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PLEDGE AND FIDUCIA ON DIGITAL ASSETS AS A BASIS FOR SEPARATE OR EXCLUSION RIGHTS IN BANKRUPTCY PROCEEDINGS

Abstract: Based on the Law on Digital Assets, 2020, this paper analyzes pledge and fiducia on digital assets as a basis for exercising separate (secured) or exclusion (repossession) rights in bankruptcy proceedings. A pledge on digital assets is created by registration in a special register maintained by an authorized service provider, which simultaneously prevents further disposal of the pledged asset. In the event of the pledgor's bankruptcy, the pledge creditor has the status of a separate (secured) creditor enabling priority settlement from the value of the pledged digital asset – including out-of-court sale, if allowed by the bankruptcy judge through the lifting of the statutory prohibition of individual enforcement and settlement, whereby a bona fide purchaser acquires ownership free of encumbrances Fiduciary transfer of ownership of digital assets leads to a dual legal position: if the contract is concluded solely for the purpose of security, the fiduciary (fiduciary creditor) is considered a separate (secured) creditor in the bankruptcy of the fiduciary debtor (fiduciant), and has the right to priority settlement from the proceeds of the sale of that asset. However, if the fiducia is concluded for any other purpose (e.g., for the management of digital assets), and bankruptcy proceedings are opened against the fiduciary, the fiduciant acquires the status of an excluding (repossession) creditor, i.e., the right to segregate the digital asset from the bankruptcy estate of the fiduciary. This research aimed to clarify the legal nature and bankruptcy treatment of pledges and fiduciary transfers on digital assets, using the

normative-legal and comparative method. The paper concludes that the statutory distinction between these security interests in digital assets enables adequate creditor protection in bankruptcy, while registration ensures necessary publicity and legal certainty.

Key words: *digital assets; pledge; fiducia; separate (secured) right; exclusion (repossession) right.*

Introduction

The Law on Digital Assets of the Republic of Serbia (hereinafter: LDA) defines digital, i.e., virtual assets, as a digital record of value that may serve as a medium of exchange or for investment purposes, excluding legal tender. Digital assets, i.e., virtual assets, means a digital record of value that can be digitally bought, sold, exchanged or transferred, and that can be used as a medium of exchange or for investment purposes, provided that digital assets do not include digital records of currencies that are legal tender and other financial assets governed by other laws, unless otherwise provided by this Law. Virtual currency is a type of digital asset that has not been issued and whose value is not guaranteed by the central bank or any other public authority, which is not necessarily linked to legal tender and does not have the legal status of money or currency, but is accepted by natural and legal persons as a medium of exchange and can be bought, sold, exchanged, transferred and stored electronically. Digital token is a type of digital asset and means any intangible property right that, in digital form, represents one or more other property rights, which may include the right of the digital token user to be provided with certain services (LDA, Art. 2, items 1 and 2). Thus, the law recognizes two basic forms of digital assets: virtual currency and digital token. In legal scholarship, it is emphasized that virtual currency is "defined as a medium of exchange, and its issuance and use are supervised by the National Bank of Serbia. On the other hand, a digital token represents an intangible property right in digital form, and its issuance and use are supervised by the Securities Commission. In practice, however, the boundaries between these forms are often not clearly defined, so digital assets may simultaneously encompass characteristics of both virtual currency and digital token, thus creating a hybrid form of asset" (Jevtić, 2026, p. 161).

"Digital property appears as a new segment of property law, although it is simultaneously a consequence of the digitalization of financial intermediation and represents a form of technological innovation as a

substitute for payment services and investments on the banking and stock market" (Stojšić Dabetić & Mirković, 2024, p. 122).

The same law, in Articles 98–100, regulates in detail the pledge over digital assets, providing that it is acquired by registration in a special register maintained by an authorized service provider, which prevents further disposal of the pledged asset. In addition to the pledge, the law introduces, in Article 121, the fiduciary transfer of ownership of digital assets for the purpose of securing claims, as an alternative security instrument. For the bankruptcy-law position of creditors, the provision of Article 103 is of crucial importance, according to which the pledge creditor over digital assets has the status of a separate (secured) creditor, as well as Article 122, which draws a distinction as to whether the fiducia serves exclusively for security purposes (separate creditor) or for another purpose (exclusion creditor). Such legal regulation provides the basis for the analysis of the manner in which pledge and fiducia on digital assets may constitute grounds for exercising separate or exclusion rights in bankruptcy proceedings.

"The Law on Digital Assets is the first regulation of a systemic character that defines the institute of digital assets. ... The domestic legislator had extremely demanding tasks, not only in the conception of this regulation, but also in defining a number of new concepts within the wording of the law" (Mirković, 2023, p. 21).

The paper systematically interprets the relevant provisions of the LDA and the Bankruptcy Law of the Republic of Serbia, 2009, (hereinafter: BL). The main findings show that a pledge provides the status of a separate (secured) creditor, while fiducia may lead to the status of either a separate or an exclusion creditor, depending on the contractual purpose, thereby providing a flexible yet predictable framework for secured transactions in the digital asset environment.

1. Acquisition of Pledge over Digital Assets by Contract and Registration

The legal basis for the pledge over digital assets is a contract, by which the pledgor undertakes towards the creditor (pledge) to provide security (collateral) for the creditor's claim against the pledgor or a third party (LDA, Art. 98, para. 1).

The pledgor, as a person holding ownership over digital assets or the capacity of a holder of digital assets which it may freely dispose of, does not necessarily have to be simultaneously the personal debtor of the creditor

from a loan or other underlying legal transaction. The pledge may be established on the digital assets of one person to secure a claim that the creditor has against a third party. Therefore, it is expressly prescribed that the pledgor may be the debtor or a third party (LDA, Art. 105).

The contract must contain: the date, data on the parties, the type and quantity of digital assets, data on the claim, and the manner of establishing the pledge. It may be concluded in paper or electronic form, including "by using a smart contract" (LDA, Art. 98, para. 2).

The pledge is acquired by registration in a special pledge register maintained by an authorized service provider. The creditor or the pledgor may request the registration of the pledge in the pledge register, provided that if the creditor requests the registration, an explicit statement by the pledgor is required consenting to the creditor's registration of the pledge in the pledge register. A condition for registration is that the digital assets have been previously entrusted for safekeeping to that provider. Registration prevents further disposal of the pledged assets until the settlement of the claim, unless otherwise agreed by contract. The registration does not produce legal effects if the pledgor does not have ownership or if the pledge is not valid (void or voidable) for other reasons (LDA, Art. 99).

Thus, the pledge contract is the title (*iustus titulus*), and the registration in the pledge register is the mode of acquisition (*modus acquirendi*) of the pledge over digital assets.

By contract or special power of attorney, the pledge creditor or several of them may authorize a third party to take legal actions for the protection and settlement of the claim. In such case, upon registration of the pledge in the pledge register, data on the authorized person shall be entered instead of data on the pledge creditor. For the waiver of the pledge, the authorized person must have a special authorization, i.e., a special power of attorney (LDA, Art. 104).

2. Legal Nature and Effects of Pledge over Digital Assets

A creditor whose pledge is registered in the register may collect from the value of the pledged asset before other creditors, if its claim is not paid in full (LDA, Art. 100). From the cited legal definition of the legal effects, it follows that a pledge over digital assets is a property right (*real right*). Property rights are absolute rights and have effects *erga omnes* (against all third parties), from which the right of priority and the right of pursuit derive. The right of pursuit consists in the fact that the holder of a property right may exercise it against any third party in whose hands, i.e., assets, the object

of the pledge right, i.e., digital asset, is found, whether unlawfully or on some weaker legal basis.

The right of priority consists in the fact that a property right is stronger in competition with an obligation right, as well as with a homogeneous property right of a later date (Stanković & Orlić, 1986, p. 3). Accordingly, the ranking of pledges is regulated: the pledge creditor has the right to collect its claim from the price obtained by selling the object of the pledge before other creditors of the pledgor, unless otherwise provided by this law. If the same object of the pledge has been pledged to several creditors, the order of payment of their claims from the value of that object is determined by astronomical computation of time, meaning according to the time (day, hour and minute) of receipt of the request for registration of the pledge in the pledge register (LDA, Art. 109). As opposed to civil computation of time, civil law also recognizes astronomical computation of time (*computatio naturalis*) – calculation of time with intervals shorter than one day – in hours and minutes, which is applied when registering absolute rights in public registers (cadastre, trademark register, patent register, etc.), due to the application of the rule that priority in time during a single day also gives priority in the acquisition of a right (*prior tempore, potior iure* – earlier in time, stronger in law) (Babić, 2008, p. 140). The same rule applies to determining the order of priority for securing claims under public revenues or other claims of the state.

A pledge is a property right and an absolute right, and as such operates against all, regardless of any change of ownership of the encumbered digital assets.

When the pledgor fails to pay the debt at maturity, the pledge creditor (the pledgee) is authorized to proceed with an out-of-court sale of the object of the pledge, which also includes a public auction sale, and to settle from the sale price its principal claim, interest, and costs of collection (LDA, Art. 110). The certificate from the pledge register on digital assets authorizes the pledge creditor to conclude a contract on the sale of digital assets in the settlement procedure in the name and for the account of the pledgor (LDA, Art. 113). A bona fide purchaser who buys the object of the pledge at an out-of-court public sale acquires ownership free of encumbrances, which cannot be challenged due to omissions in the sale procedure (LDA, Art. 114). The pledge creditor may be settled from the value of the pledged digital assets even after the statute of limitations of its claim (LDA, Art. 115).

A pledge may secure a monetary claim, a non-monetary claim expressed in digital assets, as well as future and conditional claims. The pledge secures

a specific amount of the principal claim, due interest, and costs of collection (LDA, Art. 101). This concerns the principle of speciality, which means that a pledge may secure only a specific claim of one creditor (and not an indefinite number or an indefinite amount of claims), and that a pledge may exist only on specific assets and not on all assets of the pledgor (Stanković & Orlić, 1986, p. 381). Such interpretation is a consequence of the application of the principle of speciality of pledge, which has been accepted both in judicial practice and in legal scholarship.

3. Validity of Agreeing on a Forfeiture Clause (*lex commissoria*) on Digital Assets

By a pledge agreement on digital assets, it may be provided that the pledge creditor has the right at the time of maturity of the claim, provided that the pledged digital asset has a market price, to retain the digital asset for itself at that market price (LDA, Art. 108, para. 1). The pledge creditor and the pledgor may agree that the creditor will be able to retain the object of the pledge for itself at a specific price at the time of maturity of the claim (LDA, Art. 108, para. 2).

In this way, the LDA allows the agreement of a forfeiture clause (*lex commissoria*), contrary to the general rules of other laws that prohibit it.

Under the Law on Contracts and Torts, 1978, (hereinafter: LCT), the provision on agreeing on a forfeiture clause is prohibited. Void is the provision of a pledge agreement that the pledged asset shall pass into the ownership of the creditor if its claim is not settled at maturity, as well as the provision that in such case the creditor may sell the pledged asset at a predetermined price or retain it for itself (LCT, Art. 973, para. 1). However, if a pledged asset has a prescribed price, the contracting parties may agree that the creditor may sell the pledged asset at the prescribed price or retain it for itself at that price (LCT, Art. 973, para. 2).

According to the position of judicial practice, void is any contractual provision which, at the moment of conclusion of the pledge agreement on immovable property (mortgage), provides that the pledged asset shall pass into the ownership of the creditor if its claim is not settled at maturity. Likewise, a contract on the transfer of ownership of real estate for the

purpose of securing a claim is void because fiduciary legal transactions are not permitted.[1]

Unlike the forfeiture clause which is expressly prohibited by the LCT, in the cited example, the bank, as the lender, for the purpose of securing its claim, contracted a fiduciary transfer of ownership under which it immediately became the owner of a specific real estate, leaving it for free use to the transferor. If the loan were repaid at maturity, the bank undertook to return the real estate, i.e., the ownership right, to the transferor. However, the courts did not provide legal protection to such a transaction, assessing that fiducia is prohibited in our legal system. The essence is that a fiduciary legal transaction transfers ownership to the creditor for the purpose of securing a claim, and not for the purpose of transferring ownership.

On the other hand, according to legal scholarship and judicial practice, the cited provisions are valid when they are agreed at the time of maturity of the debtor's obligation, which in any case can only occur after the creditor has previously paid the debtor the promised loan or released the credit. The reason is that the debtor is no longer in such an unfavorable position vis-à-vis the creditor as at the time of concluding the loan and pledge agreement. The debtor is no longer pressed by the need for money as when seeking the loan, and may negotiate the conclusion of such an agreement with the creditor on an equal footing. Therefore, if unable to pay its obligation at maturity, the debtor may surrender the asset to the creditor in ownership, but at a price to be determined in negotiations between him and the creditor. Likewise, a debtor whose obligation has matured may allow the creditor to sell the asset out of hand (Stanković & Orlić, 1986, p. 377). The Mortgage Law, 2005, (hereinafter: ML) received such positions of judicial practice and legal scholarship, prescribing in Art. 13, para. 1, item 2 that "void is a contractual provision of a mortgage agreement on the basis of which, if the debt is not paid at maturity... the real estate passes into the ownership of the creditor or a third party at an unspecified or pre-determined price," as well as introducing the institute of a subsequent agreement from Art. 27, para. 1, item 1.

[1] Judgment of the Higher Commercial Court in Belgrade, Commercial Department, No. Pž 199/97 of 5 March 1997. Downloaded 2026, June 26 from: http://www.propisionline.com/Practice/Decision/5479

4. Legal Effects of Pledge over Digital Assets in the Event of the Pledgor's Bankruptcy

In the event of bankruptcy proceedings over the pledgor's assets, the rules of the Bankruptcy Law apply to settlement from the value of the object of the pledge, unless otherwise provided by the Law on Digital Assets (LDA, Art. 102). The pledgee is, within the meaning of the bankruptcy law, a separate (secured) creditor who acquired the pledge in accordance with this Law on Digital Assets (LDA, Art. 103). It follows that the legal position of the pledgee on digital assets after the opening of bankruptcy proceedings over the pledgor, as the owner of digital assets, is governed by the general rules of bankruptcy law from the BL, which distinguishes between two categories of secured creditors – separate and pledge creditors, depending on whether they simultaneously have a claim against the bankruptcy debtor secured by the pledge or not, i.e., whether the debtor of the secured claim is a third party (legal or natural person), which is, therefore, not in bankruptcy.

In our bankruptcy law, situations are recognized and specially regulated where the pledgor of movable property (or digital assets), i.e., the owner of mortgaged real estate, and the debtor from the underlying legal transaction are not the same person, leading to the opening of bankruptcy over the pledgor, i.e., the mortgage debtor as the owner of the encumbered asset, against whom the creditor has no claim from the underlying legal transaction, e.g., from a loan agreement, and that person has established a pledge or mortgage on its assets to secure the creditor's claim against a third party – the loan beneficiary. Such situations have caused numerous problems and different interpretations in earlier judicial practice, which were largely remedied by the Law on Amendments to the Bankruptcy Law, 2004, by prescribing certain rules based on positions and solutions reached by judicial practice.

The applicable Bankruptcy Law distinguishes between separate and pledge creditors as two categories of secured creditors (amended Art. 49). The criterion for distinction is whether the creditor against the bankruptcy debtor has a claim secured by a mortgage or pledge on the bankruptcy debtor's assets, i.e., whether the bankruptcy debtor is simultaneously the debtor of the secured claim or whether this is a third party (Kozar, 2023, p. 69). Also, in certain provisions, the term "secured creditors" is used as a common name for both categories.[2]

[2] For example, in Art. 85, para. 3 of the BL, which regulates interest payments within a kind of "fifth conditional payment order": "If after the settlement of all claims there are

A separate creditor has a claim against the bankruptcy debtor secured by a pledge over the bankruptcy debtor's digital assets, i.e., secured by a mortgage or pledge on the bankruptcy debtor's assets (lien) or statutory right of retention or right of settlement on items and rights that are kept in public books or registers, and has the right to priority settlement from the assets realized by sale, i.e., collection of claims, on which it acquired that right (Dukić-Mijatović, 2011, p. 205). This right derives from the nature of the mentioned property rights, which consist in securing a claim of separate creditors (Čolović & Milijević, 2020, p. 128). According to the opinion of legal scholarship, a pledge on a claim should also be treated as a property right, and not as an obligation right, because it is actually acquired by handing over the document on the pledged claim into the possession of the pledgee (Medić, 2002, p. 92). "It should be borne in mind that the separate creditor has the right of priority collection only from certain assets of the bankruptcy debtor, on which it has a pledge or right of settlement. It does not have a general lien over the entire assets of the debtor and all its income, which would weaken the debtor's position" (Lazarević, 1956, p. 81).

Separate creditors are creditors who have a pledge, statutory right of retention, or right of settlement on items and rights that are kept in public books or registers, and have the right to priority settlement from the assets realized by sale (or collection of claims, if it is a pledge on a claim) on which they acquired that right. Separate creditors are not bankruptcy creditors, but if the amount of their claim is greater than the amount of assets realized by the sale of assets on which they acquired a separate right, they exercise the right to settlement for the difference in the amount of those amounts as bankruptcy creditors (BL, Art. 49, paras. 1 and 2).

By making a distinction between separate and pledge creditors, in essence, a special category of secured creditors has been distinguished from the category of separate creditors, who do not have a monetary claim against the bankruptcy debtor, but against a third party, while on the assets of the bankruptcy debtor they have proprietary security instruments (mortgage or pledge) for that monetary claim against the third party. This category of creditors acquires the status of a party by notifying the court of the pledge, accompanied by evidence of the existence of the pledge and a declaration on the amount of the monetary claim against the third party secured by that

available funds for payment, the bankruptcy judge shall approve the calculation and payment of interest to bankruptcy creditors for the period after the opening of bankruptcy proceedings and the calculation and payment of interest of secured creditors that have not been settled from the realized value of the security object." The common name is also used when prescribing the reasons for an objection to the proposed sale (BL, Art. 133, para. 8).

right, within the deadline for submitting a claim. They do not submit a claim, and do not have the right to vote in the creditors' assembly and committee, which separate creditors may have under certain conditions and to a limited extent.[3]

Secured creditors retain their right of priority in bankruptcy proceedings, in the manner in which it was established by other regulations (e.g., the Law on Digital Assets, the Law on Registered Charges on Movable Assets and Rights, 2003, the Mortgage Law, etc.). Consequently, separate and pledge creditors have the right to priority settlement from the assets obtained by the sale of assets that are the subject of their security. Consequently, separate and pledge creditors have the right to priority settlement from the proceeds of the sale of assets that are the object of their security.

The exercise of their rights may be partially limited, i.e., postponed, in the case of security measures ordered during the preliminary bankruptcy proceedings (BL, Art. 62, para. 2, item 4) (Kozar & Aleksić, 2018a, p. 515). Limitation or postponement also occurs *ex lege*, due to the prohibition of enforcement and settlement that is a consequence of the opening of bankruptcy proceedings (BL, Art. 93, paras. 1 and 2) (Kozar & Aleksić, 2018b, p. 919). This applies also to out-of-court sale of pledged digital assets, as the object of the pledge. By the 2014 amendment to the BL, security measures from Art. 62, para. 2, item 4 of the BL were extended to pledge creditors as a separate category of parties in bankruptcy proceedings.

The Bankruptcy Law does not recognize and, therefore, does not specially regulate the third legal situation that arises when the creditor's claim against the bankruptcy debtor is secured by a pledge on the assets of a third party, which means that the general regime applicable to "ordinary" bankruptcy creditors from Art. 48 of the BL applies to this category of creditors, which provides that a bankruptcy creditor is a person who, on the day of initiating bankruptcy proceedings, has an unsecured claim against the bankruptcy debtor. "Creditors who have a monetary claim against the bankruptcy debtor, but whose security instrument was the assets of third parties, are secured, but not separate creditors. Given that the security is not registered on the assets of the bankruptcy debtor but on third-party assets, they have the status of bankruptcy creditors in bankruptcy proceedings" (Radulović, 2016, p. 112). The cited position of legal scholarship has been

[3] If they make it probable that they will not be able to settle from the value of the assets on which they have a mortgage, pledge or other separate right, separate creditors may vote in the assembly proportionally to the actually unsecured part of the claim, i.e., for the difference between the amount of the claim and the value of the assets.

accepted in judicial practice: A creditor of a claim secured by a pledge on the assets of a third party is defined in judicial practice as an ordinary bankruptcy creditor, with the possibility of being classified in a special class for voting on the reorganization plan. Such a position was taken in answering the question of whether a creditor whose claim against the bankruptcy debtor is secured by a pledge on the assets of a third party is considered a separate or an ordinary bankruptcy creditor.[4]

5. Fiducia on Digital Assets as a Basis for Separate or Exclusion Rights in Bankruptcy

The institute of fiduciary transfer of ownership (*fiducia*) has its origin in Roman law, when this specific technique was used to achieve various objectives, including, among others, real security for claims (Pavićević, 2022, p. 229). In Anglo-American law, fiduciary transfer of ownership is affirmed in the modality of a trust, where the contracting parties are called *trustee* (fiduciant) and *beneficiary* (fiduciary), where the legal position of the acquirer of the right also exceeds the desired economic effects of the transaction. In European continental law, such as German law, the fiduciary transfer of ownership represents a very affirmed real security right (Pavićević, 2022, p. 231).

In domestic positive law, the fiduciary transfer of ownership is not regulated by a general regulation, but legal scholarship points out that it was recently regulated in a special regulation – the Law on Financial Collateral, 2018, (hereinafter: LFC), as a registered fiduciary transfer of ownership of financial instruments for security purposes, as a special modality, permitted only to a limited number of entities on the financial market (Pavićević, 2020, p. 5). This concerns special rules on the financial collateral arrangement, by which the collateral provider, for the purpose of securing the performance of his or another person's financial obligation, undertakes to transfer title to collateral to the collateral taker or to establish a security right on the collateral (a pledge) in favour of the collateral taker, and the collateral taker undertakes to return to the collateral provider the collateral received or equivalent collateral in accordance with the terms of this arrangement upon and/or concurrently with the discharge of the financial obligation (LFC, Art. 2, para. 1). Subject to the financial collateral

[4] Answer adopted at the sessions of the Department of the Commercial Appellate Court of 8 and 22 November 2011. Downloaded 2026, June 26 from: http://www.propisionline.com/Practice/Decision/35741

arrangement under which title to collateral is transferred, the collateral provider shall transfer to the collateral taker full ownership of cash or financial instruments constituting the collateral (LFC, Art. 2, para. 2, item 1)."

Two years after the adoption of the LFC, which did not use the term "fiducia," the LDA was adopted, which under that name regulates fiducia on digital assets, as an exception in Serbian law. This concerns the modality of fiducia for the purpose of real security (Lat. *fiducia cum creditore contracta*; Ger. *Sicherungsübereignung*). Under a fiduciary agreement on digital assets, the fiduciary debtor (fiduciant) undertakes towards the fiduciary creditor (fiduciary) to transfer to it, for the purpose of securing a claim, ownership of digital assets, and the fiduciary undertakes to, in accordance with this agreement, return the received or equivalent security assets to the fiduciant upon the performance of the secured claim, i.e., simultaneously with such performance (LDA, Art. 121, para. 1). Thus, the fiduciary is not obliged to return the object of fiducia to the fiduciant until the secured claim ceases by performance or in another legally prescribed manner. This concerns the application of the general rule of simultaneous performance from Art. 122, para. 1 of the LCT.

In legal scholarship, it is emphasized that "fiduciary ownership is not full and 'unbound,' but: conditionally acquired, temporarily limited in duration, and limited in effect, because it contains only the authority to realize the asset. Hence, this right is a specific modality of ownership, although most often it serves the role of real security for claims, differing sufficiently from other rights in that group (from pledge – possessory and non-possessory; retention and *pactum reservati dominii*)" (Pavićević, 2020, p. 3).

The LDA departed from the cited position of legal scholarship, because the fiduciary, in addition to the authority to realize the asset, also has the authority to use digital assets: the fiduciary, unless otherwise agreed, has the right to use digital assets that are the subject of the fiduciary agreement, as well as to dispose of them, including the right to alienate them (LDA, Art. 121, para. 2). In this way, *antichresis* is permitted, which is defined in legal scholarship as the creditor's right to use the asset and collect its fruits (Pavićević, 2020, p. 3). The fiduciary's right to dispose of digital assets, including the right to sell the assets, may be exercised on condition that the secured claim has not been performed on time, i.e., on condition that the debtor falls into default.

The fiduciant may also be a third party providing collateral security for someone else’s debt (LDA, Art. 121, para. 3).

It has been concluded that "this institute is practical, efficient, and fits the speed of modern legal transactions, because it enables the creditor – fiduciary faster out-of-court collection of claims, even compared to non-possessory pledge" (Pavićević, 2020, p. 17).

A fiduciary agreement on digital assets may, apart from for the purpose of securing claims, be concluded for another purpose, which in that case must be defined by the fiduciary agreement on digital assets itself (LDA, Art. 121, para. 4). Within the framework of fiducia on digital assets, it is possible to agree on a purpose that does not relate to securing a claim, but may encompass any activity that is in accordance with the will of the fiduciant, whether that is management, investment, or asset protection.

Such another purpose is, first of all, the transfer of ownership for the purpose of management of entrusted digital or other assets (similar to the Roman *fiducia cum amico contracta*), which is paralleled by the Anglo-American institute of trust, and in legal literature, fiduciary transfers of ownership with effects similar to a lease, loan for use, deposit, and mandate agreement are also mentioned (Pavićević, 2025, p. 507). "Through the fiduciary transfer of ownership in this form, the owner may, for example, due to going abroad, authorize a trusted person to manage some of his assets – movable or immovable (e.g., a house) or even his entire assets, in a more comprehensive manner than would be possible based on a concluded power of attorney agreement, due to the limits of the granted power of attorney" (Pavićević, 2025, p. 503). "The purpose of this legal transaction most resembles a power of attorney agreement, but it surpasses it in content – because the acquirer (temporarily) becomes the formal owner, and later, upon the return of the 'true' owner, the fiduciant, ownership of the asset/assets is returned to him, along with an account for the management of that asset in the meantime" (Pavićević, 2025, p. 504). In the literature, it is emphasized that "ownership can be transferred fiduciarily so that the acquirer gains the right to use the asset for which it will pay periodically, when this agreement most resembles a lease agreement, but with stronger legal effects. Furthermore, the fiduciary transfer of ownership may also have an effect similar to a loan for use agreement" (Pavićević, 2025, p. 504). Also, as emphasized in legal scholarship, the fiduciary transfer of ownership is possible for the purpose of litigation. "This transfer may occur in the case where participants in a civil dispute transfer the right to the subject of that dispute (a specific asset) into the ownership of a third party, which is a person of their mutual trust, with the obligation to transfer ownership back upon the conclusion of the dispute, according to its outcome" (Pavićević, 2025, p. 504). However, the third party, i.e., the person of mutual trust,

cannot be a lawyer representing a litigant. Because, it is not permitted for a lawyer to agree with a client on the full or partial acquisition of the disputed right for whose realization the representation was entrusted (*pactum de quota litis*) – Code of Professional Ethics of Lawyers, 2012, Rule 30.2.1. A similar prohibition exists in Art. 461, para. 2 of the LCT: "But a contract by which a lawyer or another agent would buy the disputed right whose realization was entrusted to him, or would agree for himself a share in the distribution of the amount awarded to his principal, is void."

The supervisory authority regulates in more detail the fiducia on digital assets and prescribes the closer conditions and mandatory content of the fiduciary agreement on digital assets (LDA, Art. 121, para. 5).[5]

If prescribed by the business rules of the digital asset service provider and if provided in the fiduciary agreement on digital assets, the provisions of this law relating to the pledge on digital assets may be applied accordingly to the fiducia on digital assets (LDA, Art. 121, para. 6). The corresponding application of the legal rules on pledge on digital assets is possible if two cumulative conditions are fulfilled: 1) if prescribed by the rules of the digital asset service provider's business operations and 2) if provided in the fiduciary agreement on digital assets.

A pledge provides the status of a separate (secured) creditor, while fiducia may lead to the status of a separate or exclusion creditor depending on the contractual purpose, thereby providing a flexible yet predictable framework for secured transactions in the digital asset environment.

6. Position of the Fiduciary and the Fiduciant in Bankruptcy

In Article 122 of the LDA, under the title "Position of the fiduciant in bankruptcy," the following rules are prescribed:

"If a fiduciary agreement is concluded for the purpose of securing a claim in accordance with Article 121, para. 1 of this Law, the fiduciant shall, within the meaning of the law governing bankruptcy proceedings, have the position of a separate (secured) creditor.

If a fiduciary agreement is concluded for any purpose other than securing a claim, in accordance with Article 121, para. 4 of this Law, the fiduciant shall, within the meaning of the law governing bankruptcy proceedings, have the position of an excluding (repossession) creditor"

[5] The supervisory authority (the National Bank of Serbia and the Securities Commission) has not yet adopted a special by-law regulating fiducia on digital assets in more detail.

The cited norms should be interpreted bearing in mind the conclusion of legal scholarship that the fiduciary transfer of ownership represents an institute of "substantively divided ownership" with multiple different title holders (Đurđić Milošević & Pavićević, 2023, p. 138). Therefore, we can distinguish several legal situations, depending on whether bankruptcy proceedings have been opened over the fiduciant or the fiduciary, as well as on the modality of the fiducia, i.e., whether it is fiducia for the purpose of security or fiducia for the purpose of management of entrusted digital assets, i.e., "for any purpose other than securing a claim."

6.1. Effects of Bankruptcy on Fiducia for the Purpose of Securing a Claim

When it comes to fiducia for the purpose of securing a claim, the acquirer, the fiduciary creditor (fiduciary) temporarily becomes the formal owner of digital assets, while the fiduciary debtor (fiduciant), as the "true owner," has the right to have the assets returned to him upon performance of the secured claim.

6.1.1. The Fiduciary as a Separate (Secured) Creditor in Bankruptcy Proceedings Opened over the Fiduciant – the Fiduciary Debtor

Therefore, if bankruptcy proceedings are opened over the fiduciant, the fiduciary (the fiduciary creditor) will have the position of a separate (secured) creditor. Separate creditors are creditors who have a pledge, statutory right of retention, or right of settlement on items and rights that are kept in public books or registers, and have the right to priority settlement from the assets realized by sale, i.e., collection of claims, on which they acquired that right (BL, Art. 49, para. 1). The fiduciary must, within the legally prescribed preclusive deadline of 120 days from the publication of the announcement in the "Official Gazette of the Republic of Serbia" on the opening of bankruptcy proceedings over the fiduciant, submit its secured claim, and in the claim indicate the digital assets on which it acquired the separate right and the amount of its claim that is not secured, if its claim is not fully secured (BL, Art. 111, para. 1, item 6). Because the prohibition of enforcement and settlement as a procedural-legal consequence of the opening of bankruptcy proceedings occurs *ex lege* (BL, Art. 93, paras. 1 and 2), and applies to the out-of-court sale of pledged digital assets, which is the object of the pledge. Upon opening bankruptcy proceedings, the separate right is exercised exclusively

in bankruptcy proceedings (BL, Art. 80), except in the case of adopting a decision on lifting the prohibition of enforcement and settlement in accordance with Articles 93a–93g of the BL. Thus, a legal state takes effect that is referred to in scholarship as a moratorium (Kozar & Aleksić, 2020, p. 94).

If the fiduciant, over whom bankruptcy proceedings have been opened, and the debtor of the secured obligation from the underlying legal transaction are not the same person, bearing in mind that the fiduciant may also be a third-party providing security for a third-party debt (LDA, Art. 121, para. 3), then the fiduciary has the position of a pledge creditor. In bankruptcy proceedings, the term "pledge creditor" has acquired a narrower meaning than under the general norms of civil law. Pledge creditors are creditors who have a pledge on the items or rights of the bankruptcy debtor that are kept in public books or registers, but do not have a monetary claim against the bankruptcy debtor secured by that pledge. Pledge creditors are not bankruptcy creditors and are not separate creditors. Pledge creditors are obliged to notify the court of the pledge within the deadline for submitting a claim, accompanied by evidence of the existence of the pledge and a declaration on the amount of the monetary claim against the third party secured by that right on the date of opening bankruptcy proceedings, thereby acquiring party status (BL, Art. 49, paras. 5 and 6).

Thus, in bankruptcy proceedings, there are two types of secured creditors – separate and pledge creditors, and these terms are not synonymous.

6.1.2. The Fiduciant as an Exclusion (Repossession) Creditor in Bankruptcy Proceedings Opened over the Fiduciary – the Fiduciary Creditor

On the other hand, if bankruptcy proceedings are opened over the fiduciary (the fiduciary creditor), the fiduciant has the right for the bankruptcy debtor to return the received or equivalent security assets "upon the execution of the secured claim, or concurrently with the execution.“ Thus, the condition for asserting the fiduciant's exclusion right is the performance of the claim secured by the fiducia, or the termination of the secured claim in another way (e.g., compensation in bankruptcy, etc.).

An exclusion creditor is a person who, based on their property or personal right, has the right to request that a specific asset be segregated from the bankruptcy estate. An exclusion creditor is not a bankruptcy creditor, and the asset to which the exclusion right relates does not enter the bankruptcy estate (BL, Art. 50), which itself constitutes an

exception to the general principle of collective and proportional settlement established by the bankruptcy law (Dukić Mijatović & Kozar, 2019, p. 403). "This means that exclusion creditors are settled separately from bankruptcy creditors, by segregating the assets on which they have an exclusion right" and taking them over, "in kind and in full" (Milenović, 1990, p. 180).

Exclusion creditors have the right to settlement through all proceedings (BL, Art. 80, para. 3), e.g., by filing an exclusion claim for the protection of ownership rights in civil proceedings (Kozar, 2024, p. 583). On the other hand, bankruptcy and separate creditors, as of the date of opening bankruptcy proceedings, have the right to settlement only, i.e., exclusively through bankruptcy proceedings (BL, Art. 80, paras. 1 and 2), with certain exceptions (Kozar & Aleksić, 2018a, p. 526). Exception in favor of separate creditors is provided for in the case of adopting a decision on lifting the prohibition of enforcement and settlement (BL, Art. 80, para. 2). Thus, the bankruptcy judge, at the proposal of the bankruptcy administrator, separate creditor or pledge creditor, may adopt a decision on lifting, modifying or conditioning security measures from Art. 62, paras. 2 and 3 of the BL or the prohibition of enforcement or settlement in relation to assets that are the subject of separate or pledge rights, under the conditions prescribed in Articles 93a–93g of the BL. "In this, among other things, exclusion rights differ from separate rights, because the latter are exercised in bankruptcy proceedings. Holders of separate rights are priority bankruptcy creditors, because before the opening of bankruptcy they established a pledge on the debtor's assets (movable or immovable). With holders of exclusion rights, they have that common thread, which is reflected in the right to separate and full settlement, but holders of separate rights differ from holders of exclusion rights precisely in terms of procedure, since holders of exclusion rights may exercise their rights outside bankruptcy proceedings, e.g., in civil proceedings, in compulsory enforcement proceedings, etc." (Salma, 2010, p. 236).

When it comes to exercising exclusion rights, our bankruptcy law protects exclusion creditors very effectively. This primarily concerns the case where the bankruptcy administrator is obliged to priority pay to the exclusion creditor the monetary equivalent of the asset on which they had an exclusion right, e.g., if they unlawfully alienated it after the opening of bankruptcy proceedings, in accordance with Art. 102, para. 3 of the BL (Dukić Mijatović & Kozar, 2019, p. 426). "In the case of alienation of the exclusion object by the exclusion debtor, the exclusion creditor takes the place of the seller by way of statutory subrogation, and thus has the right to take over the price instead of it, or if it has already been realized, to

damages in the form of its value from the bankruptcy estate" (Salma, 2010, p. 235). The damages are thus settled as a liability of the bankruptcy estate.

6.2. Effects of Bankruptcy on Fiducia for the Purpose of Management of Entrusted Digital Assets

When it comes to fiducia on digital assets, for another purpose, apart from the purpose of securing a claim, which is defined by the fiduciary agreement on digital assets itself (LDA, Art. 121, para. 4), the legal position of the fiduciary and the fiduciant in the event of the opening of bankruptcy over one of the contracting parties must be appropriate to the purpose of the fiducia. In that case, the fiduciant does not have the capacity of a fiduciary debtor of a secured claim, and the fiduciary does not have the capacity of a fiduciary creditor because there is no secured claim, in the context of the LDA, given that the fiduciary agreement on digital assets was not concluded for the purpose of securing a claim. In a broader sense, certain claims may exist between the contracting parties, but they are not secured by the fiducia on digital or other types of assets (e.g., rent, interest, fee, etc.), nor do they affect the position in bankruptcy proceedings regarding the digital assets that are the subject of the fiducia.

6.2.1. The Fiduciant as an Exclusion Creditor in Bankruptcy Proceedings Opened over the Fiduciary who Manages Entrusted Digital Assets

The owner of the assets entrusted by fiducia for the purpose of asset management remains the fiduciant, i.e., the person who transferred the assets into fiducia. The fiduciary, i.e., the person to whom the assets are entrusted for management, formally acquires ownership over those assets, but is obliged to manage the assets exclusively in accordance with the agreement with the fiduciant. In this legal relationship, the fiduciant retains the economic benefit of the assets, although the fiduciary may use the assets for improving their condition or achieving other purposes defined by the agreement.

If the transfer of ownership was made for the purpose of management of entrusted digital assets, or some other type of assets, the acquirer – the fiduciary temporarily becomes the formal owner of the assets, which, in accordance with the agreed conditions and after the expiration of the agreed period, should be returned to the true owner – the fiduciant, along with an account for the management of those assets in the meantime. A similar legal situation arises if the fiduciary had the right to use the digital assets, with,

for example, periodic payment of a fee in the form of rent or interest, etc., when this agreement resembles lease, loan or credit agreements. Further, if no fee is agreed, the fiduciary transfer of ownership is similar to a loan for use agreement.

If the digital assets were the subject of a dispute, and the participant in the disputed civil relationship, or more often several participants, e.g., statutory heirs, as fiduciants, transferred the right to the subject of that dispute into the ownership of a third party – the fiduciary, who is a person of their mutual trust, with the obligation of return transfer of ownership upon the conclusion of the dispute (fiduciary transfer of ownership for the purpose of litigation), in the event of bankruptcy of the fiduciary, the fiduciant's exclusion right also exists.

If bankruptcy proceedings are opened over the fiduciary who manages entrusted digital assets in one of the described ways, i.e., modalities, it follows that the fiduciant will have the position of an excluding (repossession) creditor in accordance with the explicit legal provision from Art. 122, para. 2 of the LDA, which refers to the rules of the bankruptcy law, such as the cited Articles 50 and 80, para. 3 of the BL. Because the digital assets as the subject of fiducia essentially do not belong to the bankruptcy debtor, although he is formally their owner, and the fiduciant "based on his property or personal right, has the right to request that a specific asset be segregated from the bankruptcy estate," which in this case is digital assets. The fiduciant's right to the return of digital assets is based on the fiduciary agreement, and the basis of the exclusion right is not only a property right, but also an obligation right.

"An exclusion claim is filed by an exclusion creditor in the procedural role of plaintiff, who has some property or obligation right over movable or immovable property that has entered the bankruptcy estate of the bankruptcy debtor, and this is against the bankruptcy debtor as the defendant" (Dabetić-Trogrlić, 2015, p. 161).

The legal definition links the legal basis of the exclusion right only to a property or personal right, while legal scholarship broadens the legal nature, considering that obligation rights may also constitute the legal basis of the exclusion right, provided that its subject (object) is the action of delivering an individually determined asset. Thus, the theoretical concept of the legal basis of the exclusion right is broader than the statutory one (Vrhovšek & Kozar, 2019, p. 150).

6.2.2. Obligation of the Fiduciary who Manages Entrusted Digital Assets to Hand Them Over to the Bankruptcy Estate of the Fiduciant

When the fiduciary transfer of ownership on digital assets is concluded for the purpose of management, and subsequently bankruptcy is opened over the fiduciant, an obligation arises for the fiduciary who manages the entrusted digital assets to return them – to hand them over to the bankruptcy estate of the fiduciant, in accordance with the rules on taking over the bankruptcy estate (BL, Art. 105).

Taking over the bankruptcy estate (BL, Art. 105) constitutes both an obligation and a right of the bankruptcy administrator: upon opening bankruptcy proceedings, the bankruptcy administrator takes possession of the entire assets that enter the bankruptcy estate and manages it (para. 1). If a third party at any stage of the proceedings refuses to hand over assets holding them without legal basis or on the basis of a legal transaction whose validity has ceased, which enter into the assets of the bankruptcy debtor, the bankruptcy administrator shall request from the bankruptcy judge to urgently order and carry out compulsory enforcement. Along with the order for handing over assets, the bankruptcy judge may also order measures of coercion against the bankruptcy debtor or a third party to carry out enforcement. In that case, the person who refused to hand over assets that enter into the assets of the bankruptcy debtor and who does not comply with the court order is liable for damages arising from such conduct (para. 2). The 2017 amendment added para. 3, providing that the said decisions, i.e., the order for handing over assets, shall be adopted by the bankruptcy judge in the form of a decision, against which the right to appeal lies with the bankruptcy administrator and the third party in whose possession the assets are located, which enter into the assets of the bankruptcy debtor.

Within the framework of the consequences of opening bankruptcy proceedings on legal transactions, the law essentially gives the bankruptcy administrator the possibility to cancel, i.e., to withdraw from the fiduciary agreement regardless of the agreed terms, which would cause the validity of this legal transaction to cease, and thereby the fiduciary's legal basis for holding the digital assets entrusted to it for the purpose of management, leading to the obligation to return the digital assets to the bankruptcy estate of the fiduciant. Such a conclusion is based on the legal rules on the consequences of opening bankruptcy proceedings on legal transactions. The bankruptcy administrator has the right of choice in the case of a synallagmatic (bilateral) contract, which means that it may choose whether

to remain with the performance of the contract or to withdraw from performance. The power of attorney issued by the bankruptcy debtor loses effect on the date of opening bankruptcy proceedings, unless the bankruptcy administrator decides otherwise (BL, Art. 98). A fiduciary agreement on digital assets for management purposes bears the characteristics of a mandate agreement from Art. 749 of the LCT, which provides that a mandate agreement obliges the agent towards the principal to undertake certain business for the principal's account, and at the same time the agent is authorized to undertake those business. The fiduciary has the position of an agent, and the fiduciant has the position of a principal. Also, in accordance with Art. 99, para. 3 of the BL, the bankruptcy administrator may terminate lease agreements independently of legal and contractual notice periods, with a notice period of 30 days, provided that the lessor's right to compensation for damages due to termination of the lease is exercised in an amount that may not exceed the amount of semi-annual rent.

CONCLUSION

The Law on Digital Assets of the Republic of Serbia represents the first comprehensive regulation of a systemic character that introduces into domestic law pledge and fiducia on digital assets as modern instruments for securing claims. By their bankruptcy-law treatment, the legislator has established a predictable framework that provides adequate protection to creditors, but also opened certain terminological issues.

A pledge on digital assets, as a classic property right, is acquired by registration in the register and provides the creditor with the status of a separate (secured) creditor in the bankruptcy of the pledgor.

Fiducia, on the other hand, represents a more complex institute whose bankruptcy-law position depends on the contractual purpose. If concluded for security purposes, the fiduciary (creditor) has the status of a separate (secured) creditor in the bankruptcy of the fiduciant (debtor), while in the case of fiducia for management purposes, the fiduciant acquires the position of an excluding (repossession) creditor in the bankruptcy of the fiduciary.

Although Article 122 of the LDA is titled "Position of the fiduciant in bankruptcy," its content – correctly interpreted – points to the conclusion that the legislator actually regulates the position of the fiduciary in the bankruptcy of the fiduciant (para. 1), and the position of the fiduciant in the bankruptcy of the fiduciary (para. 2), which is consistent with the nature of the fiduciary relationship as a "substantively divided ownership." Such

interpretation enables a consistent application of the legal provisions and avoids contradictions that would arise from a literal reading of the norm.

Registration in the register, in the case of a pledge, ensures publicity and legal certainty, while in the case of fiducia, the absence of mandatory registration (unless otherwise provided by the contract and the business rules of the digital asset service provider) enables the concealment of existing debt, which represents both an advantage and a potential risk. Overall, the legal distinction between these security interests provides a flexible but predictable legal framework, which corresponds to the needs of the modern digital asset market, with the necessary caution in the interpretation of certain provisions.

Overall, the distinction between these collateral bases provides a flexible yet predictable legal framework that meets the needs of the modern digital asset market, while requiring due caution in the interpretation of certain provisions.

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