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CRYPTOASSETS AND ARBITRATION IN SERBIA

Blockchain and digital assets are the new frenzy. What seemed like just another fad is now here to stay. Usage of blockchain and digital assets on a global scale and in greater volume necessitates a deeper scrutiny of the technology and its impact on the world and the legal and economic landscape beyond the initial analysis of its applicability and regulation. This paper focuses on the intersection of blockchain, digital assets and arbitration in Serbia. It analyses whether Serbia is suitable for digital asset disputes as a seat of arbitration and jurisdiction for recognition and enforcement of arbitral awards. The paper aims to answer very specific questions on crypto assets in the arbitration procedure and potential issues with these arbitration cases in Serbia. The conclusion it reaches is that Serbia is indeed a suitable jurisdiction for both the arbitration procedure itself and the recognition and enforcement of arbitral awards, but that idiosyncrasies of the Serbian legal system, and particularly judiciary, give rise to certain issues.

Key words: *arbitration, blockchain, cryptocurrencies, smart contracts, digital assets*

INTRODUCTION

This paper focuses on the intersection of blockchain, digital assets and arbitration in Serbia, in particular crypto assets as a predominant type of digital

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assets.¹ It analyses whether Serbia is a suitable jurisdiction for digital asset disputes as a seat of arbitration and for recognition and enforcement of arbitral awards. It does so in the following manner: the paper gives an overview of the topic and a brief description of the Serbian legal landscape regarding digital assets (section 2); it analyses the arbitrability of digital asset disputes (section 3) and validity of arbitration clauses in digital asset agreements (section 4); further, it inspects the possibility of recognition and enforcement of arbitral awards which deal with digital assets (section 5); the paper analyses which substantive law would be applicable for digital asset agreements (section 6); finally, the paper examines the possibility of securing interim measures over digital assets (section 7).

OVERVIEW OF THE TOPIC AND THE SERBIAN LEGAL LANDSCAPE

“Crypto craze”, the phenomenon of explosive growth and popularity of cryptocurrencies is still ongoing, with top officials and industry experts claiming that crypto is here to stay.² The initial veil of doubt about reputation and usability of cryptocurrencies seems to have been lifted, with more and more countries adopting sets of regulations dealing with digital assets.

As digital assets (and cryptocurrencies in particular) gain popularity and their usage becomes more common, it is inevitable that other aspects of their utilization come into focus. This was particularly the case during the so-called “crypto winter”, an early 2022 drop in value of crypto currencies by a whopping US\$2 trillion.³ This fluctuation had a domino effect on the entire crypto sector, with several big players on the market going bankrupt.⁴

¹ The terms “digital assets” and “crypto assets” are related but not necessarily interchangeable, as they can have different connotations depending on context. In this paper, the authors sometimes use them interchangeably, especially because the majority of all court cases actually deal with cryptocurrencies as the most popular type of digital assets.

² Ankur Grover, “The future of payments: Why cryptocurrencies are here to stay”, *The Economic Times*, 2023, available at: <https://economictimes.indiatimes.com/markets/cryptocurrency/the-future-of-payments-why-cryptocurrencies-are-here-to-stay/articleshow/102274620.cms?from=mdr>, 13. 10. 2023; Rosemarie Miller, “Crypto Is Here To Stay, Says Billionaire Hedge Fund Manager Ackman”, *Forbes*, 2022, available at: <https://www.forbes.com/sites/rosemariemiller/2022/11/21/crypto-is-here-to-stay-says-billionaire-hedge-fund-manager-ackman/?sh=a49f2d91db8d>, 13. 10. 2023.

³ Edward Taylor, Helen Wang, “Crypto winter disputes: Navigating the intersection of crypto, arbitration and insolvency”, *International Bar Association*, 2022, available at: <https://www.ibanet.org/crypto-winter-disputes>, 13. 10. 2023.

⁴ *Ibidem*.

Times of crisis usually lead to increase of disputes, and the situation is no different when it comes to digital assets. With increased use of digital assets, paired with an array of new questions and possibilities that this relatively new technology brings, it was only a matter of time when dispute resolution aspect of crypto assets would come into the spotlight. Together with the recent “crypto winter” and uncertainty it brought it appears that the time is now.

The typical disputes that arise in the world of digital assets include:

- disputes that are not a direct consequence of trading with digital assets on trading platforms but are related to and arise out of transactions with digital assets, such as, for instance, contractual disputes that have cryptocurrencies as means of payment. These would be an example of typical “off-chain disputes”, i.e. disputes that did not arise on blockchain platform but only touch upon or arise out of the blockchain transactions;
- disputes involving the issues of nullity of smart contracts or performance of obligations from or arising out of smart contracts;⁵
- breach of contract claims by investors against platforms arising from lack of access to the trading platform, and by platforms against investors arising from failure to make payment;
- misrepresentation claims by investors against platforms concerning the represented risks of investment (the latter two being the so called “on-chain disputes”).⁶

Arbitration could be a preferred method of dispute resolution for claims involving digital assets for a number of reasons: international character of transactions requiring departure from national courts to international forums, confidentiality and efficiency requirements, highly technical and specialized character of disputes that require specific choice of arbitrators and rules of procedure.⁷ However, there are also a number of matters that bring into question suitability of arbitration as an effective dispute resolution mechanism, as this technology itself brings forth an abundance of problems – unknown identity of the parties, unknown seat

⁵ Smart contract is essentially an agreement written in a computer code that automatically executes or enforces all or parts of an agreement. See section 4 for more details.

⁶ Andrea Utasy Clark, “Cryptocurrency disputes increasingly referred to arbitration, with unique issues arising”, *Pinsent Masons*, 2022, available at: <https://www.pinsentmasons.com/out-law/analysis/cryptocurrency-disputes-increasingly-referred-to-arbitration-with-unique-issues-arising>, 10. 10. 2023.

⁷ Edward Taylor, Jennifer Wu, Zach Li, “Crypto Arbitration: A Survival Guide”, *Kluwer Arbitration Blog*, 2022, available at: <https://arbitrationblog.kluwerarbitration.com/2022/09/29/crypto-arbitration-a-survival-guide/>, 13. 10. 2023.

of the parties, unknown legal regime applying to them, unknown legal capacity of the parties, to name a few. This paper deals with country specific issues of digital asset arbitration – it does not aim to cover all of the potential issues with arbitration of digital asset arbitration (be it on- or off-chain), but to present a selection of most important issues and questions on a local market.

Cryptocurrencies and other forms of digital assets in Serbia are regulated by the Law on Digital Assets (“LDA”).⁸ With this law, Serbia joined the group of countries that legalize the usage of digital assets as opposed to countries that ban all cryptocurrency-related transactions (due to national security or social reasons). By establishing a regulatory mechanism and government oversight and control, Serbia was one of the first countries in Europe to adopt a regulatory framework dealing with digital assets.⁹

ARBITRABILITY

While Serbia falls into a category of countries where crypto assets are legalized, some jurisdictions have banned crypto assets or heavily regulated their use.¹⁰ If an arbitration is seated in such a jurisdiction, or recognition and enforcement of an award is sought there, national courts may rule that crypto disputes are not arbitrable or deny recognition and enforcement of awards on public policy grounds.¹¹ This chapter aims to analyse whether disputes concerning digital assets are arbitrable according to Serbian legislation.

The Serbian Arbitration Act, modelled after the UNCITRAL Model Law, delineates arbitrability in Article 5(1) by permitting parties to engage in arbitration for resolving pecuniary disputes involving freely disposable rights, except those falling under the exclusive jurisdiction of courts.

None of the applicable laws in Serbia provide for exclusive jurisdiction of courts in disputes concerning digital asset. This means that the only question that remains is whether digital assets and transactions involving digital assets are in fact rights that the parties can freely dispose with.

It is the position of authors that these types of disputes do indeed concern rights that the parties can freely dispose with. Following a strictly common sense

⁸ Law on Digital Assets, *Official Gazette of the Republic of Serbia no. 153/2020*.

⁹ Marko Mudrinić, “Dve godine Zakona o digitalnoj imovini: Dok se web3 razvija, regulativa u Srbiji stagnira”, *Netokracija*, 2022, available at: <https://www.netokracija.rs/zakon-o-digitalnoj-imovini-izmene-i-dopune-203689>, 11. 10. 2023.

¹⁰ E. Taylor, J. Wu, Z. Li, op. cit.

¹¹ *Ibidem*.

– since users freely and frequently trade with digital assets, it only makes sense that any rights relating to or arising out of relationships involving digital assets can be freely disposed with. Authors cannot seem to find any argument to the contrary. Serbian court practice is scarce, but case law of the Permanent Arbitration of the Serbian Chamber of Commerce offers a different angle on the matter, which nonetheless leads to the same conclusion: “The fact that the parties had to act in accordance with the regulations when concluding the agreement does not entail that they were not free to dispose with certain rights. Freedom of disposition is always limited with public order and imperative regulations.”¹²

Therefore, even though movement of digital assets is regulated, it should not be concluded that parties are prevented from freely disposing with rights arising out of the digital assets. Since digital assets (and their regulation) is relatively novel, one should expect more case law to appear which would cement this position.

Courts in Europe also confirmed that crypto assets are property and that disputes involving them are arbitrable.¹³ UK Jurisdiction Taskforce has recently published its Digital Dispute Resolution Rules – a new set of arbitration rules for dispute resolution in on-chain digital relationships and smart contracts.¹⁴

Having in mind the typical type of disputes listed above, there is very little room for argument of non-arbitrability. Even though one cannot exclude that certain types of digital asset disputes will not be suitable for arbitration, it should be concluded that arbitrability of this type of disputes is the norm, whereas the opposite is an exception. Same holds true for arbitrability of these disputes in Serbia.

VALIDITY OF AN ARBITRATION AGREEMENT RELATED TO ARBITRATION OF DIGITAL ASSETS

In this specific section of the paper, two provisions from Section II of the Serbian Arbitration Act are vital: Article 9 allows parties to submit future disputes or existing disputes within a defined legal relationship to an arbitral tribunal through an arbitration

¹² Permanent Arbitration of the Serbian Chamber of Commerce, case T-7/09, *Collection of the Arbitration Awards of the Foreign Trade Court of Arbitration at the Chamber of Commerce and Industry of Serbia 1997 – 2016*.

¹³ The High Court of Justice, Business & Property Courts Of England and Wales, Commercial Court (Qbd) in private, *AA v Persons Unknown & Ors, Re Bitcoin* (December 2019), <https://www.bailii.org/ew/cases/EWHC/Comm/2019/3556.html>.

¹⁴ Douglas Robinson, Basil Woodd-Walker, David Bridge, “A new forum for digital disputes: the digital dispute resolution rules”, *Simmons Simmons*, 2021, available at: <https://www.simmons-simmons.com/en/publications/cksu381ia1jpp0a72kyuktebq/digital-dispute-resolution-rules>, 11. 10. 2023.

agreement, which can be included in a contract clause or a separate contract, and Article 12 specifies the requirements for a written arbitration agreement, including signed documents, written exchanges of messages, references in written contracts, or the initiation of written arbitral proceedings and acceptance by the respondent without challenging the agreement or jurisdiction prior to participating in the dispute.

We have previously concluded that disputes regarding digital assets are arbitrable as a rule. Against that backdrop, if we are considering a traditional, natural language agreement on the sale of digital assets and as long as there are no reasons for nullity of an arbitration agreement, there should be no issues with respect to the validity of arbitration clauses which in their essence contain a resolution of crypto disputes.

On the other hand, new type of contracts which often regulate digital asset transactions require more thought. This new type of contract is dubbed “smart contract”. Smart contract is essentially a computer code that automatically executes or enforces all or parts of an agreement.¹⁵ For blockchain-based smart contracts, the terms of an agreement are embedded in a computer code on a blockchain-based platform (such as Ethereum).¹⁶ Smart contracts are currently considered best suited to automatically execute payments even in regular commercial transaction that do not deal with blockchain, for instance by executing payments of penalties if certain objective criteria are met.¹⁷

Seeing that the entire agreement is recorded in the form of a code, the question arises whether such agreement would also contain a valid arbitration agreement. To be more precise, if the agreement is only concluded in digital form (as a part of a smart contract) without referring to a natural language agreement, this raises the question of whether the signatures of the parties can be validated and recognised by the legal framework if they are in the form of a code.¹⁸ Going back to

¹⁵ Stuart D. Levi, Alex B. Lipton, “An Introduction to Smart Contracts and Their Potential and Inherent Limitations”, *Harvard Law School Forum on Corporate Governance*, 2018, available at: <https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/>, 4. 10. 2023

¹⁶ Dirk Wiegandt, “Blockchain, Smart Contracts and the Role of Arbitration”, *Journal of International Arbitration* (Ed. Maxi Scherer), No. 5, Vol. 39, 676. “Examples for the use of smart contracts include simple consumer transactions (e.g., ‘pay out purchase price X to seller once the customer received the parcel’), compensation claims in the event of cancelled or delayed trains or flights (e.g., ‘pay out a penalty X to the customer in case the flight is delayed by more than 2 hours’), transactions involving cryptocurrencies or NFTs, as well as insurance and logistics.”

¹⁷ D. Wiegandt, op. cit., 676.

¹⁸ Sara Hourani, “Chapter 12: The Resolution of B2B Disputes in Blockchain- Based Arbitration: A Solution for Improving the Parties’ Right of Access to Justice in the Digital Age?”, *Access to Justice in Arbitration: Concept, Context and Practice* (Ed. Leonardo V. P. de Oliveira, Sara Hourani), 2020, 267.

Article 12 of the Serbian Arbitration Act, the arbitration agreement is considered as being in writing if the agreement was concluded by an exchange of messages through means of communication which provide a written record of the parties' agreement, regardless of whether the messages were signed by the parties or not. Agreeing to a code containing the terms of an agreement is certainly closer to what the law refers to as exchange of messages through means of communication providing a written record of the parties' will, but this still remains controversial.

Seeing that smart contracts and arbitration agreements concluded within them are quite novel occurrences, Serbian courts are yet to have the question of validity of arbitration agreements concluded in smart contracts posed before them. This issue is recognized by other authors who note that this situation may be a problem in all countries which are signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and/or whose arbitration rules are verbatim adoptions of UNCITRAL Model Law, i.e. in any jurisdiction where the mandatory form of arbitration agreement is prescribed as written.¹⁹

Authors of this paper are of the stance that this requirement should be interpreted flexibly. International arbitration (and courts dealing with recognition and enforcement of arbitral awards and legislators as well) should also adapt to the new technologies such as blockchain and smart contracts, as arbitration and jurisdictions with a more flexible position will benefit from it in this process.²⁰

Both of the relevant acts – the New York Convention and the UNCITRAL Model Law – appear to promote this flexible interpretation. The New York Convention Article II(2)'s scope of application became more extensive in application as a result of the adoption of the UNCITRAL Recommendation for Article II(2) of the New York Convention in 2006. According to this recommendation, consideration must be given to the wide use of electronic commerce, which legitimizes the wider interpretation of the *in writing* requirement.²¹ Similarly, it would appear that UNCITRAL Model Law (in Option I of its Article 7) gives room for this more liberal interpretation. Serbian Arbitration Act adopted an amended version of option I in its Article 12. However, limitations to this interpretation exist under the national laws – Articles II(3), V(1)(a) and IV(1)(b) of the New York Convention all refer the courts back to the applicable national law, which means that if the national law

¹⁹ Françoise Lefèvre, Nicolas Delwaide, "Resolving Smart Contracts Disputes Through Arbitration: Thoughts And Perspectives", *Liber Amicorum CEPANI (1969-2019): 50 Years of Solutions* (Ed. Dirk De Meulemeester, Maxime Berlingin *et al.*), 235.

²⁰ *Ibidem*.

²¹ S. Hourani, *op. cit.*, 267.

in question does not recognise a wide understanding of the 'in writing' requirement of the New York Convention, then the agreement in code might not be recognised under the Convention.²² Serbian legislation and case law for the time being remain unclear and scarce on this matter.

The wide array of legal challenges caused by blockchain and lack of clear legal framework and case law imply that for the time being, parties should conclude separate, natural language arbitration agreements. While this solution would somewhat reduce the confidentiality and efficiency benefits of smart contracts, it would preserve the parties' choice of dispute resolution method and at the same time provide a more robust and safer contractual framework.

RECOGNITION AND ENFORCEMENT

The Serbian Arbitration Act, in Article 66, addresses the question of recognition and enforcement of foreign arbitral awards, allowing refusal upon the request of the party against whom it is invoked, provided that the party can demonstrate (i) the invalidity of the arbitration agreement, (ii) improper notice to one of the parties, (iii) that the dispute was beyond the arbitration agreement's scope, (iv) irregularities with respect to the tribunal or the procedure itself, (v) non-binding status, or court-set aside or suspension of the award; furthermore, under Article 66(2) recognition and enforcement can also be denied if the subject matter of the dispute is non-arbitrable under the Republic of Serbia's law or if the award's effects contravene the Republic's public policy.

A close examination of the initial five grounds for refusal to recognize and enforce outlined in Article 66(1) of the Serbian Arbitration Act reveals that each of them necessitates a case-specific assessment. This implies that a universal conclusion applicable to all disputes related to digital assets is unattainable based on Article 66(1). Consequently, the only two pertinent reasons for consideration within the scope of this topic are those stipulated in Article 66(2). However, having in mind that the issue of arbitrability was covered in the previous sections, the authors will only analyse whether the effects of an award concerning (or containing a reference to) digital assets are contrary to the public policy of the Republic of Serbia (although this should also be assessed on case-by-case basis, as any other reason for refusal to recognize and enforce).

The standpoint of Serbian courts is that public policy argument in the procedure for recognition and enforcement should be interpreted narrowly and

²² *Ibidem.*

restrictively in the sense that it should only regard the fundamental principles of justice which the legal system is based on.²³ Seeing that Serbia already recognized and legalized digital assets, it is only reasonable to conclude that an arbitral award related to digital assets does not contravene public policy. As of the date of publication of this paper, the authors are not aware of any judgement of a Serbian court which recognized a foreign judgement or arbitral award related to digital assets. However, certain situations arose in different jurisdictions which should be taken into account.

For instance, Greek courts ruled that the recognition of a US-seated arbitral award granting damages in Bitcoin would run contrary to Greek public policy. The reasoning of the Greek courts was that because Greek law classified cryptocurrency as a digital asset, distinct from traditional currency as defined by the European Central Bank (ECB), the ECB did not extend any rights or guarantees for using cryptocurrency, specifically Bitcoin, as means of payment. Given this context, the court concluded that cryptocurrency transactions posed a threat and were detrimental to Greece's interests due to the absence of regulatory oversight and the tax-free nature of cryptocurrency. Consequently, the Court of Appeal in Western Central Greece ruled that recognizing an award based on Bitcoin, a decentralized digital currency, and mandating the repayment of a debt in Bitcoin, went against Greek public policy. Therefore, they declined to enforce the award on these grounds, as well as considering the potential disruption to established norms in Greece regarding the utilization of cryptocurrency in payment agreements.²⁴

It is questionable whether Serbian courts would follow this rather conservative approach. While the use of cryptocurrencies is allowed in Serbia, they are not envisaged as means of payment in Serbia, nor do they have the status of money or currency.²⁵ Furthermore, unlike Greece at the time, Serbian authorities tax cryptocurrencies under a capital gains regime, meaning that the owner of a cryptocurrency must pay taxes on any profits gained through the sale of the cryptocurrency. While Serbia was one of the first European countries to regulate digital assets, it was rather sluggish in keeping the legislation up to date. This fact, paired with a rather conservative

²³ Decision of the Commercial Appellate Court Pvž. 215/2011 dated 16 March 2011, *Judicial Practice of Commercial Courts - Bulletin No. 1/2011*.

²⁴ Ergin Mizrahi, "Bitcoin And Public Policy In International Arbitration Enforcement", *Market Screener*, 2022, available at: <https://www.marketscreener.com/quote/stock/PUBLIC-POLICY-HOLDING-COM-130670778/news/Bitcoin-And-Public-Policy-In-International-Arbitration-Enforcement-40711447/>, 11. 10. 2023; A. Utasy Clark, *op. cit.*

²⁵ Law on Digital Assets, *Official Gazette of the Republic of Serbia no. 153/2020*, Art. 2, Para. 1, It. 2.

judiciary, means that one can only hypothesize how a court would rule when presented with the recognition and enforcement of an arbitral award that mandates a debtor to fulfil a payment obligation in cryptocurrency. It remains to be seen to what extent the courts would restrict their interpretation of public policy under Serbian law, but one should tread carefully when drafting its request for relief.

GOVERNING LAW

Whether the agreements on the transfer or other disposal with digital assets is in the form of a natural agreement or a smart contract, the novelty of this technology inherently means that legislation in most countries is lagging behind. Another example of this is the issue of governing law. While this poses a big problem with smart contracts (having in mind the above-mentioned issues with unknown identity of the parties and other problems that follow suit), even natural language agreements dealing with digital assets present a challenge in ascertaining the right applicable law to the agreement.

Applying existing conflict of law rules to disputes relating to crypto assets and smart contracts is potentially difficult.²⁶ For instance, Serbian Private International Law dates back to 1986, with latest amendments being in 2006; even these latest amendments predate the idea of blockchain.²⁷ Failure of legislation to keep up with relevant trends is recognized as a problem:

“They [cryptoassets] are intangible assets that exist as records on decentralised networks with touchpoints in multiple jurisdictions. The market in many cryptoassets is a global one and counterparties to transactions may be unknown or untraceable to a particular jurisdiction. The large public blockchains (such as Bitcoin and Ethereum) are open to all, with no terms or conditions. Where a dispute arises, this market structure (or lack thereof), can create practical problems for claimants in understanding where they can bring claims, and for defendants that find themselves being sued in jurisdictions with which they have no real connection or which they never anticipated being in.”²⁸

²⁶ Sam Brown, “Arbitration of cryptoasset and smart contract disputes: arbitration unchained?”, *Practical Law Thomson Reuters*, 2023.

²⁷ Law on Resolving Conflict of Laws With Regulations of Other Countries, *Official Gazette SFRY no. 43/82 and 72/82 – amend.*, *Official Gazette SRY no. 46/96 and Official Gazette RS no. 46/2006 – other law*.

²⁸ S. Brown, *op. cit.*

In analysing the question which law applies to the transaction involving digital assets, we should search for the answer in two prongs: can the parties choose the applicable law, and if they do not or cannot, which law applies to these transactions?

With respect to the first question, Article 19 of the Serbian PIL clearly stipulates party autonomy with respect to contractual relationships, save for a different provision of the PIL or other international law. Leading private international law practitioners note that there are very few prohibitions of party autonomy in the Serbian PIL – these are mostly related to real estate, status matters, transport issues or third-party agreements.²⁹ Other notable restrictions are if the foreign applicable law is contrary to basic social organization of the state, or if the choice of law is agreed in order to avoid applicability of Serbian law.

In this respect, leading authors note that accepting a choice of law which the parties made is the easy and simple solution.³⁰ The question of digital assets seems to align perfectly with this statement. A conclusion can also be derived from the viewpoint of the courts that choice of law is allowed as long as there is a foreign element in the business transaction, and as long as the choice of law is not contrary to Serbian law.³¹ Authors of this paper also take a pro-choice stand – choice of law with respect to transactions involving digital assets is free as long as it is in accordance with the PIL.

However, if there is no choice of law clause, Serbian law (much like many other jurisdictions) does not provide a clear answer as to which law is applicable for the transactions dealing with digital assets. Serbian Private International Law contains a number of default provisions for applicable law in specific legal relationships in Article 20(1), if the parties do not choose an applicable law (e.g. sale, loan, shipping etc.). Another potential solution can be found in Article 20(1), item 20, which states that applicable law for “other contracts” shall be the law of the place where the offeror’s seat was at the time the offer was received by the offeree. In a specific transaction of crypto assets trading, the seat of the offeror would typically be the one of the seller of crypto asset while the seat of the offeree would be the seat of the buyer, or vice versa. Again, applying this provision to specific cases is not that simple especially given the involvement of third-party intermediaries

²⁹ Tibor Varadi, Bernadet Bordaš, Gašo Knežević, Vladimir Pavić, *Međunarodno privatno pravo*, University of Belgrade Faculty of Law, 2020, 373.

³⁰ *Ibidem*.

³¹ Judgment of the Commercial Appellate Court, Pž. 4900/2012 dated 6 August 2012, Judicial Practice of Commercial Courts – Bulletin No. 4/2012.

(i.e. trading platforms) and since the location of the parties in these types of transactions is usually unknown. Hence, using any default provision of Article 20 requires a careful consideration as to the real nature of the contractual relationship and the real nature of the digital asset itself.

One example of such analysis is a (controversial) decision in *Tulip Trading v Bitcoin* whereby the English courts identified the *lex situs* of an intangible asset and then decided that it is the place of the owner's residence.³² This solution, as criticized as it is, shows how different courts may apply different regimes over digital assets. This is one of the reasons why UNIDROIT is currently working on Principles on Digital Assets and Private Law.³³ The Principles became publicly available, containing a number of provisions for better regulation of digital assets. These Principles recognise that the usual connecting factors for choice-of-law rules (e.g., the location of persons, offices, activity, or assets) have no useful role to play in the context of the law applicable to proprietary issues relating to digital assets.³⁴ Instead, the approach of this Principle is to provide an incentive for those who create new digital assets or govern existing systems for digital assets to specify the applicable law in or in association with the digital asset itself or the relevant system or platform. This approach would accommodate the special characteristics of digital assets and the proprietary questions concerning digital assets that may arise.³⁵ So far, it appears that the idea is to have the applicable law of the state which is expressly specified in the digital asset/system/platform as the law applicable to such issues, or alternatively the law of the forum state.³⁶

Until these Principles are widely adopted, the position of Serbian courts would most likely rely on the location of the digital asset (as case law has shown insofar, which will be explained later), or the application of the Article 20 of the PIL regarding a specific legal relationship (sale, loan, copyright etc.). With this in mind, the parties are advised to clearly stipulate their desired applicable law in order to avoid any undesirable consequences.

³² *Tulip Trading Ltd v Bitcoin Association for BSV*, [https://uk.practicallaw.thomsonreuters.com/Document/I84727720AE7A11ECA3D199746B99F390/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/Document/I84727720AE7A11ECA3D199746B99F390/View/FullText.html?transitionType=Default&contextData=(sc.Default)), 11. 10. 2023.

³³ Digital Assets and Private Law – Public Consultation, available at: <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/digital-assets-and-private-law-public-consultation/>, 11. 10. 2023.

³⁴ UNIDROIT, *Principles on digital assets and private law*, C.D. (102) 6, 10 May 2023.

³⁵ *Ibidem*.

³⁶ *Ibidem*, Principle 2.

SECURING INTERIM MEASURES OVER CRYPTO ASSETS

At the first glance, it appears that enforcement and security of assets (before or during the arbitration procedure) is a well-regulated and clear procedure. This section will put this notion to a test and answer the following questions: (i) can authorities in Serbia assist arbitral tribunals with respect to interim measures over digital assets and (ii) does the current state of legislation and court practice in Serbia allow a quick and efficient freezing of digital assets.

Serbian courts have a duty to assist the parties with interim measures before or during the course of arbitration procedure, irrespective of the seat of the arbitration.^{37,38} Arbitral tribunals are equally authorized to so.³⁹ In practice, courts and enforcement agents comply with these provisions and assist the parties and the arbitral tribunals, although not consistently or with optimal results.

Moving particularly to the matter of interim measures over digital assets, one can observe that it operates in a relatively straightforward framework. Article 14 of the LDA provides that provisions of the law governing enforcement and security shall apply to the enforced collection of digital asset claims by enforcement creditors. Moreover, a company operating in the Republic and having the status of an enforcement debtor as defined by the law governing enforcement and security shall cooperate with the competent authorities in the enforcement procedure in accordance with that law, and shall provide all notices and data needed for the settlement of claims against digital assets, including the instruments for accessing digital assets (e.g. cryptographic keys). This applies accordingly to other legal persons and entrepreneurs operating in the Republic.⁴⁰ Therefore, the LDA recognizes that enforcement and interim measures over digital assets is in fact a possibility.

If we go to the essence of the matter, i.e. to conditions for adoption of an interim measure, one can detect several practical issues.

The conditions for granting interim measures, applicable to both monetary and non-monetary claims, involve demonstrating, in addition to the likelihood of the claim's existence, that without such measures, the enforcement debtor would engage in actions like asset disposal or concealment that could obstruct the claim's collection (applicable to monetary claims) or that the claim's satisfaction might be

³⁷ Serbian Arbitration Act, *Official Gazzete of the Republic of Serbia no. 46/06*, Art. 15.

³⁸ Commercial Appellate Court judgement, Pž 7679/2012 dated 23 August 2012.

³⁹ Serbian Arbitration Act, *Official Gazzete of the Republic of Serbia no. 46/06*, Art. 31.

⁴⁰ Law on Digital Assets, Art. 14.

hindered, involve the use of force, or result in irreparable damages (pertinent to non-monetary claims).⁴¹

In both instances, the creditor would need to prove the probability of its claim and danger for the collection of a claim. The Law on Enforcement and Security, in Article 450, further provides that there is an assumption that danger exists if the claim needs to be fulfilled abroad, even if domestic court is competent.⁴² Typical measures that the court could order include prohibiting the enforcement debtor to dispose with, or encumber movable assets in his ownership, and, when needed, seizing such movable assets from the enforcement debtor and entrusting them to the enforcement creditor or another person or court deposit for safekeeping, instructing the Central Securities Depository to make an annotation of the prohibition of disposal and encumbrance of shares of the enforcement debtor or seizing of cash or securities from the enforcement debtor, among other.⁴³

Even though the Law on Enforcement and Security does not explicitly mention digital assets, there should be no doubt that it should apply to digital assets as well. However, on a more practical level, court practice has shown that this is far more problematic than anticipated.

Specifically, it is a traditional position of the courts that Serbian courts only have jurisdiction over property that is located in Serbia, and that they cannot issue an interim measure over assets abroad. A recent decision upholding a first instance decision which rejected an interim measure request against a Serbian resident stated, among other things: “The assets – cryptocurrency, whose prohibition of disposal is requested with the interim measure request, and which can be found on the Binance platform, is not property located in Serbia, but the servers are located abroad, in many locations in the world.”⁴⁴

The authors of this paper disagree strongly with this reasoning. First, the interim measure can be directed towards the debtor, thus prohibiting the debtor from disposing with or encumbering the cryptocurrencies under a threat of court penalties, irrespective of where the debtor or the asset is located. Second, the decision goes completely contrary to the necessity of modern-day commerce and business and contrary to practice of courts from other jurisdictions which already granted interim measures over digital assets.⁴⁵ Third, there is nothing in the Law on

⁴¹ Law on Enforcement and Security, Art. 449.

⁴² Law on Enforcement and Security, Art. 450.

⁴³ Law on Enforcement and Security, Art. 459.

⁴⁴ Decision of the Higher court in Belgrade, Gži no. 1203/23, *private archive*.

⁴⁵ *Yan Yu Ying v Leung Wing Hei* [2022] HKCFI 1660, available at: <https://hsfnotes.com/asiadisputes/2022/07/05/hong-kong-court-summarises-features-of-bitcoin-digital-keys-and-hot-and-cold-wallets/>,

Enforcement and Security prohibiting a Serbian court from rendering a decision against the assets located abroad. Fourth, Article 14 of the LDA would be rendered senseless as it would mean that Serbian Law on Enforcement and Security could not be applied to any digital asset whose location is not in Serbia.

So, despite the existing regulatory framework allowing the tribunals and courts to render interim reliefs, practice showed that interim measure requests in Serbia may be rejected due to lack of jurisdiction of a Serbian court. While this reasoning goes hand in hand with the Serbian courts' conservative perception, we should wait and see if any future amendments to the laws would perhaps change this position.

CONCLUSIONS

In navigating the intricate world of crypto-arbitration, Serbia finds itself at a unique crossroad. The Serbian Law on Digital Assets clearly acknowledges the importance and relevance of digital assets in today's economy whereas overall legal framework makes Serbia a suitable seat for arbitration and recognition and enforcement of arbitral awards. Within this legal framework, it was determined in this paper that arbitrability of on-chain or off-chain disputes is not problematic as well as that crypto disputes generally should not be subject to public policy concerns. Caution is advised when incorporating arbitral clauses in smart contracts and usage of natural language agreements is advised for the time being. When it comes to the issue governing law, it is advisable that the parties themselves chose the substantive law in their contracts, because the laws still do not provide clear solutions in that respect. Yet, when it comes to the issue of interim measures over digital assets, notably the Serbian courts are reluctant to award interim measures over crypto assets as they are perceived as located outside of Serbia. This becomes even more pronounced when we juxtapose Serbian court practices with global trends. In places like Hong Kong and Singapore, courts have taken progressive strides in handling crypto disputes, making the gap in Serbian practices more evident. The recurring challenge in Serbia is balancing tradition with the necessities of modern commerce. If Serbia wants to keep up in the global crypto landscape, a pivot is essential. This would mean re-evaluating and potentially redefining the approach of courts towards digital assets, ensuring they are aligned with the realities of the digital age.

11. 10. 2023; *CLM v CLN and others* [2022] SGHC 46, https://www.elitigation.sg/gd/s/2022_SGHC_46, 11. 10. 2023; *Nico Constantijn Antonius Samara v Stive Jean Paul Dan* [2022] HKCFI 1254, <https://hs-fnotes.com/asiadisputes/2022/06/23/unravelling-the-cryptic-hong-kong-court-helps-victim-recover-crypto-assets-against-pilfering-agent/>, 11. 10. 2023; *AA v Persons Unknown* [2019] EWHC 3556 (Comm), <https://www.bailii.org/ew/cases/EWHC/Comm/2019/3556.html>, 11. 10. 2023.

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KRIPTO-IMOVINA I ARBITRAŽA U SRBIJI

Rezime

Blokčejn i digitalna imovina su deo nove realnosti – ono što je delovalo kao još jedan prolazni trend postalo je deo svakodnevnog poslovanja, a izvesno je da će tako ostati i u budućnosti. Masovna globalna upotreba blokčejna i digitalne imovine zahteva dalekosežnu analizu tehnologije i njenog uticaja na svet i ceo pravni i ekonomski sistem, a ne samo analizu primenljivosti ove tehnologije i osnovnih propisa. Ovaj rad se fokusira na blokčejn, digitalnu imovinu i arbitražu u Srbiji, te analizira da li je Srbija pogodna jurisdikcija za sporove vezane za digitalnu imovinu kao sedište arbitraže, odnosno pogodna jurisdikcija za priznanje i izvršenje arbitražnih odluka. Rad ima za cilj da odgovori na vrlo specifična pitanja o kripto-imovini u arbitražnom postupku i potencijalnim problemima sa ovim sporovima u Srbiji. Zaključak je da je Srbija pogodna jurisdikcija kako za sam arbitražni postupak, tako i za priznanje i izvršenje arbitražnih odluka, ali da specifičnosti srpskog pravnog sistema, a posebno pravosuđa i sudske prakse, stvaraju određene probleme.

Ključne reči: arbitraža, blokčejn, kriptovalute, pametni ugovori, digitalna imovina

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