

DIGITAL LAW

ЦИФРОВОЕ ПРАВО

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Research Article

Digital disputes in the new legal reality

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Abstract. The article presents the authors' view on the ongoing changes in the process of resolving new “digital” disputes. The authors assess the global practice of resolving digital disputes through arbitration, as well as the new form of digital rights protection — blockchain arbitration. They analyze regulation of the new procedure for the protection of digital rights in foreign practice. The authors believe that the developed foreign experience in resolving smart contracts is progressive and effective. The findings of the research can be outlined as follows: 1) for the first time, special rules for resolving digital disputes have been formulated; they have been developed in tight cooperation of lawyers and IT specialists; 2) disputes from smart contracts and blockchain were isolated into a separate form of rights protection; 3) special approaches to settling digital disputes at the stage of concluding smart contracts have been worked out; 4) the process of enhancing the procedure for resolving digital disputes is ongoing.

Key words: digital financial assets, digital rights, arbitration, blockchain arbitration, smart contract, digital disputes, digitalization

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Научная статья

Цифровые споры в новой правовой реальности

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Аннотация. Изложена позиция авторов на происходящие изменения в процессе разрешения новых «цифровых» споров. Дана оценка мировой практики разрешения цифровых споров посредством арбитража, а также новой формы защиты цифровых прав — блокчейн-арбитража. Анализируется регулирование новой процедуры защиты цифровых прав в зарубежной практике. Авторы полагают, что разработанный зарубежный опыт разрешения смарт-контрактов является прогрессивным и эффективным: 1) впервые появились специальные правила разрешения цифровых споров, в разработке которых участвовали не только юристы, но и IT-специалисты; 2) выделены споры из смарт-контрактов и блокчейна в отдельную форму защиты прав; 3) разработаны специальные подходы урегулирования цифровых споров на этапе заключения смарт-контрактов; 4) происходит постоянный процесс совершенствования процедуры разрешения цифровых споров.

Ключевые слова: цифровые финансовые активы, цифровые права, арбитраж, блокчейн-арбитраж, смарт-контракт, цифровые споры, цифровизация

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Introduction

The new legal reality heavily contributed to completely new phenomena, which are the result of the digital transformation of socio-economic relations. It gave rise to wide application of the Internet of things, artificial intelligence, blockchain

technologies, cloud technologies, smart systems, digital platforms, tokens, cryptocurrency, digital exchanges, digital property, etc. However, adoption of a number of regulatory legal acts and amendments to the current legislation (the Civil Code of the Russian Federation, the Tax Code, the Administrative Code, Federal Law No. 259-FZ dated 31.07.2020 On Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation, Presidential Decree No. 778 dated 10.12.2020 On Measures to Implement Certain Provisions of the Federal Law On Digital Financial Assets, Digital Currency and on Amendments to Certain Legislative Acts of the Russian Federation, Federal Law No. 259-FZ dated 02.08.2019 (ed. on 31.07.2020) On Attracting Investments using Investment Platforms and on Amendments to Certain Legislative Acts of the Russian Federation, Federal Law No. 39-FZ dated 22.04.1996 On the Securities Market, Presidential Decree No. 778 of 10.12.2020 On Measures to Implement Certain Provisions of the Federal Law On Digital Financial Assets, Digital Currency and amendments to certain legislative acts of the Russian Federation and others) did not allow to properly regulate this area to ensure a balance of private and public interests.

Nevertheless, a new area of civil law regulation related to digital rights, the so-called digital law, is being formed in the Russian legal reality (Bezbakh & Frolova, 2022). Based on understanding of the dual legal nature of digital rights and freedoms, their protection may be carried out in judicial and non-judicial forms.

Thus, digital rights may be described as human rights in the digital space. In her work *Law in the Digital Reality* T.Y. Khabrieva (Khabrieva, 2019:91) defines digital rights arising in connection with realization of human rights in the virtual digital space, such as the right to access the Internet, the right to oblivion, the right to digital death and others. Digital rights may also be described as property with certain legal rights and obligations in civil circulation (Article 128 of the Civil Code defines them as property rights; paragraph 1 of Article 141.1 of the Civil Code defines them as binding like any other rights, the content and conditions of which are determined in accordance with the rules that meet the criteria established by law).

Professor M.N. Kuznetsov rightly points out that digital rights are an ontological variety of binding and other rights, including exclusive (Kuznetsov, 2020).

Thus, in a broader sense, digital human rights are a certain set of rights enshrined in national legislation and international law; they are imperative in a society based on information and modern technologies, the implementation and provision of which the state is obliged to guarantee following digital freedom.

Digital disputes

Modern procedural legislation has not developed a satisfactory concept of digital disputes due to differences in the legal regulation of civil rights objects as a result of digitalization (Gronic, 2020). As for Russian law, the use of this concept at this stage is premature due to its dual consolidation. Moreover, according to judicial practice, issues related to the turnover of digital financial assets are considered in the process of resolving disputes on recovery of unjustified enrichment and refund, and/or on forming the register of creditors' claims in bankruptcy and other cases, without allocating such disputes to independent proceedings (Rusakova & Frolova, 2022).

As to foreign experience, at an international conference held by the Singapore International Arbitration Center in November 2021, the participants noted that disputes related to digital assets do not differ from other disputes heard by arbitration institutions, except for their subject matter¹.

The Head of the Digital Trade Department of the World Economic Forum, Mr. Ziyang David Fan, outlined the problem associated with digital technologies penetration into almost all spheres of society and possible legal difficulties that may arise since technologies are integrated faster than laws are adopted. A striking example is electronic bills of lading, where their tokenization may face a potential problem related to disputed legal recognition by the parties.

However, even if there are some differences in disputes concerning digital and commercial assets, they are not very significant. Thus, Mr. Kirpalani, a lawyer of the Drew & Napier LLC, defines smart contracts as computer codes that automatically perform certain functions when certain conditions are met. He notes that the difference between smart contracts and pseudo or soft smart contracts is that the latter includes contracts with fixed intellectual functions, for example, when the purchase amount is deposited in advance to a deposit account, from which funds are automatically debited when a certain event occurs².

The most significant event in this regard was the adoption of the Rules for the Resolution of Digital Disputes, developed by the Ministry of Justice of Great Britain together with the legal community of England and Wales. The purpose of these rules is to facilitate the rapid and cost-effective resolution of commercial disputes, especially those related to new digital technologies, such as crypto assets, cryptocurrency, smart contracts, distributed ledger technology and fintech applications. Thus, digital disputes are defined as commercial, but of a digital nature³.

Such approach is justified by the fact that a single legal mechanism for resolving digital disputes has not been developed, and issues related to digital assets are often considered in conjunction with other civil obligations. Based on this, the foreign legal community proposes to resolve digital disputes through arbitration.

Arbitration is the most popular way of resolving commercial disputes in world practice; their enforcement is guaranteed by the norms of the New York Convention On the Recognition and Enforcement of Foreign Arbitral Awards of 1958, to which 173 countries are parties.

The digital dispute resolution rules apply only when the parties have included this condition in the contract, digital asset or digital asset system in the following wording: “Any dispute shall be resolved in accordance with the UKJT Digital Dispute Resolution Rules”; they allow to appeal not only to arbitration, but also to expert

¹ Felicia Ng (Hogan Lovells Lee & Lee). YSIAC Conference Recap: Cryptocurrency, Blockchain and NFTs. November 12, 2021. Leave a comment YSIAC. Available at: <http://arbitrationblog.kluwerarbitration.com/2021/11/12/ysiac-conference-recap-cryptocurrency-blockchain-and-nfts/> [Accessed 25th April 2022].

² Felicia Ng (Hogan Lovells Lee & Lee). YSIAC Conference Recap: Cryptocurrency, Blockchain and NFTs. November 12, 2021. Leave a comment YSIAC. Available at: <http://arbitrationblog.kluwerarbitration.com/2021/11/12/ysiac-conference-recap-cryptocurrency-blockchain-and-nfts/> [Accessed 25th April 2022].

³ Digital Dispute Resolution Rules. UK Jurisdiction Taskforce. Available at: https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2021/04/Lawtech_DDRR_Final.pdf [Accessed 20th April 2022].

assessment and the parties may determine the form of the procedure, timing, procedure for allocating costs and anonymity of the process.

The Rules provide for an automatic dispute resolution process, decisions on which are binding on the parties, and arbitration and expert evaluation apply only to those disputes that have not been settled within the framework of this process.

Moreover, the rules provide for broad powers of arbitrators and experts engaged both in relation to the resolution procedure and digital assets, who can at any time manage, modify, sign or cancel any digital asset related to the dispute using any digital signature, cryptographic key, password or other digital mechanism available to their access or control, or instruct any interested party to perform any of these actions. Such an approach may lead to serious risks for the parties regarding the security of their digital assets.

Another extremely important condition for applying these rules is the extension of the jurisdiction of England and Wales to these legal relations, both with respect to the venue of any arbitration proceedings and applicable law, although in the latter case, unless the parties have agreed otherwise. Conventionally, the arbitral awards are final and binding on the parties and are not subject to appeal either on matters of law or fact, except in cases provided for by the Arbitration Act 1996 of England and Wales.

Thus, the Rules for the Resolution of Digital Disputes may determine the law of England and Wales as the main in regulating digital disputes through arbitration by extending its jurisdiction to relations, including those complicated by a foreign element. Moreover, it is planned that such arbitral awards should be enforced by all member states of the above-mentioned convention.

The problem of resolving digital disputes is dealt with by various organizations providing conflict resolution services. For example, JAMS, a company specialized in providing individual, face-to-face, virtual and hybrid dispute resolution services through the latest technologies, has developed draft arbitration rules for resolving disputes arising from smart contracts that suggest a computer protocol designed to fulfill a self-executing contract when the terms of the agreement between the parties are directly written in lines of computer code existing in a distributed decentralized blockchain network⁴.

Peter Smith, a lawyer at Charles Russell Speechlys LLP, asserts that the appearance of digital dispute resolution rules is a very welcome addition to the arsenal of technical dispute resolution arbitration mechanisms, which include Codelegit (Blockchain Arbitration Association), Kleros, a decentralized arbitration organization, as well as the draft JAMS Rules governing disputes arising from smart contracts (Smith, 2022).

It should be noted that, for example, Codelegit itself develops smart contracts where a dispute resolution function is built in, and which allows suspending the execution of the smart contract algorithm in case of its occurrence. Moreover, all smart contracts contain an arbitration clause of the Blockchain Arbitration Association and are resolved through arbitration.

The international practice of digital dispute resolution introduced a new form of digital rights protection, the so-called blockchain arbitration.

⁴ JAMS smart contract clause and rules (DRAFT). Available at: <https://www.jamsadr.com/rules-smart-contracts#14> [Accessed 13th May 2022].

According to Derrick Yeo, a Schellenberg Wittmer lawyer, a new form of online dispute resolution is currently being integrated into the international practice of dispute resolution: arbitration-blockchain, which was developed as the preferred mechanism for resolving disputes arising from smart contracts, the resolution of which requires knowledge in blockchain technology and smart contracts (Yeoh, 2018).

Thus, according to Sir Geoffrey Vos, “some digital technologies (smart contracts) completely exclude disputes, given that they are based on self-executing code that will automatically fulfill the terms of the agreement concluded between the parties”⁵.

A dispute can hardly arise from a simple smart contract, such as a purchase and sale. However, disputes may arise in more complex contracts, which may include some complex elements and definitions to understand the terms of the transaction. In this case, the parties can choose one of the blockchain arbitration models offered by CodeLegit or Kleros.

Derrick Yeo highlighted a number of features of two types of blockchain arbitration. For example, CodeLegit has developed a set of rules for blockchain arbitration and provides for dispute resolution by an arbitrator who may be a lawyer or a blockchain specialist. Kleros has created an entire quasi-judicial system with a general court, followed by two levels of judicial divisions: transport and air transport departments, and an appeal system.

However, some foreign scientists such as Pedro Lacasa, National University of Asuncion, express the opinion that blockchain arbitration is not arbitration in the sense of worldwide recognition; he refers to the absence of a number of characteristic advantages of arbitration, the possibility of choosing an arbitrator, their qualifications and nationality, language of the procedure, applicable law and others (Lacasa, 2022).

Another important difference is that arbitrators in such processes are called juries; they form a jury by drawing lots, which then decides on the case. The parties have the right to challenge the jury, but the objections must be justified, otherwise the party may be fined (Tirado & Gabriel, 2022).

The proof process in blockchain arbitration is also different, as coded evidence is provided, which does not require oral hearings being an integral part of arbitration proceedings. Moreover, due to the strict blockchain functionality, which excludes the presence of third parties, the possibility of receiving evidence from third parties is completely dismissed.

According to Kariuki Muigua, a leading specialist in environmental law, policy adviser, natural resources lawyer and dispute resolution expert from Kenya, specifics of blockchain arbitration is the cryptographic form of arbitration agreement and absence of arbitration venue (Muigua, 2022b). And these are just some of them. The concept of arbitration using blockchain is one of the most recent achievements in the field of alternative dispute resolution and is aimed at using high technology in dispute resolution. This is due to the proliferation of electronic contracts and smart contracts in commercial transactions around the world (Muigua, 2022a).

⁵ Walker Annabel, Jones Imogen, Brogden Jonathan, Cooper Alistair. Digital dispute resolution rules — a new way of resolving tech disputes? Available at: <https://www.dacbeachcroft.com/en/gb/articles/2021/may/digital-dispute-resolution-rules-a-new-way-of-resolving-tech-disputes/> [Accessed 03th May 2022].

An important principle of arbitration is the principle of confidentiality. Despite the reliable protection provided by blockchain, ensuring data protection is a serious challenge. It should be noted that the European Union has created a universal system for regulating digital rights. The General Data Protection Regulation (GDPR), adopted on April 14, 2016 (hereinafter referred to as the Regulation) and entered into force on May 25, 2018 was introduced to unify the provisions governing the protection of personal data in the European Union. The Regulation establishes specific types of security that can be described as “relevant to the risk”. It involves:

- pseudonymization and encryption of personal data,
- ability to ensure the continued confidentiality, integrity, availability and sustainability of processing systems and services,
- possibility of timely restoration of availability and access to personal data in the event of physical or technical incident (Rusakova, 2022).

However, this system is not sufficiently developed to regulate the decentralized functioning of the blockchain, which prevents assigning responsibility to data controllers. Moreover, blockchain traceability contradicts the GDPR requirement of the “right to oblivion” (Darshan Bhora & Aisiri Raj, 2020).

In February 2020, the European Commission published a number of new documents that form the EU’s digital transformation strategy at the present stage⁶. The document *Shaping the Digital Future of Europe* states that the strategy is based on three pillars: technology at the service of people, fair and competitive digital economy, and open, democratic and sustainable society. Europe is aiming to become a global model in the field of digital economy, support economies in the process of digital transformation and develop digital norms to promote them at the international level, therefore, advanced developments in the field of digital dispute resolution are actively implemented within the EU. All of the above differences of blockchain arbitration in practice may lead to problems of recognition of such decisions, which may reduce the effectiveness of this form of digital rights protection.

In the Russian legal reality, an attempt has also been made to implement the protection of digital rights through arbitration. Thus, the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs has established a panel on disputes in the field of digital economy, which resolves the following disputes:

- 1) disputes related to the issuance, accounting and circulation of digital assets certifying property rights;
- 2) disputes related to the fixation of property rights by making entries in information systems in the information and telecommunications network “Internet” based on a distributed registry (blockchain);
- 3) disputes related to transactions involving automatic execution (self-executing transactions, smart contracts), including the use of information systems based on a distributed registry (blockchain);
- 4) disputes related to transactions made with the use of and/or in relation to digital assets (including tokens, cryptocurrencies, and digital signs);

⁶ *Shaping Europe’s Digital Future*. 19 février 2020. Available at: https://ec.europa.eu/commission/presscorner/detail/en/fs_20_278 [Accessed 09th April 2022].

5) disputes related to the organization of retail financing (crowdfunding), including those related to the provision of access to information resources of the information system in the Internet telecommunications network (investment platform) to conclude contracts within this system and attract investments,

6) disputes related to transactions concluded using various methods of digital identification of the parties (including electronic digital signature and a link to the web page), as well as disputes over the processing and security of personal data,

7) disputes related to the processing of big data arrays, including disputes related to application of technical standards and ensuring information security,

8) disputes related to the use of distributed registry technology, artificial intelligence, neurotechnologies, quantum technologies, industrial Internet, wireless communication technologies, virtual and augmented reality, as well as other disputes related to creation, circulation and use of digital technologies⁷.

However, this arbitration institution has not developed special rules for resolving digital disputes, and considers them in accordance with the existing arbitration rules. According to the report on the activities of the Arbitration Center at the RSPP for 2021, digital disputes account for a fraction of 1.2% of other categories of disputes resolved by this arbitration institution, which indicates that this form of digital dispute resolution is in little demand in Russia⁸.

The need to develop legislative frameworks regulating the procedure for resolving digital disputes will increase every year, as blockchain technologies have firmly entered our lives. According to the World Economic Forum, more than 10% of GDP will be stored in the blockchain by 2025, but some analysts believe that by 2050 it may reach to 50%⁹.

The conducted research of the arbitration form of digital rights protection revealed a number of legal problems related to their insufficient legal regulation. The possibility of adapting traditional legal instruments to new phenomena has not proved its effectiveness. To develop an effective mechanism for resolving digital disputes, it is necessary to determine their legal nature (Wagner & Eidenmueller Horst, 2021).

Conclusion

Digital economy is based on smart contracts and blockchain, which require the creation of a predictable and effective dispute resolution mechanism aimed at preventing risks associated with active introduction of digital technologies.

Attention should be paid to the opinions of Oxford University scientist Horst Aidenmuller and Gerhard Wagner from Humbolt University of Berlin, who express concerns about greater digital influence on the private sector of economy, which provides new services (including electronic trading platforms) and may create their own way of resolving disputes by including it in smart contracts that they develop themselves. It may result in privatization of this dispute resolution mechanism and abuse of law in this area.

⁷ Arbitration Center at RSPP. Available at: <https://arbitration-rspp.ru/documents/rules/statute/#pr6> [Accessed 18th May 2022].

⁸ Arbitration Center at RSPP. Available at: <https://arbitration-rspp.ru/documents/rules/statute/#pr6> [Accessed 18th May 2022].

⁹ Adrien Ogée, Dominique Guinard, Blockchain is not a magic bullet for security. Can it be trusted? Available at: <https://www.weforum.org/agenda/2019/08/blockchain-security-trust/> [Accessed 16th May 2022].

Currently, many problems cannot be solved due to the lack of a unified internationally recognized approach to resolving digital disputes, as well as the implementation of a political agenda to the detriment of a coordinated long-term global legal strategy. The authors are of the opinion that it is essential to develop a unified theoretical basis for developing digital legislation and the vector of its development. Its elements should include clear legal guarantees established both at the international and national levels to protect digital rights.

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