



A Blockchain Revolution

The rise of Bitcoin and
cryptocurrencies

Virtual Round Table Series
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Blockchain was the technology story of 2017, as the paradigm shift that has been gathering among developers for several years finally hit the mainstream.

News organisations have devoted much time trying to explain to the general public these new virtual concepts including cryptocurrencies, smart contracts and initial coin offerings (ICOs). Riding the crest of this wave is Bitcoin, the first cryptocurrency with mass appeal, and a name that trips off most people's tongue when this topic comes up.

While Bitcoin grabs the headlines, there is a much bigger and deeper movement taking shape which will reach into every aspect of the global economy, re-shaping the way most people and organisations think about and approach B2B and B2C interactions.

The way in which payments, transactions and record keeping are handled is set to change dramatically with two concepts central to this shift – decentralisation and transparency.

The Ethereum Foundation is a major driver behind the decentralisation movement and has changed the game further and faster than any other project so far. By creating a shared global infrastructure that it calls a blockchain app platform, it allows start-up crypto businesses to build out their operations on top of the existing

Ethereum blockchain. It also allows users to create their own coins or tokens for fundraising purposes and develop smart contracts to handle transactions.

Ethereum is the most exciting development yet in this space and has the potential to really pull blockchain technology into the mainstream proper. It is built around the tenets of secure, anonymous, tamper proof and unchangeable and has enabled a vast range of start-up businesses to threaten the existing paradigm.

Examples include Uport, which allows users to take complete control of their identity and personal information. Instead of relying on government institutions and surrendering their identities to third parties, users control who can access and use their data and personal information.

There is also Provenance, which uses Ethereum to make opaque supply chains more transparent. By tracing the origins and histories of products, the project aims to allow consumers to make informed decisions when they buy products.

The fact that this technology can be used across such a wide range of existing industries means that lawyers and other professionals need to understand how it applies to them. It is clear that smart contracts will begin to replace

traditional forms of contract in some cases, but the real question here is how the concept of 'code is law' adopted by programmers fits in with traditional contract law?

Lawyers must also consider how disputes will differ when smart contracts are involved, understand which jurisdictions they will be judged under and how decentralisation and transparency will affect contract negotiations.

Beyond that there are new entities such as the Decentralised Autonomous Organisations (DAOs) and new ways of fundraising such as Initial Coin Offerings (ICOs) and Token Generating Events (TGEs).

Professionals must understand how these work, how they will be treated by regulatory bodies and how existing legal and professional services can adapt to serve them.

The following discussion draws on the expertise of IR Global's commercial lawyers to drill down into cryptocurrency and blockchain developments in an effort to answer these questions. You will hear from ten experts in nine different jurisdictions - Switzerland, UAE, USA, Singapore, Luxembourg, Brazil, Slovakia, Germany and The Netherlands.

Enjoy.



The View from IR

Tom Wheeler

MANAGING DIRECTOR

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.



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Diego Benz studied law at the University in Zurich and was admitted to the bar as an Attorney at Law and Notary of the Canton of Zug in 2005. He has extensive experience in practising corporate, commercial and contract law. Diego also gained profound knowledge in the area of finance and accounting at the University of Lucerne (CAS). He became a partner at Zwicky Windlin & Partner on 1 January 2015.

Among different memberships, Diego is a member of SAV (Swiss Bar Association), Advokatenverein des Kantons Zug (Zug Bar Association), registered at the Cantonal Bar Register of Zug, Joint Chamber of Commerce Switzerland – CIS, British Swiss Chamber of Commerce – BSCC and Crypto Valley Association.



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Robert Koopmans has over 35 years of banking and legal experience. He has worked in various positions at ABN AMRO Bank NV and the law firm Clifford Chance LLP. He is now also linked to the Rabobank organisation (Financial Restructuring & Recovery).

He is a member of the Amsterdam Bar, the Royal Dutch Association of International Law and the Dutch Trade Law Association.

Robert studied law at Erasmus University in Rotterdam and specialised both in private and public law.

Robert founded his law office in 2005. He advises companies and private clients on various topics, including banking and finance, corporate law, labour law, real estate law, contract law, rent law and administrative law. Robert also litigates on behalf of clients, whether as plaintiff or as a defendant.

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Thomas is general manager and Partner at Paoletti Legal Consultant, a global legal services firm advising clients across the Middle East, EU and the rest of the world.

He has more than 20 years of experience in sophisticated corporate, real estate, finance and technology related matters, on all sides of a transaction.

Along with being a member of the Italian Bar of Rome, he has an active role in several organizations in UAE. He is Vice President of the Italian Business Council and the Italian Social Club of Dubai. He is also listed as a lawyer at the Italian Embassy in Abu Dhabi, Italian Consulate in Dubai and the Italian Trade Commission in Dubai.

Before moving to Dubai, Thomas was partner at Studio Legale Paoletti in Rome for more than 10 years.

Thomas received his Law degree from the University of Rome, after completing his graduation thesis as a visiting scholar at Yale Law School.



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Martim Machado is a Brazilian lawyer with over 25 years of experience representing international companies from various sectors and their Brazilian subsidiaries in connection with a variety of legal matters.

He specialises in corporate law, commercial contracts, foreign direct investments, corporate finance and M&A. Martim is a graduate (LL.B.) from the Catholic University of São Paulo Law School – PUC/SP (1994) and holds a Master of Laws degree (LL.M.) from Georgetown University Law Center in Washington, D.C. (1998).

Prior to founding CGM Advogados in September 2014, Martim was a partner at major Brazilian law firms in São Paulo, an attorney with the Legal Department of the InterAmerican Development Bank – IDB in Washington, D.C., and a foreign associate with the Latin American Practice Group at Mayer, Brown & Platt (currently, Mayer Brown) in New York, N.Y.



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Marcus is attorney-at-law and specialist for banking and capital markets. He advises in banking and capital market related litigation and arbitration as well as in financing transactions.

He is also regularly appointed as arbitrator in arbitration proceedings. Until 2006 he worked in the Litigation & Arbitration department of an international law firm, where he represented, amongst others, national and international financial institutions in complex litigation and arbitration matters.

Later he became in-house counsel and head of transaction management in an internationally active German finance group. At the end of 2009 he joined Kantenwein Zimmermann Fox Kröck & Partners.



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A graduate of UCLA and the University of the Pacific with distinction, Mr. Friedemann frequently speaks and lectures on business and banking law topics.

In 12 separate years, Mr. Friedemann has been chosen as a Super Lawyer by Super Lawyers Magazine. Super Lawyer status is given to the top 5 per cent of lawyers and is based on peer nominations, independent research, and evaluation of professional achievement. Mr. Friedemann is recognised as one of the most capable and sought-after business attorneys in Northern California.



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Benoît Duvieusart has advised major international companies on the structuring of corporate reorganisations, mergers and acquisitions, leveraged buy-outs, private equity deals and group financings.

He previously acted as Senior Associate in the Corporate Law – M&A Practice of Arendt & Medernach, a major law firm in Luxembourg.

Prior to joining the Luxembourg Bar, Benoît was General Secretary and member of the Executive Committee of a Luxembourg private bank. He has experience in investments funds, securities custody and administration and wealth structuring in one of the major Luxembourg banks.

Benoît is a member of ALFI, the Luxembourg Investment Funds Association, of ILA, the Luxembourg institute of Directors, and a founding member, and director until 2006, of the Luxembourg professional association of portfolio managers (ALGAFI).

He is an occasional lecturer at the IFBL, the Luxembourg banking education institute and holds a Master's degree in law from the Université de Louvain-la-Neuve (UCL) (Belgium) and an LL.M. from the University of Cambridge (United Kingdom).



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Joyce is a Singapore lawyer with cross-border and domestic corporate and commercial practice experience.

She has particular strengths in technology, communications, media and intellectual property-related transactions, including the establishment of new ventures and business models, financing transactions involving technology or intellectual property, private equity investments, strategic alliances and joint ventures, acquisition, disposition, exploitation and licensing of technology and intellectual property assets.

Joyce has undertaken numerous consultancy projects on the deployment and management of intellectual property as a strategic business tool.

Her telecommunication practice includes regulatory, licensing and interconnection aspects, while she also handles the prosecution of trademark, patent and design registrations and disputes-related work in the above practice areas.



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Vasil & Partners is a law firm specialising in international tax law and the formation and management of onshore and offshore companies and other structures in various jurisdictions for our clients.

We represent high net worth individuals and their families, entrepreneurs, professionals and businesses of all sizes on a discrete basis, offering comprehensive advice on matters relating to their tax affairs, business transactions and real estate with focus on cross-border issues.

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Blockchain for beginners

At the centre of the crypto-buzz is the technology known as blockchain. It is inextricably linked to cryptocurrency and is the infrastructure that innovations such as smart contracts and initial coin offerings are built upon.

So what is it exactly?

A blockchain is an incorruptible digital ledger of economic transactions that can be programmed to record not just financial transactions but virtually everything of value.

The concept of decentralisation is the defining feature of blockchain technology. A single, shared ledger accessible by all participants records each transaction. Those transactions can be virtually anything from a cryptocurrency payment to an entry in a registry or an additional clause coded into a smart contract.

This means that the blockchain is a virtual platform for many different types of business to operate, from vehicle hire to domestic energy provision, as long as there are transactions to be made and recorded.

The key is that all parties must give consensus before a transaction can be added to the blockchain. As each transaction is made it is put into a block, then those blocks are linked together in an irreversible chain.

To take the analogy of a legal document, blockchain would allow one version of the document, to be shared with all parties at all times, instead of being passed back and forth between parties for amendments. An amendment to that document would count as an irreversible transaction and all parties to the document would need to approve the amendment before it could be added as a block to the chain.

The transparency that comes with decentralisation is the competitive advantage of blockchain and is what sets it apart from other centralised platforms such as banking systems which are owned by individual corporations.

Bitcoin has created its own blockchain to allow users of their cryptocurrency to buy and spend coins, while other 'alt-coin' developers have done the same. The Swiss-based Ethereum Foundation has gone one step further and created a shared global infrastructure called a blockchain app platform.

In time private companies will develop their own blockchain systems designed to interact in a decentralised fashion with customers, suppliers and partners.

What next for cryptocurrencies?

Until recently cryptocurrencies have run parallel and separately to the real economy which is designed around existing Fiat currencies such as the US Dollar or the Euro. Now exchanges such as Californian-based Coinbase are making it easy to change real currency for cryptocurrencies, encouraging more retailers to accept cryptocurrencies as payment for goods and services.

This emerging opportunity has been seized upon by a whole new range of cryptocurrencies called 'alt-coins' including Ether, Dash, Litecoin, Gnosis and Salt to name a few. Each one has a slightly different focus (for instance Dash aims to be a privacy-centric cryptographic currency with un-linkable transactions), but each can be traded, exchanged for other currencies and used to make purchases. Some require coins to be mined by users contributing processing power to its blockchain, while others have a model that releases limited amounts of pre-mined coins.

Clearly there will be some consolidation as the market matures, but Fin-tech companies such as the Singapore-based TenX are already developing solutions to make all the various cryptocurrencies available into one universal e-wallet linked to a debit card and a real-time currency exchange.

Their goal is to make any virtual currency spendable anytime, anywhere.

QUESTION 1

Are companies and individuals able to use cryptocurrencies to buy goods and services in your jurisdiction? If so, what systems do they need to have in place?

Switzerland – Diego Benz (DB) It is possible, dependant on parties agreeing to accept crypto currencies or not. At the moment, crypto currencies are not an official currency in Switzerland. A payment with cryptocurrency does not change the qualification of the contract concluded between parties.

Switzerland has the so-called Crypto Valley in Zug, where several start-up companies have followed the Ethereum Foundation and incorporated their companies, creating jobs and maintaining close relationships with the Swiss authorities.

The Commercial Register of the Canton of Zug accepts Bitcoin and Ethereum for the nominal capital formation of a company as 'contribution in kind'. There are discussions around whether cryptocurrencies could be considered as cash contribution for incorporations, however this still is in process.

In terms of early adopters of blockchain and the wider use of cryptocurrencies, we have seen projects from Swisscom (telecoms) and IBM. Some public authorities are also considering this, with the City of Zug accepting Bitcoin and Ethereum for some fee and registration payments. They are also in the process of accepting Bitcoin for tax payments. Cryptocurrency wallets are in extensive use for transactions such as buying real estate or instructing legal services.

There are no specific regulations governing crypto transactions, since the Federal Government is very reluctant to apply existing laws. The Crypto Valley Association worked on a best practice code (<https://cryptovalley.swiss/codeofconduct/>).

USA – John Friedemann (JF) We have the headquarters of Coinbase here in Northern California, and they have more than 10 million users and are adding 300,000 more each week. They have a product called a Shift Card which

works with your Coinbase account. It is basically a Visa debit card for cryptocurrency, but there are problems with using it for transactions. You can use it to buy a cup of coffee, but there will be a capital gains tax applied, because of arcane tax laws which treat cryptocurrency as an asset and not a currency. It is not officially recognised as a currency.

Switzerland – DB Is it considered as a security or an asset?

USA – JF Just an asset but regulated as a security.

The Netherlands – Rob Koopmans / Jaap Vreugdenhil (RK/JV) The Dutch Civil Code (DCC) provides that payment of a debt has to be made in money that is commonly used at the time of payment in the place where the transaction is based.

A Dutch court has ruled recently that Bitcoin does not qualify as legal tender, however this is not compulsory law, so parties can deviate by contract in order to use cryptocurrencies. There are exemptions though, for example employees should always be paid the minimum salary in euros into a current account. Payment in cryptocurrency is regarded as a payment in kind and is in that case not allowed.

Incorporation of a limited liability company is quite easy in the Netherlands and can be quite flexible. For Dutch limited liabilities companies, a contribution is required, but there is no minimum amount and a contribution in a foreign currency is allowed. There is no provision for contribution in cryptocurrency, but if cryptocurrency is a legal tender in any country, then such a contribution would be allowed in the Netherlands. Otherwise it would be treated as contribution in kind.



Thomas Paoletti pictured at the 2017 IR 'On the Road' Conference in Singapore

The issue of value-added tax (VAT) is interesting when applied to cryptocurrency. In 2015 the European Court of Justice has ruled that article 2(1)(c) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, must be interpreted as meaning that the exchange of traditional currency for units of the 'Bitcoin' virtual currency and vice versa, constitutes the supply of services for consideration. This means that VAT (BTW in the Netherlands) may be charged for these services. It is not yet clear how this will be dealt with in practice.

Luxembourg – Benoit Duvieusart (BD) The Luxembourg regulator, the Commission de Surveillance du Secteur Financier (CSSF) has adopted the view that 'virtual' currencies can be considered to be money, since they are accepted as a means of payment for goods and services by a sufficiently large group of people.

Despite this, they are not legal tender in Luxembourg and would be considered an investment agreed between two parties.

Several companies, some of them active in the financial sector, regularly use cryptocurrencies, including Bitstamp Europe S.A., which is a Luxembourg payment institution (under the Payment Service Directive), authorised and regulated by the CSSF. It allows trading between USD and EUR currency against several cryptocurrencies such as

Bitcoin, Litecoin, Ethereum or Ripple and allows deposits and withdrawals through the European Union's Single Euro Payments Area.

SnapSwap International S.A. is another Luxembourg CSSF authorised and regulated electronic payment institution that also provides services. It allows its customers to use, hold and transact virtual currencies; while offering payment, remittance and currency exchange using blockchain and distributed ledger technology.

Thanks to the passporting system in place in the European Union, both companies may potentially offer their services in the 28 European Union member States.

There exists, in addition to these regulated entities, a certain number of projects to set-up investment vehicles, so far non-regulated, investing in cryptocurrencies. These are being closely observed by the regulator.

Only a few Luxembourg retail companies (including Amazon and Tesla) use or accept cryptocurrencies, but distributed ledger technology (DLT) is used progressively in the finance industry in the field of settlement, clearing and fund distribution. It is a substitute for the less efficient and costly market infrastructure model, currently used by transfer agents and central securities depositories (CSDs).

The DLT can facilitate and automate procedures while reducing operational inefficiencies and errors. Interactions between intermediaries are decentralised, faster, and more transparent.

Singapore – Joyce A. Tan (JT) Yes, they are able to do so, to the extent that vendors are prepared to accept cryptocurrency as a means of payment. This is not dictated by law as there are no prohibitions against paying with cryptocurrency, which, at the same time, is not legal tender either. Instead, this is driven by technology and commerce.

Currently, it is believed (from anecdotal sources) that there are around 20 to 30 retailers in Singapore, from across a large range of sectors, that accept Bitcoin as payment.

There is a buzz about the cryptocurrency ecosystem in Singapore and many Singapore companies have been used to establish cryptocurrency exchanges, launch ICOs and establish other types of crypto infrastructure like the cryptocurrency debit card (e.g. TenX)

Because these blockchain-enabled cryptocurrencies remain unregulated as a means of payment, this phenomenon seems to be happening in a dimension that has not largely permeated the physical world and physical retailers do not appear to be in a rush to accept Bitcoin as means of payment.

One early mover in the area of blockchain distributed ledger technology is the Monetary Authority of Singapore (MAS), which has an ongoing collaborative effort, called Project Ubin, to explore the uses of such technology for clearing and settlement of payments and securities. MAS has, through Project Ubin, successfully developed three different software prototypes modelling decentralised inter-bank payment and settlements with liquidity savings mechanisms.

There are also two spin-off projects leveraging the lessons from these developed prototypes. One is focused on increasing the efficiency of the fixed income securities trading and settlement cycle through distributed ledger technology (driven by the Singapore Exchange, also known as SGX). The other is focused on developing new methods to conduct cross-border payments using central bank digital currency.

The incorporation of companies with Bitcoin as capital is technically possible and will presumably be treated as capital for 'consideration other than cash' (as opposed to for 'cash').

Germany – Marcus Van Bevern (MVB) Companies are not obliged to accept payment by Bitcoin as payments generally have to be made in Euros, however, they are free to accept payment via Bitcoin or other cryptocurrencies.

Overall acceptance is still rather low in Germany, although in Berlin, there is a neighbourhood called 'Bitcoin Kiez', where more than 20 local shops and restaurants accept Bitcoins, arguing for a world with less influence by banks and less control by states. Further, various smaller e-commerce participants and a few local stores do accept Bitcoins. Big players have so far refrained from entering the world of cryptocurrencies although there are rumours that Amazon is considering it.

Some start-ups in the digital world have started to pay a part of their employees' salaries in Bitcoins. While German law demands the main part of the salary to be paid in Euros, the parties are free to agree on an additional payment in Bitcoins. Adopting the approach of payments in shares practiced by other companies in the past, German Courts found that the parties can agree on a maximum of 25 per cent of salary to be paid in Bitcoins. The employee does not have to accept Bitcoins, but may demand payment in Euros.

Bitcoins have gained traction in the corporate world, with an increasing number of hedge funds successful in trading Bitcoins due to their value explosion. More traditional investors and insurers are reluctant to trade Bitcoins, though, as they fear a bubble and the potential of fraud.

The German Federal Financial Supervisory Authority (BaFin) considers Bitcoins to be financial instruments, comparable to foreign exchange with the difference that they do not refer to a legal tender. The mere usage, sale and acquisition of Bitcoins as an instrument of payment does not require authorisation. Equally, mining Bitcoins does not, in itself, trigger an authorisation requirement. However, commercial banking and financial services provided in Bitcoins within Germany (e.g., the granting of loans in Bitcoins or the offering of payment services) would be subject to German banking supervisory law.



UAE – Thomas Paoletti (TP) The legal status of Bitcoins is not perfectly clear across the UAE territory at the moment. The beginning of 2017 was dominated by confusion.

The Central Bank of the United Arab Emirates issued a new legal framework for digital payments in the country, stating that all virtual currencies (and any transactions thereof) would be prohibited. However, soon after that, the Bank Governor himself clarified that the provision was not to be interpreted as a ban on virtual currency.

Things are changing rapidly. As of today, it is clear that, under UAE law, cryptocurrencies do not constitute legal tender and should be treated rather as precious metals, fuels and agricultural goods.

As for Dubai, some sort of regulatory intervention for Bitcoin, and more generally for blockchain technology, would not come as a surprise in the near future. In October 2016, Sheikh Hamdan Bin Mohammed Bin Rashid Al Maktoum, the Crown Prince of Dubai, announced on Twitter that Dubai's goal was to become the first government in the world to execute all of its transaction on a blockchain by 2020. More recently, the Government has announced the implementation of a State-run cryptocurrency, emCash.

Slovakia – Imrich Vasil (IV) In Slovakia there is no official plan to use cryptocurrency, and there is also no prohibition either. The official bodies are adopting a 'wait and see' approach.

The National Bank of Slovakia (NBS) has provided no clear guidance around whether they would consider regulation in the future. There is nothing substantial but cryptocurrencies are used by young e-commerce start-ups. Those companies have been unable to get an answer around whether Bitcoins can be used for the incorporation of companies.

Hopefully soon we will have more substantial information.

Brazil – Martim Machado (MM) Cryptocurrencies are not a currency as Brazilian law recognises the Real as the only form of legal tender. In the absence of a legal definition, cryptocurrencies are being treated, including for tax purposes, as an intangible asset whose value can be expressed and realised in local currency.

Generally speaking, nothing prevents companies and individuals in Brazil from using cryptocurrencies to buy goods and services. As an asset, cryptocurrencies can

be exchanged for goods and services if the parties so agree. However, the use of cryptocurrencies in transactions involving Brazilian and foreign parties is likely to run afoul of the currency exchange controls currently in place. These controls require payments for goods and services by or to non-Brazilian parties to be channelled through regulated exchange markets.

Transactions settled with cryptocurrencies are not the norm in Brazil. Cryptocurrencies cannot be used for the payment of taxes or salaries. In theory, cryptocurrencies could be used in the formation of the companies' capital, but the volatility of cryptocurrencies and the valuation issues this volatility raises may be an obstacle for such use in certain circumstances.

Cryptocurrencies in general and Bitcoins in particular are getting more popular in Brazil because of their continued appreciation vis-à-vis the Real and other fiat currencies. For that reason, they end up being used more as a financial investment than as a 'medium of exchange.' Brazilian-based exchanges are being set up in response to an increasing demand for cryptocurrencies, but the Brazilian cryptocurrencies market is still small and incipient (when compared to the stock exchange market or the foreign currency exchange market, for instance).

Despite this relative obscurity, the Brazilian Securities and Exchange Commission (CVM) has very recently banned the direct acquisition of cryptocurrencies by Brazilian investment funds because they do not qualify as financial assets. Under current regulations funds are only allowed to invest in 'financial assets'.

CVM did not rule that cryptocurrencies were unlawful per se, meaning that Brazilian investment funds can still make indirect investments in cryptocurrencies in foreign markets. This can be done via derivatives based on cryptocurrencies, or third party vehicles that invest directly in cryptocurrencies or their derivatives (as long as both are permitted to exist in such foreign markets).

QUESTION 2

Smart contracts are becoming more popular, controlling the distribution of products and services and automating payment via a cryptocurrency e-wallet once the contract has been satisfied. What are the legal implications of this in your opinion and have you dealt with any smart contracts?

Brazil – MM Unlike traditional contracts, smart contracts take the form of computer code embedded on a blockchain.

As such, they cannot be read and interpreted as traditional contracts and pose interesting challenges to practitioners and courts. Ensuring that parties entering into smart contracts are legally capable and duly authorised to do so, confirming that smart contracts truly reflect the parties' agreement, and finding efficient ways to solve disputes that may arise from smart contracts are among these challenges.

Most smart contracts are not exactly 'contracts' (the name is a bit misleading). To a greater extent, smart contracts simply enable parties to execute the terms of a contract. As such, they play a very important role, but are nothing more than performance/enforcement mechanisms that do not embody all the terms and conditions that govern the parties' relationship.

The computer code that represents smart contracts allow parties to perform obligations or enforce remedies in an automated way. However, they usually derive from a more comprehensive set of rules established by parties, which set of rules works as a framework for the smart contracts to be deployed.

Smart contracts are not yet popular in Brazil and we are not aware of cases where they have been used. They have a great potential – as the blockchain technology that supports them – but are likely to be used (at least for some time) only in particular niches that more heavily rely on technology (streaming services, IP licensing, and e-commerce). However, as the so-called internet of things

evolve and cryptocurrencies become more popular, new opportunities for smart contracts will certainly arise. It is difficult to image complex transactions taking the form of self-executing smart contracts, but more mundane, recurring transactions can be greatly benefited from them.

UAE – TP Smart contracts represent a phenomenal challenge for the modern lawyer, with broad and complex implications. With many advantages over the traditional 'analogic' contracts, in terms of certainty and costs, smart contracts have a full range of possible applications spreading over multiple industries with foreseeable success in financial services, supply chain and logistics. They are also applicable to the automatic sales of goods and services in the software industry or tracking ownership rights and managing royalty payments over intellectual works.

In a legal perspective, the impact on traditional legal concepts and doctrines is significant. General theory of contract is facing the challenge of defining contexts and conditions for a smart contract to be seen as legally binding and enforceable in court. Along the same line, distinguishing smart and traditional contracts can prove problematic. Not every contract is meant to be a smart contract and legal analysis performed by well-prepared human beings is inevitable to interpret 'flexible' concepts of common use in everyday drafting. While the technology is still in early stages, a wide-scale adoption of smart contracts is easily predictable, especially in tech innovation inclined jurisdictions like Emirates.

The Netherlands – RK/JV Dutch law is quite flexible and therefore it is well placed for being chosen as legal jurisdiction and applicable law. There is no specific definition

in Dutch law what smart contracts are. The only difference from normal contracts is the fact that smart contracts are executed electronically and automatically. The execution phase differs, but the same rules of contract apply. There are specific provisions in the Dutch Civil Code that deal with electronic proprietary rights and contracting electronically.

Electronic contracts may be used for any products and industries that see benefit in using smart contracts, provided attention is paid to the relevant provisions in the Dutch Civil Code and to provisions and regulations of the law on supervision of financial services and know your customer requirements where applicable.

Cryptocurrencies may be used in escrow arrangements, letters of credit and any contract, if the parties so agree. There is no rule that prohibits or prescribes the use of cryptocurrencies. We have seen smart contracts being used on several occasions, often by insurance companies.

USA – JF Well we only have one state out of 50 in the US that has passed a law that even defines smart contracts - that's Arizona. They have a limited definition around event driven programmes that rely on blockchain technology.

For a broader definition we can look at Tesla which is located here. They are using smart contracts to remotely alter the battery capacity of their cars. This became apparent when they sent out alterations to cars in Florida in order to allow residents to charge their batteries higher and escape the recent hurricane.

Having said that, we are not seeing a fast adoption in the USA.

Luxembourg – BD It is currently a question among Luxembourg scholars whether smart contracts are, or are not, true contracts. The majority of authors believe that smart contracts constitute a way to execute contracts, rather than the actual conclusion of an agreement among parties. Smart contracts effectively lack some of the usual and often indispensable features of civil law contracts (formation, amendments, termination, applicable law and competent jurisdictions, misinterpretations, or conflicts with public policy rules).



Benoit Duvieusart pictured at the 2017 IR 'On the Road' Conference in Singapore

A smart contract could be considered a useful tool to evidence the existence of a contract or as a means of record of titles over assets. As the underlying agreement will usually be concluded over the internet, the rules applicable to electronically concluded contracts will usually apply.

As mentioned above, in Luxembourg, smart contracts are progressively used as a mean to settle subscriptions to, or transfer of, securities. A key feature is the accurate identification of the counterparty and the efficient undertaking of KYC due diligence.

Slovakia – IV Banks and insurance companies in Slovakia are not using smart contracts. This will likely change when Bitcoins and other cryptocurrencies become regulated in the future.

Switzerland – DB Swiss doctrine considers a smart contract as a computer program / protocol executing legal duties and thus, has control over assets and so, is not a contract itself. So, a smart contract is a digital program and not a contract in the legal meaning.

The content of the legal contract is defined between the parties. A written or oral contract is concluded and the content, or rather its execution, is then programmed in code form. Swiss law does provide several protections in case the smart contract does not execute what the parties want or there is a mistake in the execution.

Smart contracts could be easily used for example in the insurance industry (severe weather, measuring the rainfall by using official data bases), transport industry, the whole logistics industry, banking and so on. As an example, a smart contract could be used to automatically pay out an insurance claim when triggered under specific rainfall parameters using data from official weather sources.

They are also very useful in commercial disputes because blockchain is an immutable shared ledger that provides visibility across an entire transaction. As an example, IBM has created IBM Global Financing that, according to IBM, reduces the time spent resolving financial disputes by 75 per cent.

Escrow accounts and letters of credit can be governed by a smart contract, as long as it is programmed to define under which conditions which party shall receive a payment.

Germany – MVB The term 'smart contract' is misleading as smart contracts do not affect the conclusion of the contract but only the exchange of the performance as stated within the contract.

For the most part, the usage of smart contracts depends on the development of the internet of things, as only contractual conditions with connection to the internet can be fulfilled by a smart contract.

If a car is integrated into the digital world it could send data regarding driving performance. If such information is passed on to insurers, insurance contracts could be 'made smart' by correlating the insurance premium with the driving performance of the driver. Another possible application of smart contracts is seen in the car leasing industry. Smart contracts could prevent a leased car from starting the engine if the lessee failed to pay a rate in time. A possible problem in the context of smart contracts based on the blockchain technology is the publicity of the blockchain which has raised doubts regarding the practicability of smart contracts for confidential matters and data protection. The energy provider RWE is working on a blockchain-based payment system for the charging of electric cars. This system is supposed to charge cars by induction at red traffic light stops, allowing the driver to pay by automatic transfer of a cryptocurrency.

One issue closely connected to smart contracts is the reversal of the contract in case of nullity, avoidance or revocation. As a transaction based on the blockchain

technology cannot be reversed, a second transaction is necessary to ensure the reversal of the contract. This second transaction must be included in the smart contract or needs otherwise be provided for if a party is entitled to avoid the contract because of a breach of contract by the other party.

Singapore – JT The technologist Nick Szabo gave a definition of smart contracts as a set of promises, specified in digital form, including protocols within which the parties perform on these promises.

Many legal issues/difficulties thereby raised are not novel in nature, but they are new nuances which the law will have to develop to address. For example, one significant question is whether code constitutes the terms of a contract. If code allows an act not originally contemplated by the parties to the contract, is it a breach?

This problem was highlighted by a decentralised autonomous organisation called 'The DAO', which raised USD150 million via a token sale in May 2016. One user was able to exploit vulnerabilities in the smart contract to divert USD55 million of Ether away from the DAO. The user's act caused great debate in the Ethereum community. Some viewed it as a breach of contract as it went against the common understanding in natural language (for example, as contained in the White Paper or on official DAO forums) as to how the DAO would operate, but seen as legitimate by others since the operator was working within the bounds of the smart contract coding. We see issues like this as the type of legal issues that laws will need to develop to address.

Also, in the context of litigation in particular, there may be difficulties with identifying the appropriate parties against whom a cause of action may arise due to the anonymity which smart contract dealings may afford its users.

We have, in our practice, seen the use of smart contracts by various clients. For example, we recently advised a client on the regulatory aspect of their ICO which utilised smart contracts in its launch of digital tokens.

QUESTION 3

How can a Blockchain system change the commercial contract process in your opinion? What are the opportunities and challenges?

UAE – TP With large scale adoption, blockchain technology could significantly reduce friction in contract conclusion. This means more and more contracts, every minute, every day on a global scale.

The Internet of Things (IoT) will contribute as well, because an increasing number of connected devices will deploy smart contracts in transactions execution. The 'traditional' contract process is likely to be impacted but it is not easy to predict how. Contracts will probably be available in templates on github-like platforms for a worldwide open source community of coders and lawyers to readapt and reuse on a case-by-case base.

The traditional role of the legal professional will probably be impacted as well, shifting from execution (drafting every single clause of the contract) towards a more strategic function. Advising the client whether to enter into a certain contract or not, considering the overall legal position of the agent and all the regulatory issues. In this new scenario some technical understanding of the technology, included perhaps some familiarity with programming languages, will be required for lawyers specialising in smart contracts, in order to assess properly any technical and legal issue and communicate efficiently with clients.

In terms of challenges, mistakes in programming might bring potentially critical issues around product liability or cybersecurity data leaks. It is a serious and concrete range of risks, as proven in the well-known Singapore DAO case mentioned earlier. Smart contract-based businesses should seek proper legal advice before offering such services.

Germany – MVB The European Union offers a public reward of five million euros for the development of sustainable applications of the blockchain technology. Examples given by the EU include a secure procedure of public elections, the tracking of commodities as well as a decentralised organisation of social networks.

Using the blockchain system for the tracking of goods and commodities is also the subject of a project promoted by IBM and Maersk. Jointly, these companies have successfully conducted a pilot test which tracked the shipping of flowers from Kenya, oranges from California and Pineapples from Columbia to Rotterdam.

The aim of the project is the construction of a global network of carriers, shipping companies, ports, and customs authorities

The accuracy of the blockchain technology in the supply chain may allow for a system which registers every transaction and, consequently, certifies a traders' trustworthiness, allowing businesses to choose their partners based on a proven track record.

It seems feasible that the simultaneous access to blockchain in combination with its (generally assumed) security against manipulations suggests that a blockchain could be used as a register. As such, it could be used to document stock market transactions or, for example, replace the land register.

Luxembourg – BD Smart contracts certainly provide a quasi-real time audible record of information that is simultaneously updated and distributed among participants. Businesses using and trusting records that are stored on shared ledgers must consider the legal basis for these records. Users of these records will need to be assured of their reliability as an authoritative source of the underlying obligations and the enforceability of those obligations.

Shared ledgers should be designed to provide these assurances under existing laws or, alternatively, statutes, and rules may need to be adjusted for enabled record keeping.

The use of blockchain technologies may substantially change the way the finance industry will operate and create a major challenge for traditional banks and systems of payments. Luxembourg has created the Luxembourg



Rob Koopmans pictured at the 2017 IR Annual Conference in Berlin

House of FinTech (LHoFT) to attract start-ups and assist them in their development and partnering with traditional banking institutions.

Switzerland – DB The blockchain speeds the whole contract process up, and gives more security and transparency. For example, IBM's truck-tracking solution is designed to monitor what is happening with the trucks in-flight, capturing the input and output weight to define available capacity, in addition to identifying which silo and person will carry the load.

The data is then correlated against external information, such as weather, humidity, temperature and the driver's data, providing a more efficient transport system and giving customers a much more accurate delivery time estimate.

Brazil – MM Blockchain technology permits parties to transact directly without the involvement of a trusted intermediary in a secured and cost-efficient environment.

The potential benefits of the technology are many and its possible uses are countless. The increased transparency, certainty and efficiency that the technology brings, coupled with the self-executing, self-enforcing nature of its smart contracts, are expected to help business tremendously. For instance, several transactions in Brazil rely on a complex system of public records maintained for different purposes by various 'trusted parties' (governmental and non-governmental entities).

The current system may address the 'trust issue' by relying on third parties, but adds bureaucracy, inefficiency and uncertainties to various processes. The use of blockchain technology may improve this system by integrating databases, increasing accuracy and security, eliminating intermediaries, and reducing costs.

Blockchain technology was overshadowed for some time by its most famous by-product: cryptocurrencies. Only recently have its many other uses become more apparent. Existing laws may sometimes represent obstacles to the adoption of blockchain-based applications, not because they ban blockchain technology expressly, but because they have set rules that were conceived under circumstances that evolved and are no longer compatible with the new possibilities that innovative technologies bring.

Singapore – JT A game-changing characteristic of blockchain distributed ledger technology is the lack of human involvement. It removes the subjective element when it comes to enforcing the contractual relationship and leads to more predictable behaviour.

There are significant opportunities for use in corporate governance and the management of legal responsibilities. It has to be remembered though that it is ultimately just a tool, not a panacea for all.

The Netherlands – RK/JV There are tremendous opportunities and challenges in blockchain systems. They create the ability to publicly register anything in the context of a contract or process without the possibility of undoing any step that occurred. That in itself will have consequences, for example if a tort or default occurred.

Blockchain technology may in due course replace services now provided by banks, notaries or by means of letters of credit. The use of funds may now also be effectively followed, where as in the past money used to be fungible and comingled with other monies in the same account or in the same wallet. Simultaneous access for all parties may be of tremendous use, but is obviously an obstacle in situations where that should not be the case.

QUESTION 4

Initial Coin Offerings (ICOs) and Decentralised Autonomous Organisation (DAO) are new forms of entity that use cryptocurrencies and exploit Blockchain technology. Have you seen this in your jurisdiction, and what are your thoughts from a legal perspective?

USA – JF It is a very interesting time to talk about ICOs in California. A short while ago the chairman of the Securities and Exchange Commission (SEC) warned that they would take action against coin offering issuers. He said they were going to have to comply fully with US securities laws, and he made the comment that he considers ICOs as a fertile ground for fraud.

Luxembourg – BD The Commission de Surveillance du Secteur Financier has very recently endorsed the position of the European Securities and Markets Authority (ESMA) regarding ICOs and the related risks for investors entering that non-regulated world.

Today, organisations that intend to launch an ICO in Luxembourg should self-assess whether they fall outside the scope of the regulation applicable to the issuance of securities, or request a negative clearance from the CSSF that will assess each case on its particular merits. A white paper containing all the necessary information for a potential token buyer may be considered and reviewed as a prospectus. It is paramount for the supervisor and the issuer to agree on the legal basis of the proposed ICO.

As such, ICO issuing platforms may well require ministerial prior authorisation and CSSF ongoing supervision, if assimilated as a professional entity of the financial sector.

The banking regulation (raising funds from the public with a view to lending) and investment fund regulation might also apply, with all the related requirements (capitalisation, governance, risk management policies, transparency and reporting, valuation, AML/FT and KYC obligations).

The US Securities and Exchange Commission (SEC) has issued a report into ICOs, concluding that they have the same characteristics as securities issuances and

are therefore subject to the same regulatory and legal regime. In response, many ICOs have begun to exclude US investors from participating.

Slovakia – IV Slovakia's approach to ICOs is cautious and conservative, maintaining that present law has to be applied to the issue of cryptocurrencies, in line with the 'what is not prohibited by law, is allowed.' mantra. Recently, one of our clients approached the regulator and, following lengthy discussions, he got the green light to proceed with setting up an ICO, subject to the valid verification of all investors.

Switzerland – DB As per end of September 2017, four out of the six largest ICOs were hosted in Switzerland.

As mentioned earlier, Crypto Valley, located in Zug in the heart of Switzerland, is uniquely positioned to make the most of the decentralized Swiss political system and its matchless business environment. This also is very friendly for ICOs.

The Swiss cantonal system with 26 semi-autonomous regions and rotating federal presidency provides a balanced framework and a real-world example of the principles that power blockchain. And even when politicians do get involved, it is in the spirit of 'consensus-building.' Zug recently hosted two of the seven Swiss Federal Councilors – Johann Schneider-Ammann (economic affairs) and Ueli Maurer (finance). Both showed an openness to learn and try to understand the complex potential of blockchain and cryptocurrencies.

Another reason is that there is a wealth of experience and technical talent in Switzerland's Crypto Valley. What started with the founding of the Ethereum Foundation in Zug, continues to grow.

The Swiss Financial Authority (FINMA) is applying the existing law on ICOs, but the way ICOs are structured from technical, functional and business standpoints, varies markedly from offering to offering.

ICOs are currently not governed by specific regulations. Swiss legislation on financial markets is principle-based; one such principle is technology neutrality. Collecting funds or issuing shares for one's own account without a platform, is unregulated from a supervisory perspective in cases where repayment is not obliged, payment instruments have not been issued and no secondary market exists.

However, due to the underlying purpose and specific characteristics of ICOs, various links to current regulatory law may exist depending on the structure of the services provided. This concerns the areas of money laundering, terrorist financing, banking law, securities trading and provisions set out in collective investment schemes.

Due to the close proximity in some areas of ICOs and token-generating events with transactions in conventional financial markets, the likelihood arises that the scope of application of at least one of the financial market laws may encompass certain types of ICO model.

Germany – MVB So far, there is no regulation on ICOs or digital tokens in general. However, the German Federal Financial Supervisory Authority (BaFin) recently explicitly warned of the substantial risk associated with the purchase of coins in ICOs as such speculative investments could, in view of BaFin, attract criminal behaviour (such as fraud).

Further, the immense volatility and the risk of an illiquid or non-existent secondary market puts investments in jeopardy. This holds particularly true as the issuing business will usually not be fully developed but in an experimental state. Further, the information provided by the issuer could be misleading (or not fully transparent) and difficult to verify. The issuer of tokens, for example, does not assume the duty of redemption and the purchaser is dependent on a secondary market in order to exchange the coins for traditional currencies.

We have seen how a hacker used a gap in a 'Smart Contract' issued by a DAO and was able to transfer cryptocurrencies in the value of USD40-60 million to his own e-wallet. In his opinion, he did not act illegally as he acted within the coded terms of the DAO. In our view, this

attitude is typical of the position adopted by many individuals and corporates in the Fin-tech sector who follow the 'code is law' approach. This approach, however, is not in compliance with German law and destroys the trust of people in smart contracts and DAOs.

Singapore – JT An Initial Coin Offering (ICO) can be deployed as a fund raising method such as in offering a cryptocurrency or digital token in exchange for fiat money or other cryptocurrencies. A Decentralised Autonomous Organisation (DAO) is a community governed in accordance with rules encoded in smart contracts, usually raising funds through an ICO.

Many Singapore-incorporated companies have been used to launch ICOs, and the Monetary Authority of Singapore (MAS) has issued a guide to Digital Token Offerings. Examples include TenX Pay which raised USD83 million in June 2017. Its ICO tokens entitled holders to a share of the entire payment volume spent through the TenX Wallet, which it was raising funds to develop. The TenX wallet enables users to spend various cryptocurrencies through their smartphone or a physical debit card at various points of acceptance online and offline.

We have seen several million dollars traded in a short period of time, and, while regulators in Singapore have initially taken a relaxed and libertarian approach, in more recent times they have begun to sit up more and caution that they will not refrain from regulating offers or issues of digital tokens if the digital tokens are capital markets products under the Securities and Futures Act (SFA).

MAS will examine the structure and characteristics of a digital token in determining if the digital token is a type of capital markets product under the SFA. This determination will therefore largely depend on the particular circumstances surrounding the launch of the digital token in question, and the terms and conditions of the same, typically contained in the White Paper relating to its launch.

The Netherlands – RK/JV Currently there is no general regulation on ICO's in the Netherlands, and legal position on digital tokens is dependent on their use. The law on financial supervision (Wft) provides that a security is a negotiable instrument or other comparable negotiable document of value. So if the token is more a (blockchain) technology, rather than an instrument or document, and is itself not tradable, the Wft does not apply.

Obviously, if a token is being considered as a negotiable instrument, it would fall within the definition of security and it will then be required to follow the elaborative regulatory rules of supervision.

The above also applies to redemption and exchange. Depending on the circumstances the redemption and/or exchange of tokens may be subject to supervision rules, even if the token is not. The gateway into and out of the normal financial system is closely monitored. Banks, solicitors, notaries and exchange offices are some of the parties who have a legal reporting and monitoring obligation with respect to suspect and abnormal transactions. Recently the Dutch supervisory authorities (AFM) issued a warning regarding serious risks associated with ICOs. The supervisory authorities are very concerned with abuse and notably warnings are issued for Ponzi schemes and investment bubbles.

ICOs are generally structured in such a way that they are not subject to supervision by the AFM. In addition, due to their unregulated status and the anonymous nature of the transactions involved, ICOs may be attractive for laundering of money obtained by criminal means. As the normal criminal rules of fraud or deceit are applicable to the use of tokens and crypto-technology, structuring an ICO should be carefully done based on qualified legal advice.

UAE – TP In UAE, on October 2017, the Financial Services Regulatory Authority (FSRA) of Abu Dhabi released a nine-page circular entitled;

‘Supplementary Guidance – Regulation of Initial Coin/Token Offerings and Virtual Currencies under the Financial Services and Markets Regulations.’

The bottom line is that ICOs will be only regulated when seen as securities. If investors have owning rights over the business, the ICO will be regulated similar to a company issuing a new stock.

The Authority will assess each ICO on a case-by-case basis. Effectively, this means an ICO needs to approach the FSRA at a very early stage to gain insight on the applicable regime. Abu Dhabi’s regulatory action is very similar to what we have seen in the U.S. under the SEC regulation and in Singapore under the MAS.

A more regulated model for ICO is to be expected by regulators especially where ICOs gain more popularity. The great focus on blockchain in UAE will probably speed

things up in the region, and, of course, the progressively increased involvement of FSRA in ICO launches will help to define when a proposed cryptocurrency transaction does or does not represent the offer or sale of securities subject to regulation.

Prudent investors are advised to study the white paper carefully before making any move. The white paper should state, among other things, the organisation’s core business and a proven business model, structure, the relevant specifics of the offering, and investor rights. The involvement of legal advisors might be regarded as a significant clue to the ICO’s legitimacy.

Brazil – MM ICOs and digital token sales made by DAOs or other entities are novelties that have not been widely used in Brazil. However, ICOs and digital token sales promoted elsewhere have been reaching the Brazilian market and getting noticed by Brazilian authorities, particularly the Brazilian Securities and Exchange Commission (CVM).

ICOs and digital token sales are very innovative and interesting ways to raise capital for projects and ventures, but may expose investors to the same risks that are associated with investments in traditional securities. Additionally, fraudsters sometimes take advantage of innovative but not-well-known technologies to perpetrate fraudulent investment schemes.

The CVM does not specifically regulate ICOs and digital token sales. However, in an October 2017 note, the CVM clarified that virtual coin or digital token offers may qualify as securities depending on the rights they confer to investors, and the facts, circumstances and economic realities of their offer or sale.

Accordingly, unless a valid registration requirement exemption applies, issuers of blockchain technology-based securities must register offers and sales of such securities (no matter how such securities are called, distributed or paid for). Furthermore, exchanges facilitating offers or sales of such securities must hold a proper authorisation to do so and those otherwise participating in unregistered offerings subject to registration will be liable for violations of securities laws.

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