

AT THE FOREFRONT OF THE LEGAL RESEARCH

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THE DEVELOPMENT OF CONTRACT LAW IN THE FIELD OF BLOCKCHAIN TECHNOLOGIES

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Abstract

The paper provides an overview of different legal approaches to structuring contractual relations based on blockchain technology. The author considers the USA experience of building blockchain-oriented contractual relations to be cutting-edge legal solutions. The paper introduces the concept of a Simple Agreement for Future Tokens (SAFT). American investment lawyers invented this specific type of contract. SAFT shows the unique contractual solution that allows investors and inventors to form legal, contractual obligations that contradict neither American nor Russian contract law. The complexity of SAFT is also analyzed on the example of several recent blockchain projects and legal cases. The paper provides several approaches to optimizing Russian law and legal doctrine to new technological solutions. Among those are franchise, license, and loan agreements. The emphasis is made on the necessity of the implementation of new technology in the contract formation and amendment. The brief overview of COVID-19 challenges concerning the contract law doctrines of force majeure, hardship, frustration of contract are also analyzed in the scope of the paper's central hypothesis, namely: blockchain solutions.

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Keywords

Blockchain, token, cryptocurrency, ICO, SAFT, IPO, private placement, investments, smart contracts, securities, license, franchise, loan, COVID-19, force majeure, hardship

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I. Introduction

A blockchain technology has become widely known due to the introduction of cryptocurrencies into economic circulation. This new medium of exchange became popular following a series of global economic recessions that have undermined consumer confidence in traditional (fiat) currencies and traditional financial institutions.

The money “owners” felt they had been deprived of full control over their property.² Another significant reason for the growth of cryptocurrency in popularity was its ability to reach those parts of the world where previously financial transactions were impossible.³ In certain geographical locations, not all the individuals, despite having legal capacity, can have a bank account in their name, due to cultural restrictions dominating in those regions.⁴ Thus, cryptocurrencies

² Felix Martin, *Money: The Unauthorized Biography* (Knoopf 2014) (336).

³ Paul Vigna, Michael J. Casey *The Age of Cryptocurrency: How Bitcoin and The Blockchain Are Challenging the Global Economic Order* 240–241 (2016). For example, with more than 70 % of the population living below the poverty line, Mali is one of the poorest countries in the world, and the region has no developed banking system. Mali residents working abroad to make their living have to hand cash through random travelers who are flying back home. The national banking system is underdeveloped, and electronic payments and cash transfers grow very slowly.

⁴ *Id.* at 243. An example of women in Afghanistan and several other countries where women are prohibited from keeping bank accounts on their behalf. Husbands, fathers or brothers keep their income under full control.

(1) offered to increase the degree of control over assets, (2) and introduced new participants to the economic turnover, who did not have access to financial services before. The lack of a full-scale infrastructure and high level of anonymity of cryptocurrencies results in the downside. Cryptocurrencies global turnover requires a comprehensive approach from the leading nations to prevent illegal transactions. The FATF developed a regulatory regime to combat illegal cryptocurrency transactions, money laundering, and the financing of terrorism,⁵ with which countries should bring in line their national legal framework. Besides, some countries are considering issuing their own cryptocurrency.⁶

Although cryptocurrencies contributed to the promotion of the blockchain technology, the main outcome of this promotion was the introduction of smart contracts. Most jurisdictions did not need any specific updates to merge smart contracts into the body of contract law.⁷ Some countries, Russia included, had to amend their *corpus* of civil

⁵ FATF is an inter-governmental body established in July 1989 by a Group of Seven (G-7) Summit in Paris, initially to examine and develop measures to combat money laundering and the financing of terrorism. FATF has set the internationally endorsed global standards against money laundering, terrorist financing and the financing of proliferation (the FATF Recommendations). The FATF Recommendations contain 40 recommendations that establish comprehensive requirements for anti-money laundering and combating the financing of terrorism and proliferation together with Interpretive Notes and the applicable definitions in the Glossary. On June 21, 2019, FATF published the Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers ("2019 Guidance"). At the same time, FATF adopted and issued an Interpretive Note to Recommendation 15 on New Technologies ("INR. 15"). The FATF defines terms used by professional players in the cryptocurrency market, such as Virtual Asset (VA) and Virtual Asset Service Provider (VASP). The FATF expects that its member states implement the new rules within the following 12 months. See: Yuriy V. Brisov, *Otchet Komissii po provovomu obespecheniyu tsifrovoy ekonomiki pri Moskovskom otdelenii Assotsiatsii yuristov Rossii* [Interpretive Note of the Commission on Legal Support of Digital Economy, Moscow Branch of the Association of Lawyers of Russia]. URL: https://alrf.msk.ru/komissiya_po_pravovomu_obespecheniyu_cifrovoy_ekonomiki_pri_mos_3 (last visited Jun. 03, 2020).

⁶ David B. Black, *Who Needs Cryptocurrency FedCoin When We Already Have A National Digital Currency?* URL: <https://www.forbes.com/sites/davidblack/2020/03/01/who-needs-cryptocurrency-fedcoin-when-we-already-have-a-national-digital-currency/#633292614951> (last visited Jun. 03, 2020).

⁷ Anton M. Vashkevich, *Smart-kontrakty: chto, zachem i kak* [Smart contracts: what, why, and how] 26 (Moscow: Simplawyer 2018). (In Russ.).

law to enable smart contracts-based transactions.⁸ It is also important to note some new issues that blockchain-based transactions have faced due to the COVID-19 pandemic.⁹

We will also address the blockchain-based approach to traditional contracts, such as franchise, license, and loan agreements. These types of contracts have been adapted to blockchain technology and are used widely. Other critical issues we will be addressing are certain types of investment agreements: (1) blockchain-based crowdfunding solutions (ICO); (2) private placements; (3) initial public offering (IPO); (4) and Simple Agreement for Future Tokens (SAFT).

II. Legal regulation of blockchain in the United States

The US law has been allocating blockchain technologies for more than eleven years now since the launch of the most popular cryptocurrency Bitcoin. The popularity of Bitcoin gave rise to a new investment model for blockchain projects ICO (initial coin offering). The idea of ICO was to allow participants to exchange-listed cryptocurrencies, such as Bitcoin, Ethereum, and some other altcoins (alternative cryptocurrencies)¹⁰ for the tokens (coins) of the new blockchain projects at a discounted price. This fund-raising method is called ICO, to distinguish it from initial public offering (IPO), regulated under security laws.

⁸ Poyasnitelnaya zapiska k projektu Federalnogo zakona “O vnesenii izmeneniy v chasti pervuyu, vtoruyu i chetvertuyu Grazhdanskogo kodeksa Rossiyskoy Federatsii” (zakonoproekt No 424632-7) [Executive Summary to the draft Federal Law on Amendments to the First, Second, and Fourth Parts of the Civil Code of the Russian Federation. (Draft law No 424632-7)]. URL: <http://sozd.duma.gov.ru/download/827EDED-92F1-46AE-A576-71C8113EB77C> (last visited Jun. 03, 2020). (In Russ.)

⁹ Yuriy V. Brisov, *Fors-mazhor v resheniyakh angliyskikh i amerikanskikh sudov* [Force Majeure in the Decisions of the UK and US courts]. URL: https://zakon.ru/blog/2020/04/05/fors-mazhor_v_resheniyah_angliyskikh_i_amerikanskikh_sudov (last visited Jun. 03, 2020). (In Russ.)

¹⁰ Sergei Bazarov, *Kriptovalyuty: terminy i sokrashcheniya* [Cryptocurrency: terms and abbreviations] (In Russ.) URL: <https://medium.com/bitcoin-review/криптовалюты-термины-и-сокращения-27293b8413cc> (last visited Jun. 25, 2020). (In Russ.)

The US law applies a very broad description of securities¹¹ including a bill, a bond, an investment contract and the whole list of items that can be called a security.¹² This list is so extensive that it cannot be perceived as *numerus clausus*. Thus, the initial token offering can be either an investment contract (a security under the U.S. law)¹³ or any other agreement. The United States Securities and Exchange Commission (SEC) is policing compliance with financial markets and securities law. The policing is based on a number of tests developed by the Supreme Court of the United States and known as “Howey Test” by reference to one of the first and major cases in this field SEC v. W.J. Howey Co. (1946).¹⁴

The facts in *Howey* were the following: W.J. Howey Co. (Defendant) was a Florida-based company operating on orange groves under the management of Mr. Howey. To attract investments, Howey sold the land to private individuals. Most of them were not farmers or even Florida residents, and they were offered to enter into service contracts to care for and cultivate citrus trees as a service. Eighty-five percent of

¹¹ Sergei A. Khabarov, Printsip legaliteta i voprosy kvalifikatsii tsennykh bumag [The Principle of Legality and Issues of Qualification of Securities], 4 Zhurnal predprinimatelskogo i korporativnogo prava [The Journal of Entrepreneurship and Corporate Law] 41 (2016). (In Russ.)

¹² 15 USCS § 80a-2a(36). “Security” means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security (including a certificate of deposit) or on any group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a “security”, or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.”

¹³ Federal Securities Act No 73-22 on 27.05.1933, The Yale Law Journal Company. Inc. 43(2):171-217.

¹⁴ SEC v. W. J. Howey Co. No 873 on 27.05.1946, URL: <https://supreme.justia.com/cases/federal/us/328/293/> (last visited Jun. 26, 2020).

the buyers signed such service contracts. Howey Co. was in full control of the property and transactions. Clients were offered a portion of the profit generated from the sale of oranges.

The SEC (Plaintiff) filed a lawsuit against Howey for using interstate commerce to offer and sell unregistered securities in violation of Section 5 (a) of the Securities Act of 1933 (SEA). Howey claimed that he was not selling securities. The United States Court of Appeals for the Fifth Circuit agreed with Howey. The SEC then filed a *certiorari* petition with the U.S. Supreme Court, which was granted, and the Supreme Court ordered the case to be heard.

The judge (Murphy) presented an opinion that purchase contracts offered by Howey were securities. Subject to § 2 (a), SEA, the term ‘security’ includes many instruments. Although the term ‘investment agreement’ was not explicitly defined by law, it was usually defined in many state laws long before the SEA was adopted, and this definition is consistent with SEA’s legislative goals. An investment contract involves “Placing capital or laying out of money in a way intended to secure income or profit from its employment is an investment, and the Certificates issued by the defendant were investment contracts” as was stated in *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52 (Minn. 1920).

Courts reviewed the substance and economic reality of any such contract to determine whether it was a security regardless of what it may be called. The court developed a four-step test and found that the contract offered by Mr. Howey was a security. Buyers received a portion of orange groves to generate profit from Howey’s farming operations as a result. Most buyers lived outside Florida and were not committed to cultivating their land themselves. Howey had complete control of the business. Thus, sales contracts are essentially securities, and Howey’s failure to comply with the SEA requirements cannot be justified because of his ignorance of the law.¹⁵

The SEC issued recommendations for initial coin offering (ICO).¹⁶ The SEC warned that ICO participants and coordinators must consider

¹⁵ *Id.*

¹⁶ SEC.gov, Framework for “Investment Contract” Analysis of Digital Assets, URL: <https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets> (last visited Jun. 26, 2020).

whether or not the U.S. federal securities laws apply to their token offerings.

The threshold question is whether [or not] a digital asset should be treated as a security under these laws.¹⁷ A digital asset must be analyzed for its compliance with the characteristics of “security” according to the federal securities laws. The SEC guidelines provide a foundation for analyzing whether [or not] the digital asset meets the characteristics of an “investment contract”.¹⁸ The SEC recommends applying Howey test for this purpose.¹⁹

All offers of securities, including those related to digital assets, must be registered following the law or be eligible for an exemption from registration. The registration regulations require individuals to disclose certain information to investors, and this information must be complete and not misleading. These disclosure requirements contribute to the federal securities laws the goal to provide investors with the information necessary to make informed investment decisions. Required disclosures include company management information.²⁰ The absence of information required by law about corporate governance (persons in control and governance principles) or disclosures about the company’s investment and business model gives rise to information asymmetry, which is a violation of law.

July 25, 2017, the SEC published a report on “the Decentralized Autonomous Organization” or DAO report, which was initiated to protect U.S. investors in ICO. The report emphasized that digital tokens are investment contracts; therefore, ICO must comply with the U.S. federal securities laws.²¹

The technology-based startup Tezos can be referred to as the victim of the first landmark crypto business case. This project raised

¹⁷ 15 U.S.C. § 77(2) (“The Securities Act” of 1933); 15 U.S.C. § 78c(a)(10) (the “Securities Exchange Act” of 1934); 15 U.S.C. § 80a (“Investment Company Act” of 1940); 15 U.S.C. § 80a-2(a)(36) (“Investment Advisers Act” of 1940).

¹⁸ *Id.* SEC.gov, Framework for “Investment Contract” Analysis of Digital Assets.

¹⁹ SEC v. Howey Co., 328 U.S. 291 (1946).

²⁰ TSC Industries v. Northway, 426 U.S. 438, 441 (1976).

²¹ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO. URL: <https://www.sec.gov/litigation/investreport/34-81207.pdf> (last visited Jun. 26, 2020).

\$232 million. In October 2017, Tezos said the project has some internal problems, and investors never received their tokens. Moreover, lawsuits have been filed against Tezos. One of them, filed in a San Francisco court, was based on a violation of securities, advertising, and competition laws.²²

It should be noted that American lawyers' experience has been considered and analyzed worldwide since the United States introduced blockchain technologies. The U.S. approach is usually considered as *ex-post*. The U.S. legislator and government agencies observe newly emerging practices. The agencies render authoritative opinions and recommendations. Only after that certain restrictions may follow. A different approach (*ex-ante*) has been applied by some states and it has generally created *corpus* of *nudum jus* regulations. We find the latter approach to be shortsighted and preventing the industry development.

The *ex-post* regulation seems to be the most reasonable approach to the statutory regulation of technology breakthroughs and it is traditionally used in the United States.²³ Based on the analysis of all *pro et contra*, the paper addresses potential threats inherent in some projects. When agencies prohibit project implementation relying on their recommendations alone, the court interferes with settling the dispute and contributing to flexible *ex-post* regulation. While this approach protects the industry against dangerous abuses, it does not limit its development.

The SEC aims its activities at streamlining the blockchain initiative rather than banning it. Both the SEC and FinCEN state they do not pursue combatting blockchain or cryptocurrencies. The government aims to prevent money laundering and terrorism financing and protect U.S. citizens from Ponzi-like investments.

Numerous explanations published on the SEC's website²⁴ confirm the priority of protecting the U.S. citizens from reckless investment by

²² Yuriy V. Brisov, ICO na poroge pervogo klassovogo iska [ICO on the Verge of the First Class Action]. URL: https://zakon.ru/blog/2017/11/04/ico_na_poroge_pervogo_klassovogo_iska (last visited Jun. 26, 2020). (In Russ.)

²³ Matthew D. Adler & Chris W. Sanchirico, Inequality and Uncertainty: Theory and Legal Applications, 155 University of Pennsylvania Law Review 281 (2006).

²⁴ Spotlight on Initial coin offering and digital assets, URL: <https://www.sec.gov/spotlight-initial-coin-offerings-and-digital-assets> (last visited: 16.08.2019).

applying the legal regulation of blockchain technology and show the commitment to forming the transparent digital market. Still, some of the laws of some countries banned ICO referring to such explanations. China's government imposed a full ban on ICOs and similar ways of fundraising across the country.²⁵ Following China, South Korea has established a strict policy of ICO regulation.²⁶

However, it was not only the activities of government agencies that facilitated the development of the legal basis for blockchain technology. An in-depth legal study of tokens was conducted in 2015. The following works by ICO lawyers may be given as examples: Santori "Appcoin Law: ICOs the Right Way"²⁷ and F. Ehram "How to Raise Money on a Blockchain with a Token."²⁸

The lawyers implemented two basic approaches to the definition of blockchain tokens. The first approach assumed that the token should not necessarily be treated as security, since the law does not contain a definition of blockchain that is closed from arbitrary interpretation. Applying the analogy of the law also leaves a large field for interpretation. In the absence of a clear definition, the financial and legal essence of a token can be disclosed based on the problem that the blockchain project is designed to solve: a sale (token as a product), loan (token as a liability), franchise (token as a service), license (token as intellectual property), and stock (token as corporate rights).²⁹ As mentioned above, the second approach relied on *SEC v. Howey (1946)*.³⁰ In this case, the U.S. Supreme Court developed a test to determine whether a particular

²⁵ Tian Chuan & Rachel-Rose O'Leary, China Outlaws ICOs: Financial Regulators Order Halt on Token Trading, URL: <https://www.coindesk.com/china-outlaws-icos-financial-regulators-order-halt-token-trading> (last visited Jul. 2, 2020).

²⁶ Ilya Nemchenko & Lyudmila Petukhova, Yuzhnaya Koreya zapretila ICO vsled za Kitaem [South Korea banned ICO in the footsteps of China], URL: <https://www.rbc.ru/money/29/09/2017/59ce0aa99a7947e94cf30743> (last visited Jun. 26, 2020). (In Russ.)

²⁷ Marco Santori, Appcoin Law: ICOs the Right Way, URL: <https://www.coindesk.com/appcoin-law-part-1-icos-the-right-way> (last visited Jun. 26, 2020).

²⁸ Fred Ehram, How to Raise Money on a Blockchain with a Token, URL: <https://blog.coinbase.com/how-to-raise-money-on-a-blockchain-with-a-token-510562c9cdfa> (last visited Jun. 26, 2020).

²⁹ Ehram F. Op. cit.

³⁰ Santori M. Op. cit.

transaction is related to an investment contract. The U.S. law treats an investment contract as a security.³¹ The United States use the Howey test to determine whether tokens are securities. A token is a security if it meets four criteria at the same time: (1) investors who (2) invested their own money (3) in a joint venture with (4) the reasonable expectation of profit from the activities of the promoters or other third party.³² There are a number of precedents³³ that form a complex set of criteria roughly defined as the “Howey test”. Legal literature provides a detailed study of particular cases analyzed by the U.S. courts. If the contract is recognized as an investment contract, it will be subject to the SEC authority.

III. Developing new solutions

The ICO’s future is questionable, as some countries have forbidden it altogether. STO (security token offering)—an alternative model for attracting investment in blockchain projects, similar to IPO—proved to be costly, lengthy, and, most importantly, failed to offer a new solution that users were looking for in the blockchain technology. Thus, the urge to find alternative legal frameworks for building contractual relationships using blockchain technology has become evident. The major problem was to develop an investment model that was primarily intended to protect inexperienced investors from investing in projects at the first stages of development, i.e., when the risk of fraud is most significant.

That was when the SAFT appeared. The SAFT (Simple Agreement for Future Tokens — an agreement to convert investments into future tokens) has become the most promising model of investment on blockchain platforms. The SAFT design is different from the usual token sale (ICO), as it is an investment contract between developers and qualified investors. This model of raising funds is a modern transaction

³¹ Yuriy V. Brisov, ICO vs IPO (Blockchain tokens. Smart Contracts. Cryptocurrency). URL: https://zakon.ru/blog/2017/07/16/ico_vs_ipo_blokchejn_tokeny_smart_kontrakty_kriptovalyuty (last visited Jul. 2, 2020).

³² Peter V. Valkenburgh, Framework for Securities Regulation of Cryptocurrencies. Version 2, CoinCenter Report. 45 (2018).

³³ See also SEC v. Edwards No 02-1196 on 13.01.2004. URL: <https://supreme.justia.com/cases/federal/us/540/389/> (last visited Jul. 10, 2020).

system that can significantly reduce the risks for token sellers. The new structure is formed together with investors, issuers, and developers.³⁴

The general SAFT mechanism looks like this. The developers of the blockchain platform enter into a written SAFT with a pool of sophisticated investors. According to SAFT, investors must pay cash to developers in exchange for the right to receive tokens at a fixed price after the project is launched. The price for investors usually implies a discount. This two-step investment structure allows investors to earn money later on the difference between the token sale price of the current project and the price specified in SAFT, which in the “classic” ICO model corresponds to the pre-sale price (pre-ICO).

This model of structuring investment transactions is possible under the U.S. federal securities laws. Companies may not offer or sell securities unless the offer has been registered with the SEC or an exemption from registration has been granted. An offer of securities that is exempt from registration with the SEC is called a private placement or an unregistered offering.³⁵

Private placements are not subject to certain laws and regulations aimed at protecting investors. These are requirements for disclosures for the investors to make informed decisions.³⁶ Hedge funds and other private funds often use private placements.³⁷

Regulation D

Private placements usually refer to Regulation D. This regulation includes three rules regarding exemptions from the SEC registration requirements. These Rules are 504, 505, and 506. The issuers rely on

³⁴ Pete Rizzo, SAFT Arrives: ‘Simple’ Investor Agreement Aims to Remove ICO Complexities, URL: <https://www.coindesk.com/saft-arrives-simple-investor-agreement-aims-remove-ico-complexities> (last visited Jul. 2, 2020).

³⁵ Investor Bulletin: Private Placements Under Regulation D, Investor.gov, URL: <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-31> (last visited Jul. 10, 2020).

³⁶ TSC Industries v. Northway, 426 U.S. 438, 441 (1976).

³⁷ Investor Bulletin: Hedge Funds, Investor.gov, URL: <http://investor.gov/news-alerts/hedge-funds> (last visited Jul. 10, 2020).

these rules when offering unregistered securities. Each rule contains special requirements for issuers.³⁸

Rule 504

Rule 504 allows some companies to offer and sell up to \$1,000,000 of their securities in any 12-month period. These securities can be sold to any number and type of investors, and the issuer is not subject to special disclosure requirements. Generally, securities issued under Rule 504 are restricted securities.³⁹

Restricted securities are securities acquired in an unregistered, private sale from the issuing company or from its affiliate.⁴⁰ These securities usually include option plans or payments to investors under a convertible loan agreement. In other words, these are time-limited offers or offers restricted to general public (not intended for the public sale).⁴¹

Rule 505

Issuers can only offer and sell up to \$5 million of its securities in any 12-month period. There are restrictions on the types of investors who can acquire securities. The issuer may sell to an unlimited number of “accredited investors” and up to 35 non-accredited investors.⁴²

If the issuers sell their securities to non-accredited investors, the issuers must disclose certain information about themselves, including

³⁸ 17 C.F.R. § 230.506 (Lexis Advance through the April 29, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 23459 and 85 FR 23470. Title 3 is current through April 3, 2020).

³⁹ Rule 144: Selling Restricted and Control Securities, Investor.gov, URL: <http://www.sec.gov/investor/pubs/rule144.htm> (last visited Jul. 10, 2020).

⁴⁰ 17 C.F.R. § 230.144 (Lexis Advance through the April 29, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 23459 and 85 FR 23470. Title 3 is current through April 3, 2020).

⁴¹ “[s]ecurities acquired directly or indirectly from the issuer thereof, or from an affiliate of such issuer, in a transaction or chain of transactions not involving any public offering”. See: *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 343 n.2, 98 S. Ct. 2380, 2381 (1978).

⁴² Updated Investor Bulletin: Accredited Investors, Investor.gov, URL: <http://investor.gov/news-alerts/investor-bulletins/investor-bulletin-accredited-investors> (last visited Jul. 10, 2020).

the financial statements. If securities are sold only to accredited investors, the issuer may disclose information to investors at their own discretion. However, any disclosures made to accredited investors must be provided to non-accredited investors.⁴³

Rule 506

Companies relying on the Rule 506 exemptions can raise an unlimited amount of money. The issuer relying on Rule 506(b) may sell its securities to an unlimited number of “accredited investors” and up to 35 non-accredited investors (same as under Rule 505). However, unlike Rule 505, non-accredited investors participating in the offer must have financial knowledge and experience in financial and business matters.⁴⁴ As for Rule 505, the issuers must disclose certain information about themselves to non-accredited investors. If securities are sold only to accredited investors, the issuer may disclose information to investors at their discretion. Any disclosure to accredited investors must be provided to non-accredited investors. In contrast to registered offers, which require disclosure of certain information, investors in private placements usually independently obtain the information they need to make an informed investment decision. Investors should fully understand the risks involved.⁴⁵

Accordingly, by limiting the number of pre-sale participants to sophisticated investors, developers avoid the risk associated with the anticipation of revenue. According to the Howey test, the latter is a sign of investment activity, and it requires a special verification procedure

⁴³ An accredited investor must meet the following criteria: (1) have an annual income exceeding \$200,000, or \$300,000 for joint income, for the last two years with expectation of earning the same or higher income in the current year or (2) have net worth exceeding \$1 million, either individually or jointly with his spouse (excluding the value of that person’s primary residence and any loans secured by that residence). The requirements for accredited investors may differ from state to state. *Billingsley v. Ariz. Corp.* Comm’n, No 1 CA-CV 18-0630, 2019 Ariz. App. Unpub. LEXIS 1256 (Ct. App. Nov. 19, 2019).

⁴⁴ *Pinter v. Dahl*, 486 U.S. 621 (1988).

⁴⁵ *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 105 S. Ct. 2621 (1985).

under the U.S. law. Under SAFTs, developers issue future tokens, investors receive tokens when the project is launched, and registration with the SEC in this case requires simple filing.⁴⁶

The authors of SAFT did not mean to get around the securities laws. On the contrary, they emphasize the full compliance of SAFT with the Securities Act of 1933. This structure avoids uncertainties usually arising when investing in a future company. Entrepreneurs follow the U.S. federal securities laws in the same way they do for venture financing.⁴⁷ At the same time, SAFT is equivalent to a simple written contract and it allows modifying to meet the project needs or requirements applicable in the jurisdiction. Pantera Capital P. Veradittakit, a venture investor, developed their own SAFT version as reported in the White Paper (project documentation). Veradittakit described SAFT as the first meaningful step towards creating a structure and standard in token financing that reflects the position and goals of companies.⁴⁸ The investor emphasizes that, on the other hand, the SAFT will have a limited application. The SAFT model is primarily focused on projects that raise funds for tokens that are not securities.⁴⁹

E. Syvertse, the leading consultant of AngelList, notes that SAFT does not restrict the circulation of any other types of tokens. They may eventually be present in the CoinList listings, a new organization that the company is creating in partnership with ProtocolLabs to conduct the relevant ICOs.⁵⁰

The future of the SAFT depends on the decision of the crypto community. In any case, this model will be useful as much as it will be in demand and accepted by industry players. Marco Santori emphasizes that the SAFT concept is the type of operation that fully complies with current laws and requires no changes in legal regulation. SAFT can

⁴⁶ Rizzo. Op. cit.

⁴⁷ Kirill O. Osipenko, *Dogovor ob osushchestvlenii prav uchastnikov khozyaystvennykh obshchestv v rossiyskom i angliyskom prave* [An Agreement on exercising company members' rights in Russian and English Law] 5 (Moscow: InfotropicMedia 2016). (In Russ.).

⁴⁸ Rizzo. Op. cit.

⁴⁹ Rizzo. Op. cit.

⁵⁰ Rizzo. Op. cit.

minimize the risks of venture investments and democratize access to the secondary markets.⁵¹

Undoubtedly, there are a number of problems that can hinder the application of a SAFT model. The main one is that SAFT lacks the promises that made ICO so attractive to the public, namely, SAFT is only available to sophisticated U.S. investors and may not be available to investors globally.

IV. The Telegram case

However, new investment concepts that use exemptions from securities registration rules are hardly airtight. A good example was presented in legal dispute SEC v. TON where Russian digital entrepreneur Pavel Durov confronted the U.S. justice.

In January 2018, Telegram, a company famous for its messenger, began raising funds to finance its new blockchain project “Telegram Open Network” or “TON Blockchain” and cryptocurrency “Grams”. The project offered multiple solutions for contractual relationships based on smart contracts and blockchain apps to develop a comprehensive infrastructure for valid economic activities.⁵²

In 2018, Telegram offered future Grams to 175 legal entities and individuals (sophisticated investors under an exemption from the securities registration rules) in exchange for fiat money. Token sales agreements allowed initial buyers to acquire TON blockchain tokens. The company raised about \$1.7 billion and sold 2.9 billion Gram tokens to investors worldwide. Under sales agreements, Gram tokens were to be issued (and TON to be launched) on or before October 31, 2019.

On October 11, 2019, the SEC filed a complaint with the federal court for an illegal offer of securities, and asked for a temporary restraining order (TRO)⁵³ and a preliminary injunction⁵⁴ despite the

⁵¹ Rizzo. *Op. cit.*

⁵² Meghan Spillane, SEC Wins Injunctive Relief To Prevent Telegram’s Distribution of \$1.7B Worth of Cryptocurrency. URL: <https://www.lexology.com/library/detail.aspx?g=e229fa49-10ae-4e9c-a219-401f41225176> (last visited Jul. 10, 2020).

⁵³ Temporary restraining orders (TRO) are short-term pre-trial temporary injunctions against asset management. USCS Federal Rules of Civil Procedure, R 65.

⁵⁴ SEC halts alleged \$1.7 billion unregistered digital token offering. URL: <https://www.sec.gov/news/press-release/2019-212> (last visited Jul. 17, 2020).

fact that, according to both parties to the proceedings, Telegram and the SEC were in the process of sharing information.⁵⁵ The court imposed a temporary restraining order on Telegram's assets.⁵⁶

When the proceedings opened, Telegram postponed the TON launch until April 30, 2020. On January 15, 2020, both parties filed motions for summary judgment⁵⁷ and both were denied by the court, setting the case for trial by jury. Neither party testified in court despite the opportunity to do so. The parties presented the Court with a fulsome Joint Stipulation of Facts,⁵⁸ and each side offered deposition testimony,⁵⁹ exhibits, and declarations. The parties also filed cross-motions for summary judgment, and the SEC filed a motion to strike an affirmative defense, motions⁶⁰ which the Court found unnecessary.

⁵⁵ Court record. Southern District Reporters, P.C. (212) 805-0300 K2JAASEC2 Hearing. P. 48.

⁵⁶ A temporary restraining order (a TRO) aims at keeping the parties, while the claim is pending, as much as possible in the original positions they held at the time the claim was initiated, and preserving the ability of the court to make a meaningful decision after consideration of the case on the merits. A TRO is issued upon equitable discretion of a first-instance judge. No TRO is issued unless there is an adequate remedy. For example, preliminary injunctions are often issued in relation to trademark infringements or infringements of copyright or other intellectual property rights or when consumer safety is at stake. See: *California v. Am. Stores Co.*, 495 U.S. 271 (1990); *Univ. of Tex. v. Camenisch*, 451 U.S. 391 (1981); *Salinger v. Colting*, 607 F.3d 68, 70 (2d Cir 2010).

⁵⁷ A motion for summary judgment (an MSJ) is a procedural application for summary judgment, due to the fact that the other party does not have enough grounds for a jury trial, since there is no issue of fact. USCS Federal Rules of Civil Procedure, R 56.

⁵⁸ A joint stipulation is a procedural document in which the parties inform the court of the agreements reached. In this case, the SEC and TON have agreed on an evidence-gathering process that may otherwise be expensive, complex, and lengthy. USCS Federal Rules of Civil Procedure, R 4.

⁵⁹ A deposition testimony in the law of the United States takes place when parties interview witnesses themselves at the evidence-gathering stage, and such testimony is given under oath, and filed with the court as a transcript or video. Witnesses may also be called to court to re-testify. USCS Federal Rules of Civil Procedure, R 32.

⁶⁰ An affirmative defense is a defense by making independent statements rather than responding to a claim. A motion to strike affirmative defenses is objections to the defendant's affirmative defense. A motion to strike affirmative defenses refuting the claim. USCS Federal Rules of Civil Procedure, R 12(f). Based on the motion, the court may strike an unfair defense. Objections are sustained when it is obvious that

On February 19, 2020, the parties appeared for oral argument on the motions for summary judgment and a preliminary injunction, but the motions for summary judgment were denied. On March 24, 2020, the court reviewed and granted a motion by the SEC to impose a preliminary injunction on the distribution of Telegram assets related to the TON project until the end of the trial.

The Court finds that the SEC has shown a “substantial likelihood of success”⁶¹ in proving that the contracts and understandings at issue, including the sale of 2.9 billion Grams to 175 purchasers in exchange for \$1.7 billion, are part of a larger scheme to distribute those Grams into a secondary public market, which would be supported by Telegram’s ongoing efforts. Considering the “economic realities” under the *Howey* test, the Court finds that, in the context of that scheme, the resale of Grams into the secondary public market would be an integral part of the sale of securities without a required registration statement.⁶²

Telegram knew and understood that reasonable purchasers would not be willing to pay \$1.7 billion to acquire Grams merely as a means of storing or transferring value. Instead, Telegram developed a scheme to maximize the amount initial purchasers would be willing to pay Telegram by creating a structure to allow these purchasers to maximize the value they receive upon resale in the public markets.⁶³

As part of its *Howey* analysis, the Court finds an implicit (though formally disclaimed) intention on the part of Telegram to remain committed to the success of the TON Blockchain post-launch. As such, the initial 175 purchasers possess a reasonable expectation of profit based on Telegram’s efforts because these purchasers expect to receive profits from the resale of Grams in the immediate post-launch period.

the affirmative defense is not relevant to the case under consideration, is unfair, and its removal from the case file corresponds to the principle of procedural economy. See: *SEC v. Gulf & Western Indust.*, 502 F. Supp. 343, 345 (D.D.C. 1980).

⁶¹ *Supra* note 5.

⁶² *Securities and Exchange Commission v. Telegram Group Inc. et al*, No 1:2019cv09439 — Document 227 (S.D.N.Y. 2020). URL: <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2019cv09439/524448/227/> (last visited Jul. 17, 2020).

⁶³ *Id.*

Under the Howey test, the series of contracts represent a security within the meaning of the Securities Act of 1933 (the “Securities Act”).⁶⁴

Telegram asked the court to clarify whether the assets not related to the U.S. investors are also under injunction. On April 1, the court explained that all the project assets were seized, as they are a part of the general scheme.⁶⁵

Telegram also filed an appeal with the United States Court of Appeals for the Second Circuit⁶⁶, unfortunately we would not be able to see the decision on the appeal. However, we can examine an explicit *amicus curia* brief that has been filed by the representatives of the blockchain industry.

The blockchain industry members filed their statement on April 3, 2020.⁶⁷ In particular, the *amicus curiae* brief states that “This future holds immense promise for U.S. consumers, investors, and innovators. The Court’s decision will influence all future projects. Before filing this action, the Commission (SEC) had provided limited guidance on how to fund and present blockchain networks. However, what it had said differs drastically from its position in this case and the decision. Like many other cryptocurrency projects, Telegram and its council structured two-part fundraising, the first of which complied with existing exemptions for private placements and the second of which involved the delivery of functional assets. The Court nevertheless decided that this compliant sale was part of a “scheme” to effectuate an unregistered security offering.”⁶⁸

Therefore, this appeal addresses whether companies may enter into a private placement with sophisticated investors under SEC Rule 506 (Regulation D) to fund a blockchain network and deliver tokens to investors once the network is functional. The district court

⁶⁴ Id. 17–20.

⁶⁵ SEC v. Telegram Grp., Inc., No 19-cv-9439 (PKC), (S.D.N.Y. 2020).

⁶⁶ SEC v. Telegram Group, Inc., No 20-1076 (2d Cir., filed Mar. 25, 2020).

⁶⁷ JD Alois, The Blockchain Association Files Amicus Brief in Support of Telegram’s Battle with the SEC. URL at: <https://www.crowdfundinsider.com/2020/04/159894-the-blockchain-association-files-amicus-brief-in-support-of-telegrams-battle-with-the-sec/> (last visited Jul. 17, 2020).

⁶⁸ Brief of amicus curiae the blockchain association in support of appellants Case 20-1076, Document 55, 04/03/2020, 2814127, at 9.

erred by rejecting Telegram's private placement and the future delivery of blockchain tokens. The two steps are legally and temporally distinct. Indeed, the tokens did not even exist at the time of the private placement. Treating the two steps as one is against the purpose of the Commission's private-placement rules. Telegram gathered investments in a private placement with a proper Regulation D filing. Yet the court has barred Telegram from delivering the fruits of that investment and, even from finishing the harvest.⁶⁹

However, despite the industry's resentment, the decision of the court of first instance was not reviewed. As a result, Pavel Durov announced in his Telegram channel on May 12, 2020,⁷⁰ that he would terminate the project. It was not until late June that media released information about the settlement agreement between TON and the SEC, under which Telegram terminates the TON project and returns money to investors and pays a fee, and the Commission, in turn, withdraws the charges and refuses further prosecution.⁷¹

The reason for Pavel Durov's project to have caused discontent of the Commission will remain a mystery. Previously, projects successfully negotiated with the Commission and went on with their business. For example, Block.One, which raised \$4 billion, paid the SEC a \$24 million fine and issued its cryptocurrency.⁷² However, it should be noted that this happened before the publication of the SEC's DAO Report mentioned above.⁷³ At the same time, KIK, a Canada-based messenger, which implemented a scheme to raise funds using a similar to TON, has been

⁶⁹ Id.

⁷⁰ URL: <https://tgraph.io/What-Was-TON-And-Why-It-Is-Over-05-12> (last visited Jul. 17, 2020).

⁷¹ Interfax, SEC ofitsialno podvela itogi ICO TON Durova [The SEC officially summed up the results of Durov's TON ICO]. URL: <https://www.interfax.ru/business/714918> (last visited Jul. 17, 2020). (In Russ.)

⁷² Valeriya Pozychanyk, "Pamyat korotkaya, no ruki dlinnie": istoriya proekta Pavla Durova i poverivshikh v nego investorov ["Memory is short, but hands are long": the history of Pavel Durov's project and investors who believed in it]. URL: <https://thebell.io/pamyat-korotkaya-no-ruki-dlinnye-chto-investory-pavla-durova-budut-delat-posle-zakrytiya-ton> (last visited Jul. 17, 2020). (In Russ.)

⁷³ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO, URL: <https://www.sec.gov/litigation/investreport/34-81207.pdf> (last visited Jul. 17, 2020).

subjected to exactly the same sanctions and is pursuing proceedings against the Commission.⁷⁴ Therefore, there is no question of a “Russian trace” or “conspiracy of the United States authorities” against Pavel Durov. The U.S. and Canadian projects are facing similar challenges. Having made a solemn conclusion about the triumph of rule of law in the United States, we will leave this blissful jurisdiction for a while and see how things are in Russia.

V. Legal regulation of blockchain in Russia

The Russian Federation has enacted the whole bundle of new legislation. Finally, the bill “On digital financial assets” was adopted in July 2020. It has been aggressively promoted for more than a year.⁷⁵

The Law “On Crowdfunding Platforms” took effect recently,⁷⁶ and new amendments regarding “digital rights” were made to the Civil Code

⁷⁴ Vladimir Opyra, SEC prodolzhaet sudebnoe razbiratelstvo po delu protiv messendzhera Kik [The SEC continues proceedings in the case against Kik. URL: <https://bits.media/sec-prodolzhaet-sudebnoe-razbiratelstvo-po-delu-protiv-messendzhera-kik/> (last visited Jul. 17, 2020)].

⁷⁵ Postanovlenie GD FS RF ot 22.05.2018 No 4030-7 GD “O proekte Federalnogo zakona No 419059-7 “O tsifrovyykh finansovykh aktivakh” [Decree No 4030-7 GD of the State Duma of the Federal Assembly of the Russian Federation dated 22 May 2018 “On Draft Federal Law No 419059-7 on Digital Financial Assets”]. Article 3108. Official Gazette 2018 No 22. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2018, Item 3108 (In Russ.). Article 2 of the Law contains definitions of the following concepts:

A digital financial asset is property in electronic form created by using cryptographic tools. Ownership of this property is verified by entering digital records in the register of digital transactions. Digital financial assets include cryptocurrency and tokens.

A token is a type of digital financial asset issued by a legal entity or individual entrepreneur (hereinafter referred to as the issuer) to raise financing and is registered in the register of digital transactions.

A digital wallet is a software and hardware tool that enables storing information related to digital records (digital rights). A digital wallet can provide access to the registry of digital transactions.

⁷⁶ Raising funds through blockchain technology platforms is addressed in Federal Law No 259-FZ dated 02.08.2019 “On Raising Investments via Investment Platforms and on the Amendments to Certain Legislative Acts of the Russian Federation”. Article 8 of the Law introduces the concept of utilitarian digital rights that can be

of the Russian Federation (Article 128).⁷⁷ These amendments added digital rights to the list of real property, intellectual property, and other rights. Federal Law (34-FZ) of 18.03.2019 amended Article 141.1 of the Civil Code of the Russian Federation, which preserves the concept of digital rights and added to Article 160, Part 1, of the Russian Civil Code, the rule that a written form of the contract is complied with if it is made by electronic or other technical means. All of this together shows that the Russian Federation is in the process of adapting its legal system to the new economic reality created by digital technologies. At the same time, law enforcement is leaning against the development of blockchain technology, rather than in support of the latter.⁷⁸

Blockchain technology opens new horizons for the securities market because it provides new opportunities for trading and clearance. However, the widespread integration of distributed ledger technologies to the stock exchange, while being beyond the scope of individual experiments, is limited by Russian law. The Russian Federation regulates the issue of securities by Federal Law No 39-FZ “On the Securities Market” dated 22.04.1996.⁷⁹ In addition, the violation of the strict procedure of issuing

exchanged inside a digital platform, which corresponds to the technical description of a distributed registry or blockchain technology.

⁷⁷ *Federal’nyi zakon No 34-FZ “O vnesenii izmeneniy v chasti pervuyu, vtoruyu i statyu 1124 chasti tretyey Grazhdanskogo kodeksa Rossiyskoy Federatsii”* [Federal Law of the Russian Federation on the Amendments to Parts 1, 2 and Article 1124 of Part 3 of the Civil Code of the Russian Federation], *Ofitsial’naia Gazeta* [Off. Gaz.] No 12, Art. 1224, 2019; *Sobranie zakonodatel’sstva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of legislation] 2019, No 12, Item 1224. (In Russ.)

⁷⁸ E.g., some quoted and similar decisions where virtual assets are treated as the target of a crime, and the use of cryptocurrencies is interpreted a priori as confirming the illegality of the transaction: e.g. the Decision of the Kirov district court in case No 1-37/2019 of 25.04.2019, *Arkhiv Kirovskogo raionnogo suda g. Kazani* [Archive of the Kirov district court of Kazan]; Decision of the Sverdlovsk district court in case No 1-9/2018 (1-416/17) of 16.07.2018, *Arkhiv Sverdlovskogo raionnogo suda g. Kostroma* [Archive of the Sverdlovsk district court of Kostroma]; Verdict of the Ramonsky district court of the Voronezh Region No 1-90/2018 of July 10, 2018 in case No 1-24/2018.

⁷⁹ *Federal’nyi zakon No 39-FZ “O rynke tsennykh bumag”* [Federal Law of the Russian Federation on the Securities Market] dated 22.04.1996, *Sobranie zakonodatel’sstva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of legislation] 1996, No 17, Item 1918). Article 128 of the Civil Code defines the objects of civil rights: “including property rights, including non-cash funds, non-documentary

new securities is against the law and invokes: administrative liability (Article 15.17, the Code of Administrative Offences), and criminal liability (Article 185, the Criminal Code⁸⁰). While Russian law on crowdfunding is very new and very limited in scope yet,⁸¹ there exists no unified legal approach to blockchain investment whatsoever. Therefore, it is hardly possible to draw a clear line between various economic forms of blockchain and ways to raise funds for the development of projects under Russian law.

The Ministry of Finance of the Russian Federation proposed introducing criminal liability for the issue and turnover of cryptocurrencies in Russia. It planned to add Article 187.1 “Money Surrogate Circulation” to the Russian Federation’s Criminal Code. While the Russian Government and the Bank of Russia⁸² are cautious about cryptocurrency, there is risk that any project based on the blockchain technology may be treated as “money surrogate” production even though the new law has been adopted.

Thus, it is too early to talk about the broad implementation of blockchain technology in Russia. It would be advisable to wait for the adoption of the entire block of special laws that should contribute to the introduction of terminological and legal clarity in the relevant sphere. However, we can implement some of the legal models developed in the U.S. even now.

The SAFT can be used for structuring investment transactions in Russia. A token cannot be considered a security under Russian law. In this regard, the SAFT model seems to be the most effective since

securities, and digital rights”. No concept of digital rights is contained in the Civil Code, but it is disclosed in a special law that has not yet been adopted, but since its publication in 2018, it creates a theoretical basis for the new provisions of the Civil Code.

⁸⁰ Ugolovnyi kodeks Rossiiskoi Federatsii [Criminal Code of the Russian Federation] No 63-FZ of 13.06.1996. Sobranie zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 1996, No 25, Item 2954.

⁸¹ See: Crown Fund Act No 112-106 of May 4, 2012. URL: <https://www.congress.gov/bill/112th-congress/house-bill/3606> (last visited Jul. 17, 2020).

⁸² Informatsionnoe pismo Banka Rossii o natsionalnoi otsenke riskov OD/FT ot 14.08.2018 No IN-014-12/54 [Information letter No IN-014-12/54 of the Bank of Russia on the National Assessment of ML/FT risks dated 14.08.2018] Vestnik Banka Rossii [Bank of Russia Bulletin] 2018, No 64.

it establishes a balance between investors and the startup. SAFT is consistent with the applicable Russian law and creates no obvious criminal risks. In addition to the SAFT, Russian law contemplates other ways to structure contractual relationships in blockchain projects. Some of the ways include the use of license agreements and franchise agreements.

If a license agreement is applied, the rights associated with the token will correspond to specific contractual characteristics. The token issuer may place a contract that includes the right to grant or distribute all or some of the rights related to the use of software code (which initially is the intellectual property of the licensor). The licensor may also have the right to deny individuals the right to exercise such rights. Therefore, as a result of performing the agreement, the licensee receives either all or part of these rights. The scope of rights obtained depends on the licensor. Any rights granted to the holders of digital tokens are formed by the initial issue of tokens (similar to a license to use any other software).⁸³

As for the franchise model, it is necessary to define the key terms. Russian law operates the term “commercial concession”. The U.S. laws do not apply the concept of a concession since before World War II; instead, the law establishes the concept of franchising.⁸⁴ The latter, in turn, is not used in Russian law. No matter the term, this type of a legal relationship has long been known in the Russian civil law doctrine.

Usually, franchising is defined as an agreement under which the franchisor grants the franchisee the right to use a set of industrial or intellectual property rights in exchange for financial compensation.⁸⁵ It should be recognized that franchising actually contains not only signs of investment (capital), but also the indicators of investment activity.⁸⁶

⁸³ Brisov. *id.* ICO vs IPO.

⁸⁴ DJ Kaufman, *An Introduction to Franchising and Franchise Law*, 603 Business and Legal Issues, Commercial Law and Practice 341 (1992).

⁸⁵ Aleksandr A. Yeremin, *Franchaizing i dogovor kommercheskoi kontsessii: teoriia i praktika primeneniia: monografiia* [Franchise and commercial concession agreement: the theory and practice of application. Monograph] 12 (Moscow 2017). (In Russ.).

⁸⁶ Mariya N. Titova, *O meste franchaizinga v sisteme pravovogo regulirovaniia investitsionnoi deiatelnosti* [The place of franchising in the system of legal regulation

“Franchising should be considered as a business model (project), which is carried out by its participants using a set of interrelated legal means to achieve a specific economic result.”⁸⁷

Pursuant to Article 1027 of the Civil Code of the Russian Federation,⁸⁸ the concessionary under the commercial concession contract makes direct efforts to develop business in its territory and the grantor exercises control (administration) remotely. The rights granted through the blockchain token allow the holder to contribute to the system, while the token issuer has remote control, although without the right to interfere in the project implementation. The contract terms are written in the blockchain, allowing you to avoid a negative subjective component in the form of, for example, bad faith of the assignor. Thus, the token holder is granted the rights to work in the system by the issuer for the purpose of its development, and not because of a passive investment interest (the Howie test). Under the commercial concession model, the grantor grants its intellectual property rights to the concessionaire. According to a similar scheme in the structure of a digital token, its holder gets access to the system, which is the main model on which the token holder operates. Under this model, it is also possible to control the behavior of users of the system by agreement and include provisions on non-disclosure of information.

Another interesting solution for crypto entrepreneurs may be the possibility of obtaining a loan in a Fiat currency, secured by cryptocurrency. Such a solution seems reasonable in the economic sense, since it makes it possible not to exchange the cryptocurrency to Fiat money, losing on the exchange rate and exchange. In addition, crypto entrepreneurs avoid the risks associated with high volatility of

of investment activity], 9 *Pravo i Ekonomika* [Law and Economics] 28–21 (2014). (In Russ.).

⁸⁷ Mariya N. Titova, *Pravovoy status subektov franchayzinga biznes-formata* [Legal Status of Business Format Franchise], 3 *Predprinimatelskoe pravo* [Entrepreneurial Law] 57–61 (2014). (In Russ.).

⁸⁸ *Grazhdanskiy kodeks Rossiyskoy Federatsii. Chast vtoraya* ot 26.01.1996 No 14-FZ (red. ot 29.07.2018) [Civil Code of the Russian Federation. Part II, dated 26.01.1996 Federal Law 14-FZ (as amended on 29.07.2018)]. *Sobranie zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 1996, No 5, Item 410.

virtual assets, while maintaining the ability to raise funds for business development.

As any property, including things, documentary and undocumented securities, tokens can be deposited in accordance with Article 926.1 of the Civil Code of the Russian Federation or deposited with the notary under Article 88.1 of the Fundamentals of the Russian Law on Notary System, and the notary is considered as an escrow agent and its actions are regulated by civil law provisions on escrow agreements. Articles 327.1 and 328 of the Civil Code of the Russian Federation and Articles 57–59, Resolution 54 of the Plenum of the Supreme Court of the Russian Federation dated 22 November 2016 “On Certain Issues of Application of General Provisions of the Civil Code of the Russian Federation on Obligations and their Performance” allow including a provision requiring depositing tokens with the notary and to stipulate conditions for the transfer of tokens to the beneficiary or return the token to the depositor.

The legal possibility of accepting tokens as a notary deposit follows from the definition of tokens as other property in accordance with the post-reform provisions of Article 128 of the Civil Code of the Russian Federation.

Article 128 of the Civil Code defines the objects of civil rights: “including property rights, non-cash funds, non-documentary securities, and digital rights.” Although the Civil Code does not operate the term “digital rights”, it is disclosed in a special law that has not yet been adopted, but since its publication in 2018, it creates a theoretical basis for the new provisions of the Civil Code. Article 2, draft Federal Law No 419059-7 “On Digital Financial Assets” contains the following definitions:

1. A digital financial asset is property in electronic form created by using cryptographic tools. Ownership of this property is verified by entering digital records in the register of digital transactions. Token and cryptocurrency are digital financial assets.

2. A token is a type of digital financial asset issued by a legal entity or individual entrepreneur (hereinafter referred to as the issuer) to raise financing and is registered in the register of digital transactions.

3. A digital wallet is a software and hardware tool that enables storing information related to digital records (digital rights). A digital wallet can provide access to the registry of digital transactions.⁸⁹

Raising funds through blockchain technology platforms is addressed in Federal Law No 259-FZ dated 02.08.2019 “On Raising Investments via Investment Platforms and on the Amendments to Certain Legislative Acts of the Russian Federation”.⁹⁰ Article 8 of the Law introduces the concept of “utility digital rights”. These rights can be exchanged on a digital platform, corresponding with the technical description of a distributed ledger or blockchain technology.

Therefore, tokens that existed before the law “On Crowdfunding Platforms” can circulate beyond specific platforms. Article 5 of the Law applies to new tokens. At the moment, tokens that can only be received as a reward for mining, *i.e.* actions to maintain the platform’s functionality, are not subject to special regulation. Therefore, they cannot be subject to the requirements of a particular law that indicates the time and method of creating the token, as well as the process of attracting investment.

Thus, the analysis of legislative initiatives in the Russian Federation shows that the main trends in Russian law are aimed at defining a token as a “digital right”. Also, potential criminal and legal risks are the main concerns for domestic blockchain entrepreneurs. By analogy with international rules and Russian rules, we can summarize that it is necessary to follow the requirements for personal data protection regulations and disclosure of information regulations. Today, the vast

⁸⁹ Postanovlenie GD FS RF ot 22.05.2018 No 4030-7 GD “O proekte Federalnogo zakona No 419059-7 “O tsifrovyykh finansovykh aktivakh” [Decree No 4030-7 GD of the State Duma of the Federal Assembly of the Russian Federation dated 22.05.2018 “On draft Federal Law No 419059-7 on Digital Financial Assets”], *Sobranie zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2018, No 22, Item 3108, Art. 2.

⁹⁰ Raising funds through blockchain technology platforms is addressed in Federal Law No 259-FZ dated 02.08.2019 “On Raising Investments via Investment Platforms and on the Amendments to Certain Legislative Acts of the Russian Federation” Article 8.

majority of the blockchain activities seem to be restricted in Russia. For example, the cryptocurrency exchange is treated as an illegal business. A similar understanding should apply to commercial mining, which remains in the gray zone.

However, despite the government's negative attitude to blockchain technology and a direct ban on some investment transactions, in the foreseeable future, blockchain technology is likely to establish a significant market segment. As a result of the research, we formed a position that in the absence of coordinated legislative regulation of the blockchain technology in the Russian Federation, some forms of structuring transactions such as a SAFT, a license agreement and franchising, have been and still can be applied.

VI. New contractual challenges in terms of COVID-19

The coronavirus epidemic has challenged all areas of social life, the law included. The controversy surrounding the performance and repudiation of contracts, and force majeure have acquired a fundamentally new perspective. Legal matters previously addressed solely in theoretical discussions have become urgent and in need of practical solutions. The issue of termination of a smart contract has become more than relevant. Before the pandemic these challenges did not emerge, since most events in ordinary life we can usually predict.

For example, France has recognized the coronavirus as force majeure (*cas de force majeure*). Accordingly, no delay penalties established by law and contract will apply to public procurement contracts. However, the situation is not so apparent for private contracts. According to the French courts' decisions, most cases related to the pandemic require to weigh the specific factual circumstances.⁹¹ The position is similar with international commercial contracts. Most international sales contracts are concluded under the terms of the United Nations Convention on

⁹¹ See: Cour d'appel de Nancy, 1re ch. civile, 22 nov. 2010, в деле No 09/00003 on dengue fever or Cour d'appel de Basse-Terre, 1re ch. civile, 17 déc. 2018, case No 17/00739: chikungunya virus.

Contracts for the International Sale of Goods (CISG) or the “Vienna Convention.” Since the document was adopted as the law governing international transactions for the sale of goods, its Article 79 applies to the relations of the parties as a protection against liability for non-performance of obligations.

Article 79 of the CISG covers changing circumstances in a contract for the international sale of goods. It uses the term “impediments” to illustrate the circumstances in which a party, whether a buyer or a seller, may be relieved of liability for non-performance of a contractual obligation. The Article does not contain the term “force majeure,” but the properties of the manifestation of impediments in contracts are very similar to *force majeure*. The CISG identifies three conditions for the occurrence of force majeure:

- 1) the failure was caused by an “obstacle” that the party could not control;
- 2) the obstacle is reasonably unforeseen at the time of signing the contract;
- 3) the party is reasonably unable to avoid or overcome the “obstacle” or its consequences.

These conditions are the main requirements for force majeure in civil law or for the frustration of a contract in common law countries.⁹²

The U.S. courts use the frustration of purpose doctrine, similar to the English frustration of a contract doctrine. It is applied “in cases where a change in circumstances makes the performance of one of the parties practically useless for the other. If the party had known about these circumstances, it would never have agreed to enter into a contract.”⁹³

In any case, the courts try to narrow down the application of frustration to the case’s specific circumstances. All contractual terms specified due to a well-thought-out algorithm for managing contractual relations in the smart contract were “weighed” anew, based on the

⁹² See: Taylor v. Caldwell In the Queen’s Bench 3 Best & S. 826 [1863] or Tsakiroglou & Co. Limited v. Noblee Thorl Gesellschaft mit beschränkter Haftung House of Lords AC 93 [1962].

⁹³ See: Evans v. Famous Music Corp., 1 N.Y.3d 452 (N.Y. 2004) or E-Pass Techs. v. Moses & Singer, LLP, No C-09-5967 EMC, 7 (N.D. Cal. Apr. 13, 2012).

changed reality, in the COVID-19 conditions. The system of additional duties related to primary obligations (*Nebenpflichten*), grounds (*Wegfall der Geschäftsgrundlage*), the duty to ensure the safety of the property of the company or even third person (*Schuldpflichten*),⁹⁴ the prohibition to demand performance in kind, overly burdensome to the debtor (*Wirtschaftliche Unmöglichkeit*)⁹⁵ in German law or hardship,⁹⁶ implied terms,⁹⁷ good faith efforts,⁹⁸ reasonable efforts⁹⁹ in common law—all these doctrines were put under question due to the widespread transition to smart contracts in the near future, since it became evident that a number of contractual doctrines allow renegotiation in the process of performance. On the other hand, COVID-19 promoted the transfer of contractual relations to the digital sphere.

In Russia, the courts have developed a unified approach that allows to use messages in digital messenger services as evidence in court.¹⁰⁰ This new development gave the parties new tools to prove that they have

⁹⁴ Dmitriy V. Dozhdev, *Printsip dobrosovestnosti v grazhdanskom prave* [The principle of good faith in civil law], in *Printsip formalnogo ravenstva i vzaimnoe priznanie prava* [The principle of formal equality and mutual recognition of rights] 149, 147–162 (Belyaev M.A., et al., 2016). (In Russ.)

⁹⁵ Vadim S. Petrishchev, *Sushchestvennoe izmenenie obstoystelstv: pravoprimeneniye st. 451 GK RF i opyt stran obshego i kontinentalnogo prava: preprint wp10/2007/06 V. S.* [Material change in circumstances: the enforcement of Article 451 of the Civil Code of the Russian Federation and the and the experience of common and continental law countries] Preprint WP10/2007/06. M. GU VSHE 31 (2007). (In Russ.)

⁹⁶ *Id.*, at 16.

⁹⁷ David Kelly, Ruby Hammer & John Hendy, *Business Law*. 3rd Edition (London: Routledge, 2017) (374).

⁹⁸ Kenneth A. Adams, *Understanding “Best Efforts” and its Variants*, 50 *The Practical Lawyer* 12–11 (2004).

⁹⁹ Sergei N. Vinokurov, *Sovremennaya kontseptsiya dobrosovestnosti v obyazatelstvennom prave Frantsii, Germanii, SShA i Anglii* [Modern concept of good faith in the law of obligations of France, Germany, the USA and England], 8 *Pravo i politika* [Law and Politics] 1–11 (2018). URL: https://nbpublish.com/library_read_article.php?id27104 (last visited: 02.03.2020). (In Russ.)

¹⁰⁰ *Postanovlenie Plenuma Verkhovnogo Suda RF o primeneni chasti chetvertoy Grazhdanskogo kodeksa Rossiyskoy Federatsii* [Resolution of the Plenum of the Supreme Court of the Russian Federation On the application of Part Four of the Civil Code of the Russian Federation] No 10 dated 23.04.2019, *Rossiiskaya gazeta* 2019, No 96, Item 55.

complied with the agreement;¹⁰¹ damage was caused,¹⁰² an opponent received the documents.¹⁰³

At the same time, Russian case law shows that an agreement cannot be changed or terminated by short message service (SMS) communication, since this contradicts with clause 1 of Article 452 of the Civil Code of the Russian Federation (hardship).¹⁰⁴ In the context of the pandemic, the question of whether a contract can be concluded or terminated via SMS has become particularly relevant.

The 2019 amendments to Article 160 of the Civil Code of the Russian Federation¹⁰⁵ gave reason to believe that the conclusion of contracts by SMS messages may be considered as a written form of a contract (when the written contract is required by law) made “through electronic or other technical means to reproduce in a tangible medium unchanged the content of the transaction.” Foreign courts have also adopted a digital communication between parties as sufficient to establish a written form when it is required by law (*e.g.* Statute of Frauds).¹⁰⁶ The Supreme Court of South Africa recognized the contract formed by the exchange of digital

¹⁰¹ Postanovlenie Odinnadtsatogo arbitrazhnogo apellyatsionnogo suda [Decision of the Eleventh commercial court of appeal] dated March 05, 2020, in case No A72-13662/2019, URL: <https://kad.arbitr.ru/Card/3fe80c69-840a-4aff-847f-0a1060a46762> (last visited: 11.05.2020).

¹⁰² Postanovlenie Devyatnadsatogo arbitrazhnogo apellyatsionnogo suda [Decision of the Nineteenth commercial court of appeal] dated Jan. 29, 2020, in case No A48-7646/2018. URL: <https://kad.arbitr.ru/Card/b6ba1443-c8cd-4c07-b8do-ecb3d71600ce> (last visited Jul. 17, 2020).

¹⁰³ Postanovlenie Pyatnadsatogo arbitrazhnogo apellyatsionnogo suda [Decision of the Fifteenth commercial court of appeal] dated Mar. 23, 2020, in case No A53-6254/2018. URL: <https://kad.arbitr.ru/Card/8f428135-65bc-4f2e-8951-ea6145f05403> (last visited Jul. 17, 2020).

¹⁰⁴ Postanovlenie Vosmogo arbitrazhnogo apellyatsionnogo suda [Decision of the Eighth commercial court of appeal] dated Mar. 23, 2020, in case No A70-10890/2019, URL: <https://kad.arbitr.ru/Card/6288bae1-a3eb-43ed-b681-6075cfod9e39> (last visited Jul. 17, 2020).

¹⁰⁵ Federal’nyi zakon “O vnesenii izmeneniy v chasti pervuyu, vtoruyu i statyu 1124 chasti trety Grazhdanskogo kodeksa rossiyskoy Federatsii” [Federal Law “On amendment to Parts One and Two and Article 1124, Part Three of the Civil Code of the Russian Federation], Sobranie zakonodatel’sstva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation] 2019, No 12, Item 1224. (In Russ.)

¹⁰⁶ “The Statute of Frauds requires that a contract for lifetime employment be in writing. *McInerney v. Charter Golf*, 680 N.E.2d 1347, 1341 (1997).

messages concluded in accordance with the requirements of the law.¹⁰⁷ However, not every message exchange will be considered a contract. An *anima contrahendi* (a legal purpose for entering into a contract)¹⁰⁸ is required for a contract to exist, as South Africa's Supreme Court of appeal ruled in another case.¹⁰⁹ To determine whether a contract was concluded, the court used the objective reasonableness test.

Common law courts also consider the form of the contract to be met, with the exception of a special requirements form,¹¹⁰ if the objective reasonableness test allows considering the contract: "[the contract] depends not on their subjective state of mind, from the consideration of what was communicated between them by words or behavior, and whether this leads objectively to the conclusion that they intended to create legal relations and agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."¹¹¹ However, a person who does not intend to enter into a contract will be bound by the objective features of the contract but cannot itself refer to an objective criterion against the counterparty.¹¹²

The U.S. courts recognize the written form of any communication between the parties to a contract in the form of sound, image, recording, or code.¹¹³ In this case, the meeting of the minds of the parties is

¹⁰⁷ In: Spring Forest Trading 599 CC v. Wilberry: Opinion Supreme Court of Appeal, No 725/13, November 21, 2014. URL: <http://www.saflii.org/za/cases/ZASCA/2014/178.html> (last visited: 15.05.2020).

¹⁰⁸ Jean du Plessis, Bernhard Großfeld, Claus Lutterman, German Corporate Governance in International and European Context 14 (Springer, 2017).

¹⁰⁹ In: Kgopana v Matlala: Opinion of Supreme Court of Appeal, No 1081/2018, December 2, 201, URL: <http://www.saflii.org/za/cases/ZASCA/2019/174.html> (last visited Jun. 26, 2020).

¹¹⁰ N Chumak & M Rybyno, Vvedenie v angliyskoe pravo [Introduction to English Law], 1 Peterburgskiy yurist [Saint Petersburg Lawyer] 43 (2014). (In Russ.).

¹¹¹ In: RTS Flexible Systems Ltd v. Molkerei Alois Muller GmbH&Co: UKSC No 2009/0048, March 10, 2010 URL: <https://www.supremecourt.uk/cases/docs/uksc-2009-0048-judgment.pdf> (last visited Jun. 26, 2020).

¹¹² In: HLB Kidsons v. Lloyd's Underwriters: Opinion of Supreme Court of Judicature Court of Appeal, No A3/2007/2450, A3/2007/2544, A3/2007/2546, June 17–20, 2008. URL: <https://www.bailii.org/ew/cases/EWCA/Civ/2008/1206.html> (last visited Jul. 17, 2020).

¹¹³ "an electronic sound, symbol, or process, attached to or logically associated with a contract" (In: Tayyib Bosque, Corp. v. Emily Realty, LLC: Opinion of United

determined on the basis of the test of a reasonable observer, carried out by jurors in civil proceedings.¹¹⁴

Currently, we cannot present any examples in Russian case law that courts recognized SMS correspondence as a sufficient written form of a contract but given that “the development of electronic means of communication currently allows them to be actively used when the contracts are being concluded,”¹¹⁵ we expect the Russian courts soon to permit such contracts.

Following this logical trail, we might suggest that the new version of Article 160 of the Civil Code of the Russian Federation should also become the basis for the “smart contracts”.¹¹⁶ There may be difficulties in their performance related to the abuse of rights “by the developers who have an abundant informational advantage,” errors that accidentally occurred during the development and compilation of software code,¹¹⁷ which can become a source of disagreement and disputes between the parties.¹¹⁸ Their resolution, taking into account the specifics, should be based, *inter alia*, on the doctrines of common law, such as the test of a bona fide observer.

States District Court, Southern District of New York, 17 Civ. 512, June 17, 2019. URL: <https://casetext.com/case/tayyib-bosque-corp-v-emily-realty-llc> (last visited Jul. 17, 2020)).

¹¹⁴ In: *Senno v. Elmsford Union Free Sch. Dist.*: Opinion United States District Court, S.D. New York, 08 Civ. 2156, July 28, 2011. URL: <https://casetext.com/case/senno-v-elsford-union-free-school-district?tab=keyword> (last visited Jul. 17, 2020).

¹¹⁵ SA Stepanov, ed., *Grazhdanskoe pravo*. T. 1. 2-e izdanie. Uchebnik [Civil Law. Volume 1, 2nd edition. Textbook] (Moscow: Prospect, 2019) 582 (In Russ.)

¹¹⁶ *Poyasnitelnaya zapiska k projektu federalnogo zakona “O vnesenii izmeneniy v chasti pervuyu, vtoruyu i chetvertuyu Grazhdanskogo kodeksa Rossiyskoy Federatsii”* (zakonoproekt No 424632-7) [Executive Summary to the draft Federal Law on Amendments to the First, Second, and Fourth Parts of the Civil Code of the Russian Federation (Draft law No 424632-7)]. URL: <http://sozd.duma.gov.ru/download/827EDED-92F1-46AE-A576-71C8113EB77C> (last visited Jul. 17, 2020). (In Russ.)

¹¹⁷ AY Ivanov, ML Bashkatov, YuV Galkova, et al., *Blokcheyn na pike khaypa: pravovye riski i vozmozhnosti* [Blockchain at the peak of hype: legal risks and opportunities] (Moscow: Higher School of Economics Publ., 2017) (237).

¹¹⁸ Nikita V Lukoyanov, *Pravovye aspekty zaklyucheniya, izmeneniya i prekrashcheniya smart-kontraktov* [Legal aspects of conclusion, modification and termination of smart contracts], 11 *Yuridicheskie issledovaniya* 33 (2018). (In Russ.)

VII. Conclusions

As the study shows, blockchain technology has massive potential in structuring transactions. Despite the challenges of adapting this new technology to the applicable laws in different jurisdictions, the economic turnover can always find suitable solutions. The study also shows that a flexible regulatory approach (*ex-post*) contributes much more to the new legal models of contractual relations than strict regulation (*ex-ante*). Prescription endures no benefits to the new technology. The restrictive governmental approach usually pushes the progress out of the country together with the new ideas, opportunities, and investments. The COVID-19 pandemic has become a severe stress test for the existing contractual forms. By setting new challenges for smart contracts, the pandemic also showed that the development of distant transactions and different forms of automatic execution of contracts could be very much in demand. Thus, the governments should actively develop and introduce information technologies into the circulation, and lawyers should form proposals for regulating new technology.

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