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Blockchain N. 6

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LEGAL MANIFESTATIONS

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A BLOCKCHAIN SOLUTION CAN HAVE A VARIETY OF MANIFESTATIONS, SOME OF WHICH COULD HAVE A LEGAL COMPONENT.

Among many possible applications, one could use a blockchain solution to record agreements between two or more parties or to record a unilateral act under private law, for the execution and publication of a resolution subject to public law, as a single source of truth (in other words, as proof), for the execution of a legal procedure or judgement subject to different domains of law, for compliance with tax obligations or for the use of suspensive and/or dissolving solutions to legal acts

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Depending on the intention of the parties, more than one of these legal manifestations could be combined in a particular blockchain solution, for instance a blockchain solution that captures the rights of ownership and shares in a work of intellectual property, the licensing, assignment or sale thereof, including cross border royalty tax implications and limitations of use depending on the law within a particular jurisdiction or across multiple jurisdictions.

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Depending on the nature of any given transaction, blockchain users will need to consider the implications of a number of legislative instruments for instance, the Consumer Protection Act (CPA), the National Credit Act (NCA) or the Copyright Act, to name a few, when developing a blockchain and maintaining the chain to accommodate legislative amendments across various jurisdictions.

LEGAL ISSUES

Blockchain participants need to be aware of the legal ramifications of the solution they are using, including public law, private law, criminal law as well as, financial and regulatory law.

PRIVATE LAW

In the private-law domain, there are a host of legal issues to consider when using smart contracts on a blockchain. In the previous example, the issue of liability needs to be addressed if the contract has been miscoded such that it does not achieve the intent of the parties, or the oracle makes a mistake or deliberate error. In addition, the parties will need to agree on applicable law, jurisdiction, general principles of proper governance, dispute resolution, privacy and the means of digital identity.

PRIVATE LAW

Is the contract available in writing as well as code so that the parties know what they are agreeing to? Can the identity of the parties be established with sufficient certainty to render the contract valid? If these challenges are not addressed in advance, despite the parties acting in good faith they may find that they do not actually have a contract, and if problems arise they have not agreed-upon means of resolving them.

PUBLIC LAW

From a public-law perspective, there are obviously risks that permissionless blockchains are used for illegal purposes such as money-laundering or to take advantage of pseudonymous involvement to get around competition-law issues. Participants may be exposed to the “miners” who create new blocks acting irresponsibly or not acting in good faith.

PUBLIC LAW

Currently there are no specific legal remedies against corrupt miners.

Since smart contracts run on a blockchain, they cannot be manipulated after the event and, as they are self-executing, execution cannot be prevented. If the precondition is met, then the transaction is automatically executed, even if the parties have good reasons for no longer wishing that to be the case.

SOLUTIONS

As lawyers and technologists wrestle with these issues, a number of solutions are being explored. One solution is to combine permissioned and permissionless blockchains where components of the proposed transactions require some intervention by a responsible party, such as compliance with Know Your Client regulations.

SOLUTIONS

All participants in and users of blockchains and smart contracts in which personal data is exchanged are data controllers and must comply independently with all data protection requirements. All parties that run nodes in the blockchain are data processors and must comply with relevant provisions. This is more easily managed in a permissioned than a permissionless blockchain.

SOLUTIONS

Another solution is to decide what goes on the chain or in the smart contract and what is taken care of off-chain. While it is possible to include provisions as to liability, jurisdiction and other legal aspects in the smart contract. This allows no room to manoeuvre or for interpretation because it is based on conditions. A better solution may be to have a “real” contract stored off the chain, but linked to it with a hash secure value so that the parties can have confidence that the agreed version is the one being relied on by taking advantage of blockchain’s timestamping capability.

SOLUTIONS

In addition to general legal considerations, there are also industry-specific ones such as the Principles for Financial Market Infrastructures for financial services businesses, CE marking in the automotive sector and nature conservation regulations that affect the extractive industries. In some cases it may be possible to build demonstrable compliance into the blockchain while others may require an off-chain solution.

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