Refas Revista Fatec Zona Sul
1ª. Edição Outubro 2014

Business management
ISSN 2359-182X

THEORETICAL AND PRACTICAL ASPECTS ABOUT ATTACHMENT OF CRYPTOCURRENCIES

ASPECTOS TEÓRICOS E PRÁTICOS DA PENHORA DE CRIPTOMOEDAS

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Article received in March 2019

ABSTRACT

In the last decade, cryptocurrencies have gained prominence in the media as a payment method or an investment, arisingthe importance to study the viability of their attachment in the Brazilian execution process. However, the pace at which technological innovations arise is not always accompanied by the law to regulate them, and any omissions should be analyzed by the Judiciary, applying the current law and making up any gaps, in order to provide effective jurisdiction. This article, therefore, intends to review the existing literature to briefly explain some aspects of attachment of property, to define the legal and technical concepts of cryptocurrencies, elucidating how they work and analyzing the possibility of their attachment. At last, it will be discussed about the best mode of procedure for attachment of cryptocurrencies, if allowed by law.

Keywords: Law. Attachment. Cryptocurrencies.

RESUMO

Na última década, as criptomoedas ganham cada vez mais destaque na mídia como forma de pagamento ou de investimento, razão pela qual surge o interesse de se analisar a viabilidade de sua penhora no processo de execução brasileiro. Contudo, o ritmo com que surgem as novidades tecnológicas nem sempre é acompanhado pela edição de normas que as regulamente, devendo eventuais omissões serem analisadas pelo Poder Judiciário, no contexto das normas vigentes, suprindo-se as lacunas encontradas, a fim de se prestar a efetiva jurisdição. O presente trabalho, portanto, intenciona analisar a literatura existente para expor alguns aspectos da penhora de bens, conceituar as criptomoedas nos aspectos técnico e jurídico, explicando seu funcionamento e indicando eventuais normas regulamentadoras e julgados acerca da possibilidade de penhora. Ao final, pretende-se discutir os entendimentos acerca da melhor forma de se proceder à excussão desse bem do patrimônio do executado, caso seja possível.

Palavras-chave: Direito. Penhora. Criptomoedas.

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1 INTRODUCTION

In modern societies, with the exception of legally authorized hypotheses of self-defense, such as the legitimate defense of tenure, the State is the only one authorized to resolve conflicts of interests between its individuals, replacing the parties in order to resolve the dispute impartially (GONÇALVES, 2017).

In the scope of Civil Procedural Law, conflicts of interest can generate knowledge, enforcement processes or lead to the beginning of the sentence compliance phase. In the processes of knowledge, the State-judge applies the general and abstract law to the specific case presented to it, declaring the law in that situation conflicted. The execution processes or the enforcement phase, in turn, presuppose a default of a recognized right of the author, which is why it is necessary for the intervention of the Judiciary to make it effective, promoting an activity that was the responsibility of the debtor to perform (GONÇALVES , 2016, THEODORO JÚNIOR, 2017).

Thus, in the process of executing or enforcing the judgment, the State intervenes in the debtor's assets to satisfy the creditor, making the practical result that would be delivered to him if there were no default (THEODORO JÚNIOR, 2017).

According to Theodoro Júnior (2017), if the obligation consists in the payment of sums of money, execution will consist in the expropriation of the assets of the debtor to judicially determine the resources necessary for the payment of the creditor.

> [...] If it is possible to find it in kind in the debtor's assets, the court will apprehend it to use it in payment of the claimant's credit. If this is not possible, other assets will be seized for conversion into cash or for adjudication to the creditor, if the latter so agrees to pay (THEODORO JÚNIOR, 2017, page 424).

Theodore Júnior (2017) complements that execution for a certain amount necessarily goes through a complex phase of judicial appropriation of assets or values of the executed, in order to satisfy the creditor of the executor, and, as fundamental acts, the attachment, the alienation and the payment.

According to Gonçalves (2016, p. 153), "The attachment is an essential act of the execution process by amount, without which it can not achieve the desired result. [...] The attachment of property shall constitute a preparatory act of expropriation, affecting them for future evaluation and forced alienation".

Gonçalves (2016, p.154) states that the purpose of the pledge is "to ensure the continuation of execution, affecting the expropriation of goods sufficient to satisfy the creditor."

All assets of the debtor, whether movable or immovable, tangible[3] or intangible[4], as long as they have equity value (GONÇALVES, 2016), may be subject to attachment, except

[3] They are goods that have physical existence, and can be touched, such as houses, cars, etc. (TARTUCE, 2018).

[4] They are goods with abstract existence, which cannot be touched, such as copyrights, antichrists, etc. (TARTUCE, 2018).

for the exceptions listed in articles 832 and 833 of the Code of Civil Procedure (BUENO , 2018, GONÇALVES, 2016).

Among the intangible assets, in the last ten years, the media has been gaining prominence in the literature on the so-called crypto-coins, used, among other purposes, as a form of payment or investment, bitcoin being the pioneer and best known of them (ACUÑA, PULLAS, 2016 (1998).

According to Alves e Silva (2018), considering the principle of patrimonial responsibility, the rule is the unenforceability of the debtor's assets, being the exception unreliability. Therefore, since crypto-coins are not described as unenforceable goods in the list of article 833 of the Code of Civil Procedure, there is no legal protection to exclude them from the possibility of attachment.

In addition, the absence of a regulatory authority and pseudo-anonymity, which form part of their own structure (BOFF, FERREIRA, 2016, CRITICOMOEDA, 2018, SILVA, OLIVEIRA, REZENDE, 2018) may make it difficult to carry out such a procedural act, though, it should not be a sufficient argument for the rejection of judicial restriction, since the attachment of non-registrable assets is already consolidated in the jurisprudence (ALVES, SILVA, 2018).

The present work intends to define the legal nature of crypto-coins, to verify if there is legislation or jurisprudence on the subject and, in the end, to conclude on the possibility or not of the effective attachment of such good, proposing the most efficient way, in positive case.

2 THEORETICAL BACKGROUND

The theoretical background starts with the presentation of the concept of cryptocurrency, some technical aspects of its operation and its legal nature.

2.1 Concept of cryptocurrency

Cryptocurrency is the medium of exchange that uses a database technology called blockchain. Such technology is similar to a virtual public book of records, composed of sequential blocks, in which are inserted several individual transactions (BOFF; FERREIRA, 2016; CRIPTOMOEDA, 2018; SILVA; OLIVEIRA; REZENDE, 2018).

2.2 Function of cryptocurrencies

The database called blockchain is distributed over a decentralized network of computers, also called a peer-to-peer network, where each machine is at the same time server (stores a copy of the blockchain) and client (can make notes in the record, which correspond to transactions). Thus, its control is also decentralized, lacking a regulatory institution such as the Central Bank of Brazil (BOFF, FERREIRA, 2016, CRIPTOMOEDA, 2018, SILVA, OLIVEIRA, REZENDE, 2018).

For the insertion of a new block with transactions, a complicated encryption system is used to guarantee security (ACUÑA; PULLAS, 2016; CRIPTOMOEDA, 2018) and each

block must be present in more than half of the computers for it to be valid, which is called the network consensus (BOFF; FERREIRA, 2016; CRIPTOMOEDA, 2018).

The validation of the individual transactions, in turn, involves digital signature, composed of a public key and a private key (CRIPTOMOEDA, 2018; SILVA; OLIVEIRA; REZENDE, 2018).

The public key is the address used for the user to receive payments with the crypto-currency, and can be compared analogously to the number of a bank account. In turn, the private key is generated for each transaction annotated in the public registry (blockchain) and is used for the recipient of the cryptocurrency to have access to the transferred balance (ACUÑA; PULLAS, 2016; CRIPTOMOEDA, 2018).

The use of public and private keys generates pseudo-anonymity because their owners are only known by their public key addresses, which do not contain any identification data. However, it is not a matter of complete anonymity, since, in general, it is necessary for the owner to be properly identified so that he can convert the cryptocurrency into real money (ACUÑA, PULLAS, 2016, BAIÃO, 2018, CRIPTOMOEDA, 2018).

The acquisition of crypto-coins, in turn, occurs in three ways:

a) By means of a procedure called mining, it is a form of reward to the user that contributes to the operation of the system, in which cryptocurrency units are created;
b) By direct purchase of individuals;
c) Through brokers, also known as exchanges (ALVES; SILVA, 2018; BAIÃO, 2018; CRIPTOMOEDAS, 2018).

2.3 Legal Nature of cryptocurrencies

There is no consensus as to the legal nature of crypto-currencies (MARINHO & RIBEIRO, 2017), considering that some countries recognize them as currency, others as commodities, while others do not accept it as a financial transaction modality (ANDRADE, 2017).

Despite their name, cryptocurrencies cannot be considered currencies in Brazil, since they are not endowed with legal course and forced course, that is, they are not necessarily accepted as a means of exchange throughout society (BORGES, SILVA, 2016).

According to Hazar and Ferreira (2017), cryptocurrencies are virtual monetary instruments because they do not exist in the physical world, being guaranteed by their own users, and not by governmental issuance.

In this way, they may also be considered intangible assets.

> [...] are those with an abstract existence and cannot be touched by the human person. To illustrate, copyright, industrial property, business fund, mortgage, pledge, antichrists, among others, may be cited as intangible assets. This intangibility cannot be confused with the materiality of the title that supports the demonstration of these rights (TARTUCE, 2018, p.303).

Borges and Silva (2016), on the other hand, compare them to commodities like gold, since they are distinct articles of services, used in exchange or commerce. This conclusion is corroborated by the survey made by Andrade (2017, page 52).

Under the taxation aspect, the IRS intends to classify them as "financial assets", so as to impose income tax on its gains (ANDRADE, 2017; HAZAR; FERREIRA, 2017).

It is possible to affirm, therefore, that the cryptocurrencies are "immaterial goods endowed with economic value" (ALVES, SILVA, 2018, page 78).

3 METHOD

Bibliographical and documentary research techniques were used to elaborate the present work (SILVA; MENEZES, 2005).

The bibliographic research was based on the reading of books, scientific articles, news and other pertinent materials, in order to elucidate the concepts and to compile the existing understandings on the proposed theme.

In turn, the documentary research consisted of consulting the data banks of the Superior Courts and the largest state courts of the country, in order to locate possible judgments on the subject, as well as a search in the databases of the Chamber of Deputies and the Federal Revenue Service, in order to ascertain the existence of laws or norms that regulate the cryptocurrencies.

4 RESULTS AND DISCUSSION

According to Tartuce (2018), the law is the main source of Brazilian law, while jurisprudence can be defined as the interpretation of the law by the organs of the Judiciary.

Thus, this section aims to expose existing legislation and jurisprudence that may justify the attachment of crypto-coins, at the end discussing the procedure for the effectiveness of this procedural act.

4.1 Legislation

Hazar and Ferreira (2017) affirm that there is no legislation or regulation in Brazil, addressing the technological innovations of cryptocurrencies, causing difficulty in establishing parameters, limits and definitions to their practice.

Andrade (2017) adds that, although some companies accept cryptocurrency as a form of payment, there are no normative provisions in this regard.

Although there is no current law, the Chamber of Deputies is in charge of bill no. 2.303 / 2015, which, if approved as originally proposed, intends to entrust the Central Bank of Brazil with the function of disciplining payment arrangements, including those based on in virtual currencies, through an amendment to article 9, item I, of Law No. 12.865 / 13, and expressly states that the Consumer Defense Code applies in operations conducted in the virtual currency market (BRAZIL, 2015).

The Special Committee created in the Chamber of Deputies for this purpose, gave favorable opinions to the adequacy, financial compatibility, constitutionality, legality and legislative technique of the bill. However, two substitute proposals have already been

presented (BRAZIL, 2015), so that the final content of the law, if approved, could be very different from the original project.

There is not even an infralegal norm that regulates the cryptocurrencies. The Internal Revenue Service directs that the income tax return should be filed in the Assets and Rights Sheet at the acquisition value (TAXI, 2018, 183-184), but for the time being it was only open to public consultation no. In order to make regulatory disclosure, by exchanges and by individuals, related to crypto active transactions, normative instruction is issued in the future (CONSULTA, 2018).

4.2 Jurisprudence

Because it is still a recent issue, there are still no judgments regarding the possibility of attachment of crypto-coins to the Federal Supreme Court (STF) or the Superior Court of Justice (STJ). Neither is there a substantial number of cases judged by the Court of Justice of the State of São Paulo, and only a few have been located.

> Execution of extrajudicial title. Aggravated decision that rejected new blocking via BacenJud and searches via InfoJud and RenaJud. Insurgency of the Exequent. Fitting. Proceedings that must be carried out by the Court, justifying the request for reiteration, even due to the lapse of time elapsed from the previous investigations, which remained unsuccessful, given the possibility of altering the financial situation of the Executed. Research with CRC_Jud is also possible, however, only to obtain the updated data of the civil registry of the Executed. Impossibility to search for virtual currencies, in the absence of any indication of their existence and regulation. Previous jurisprudential. Resource partially provided (BRASIL, 2018, emphasis added).

> INSURANCE AGREEMENT. Execution of extrajudicial title. Attachment of virtual currency (bitcoin). Refusal. Generic order. There is no evidence that the executions are holders of such assets. Decision held. Resource deprived (BRAZIL, 2017).

It is then verified that the São Paulo Court of Justice considers that it is necessary for the creditor to present previously indications that the debtor has an account in crypto-currencies brokers (ALVES; SILVA, 2018; MARINHO; RIBEIRO, 2017).

It is interesting to note that it was only possible to find judgments in the Court of Justice of the State of São Paulo, which receives more cases and has the largest collection of the country (JUSTICE ..., 2018, pp. 27-29). In fact, in a study carried out in the databases of Jurisprudence of the Courts of Justice of the States of Santa Catarina, Rio Grande do Sul, Paraná, Rio de Janeiro, Minas Gerais, Bahia, Ceará, Goiás, Federal District and the Federal Regional Courts, using the terms attachment and bitcoin or cryptocurrency or "virtual currencies", no relevant results were found.

4.3 Attachment procedure

As Alves e Silva (2018) maintains, being the cryptocurrencies immaterial goods with economic content, our Code of Civil Procedure provides all the tools that enable its attachment. The absence of a central regulatory entity is not a hindrance to the act, since high-value movable goods such as jewelry or appliances are also not registered in a central body, but are indisputably attachable.

In view of the ways of obtaining cryptocurrencies described above, they may be located with intermediaries, such as in cryptocurrency dealers, or in a device called a wallet, which may be a hard disk in the possession of the executed one, in which one or more private keys of access to the cryptocurrencies balance (ALVES; SILVA, 2018).

If there is news of the existence of crypto-currencies deposited in brokerage firms, it is up to the party entitled under Article 798, item II, letter "c", in conjunction with article 829, paragraph 2, both of the Code of Civil Procedure, to request the execution of the dispatch of letters, indicating which brokers may potentially hold the assets of the executor (ALVES; SILVA, 2018).

It is important to note that Alves and Silva (2018) argue that the attachment of cryptocurrencies held by brokerage firms should be interpreted analogously to the attachment of money in deposit or financial application, applying Article 854 of the Code of Civil Procedure, there is a need to prove the existence of a link between the executor and the brokerage firm. However, this argument is not yet accepted by the Court of Justice of the State of São Paulo (BRAZIL, 2017, BRAZIL, 2018), so it is recommended that the executor instruct the attachment request with indications of the ownership of these assets by the executor, which can be obtained, for example, through information obtained from social networks (ALVES, SILVA, 2018).

On the other hand, if the indications indicate that the cryptocurrencies are not guarded by a third party, the attachment must occur in the place where the portfolio that stores its private key is located, including with order of break-in and police reinforcement, if necessary, according to articles 845 and 846 of the Code of Civil Procedure. At the time of execution of the warrant, the Judicial Officer shall carry out an on-site scan to seize hard disks or documents necessary for the identification of cryptocurrencies, and shall declare a court of secrecy in the proceedings to preserve the confidentiality and protection of the privacy of the executed, without giving up the possibility of the contradictory (ALVES, SILVA, 2018).

Alves and Silva (2018) point out that, due to the high volatility of the crypto-coins, it is interesting to apply the provisions of article 852, item II, of the Code of Civil Procedure, and it is up to the judge to determine the alienation in advance, in order to avoid depreciation, a new valuation will be carried out on the date of the auction, pursuant to Article 873, item II, of the Code of Civil Procedure.

Baião (2018), however, disagrees with the possibility of pledging Cryptocurrencies if they are not deposited in brokerage houses, since after seizure of the portfolio there are doubts as to who should guard them, who will be liable in case of perishing and how to avoid the loss, observing there is no technological structure capable of ensuring the security of the administration of these goods.

The restriction of attachment only to crypto-parties held by brokers, in turn, presents another advantage, since it is sufficient that the Judge determines directly to the brokerages the sale of them, in sufficient quantity to satisfy the creditor, depositing in judicial account the amount earned, already converted into currency (BAIÃO, 2018).

5 FINAL CONSIDERATIONS

With the present work, it was possible to define that the cryptocurrencies can be considered, in the juridical scope, as immaterial goods with economic value (ALVES; SILVA, 2018; BAIÃO, 2018).

The absence of legislation that regulates them, in turn, is not an obstacle to the seizure of such assets, since, as Alves and Silva (2018) affirm, the attachment is the rule, while unenforceability is the exception.

If the debtor's cryptocurrencies are deposited in brokerage houses, the seizure procedure can be carried out by means of simple ex officio dispatch to the companies that have custody, determining the conversion of their cash value, to be deposited in a court account (ALVES, SILVA, 2018).

Although few judged on the subject, the Court of Justice of the State of São Paulo, for now, conditions the attachment of crypto-currencies in brokers to the previous proof of link between the executed and such companies (ALVES, SILVA, 2018, MARINHO, RIBEIRO, 2017). However, as Alves and Silva (2018) argue, this is sometimes impossible to prove by the exequent, so the dispensation of such a requirement would be ideal.

Despite the understanding that it is possible to search for and seize crypto-sedan portfolios stored outside brokerage firms (ALVES; SILVA, 2018), Baião's observations (2018) are pertinent in the sense that such an act is not feasible.

However, the movement of the crypto-currency balance occurs through the private key (ACUÑA; PULLAS, 2016; CRIPTOMOEDA, 2018). Therefore, the seizure of the portfolio containing the private key would not prevent the debtor himself or any person who has access to the records, even in secrecy, from moving the account, while identifying the person responsible for such an offense would be difficult by the pseudo-anonymity that is inherent in the very structure of cryptocurrencies. On the other hand, the Courts of Justice do not have the technological structure to be depositaries of these assets and, even if they had, the long-term deposit could be harmful to all parties, considering their high volatility (BAIÃO, 2018).

It is therefore apparent that it is for the Judge to apply the principles of cooperation, utility and effectiveness of enforcement, performing all the necessary and useful acts to the satisfaction of the creditor, since the procedural legislation already provides the necessary tools for the attachment of cryptocurrencies.

However, the task of the Judiciary would be facilitated by the approval of laws and a regulator of brokerage firms. In this way, it would be possible to create a similar agreement between the Courts of Justice and the Central Bank of Brazil, which would speed up the location and effective attachment of these assets.

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