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DIGITAL PROPERTY – SPECIFIC ISSUES IN THE APPLICATION OF PRIVATE INTERNATIONAL LAW RULES

ABSTRACT: Digital property emerges as a new segment of property law, while simultaneously being a consequence of the digitalization of financial intermediation and representing a form of technological innovation that substitutes payment services and investments in the banking and stock markets. Key issues that arise include the choice of governing law, internationally competent courts, and the recognition and enforcement of foreign court and arbitration decisions related to transactions in cryptocurrencies, which are the most widespread form of digital assets. This paper is designed to highlight the specific features of digital property that are important for the application of existing private international law (PIL) rules. It does not focus on a specific legal system, but rather situates the analysis within PIL as a branch of legal science with its own regulatory postulates, which are largely harmonized across legal systems. The aim of the paper is to see the scope of the possibility of applying traditional institutes of international private law to digital property as a legal and regulatory novelty that stands between property or things and rights or financial instrument. By synthesizing core issues that emerge in application of private international law rules to digital

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assets, we aim to provide a comprehensive understanding of regulatory challenges which encompass digital assets' role in modern law and economies.

Keywords: *digital property, crypto-assets, private international law, smart contracts, governing law, competent court, lex cryptographia.*

1.Introduction

The usage of digital technology in all spheres of modern life and business has created new market and business dynamics that is determined by rapid changes. At the same time, every change requires a regulatory response, primarily from the state or the legislator. In the modern digital society, i.e. within the framework of the digital economy and e-commerce, at the same time as the state regulation of the usage of digital technology, a special, non-national regulation is emerging between the participants of electronic transactions themselves, which includes the rules agreed upon by the participants, which refer to the rules for participation in digital platforms or blockchain transactions. National legal systems cannot ignore the development and rise in different types of digital technology, nor can they remain on the sidelines regarding the creation of adequate norms, which is, after all, a prerequisite for the rule of law in modern societies. Since the end of the 20th century, and especially with the beginning of the 21st century, in the legal systems of Europe, the United States of America, but also economically developed countries in Asia (China, Singapore), significant work has been done on the legal regulation of transactions that takes place through digital technology and electronic communication, both between economic entities and between individuals.

The development and application of digital technology has caused the emergence of new or further redefinition of existing legal institutes in all areas of law. Consequently, the traditional way of understanding property is redefined as a consequence of changes in reality that require regulatory treatment (Mirković, 2023, p. 19). Digital property appears as a new segment of property law, although it is simultaneously a consequence of the digitalization of financial intermediation and represents a form of technological innovation as a substitute for payment services and investments on the banking and stock market. Digital or virtual or crypto asset means a digital record of value that can be bought, sold, exchanged or transferred electronically and can be a medium of exchange or investment. The functional parts of the digital

property as legal term are of "digital or crypto character" and this institute is treated as *sui generis*, with the application of legal qualification methodology according to existing legal institutes for the purposes of applying legal rules in case of disputes. In this sense, in connection with digital assets, there are issues of choice of governing law and internationally competent court, as well as issues of recognition and enforcement of foreign court and arbitration decisions related to transactions in crypto-currencies as the most widespread form of digital assets. The paper was conceived in such a way as to highlight the specifics of digital property that are important for the application of the existing rules of private international law (PIL), not tying the analysis to one specific legal system, but placing the analysis on PIL as a branch of legal science that has its own regulatory postulates that are for the most part harmonized between legal systems. The goal of the paper is to see the scope of the possibility of applying traditional institutes of international private law to digital property as a legal and regulatory novelty that stands between property or things and rights or financial instrument. By synthesizing core issues that emerge in application of private international law rules to digital assets, we aim to provide a comprehensive understanding of regulatory challenges which encompass digital assets' role in modern law and economies.

2. Digital property – a novelty to property law

Digital or crypto property or assets (terms will be used alternately in this paper, due to semantic differences in Serbian and English language), encompassing cryptocurrencies, digital tokens, and non-fungible tokens (NFTs), have emerged as pivotal elements in the contemporary financial landscape. Today, crypto-currencies are becoming a new reality in payments for goods and services. Modern business today consists of smart contracts, electronic trade documents, digital assets, as well as distribution chains of electronic records. They are used as a substitute for traditional means of payment, investments, international trade, and proof of transfers and ownership. The advent of blockchain technology has revolutionized the concept of digital ownership, leading to the creation and proliferation of digital assets. Defined as any asset that is stored digitally, these assets include crypto-currencies like Bitcoin and Ethereum, utility tokens used in specific ecosystems, and NFTs that represent ownership of unique digital items. The rapid growth of digital assets has prompted both enthusiasm and skepticism, necessitating a thorough examination of their implications.

The contemporary environment in which the rules of property law are applied is a dynamic interrelationship between legal philosophy, social norms and the ever-expanding limits of human innovation. Digital property is a new, modern, form of property, which is immanent in the digital society. As such, it inevitably conditions the redefinition of traditional legal institutes of property and property rights, i.e. property rights principles. Together with electronic contracts, electronic signatures, electronic administration, and other modern legal innovations, it poses significant challenges to the legislator and legal norms in general (Feliu, 2024).

A digital asset is defined as a digital entity containing data, content and rights that are stored in a unique and identifiable manner (Lee, 2024). Digital assets can be broadly categorized into three main types: cryptocurrencies, tokens and non-fungible tokens (NFTs). Cryptocurrencies are decentralized digital currencies that leverage cryptography for secure transactions and they operate on blockchain technology (*distributed ledger technology* – DLT), which ensures transparency and immutability. Tokens represent assets or utilities on a blockchain and can be subdivided into two main categories: utility tokens (used within a specific ecosystem to access services or products, and security tokens (which are used as digital representations of ownership in traditional assets, subject to securities regulation). NFTs are unique digital assets that represent ownership of specific items, such as art, music, or virtual real estate. Their distinctiveness is verified through blockchain technology, enabling provenance and scarcity. Tokens and virtual currencies, as currently the most widespread forms of digital assets, are in theory designated as cryptoassets, implying that digital assets are secured cryptographically, and that present value or contractual rights. Tokens and virtual currencies are transferred, stored and exchanged electronically in legal transactions, relying on DLT technology (distributed ledger technology) (Garrido, 2023). Bitcoin is the most widely recognized form of crypto-assets based on blockchain technology, and it is further enhanced by the integration of smart contracts with this technology, which enables the safe transfer of property rights. It is important to note here that not all DLT applications are cryptocurrencies at the same time, since cryptocurrencies primarily use blockchain technology, as a subsystem of DLT (Cvetković, 2020).

The ownership of these assets is often murky due to the lack of universally accepted legal definitions and frameworks. Unlike tangible property, which is easily transferable and often well-documented, digital assets can be created, modified, and transferred with relative ease, raising questions about ownership rights. As we have mentioned, digital assets mainly rely on blockchain

technology, which consists of distributed ledgers that record transactions across multiple nodes (Akpan, Enyeribe, & Awe, 2022). Key features of this technology include decentralization in the sence of elimination of central authorities which enhances security and reduces the risk of fraud, usage of smart contracts as self-executing contracts with the terms of the agreement directly written into code, in order to facilitate trustless transactions, and interoperability as the ability of different blockchain systems to interact with one another which allows for a more versatile and integrated financial ecosystem.

3. Digital property from the private international law perspective

Digital property, and the special legal aspects of this new legal institute, are today a common subject of legislative regulation. At the same time, the global financial market, based on the Internet, in which subjects participate through various forms of crypto currencies or crypto-assets, operates to a certain extent outside the reach of official regulation. Special regulatory entities appear, in the form of financial regulators that create rules of a non-national character or the so-called soft law, with the aim of reaching financial stability and protection of service users. This regulatory strategy is characterized by being based on risk assessment and management, and proactive control mechanisms (Stojšić Dabetić & Mirković, 2024). Crypto-assets are intangible entities that exist as a record on decentralized networks that touch multiple national jurisdictions, in the sense that they are part of the global market that takes place via the Internet, and that the participants of such transactions is not usually possible to connect to one national jurisdiction (Brown & Chance, 2023). In such circumstances, the injured parties are faced with a real dilemma of whom to sue and before which court. In this segment of the paper, we will analyze the reach of the usual legal rules of PIL on special issues that arise in connection with disputes regarding the use of digital or crypto assets, while a critical review of non- national rules will be presented in the concluding remarks.

4. Conflict of laws issues

Ever since the emergence of the Internet as a separate system not tied to one (sovereign) territory, the very usage of digital technology deviates from the principle of territoriality, which is the foundation of the PIL system. The concept of DLT was created with the intention of creating a decentralized

system based on the trust of the participants in the technical process itself, and the rules of conduct are subject to mutual consent and agreement of the participants themselves. In the absence of a valid choice of governing law in a specific legal relationship, the question arises as to how to determine the governing law, which is further complicated by different understandings of the legal nature of digital property – whether it is real property or obligation law.

As a key question, it is highlighted whether PIL can include in its rules legal relationships that arise and take place via the Internet. The basic principle of PIL is to find the center of gravity of the legal relationship that is connected to the territory of a certain state in order to be able to determine the governing law. This is the essence of the methodology in the creation of legal rules related to the principle of finding the closest connection – which implies a geographically determined place, which in the context of legal relations created through the Internet, i.e. digital technology, cannot be clearly determined. The Internet itself, as well as blockchain technology, is an intangible and transnational phenomenon. The key problem is determining the location on the Internet, or location of the blockchain, which is fundamentally decentralized.

If we look at crypto-assets as property, applying the traditional rules of PIL – *lex rei sitae*, for the acquisition and loss of property rights on crypto-assets, the law of the place where the asset in question is located at the moment of the act by which the right is acquired or lost. The legislator, that is, the judge in the case of a legal gap, will try to identify the national order that is most closely related to the legal relationship in question. Specifically, in the case of crypto-assets, this means determining the location of either the digital wallet or the owner's private cryptographic key, or the location of some other digital data or records. This is where a collision occurs between the specificities of different forms of digital property and the possibility of applying the PIL rules. Determining a location in a virtual world is not the same as determining a location in a non-virtual one, nor can a location just be "transferred". Namely, the location of a specific digital record can be completely random, so without a real and relevant connection with the specific country it points to. If it is a record in the block chain, that connection is decentralized, the chain itself is "everywhere and nowhere." In this context, digital assets are often attributed the property of "omniterritoriality", in the sense that it denotes a phenomenon that cannot be tied to one country or public order or another because it has simultaneous and equally relevant connections with other jurisdictions around the world (Law Commission, 2023).

If we look at crypto-assets as obligations, in the event of a dispute, the claim will be aimed at compensation for damages in the amount of lost crypto-assets. Applying the traditional rules of PIL – *lex loci delicti*, the center of gravity of this legal relationship is the place where the damage occurred or the place where the consequence occurred. In the context of transactions on the Internet, the place of occurrence of damage is the place from which the illegal activity (hacking) that resulted in damage to digital property was undertaken, which in practice can be any location, even several locations at the same time. An additional aggravating circumstance is if the harmful action is taken within the framework of an public order in which such action is not illegal. If we decide to bind the governing law to the place where the consequence occurred, we return, as in the case of real legal treatment of crypto-assets as property, to the problem of locating the digital wallet or private cryptographic key, and encounter the same limitations as previously explained. If we would like to apply as a binding point the place where the owner of the digital property is at the time of the damage, his habitual residence or domicile, this proves to be problematic in practice since the owner of the digital property can access it from anywhere on the planet where exists internet connection.

The context of transactions with digital assets means that digital assets are most often traded through smart contracts, which are essentially computer codes that automatically execute the entire contract or part of it. Smart contracts are based on DLT or blockchain technology, which has the effect that the terms of the contract are contained in the computer code on the blockchain platform (Kim, 2020). Freedom of contracting is a basic and generally accepted principle of contract law, which can also be applied to contracts related to digital assets. In this sense, when concluding a contract related to digital assets or through which transactions with digital assets are carried out, the parties have the opportunity to choose the applicable law, with certain limitations that concern each legal order separately. The usual restrictions refer to contracts related to the sale of real estate, to certain status issues, to circumventing the law and respect for public order, as well as the protection of third parties. The choice of the applicable law, which is shown to be the most acceptable solution, implies that the parties can effectively give their consent to the application of a certain law, which takes place either within the smart contract itself or by accessing the blockchain platform, where the rules for participation are agreed on and accepted, which also contain a clause on the choice of the applicable law. The choice of governing law must be made among the legal systems that recognize blockchain transactions, because that is the only way they can have a legally binding character. In the absence of an

agreement between the parties on the applicable law, and bearing in mind the limitations when locating crypto-assets, we can imagine the application of *lex fori* as a residual solution, as a presumption of an objective connection with the dispute.

5. Conflict of jurisdiction issues

Disputes that may arise in practice in connection with digital assets, taking into account their basis on smart contracts and DLT, can be divided into off-chain and on-chain disputes (Utasy Clark, 2022). If it is a contractual dispute regarding a contract where cryptocurrency is provided as a means of payment, or disputes related to the nullity of a smart contract or the performance of another obligation from a smart contract, these are the types of disputes that are designated as off-chain disputes. These disputes are not related to the blockchain platform itself and the activities on it, but are only a consequence of a certain blockchain transaction. On the other hand, disputes that are designated as on-chain disputes are those regarding lawsuits against the very digital platforms on which transactions are performed, either for reasons of denial of presence or other risks related to trading on the platform.

Considering the primary use of crypto-assets in the economic and business environment, the first question that arises is the issue of arbitrability of disputes related to digital assets, since arbitration is perceived in the modern business environment as the most preferred dispute resolution mechanism. Most European courts have recognized the property status of digital assets, and with it the arbitrability of disputes related to it. This means in practice that there may be a small number of grounds where a country's regulations would provide for the exclusive jurisdiction of its courts in relation to disputes over the use of digital assets. What may be of importance in practice are the imperative state regulations that refer to restrictions on the freedom of contracting and freedom of choice of the court, which seek to protect public order. Arbitration as a way of resolving disputes proves to be a very suitable mechanism in relation to disputes regarding digital assets, since the internationality of transactions naturally requires an international forum for the resolution of possible disputes, ensuring efficiency and confidentiality and appropriate rules of procedure, and above all the technical aspects of the dispute in this way they receive treatment from persons who have professional specific knowledge (Lazić & Dragićević, 2023).

In the context of national courts, a state court can decide a dispute related to a digital asset or other transaction on the Internet, only if domestic

regulations treat blockchain transactions as legally binding. As in relation to the question of the applicable law, and in the context of the internationally competent court, the parties should be given the opportunity to choose the competent court – by prorogation or derogation agreement. Especially since there is very little possibility to foresee the exclusive jurisdiction of national courts in relation to these disputes, and the transactions themselves or records are by their nature cross-border. As well as the choice of the applicable law, due to the competent court, it can be an integral part of the smart contract or general terms of business or of the rules of the blockchain platform. If the parties do not choose an internationally competent court, the possibility remains to apply the national rules by which each country determines the conditions for the jurisdiction of its courts for disputes arising from blockchain transactions.

The recognition and enforcement of foreign arbitral and judicial decisions relating to digital assets is first subject to the test of the application of the public policy clause of each national system. If the national system has appropriate regulations that regulate digital assets, or if there is a national regulatory mechanism and state supervision as a framework for legalizing the use of digital assets, the recognition and execution of decisions related to digital assets should not be refused by calling for public order. On the other hand, very restrictive regulations regarding the use of digital assets in one order may make it impossible to recognize and enforce foreign court and arbitration decisions.

6. Conclusion

In the rapidly evolving digital landscape, the concept of property has expanded beyond physical assets to include digital property or assets. Digital assets represent a transformative force in the financial ecosystem, offering unprecedented opportunities alongside significant challenges. As our reliance on digital technology increases, so too does the need for a coherent legal framework to address the unique challenges posed by the ownership, transfer, and protection of these intangible assets.

The application of PIL allows blockchain transactions to be linked to the national order, thus enabling the transactions themselves to receive a certain legal framework and thus legal force. There is still no 100% coverage in this segment in national legal orders, although more and more countries are passing regulations regulating transactions on the Internet and digital assets. In the literature, there are positions that speak in favor of the development of

various forms of digital property, which seeks to create a system that creates the necessary security for international trade transactions without the need for the participation of legal regulations and legislators. The aspiration to provide legal rules that lead to legal certainty is marked as paradoxical, for the needs of a system that was not originally designed to require the existence of legal certainty of the state apparatus behind it. The system of blockchain transactions is precisely based on the paradigm of mutual trust of the participants, as well as trust in the system. The security guarantee is not provided by the state, nor by financial intermediaries, but by the computer protocol itself, which once started works without human intervention. In this way, a kind of self-regulation develops within such systems, where the participants themselves create legal rules that are valid based on mutual trust supported by computer protocols and codes. It is precisely this postulate of trust in the digital record or the computer code conditioned the designation of the thus created and applicable rules as *lex cryptographia* – a legal order separate from the state legal order. A kind of non-national legal system, which further requires an upgrade with an online dispute resolution system, in order to be effective in protecting private rights. In the current state of development of the modern digital society, this idea still seems paradigmatic. PIL are the existing rules that were created to solve the problems arising from the juxtaposition of the transnationality of the Internet and the nationality of the private law system, by enabling legal relations that have nothing to do with a certain territory to be legally connected to a certain legal order. It is clear that the traditional PIL rules have limited reach here, as we have seen, but for now they are the only rules we can apply in this context. The further process of convergence of law and digital technology must certainly move in the direction of redefining the postulates of PIL.

The rapid evolution of digital assets has outpaced regulatory frameworks, leading to various challenges such as lack of standardization and the absence of universally accepted standards which complicates the classification and regulation of digital assets (Sidorenko & von Arx, 2020). Followed by jurisdictional issues as different countries adopt varying stances towards digital assets, creating a fragmented regulatory environment. The emergence of blockchain technology has introduced new paradigms for ownership and transaction verification. However, the lack of a centralized authority complicates enforcement and compliance with regulations. This situation creates a legal gray area, wherein individuals may find themselves operating outside established laws, potentially leading to conflicts and legal disputes. As digital property continues to gain prominence, regulatory bodies are grappling

with how to treat these assets within existing legal frameworks. Governments around the world are developing regulations for cryptocurrencies and digital assets, attempting to balance innovation with consumer protection and financial stability (Gutbrod, 2020). The decentralized nature of many digital assets poses challenges for regulation, as traditional regulatory mechanisms may not apply. Efforts to establish a cohesive regulatory framework across jurisdictions will be crucial for the sustainable growth of digital assets. The path forward will likely involve a combination of reforming existing legal structures and creating new frameworks tailored to the digital age, ensuring that the legal treatment of digital property keeps pace with technological advancements.

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DIGITALNA IMOVINA – POSEBNA PITANJA PRIMENE PRAVILA MEĐUNARODNOG PRIVATNOG PRAVA

APSTRAKT: Digitalna imovina se pojavljuje kao nov segment imovinskog prava, iako je istovremeno posledica digitalizacije finansijskog posredovanja i predstavlja oblik tehnološke inovacije kao supstituta platnim uslugama i ulaganjima na bankarskom i berzanskom tržištu. Kao važna se javljaju pitanja izbora merodavnog prava i međunarodno

nadležnog suda, kao i pitanja priznanja i izvršenja stranih sudskih i arbitražnih odluka koje se odnose na prestacije u kriptovalutama kao najrasprostranjenijem obliku digitalne imovine. Rad je i koncipiran tako da istakne specifičnosti digitalne imovine koje su od značaja za primenu postojećih pravila međunarodnog privatnog prava, ne vezujući analizu za jedan konkretan pravni sistem, već postavljajući analizu na međunarodno privatno pravo kao granu pravne nauke koja ima svoje regulatorne postulate koji su najvećim delom harmonizovani između pravnih sistema. Cilj rada jeste da se vidi domašaj mogućnosti primene tradicionalnih instituta međunarodnog privatnog prava na digitalnu imovinu kao pravni novum koji se nalazi između imovine, odnosno stvari i prava, odnosno finansijskog instrumenta. Sintezom ključnih pitanja koja se pojavljuju pri primeni pravila međunarodnog privatnog prava na digitalnu imovinu, cilj nam je da pružimo sveobuhvatno razumevanje regulatornih izazova koji su neodvojivo povezani sa ulogom digitalne imovine u savremenom pravu i ekonomiji.

Ključne reči: *digitalna imovina, kripto sredstva, međunarodno privatno pravo, smart ugovori, merodavno pravo, međunarodno nadležan sud, lex cryptographia.*

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