

Week 10:  
Crypto assets,  
Cloud service providers,  
Space insolvency,  
Airline insolvencies.

---

AKSHAYA KAMALNATH



# Cloud storage/ computing

---

“Cloud computing arrangements give companies attractive possibilities regarding IT management, for example through outsourcing of elements. Cloud storage is almost instantly scalable and adaptable, one of the factors enabling users to achieve lower IT costs. Significant savings can be made, for example since the need for companies to own hardware and pay associated running costs can be reduced and fewer specialist IT staff may be required. Software can be made more widely available through being offered for access through subscription. Cloud services therefore put advanced technologies within the reach of small and medium enterprises, for example, without the upfront cost that this would otherwise entail. Such potential savings are attractive in an economic climate which has generated a need for costs cutting, and this has thus fuelled the usage of cloud services.”

Parry and Bisson: Legal approaches to management of the risk of cloud computing insolvencies (<https://www.tandfonline.com/doi/abs/10.1080/14735970.2020.1724504>).

# Cloud storage

---

INSOL survey:

- data integrity and security;
- the risk of deletions and corruption of files, particularly where the proper software to read the files was unavailable;
- the difficulties inherent in seeking to secure and access a virtual server, including having to handle demands for payments of service arrears to ensure ongoing access;
- who might lawfully have access and passwords to the cloud service, whether the insolvent entity or in reality another party; and
- thorny jurisdictional issues that might arise depending on where the internet connected servers hosting the cloud might be physically located.

# What needs to change?

---

INSOL survey:

- greater training and understanding on the broader technology, including the ability and best practice to secure digital assets;
- greater collaboration between the professional sectors to better understand the changes occurring in professional services, financial services and business due to digital disruption;
- legislation to prevent the ability to ransom information for non-payment and / or to specifically require co-operation with external administrators to recover data;
- more efficient and immediate access allowed to IPs for online customer accounts in order to reduce red tape and facilitate access to key records;
- modification of orders and cross-border recognition where cloud data is in a different jurisdiction; and
- more tech savvy judges to assist IPs seeking to gain urgent disclosure of / access to material stored in weird and wonderful places.

# What happens when the cloud computing service becomes insolvent?

---

Parry and Bisson: Legal approaches to management of the risk of cloud computing insolvencies (<https://www.tandfonline.com/doi/abs/10.1080/14735970.2020.1724504>).

A possible ‘too big to fail’ scenario in which an approach which is merely reactive could lead to losses of data and productivity and give rise to significant costs?

“There is therefore a probable tension between the creditors with pecuniary interests in the insolvent entity who may favour a quick closure and the interests of customers, and creditors with principally executory interests, who would want a managed close-down.”

“...where the CSP enters insolvency proceedings it will be in the interests of customers for the company to continue to trade in order for data to be preserved, at least pending its customers finding alternative arrangements. However, a tension with creditors arises as ongoing trading leads to costs and the office holder is required to act in the interests of creditors.”

Preventive strategies; reactive strategies

(Listen to <https://open.spotify.com/episode/2fDfKclhBzl000dkjkNflb?si=357552670da24d6d> from 27.00 onwards.)

# Blockchain/ smart contracts

---

“A straightforward way of visualising the concept is first to imagine a list of transactions that is copied and then stored on multiple separate and unrelated computers (or nodes), all connected to the Internet. This ensures that numerous copies of the correct version of the records exist. Second, imagine now that this network of computers is utilised regularly to check / validate previous entries in the list of transactions and then to update the record with any new entries. This is in essence how the blockchain works. Each new transaction entry or “block” created contains a timestamp and is linked to a previous block. This protects against tampering because to cheat the blockchain it would require every single block and network participant to take part.

Accordingly, it is said a blockchain can serve as an open, distributed ledger that can record transactions between two parties efficiently and in a verifiable and permanent way. The ledger itself can also be programmed to trigger transactions automatically – hence the concept of self-executing, smart contracts which would be self-executing upon certain conditions being met, with the terms of the agreement between buyer and seller being directly written into lines of computer code.”

<https://brownrudnick.com/article/insol-international-the-role-of-artificial-intelligence-ai-and-technology-in-global-bankruptcy-and-restructuring-practices/>

# An issue of the future?

---

## INSOL SURVEY

“Of the IPs surveyed, only 10% admitted to having come across smart contracts and / or blockchain in the preceding year or so and, even then, only “sometimes”. Conversely, around 64% stated they had “never” come across them and around a quarter said they “hardly ever” did. Of those who did have experience, it was found to have been mostly related to retail and the automotive industries.”

# Insolvency of crypto currency exchange

## Insolvency appointments to digital currency exchanges

At the beginning of 2018, there was only one formal insolvency proceeding globally that related to the collapse of a cryptocurrency business. The ongoing bankruptcy proceeding of the Japanese digital currency exchange (DCE) Mt Gox started in 2014 and the slow process of tracing the crypto-assets and realising them for the benefit of creditors was still grinding on in uncharted territory.<sup>1</sup> However, by year's end the courts in Austria, Italy, Switzerland and the United Kingdom were also contending with appointments of IPs to DCEs domiciled in their own jurisdictions.

“In circumstances of a hack, users are often unable to access their accounts because it is likely that those assets are wholly or partially the subject of the hack by virtue of the crypto-assets being combined with assets of other users and often the DCE itself.”  
Pascoe.

A critical issue when dealing with crypto-assets is the speed at which cryptocurrency can be dealt with by anyone holding the relevant private keys.<sup>5</sup> Further, once transferred, the immutable nature of the blockchain means that any transactions effected (even after an IP's appointment) are generally irreversible, leaving the IP seeking compensation rather than the return of the asset.



# Insolvency of crypto currency exchange

---

“The principles of pari passu that see all creditors of one class being treated equally may not always appear justifiable in circumstances where a hack or scam only affects one type of cryptocurrency. For example, users of the BitGrail exchange lost Nano, but the users who held fiat and Bitcoin in their wallets also had those assets seized. It is easy to see how an outcome where all users are given a pari passu distribution may be offensive to those whose assets were untouched by the hack or scam, but seized on the basis of the contractual terms of the DCE's terms of use.” (Pascoe)

Mt. Gox

“Notwithstanding that the trustee properly considered and sought court approval for the method and timing of the sale of the crypto-assets, it was heavily criticised. First, that the sale of significant quantities of Bitcoin was the cause of the Bitcoin bear market. Second, that the Bitcoin should not have been realised in circumstances where it was likely that the value of the available assets would exceed the quantum provable creditor claims.” (Pascoe)

My article about NZ case: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3678525](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678525)

# ICOs

---

“ICOs are, in effect, a new funding model and refer to the process where investors buy digital tokens in an enterprise that operates on a blockchain. The recipient of an ICO token does not generally get an equity interest in the enterprise, but rather purchases the right to receive a return on its token once a product or service is launched. Alternatively, a token may allow the holder to access the services of the enterprise once it officially launches. This is the most common token and they are referred to as a 'utility token’.” (Pascoe)

Some questions: What happens if an insolvent debtor holds tokens and insolvency proceedings are opened? **Debtor might hold them in a different name and came keep the tokens hidden.**

How can tokens be made available for the debtor's creditors? **IP will certainly encounter some difficulty in enforcing post-commencement avoidance rules because blockchain transactions are technically irreversible.**

How can post-commencement avoidance rules be enforced? And how can fraudulent transaction avoidance rules be enforced? (<https://www.law.ox.ac.uk/business-law-blog/blog/2018/12/initial-coin-offerings-and-insolvency-law>)

# Cybercrime

---

“Cybercrime, hacking, and ransomware are just three terms that regularly appear in media reports about online disasters befalling businesses.”

According to a 2018 report by the Centre for Strategic and International Studies and the antivirus software company McAfee, “cybercrime may now cost the world almost USD 600 billion, or 0.8% of global GDP.”

As to how often such areas of cyber risk were internally brought to IPs and their staff’s attention, around 70% of responders said such matters were either brought to their attention daily, regularly or often. (<https://brownrudnick.com/article/insol-international-the-role-of-artificial-intelligence-ai-and-technology-in-global-bankruptcy-and-restructuring-practices/>)

---

Solutions: Security systems? IP’s assessing how to secure data as soon as they take over?

# The Aircraft Protocol of the Capetown Convention

---

VA and Wells Fargo

The dispute was about what is meant by “give possession” under Art XI of the Aircraft Protocol to the Cape Town Convention on International Interests in Mobile Equipment.

Did it require the administrators to simply make the engines available for the lessors to take on an “as is where is” basis, which is what the administrators offered? Or did it require the administrators to redeliver the engines to Florida, as the lease agreement required, and to do so at Virgin’s expense? There were clearly significant financial and resource implications falling either on the administrators (and thus the creditors of Virgin) or on the lessors, depending on the answer. Furthermore, this case is an international first under the Convention and Protocol.

*“Give” and “Take”: Virgin Australia, the Cape Town Convention and Aircraft Protocol (2021) 21(1&2) INSLB 21*

---

The CTC Act (s 8) makes clear that the CTC and Protocol prevail over Australian legislation to the extent of any inconsistency.

“Justice Middleton interpreted the CTC and Protocol, which overrode Pt 5.3A, as requiring the lessees to redeliver the engines in accordance with the stipulations laid down in the lease agreements.” (Commercially reasonable)

Full court: The lease agreements are not central. Creditor is given the opportunity to take possession.

On appeal, the HCA upheld this.

My post on this also discusses space assets:

<https://corporatelawacademic.wordpress.com/2021/04/16/insolvency-in-air-and-space-and-the-cape-town-convention/>

# Space protocol – space assets



From the PPSR Australia website:

## Other goods

'Other goods' is a collateral class and means personal property that is goods, other than agriculture, aircraft, motor vehicles and watercraft.

### Example:

Bank X has a security interest over ABC Ltd's space satellite. A space satellite is a tangible property (ie goods) but is not agriculture, aircraft, motor vehicle or watercraft. It is therefore assigned the collateral class 'other good' in the registration.

Other goods are searchable by grantor.

More on insolvency issues in the space sector:

<https://www.nortonrosefulbright.com/en/knowledge/publications/b34b1f80/outer-space-the-new-frontier-for-restructuring-and-insolvency>

# Week 11: Pooling, AI, Mediation in insolvency proceedings

---

# Pooling

---

Harris: “...the court will consider the benefits to, and the impact upon, each of the companies’ creditors. The court will not approve a pooling where to do so would sacrifice the interests of one creditor (or one group of creditors) in order to benefit another group of creditors. For example, in the recent case of *Re Ansett Australia Ltd* (2006) 151 FCR 41; 56 ACSR 718; 24 ACLC 386; [2006] FCA 277,14 Goldberg J refused to sanction a proposed pooling where the result would have been a marginal increase in the rate of return for the creditors as a whole, but a small group of creditors of one of the companies would have received nothing.”

“Thus, where the creditors have been led to believe that they were dealing with one part of the group (such as an asset-rich holding company) it is appropriate to pool the assets of the group. In the recent *Ansett* case, Goldberg J determined that a pooling was not justified where the evidence demonstrated that most creditors were aware of which company within the *Ansett* group they were dealing with.”



# AI in insolvency proceedings

---

Overall, however, it would appear that while progress may be gathering apace, change will be more of an augmentation proposition and not necessarily a widespread adoption of automation of assessment. In other words, the technology is still quite some distance from being able to replace humans, for example by producing judicial decisions and precedent by algorithm, or to be able to deliver a more granular review of documents which goes beyond merely identifying what documents appear similar, but rather looking for responsive constructs across other documents and data sets which in themselves may look entirely different.

Christoph Henkel chapter: <https://www-elgaronline-com.virtual.anu.edu.au/view/edcoll/9781786437464/9781786437464.00031.xml>

The EU Restructuring Directive may further incentivize and accelerate the use of AI-based systems in the area of insolvency law. As the Commission notes in its proposal 'the digitisation of all insolvency procedures will help reduce the length of procedures and increase their efficiency, which would translate to lower costs of restructuring and higher recovery rates for creditors'. Indeed, AI may have the potential of being very disruptive to the insolvency bar. Certain types of insolvency investigations or filings may no longer require the retention of any attorney. At the same time, the use of AI may also produce significant opportunities and provide many advantages for insolvency practitioners and their clients. Most obvious, AI systems may be able to better predict outcomes and offer the potential of preventing more insolvencies in the future.

# Mediation in insolvency proceedings

---

Watch Episode 6 on cross-border mediation: [https://www.insol.org/Focus-Groups/Insolvency-Practice-Group/Vlog?utm\\_campaign=1136907\\_IPG%20Vlog%20Ep.6&utm\\_medium=email&utm\\_source=INSOL%20International&dm\\_i=4WAM,OD8R,50QMM1,2Z970,1](https://www.insol.org/Focus-Groups/Insolvency-Practice-Group/Vlog?utm_campaign=1136907_IPG%20Vlog%20Ep.6&utm_medium=email&utm_source=INSOL%20International&dm_i=4WAM,OD8R,50QMM1,2Z970,1) (about 22 mins)

Also relevant to week 10 and week 11 discussions on digital assets: watch episode 2 at the same link on valuation of digital assets. (about 23 mins)