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Ensuring Proper Enforcement of Cryptocurrency Arbitration Clauses: A Call for Supreme Court Intervention

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Ensuring Proper Enforcement of Cryptocurrency Arbitration Clauses: A Call for Supreme Court Intervention

Introduction.

The global purchase and use of Cryptocurrency (“crypto”) is more prevalent than ever before. With over 5,000 cryptocurrencies worldwide, there is no shortage of tokens to purchase from a crypto exchange.¹ By correlation with the rise in crypto’s popularity, disputes between crypto exchanges and their users are on the rise as well.² A significant amount of user disputes arise as a result of third-party hacks on the users’ account, that users often try to hold crypto exchanges accountable for.³ As a result of legal action in these cases, many crypto exchanges move to compel arbitration in accordance with their user agreements’ arbitration provisions.⁴ Federal Courts in the United States have varied widely in their decisions on whether similar crypto exchanges’ arbitration agreements are enforceable.⁵

To help protect consumers and streamline cryptocurrency disputes, the U.S. Supreme Court should lay out a proper standard for an enforceable arbitration agreement that will be better applicable in the context of crypto exchanges’ user agreements. As an interrelated subsidiary point, the Court should also require proceedings to be stayed during the appeal of an arbitral denial to avoid the discouragement of arbitration and prevent further congestion in the court system. International arbitration will likely have a large role to play in the resolution of user disputes due to the growing preference of crypto exchanges for arbitration as an alternative dispute resolution

¹ Tamar Meshel & Moin A. Yahya, *Crypto Dispute Resolution: An Empirical Study*, 2021 U. ILL. J.L. TECH. & POL’Y 187, 196 (2021).

² *Id.*

³ *See Robertson v. Coincheck, Inc.*, No. 18-cv-01182 (S.D.N.Y. Dec. 10, 2018) (discussing a dispute that arose due to a third-party hack of the plaintiff’s cryptocurrency valued at several millions of dollars).

⁴ *Id.*

⁵ *Compare* Leidel v. Coinbase, Inc., 729 F. App’x 883 (11th Cir. 2018) (denying defendant’s motion to compel arbitration for dispute arising out of third-party hack) *with* Sultan v. Coinbase Inc., 354 F. Supp. 3d 156, 162 (E.D.N.Y. 2019) (granting defendant’s motion to compel arbitration for a dispute arising out of a third-party hack).

mechanism to litigation.⁶ This is evidenced in part by the number of crypto exchanges that contain an arbitration agreement within their user agreements.⁷ For instance, an empirical study done by Tamar Meshel & Moin A. Yahya provides evidence for this trend in tendency.⁸ Based on their analysis of many of the most popular crypto exchanges' terms and conditions, the study indicates that arbitration is increasingly the most popular alternative to litigation in crypto disputes.⁹

Although studies such as these indicate a trend toward arbitration in crypto disputes, there is a disparity in the enforcement of arbitration agreements in the U.S. and around the world. As a result of this disparity, some crypto exchanges' similar (if not identical) arbitration agreements are denied enforcement in some cases but not in others. This leads to an increase in crypto litigation in the already congested court system over procedural issues. Although the Supreme Court is not likely to craft a proper and uniform standard to determine the enforceability of arbitration agreements, it is important to address why and how the Court should institute a more uniform standard. Nonetheless, the Supreme Court will determine the issue of whether litigation proceedings are automatically stayed during the appeal of a denied motion to compel arbitration in their upcoming decision in *Coinbase v. Bielski*.¹⁰ Although this issue is subsidiary to the main problem of disparity in the enforcement of arbitration agreements, the decision is still important because of its potential ramifications for the crypto and arbitration industries.

There are a range of effects that could result from the Supreme Court's upcoming decision in *Bielski*. For instance, the Court's decision on the automatic stay issue could affect whether crypto exchanges continue to trend toward arbitration or back toward litigation. More specifically,

⁶ Meshel & Yahya, *supra* note 1, at 196.

⁷ *Id.* at 197.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Coinbase Inc. v. Bielski*, 143 S. Ct. 521 (2022).

a decision that opposes an automatic stay would likely cause crypto exchanges to opt for litigation as opposed to arbitration because of additional costs and time expended in the lower court during an appeal. This paper will propose a uniform standard for the proper enforceability of arbitration agreements that will be better applicable in the crypto context. This paper will further address why the Supreme Court should hold in their upcoming decision in *Bielski* that litigation proceedings are stayed during the appeal of an arbitral denial.

If the standard applied to determine the enforceability of arbitration agreements is clarified, disputes will be able to move more efficiently through the arbitration process and prevent further backlog in a court system plagued with congestion. A more uniform standard will also allow disputes, in which parties did not contract for arbitration, to litigate in court without longer delays. In the U.S., Federal Courts disagree on whether the arbitration clauses in crypto exchanges' user agreements are enforceable against users. Additionally, courts in the U.S. are also unclear on whether litigation proceedings are stayed during the appeal of a denied motion to compel arbitration, an issue which stems from the overall enforceability of the arbitration agreement.¹¹ The Supreme Court's intervention and adoption of the proposed standard would ensure fairness on behalf of all parties involved and clarify requirements for valid arbitration agreements.

The analysis of this issue is structured into five parts. Part I is broken down as follows: First, this section provides a basic overview of crypto and crypto exchanges as they relate to their role as trading facilitators. This section will also discuss the advantages and disadvantages of arbitration in crypto disputes, along with the types of arbitration available in this context. This section will conclude with empirical evidence of the growing trend of crypto exchanges to select arbitration as opposed to litigation and other methods of dispute resolution.

¹¹ *Bielski v. Coinbase, Inc.*, No. 22-15566, 2022 WL 3095991, at* 1 (9th Cir. July 11, 2022).

Part II will focus on U.S. case studies that illustrate the disparity in enforcement of arbitration agreements against crypto exchange users. Each of these cases involve disputes between crypto exchanges and users surrounding the enforceability of their accompanying arbitration agreements as interpreted by U.S. federal courts. More specifically, some of the analyzed cases in this context arose from third-party hacks on user accounts. The similarity of these cases' circumstances and arbitration agreements further emphasizes the disparity in enforcement. The analysis will then turn to how signatory countries to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") have dealt with enforcement in this context.

Part III will begin with a close analysis of *Coinbase v. Bielski*, the first crypto case to be certified for review by the U.S. Supreme Court.¹² This section will outline the circumstances and issues in the case to illustrate the concerns of courts on behalf of users regarding crypto exchanges' arbitration agreements. To resolve these issues, this section will provide the proposed standard the Court should institute for an enforceable arbitration agreement. The proposed standard is designed to be effectively applicable in the context of crypto exchanges' user agreements. More specifically, this section will elaborate on the issue that each element of the proposed standard addresses. Part III will conclude with support for the subsidiary proposition that the Supreme Court should determine that litigation proceedings are automatically stayed during the appeal of an arbitral denial. Additionally, an explanation will be provided regarding how the automatic stay issue is important for arbitration's role in this context. Finally, this section will provide a conclusion and reiterate the necessity for Supreme Court intervention.

¹² *Bielski*, 143 S. Ct. at 521

I. An overview of crypto, crypto exchanges, and arbitration’s growing role in crypto dispute resolution.

The legal landscape in the field of crypto is new and constantly evolving. To better adapt the current laws to novel technology, it is necessary to understand the topic of crypto broadly as it relates to crypto exchanges and their function as trading facilitators. The background knowledge on crypto and crypto exchanges provided in this section will also enable better comprehension of arbitration’s role in this context. Additionally, empirical evidence that follows will indicate that arbitration is the most frequently selected method of alternative dispute resolution by crypto exchanges.¹³ In addition to empirical evidence, an analysis of the advantages and disadvantages to arbitration in crypto disputes will further illustrate why this trend toward arbitration is occurring. To obtain a basic understanding of what cryptocurrencies are, it is helpful to first understand their inception because crypto’s creation illustrates its use cases and its relation to blockchain technology. Moreover, a basic understanding of crypto is necessary to comprehend the relationship between crypto exchanges and their users.

A. An overview of crypto and crypto exchanges.

In the wake of the 2008 financial crisis, an unknown entity named “Satoshi Nakamoto” created the world’s first cryptocurrency, Bitcoin.¹⁴ Along with the creation of Bitcoin was the publication of the Bitcoin White Paper titled “Bitcoin: A Peer-to-Peer Electronic Cash System”, which was published in 2008.¹⁵ The original vision of Bitcoin as the first crypto was to be a decentralized digital currency that operates on a peer-to-peer network with anti-inflationary

¹³ Meshel & Yahya, *supra* note 1, at 207.

¹⁴ Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, Bitcoin.org (Oct. 31, 2008), <https://bitcoin.org/bitcoin.pdf>.

¹⁵ *Id.*

properties.¹⁶ The decentralized aspect of blockchain technology is meant to render intermediaries like banks or other financial institutions unnecessary.¹⁷ This disruption is made possible through the ability for crypto users to be the sole custodians of their tokens and interact with other wallets on the network.¹⁸

The transactions on the blockchain network are verified through individuals' computers, otherwise referred to as 'nodes', that participate in the validation of transactions through complex mathematical computations.¹⁹ Those verified transactions all occur and update in real time to the network's blockchain, which is better understood as the network's public ledger of all transactions.²⁰ The public ledger is essential to the function of Bitcoin and most cryptos due to the transparency of the transaction log.²¹ The majority of nodes that operate on the system confirm the first node's verification of the transaction to avoid any double spend issue.²²

The ledger is accessible by any members of the public with internet access.²³ Although blockchain technology solves many issues, it also creates issues for users who experience theft that are left without an intermediary to reverse the fraudulent transactions. Meanwhile, the 21 million Bitcoin limit that is programmed into its protocol solves any potential inflationary issue for the currency.²⁴ Although the price of Bitcoin fluctuates (sometimes by a wide margin) based on the speculation of investors, the programmed limit prevents any possibility for an increase to

¹⁶ *Id.* (explaining that a peer-to-peer network is one in which each participant can send and receive funds through a broadcast of that action to the network, which is then verified on the blockchain once the sufficient conditions are met).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

the supply. This aspect of Bitcoin contrasts sharply with the Federal Reserve (the U.S. Central Bank), and their ability to “issue currency . . . effectively without limit.”²⁵

Today, the term “cryptocurrency” is used to refer to all digital tokens and is defined by the International Monetary Fund (“IMF”) as any “digital or virtual currency that uses cryptography (a technique for secure communication) for security and operates independently of a central bank.”²⁶ Cryptos are traded primarily through exchanges as compared with the original peer-to-peer method.²⁷ Through the facilitation of transactions on exchanges, crypto can be purchased for fiat currencies (money that has value because a country agrees to ascribe value to it)²⁸ like U.S. Dollars and other crypto tokens depending on what is permitted within that specific crypto’s system.²⁹ As a result of the rising popularity of crypto exchanges, the number of disputes users have with exchanges continues to rise as well due to a range of user issues.³⁰ Although the use of crypto is on the rise, the novelty of crypto gives way to financial criminality such as the recent criminal conduct that caused the collapse of the popular exchange, FTX.³¹ Failures of exchanges like FTX are a catalyst of crypto disputes, as are other crimes such as third-party hacking of user accounts. In anticipation of these disputes, many crypto exchanges have included dispute resolution agreements within their terms and conditions.³²

²⁵ Alan Greenspan, Chairman, Fed. Reserve, Address at the Catholic University Leuven, Leuven, Belgium (Jan. 14, 1997).

²⁶ International Monetary Fund, *Fintech Notes: Virtual Currencies and Beyond: Initial Considerations* (2018), <https://www.imf.org/en/Publications/fintech-notes/Issues/2018/11/13/virtual-currencies-and-beyond-initial-considerations-46233>.

²⁷ See COIN MARKET CAP, <http://coinmarketcap.com/all/views/all/> (last visited March 10, 2023) (listing different types of cryptocurrencies and exchanges for their purchase).

²⁸ Irena Asmundson & Ceyda Oner, *What Is Money?*, Finance & Dev., Sept. 2012, at 36, <https://www.imf.org/external/pubs/ft/fandd/2012/09/basics.htm#:~:text=Eventually%2C%20the%20paper%20claim%20on,people%20believe%20that%20it%20will.>

²⁹ Meshel & Yahya, *supra* note 1, at 196.

³⁰ *Id.*

³¹ See Kalley Huang, *Why Did FTX Collapse? Here’s What to Know*, N.Y. Times (Nov. 18, 2022), <https://www.nytimes.com/2022/11/10/technology/ftx-binance-crypto-explained.html>.

³² Meshel & Yahya, *supra* note 1, at 196.

B. Arbitration as a trending alternative dispute resolution mechanism.

According to the empirical study by Tamar Meshel and Moin A. Yahya of 168 of the most popular exchanges' user agreements, the most common alternative dispute resolution method to litigation found was arbitration.³³ More specifically, 35% of the analyzed exchanges that made available their user agreements online expressly chose arbitration as their dispute resolution method.³⁴ The 35% of exchanges that included an arbitration agreement in their terms made up nearly all of the exchanges that chose alternatives to traditional litigation in the study.³⁵ It is also interesting to note that while there is a decline in “the use of arbitration (as opposed to litigation) in other commercial sectors . . . the novel, specialized, and transnational nature of crypto disputes, as well as jurisdictional limitations associated with domestic litigation, may drive [cryptos] and exchanges to use arbitration as often as litigation.”³⁶

There are a multitude of factors that might play a role in many crypto exchanges' decisions to include arbitration provisions in their user agreements. According to Meshel and Yahya, their study suggests “that the ability to require prior formal or informal resolution before resorting to arbitration” is one of the motivating factors for crypto exchanges to opt for arbitration.³⁷ Additional motivating factors for crypto exchanges include “the ability to prohibit class proceedings, and the ability to address costs issues. . . .”³⁸ Each of these factors that motivate crypto exchanges to either choose arbitration or traditional litigation boils down to the maximization of control over disputes.³⁹ However, the study determined that “the ability to prohibit class proceedings may be

³³ *Id.* at 214.

³⁴ *Id.* at 220.

³⁵ *Id.*

³⁶ *Id.* at 221.

³⁷ *Id.* at 238.

³⁸ *Id.*

³⁹ *Id.* at 240.

the strongest explanatory factor in platforms' choice of arbitration."⁴⁰ Many of these factors point to arbitration as a better dispute resolution method for crypto exchanges. However, some factors such as selection of venue, "are statistically linked to the choice of litigation."⁴¹ The factors each crypto exchange finds most important for control under their circumstances will motivate the decision between litigation and arbitration.⁴² The reality that dispute resolution agreements are embedded within user agreements illustrates the reason that users have no ability to negotiate with crypto exchanges regarding their terms. Instead, users are faced with the decision to either accept the terms or avoid registration with the crypto exchange entirely.

C. The advantages and disadvantages of arbitration in crypto disputes.

There are a multitude of advantages to arbitration in the crypto context that likely motivate a significant number of crypto exchanges to include arbitration provisions in their user agreements. From the perspective of the user, arbitration has advantages over traditional litigation as well. Nonetheless, there are drawbacks to arbitration from both perspectives that can account for the significant number of user agreements that do not opt for arbitration. Some advantages of arbitration in the context of crypto disputes include "the confidentiality of the process and the parties' ability to appoint specialized decision-makers, as well as the straightforward enforcement of arbitral awards."⁴³

These advantages are important to crypto exchanges and users for multiple reasons.⁴⁴ For instance, crypto exchanges value the confidentiality aspect of arbitration because they may want to keep their disputes outside of the public attention.⁴⁵ From the user's perspective, confidentiality

⁴⁰ *Id.* at 239.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 207.

⁴⁴ *Id.*

⁴⁵ *Id.*

is likely much less of a concern. Additionally, both users and crypto exchanges find the ability to select specialized arbitrators important due to the novelty and complicated nature of blockchain technology and crypto disputes.⁴⁶ An article from a 2018 issue of the International Arbitration Report, authored by James Rodgers, reinforces these advantages with the point that “[p]arty autonomy, confidentiality and the ability for parties to choose arbitrators with specific expertise lie at the heart of arbitration.”⁴⁷

Another advantage of arbitration from the perspectives of both parties in this context is arbitration’s removed nature from governmental bodies.⁴⁸ For instance, Rodgers also notes that arbitration is “more removed from the sometimes anti-cryptocurrency rhetoric and policy objectives of regulators and, potentially, national courts.”⁴⁹ Moreover, the separate nature of arbitration institutions from any governmental body makes both investors and crypto exchanges more comfortable with the resolution of their disputes.⁵⁰ An example that illustrates the anti-crypto actions of regulators that make users and crypto exchanges apprehensive is the recent wells notice (letter that states a government entity plans to bring an enforcement action) sent to Coinbase from the Securities and Exchange Commission (“SEC”).⁵¹

The SEC wells notice notified Coinbase of a planned enforcement action regarding allegations “that the company’s staking products constitute unregistered securities.”⁵² In an interview with Joshua Klayman, the U.S. Head of Fintech and Head of Blockchain and Digital

⁴⁶ *Id.*

⁴⁷ James Rodgers, *Cryptocurrencies and Arbitration – A Match Made in Heaven?*, NORTON ROSE FULBRIGHT INTERNATIONAL ARBITRATION REPORT (May 2018), <https://www.nortonrosefulbright.com/en/knowledge/publications/cae35319/cryptocurrencies-and-arbitration-a-match-made-in-heaven>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Stacy Elliot & Daniel Roberts, *SEC Warns Coinbase of Enforcement Over Its Staking Rewards Products*, Decrypt (Mar. 22, 2023), <https://decrypt.co/124262/sec-wells-notice-coinbase-enforcement-over-staking-products>.

⁵² *Id.*

Assets at Linklaters (a multinational law firm), she explained that this action likely illustrates the SEC’s preference for crypto exchanges to separate entities used for trading, staking, and other services as opposed to those services all offered under one entity.⁵³ In response to the SEC wells notice, Coinbase’s Chief Legal Officer, Paul Grewal, responded publicly on Twitter and stated that prior to Coinbase’s initial public offering, their filings with the SEC expressly included “57 references to staking and details on our asset listing process.”⁵⁴ Grewal further noted that following the required SEC registration filings, “[t]he SEC approved [Coinbase] to go public, knowing those details.”⁵⁵ This type of regulation by enforcement from governmental bodies such as the SEC results in the apprehension of crypto exchanges and individual investors of crypto assets. Moreover, the example of the SEC wells notice illustrates Rodgers’ point that both users and crypto exchanges may prefer arbitration due to their concerns over courts that might also have an anti-crypto bias.

Another significant advantage that Rodgers emphasizes is “[t]he benefit of global enforcement of arbitral awards (under the New York Convention) . . . given the fundamentally borderless nature of blockchain technology.”⁵⁶ By this, Rodgers points out that the New York Convention is compatible with the resolution of crypto disputes because of the similar global nature of crypto.⁵⁷ The global nature of crypto is emphasized by its ability to be sent anywhere in the world within a few minutes.⁵⁸ If assets, or proceeds of assets, are moved to a location outside of the U.S., the New York Convention theoretically ensures that an award can be enforced in any

⁵³ Telephone Interview with Joshua A. Klayman, U.S. Head of Fintech and Head of Blockchain and Digital Assets, Linklaters, (Mar. 31, 2023).

⁵⁴ @iampaulgrewal, TWITTER (Mar. 22, 2023, 5:52 PM), <https://twitter.com/iampaulgrewal/status/1638660032324829184>.

⁵⁵ *Id.*

⁵⁶ Rodgers, *supra* note 42.

⁵⁷ *Id.*

⁵⁸ *Id.*

signatory country.⁵⁹ The advantage of global enforcement benefits both crypto exchanges and users because both will have access to straightforward enforcement. Furthermore, Rodgers notes that “[t]he recent move of arbitral institutions to establish expedited and emergency procedures” will cause a decrease in costs and encourage others to opt for arbitration.⁶⁰ The speed and decreased costs of expedited procedures will also serve as an advantage to both users and crypto exchanges.

In addition to arbitration’s baked in advantages, “traditional arbitration providers” are currently in the process of efforts “to address the unique dispute resolution needs of crypto traders.”⁶¹ For example, Judicial Arbitration and Mediation Services, Inc. (“JAMS”), a large provider of arbitration services in the U.S., is in the process of instituting “protocols designed to support arbitration of disputes arising from blockchain activities.”⁶² This means that in addition to the traditional advantages of arbitration, large providers will adapt protocols tailored to crypto disputes.⁶³ Likewise, “[t]he American Arbitration Association (“AAA”), another major provider of arbitration in the U.S., offers a webinar on ‘Arbitration Blockchain, Smart Contract & Smart Legal Contract Disputes. . . .’”⁶⁴ The purpose of the AAA’s webinar is to explain why “arbitration is ideally suited to resolve [crypto] disputes.”⁶⁵ The solution-oriented focus of these institutions to adapt to crypto disputes emphasizes another reason why crypto exchanges are trending toward arbitration. Additionally, the institution of crypto-tailored protocols from traditional arbitration providers benefits both users and crypto exchanges with more specialized arbitrators.

⁵⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

⁶⁰ *Id.*

⁶¹ Meshel & Yahya, *supra* note 1, at 207.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Conversely, some of the disadvantages to arbitration, mainly from the perspective of crypto exchanges, may include “jurisdictional issues, applicable law(s), and, particularly, technical complexities which most distinguish crypto disputes from other online disputes.”⁶⁶ However, many of these disadvantages can be avoided with clear arbitration agreements that address these issues. From the perspective of users, another disadvantage to arbitration in this context is a lack of meaningful consent. Since a user has no ability to negotiate the terms of the user agreement with the crypto exchange, courts are concerned that a user is not able to meaningfully consent to the terms because the alternative to consent is exclusion from use of the platform. An additional notable disadvantage to users is the reality of many clickwrap user agreements, in which many individuals do not view or read the terms and conditions prior to their assent. Nevertheless, the growing trend of crypto exchanges to select arbitration in their user agreements emphasizes the need for a uniform standard for the enforceability of those agreements.

D. Types of arbitration available in crypto disputes.

There are three types of arbitration that are available in crypto disputes: traditional arbitration, online crypto arbitration, and blockchain based arbitration.⁶⁷ Crypto exchanges today are not limited to traditional arbitration “administered by established international institutions. . . .”⁶⁸ However, traditional arbitration remains a popular type selected by crypto exchanges for resolution of their disputes through institutions such as JAMS. Traditional arbitration provides well-established arbitral procedures and rules from recognized institutions with crypto-adapted protocols to better suit disputes in this context.⁶⁹

⁶⁶ *Id.* at 202.

⁶⁷ *Id.* at 206.

⁶⁸ *Id.*

⁶⁹ *Id.*

The second type of arbitration is “online crypto-arbitration, which retains most of the fundamental features of traditional international arbitration but is administered online by new institutions.”⁷⁰ An example of this type of online arbitration is “Cryptonomica Ltd., the first online international arbitration institution based in London, U.K.”⁷¹ Cryptonomica instituted arbitration rules that “are based on the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, a comprehensive set of procedural arbitration rules.”⁷² In online crypto arbitration, all documents are submitted to the tribunal electronically.⁷³ Additionally, all hearings and communications with the tribunal are conducted over video-conferencing platforms.⁷⁴

The third type of arbitration in this context “includes mechanisms built into the crypto platforms which . . . do not resemble traditional arbitration but rather employ some internal, ‘on-chain,’ decision-maker or tribunal.”⁷⁵ This type of arbitration can be referred to as blockchain-based arbitration.⁷⁶ This third type of arbitration is more complex due to its automated nature that is not very similar to traditional arbitration.⁷⁷ However, in its simplest form blockchain-based arbitration usually includes a “mechanism [that] involves a third-party ‘adjudicator’ who, if a dispute arises between the trading parties, will be asked to determine whether the disputed cryptocurrencies should be transferred to the recipient or given back to the original sender.”⁷⁸ This automated form of arbitration will effectuate the transfer of assets through the use of a smart contract that can also act as an escrow account for the disputed funds.⁷⁹

⁷⁰ *Id.*

⁷¹ *Id.* at 208.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 209-10

⁷⁶ Bergolla, Luis and Seif, Karen and Eken, Can, *Kleros: A Socio-Legal Case Study of Decentralized Justice & Blockchain Arbitration*, 37 OHIO ST. J. ON DISP. RESOL. 55 (2022).

⁷⁷ Meshel & Yahya, *supra* note 1, at 210.

⁷⁸ *Id.*

⁷⁹ *Id.*

Smart contracts are “agreements – or parts of agreements – that are written into code on top of a blockchain platform and can be automatically executed when specific conditions are validated.”⁸⁰ One of the advantages to this type of arbitration is its compatibility with smart contracts. For example, “[t]he Blockchain Arbitration Forum (“BAF”), founded by a group of law and technology experts in 2018, is a stand-alone service that provides template smart contracts (with arbitration and mediation clauses) in addition to a pool of Forum members with the expertise to arbitrate disputes.”⁸¹ Another provider of blockchain-based arbitration is Kleros.⁸² Kleros is an “arbitration solution that relies on smart contracts and crowdsourced jurors to resolve disputes and transfer assets awarded.”⁸³

One potential risk of blockchain-based arbitration is the possibility of award enforcement issues if courts determine that either the New York Convention or Federal Arbitration Act (“FAA”) do not recognize this type as valid arbitration. Based on case law research, no cases found indicated a refusal of award enforcement by courts. However, this could be explainable by the aspect of smart contracts that hold funds in escrow until the dispute is resolved, which are then transferred to the awarded party without any need for enforcement through courts. Nonetheless, it is unclear if blockchain-based arbitration is recognized by the New York Convention and FAA. Each of the three types of arbitration in the crypto context has their own aspects that may be better for some crypto exchanges as compared with others, depending on their circumstances. However, these different types of arbitration illustrate the versatile and adaptable nature of arbitration that is attractive to crypto exchanges and users for dispute resolution.

⁸⁰ Darcy Allen, Aaron M. Lane & Marta Poblet, *The Governance of Blockchain Dispute Resolution*, 25 HARV. NEGOT. L. REV. 75, 78 (2019).

⁸¹ *Id.* at 92.

⁸² Bergolla, Seif & Eken, *supra* note 53, at 56.

⁸³ *Id.*

II. Case studies regarding the enforceability of crypto exchanges' arbitration agreements.

Cases in the U.S. that have required courts to grapple with the issue of enforceability in this context illustrate the problematic application of the current FAA standard in this context. Although disputes and user agreements vary between crypto exchanges and their users, the circumstantial similarities of many cases coupled with the disparate enforcement of arbitration agreements by courts illustrate the necessity for a uniform standard. First, cases regarding the enforceability of crypto exchange arbitration agreements assented to by clickwrap will be analyzed to emphasize the disparate enforcement of courts. Following this analysis, cases regarding enforceability in disputes against crypto exchanges due to third party hacks on user accounts will further show the disparity in enforcement and need for Supreme Court intervention.

To understand the issues more accurately regarding enforceability in this context, it is important to analyze the current legal standard applied by U.S. and foreign courts that are party to the New York Convention. The legal standard in the U.S. to grant a motion to compel arbitration under the Federal Arbitration Act (“FAA”) requires a determination of the following: “(1) whether a valid arbitration agreement exists; and (2) whether the agreement encompasses the dispute(s) at issue.”⁸⁴ Generally, an arbitration agreement is enforceable under the FAA if it is (1) in writing, (2) part of a valid contract, (3) clear and unambiguous, (4) covers the disputes in question, and (5) not unconscionable.⁸⁵ The FAA standard is highly deferential to the interpretation of courts on whether a valid arbitration agreement exists.

⁸⁴ 15 U.S.C. §§ 1 et seq. (2018).

⁸⁵ *Id.*

A. The application of the FAA standard among different U.S. courts.

The high degree of deference that U.S. courts have, to determine whether a valid arbitration agreement exists continues to contribute to the uncertainty regarding the enforceability of crypto exchanges' arbitration agreements. More specifically, the first element of the FAA standard requires clarification due to the high degree of discretion left to courts for interpretation. This high degree of discretion causes inconsistency in the application of the standard. In each of the cases analyzed, the crypto exchanges contained an arbitration agreement within their user agreements. Additionally, the users in dispute in each of the cases all assented to the respective user agreements through clickwrap. The term "clickwrap" refers to the required assent of a user to the provider's terms and conditions through an affirmative selection that the user read and accepted the terms.⁸⁶ In the following two examples, both crypto exchanges' arbitration agreements were similar and assented to by clickwrap. Nevertheless, the cases resulted in disparate outcomes. For instance, in *Ventoso v. Shihara*, the crypto exchange, "Bittrex" suspended the user's account following her deposit of around \$120,000.⁸⁷ According to Bittrex, the crypto exchange suspended the plaintiff's account due to a failure to submit all the required forms for the account to remain active in accordance with the State of New York's cybersecurity regulations and Federal Anti-Money Laundering Laws.⁸⁸ Due to the user's account freeze, she could not access her deposited funds and sued Bittrex in federal district court.⁸⁹

In response, Bittrex filed a motion to compel arbitration in accordance with the arbitration agreement from their Terms of Service.⁹⁰ Comparatively, in *Harris v. Coinbase*, the plaintiff also

⁸⁶ *Ventoso v. Shihara*, No. 19 Civ. 03589 WL 9045083 (S.D.N.Y. Jun. 26, 2019).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

sued the crypto exchange for violations under a theory of fraud, insider trading, and market manipulation.⁹¹ In *Harris*, Coinbase similarly sought to compel arbitration.⁹² The relevant arbitration provision within the user agreement in *Harris* required disputes to be arbitrated pursuant to the rules of the AAA.⁹³ In *Ventoso*, the relevant portion of Bittrex’s Terms of Service stated, “THE ARBITRATION CLAUSE IN SECTION 18 GOVERNS RESOLUTION OF CERTAIN DISPUTES AND WAIVES ANY RIGHT TO TRIAL BY JURY OR TO PARTICIPATE IN A CLASS ACTION.”⁹⁴ Similar to the arbitration agreement in *Harris*, the arbitration clause further stated that “all disputes . . . arising out of or relating to these Terms . . . will be resolved through confidential binding arbitration held in Seattle, Washington in accordance with” the arbitration rules set forth by JAMS.⁹⁵

The Court in *Ventoso* held in a straight forward manner that the arbitration agreement satisfied the basic requirements under the FAA, the dispute was arbitrable and within the scope of the agreement, and that the user assented to the clickwrap user agreement during the registration of her account.⁹⁶ The Court supported their conclusion with the fact that “[t]he Second Circuit has made clear that such ‘clickwrap’ agreements can serve as valid consent to arbitrate because in checking a box the user must affirmatively assent to the terms of the agreement.”⁹⁷ The Court further noted that “Congress enacted the FAA to reverse ‘centuries of judicial hostility to arbitration agreements’ and ‘to place arbitration agreements upon the same footing as other

⁹¹ *Harris v. Coinbase, Inc.*, No. 3:18-cv-04965-JD (N.D. Cal. Mar. 17, 2021).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Ventoso*, No. 19 Civ. 03589 WL 9045083.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* And see, *Meyer v. Uber Technologies*, 868 F.3d 66, 75 (2d Cir. 2017) (involving an issue of whether an arbitration agreement can be assented to by “clickwrap”).

contracts.”⁹⁸ By contrast, the court in *Harris* held oppositely under similar circumstances.⁹⁹ The *Harris* Court denied Coinbase’s motion to compel arbitration because the user was not provided with adequate notice of the user agreement and embedded arbitration provisions.¹⁰⁰ Moreover, the Court stated the user agreement was at the bottom of the webpage and as a result did not provide sufficient notice.¹⁰¹ The opposite holdings of the courts in these cases under similar circumstances illustrate a necessity for a more elaborate and uniformly applicable standard.

Cases regarding similar allegations against crypto exchanges and the enforceability of their arbitration agreements that result in disparate outcomes emphasize the necessity for Supreme Court intervention in this context. The cases of *Leidel v. Coinbase*, and *Sultan v. Coinbase*, convey the disparate enforcement of arbitration agreements through identical claims brought under similar circumstances and agreements, against the same crypto exchange.¹⁰² For instance, in *Leidel*, the Eleventh Circuit affirmed the lower court’s denial of defendant Coinbase’s motion to compel arbitration.¹⁰³ Contrarily, in *Sultan*, the court ordered the plaintiff to resolve his dispute in arbitration.¹⁰⁴ In *Leidel*, the plaintiff brought an action against Coinbase for its failure to stop the plaintiff’s stolen crypto from conversion to cash and withdrawal from Coinbase’s trading platform.¹⁰⁵ The plaintiff alleged that Coinbase had a duty to prevent the conversion of his stolen crypto to cash in addition to its withdrawal by the perpetrators under the Bank Secrecy Act.¹⁰⁶ Coinbase filed a motion to compel arbitration in response per its user agreement with the

⁹⁸ *Id.*

⁹⁹ *Harris, Inc.*, No. 3:18-cv-04965-JD.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Compare *Leidel v. Coinbase, Inc.*, 729 F. App’x 883 (11th Cir. 2018) (denying Coinbase’s motion to compel arbitration), with *Sultan v. Coinbase Inc.*, 354 F. Supp. 3d 156, 162 (E.D.N.Y. 2019) (granting Coinbase’s motion to compel arbitration).

¹⁰³ *Leidel*, 729 F. App’x at 883.

¹⁰⁴ *Sultan*, 354 F. Supp. 3d at 162.

¹⁰⁵ *Leidel*, 729 F. App’x at 885.

¹⁰⁶ *Id.*

plaintiff.¹⁰⁷ Likewise, the plaintiff in *Sultan* also alleged that the defendant “negligently failed to prevent a scam that allowed a third party to steal more than \$200,000 from his account.”¹⁰⁸ Coinbase responded in an identical manner and sought to compel arbitration.¹⁰⁹

The court in *Leidel* denied defendant Coinbase’s motion and stated that “[b]ecause [plaintiff’s] claims [did] not have a ‘significant relationship’ to the [user] agreement, [the d]efendant cannot show that those claims meet the more stringent ‘direct relationship’ standard applicable to arbitration provisions that are narrow in scope.”¹¹⁰ Moreover, the court supported their decision with the argument that in *Leidel*, the plaintiff sought “to enforce obligations allegedly imposed on the defendant by federal statutes, federal regulations, and state common law.”¹¹¹ As a result, the plaintiff was not compelled to arbitrate his claim because he did “not rely on the User Agreements to establish his cause of action. . . .”¹¹²

By contrast with the Eleventh Circuit’s holding in *Leidel*, the Eastern District of New York held in *Sultan*, that the plaintiff depositor was compelled to bring his claims in arbitration.¹¹³ The court supported their holding with the facts that the plaintiff entered his personal information, chose a password, and assented to the defendant’s User Agreement and Privacy Policy.¹¹⁴ The full text of the User Agreement, which was attached by hyperlink, stated in its relevant provision: “If we cannot resolve the dispute through our support team, you and we agree that any dispute arising under this Agreement shall be finally settled in binding arbitration . . . in accordance with the American Arbitration Association’s rules. . . .”¹¹⁵

¹⁰⁷ *Id.*

¹⁰⁸ *Sultan*, 354 F. Supp. 3d at 162.

¹⁰⁹ *Id.*

¹¹⁰ *Leidel*, 729 F. App’x at 888.

¹¹¹ *Id.* at 890.

¹¹² *Id.*

¹¹³ *Sultan*, 354 F. Supp. 3d at 162

¹¹⁴ *Id.*

¹¹⁵ *Id.*

The Court in *Sultan* elaborated that the plaintiff had notice of the terms because the terms were in plain view during the account registration process.¹¹⁶ The Court further explained that the plaintiff assented to the terms by clicking the box for agreement to the Terms and Conditions.¹¹⁷ Based on similar facts to those in *Leidel*, the Court supported their contrary decision in *Sultan* with the explanation that “a reasonable user would know that by clicking the registration button, he was agreeing to the terms and conditions accessible via the hyperlink, whether he clicked on the hyperlink or not.”¹¹⁸ Moreover, because the Terms and Conditions were in plain view, available in full via hyperlink, and were assented to by clickwrap, the Court determined the arbitration agreement was enforceable against the user and considered the claim within the scope of the agreement.

These cases indicate a wide discrepancy in the interpretations by courts of the enforceability of arbitration agreements in the context of crypto exchanges, even under similar circumstances. This reality emphasized by the cases mentioned above signifies the necessity for Supreme Court intervention. An adoption of the proposed standard will clarify the requirements for crypto exchanges, address user concerns, and resolve the vast disparity between applications of the standard in crypto disputes.

B. Global dispositions on the enforceability of crypto exchanges’ arbitration agreements.

Due to the borderless nature of crypto and the globalization of commerce, other countries’ courts are also forced to grapple with the issue of enforceability in this context. The wide range of interpretations from countries around the world signifies that clarity is needed. By contrast with the U.S. approach is China, another signatory to the New York Convention, which maintains a

¹¹⁶ *Id.* at 161.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

hands-off approach to the issue. For instance, a Chinese domestic court denied an arbitration award against Binance, a Chinese based crypto exchange, on the grounds that the trading and circulation of Bitcoin was prohibited by law.¹¹⁹ The Court supported their determination on the grounds that Bitcoin was against China's public policy interests.¹²⁰ From this decision, it is reasonable to discern that if Chinese courts are unwilling to enforce arbitral awards, they are also unlikely to enforce arbitration agreements.

Comparatively, in *AA v. Persons Unknown & Ors*, the Commercial Court of London in the U.K. denied the plaintiff crypto exchange's motion to compel arbitration.¹²¹ The plaintiff sought to compel arbitration against several anonymous individuals that allegedly stole Bitcoin from the plaintiff crypto exchange.¹²² The Court denied the motion on the grounds that there could not be an enforceable arbitration agreement against unknown individuals.¹²³ The significant range of courts' interpretations of exchanges' arbitration agreements that vary from unconscionable versus similar agreements interpreted as straight forward and enforceable illustrates the need for clarity on this issue. The adoption of the proposed standard of enforceability will benefit this industry domestically in the U.S. and may also provide an example for other member countries to the New York Convention to follow suit.

¹¹⁹ *Gao Zheyu v. Shenzhen Yunsilu Innovation Dev. Fund Enter. (L.P.) and Li Bin*, Yue 03 Min Te No. 719 (Shenzhen Interm. People's Ct. 2018).

¹²⁰ *Id.*

¹²¹ *AA v. Persons Unknown & Ors*, unreported, Commercial Court, London, 28 October 2019.

¹²² *Id.*

¹²³ *Id.*

III. The necessity for a uniform enforceability standard and the automatic stay of litigation proceedings during the appeal of an arbitral denial.

A more uniform and easily applicable interpretation of the FAA standard is necessary to resolve the enforcement disparity in this context. This section will first analyze the Northern District of California’s decision in *Bielski* to highlight the problems with the current FAA standard. Additionally, a closer case analysis of *Bielski* is helpful because the case outlines the problematic aspects of many crypto exchange arbitration agreements. Moreover, this case will be the first crypto related case to be reviewed by the Supreme Court. The Supreme Court will directly address the issue of whether litigation proceedings are automatically stayed during the appeal of an arbitral denial.¹²⁴ Although the Supreme Court is unlikely to do so, this section will propose the proper enforceability standard that the Court should adopt. This section will then elaborate on the rationale for each element of the proposed standard. Finally, as a subsidiary point the Supreme Court should determine that litigation proceedings are automatically stayed during the appeal of an arbitral denial to encourage the use of arbitration and prevent further congestion in the courts.

A. The arbitration agreement at issue in *Bielski v. Coinbase*.

A close analysis of *Bielski* is helpful in the recognition of the issues courts have with arbitration agreements in this context that often prevent their enforceability. The analysis of this case is also helpful in the understanding of how the proposed standard addresses each of these issues. In *Bielski*, the plaintiff created an account with Coinbase and was “soon targeted by a scammer who purported to be a PayPal representative.”¹²⁵ As a result of the scam, the plaintiff “granted this unknown individual remote access to his Coinbase account. . . .”¹²⁶

¹²⁴ *Coinbase Inc.*, 143 S. Ct. at 521.

¹²⁵ *Bielski v. Coinbase, Inc.*, C 21-07478 WHA, 1 (N.D. Cal. Apr. 8, 2022).

¹²⁶ *Id.*

The perpetrator of the scam used the access to send over \$30,000 out of the plaintiff's account.¹²⁷ To resolve this issue, the plaintiff initiated contact with the defendant through the Coinbase website's customer service "live chat" but was unable to establish contact with a representative.¹²⁸ The plaintiff then called the "customer service 'hotline' specified in his user agreement as where to get help for a compromised account."¹²⁹ After the plaintiff again failed to reach any representatives, he sent two letters to the defendant at Coinbase's San Francisco office for assistance.¹³⁰

Following the plaintiff's failure to reach a representative at Coinbase, the plaintiff filed an action "against Coinbase for violations of the Electronic Funds Transfer Act and Regulation E therein."¹³¹ In response, the defendant sought to enforce the arbitration agreement as part of the plaintiff's user agreement.¹³² The plaintiff contended in response that the arbitration agreement was unconscionable and thereby unenforceable.¹³³ The arbitration agreement stated in part that "[i]f we cannot resolve the dispute through the Formal Complaint Process, you and we agree that any dispute arising out of or relating to this Agreement or the Coinbase Services . . . shall be resolved through binding arbitration, on an individual basis."¹³⁴ The formal complaint process provision stated that users must first contact the Coinbase support team regarding any dispute.¹³⁵ If the dispute was not resolved through the Coinbase support team, then the formal complaint process required users "to file a complaint form, upon which, within fifteen business days (and no

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 4.

later than thirty-five business days), Coinbase will: (1) resolve the dispute requested; (2) reject the complaint and explain why; or (3) provide an alternative solution.”¹³⁶

Regarding this portion of the arbitration agreement, the District Court stated that “[b]ecause only Coinbase users can raise a complaint through the pre-arbitration complaint procedure, the arbitration provision imposes no obligation on Coinbase itself to submit its disputes with users to binding arbitration.”¹³⁷ However, Coinbase contended in response “that the arbitration agreement itself is explicitly bilateral.”¹³⁸ The Court began their determination with the principle that “[t]he paramount consideration in assessing substantive conscionability is mutuality.”¹³⁹ The court determined that the plain language of the arbitration agreement cited indicated an absence of the required bilaterality to be substantively conscionable.¹⁴⁰

Additionally, the court explained that the overly cumbersome “Formal Complaint Process” also rendered the arbitration agreement substantively unconscionable.¹⁴¹ Another relevant portion of Coinbase’s Terms and Conditions that struck the Court as substantively unconscionable stated “[t]his Arbitration Agreement includes, without limitation, disputes arising out of or related to the interpretation or application of the Arbitration Agreement, including the enforceability, revocability, scope, or validity of the Arbitration Agreement. . . .”¹⁴² Furthermore, the arbitration provision stated that “[a]ll such matters shall be decided by an arbitrator and not by a court or judge.”¹⁴³ The Court determined the above provision to be substantively unconscionable as well because it lacked meaningful negotiation and was one-sided in favor of Coinbase.¹⁴⁴

¹³⁶ *Id.* at 4-5.

¹³⁷ *Id.* at 6.

¹³⁸ *Id.*

¹³⁹ *Id.* (citing *Nyulassy v. Lockheed Martin Corp.*, 120 Cal. App. 4th 1267, 1281 (2004)).

¹⁴⁰ *Id.* at 7.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 9.

The court then turned to the issue of whether the arbitration agreement was also procedurally unconscionable.¹⁴⁵ The Court introduced their analysis with the explanation that the standard for procedural unconscionability “addresses the circumstances of contract negotiation and formation and concentration on two factors: oppression and surprise.”¹⁴⁶ Regarding the first factor, the Court determined that the arbitration agreement was oppressive because “even though a federal claim for relief can be forced into arbitration . . . the ‘right’ to arbitrate may not be further conditioned on onerous procedural preconditions, as here employed.”¹⁴⁷ The “onerous procedural preconditions” referenced by the Court referred to the provision that stated if the user does “not follow the procedures set out in this Section before filing an arbitration claim or suit . . . we shall have the right to ask the arbitrator or small claims court to dismiss your filing unless and until you complete the [formal complaint process].”¹⁴⁸

Regarding the second factor of surprise, the Court determined that the pre-arbitration formal complaint process requirement “would surprise the average consumer for this type of service.”¹⁴⁹ As a result, the Court in *Bielski* held that Coinbase’s arbitration agreement “impose[d] a burdensome and unfair pre-arbitration dispute process on users and [as a result] . . . the arbitration agreement as a whole [was] unconscionable and, hence, unenforceable.”¹⁵⁰ The proposed standard in the following section addresses the concerns of the court in *Bielski* and ensures bilaterality and fairness for both crypto exchanges and users.

¹⁴⁵ *Id.* at 8.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.*

B. The Supreme Court should adopt the proposed uniform standard for the enforceability of arbitration agreements.

To clarify the issue of enforceability and ensure fairness, the Supreme Court should adopt the proposed standard for the interpretation of a valid arbitration agreement under the FAA. This standard will be applicable for all arbitration agreements and will be easily applicable in the crypto exchange context. The following standard should be instituted by the Supreme Court: All arbitration agreements that (1) satisfy the basic requirements of a valid arbitration agreement under the FAA, (2) include express bilateral agreement of the parties to arbitrate any disputes, (3) do not require more than the submission of a user’s claim for pre-arbitration procedures, (4) provide the full user agreement and arbitration provisions at the time of the agreement in plain view, and (5) require the affirmative assent of the user through methods such as “clickwrap” or electronic signature have a rebuttable presumption of enforceability.

Each element of the proposed standard addresses issues that concern courts regarding bilaterality, conscionability, and fairness. Additionally, this standard would presume all arbitration agreements that would be valid in other contexts to be valid in the crypto context. If the rebuttable presumption is overcome under the standard, all litigation proceedings would be stayed during an appeal of an arbitral denial. If instituted, this standard would streamline disputes regarding the enforceability of arbitration agreements. Moreover, this proposed standard would clarify for crypto exchanges the terms of arbitration agreements that will be valid as part of their user agreements.

1. Satisfaction of the basic requirements of a valid arbitration agreement under the FAA.

The first element of the proposed standard requires that all the basic requirements of a valid arbitration agreement under the FAA be satisfied. For an arbitration agreement to be enforceable under the FAA, the agreement must be (1) in writing, (2) part of a valid contract, (3) clear and

unambiguous, (4) covers the disputes in question, and (5) not unconscionable.¹⁵¹ These basic requirements maintain some of the court's deference in the determination of whether a valid arbitration agreement exists. Additionally, this element of the proposed standard provides the opportunity to the user in this context to push back against the rebuttable presumption of enforceability if all other elements are met. More specifically, because arbitration agreements in this context cannot be meaningfully negotiated by users, this element allows for rebuttals regarding whether the agreement in question is conscionable.

2. Express bilateral agreement of the parties to arbitrate any disputes.

This element of the proposed standard requires express language that both parties are required to arbitrate any disputes within the scope of the agreement. Additionally, any pre-arbitration procedures within the permitted bounds of the standard must be imposed upon the crypto exchange as well. For instance, if a crypto exchange requires users to submit notice of a dispute to the crypto exchange prior to initiation of arbitration or legal action, then the crypto exchange must also notify the user of a dispute prior to the initiation of any dispute resolution actions. This element is necessary to ensure the bilaterality of both parties and ensures substantive conscionability.

3. Limited requirements for pre-arbitration procedures.

A limitation on any pre-arbitration procedures is necessary to ensure the procedural conscionability of an arbitration agreement under this standard. This element limits pre-arbitration procedures to a requirement of nothing more elaborate than an easily accessible electronic submission of a dispute. This limitation protects the interest of the user through a strong limitation on what can be required of a user for pre-arbitration procedures prior to the initiation of arbitration

¹⁵¹ 15 U.S.C. §§ 1 et seq. (2018).

or legal action. Additionally, this element also protects the interest of the crypto exchange in this context that desires notice of a user's dispute prior to the initiation of an action. Moreover, this element prevents the possibility of a crypto exchange's oppressive or surprising pre-arbitration procedure that could render an arbitration agreement unconscionable.

4. Plain view of the full user agreement and arbitration provisions.

The proper notice to a user regarding the presence of an arbitration agreement and its terms are important to ensure fairness and transparency. In the crypto context, this element would require the crypto exchange to provide the full user agreement and arbitration provisions in plain view before the user could assent to the agreement. For instance, before the user could complete the registration process with a crypto exchange's trading platform, the user agreement would have to pop up on the screen in full plain view of the user, including the arbitration provisions.

5. Affirmative assent.

The affirmative assent of both parties in an arbitration agreement is an important requirement for any valid contract. The fifth and final element of this standard would require more than the mere use of the crypto exchange to constitute assent to the user agreement. For instance, in the crypto context users would be required to assent through clickwrap or e-signature at a minimum to constitute assent to the agreement. This element will better ensure notice to the user through the requirement of physical action to assent. Lastly, this element resolves any need for courts to decide whether the arbitration agreement could be properly assented to by clickwrap. This feature ensures enforceability on part of the crypto exchanges and ensures proper notice to users prior to the completion of account registration.

C. Litigation proceedings should be stayed during the appeal of an arbitral denial.

In addition to the question of what constitutes an enforceable arbitration agreement in this context, U.S. Circuit Courts are also split on whether an appeal of a denied motion to compel arbitration automatically stays litigation proceedings in the lower court.¹⁵² Six circuits, including “the Third, Fourth, Seventh, Tenth, Eleventh, and D.C. Circuit have held that a non-frivolous appeal of the denial of a motion to compel arbitration divests the district court of jurisdiction, thereby automatically staying proceedings in the district court.”¹⁵³ Conversely, “three circuits – the Second, Fifth, and Ninth Circuit – have held that a non-frivolous appeal of the denial of a motion to compel arbitration does not divest the district court of jurisdiction, and thus a district court may proceed with litigation while the arbitrability appeal is pending.”¹⁵⁴ In addition to the clarified standard for enforceability in the crypto context, the Supreme Court should also hold in their upcoming decision in *Bielski* that litigation proceedings are automatically stayed upon the appeal of an arbitral denial.

In the determination of this issue, it is interesting to note how U.S. Circuit Courts decide the issue of whether to stay arbitration proceedings when a granted motion to compel arbitration is appealed. Regarding this issue, it seems that there is no circuit split and that most (if not all) circuits have discretion of whether to stay arbitration proceedings when a granted motion to compel arbitration is appealed. For instance, the Second and Sixth Circuits maintain the position that district courts should stay arbitration proceedings when an order granting arbitration is

¹⁵² Peter B. Rutledge & Alexis M. Watson, *Supreme Court Denies a Request for Stay in Coinbase Arbitration Dispute*, Law.com (Jan. 14, 2022), <https://www.law.com/dailyreportonline/2023/01/30/supreme-court-denies-a-request-for-stay-in-coinbase-arbitration-dispute/?slreturn=20230224200146>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

appealed.¹⁵⁵ On the other end of the spectrum, the Fifth, Ninth, and Eleventh Circuits also held that district and appellate courts have discretion as to whether or not to stay proceedings when a granted order to compel arbitration is appealed.¹⁵⁶ These referenced decisions illustrate that some circuit courts lean toward the stay of arbitration proceedings during an appeal while other lean against the stay of arbitration proceedings under certain circumstances.

Nonetheless, a decision by the Supreme Court not to stay litigation proceedings during the appeal of an arbitral denial in this context can adversely impact the arbitration industry, the court system, and the parties to crypto disputes themselves. For instance, if the Court rules against the stay of litigation proceedings in this context, then an arbitration agreement could more likely increase the crypto exchange's litigation costs because of the proceedings regarding enforceability. Additionally, even if the crypto exchange's arbitral denial is overturned by an appellate court, the proceedings that were not stayed become a purposeless sunk cost of time and funds for the parties and the court. The increased potential litigation expenses and administrative obstacles will likely cause crypto exchanges to turn away from arbitration due to uncertainty and opt for traditional litigation more often. As a result, the already congested court system will have an inflow of complex new crypto cases that specialized arbitrators may be much better equipped to handle.

The lack of adjudicators in the court system that are specialized in the complicated and technical nature of blockchain technology and digital assets will adversely affect the interests of all parties in dispute. Conversely, the only potential argument that litigation proceedings should

¹⁵⁵ Compare *Katz v. Cellco P'ship*, 794 F.3d 341 (2d Cir. 2015) (holding that district courts should stay arbitration proceedings but have ultimate discretion) with *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.3d 513 (6th Cir. 2017) (holding that the district court should stay arbitration proceedings until the appeal is decided).

¹⁵⁶ See *In re U.S. Healthcare, Inc.*, 193 F.3d 151 (5th Cir. 1999) (requiring arbitration proceedings to continue unless the appellate court stays proceedings); see also *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (holding proceedings should continue unless the district court issues a stay); *Javitch v. First Union Sec., Inc.*, 315 F.3d 619 (11th Cir. 2003) (maintaining that arbitration proceedings should continue unless the district court issues a stay under certain circumstances).

not be stayed upon an appeal of an arbitral denial would be that users who oppose arbitration will be able to continue proceedings of their claims instead of a freeze of proceedings. However, the costs and energy expended, even by the parties that prefer litigation, may become wasted funds and efforts if the appellate court decides to reverse the lower court's decision and compel arbitration. As a result, the adverse impacts of a determination not to stay proceedings in this context would far outweigh the potential benefits. Lastly, the legislative intent of the FAA to put arbitration agreements on equal footing with all other contracts and end judicial hostility toward arbitration also supports the determination to stay proceedings.¹⁵⁷

V. Conclusion.

If individuals have the freedom to contract and choose to have their disputes resolved by arbitration, then it is necessary in the interest of fairness for the Supreme Court to intervene and clarify the appropriate enforceability standard that will be more applicable in the crypto context. The uniform interpretation of the FAA standard this paper proposes for the Court to adopt is the following: All arbitration agreements in the cryptocurrency context that (1) satisfy the basic requirements of a valid arbitration agreement under the FAA, (2) include express bilateral agreement of the parties to arbitrate any disputes, (3) do not require more than the submission of a user's claim for pre-arbitration procedures, (4) provide the full user agreement and arbitration provisions at the time of the agreement in plain view, and (5) require the affirmative assent of the user through methods such as clickwrap or electronic signature have a rebuttable presumption of enforceability. This standard addresses many courts' concerns regarding conscionability and overall fairness. Additionally, this standard resolves the disparity in the enforcement of arbitration agreements in the crypto context.

¹⁵⁷ *Meyer*, 868 F.3d at 75.

Moreover, the Supreme Court should also determine in their upcoming decision in *Bielski* that litigation proceedings are automatically stayed during the appeal of a denied motion to compel arbitration. This decision will avoid the discouragement of crypto exchanges to use arbitration due to consequential litigation costs and administrative obstacles. Such a result would constitute a disservice to all parties involved in crypto disputes due to the adaptability of arbitration providers and the availability of arbitrators with specialized blockchain and digital asset knowledge. Moreover, the determination to stay proceedings would also avoid further congestion in the court system. In the modern world of globalization, adaptable and global arbitration systems are well-equipped to resolve disputes related to crypto and blockchain technology. Finally, to streamline crypto disputes and resolve the disparity in enforcement, the Supreme Court should adopt the proposed enforceability standard for arbitration agreements.