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CONFLICT-OF-LAW REGULATION OF THE ISSUANCE, PLACEMENT AND CIRCULATION OF CRYPTOASSETS AS AN INTRUMENT FOR RAISING CAPITAL IN INTERNATIONAL PRIVATE LAW

КОЛІЗІЙНО-ПРАВОВЕ РЕГУЛЮВАННЯ ВИПУСКУ, РОЗМІЩЕННЯ ТА ОБІГУ КРИПТОАКТИВІВ ЯК ІНСТРУМЕНТУ ЗАЛУЧЕННЯ КАПІТАЛУ В МІЖНАРОДНОМУ ПРИВАТНОМУ ПРАВІ

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Abstract. *The purpose of the study is to analyse the regulatory and legal acts of states, as well as the works of organisations and scholars, for the purposes of determining approaches to the applicable law to cryptoassets in legal relations with a foreign element or the possibility of choosing a special law at the discretion of the parties. The main issue of the study is the lack of a generally accepted approach in modern private international law to considering the applicable law to legal relations involving cryptoassets in the presence of a foreign element. Due to the ongoing integration of cryptoassets into international finances, there is an urgent need to define the conflict of laws rules that shall be applied to cryptoassets. The study analyses conflict-of-law rules that are either proposed by various researchers, soft law acts, works of legal organisations, or determined by courts as precedents in countries with Anglo-Saxon legal systems. Therefore, the author has unified such approaches to develop a single hierarchical system of conflict-of-law rules that can be applied to cryptoassets and will serve as a proposal for implementation into Ukrainian legislation in the future. It has been determined that the main principle in establishing the applicable law is the autonomy of the parties' will, which allows the parties to independently choose any law, except in cases where cryptoassets are to be stored with a cryptoasset service provider in relation to custody and administration of cryptoassets on behalf of customers. At the same time, the applicable law regarding the placement of cryptoassets and their circulation has also been separately analysed and proposed. In addition, it has been confirmed that no law applies to the issuance of cryptoassets, since the actual issuance of cryptoassets is a technical process that is not subject to regulation and has no legal aspect.*

Keywords: *cryptoassets, issuance, placement, circulation, conflict of laws, autonomy of the parties, cryptoasset service provider.*

Анотація. *Метою дослідження є аналіз нормативно-правових актів держав, а також праць організацій та науковців для визначення підходів щодо застосовного права до*

криптоактивів у правовідносинах із іноземним елементом або наявності можливості обрати спеціальне право за бажанням сторін. Основна проблематика дослідження полягає у відсутності у сучасному міжнародному приватному праві загальноприйнятного підходу щодо визначення застосовного права до правовідносин із криптоактивами за наявності іноземного елемента. У зв'язку із постійною інтеграцією криптоактивів у міжнародні фінанси, виникає нагальна потреба окреслити колізійні прив'язки, які слід застосовувати щодо криптоактивів. У досліджені проаналізовано колізійні прив'язки, які або пропонуються різноманітними дослідниками, актами м'якого права, роботами правових організацій, або визначених судами у якості прецедентів у державах англо-саксонської системи права. Таким чином, автором було уніфіковано зазначені підходи для вироблення єдиної ієрархічної системи колізійних прив'язок, які можуть застосовуватися до криптоактивів та слугуватимуть пропозицією щодо імплементації в українське законодавство у майбутньому. Визначено, що основним принципом при встановленні застосовного права є автономія волі сторін, яка дозволяє сторонам самостійно обрати будь-яке право, окрім випадку, коли передбачається зберігання криптоактивів у постачальника послуг зі зберігання криптоактивів. При цьому також окремо проаналізовано та запропоновано застосовне право у зв'язку з розміщенням криптоактивів та їх обігом. Окрім цього, підтверджено, що до випуску криптоактивів не застосовується жодне право, оскільки їх фактичний випуск є технічним процесом, який не піддається регулювання та щодо якого відсутній юридичний аспект.

Ключові слова: *криптоактиви, випуск, розміщення, обіг, колізійні прив'язки, автономія волі сторін, постачальник послуг зі зберігання криптоактивів.*

Introduction. The integration of cryptoassets into the financial system is becoming increasingly important. However, the pace of introducing legal regulations governing cryptoassets is excessively slow, which is already resulting in number of problems that needs to be resolved. One of the issues is the law that should be applied in legal relations involving cryptoassets with the existence of a foreign element. There are many variables in this regard, such as the decentralised network on which it is issued, placed, and circulated, the issuer of the cryptoasset, and the parties to the transaction involving the cryptoasset. Since there is an urgent need to understand which law shall be applied to cryptoassets, for this purpose this study was conducted.

The purpose of the article is to examine the approaches proposed by scholars or legal organisations, soft law acts, and case law of Anglo-Saxon legal family countries in order to develop a hierarchical system of conflict-of-law rules regarding applicable law that can be implemented in Ukrainian legislation.

Literature review. In addition to the legislation of countries and the case law of Anglo-Saxon countries, among the authors of specialised literature on determining the applicable law to legal relations involving cryptoassets, the following can be highlighted: O.I. Vygovskyy, V.I. Lehenko, Barbara M. Goodstein, Adam C. Wolk, Andrew Dickonson, Pascal Favrod-Coune, Kévin BeletChapter, and Lehmann Matthias. In addition, the UNIDROIT Principles on Digital Assets and Private Law were examined as one of the main fundamental works on the proposed conflict of laws rules.

Main results of the research. Currently, private international law does not offer generally accepted conflict-of-law rules that apply to cryptoassets as a whole for the purposes of determining the applicable law in the presence of a foreign element or the desire of the parties to the transaction to choose a specific law for it. In this regard, it would be advisable to examine the proposed ideas of conflict-of-law rules for general cryptoassets or the approaches of different states, and if they cannot be directly applied to the subject of the study, to adapt the most rational ideas.

From a technical point of view, cryptoassets and securities are different in nature, but their legal nature has many similar aspects, so at first glance it would be advisable to apply traditional conflict-of-law rules typical for direct and indirect ownership of securities. However, as noted by Vygovskyy O. I., given the accounting of cryptoassets in a decentralised network based on blockchain, they lose their relevance due to problems with localisation in space and determining the lex situs for cryptoassets, i.e. the relevance of determining the situs for an intangible asset, which is complicated by the special place of accounting for cryptoassets *(Vygovskyy, 2020)*.

To this end, it is necessary to review a number of regulatory acts of various institutions and states in order to examine the conflict-of-law rules they propose for application, and then systematise them and identify those that are most efficient for the general circulation of cryptoassets in general, as well as applicable to the issuance, placement and circulation of cryptoassets for the purpose of raising capital.

UNIDROIT Principles on Digital Assets and Private Law 2023

This document considers digital assets in a broad sense as electronic records that can be controlled. On a practical level, this includes cryptoassets. It should be noted that it considers digital assets only in relation to issues of choice of law and does not address issues of jurisdiction or the subject matter of the dispute. The UNIDROIT Principles provide that the main conflict-of-law rule for determining the applicable law for cryptoassets is the autonomy of the parties' will *(UNIDROIT Principles on Digital Assets and Private Law, 2023)*.

The autonomy of the parties' will, or lex voluntatis, is in fact one of the main conflict-of-law rules, which in fact embodies the main features of private international law, so it is foreseeable that it is proposed for application in property relations concerning cryptoassets in the aforementioned document *(Pokachalova, 2016)*.

At the same time, the chosen law must be explicitly stated in the cryptoasset *(UNIDROIT Principles on Digital Assets and Private Law, 2023)*. In this context, it is quite problematic to determine how this rule should be specified, given the nature of cryptoassets: whether in the cryptoasset's whitepaper, on its official website, or in the program code.

Nevertheless, the document in question is soft law, so states can adapt the provision independently. In our opinion, the autonomy of choice of applicable law lies in the possibility, for instance, for an issuer or a person making an offer for the initial purchase of a cryptoasset to determine which law will apply to property relations regarding cryptoassets in the process of their circulation.

It is also noteworthy that, in addition to indicating the applicable law, it is permissible to specify the special UNIDROIT Principles on Digital Assets and Private Law 2023 that will apply to it (the "**Principles**"). In our opinion, the application of the Principles may be permitted in such a case, but only to the extent that they do not conflict with the applicable law. If, over time, the applicable law includes provisions that conflict with the Principles, the provisions of the applicable law will prevail.

Nevertheless, the Principles provide for other conflict-of-law rules. If the applicable law is not specified for a cryptoasset, then the law that is explicitly specified for the decentralised network on which the cryptoasset operates applies (and certain Principles are additionally applied, as in the first case). This approach is generally problematic, as there are currently few decentralised networks that directly or indirectly determine the law to which they are subject (for example, Bitcoin or Ethereum do not have such a connection).

If the above approaches cannot be used, the law of the issuer's personal law is chosen (i.e., the citizenship of the natural person issuer or the place of registration of the legal entity issuer).

However, frequently the identity of the issuer of a cryptoasset remains unknown, since the cryptoasset has been created by an anonymous person. In this case, the Principles provide two options for application.

In the first option, the legislator of a particular state may independently determine that its law should apply to property relations involving cryptoassets, supplemented by the Principles (if the legislation does not cover certain issues). For issues not covered by the legislation and the Principles, special rules of private international law of that state are to be applied.

At the same time, second option provides for the direct application of the Principles in accordance with the legislation of a particular state, and in cases not covered by the Principles, the special rules of private international law of that state are applied.

In our opinion, allowing a state to independently determine that certain provisions regarding cryptoassets should be regulated by its legislation is dangerous in terms of the fragmentation of the legislation of different states, when situations arise in relations with a foreign element where some legal relations will be subject to the jurisdiction of several states (or certain rules will be governed by the Principles, while others will be governed by the legislation of another state).

In addition, the Principles provide for a specific conflict of laws rule in the form of the law governing the custody of cryptoassets. In other words, in relationships where a customers'

cryptoassets are stored by a cryptoasset service provider, the law governing the contract for the provision of cryptoasset custody and administration services by that service provider applies to these property relations. In other words, the parties to such an agreement may independently choose the applicable law. If this is not provided for, the law of the place of registration of the service provider shall apply *(UNIDROIT Principles on Digital Assets and Private Law, 2023)*. However, in this situation it is rather advisable to constantly apply the law of the place of registration of the service provider, given the necessity for the states to introduce regulations to be followed by the service providers in order to secure cryptoassets of the customers. It is mostly an issue of providing a detailed regulation of the general cryptoassets circulation, therefore, the possibility to choose the law independently may prevent states from their primary function to regulate cryptoasset service providers, which are registered in such states.

As we can see, the Principles provide for a fairly consistent structure for the application of conflict-of-law rules to determine the applicable law. At the same time, there is a separate conflict-of-law rule in relation to the custody of cryptoassets with the relevant service providers.

However, in general terms, without custody, these rules do not resolve the problem constantly, since if it is impossible to apply the three main approaches, it is assumed that states will be able to independently determine in their legislation that certain issues will be governed by the provisions of their legislation, and in other cases – by the Principles or the rules of private international law of that state. As already mentioned, such an approach can only complicate the determination of law due to competition between different jurisdictions that will determine the relevant provisions in their legislation.

The United States of America

In 2022, the Uniform Commercial Code of the United States of America was amended by introducing in Article 12 the concept of a controllable electronic records as a record stored in an electronic medium that can be subject to control. Based on this concept, it also includes cryptoassets, which are not explicitly mentioned.

Thus, according to the amendments, there are five consecutive links to a controlled electronic record:

1) the jurisdiction explicitly specified in the cryptoasset;
2) the jurisdiction explicitly specified in the decentralised network on which the cryptoasset operates;
3) the law of jurisdiction explicitly specified in the cryptoasset;
4) the law of jurisdiction explicitly specified in the decentralised network on which the cryptoasset operates; or
5) the jurisdiction of the District of Columbia, Washington.

On the one hand, paragraphs 1 and 3, as well as 2 and 4, are synonymous. However, in our opinion, the issue lies in the peculiarities of the legislation of the United States of America, where each state has its own legislation. In this regard, such clarification is provided for a more prudent choice of applicable law in cases where particular jurisdiction or law of this jurisdiction is applied. As a result, the Uniform Commercial Code of the United States offers conflict-of-law rules that are applied sequentially if the previous one is not applicable *(Uniform Commercial Code Amendments, 2022; Wilkie Farr & Gallagher LLP, 2024)*.

In fact, a similar approach to autonomy of will is found in the Principles, whose developers probably incorporated some ideas from the amendments to the Uniform Commercial Code.

The last conflict-of-law rule is also peculiar. If it is not possible to identify the applicable law or jurisdiction, the law of Washington, District of Columbia, as a neutral jurisdiction, will apply. Therefore, it is clear that the provisions of the Code were focused on the United States, not other countries *(Goodstein & Wolk, n.d.)*.

In any case, the Uniform Commercial Code is a soft law act and serves more as a set of recommendations for states on how to implement the provisions. Nevertheless, at the time of writing, 25 US states have already adopted, and 13 are in the process of adopting, provisions on controllable electronic records, including in the context of conflict of laws *(UCC, 2022)*.

England and Wales

Although English law does not currently provide for statutory conflict-of-law rules governing

property relations in the context of cryptoassets, the High Court of England and Wales has repeatedly confirmed the right of domicile (personal law of a person), indicating that the lex situs of a cryptoasset is the permanent place of residence of the natural person or the place of registration of the legal entity that owns it.

Notably, a similar approach was proposed by Andrew Dickinson in 2019 *(Dickinson, 2019)* and subsequently confirmed in a number of decisions by the High Court of England and Wales. In particular, in the cases of Ion Science v. Unknown Persons in 2020 *(Ion Science Ltd v Persons Unknown and others, 2020)* and Fetch.ai v. Unknown Persons in 2021 *(Fetch.ai Ltd v Persons Unknown Category A, 2021)*.

These cases make it clear that in property disputes where a person is the owner of a certain cryptoasset, the personal law of that person applies. Accordingly, English law was used in these two cases.

However, in a later case, Tulip Trading Limited v Wladimir van der Laan et al. in 2022, the High Court of England and Wales changed its position, noting that in property relations, it is necessary to determine not the permanent residence of the individual/place of registration of the legal entity owning the cryptoassets, but rather the right of temporary residence of the individual or the temporary main activity of the legal entity that owns the cryptoassets *(Tulip Trading Limited v Wladimir van der Laan and ors, 2022)*.

Switzerland

Switzerland offers a rather complex structure of legislation related to cryptoassets. In its concept, they are referred to as tokens and are not directly mentioned in the legislation on conflicts of law. Nevertheless, researchers note that the rules of Article 145a of the Swiss Federal Act on Private International Law of 1987 ("**Swiss Federal Act**"), as amended, apply to them, although it mainly concerns securities in the form of tokens, as well as tokens linked to assets (e.g., stablecoins) *(Federal Act on Private International Law of 18 December 1987, n.d.; Favrod-Coune, Belet, 2023; Lehmann, 2024)*.

The provisions of the law stipulate that the issuer may independently specify the law that will apply to the token. In other words, in this case, the autonomy of the parties' will is assumed.

If no law is chosen, the law of the place of registration of the legal entity (issuer) applies. If it is impossible to determine such law, the main place of activity of the legal entity law applies.

At the same time, if a dispute arises, where several persons claim their rights to a token (i.e., a token linked to an asset), the law of the location of the assets embodied in the token will apply in accordance with Swiss Federal Act. However, this is a specific conflict of laws rule, which probably applies to a specific individualised asset whose location can actually be determined. For example, certain agricultural goods in a specific warehouse, the rights to which were embodied in the form of tokens.

Liechtenstein

In 2021, the Act on Tokens and Trusted Technology Service Providers ("**Liechtenstein Act**") came into force in Liechtenstein. Liechtenstein Act does not provide for direct conflict of laws provisions regarding cryptoassets, but it does have localisation provisions aimed at determining Liechtenstein law as the law applicable to tokens (cryptoassets) *(Vygovskyy, Lehenko, 2024)*.

It should be noted that Liechtenstein Act directly regulates cryptoassets and providers of services related to cryptoassets, although it uses the terms tokens and trust technology service providers for this purpose.

The application of Liechtenstein law is permissible in two cases:

1) if the cryptoassets are created or put into circulation by a service provider with its headquarters or place of registration in Liechtenstein; or

2) the parties expressly state that the provisions of Liechtenstein law apply to their property relations with cryptoassets in transactions *(Token and TT Service Provider Act, 2019)*.

As we can see, Liechtenstein Act offers two localisation links: the law of the place of registration of the legal entity-issuer or the location of the executive management body of the legal entity.

However, if the parties wish, they may independently choose Liechtenstein law. In other words, the principle of autonomy of the parties' will applies.

Singapore

Singaporean law does not provide for conflict of laws rules for determining the applicable law in property relations involving cryptoassets on a statutory level. However, precedent is also a source of law in Singapore. Accordingly, in 2024, in the case of Cheong Jun Yoong v Three Arrows Capital Ltd *(Cheong Jun Yoong v Three Arrows Capital Ltd and others, 2024)*, the High Court of Singapore analysed the precedents of English law mentioned above in section "*England and Wales"*, in particular Ion Science v. Unknown Persons 2020 *(Ion Science Ltd v Persons Unknown and others, 2020)*, Fetch.ai v. Unknown Persons 2021 *(Fetch.ai Ltd v Persons Unknown Category A, 2021)* and Tulip Trading Limited v. Wladimir van der Laan et al 2022 *(Tulip Trading Limited v Wladimir van der Laan and ors, 2022)*.

As a result, the court concluded that the most appropriate conflict of laws rule is rather not the personal law of the owner of the cryptoasset, but the personal law of the person who controls and owns the cryptoasset. This position was taken by the plaintiff Cheong Jun Yoong, who argued that the asset "*is best manifested through control over it*", an opinion that was supported by the court *(Cheong Jun Yoong v Three Arrows Capital Ltd and others, 2024)*.

Therefore, considering the positions of various jurisdictions in the context of cryptoassets, we can identify seven general approaches that are proposed in numerous sources:

1) the principle of autonomy of will with regard to cryptoassets (where the applicable law is embodied in the cryptoasset);
2) the principle of autonomy of will with regard to decentralised networks;
3) the principle of autonomy of will of the parties;
4) the personal law of the issuer;
5) the personal law of the cryptoasset service provider in relation to custody and administration of cryptoassets on behalf of customers;
6) the personal law of the person or entity who owns the cryptoasset; and
7) the personal law of the person or entity who controls the cryptoasset *(Lehmann, 2024)*.

In many cases, more than one conflict-of-law rule is used, depending on the situation. Given the variety of different approaches and the impossibility of implementing a single "ideal" conflict of laws rule, we can conclude that the most effective option is to create a system that would provide for the application of the next conflict of laws rule if the previous one is not applicable due to certain circumstances.

It should be noted that, in our opinion, the principle of autonomy of will of the parties could be the most acceptable option for regulating property relations. Nevertheless, in most cases, in particular in the Principles, as well as in the Uniform Commercial Code of the United States, autonomy of will addresses precisely the possibility of specifying, when issuing a cryptoasset, a specific law that will apply to virtually all property relations.

In this case, we rely on the autonomy of will of the issuer of the cryptoasset to specify the applicable law or, if the cryptoasset is created on the basis of the Proof-of-Work consensus algorithm, the developer of the cryptoasset *(What is Proof-of-Work (PoW) with Simple Words?, 2023)*. The possibility of applying the applicable law by the parties of transactions with cryptoassets independently is provided for exclusively in the relevant law of Liechtenstein, which states that its legislation applies if the parties have expressly chosen its law.

As Matthias Lehmann points out, the autonomy of the issuer (developer) in applying the applicable law carries a high risk that third parties who will use cryptoassets and carry out transactions with them will not be aware of the law specified by the issuer (developer). Specifying the law in the program code or providing a reference to official sources of information about the cryptoasset could solve this issue, but in any case, it is insufficient for general user information. In addition, he also emphasises the contradiction of this approach with the "libertarian and anti-state philosophy underlying blockchain", which provides for the free use of cryptoassets *(Lehmann, 2024)*. The same can be referenced to the principle of autonomy of will with regard to a decentralised network.

In view of this, priority should be given first and foremost to the autonomy of will in the independent choice of applicable law by the parties to a transaction involving cryptoassets, and only then to cryptoassets and decentralised networks.

Considering the above, in our opinion, the general hierarchy of conflict of laws in relation to property relations with cryptoassets should be as follows:

1) The principle of autonomy of the parties' will

It is important that the parties to a transaction have the opportunity to choose the applicable law themselves, however, the parties must specify it explicitly and clearly in advance, otherwise this principle will not apply.

2) The principle of autonomy of the issuer's (developer's) will

If the parties have not specified which law they wish to apply, the principle of autonomy of the issuer's (developer's) will may be used, which directly specifies the applicable law for the cryptoasset. States may independently determine what constitutes confirmation of the choice of law, but in our opinion, it is sufficient to indicate this in the program code of the cryptoasset and/or in official sources of information about it. For example, in a whitepaper (if available).

3) The principle of autonomy of will with regard to a decentralised network

If no applicable law has been determined for the cryptoasset, preference should be given to the autonomy of the decentralised network on which the cryptoasset operates. The rules for determining such law are similar to the autonomy of the issuer (developer).

4) Personal law of the issuer (the person making the offer)

If the three previous rules cannot be applied, it would be advisable to use the issuer's personal law. In our opinion, the most appropriate approach for legal entities is to apply the place of registration of the legal entity, and for individuals – their nationality as the most stable legal construct in property relations, including those relating to cryptoassets.

In this context, it is worth noting that when placing a cryptoasset for the purpose of raising capital, the greatest degree of responsibility lies with the person making the offer to purchase the cryptoasset to buyers. In view of this, such cryptoassets should be subject to the personal law of the person making the offer, i.e. their place of registration.

5) Personal law of the cryptoasset owner

The United Kingdom and Singapore have fairly similar precedents regarding cryptoassets, which refer to the personal law of the owner of the cryptoasset (the person who controls the cryptoasset). However, under normal circumstances, the Singapore approach should be relied upon, as one of the manifestations of ownership of a cryptoasset is the ability to dispose of it, i.e. to control it using private keys *(Private Key: What It Is, How It Works, and Best Ways to Store, 2025)*.

In the case of legal disputes in which an owner who has lost control over a cryptoasset wishes to regain control over it, the general personal law of the owner of the cryptoasset (without taking control into account) should be followed.

Similarly to the fourth conflict of laws rule, the personal law for a legal entity should be determined by the place of registration of that entity, and for a natural person, by their nationality.

In our opinion, this structure of conflict of laws rules will contribute to the overall regulation of cryptoasset circulation.

However, it should be noted that it is also necessary to identify a special conflict of laws rule for the personal law of a cryptoassets service provider involved in the custody and administration of cryptoassets on behalf of customers. Since generally the relevant service providers can only perform their functions in the form of legal entities, the law of the place of registration of such legal entities will apply, rather than the general conflict of laws rules proposed above.

Conclusions. Having defined the conflict of laws rules applicable to property relations concerning cryptoassets in general, we can conclude to what extent they can be applied to cryptoassets that are issued and placed for the purpose of raising capital.

With regard to the actual issuance of cryptoassets, we do not observe any legal issues, since the issuance of cryptoassets is a purely technical aspect that cannot be regulated.

The situation is different with the placement of cryptoassets. Since the placement must be carried out by a person making an offer in a particular country, a rule should be introduced to apply the law of the authority where the whitepaper and marketing communications are registered.

In other words, the placement will take place in accordance with the law of the state to whose regulatory authority all necessary documents are submitted for the purpose of admitting the cryptoasset to placement.

However, with regard to the further circulation of cryptoassets after their placement, the hierarchy of general rules for cryptoassets that we have already proposed will apply:

1) The principle of autonomy of the parties' will;
2) The principle of autonomy of the issuer's (developer's) will;
3) The principle of autonomy of will with regard to a decentralised network;
4) The personal law of the issues (the person making the offer); or
5) The personal law of the owner of the cryptoasset;

Finally, the personal law of the service provider related to the custody and administration of cryptoassets on behalf of customers will also serve as a special conflict-of-law rule for such particular case.

As a result, we have presented structured conflict-of-law rules that can be used to resolve issues of applicable law in property relations involving cryptoassets with and, separately, in relation to the placement of cryptoassets for the purpose of raising capital and their subsequent circulation with the existence of foreign element (or when the parties wish to apply special law).

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