

Blockchain contracts: International Jurisdiction, Applicable Law and Enforcement

Pedro de Miguel Asensio

Chair Professor of Private International Law

Complutense University of Madrid

ALAI Italia - La tecnologia blockchain e il diritto d'autore

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‘Blockchain and smart contracts’

- So-called smart contracts – self-executing computer protocols based on DLT or blockchain technology
- Instrument for the decentralised execution of programable contractual obligations (e.g. access to copyright works / payments)
- Encoded rights and obligations may be enforced without recourse to third parties or courts
- The distributed nature of the network guarantees performance as planned

'Blockchain and smart contracts' vs Contracts

- 'Smart contracts' are usually not contracts in the legal sense
- Significance of the underlying contract in natural language
- 'Smart contracts' encode (part of) the underlying contract (e.g. a license)
- Legal effectiveness and validity of contracts concluded by electronic means

Lex cryptographica v traditional legal orders

- Decentralized blockchain networks
- Party autonomy and freedom of parties to incorporate by reference into their contract non-State rules
- Smart contracts as private regulatory framework: limitations
- Legal effects of encoded protocols and underlying contracts are subject to the jurisdiction of competent courts and governed by national legal orders

Some legal implications

- Formation of contracts and information to contractual parties: E-commerce Directive / Consumer protection directives / Directives on contracts for the supply of digital content and digital services / GDPR
- Formal validity / Capacity / Consent
- Contract interpretation and interplay between the encoded smart contract and the underlying contract
- Performance of contractual obligations

‘Smart contracts’ and cross-border transactions

- Borderless nature of DLT-based networks: possible connecting factors to be used
- Transactions in assets on a DLT system: proprietary effects
- Territoriality of copyright: Blockchain arrangements to record transfers of rights and application of the *lex loci protectionis* in matters concerning the right as such, including transferability
- Scope of the analysis: contracts

International jurisdiction: Party autonomy

- Party autonomy and choice of forum: Article 25 Regulation 1215/2012 and related provisions
- Formal requirements in electronic contracts (E.g. CJEU Judgment of 21 May 2015, C-322/14, *El Majdoub*)
- Restrictions in B2C transactions: application of Articles 17-19 of Regulation 1215/2012 to smart consumer contracts

Jurisdiction and contract enforcement in the absence of a choice of court

- Legal uncertainties
- Scope of Regulation 1215/2012
- Defendant's domicile as general forum
- Application of the special jurisdiction rule of Article 7(2) (place of performance of the obligation) to smart contracts: sale of goods / provisions of services / copyright licenses

Choice of law: foundations

- Article 3 of the Rome I Regulation and its application to blockchain transactions
- Consent / Formal validity / Capacity
- Law applicable in the absence of choice: Article 4 of the Rome I Regulation and copyright transactions

Consumer transactions

- Limitations to party autonomy: Article 6 Rome I Regulation and requirements of choice of law clauses to be included in electronic transactions (E.g. CJEU Judgment of 28 July 2016, C-191/15, *Verein für Konsumenteninformation*)
- Assessment of the unfairness of terms
- Challenges posed by certain consumer rights: right of withdrawal
- Fragmentation of the applicable law

Data protection

- Interplay with the law applicable to the contract
- Data protection: Implications of Article 3 of the GDPR and related provisions
- Law governing the processing of personal data in blockchain transactions

Copyright

- Scope of the *lex loci protectionis*: territoriality applies with regard to the existence, validity, duration, transferability, and content of copyright
- Exceptions and limitations. E.g., article 7 Directive 2019/790 on copyright in the Digital Single Market: “*Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable*”
- Cross-border (smart) copyright transactions and multiplicity of applicable laws: implications for blockchain copyright registries and licenses

Enforcement

- Contract performance vs enforcement of contractual rights and obligations
- Dispute resolution and enforcement: significance of ADR mechanisms
- Recourse to court systems for enforcement
- Challenges posed by the cross-border recognition and enforcement of judgments

Final Remarks

- ‘Smart contracts’, a misleading name?
- Need to reconcile the potential of DLT technologies with national jurisdictions and laws