THEORETICAL APPROACHES TO THE FORMATION OF COMPLEX ADAPTIVE INSTRUMENTS FOR INTERNATIONAL REGULATION OF DIGITAL ASSETS AS A MEANS OF INTERNATIONAL SETTLEMENTS

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II International Interdisciplinary Congress "Actual problems of Private International Law“

25 April 2023

Electronic copy available at: https://ssrn.com/abstract=4430001

- Legal regimes of Digital Assets (DAs)
- Current instruments and their applicability to DAs
- Activities of international organizations: new dimensions
- Complex adaptive instruments

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Legal regimes of DAs (1)

- Factors

1) The legal status of DAs

✓ property – judicial practice of the UK, Australia, Singapore, Canada

✓ property rights - Article 128 of the Civil Code of the Russian Federation (digital rights)

✓ means of payment - Singapore Law "On Payment Services" 2019 (digital payment token)

✓ a financial instrument – interpretation of the US Securities Act of 1933

✓ an independent object of law is the Malta Virtual Financial Assets Act of 2018

2) Public financial policy

✓ readiness to allow the circulation of certain DAs

✓ willingness to introduce new legal concepts or use existing ones

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Legal regimes of DAs (2)

- Typology of legal regimes of DAs

1) Prohibition regime

✓ for all entities (Bangladesh, Saudi Arabia, Egypt, Qatar, Tunisia, Algeria, Morocco, planned in India)

✓ for financial intermediaries (China)

✓ as a means of payment (Turkey, Thailand, Russia)

2) Risk control regime

✓ AML/CFT legislation (USA, EU, UK, Canada, Australia, Mexico, Malaysia, South Korea, Brazil, South Africa)

✓ regulation does not aim to define the legal status of DAs

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Legal regimes of DAs (3)

3) Functional regime

- ✓ legislation on payment services (Japan, Singapore, USA)
- ✓ legislation on financial markets (USA, UK, Hong Kong, Singapore, Nigeria)
- ✓ "digital securities" (France, Germany, Switzerland, Luxembourg)

4) Institutional regime

- ✓ new types of regulated intermediaries (Malta, Liechtenstein, Finland, Gibraltar, Russia, UAE, planned in EU , UK, Australia, Brazil)

5) Special (experimental) regime

- ✓ localization of operations with DAs in the international financial center, the center for digital innovation or in the "regulatory sandbox" (Belarus, Kazakhstan, planned in Russia)

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Legal regimes of DAs (4)

- Problems of differences in the legal regimes of DAs

✓ conflicts of laws

✓ risks of invalidation of transactions with DAs

✓ risks of different qualifications of transactions with DAs for private and public law purposes

✓ risks of applying different requirements to the same transaction with DA depending on jurisdiction

- Elements of Effective Policies for Crypto Assets, IMF Policy Paper No. 2023/004

✓ elimination of legal uncertainty regarding DAs

✓ minimization of legal risks

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Current instruments and their applicability to DAs (1)

- UNCITRAL Model Law (ML) "On International Credit Transfers" 1992

✓ legal concept of credit transfer

✓ ML may be applicable to DAs with certain modifications considering the distributed infrastructure

- ICC Uniform Rules and Customs for Documentary Letters of Credit (UCP 600, 2007)

✓ payments against documents, including submitted through distributed systems (eUCPv.2.0 2019)

✓ UCP 600 may be applicable for the circulation of utility tokens and the use of smart contracts

- UNCITRAL Model Law "On Electronic Transferable Records" 2017

✓ the concept of control (the functional equivalent of ownership)

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Current instruments and their applicability to DAs (2)

- ✓ ML may be applicable to the circulation of DAs certifying monetary claims
- ▪ Geneva Securities Convention 2009
- ✓ legal consequences of crediting securities accounts
- ✓ the Convention may be applicable to the relationships between the DA owner and the digital wallet provider
- ▪ Principles for Financial Market Infrastructures (PFMI)
- ✓ settlement finality
- ✓ PFMI are applicable to transfers of stablecoins
- ▪ Problems of using existing instruments
- ✓ lack of consistency and complexity (fragmentation)
- ✓ lack of rules for cross-border interaction of digital financial infrastructures (DFIs)

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Activities of international organizations: new dimensions (1)

- HCCH

✓ planning stage

✓ the list of issues: the qualification of records in the blockchain, the legal significance of tokens and underlying assets (off-chain assets), the interests of third parties, relations with service providers

- UNCITRAL

✓ the list of issues in the field of digital economy

✓ general approach: the use of the principles of adopted UNCITRAL documents (model laws, conventions etc.)

- UNIDROIT

✓ draft principles (Digital Assets and Private Law Principles)

✓ methodological connection with the Geneva Securities Convention 2009 and the UNCITRAL ML 2017

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Activities of international organizations: new dimensions (2)

- ✓ the key principle is control (functional nature)
- ✓ control over the DA is established if the person:
- has the exclusive ability to transfer control to third parties
- to prevent control by third parties
- to benefit from the possession of the DA
- ✓ for the transfer of the DA, the transfer of control is sufficient
- ✓ the principles do not:
- affect the legal status of the DAs
- do not define the conditions and procedure for the transfer of the DAs
- do not determine the legal consequences of the transfer of the DAs for related assets

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Activities of international organizations: new dimensions (3)

- conflict of laws rules
- ✓ lex voluntatis - indication of the applicable law in the DA or in the documentation for system/platform
- ✓ the escape clause – lex fori with 2 options
- evaluation of the draft principles
- ✓ pros
- technologically neutral approach
- departure from usage of location (locus, situs) as a connecting factor
- ✓ cons
- potential problems with application of the control principle in civil law jurisdictions
- lack of rules for main types of transactions with DAs (transfer, exchange, collateral)

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Complex adaptive instruments (1)

- Complexity
- ✓ rules of cross-border transfers of DAs and cross-border interaction of DFIs
- ✓ combination of public law and private law rules
- ✓ combination of hard law and soft law rules
- Adaptability
- ✓ consideration of geopolitical risk factors - the possibility of "switching" the applicable law
- ✓ the possibility of applying principles as lex mercatoria
- ✓ flexibility in the choice and “switching” of currency of payment and place of payment
- Elements
- ✓ international agreement
- ✓ principles

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Complex adaptive instruments (2)

- international agreement on DAs recognition and cross-border transactions with DAs (*example of the Hague Convention on the Recognition of Trusts of 1985*) - obligations of the State parties to recognize:

✓ DAs (for example, digital financial assets, tokenized assets and CBDCs) as a means of international settlements if certain conditions are met (for example, qualification by the financial regulator)

✓ the legal consequences of recognized DA transfer like payment in currency of the State party

✓ the principles of cross–border transactions with DAs as international standard contractual provisions when incorporating by reference in DA itself (*example UCP 600*) and (or) in the rules of the DA system/platform (may be developed by national trade chambers of State parties)

✓ the principles of interaction of the DFIs (may be developed by national financial regulators of State parties)

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Complex adaptive instruments (3)

- principles of cross-border transactions with DAs
- ✓ rules for the cross-border transfers of DAs
- ✓ rules for the cross-border exchange of DAs (for other DAs of fiat currencies)
- ✓ rules for cross-border collateral of DAs
- ✓ flexible conflict of laws rules (using approaches of the draft UNIDROIT principles)
- ✓ conditions for "switching" of applicable law, currency of payment and place of payment in case of material negative impact of geopolitical risk factors
- principles of DFIs interaction
- ✓ list of eligible DFIs (DAs systems/platforms, payment systems, digital identification systems etc.)
- ✓ recognized legal schemes of DFIs interaction
- ✓ rules for settlement finality in case of transfers of various types of DAs
- ✓ rules for DvP and PvP including obligations of FX providers
- proposed instruments may be implemented by Eurasian Economic Union, BRICS, SCO

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