissed the argument that Bitcoin does not constitute money as it can be exchanged for legal tender.

The case of Securities Exchange Commission v Trendon T Shavers and Bitcoin Savings and Trust, dealt with a Bitcoin ponzi scheme, wherein the judge held that “it is clear that the Bitcoin can be used as money…[I]t can also be exchanged for conventional currencies…”.

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85 Brown and Moller “Cryptocurrency issues in an insolvency context” 2018 Corporate Rescue and Insolvency 139.
86 Case C-264/14.
87 Brown and Moller (n 85).
89 Godlieb et al (n 88).
92 Case number 4:13-CV-416 (hereinafter referred to as the Shavers case).
In United States v Faiella,\(^\text{94}\) the court held that, “‘money’ in ordinary parlance means ‘something generally accepted as a medium of exchange, a measure of value, or a means of payment’”.\(^\text{95}\) The court also referred to the Shavers case and found that Bitcoin qualified as money.\(^\text{96}\)

The case of United States v Murgio,\(^\text{97}\) dealt with a Bitcoin exchange, Coin.mix, which operated illegally under the guise of a “Collectables Club”. This case indicated that, where Bitcoins are used as a method of payment or converted into traditional currency to pay for items, it will be treated as currency.\(^\text{98}\)

5.1.4 United Kingdom

The United Kingdom does not recognise cryptocurrencies as money or the equivalent of fiat money.\(^\text{99}\) Davis notes that Her Majesty’s Treasury is to determine whether certain cryptoassets, which do not fall within the ambit of the existing financial regulatory framework, be amended to include cryptoassets, such as Bitcoin.\(^\text{100}\)

The Bank of England notes that cryptocurrencies do not adequately satisfy the economic functions of money due to its price volatility.\(^\text{101}\) It fails to perform as a store of value.\(^\text{102}\) It noted that while some people may accept cryptocurrencies as a method of payment, “meeting these economic definitions does not necessarily imply that an asset will be regarded as money for legal or regulatory purposes”.\(^\text{103}\)

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\(^{95}\) United States v Faiella (n 93) 545; Consultation Paper (n 6) 20.

\(^{96}\) United States v Faiella (n 93) 545.

\(^{97}\) 15-CR-769 (AJN) SDNY (2016).

\(^{98}\) Brown and Moller (n 85).


\(^{100}\) Davis et al (n 99).

\(^{101}\) INSOL Special Report (n 14) 11.

\(^{102}\) INSOL Special Report (n 14) 11.

\(^{103}\) INSOL Special Report (n 14) 12.
5.1.5 New Zealand

New Zealand has undertaken a more “hands-off approach”. Its Reserve Bank has issued the following statement,

“The Reserve Bank of New Zealand Act prohibits the issuance of notes and coins by any party other than the Reserve Bank. However, the Reserve Bank has no direct power over any form of alternative payment mediums. Non-banks do not need our approval for schemes that involve the storage and/or transfer of value (such as ‘bitcoin’) – so long as they do not involve the issuance of physical currency (notes and coins).”

5.2 Commodity

There is support for the idea that cryptocurrencies fall within the classification of a commodity. The INSOL Special Report defines a commodity as “a good that is used in commerce that is interchangeable with other goods”.

The case and statements below represent the international responses thereto.

5.2.1 United States of America

The case of Commodity Futures Trading Commission (CFTC) v McDonnell, is the first United States case to reinforce the CFTC’s position, that cryptocurrencies are commodities. This case dealt with a civil enforcement action against McDonnell, relating to fraud in connection with purchases and trading of Bitcoin and Litecoin and the CFTC’s authority to govern cryptocurrencies as a commodity. The court held, inter alia, that virtual currencies store value, which is influenced by supply and demand, and can therefore be viewed as a commodity. The court also noted that the Commodities Exchange Act should be interpreted liberally to allow for “broad market protection”.

105 Liedel (n 104).
108 Bergham (n 107).
109 Johnston (n 107) 154.
110 Ryznar (n 22) 155.
Johnston notes that this case recognises the CFTC’s authority and ongoing efforts to prevent abusive practices in the virtual currencies derivative markets.  

5.2.2 United Kingdom

In the 2018 Financial Policy Committee, issued by the Bank of England, it was noted that the value of cryptocurrencies are too volatile to be used as a currency or a store value and constitute “an inefficient media of exchange”. Cryptocurrencies should be considered as assets, however, “they establish no claim on any future income streams or collateral. They have no intrinsic value beyond their currently limited potential to be adopted as money in the future, and hence could prove worthless”.  

5.2.3 New Zealand

As the use of Bitcoin in New Zealand is low, its Reserve Bank views Bitcoin as “speculative investment commodities”, instead of a means of payment. Sims notes that people are using Bitcoin as a method of payment, mostly for cross border transactions, without the knowledge of the Reserve Bank of New Zealand.

5.3 Property

Another possible classification of cryptocurrencies, is property. Considering that cryptocurrencies are non-tangible, proving proprietary rights can be challenging. The cases below, depict how the various jurisdictions have dealt with these issues.

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111 Johnston (n 107).
113 Draper (n 112).
115 Sims et al (n 114).
The case of Tsarkov,116 dealt with insolvency of an individual. An insolvency practitioner approached the court to, *inter alia*, declare the Bitcoin contained in the crypto wallet, which was alleged to be owned by Mr Tsarkov, as an asset to form part of the insolvent estate for distribution.117 While the court of first instance did not recognise Bitcoin as an asset, the Appellate Court held that, in terms of article 128 of the Russian Civil Code, property rights include rights to “other assets”.118 A broad interpretation of the phrase “other assets” was justified in light of the development of technology.119 The court also referred to the draft legislation proposed by the Russian Ministry of Finance, which defined cryptocurrency therein.120 The Appellate Court took the stance that any property which has economic value, should form part of the insolvent estate.121 There were no challenges as to whether Mr Tsarkov owned the Bitcoin.122 The Appellate Court found that Mr Tsarkov could exercise rights over the Bitcoin which were analogous to those rights of ownership and ordered that Mr Tsarkov provide the private key to the insolvency practitioner.123

Jeffery notes that while the court of first instance refused to recognise Bitcoin as an asset, the Appellate Court correctly identified that it is capable of proprietary rights and that the court will have to adopt a flexible approach in dealing with these legal challenges.124

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116 *In Re Tsarkov*, Commercial Court of Moscow (Russia), Case number A40-124668/17-71-160 and Case No A40-1204668/2017 (hereinafter referred to as the *Tsarkov* case).

117 Kokorin (“When Bitcoin meets insolvency” (n 8)) 2; Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)) 2; Jeffrey (n 8).

118 Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)) 2; Jeffrey (n 8) 2.

119 Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)) 2; Jeffrey (n 8) 2.

120 Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)) 2; Jeffrey (n 8) 2.


122 See (n 117) above.

123 Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)) 3; Jeffrey (n 8) 2.

124 Jeffrey (n 8) 2.
5.3.2 Netherlands

In a 2018 judgment, involving Koinz Trading B.V. (Koinz Trading), Koinz Trading entered into a contract with a certain individual (creditor) in terms of which mining proceeds were to be paid in Bitcoin, however, Koinz Trading failed to transfer the mining proceeds to the creditor, notwithstanding a court order. Subsequently, Mr Vries, on behalf of the creditor, filed for Koinz Trading’s insolvency.

The court held that the failure to transfer the Bitcoins sufficed, for purposes of article 1 of the Dutch Bankruptcy Act, to initiate insolvency proceedings. The court reasoned that Bitcoin has characteristics which are analogous to proprietary rights. This is because Bitcoin has a value which is capable of being transferred from one Bitcoin wallet to another. The court held that the failure to pay the Bitcoins can be used to determine whether a company is insolvent.

It is noted that “payment”, within the context of the Dutch Bankruptcy Act, has a broad meaning, which not only includes monetary payments, but also discharging commitments. The court recognised that the failure to transfer Bitcoins to a creditor could initiate insolvency proceedings, as in terms of the Dutch Bankruptcy Act, the word “payment” also includes discharging commitments.

Kokorin notes that Industry 4.0 has allowed “for the creation of novel types of intangible assets with their own values and characteristics”, such as Bitcoin. It would appear that in jurisdictions such as Russia and the Netherlands, courts have demonstrated a willingness to characterise Bitcoin as property.

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125 See (n 117) above.
126 See (n 117) above.
127 See (n 117) above; Pascoe (n 121) 2.
128 See (n 117) above; Pascoe (n 121) 3.
129 See (n 117) above; Pascoe (n 121) 3.
5.3.3 Singapore

Quoine Pte Limited v B2C2 Limited (B2C2),\(^{131}\) dealt with a cryptocurrency exchange (Quoine) which unilaterally reversed a trade that favoured B2C2.\(^{132}\) Quoine conceded that the cryptocurrency was property.\(^{133}\) Thorley J held that even though cryptocurrency is not recognised as legal tender, cryptocurrencies have characteristics of intangible property “as being an identifiable thing of value”.\(^{134}\) In identifying cryptocurrencies as property, Thorley J refers to requirements set out in National Provincial Bank v Ainsworth,\(^{135}\) which Lord Hodson held as follows:

“Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.”\(^{136}\)

Babie notes that Thorley J does not analyse these requirements, but simply states outright that cryptocurrencies satisfy them.\(^{137}\)

5.3.4 United Kingdom

5.3.4.1 Robertson v Persons Unknown\(^{138}\)

This case dealt with an application for an asset preservation order and a bankers trust order, in relation to Bitcoins which were subjected to “spear phishing attack”.\(^{139}\) Mr Robertson, a cryptocurrency trader (the claimant), was hacked in the middle of transferring 100 Bitcoins, where a majority were re-directed into another wallet at Coinbase UK Limited and the rest to other Bitcoin exchanges.\(^{140}\)

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\(^{131}\) 2019 SGHC I 3 (hereinafter referred to as the Quoine case).

\(^{132}\) Quoine case (n 131) 2.


\(^{134}\) Quoine case (n 131) 57; Babie et al (n 133).

\(^{135}\) 1965 2 All ER 472 (hereinafter referred to as the Ainsworth case).

\(^{136}\) Ainsworth case (n 135) 494.

\(^{137}\) Babie et al (n 133) 6.

\(^{138}\) Case number 2019-000444 (hereinafter referred to as the Robertson case).

\(^{139}\) Jones “A Bitcoin first? Stewarts obtain asset preservation order over cryptocurrency (Robert v Persons Unknown)” 2019 LexisPSL News Analysis 1.

\(^{140}\) Jones (n 139).
In terms of English law, personal property can be categorised into a “chose in possession” whereby one could take actual physical possession of the property and a “chose in action” whereby one would have to obtain the property right by legal action.141

Since Bitcoin does not fall within these categories, the claimant relied on foreign case law, one of these cases being the Quoine case. Justice Moulder noted that Bitcoin is a “hybrid ‘virtual chose in possession’. That is, intangible property with the essential characteristics of a chose in possession”.142 Justice Moulder granted the orders that were requested, and, while not final, it does indicate a willingness of the English courts to consider Bitcoin as a “hybrid ‘virtual chose in possession’”.143

5.3.4.2 AA v Persons Unknown144

In this case, an insurance company (the Company) fell victim to a cyber-attack as it could not access its IT systems unless it transferred 109.25 Bitcoins to the cyber attackers.145 The Company’s insurer employed consultants who managed to link the Bitcoin to Bitfinex, a cryptoasset exchange.146 The insurers approached the court for a proprietary injunction to reclaim the remaining Bitcoins.147

Central to granting the order, was whether or not Bitcoin could be considered as property.148 Like in the Robertson case, Bryan J identified the two categories of property and encountered the same issue as Justice Moulder. Bryan J then turned to the UK Jurisdiction Taskforce’s legal statement on cryptoassets and smart contracts, which refers to novel kinds of intangible assets, and concluded that while it may not fall strictly within the category of a “chose in action”, Bitcoin should not be barred from being treated as property.149 Bryan J noted that Bitcoin satisfies the requirements for property contained in the Ainsworth case.150 The order was subsequently granted.

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141 Jones (n 139).
142 Jones (n 139) 2.
143 Babie et al (n 133).
144 Re Bitcoin 2019 (EWHC) 3556 (Comm) (hereinafter referred to as the AA case).
146 Baker et al (n 145).
147 Baker et al (n 145).
148 Baker et al (n 145).
149 Baker et al (n 145).
150 Jones (n 139).
5.3.5 New Zealand

Babie submits that the case of *Ruscoe and Moore v Cryptopia Limited (in liquidation)*,\(^{151}\) provides “the most recent and most authoritative common law statement”\(^{152}\) in relation to whether cryptocurrencies constitute property.\(^{153}\) Cryptopia Limited (Cryptopia), an international cryptocurrency exchange, was hacked and consequently went into liquidation.\(^{154}\) The liquidators valued the accounts of the various holders of the cryptoassets at NZD$170 000 000 and applied to court to determine, *inter alia*, whether these cryptoassets should be treated as an asset within Cryptopia’s insolvent estate.\(^{155}\) Gendall J referred to the *Quoine* case, the *AA* case, and analysed the property requirements set out in the *Ainsworth* case.\(^{156}\)

Gendall J satisfied the first property requirement of the *Ainsworth* case by linking the public key to the numbered bank accounts, and found that the cryptocurrencies were identifiable.

In relation to the second requirement, Gendall J held that it is present when one can exercise control over the thing.\(^{157}\) This was evidenced through the private key, which was generated every time a transfer took place.\(^{158}\) These private keys were only accessible to Cryptopia.\(^{159}\) The ability of Cryptopia to exclude others from exercising control over the cryptocurrencies, was a stronger indicator of a proprietary right than the right to use the cryptocurrencies.\(^{160}\)

As far as the cryptocurrencies were capable of assumption by third parties, Gendall J held that the rights of those who held cryptocurrencies were “subject to remedies for interference”.\(^{161}\)

Lastly, regarding the fourth requirement, the blockchain technology and the digital ledger, established a degree of permanence before the cryptocurrencies could be spent and that fraudulent or criminal activity in relation thereto did not detract from the stability thereof.\(^{162}\)

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\(^{151}\) 2020 (NZHC) 728 (hereinafter referred to as the *Ruscoe* case).

\(^{152}\) Babie *et al* (n 133) 4.

\(^{153}\) Babie *et al* (n 133) 4.

\(^{154}\) Babie *et al* (n 133) 4.

\(^{155}\) Babie *et al* (n 133) 4.

\(^{156}\) Babie *et al* (n 133) 7.

\(^{157}\) Babie *et al* (n 133) 8.

\(^{158}\) Babie *et al* (n 133) 8.

\(^{159}\) Babie *et al* (n 133) 8.

\(^{160}\) Babie *et al* (n 133) 8.

\(^{161}\) Babie *et al* (n 133) 8.

\(^{162}\) Babie *et al* (n 133) 8.
As to whether cryptocurrencies should be classified as a “chose in possession” or “chose in action”, Gendall J held that these categories did not bar cryptocurrencies from being classified as property, but simply created two categories of property within which all property should be classified and consequently classified cryptocurrencies as a “chose in action”. This is because various other types of intangible property such as shares and licences can be recognised through enforcement of rights but do not qualify as “chooses in action”.

5.4 Cryptocurrency valuation date for purposes of insolvency law

Central to an insolvency practitioner’s general powers and duties (as more fully explained under chapter 6), is the duty to realise the assets within the insolvent company's estate. If that asset is a cryptocurrency, it can pose some challenges to an insolvency practitioner. The issue therefore is: due to its volatile nature, at what point in time should an insolvency practitioner convert cryptocurrency?

A practical example is dealt with in the Japanese case of MtGox (hereinafter referred to as the MtGox case). It dealt with a digital currency exchange which the Tokyo District Court ordered to be wound up, due to the hacking of its system and theft of 744 800 Bitcoins, equating to ±USD473 000 000. Soon after the trustees appointment, the trustee applied for Chapter 15 recognition proceedings of the United States Bankruptcy Code in the United States and analogous proceedings in Canada, in order to recognise the bankruptcy proceedings which were initiated in Japan “as a foreign main proceeding”.

In terms of Japanese bankruptcy law, the creditors’ claims in relation to Bitcoins (and all assets) had to be valued at the date the bankruptcy proceedings commenced. The trustee valued the Bitcoins, in light of these regulations and sought the direction of the court in

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163 Babie et al (n 133) 9.
164 Babie et al (n 133) 9.
165 SARB Policy Paper (n 5) 3.
166 See (n 11) above.
167 Pascoe (n 121) 3; Pascoe “Bankruptcy, recognition proceedings and recoveries in a cryptocurrency world” 2018 6 https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=dd394ab4-b3d7-4f79-9888-67fba0a1e7f7 (10-10-2019).
168 Pascoe (n 121) 3 and see Pascoe (“Bankruptcy, recognition proceedings and recoveries in a cryptocurrency world” (n 167)) 7.
relation to the method and timing of the sale of the Bitcoins, for purposes of converting it into fiat currency and distributing it to the creditors.\footnote{Molinaro \textit{et al} (n 169).}

Due to the volatile nature of Bitcoins, its value significantly increased from 2014 (when bankruptcy proceedings commenced) to when the trustee decided to implement the sale (December 2017 – February 2018).\footnote{Pascoe (n 121) 3.} The creditors consequently petitioned the court so that the present value of the Bitcoins could be used, which had the effect of converting the bankruptcy proceedings into civil rehabilitation proceedings.\footnote{Pascoe (n 121) 3.} These proceedings allows for distributions to be made in Bitcoins, instead of converting it into fiat currency, which would need to be valued at the date on which bankruptcy proceedings commenced.\footnote{Molinaro \textit{et al} (n 169) 2.}

Therefore, the civil rehabilitation proceedings will be more advantageous to creditors.

5.5 \textbf{Challenges with anonymity of transactions}

It is almost impossible for insolvency practitioners to trace the identity of the person from a Bitcoin transaction without the co-operation of the Bitcoin holder. Another problem which they will encounter, in addition to identifying the owner (as can be seen from the case law discussed above), is the location of the Bitcoin. Due to the lack of regulation, there is no readily available public register which an insolvency practitioner can inspect to identify the holders of cryptocurrencies, and its location cannot therefore be identified without the aid of specialist investigators or the holders.\footnote{Draper (n 112) 2.} This may result in costly investigations which may or may not be beneficial to the creditors.\footnote{Draper (n 112) 2.}

This problem is already rearing its head in the United States. Section 541 of the US Bankruptcy Code, which deals with property of a bankrupt estate, includes “all legal or equitable interests of the debtor in property as of the commencement of the case”.\footnote{Haake “The bankruptcy estate and cryptocurrency” 2018 \textit{Westlaw Journal Bankruptcy} 2.} Deppert notes that the intention of Congress was to define property, as broadly as possible, to capture various types of property, so there is little doubt that Bitcoin will be included within this definition.\footnote{Deppert “Bitcoin and bankruptcy: putting the bits together” 2015 \textit{Emory Bankruptcy Developments Journal} 124 130.}

Section 727 of the Bankruptcy Code vests the courts with the power to grant a discharge order, which has the effect of barring creditors from bringing any actions against
the debtor. One of the grounds of disqualification for this order, is the concealment of property, which includes Bitcoin.\textsuperscript{178} This serves as an incentive to disclose the location of a debtor’s cryptocurrency. While this is only relevant to natural persons, the same issue of identity of the holder and location of the Bitcoin will exist when it comes to juristic persons.

In the case of \textit{In Re: Jackson}, the debtor was rumoured to be in possession of cryptocurrency which had not been disclosed.\textsuperscript{179} Consequently, the debtor had to file a declaration which explained that the Bitcoin was owned by an independent third party.\textsuperscript{180} This case highlights that a trustee should always investigate the affairs of an individual, before the issue is raised by other interested parties.\textsuperscript{181} Likewise, a trustee must thoroughly investigate the affairs of a juristic person, and enquire about the holding of cryptocurrencies.

6 \hspace{0.5cm} \textbf{GENERAL POWERS AND DUTIES OF INSOLVENCY PRACTITIONERS}

This chapter looks at the general powers and duties of an insolvency practitioner specifically within the context of companies. The summary below, is not intended to be an exhaustive overview of all the powers and duties of an insolvency practitioner as contained in the 1973 Act, but a summary of some of those general powers and duties which would be affected by the development of cryptocurrencies due to Industry 4.0.

Under South African law, an insolvency practitioner has certain mandatory statutory duties to, \textit{inter alia}, realise the moveable as well as immoveable assets and property of the company, to apply the assets and property toward satisfying creditor claims, winding up costs and to distribute the balance thereof towards those who are entitled thereto.\textsuperscript{182} An insolvency practitioner has a duty to the \textit{concursus creditorium} to place the them in the most advantageous position.\textsuperscript{183} He also has a duty toward the \textit{concursus creditorium} to place the them in the most advantageous position.\textsuperscript{184} When an

\textsuperscript{178} s 727(2) – (4) of the US Bankruptcy Code.
\textsuperscript{179} Haake (n 176).
\textsuperscript{180} Haake (n 176).
\textsuperscript{181} Haake (n 176).
\textsuperscript{183} Blackman, Jooste, Everingham, Yeats, Cassim, de la Harpe, Larkin and Rademeyer \textit{Commentary on the Companies Act} (2012) 376.
\textsuperscript{184} \textit{Commissioner, South African Revenue Service \textit{v} Stand Two Nine Nought Wynberg (Pty) Ltd and Others} 2005 5 SA 583 (SCA) 14 and applied in \textit{Commissioner, South African Revenue Service \textit{v} Pieters and Others} 2020 1 SA 22 (SCA).
insolvency practitioner is appointed, he stands in a fiduciary relationship, which is threefold, with the company, its shareholders/members and the company’s creditors.\textsuperscript{185}

For an insolvency practitioner to fulfil his general duties contained in section 391 of the 1973 Act, he must exercise his ancillary power of acquainting himself with and investigating the affairs of the insolvent company. The dictum from the case of \textit{Ex Parte Clifford Holmes Proprietary Limited},\textsuperscript{186} highlights the importance of proper investigation by insolvency practitioners of an insolvent company. Stegmann J held that an insolvency practitioner should “with great thoroughness… probe the insolvent company’s records”.\textsuperscript{187}

Where there is a winding up by the court, an insolvency practitioner, who is an officer of the court, has a duty to investigate the conduct of the company prior to its insolvency.\textsuperscript{188} He must investigate contraventions of the 1973 Act and the Companies Act 73 of 2008 (2008 Act), and initiate civil or criminal proceedings as applicable.\textsuperscript{189} He is also bound to exercise his powers and perform his duties within the confines of the 1973 Act and cannot exercise any discretion thereof.\textsuperscript{190} If he discovers during the course of his investigation that a transaction is in fact impeachable, he must, with the approval of the creditors, set aside the offending transaction.\textsuperscript{191}

Navsa JA noted that when an insolvency practitioner carries out his duties, he must act with the requisite care, skill and diligence, and when he is uncertain, he must obtain instructions from the Master, creditors or members/shareholders.\textsuperscript{192}

An insolvency practitioner has a duty to keep a record of all moneys, goods and books received by him on behalf of the insolvent company, which shall be made available for inspection to the Master, at any time.\textsuperscript{193} Section 402 of the 1973 Act, also details the contents of the report which an insolvency practitioner must provide at a general meeting of creditors, within 3 months of his appointment, save in circumstances of voluntary winding up.

\textsuperscript{185} Blackman \textit{et al} (n 183) 380; Meskin \textit{et al Insolvency Law} (2019) par 4.52 and James \textit{v Magistrate Wynberg} 1995 1 SA 1 (C) 13.
\textsuperscript{186} 1989 4 SA 610 (W) 612H 613C and applied in Kebble \textit{v Gainsford and Others NNO} 2010 1 SA 561 (GSJ).
\textsuperscript{187} See (n 185) above.
\textsuperscript{188} s 400 of the 1973 Act.
\textsuperscript{189} s 400 - 401 of the 1973 Act.
\textsuperscript{190} s 388, s 387(1) - (2) of the 1973 Act read with s 339 and s 53(3) Insolvency Act 25 of 1936; Meskin \textit{et al} (n 185); Meskin \textit{Henochsberg on the Companies Act 61 of 1973} (2011-) s 391.
\textsuperscript{191} s 386(4) of the 1974 Act.
\textsuperscript{192} \textit{Standard Bank of South Africa v The Master of the High Court and Others} 2010 4 SA 405 (SCA) 427; s 387(1) and s 388(1) of the 1973 Act.
\textsuperscript{193} s 393(1) - s 393(2) of the 1973 Act.
Other powers of an insolvency practitioner include, *inter alia*, selling any property of the insolvent company by way of public auction, tender or private treaty and giving delivery thereof.\(^{194}\)

### 6.1 Claw back powers of insolvency practitioners

An insolvency practitioner is vested with the power to recover property or the proceeds which a company alienated before it was insolvent.\(^{195}\) In these circumstances, an insolvency practitioner may approach the court to set aside such an impeachable disposition and in certain situations, treat such a disposition as void.\(^{196}\) The ability of an insolvency practitioner to recover the property or the proceeds, is known as his “claw back powers”.

The anonymity of Bitcoin transactions, inevitably have an impact on an insolvency practitioner’s claw back powers, which is ancillary to his duty to realise the company’s assets.\(^{197}\) One of the characterisations of a Bitcoin transaction is the fact that it is irreversible.\(^{198}\) Once again, an insolvency practitioner could employ the expertise of a tracing company, to track impeachable transactions, however, the costs involved in employing that service, would need to be weighed against the value of the cryptocurrencies.\(^{199}\) To understand the nature of the transaction, an insolvency practitioner would probably require the assistance of the insolvent company.\(^{200}\)

The following United States case, is commonly referred to when dealing with an insolvency practitioner's claw back powers, even though the court did not make a determination in relation thereto. This is the case of *Hashfast Technologies LLC v Marc A. Lowe*,\(^{201}\) in terms of which a bankruptcy trustee sought to claw back a transfer of 3000 Bitcoins, which had exponentially appreciated in value, at the present day value.\(^{202}\) The reasoning the trustee used for asking for the present day value, was that the Bitcoin should be treated as a commodity.\(^{203}\) The transferee countered by stating that the Bitcoins should be treated the

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\(^{194}\) s 386(4)(h) of the 1973 Act.

\(^{195}\) s 423 of the 1973 Act; s 32(3) of the Insolvency Act; Sharrock, van der Linde and Smith *Hockley's Insolvency Law* 2012 138.

\(^{196}\) s 341 of the 1973 Act; s 26, s 29, s 30, s 31 of the Insolvency Act.

\(^{197}\) Blackman *et al* (n 183) 377.

\(^{198}\) SARB Policy Paper (n 5) 5; De Mink (n 20) 1.

\(^{199}\) Draper (n 112) 2.

\(^{200}\) Draper (n 112) 2.

\(^{201}\) Case number 14-30725DM (hereinafter referred to as the *Hashfast case*).

\(^{202}\) Haake (n 176) 3.

\(^{203}\) Haake (n 176) 3.
same as United State Dollars, which would mean that the Bitcoins would have held the transfer date value, should the transferee be held liable for the transfer of the Bitcoins.\textsuperscript{204} The Court did not decide whether Bitcoin constituted a commodity or a currency, instead it just stated that it is not United States Dollars.\textsuperscript{205} It also did not decide whether the Bitcoin should be returned or, if it is not returned, at what value it would be calculated, until such time the trustee was successful in an application for avoidance.\textsuperscript{206}

7 RECOMMENDATIONS AND CONCLUSION

As seen from the Consultation Paper, South Africa’s regulations is still in its infancy, in relation to cryptoassets. While it has mapped a way forward in terms of the development and implementation of policy and regulations, this paper is not yet binding. If implemented, this change is not imminent, but is a starting point for South Africa. The 2020 Position Paper sheds some light on how these regulatory changes and safeguards are to be implemented, however, a final position paper is still to be published, after consideration of the comments thereon.\textsuperscript{207}

South Africa can also learn from its international counterparts. In terms of the legal characterisation of cryptocurrencies and the treatment thereof, similar to South Africa, many jurisdictions do not recognise cryptocurrencies as a form of legal tender.\textsuperscript{208} One of the reasons for this is that cryptocurrencies do not adequately satisfy the economic functions of money due to its price volatility. The United States of America seems to favour the interpretation that Bitcoin/cryptocurrency constitutes money/currency in cases of fraud or money laundering.

The most distinct position as to whether Bitcoin can be classified as a commodity, has been recorded in the United States of America, in the \textit{CFTC} case. The court noted that virtual currencies store value, which is influenced by supply and demand, and therefore can be viewed as a commodity.\textsuperscript{209} In comparison, the Bank of England views cryptocurrencies as

\begin{footnotes}{\scriptsize\textsuperscript{204} Molinaro \textit{et al} (n 169) 2.  
\textsuperscript{205} Molinaro \textit{et al} (n 169) 2.  
\textsuperscript{206} Molinaro \textit{et al} (n 169) 2.  
\textsuperscript{207} 2020 Position Paper (n 64) 32.  
\textsuperscript{208} Dmitriev \textit{et al} (n 83) 8; Brown and Moller (n 85); Godlieb \textit{et al} (n 88); Davis \textit{et al} (n 99); Liedel (n 104).  
\textsuperscript{209} Johnston (n 107) 154.}
too volatile to be used as a currency or a store value and constitute “an inefficient media of exchange”.210

In the Tsarkov case, the Russian court interpreted the words “other assets”, in terms of the Russian Civil Code, to include cryptoassets.211 The fact that the cryptoassets added value to the debtor’s estate, meant that it was considered part of the insolvent estate.212

In the Netherlands, the court recognised that the failure to transfer Bitcoins to a creditor could initiate insolvency proceedings, as in terms of the Dutch Bankruptcy Act the word “payment” also includes discharging commitments.213 It would appear that creditors are able to base their claims on cryptocurrencies, in the Netherlands. Under South African law, sections 344 and 346 of the 1973 Act allows creditors to initiate court proceedings, for the winding up of an insolvent company, when the company is, inter alia, unable to pay its debts. If South African courts follow suit, then the inability of a company to pay its debts could be given a broad interpretation to encompass the inability of a company to discharge a commitment, such as a failure to transfer Bitcoins to a creditor.

Courts should adopt a flexible approach to cater for Industry 4.0 and for the “novel types of intangible assets” such as Bitcoin.214 This flexible approach is also demonstrated in the Quoine case (Singapore).

In the Quoine case, cryptocurrencies were characterised as intangible property as it was seen as “an identifiable thing of value”.215 While Thorley J relied on the requirements of the Ainsworth case, Babie notes that Thorley J simply states that cryptocurrencies satisfy the requirements of property without any analysis thereof.216

In the United Kingdom, the Robertson case noted that Bitcoin is a “hybrid ‘virtual chose in possession’. That is, intangible property with the essential characteristics of a chose in possession”.217 In the AA case, Bryan J concluded that while Bitcoin may not fall strictly

210 Draper (n 112).
211 See (n 117) above.
212 See (n 117) above.
213 See (n 126) above; Pascoe (n 121) 3.
214 Jeffrey (n 8) 2; Kokorin (“When Bitcoin meets insolvency: Is Bitcoin property? Dutch and Russian responses” (n 8)) 1.
215 See (n 136) above.
216 Babie et al (n 133) 6.
217 Jones (n 139) 2.
within the category of a “chose in action”, and should not be barred from being treated as property.\textsuperscript{218}

Lastly, in New Zealand, in the \textit{Ruscoe} case, Gendall J analysed the requirements of the \textit{Ainsworth} case and found that cryptocurrencies satisfy each requirement. Gendall J held that cryptocurrencies constituted a “chose in action”, as various other types of intangible property, such as shares, are classified as such.\textsuperscript{219} Gendall J classified the cryptocurrency as a “chose in action”.\textsuperscript{220}

Babie notes that “property is not a static, but a fluid concept”.\textsuperscript{221} While the \textit{Ruscoe} case recognises novel types of property, in relation to the present circumstances, the concept may not be the same in the future and courts will have to determine if the thing in question constitutes a certain type of property.\textsuperscript{222}

The classification of cryptocurrency, within an insolvent estate, will impact the way in which an insolvency practitioner deals with same. For example, under the US Bankruptcy Code, Rochester notes that there are more protections in place for currencies than there are for commodities.\textsuperscript{223} Within the American context, if cryptocurrency is classified as currency, then where there’s a contract in place and cryptocurrency is being exchanged for fiat currency, or fiat currency of another country, then it is possible that such contract will be treated as a swap agreement, which is granted certain protections under US bankruptcy law.\textsuperscript{224} These protections \textit{inter alia} include that only fraudulent transfers made in terms of a swap agreement can be avoided and the moratorium, generally applicable during the course of bankruptcy proceedings, does not apply to the counterparty to the swap agreement. In comparison, if cryptocurrencies are characterised as commodities, then the US Bankruptcy Code only affords protection in relation to forward contracts.\textsuperscript{225}

\textsuperscript{218} Baker \textit{et al} (n 145).
\textsuperscript{219} Babie \textit{et al} (n 133) 9.
\textsuperscript{220} Babie \textit{et al} (n 133) 9.
\textsuperscript{221} Babie \textit{et al} (n 133) 11.
\textsuperscript{222} Babie \textit{et al} (n 133) 11.
\textsuperscript{224} Rochester \textit{et al} (n 223) 4.
\textsuperscript{225} Rochester \textit{et al} (n 223) 4.
If cryptocurrencies are to be classified as currency under South African law, and there is an exchange contract where cryptocurrencies are being converted into Rands, and property is therefore being disposed of, then such disposition could possibly be exempt in terms of section 35A or section 35B of the Insolvency Act.\textsuperscript{226} (Insolvency Act) provided that our existing laws are updated to cater for cryptocurrencies, as suggested by the Consultation Paper and as proposed by the 2020 Position Paper.\textsuperscript{227} Consequently, if cryptocurrencies are classified as property, and there’s a master agreement in place where the property is being disposed of in accordance with the requirements of sections 35A or 35B of the Insolvency Act, then an insolvency practitioner would not be able to claw back the disposal of the cryptocurrency, as this disposition is exempt in terms of the Insolvency Act.\textsuperscript{228}

There does not seem to be any particular protection for commodities under the South African Insolvency Act. If cryptocurrencies were to be classified as a commodity, an insolvency practitioner would be able to capture the appreciation of the cryptocurrency when he realises same for distribution to creditors.

Sarra notes that if Bitcoin constitutes property, a practical implication would be that the Bitcoin could be the subject of a security interest.\textsuperscript{229} Consequently, the holder of the security interest would be a secured creditor, which would have to be considered by an insolvency practitioner in terms of the ranking of creditors.\textsuperscript{230}

\textsuperscript{226} 25 of 1936 and Sharrock \textit{et al} Hockley’s \textit{Insolvency Law} (2012) 153. S 35A deals with transactions which are governed by the rules of exchange. The term “market infrastructure” shall bear the same meaning in s 35A(1) of the Insolvency Act. S 35A(2) of the Insolvency Act states “if upon the sequestration of an estate of such market participant in respect of any transaction entered into prior to sequestration the obligations of a market participant have not been fulfilled, the market infrastructure in respect of any obligation owed to it, or any other market participant in respect of obligations owed to such market participant, shall in accordance with the rules applicable to any such transaction be entitled to terminate transactions or revoke settlement instructions and the trustee of the insolvent estate of the market participant shall be bound by such termination or revocation.” S 35A(3), limits the claim, against the estate from the election contained in s 35A(1), to those amounts due upon termination in terms of the rules in question. Further, s 35A(4), binds the insolvency practitioner to the rules of exchange which are applicable to the market participant such as netting the market participant’s position, or setoff in respect of certain transactions, “or for the opening or closing of a market participant's position, or for the revocation of settlement instructions” relating to the market participant’s transactions concluded prior to its sequestration. An insolvency practitioner may not challenge this set off in terms of s 46 of the Insolvency Act.

S 35A(5) creates an exception to impeachable transactions and the ability of an insolvency practitioner to exercise his claw back powers. This section states that s 341(2) of the 1973 Act and ss 26, 29 and 30 of the Insolvency is inapplicable to dispositions of property in accordance with the rules. S 35B of the Insolvency Act deals with master agreements, as defined therein. S 35B(1) states that if the insolvent is a party to a master agreement/s, all unperformed obligation in terms thereof, or the “obligations arising from such...agreements in respect of assets in which ownership has been transferred as collateral security” shall automatically terminate upon the sequestration date. S 35B(1) values the obligations at the sequestration date and calculates it at the market value, which values must be netted and payable either to or
by a party to a master agreement. Once again, an insolvency practitioner may not challenge this set off in terms of s 46 of the Insolvency Act.

Lastly, s 35B(3) of the Insolvency Act excludes s 35A of the Insolvency Act or a netting arrangement considered in the National Payment Systems Act 78 of 1998 from the operation of this section. S 35B(4) of the Insolvency Act also excludes the dispositions contemplated in s 341(2) of the 1973 Act and ss 26, 29 and 30 of the Insolvency if the dispositions were in accordance with the master agreement.

227 See (n 60) above.
228 See (n 60) above; 2020 Position Paper (n 63).
230 Sarra et al (n 229).
The *MtGox* case demonstrates the importance of the court validating the insolvency practitioner’s decisions in relation to the valuation and method (i.e. timing) of realisation of cryptocurrencies which fall within an insolvent estate. While the Japanese Bankruptcy rules state that the valuation of the Bitcoins had to take place when the insolvency proceedings commenced, the creditors successfully petitioned the court to use the present value of Bitcoins, which converted the proceedings into civil rehabilitation proceedings.\(^{231}\) When dealing with cryptocurrencies, it is therefore suggested that an insolvency practitioner’s decision to realise cryptocurrencies should always be backed by a court order and be guided by the creditors and shareholders/members to avoid any legal action.\(^{232}\) The *MtGox* case also highlights the price volatility of Bitcoin, which could mean that businesses dealing with Bitcoin can quickly swing from being hopelessly insolvent to solvent.\(^{233}\) This means that insolvency practitioners would have to be sensitive to the cryptocurrency market as the price volatility makes it potentially unsuitable for creditor distributions.\(^{234}\) The price volatility can also have an impact on the timeframe within which an insolvency practitioner winds up the company, as creditors and an insolvency practitioner would want to wait for the right time to realise the cryptocurrencies so that there is maximum benefit to the company and the creditors.\(^{235}\) There are also jurisdictional issues which an insolvency practitioner would have to consider. In the *MtGox* case, to overcome this issue, the trustee applied in the United States and Canada to recognise the bankruptcy proceedings that were initiated in Japan “as a foreign main proceeding”.\(^{236}\)

An insolvency practitioner may not always be aware of cryptocurrencies which fall within an insolvent estate. To assist with this problem, in the Unites States of America, while in relation to natural persons, the US Bankruptcy Code provides incentives for the debtor to disclose their cryptoassets. Failing to do so, will result in a disqualification for a discharge order.\(^{237}\) Providing incentives to companies to reveal its cryptoassets may assist in overcoming this issue.

Sarra submits that if the insolvent company is directly holding Bitcoin, there should be a duty on the insolvent company to disclose that it is the Bitcoin holder, irrespective of the legal characterisation of Bitcoin, as it adds value to the insolvent estate.\(^{238}\)

\(^{231}\) Pascoe (n 121) 3.
\(^{232}\) See (n 191) above.
\(^{233}\) Rochester *et al* (n 223) 4.
\(^{234}\) Rochester *et al* (n 223).
\(^{235}\) Rochester *et al* (n 223) 5.
In the *Hashfast* case, while the court did not make a decision on the claw back powers of the trustee, it did note that if the Bitcoin constituted a currency, then the trustee could recover the monetary value of the Bitcoin at the transfer date and if it constituted a commodity, then the trustee could recover the Bitcoin (which would include its appreciated value).

Where an insolvency practitioner recovers property pursuant to an impeachable transaction via a court order, and is incapable of doing same as it is impossible for the property to be returned, then he will be entitled to recover the value at the transfer date or at the date on which the transaction was set aside, whichever is higher.

Similarly, in the *Hashfast* case, if the Bitcoin is treated as money, then the transfer date value will hold. Alternatively, if it is treated as a commodity, then the later date would apply to capture the appreciated value. This approach would also make sense within the South African context.

As previously mentioned, the co-operation of the insolvent company or a specialist tracing company will have to be used, taking into account the cost factor and the impact that it will have on creditor distributions. An insolvency practitioner wishing to claw back a transaction, depending on what it is, would need the appropriate evidence to show that the cryptocurrency was in the estate and that it was transferred to a certain person, which can prove challenging within the context of Industry 4.0.

Since technology is rapidly advancing and the existing statutory laws are not equipped to deal with these developments, the common law is being amplified to keep up with Industry 4.0. Clearly, there is no unified approach in dealing with these highlighted issues across jurisdictions. South Africa can still draw from these international experiences and formulate an approach that would work best within its insolvency framework, whilst still adhering to international best practice.

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236 See (n 167) above.
237 s 727(2) – (4) of the US Bankruptcy Code.
238 Sarra et al (n 229) 254.
239 Rochester et al (n 223).
240 s 32(3) of the Insolvency Act.
241 Draper (n 112) 4.
242 Consultation Paper (n 6) 19.
As identified in the Consultation Paper, there needs to be legislative intervention. Our statutory laws in relation to insolvency are in the process of being reviewed and amended in accordance with the 2020 Position Paper. It is important that cryptocurrencies are legally characterised, so that insolvency practitioners understand how their powers and duties are affected.

While the advancement of technology provides a platform for innovation and opportunities, it also comes with its own set of challenges. As technology advances, there is a clear need for a legal framework for the regulation of cryptocurrencies in order to ensure legal certainty. In the meantime, while South Africa is in the process of initiating regulatory changes, the courts will most probably be the primary place where issues surrounding cryptocurrencies will be heard. The courts will serve as a testing ground for the characterisation of cryptocurrencies, as well as serve as a mechanism to develop the common law, while the regulations and the legal framework are put in place.
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