

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/336127795>

The Vienna Convention on International Sales of Goods and the Bitcoin

Article · May 2019

DOI: 10.17265/1548-6605/2019.05.001

CITATIONS

0

READS

51

1 author:



Miklós Király

Eötvös Loránd University

3 PUBLICATIONS 0 CITATIONS

SEE PROFILE

Some of the authors of this publication are also working on these related projects:



Unification of Contract Law and Private International Law [View project](#)

The Vienna Convention on International Sales of Goods and the Bitcoin

Miklós Király

Eötvös Loránd University, Budapest, Hungary

Cryptocurrencies like Bitcoin may turn upside down not only the system of currencies but that of the international trade. One of the most intriguing questions is how a currency, like Bitcoin, intended to be used globally, can be inserted in the soundly elaborated system of the Vienna Convention on International Sales of Goods (CISG). The paper focuses on the following topics: the nature of Bitcoin, exchange rate fluctuation and hardship, and the determination of late payment interest.

Keywords: Bitcoin, CISG, cryptocurrencies, international sales, trade

Nature of Bitcoin

Cryptocurrencies like Bitcoin have brought a completely new phenomenon in the classical system of currencies and money as such. In this new world, computer softwares encrypting codes generate the existence of cryptocurrencies and regulate their transfer, without any action or control of central banks.

Next to the computer based background, their decentralised form is a main character of the cryptocurrencies. They have no imminent value like precious metals, neither guaranteed by the state as legal tender. Their usage is ensured by the acknowledgment of a narrow or broad community, if any.

Investigating the connection between the Vienna Convention on International Sales of Goods (CISG or Vienna Convention) (1980) and the cryptocurrencies like Bitcoin, numerous questions raise to be answered. At the moment, these problems are often handled as theoretical ones, but in case of further success and more frequent usage, practical questions have to be faced. One of the most intriguing questions is how a currency, like Bitcoin, intended to be used globally, can be inserted in the soundly elaborated system of international rules on transfer of goods. Is it a great opportunity or rather a strange couple relationship dotted with hardship?

Among many of its characteristics, money as classical currency (legal tender) has the ability to compare the value of goods, to pay for the price of goods, and to keep its value. It is durable, carriable; it is acknowledgable as value-carrier, keeps its value. Courts and authorities have different views on Bitcoin's nature, such as it has the characteristic of money or not.

The European Court declared in C-264/14 Hedqvist judgement,¹ interpreting the regulations of Council Directive 2006/112/EC on the common system of value added tax (VAT), that “the ‘bitcoin’ virtual currency

Miklós Király, Ph.D, professor, Department of Private International Law and European Economic Law, Eötvös Loránd University, Budapest, Hungary.

¹ C 264/14 Skatteverket and David Hedqvist ECLI:EU:C:2015:718.

cannot be characterised as ‘tangible property’² neither as a security conferring a property right nor a security of a comparable nature”. Furthermore,

transactions involving non-traditional currencies, that is to say, currencies other than those that are legal tender in one or more countries, in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, are financial transactions.

In Germany, the Federal Ministry of Finance acknowledged Bitcoin as a unit of account, and published a decree to regulate the cryptocurrencies and provide guidance on their VAT treatment.³ In the US, in the Securities and Exchanges Commission and Shavers (2013) case (Lindquist, 2014)⁴, a United States District Court declared that Bitcoin is a currency or form of money since it can be used to purchase goods or services, and to pay for individual living expenses.

The Internal Revenue Service of the US—opposite to the above concessive position—acknowledged in 2014 that Bitcoin is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value⁵, but qualified it as a property for tax purposes, stressing that virtual currency is not treated as currency that could generate currency gain or losses for tax purposes⁶.

The Paneuropean warning issued by the European Securities and Markets Authority, the European Banking Authority, and the European Insurance and Occupational Pensions Authority (hereafter referred to as the three ESAs⁷) in 2018 on the high risk of buying and/or holding so called virtual currencies, took also a stricter view on cryptocurrencies.⁸ In the warning, the three ESAs stressed that virtual currencies currently available are digital representations of value, neither issued nor guaranteed by central banks or public authorities and do not have the legal status of currency or money. Furthermore, the three ESAs highlighted the risks involved in virtual currencies, that is being subjected to extreme price volatility and pricing bubbles, absence of protection as being unregulated under EU law, lack of price transparency, disability to sell them in case of operational disruption, misleading information and unsuitability of most virtual currencies for most purposes, including investment.⁹

The nature of Bitcoin has to be clarified also from the viewpoint of the CISG, in particularly to decide if it is a contract of sale of goods when the buyer offers Bitcoin as countervalue to pay the price. Especially important to examine this question as regarding Article 1, Paragraph 1 of the Convention declares that,

² A physical asset or thing.

³ <http://www.loc.gov/law/foreign-news/article/germany-federal-ministry-of-finance-publishes-guidance-on-vat-treatment-of-virtual-currencies/>

⁴ Securities and Exchange Commission v. Trendon T. Shavers and Bitcoin Savings and Trust; In the United States District Court; Eastern District of Texas, Sherman Division.

⁵ “Virtual currency is a digital representation of value that functions as a medium of exchange, a unit of account, and/or a store of value”.

⁶ “For federal tax purposes, virtual currency is treated as property. General tax principles applicable to property transactions apply to transactions using virtual currency. Under currently applicable law, virtual currency is not treated as currency that could generate foreign currency gain or loss for US federal tax purposes”.

⁷ The European Supervisory Authorities (ESAs) for securities (ESMA), banking (EBA), and insurance and pensions (EIOPA).

⁸ [file:///C:/Users/Kir%20A1ly%20Mikl%C3%B3s/Downloads/esma50-1641284_joint_esas_warning_on_virtual_currencies1%20\(2\).pdf](file:///C:/Users/Kir%20A1ly%20Mikl%C3%B3s/Downloads/esma50-1641284_joint_esas_warning_on_virtual_currencies1%20(2).pdf)

⁹ Extreme volatility and bubble risk, absence of protection, lack of exit options, lack of price transparency, operational disruptions, misleading information, unsuitability of VCs for most purposes, including investment or retirement.

This Convention applies to contracts of sale of goods between parties whose places of business are in different States, (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State.

However, Article 2, Subsection d declares that the CISG does not apply to sales of stocks, shares, investment securities, negotiable instruments, or money. As regarding interpretation of its regulations, Article 7, Paragraph 1 of the Convention requires an autonomous interpretation taking into consideration its international character and the need to promote uniformity in its application and the observance of good faith in international trade.

Interpretation has far-reaching consequences with special view to place the transaction under the scope of CISG or out of it. In case of traders buying Bitcoin for Euro in an international deal, the transaction is considered out of sphere of application of CISG, having declared Bitcoin as money. It is difficult to handle it as goods or tangible property, and consequently considering it as intangible, it is also out of sphere of application of the CISG, just like software and goodwill are handled in the consistent decisions of courts; however, there are different viewpoints in the latter.¹⁰ The question has a different outcome in case that Bitcoin is used to pay the countervalue of a computer sold in an international, B2B transaction. In this case—accepting Bitcoin as money—it is an international sale of goods transaction and CISG applies. In other case, considering Bitcoin as goods itself, it is a barter contract that is out of sphere of application of CISG.¹¹

Despite of conflicting opinions, to consider it from CISG's viewpoint, it is reasonable to characterise Bitcoin-based and similar transactions as sale of goods and Bitcoin as money, taking into consideration the function of Bitcoin, the behaviour and intention of the contracting parties. It is unquestionable that Bitcoin functions as a special form of money, and we may not forget that banknote was also considered as a suspicious and strange novelty in the past.

Exchange Rate Fluctuation and Hardship

To decide about the nature of Bitcoin is not the only challenge when interpreting the provisions of CISG. To determine the price and its payment is one of the substantial parts of the Convention. According to Article 14 CISG, a proposal for concluding a contract is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price. Accordingly, the main obligation of the buyer is to pay the price for the goods and take delivery of them as required by the contract and Article 53 of CISG. In case of a contract concluded in Bitcoin, we may not however set aside the extreme volatility of Bitcoin that is a special challenge. The value or current rate of Bitcoin (one Bitcoin/€) increased sharply in 2017 from around €1,000 in January to over €16,000 in mid December and then fell almost 70% to €5,000 in early February, back to €7,000 during spring and again fell to €5,400 in October. According to more recent series one Bitcoin was worth of 3,870 USD in December 2018, while already 8,200 USD in May 2019.

One can be protected against the heavy exchange rate fluctuation by avoiding settling the price. In this case the CISG provides rules in its Article 55 according to which a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price; the parties are considered, in the absence

¹⁰ CISG Digest in the Explanation of CISG to Article 1, <http://www.cisg.law.pace.edu/cisg/text/digest-2012-01.html>.

¹¹ See Article 1, Paragraph 1 and Article 2, Point d. Furthermore, see CISG Digest in the Explanation to Article 1, <http://www.cisg.law.pace.edu/cisg/text/digest-2012-01.html>.

of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned. The crux is that the CISG refers in this Article to the price charged *at the time of the conclusion of the contract*, while the dramatic change in Bitcoin's value might have happened just after it. However, based on the principle of freedom of contract, nothing impedes the seller and the buyer to settle the price as the one *charged at the date of delivery*. Otherwise, this is the model followed by the *US Commercial Code* (UCC) § 2305 about *open price terms*.¹² According to this, the Parties, if they intend to, can conclude a contract without fixing the price. In this case the price is a reasonable price at the time for delivery.

Another possibility might be to take into consideration the change of circumstances. The CISG is not concerned with the question of hardship—that is occurrence of events making performance more difficult—though not mentioning it in Article 4 among the matters beyond its scope.

In case of an internal gap, questions concerning matters governed by the CISG not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in case of external gap, that is the case in the absence of such general principles, they must be settled in conformity with the law applicable by virtue of the rules of private international law, according to Article 7, Subsection 2 of the Convention.

Taking into consideration the rules of the UNIDROIT Principles of International Commercial Contracts might be also a solution,¹³ since they codified the general principles of contract law. Based on Article 6.2.2 of UNIDROIT Principles, hardship emerges where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. This seems to be a perfect institution to handle the difficulties deriving from the alteration of value of Bitcoin. However, Article 6.2.2 contains additional requirements for hardship, namely: (a) The events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party.

The disadvantaged party must have met all those requirements and then has the right to turn to the court and require the renegotiation of the contract. Taking into account the well-known volatility of Bitcoin, it is disputable to refer by the disadvantaged party either to requirement (b) that change in value *could not reasonably taken into account* at the time of conclusion of the contract, or requirement (d), according to which the *risk of the events was not assumed*.

Alternatively, searching for domestic state laws to fill in gaps in the CISG regarding hardship, we may invoke the following examples. The German BGB, Section 313 provides that,

If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had

¹² UCC § 2305 (1): The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; (b) the price is left to be agreed by the parties and they fail to agree; or (c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

¹³ The UNIDROIT Principles of International Commercial Contracts, published first in 1994. Amended versions were published in 2004, 2010, and 2016, <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016>.

foreseen this change, adaptation of the contract may be demanded.

The French Civil Code, in its new Section 1195, declares that,

if a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract.

The doctrine of frustration and the court cases connected that handles the question of hardship in the UK (UNIDROIT, 2016). We may refer also to the Hungarian Civil Code, whereas Section 6:192 requires similar conditions in favor of amending the contract by court order.¹⁴

Late Payment Interest

The use of Bitcoin raises also concerns regarding late payment interest. Article 78 of CISG on late payments interest manifests a difficult compromise and provides only halfway measures: “If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74”. It is not a surprise that Article 78 raises many issues of interpretation, such as the moment from which interest will accrue, if the claimant may request interest on the amount of additional damages, or the claimant asks for compound interest. There is a wide academic background dealing with these questions raised, taking partly different approaches (Schwenzer, 2016, pp. 1113-1117). The CISG Advisory Council provided an elaborated overview above Article 78 in its Opinion No. 14.¹⁵

It would be obvious for the parties to determine liberally the default interest rate in the contract, in this partly unresolved issue. However, the parties may be bound despite of freedom of contract, by such as Directive 2011/7/EU on Combating Late Payment in Commercial Transactions¹⁶ or the legal regulations of EU Member States implementing the said Directive. Article 2 of the Directive declares the minimum amount of default interest rate¹⁷; furthermore, according to its Article 7, a contractual term or a practice which excludes interest for late payment shall be considered as grossly unfair and Member States shall provide that a contractual term or a practice to the contrary—grossly unfair to the creditor—is either unenforceable or gives rise to a claim for damages. At this point, the unification of laws at universal and regional level meets. The contracting parties may derogate from Article 78 of CISG—just as from any of its provisions—subject to Article 12—and may fill in the gaps. The CISG does not forbid the parties to exclude the application of the provisions on late payment interest; however Directive 2011/7/EU does not allow it.

¹⁴ Hungarian Civil Code 6:192 § (1): Either of the parties shall be entitled to request to have the contract amended by court order if in the long-term contractual relationship of the parties performing the contract under the same terms is likely to harm his relevant lawful interests in consequence of a circumstance that has occurred after the conclusion of the contract, (a) the possibility of that change of circumstances could not have been foreseen at the time of conclusion of the contract; (b) he did not cause that change of circumstances; and (c) such change in circumstances cannot be regarded as normal business risks.

¹⁵ CISG-AC Opinion No. 14, Interest Under Article 78 CISG, Rapporteur: Professor Doctor Yesim M. Atamer, Istanbul Bilgi University, Turkey. Adopted unanimously by the CISG Advisory Council following its 18th meeting, in Beijing, China on 21 and 22 October 2013 (furthermore: CISG-AC Opinion No. 14).

¹⁶ Directive 2011/7/EU of the European Parliament and of the Council of 16 February, 2011 on combating late payment in commercial transactions (recast). Official Journal of the European Union 23.2.2011 L 48 1-10.

¹⁷ Article 2 Definitions, Subsection 6: “statutory interest for late payment’ means simple interest for late payment at a rate which is equal to the sum of the reference rate and at least eight percentage points”.

In the legal systems of other, non EU member countries, the applicable national law provisions on validity, especially usury, may bar the parties to decide on late payment interest rate.¹⁸ In certain situation, even the contracting parties' rightful decision on late payment interest might lead to an over-compensation caused by high fixed interest rates. The debtor is not granted the right to prove that the creditor's actual loss is less than that of the default interest rate above market conditions.¹⁹ As Ramberg (2016, p. 180) pointed it out, in case of Swedish law defined as applicable by the contracting parties, in case of late payment it would trigger the application of the provisions of the Swedish Interest Act and its relatively high fixed interest rate, even if market conditions—from the parties' point of view—does not justify it.

Instead of the express agreement of the parties on the interest rate, they may be bound by any usage to which they have agreed, and by any practices, which they have established between themselves according to Article 9 (1) CISG. Whether or not the parties might be considered to have impliedly made international trade usages regarding an interest rate applicable to their contract should be judged very carefully. It should not be disregarded that the existence of an international usage is only acceptable if the usage is widely known in international trade, and regularly observed by parties to contracts of the type involved in the particular trade concerned. Article 9 (2) CISG should not be interpreted in a manner that allows it to become a gateway for arbitral choices of interest rates.²⁰

In lack of mutual agreement of the parties, or usage to which they have agreed, and by any practices, which they have established between themselves regarding the interest rate in case of default, further solutions are required. Tendencies in defining the rate of interest have pointed in two directions in accordance with Article 7 (2) of the CISG on bridging internal gaps. The first approach turns to the general principles deduced from the CISG; the second one refers to private international law regulations and invites the applicable national law. As regarding the first one, the suggestions regarding this general principle vary considerably and show a rather diverging conception (Ramberg, 2016, p. 179).²¹ The major proposals can be summarized as follows: The current interest rate might be defined at the creditor's place of business, or on the contrary at the debtor's place of business, or related to the particular currency of the claim or the reference rate of the particular currency of the claim. Others resort to *lex fori* or *lex arbitri* or the application of the Unidroit Principles that is the interest rate prevailing at the place for payment.²² There are arguments in favor of internationally or regionally applied interest rates like the Libor (London Interbank Offered Rate) or the Euribor (Euro Interbank Offered Rate) or the reference rate defined by Directive 2011/7/EU on Combating Late Payment in Commercial Transactions. However, there is not an obviously preferable one among the diverging solutions, and sound counterarguments might be raised against each and every of them.²³ Just to refer to some soundly documented examples, it is worth to mention the Vienna International Chamber of Commerce's view that finds preferable the autonomous decision of the default interest

¹⁸ CISG-AC Opinion No. 14. 3.22.

¹⁹ CISG-AC Opinion No. 14. 3.40.

²⁰ CISG-AC Opinion No. 14. 3.23.

²¹ CISG-AC Opinion No. 14. 3.26.

²² Article 7.4.9. (Interest for failure to pay money): "The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment".

²³ CISG-AC Opinion No. 14. 3.29-3.35 points.

rate, and renders a full compensation of damages and calculates the amount of late payment interest based on the currency interest rate applicable in the place of the seller.²⁴ The Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce decided on EURIBOR as the basic interest rate to be taken into account when defining the default interest rate on delayed payment.²⁵ It supports searching for different solutions—in silence of the CISG—that arbitral tribunals have a considerable room of manoeuvring to decide on the law applicable regarding the interest rate in case of late payment (Ramberg, 2016, p. 181) that means that in the absence of such agreement of the parties, the arbitral tribunal shall apply the law which it considers to be the most appropriate.²⁶

The CISG Advisory Council—underlining that the major reason why interest is awarded is to compensate the creditor for the time value of money—took the position that the interest rate applicable shall be defined according to the law of the state where the creditor has its place of business. At this stage, the duty in relation to proof of foreign law and the rules of *lex fori* shall be taken into account. Based on different private international law codes, this may sometimes be a burden placed upon the parties, whereas in other instances the court undertakes this investigation *ex officio*. This latter view prevails in the Act of Belgian Private International Law under Article 15²⁷, or in the Italian Private International Law Act, Article 14.²⁸ In Hungary, the new Act on Private International Law,²⁹ Section 8 confirms the previous approach³⁰ and defines that the court investigates the proof of foreign law *ex officio* and shall take into consideration all means, such as submissions of the parties, expert opinions, or the related information provided by the minister responsible for justice.

The CISG Advisory Council does not provide further details regarding the interest rate applicable, saying for example that the average commercial bank short-term lending rate to prime borrowers' should be taken into account. Observing the nature of the solution supported by the CISG Advisory Council, it is worth to mention that it is actually a conflicts rule, since it refers to the law of a certain country, so the forum does not have to recourse to its own private international law provisions. Therefore, a tribunal searching for the proper rate of interest could directly apply the laws of the creditor's state that is a sort of "take the hair of a dog that bit you" solution. The fathers of the proposal argue that from the analyzed 274 decisions, 103 were either directly or indirectly applying the law of the state of the creditor.³¹ It is worth to note that the predecessor of the CISG, the Convention relating to a Uniform Law on the International Sale of Goods signed in 1964 in the Hague (ULIS), in its Article 83 contained the same provision that ordered to apply the official discount rate plus 1% that prevails in the country where the seller had his place of business or, if he had no place of business, his habitual residence.³² According to

²⁴ Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft—Wien, CISG-online 691, cited by Schwenzer et al., pp. 576-577.

²⁵ Foreign Trade Court of Arbitration at Serbian Chamber of Commerce, 23 January 2008, CISG Online 1946, cited by Schwenzer et al., pp. 577-578.

²⁶ See for example, Rules of Arbitration, Arbitration Institute of the Stockholm Chamber of Commerce, Article 22, Applicable law (1): The Arbitral Tribunal shall decide the merits of the dispute on the basis of the law(s) or rules of law agreed upon by the parties. In the absence of such agreement, the Arbitral Tribunal shall apply the law or rules of law which it considers to be most appropriate.

²⁷ Law of 16 July 2004 Holding the Code of Private International Law.

²⁸ Reform of the Italian System of Private International Law, Law of 31 May 1995, No. 218.

²⁹ Act XXVIII of 2017.

³⁰ See: Decree 13 of 1979 on Private International Law, Section 5.

³¹ CISG-AC Opinion No. 14. 3.36-3.37 points.

³² "Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%".

Schlechtriem and Schwenger, the opinion of the CISG Advisory Council was born in the hope that a minimum global consensus could be reached, but even the commentary contains concerns with reflecting the counter arguments raised (Schwenzer, 2016, p. 1123).

In this case, when there is no agreement how this lacuna in Article 78 can be best filled based on the general principles of the CISG, one may not avoid observing the solutions provided by certain provisions of private international laws. The decision of the contracting parties on the applicable interest rate belongs to this subject, but we have already mentioned this.

As regarding the conflict of laws rules, in EU Member States the Rome I Regulation³³ shall be applicable. Article 4 (1) a of Rome I Regulation declares that to the extent that the law applicable to the contract has not been chosen by the parties, the law governing the contract for the sale of goods shall be the law of the country where the seller has his habitual residence. Having regarded to the fact that the CISG does not apply to consumer contracts³⁴, supposing that the seller was aware of the nature of the deal, the corrective rules of Rome I Regulation have to be rarely taken into account. The place of business of the seller may overlap with his habitual residence. In this latter case, the application of the law of the seller's place of business—the seller is considered as creditor in case of a claim for the price of goods—leads to the solution supported by the CISG Advisory Council that is the laws of the creditor's state (In case of the buyer taking the position of the creditor, the latter harmony does not exist, since the law of the buyer as creditor should be applied, while Rome I Regulation refers to the law of the seller). Exceptionally, Article 4 (3) of Rome I as an escape clause (Ferrari, 2015, pp. 171-175) may give relevance to the fact that from the circumstances of the case the contract is manifestly more closely connected with a country than that of the seller. In this case the law of that other state—with which the contract is more closely connected—shall be applicable. Circumstances such as the nationality of the parties, the language of the contract, the currency of the debt, or the place of concluding the contract (Ferrari, 2015, p. 173) might be taken into account; however, no sound arbitral practise is observed in this regard.

It makes the picture even more colourful that in case of certain states the 1955 Hague Convention on the Law Applicable to International Sale of Goods shall be applicable instead of Rome I Regulation as the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties and which lay down conflict-of-law rules relating to contractual obligations.³⁵ Denmark, Finland, France, Italy, Nigeria, Norway, Sweden, and Switzerland are still parties to the said Hague Convention.³⁶ The application of the rules of the 1955 Hague Convention—with special view to its Article 3—leads to the same solution at first that is the domestic law of the country in which the vendor has his habitual residence. However, differently from this base rule, a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such

³³ Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

³⁴ See Article 2 of the CISG: This Convention does not apply to sales: "(a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use..."

³⁵ See Rome I Regulation, Article 25.

³⁶ <https://www.hcch.net/en/instruments/conventions/status-table/?cid=31>.

country, whether directly by the vendor or by his representative, agent, or commercial traveller.³⁷ The application of the regulations of the 1955 Hague Convention or Rome I Regulation may lead to different solutions and invokes different laws, since the regional and universal unification of private international law elaborated partly differing regulations (Ferrari, 2015, pp. 136-137).

Harmonisation of laws in the European Union dissolves the legal uncertainty and supports predictability regarding the interest rates applicable, namely through the aforementioned Directive 2011/7/EU on combating late payment in commercial transactions, which declares the minimum interest rate for late payment in its Article 2. From this viewpoint, it is almost indifferent which member state's law is applicable to a contract, with the restriction that the transposition did not bring a perfect harmonization. The survey on the implementation displays that certain member states declared a couple of basis points higher interest rates than that of declared in the Directive.³⁸

But how can we count late payment interest in case of Bitcoin? The foregoing practice rarely dealt with the time dimension of Bitcoin and with its value. Since it is not an official currency, that is not a legal tender, there is no official base rate in case of this cryptocurrency neither at the place of business of the creditor, nor at the place of delivery, or at any other place. Parties may decide on the base rate according to the principle of freedom of contract. In lack of decision of the parties, the forum to decide in the case may take into account the base rate of other currencies—like Euro or USD—however, this seems a rather artificial, and not a lifelike solution. Furthermore, it might be a basic problem that the amount of late payment interest—based on the volatility of the value of Bitcoin—in certain case does not compensate the loss in value of the Bitcoin itself, when it decreases half or one-third comparing to the Euro.

Finding Proper Answers

There are plenty of questions to be solved. Considering it prospectively, it is in the card that the usage of cryptocurrencies is not just a transitory sensation, high-tech caprice, and then, accordingly, answers must be found on the questions raised. Law is very adaptable, as it reacted with proper means on spreading of steam engines, modern mass production, or use of nuclear power; it will find the proper answers regarding digital world and its currencies as well.

References

- CISG. (1980). *United Nations Convention on contracts for the international sale of goods*. Retrieved from https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg
- Ferrari, F. (Ed.). (2015). *Rome I Regulation, pocket commentary*. Munich: Sellier.

³⁷ Article 3: “In default of a law declared applicable by the parties under the conditions provided in the preceding Article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale shall be governed by the domestic law of the country in which the establishment is situated. Nevertheless, a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has been received in such country, whether by the vendor or by his representative, agent or commercial traveller”.

³⁸ European Commission Brussels, 26.8.2016 SWD (2016) 278 final, Commission Staff Working Document Evaluation of the Late Payment Directive/REFIT Evaluation Accompanying the Document Report from the Commission to the European Parliament and the Council on the Implementation of Directive 2011/7/EU on combating late payment in commercial transactions {COM(2016) 534 final}; <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-534-EN-F1-1.PDF> (10.08.2017).

- Lindquist, A. (2014). Funny money: Why Bitcoin does not warrant increased governmental regulation. *Regent Journal of Global Justice and Public Policy*, 1(79), 79-114.
- Ramberg, J. (2016). CISG and the default rate interest in arbitration. In I. Schwenzer (Ed.), *35 years cisg and beyond* (pp. 179-181). The Hague: Eleven International Publishing.
- Schwenzer, I. (Ed.). (2016). *Schlechtriem & Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)* (4th ed.). Oxford: Oxford University Press.
- UNIDROIT. (Ed.). (2016). Harmathy, A. Hardship. In *Eppur si muove: The age of uniform law, essays in honour of Michael Joachim Bonell to celebrate his 70th birthday, Volume 2* (pp. 1035-1043). Rome.