

PARIS ARBITRATION WEEK - BLOCKCHAIN ARBITRATION AND THE RESOLUTION OF CRYPTOCURRENCY DISPUTES: BLOCKCHAIN LAW

PROFESSOR V. GERARD (JERRY) COMIZIO

ASSOCIATE DIRECTOR, BUSINESS LAW PROGRAMS

WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

APRIL 1, 2022



- **V. Gerard (Jerry) Comizio is the associate director of the Business Law Program at AUWCL. He teaches courses on U.S. and international banking law, virtual currency law, regulation of financial institutions and U.S. business associations.**
- Professor Comizio is a leading authority on financial services regulatory, transactional, and compliance matters. He has had extensive experience in private practice representing a wide range of financial services companies, including both domestic and foreign banking organizations, non-bank financial institutions, online banking, fintech companies, virtual currency exchanges and private equity firms.
- Professor Comizio has written extensively about current issues in financial services regulation. He is the author of *International Banking Law* (West Academic 2016), one of the first major casebooks on international banking law issues. He is also the contributing author to three books on financial services issues: *Winning Legal Strategies for Banking Law*, Aspatore Books (2005); *The Bank Investor Relations Handbook, America's Community Bankers* (2003); and *The Bank Founder's Guidebook*, SNL Securities (1999).
- He also focuses on the emerging legal regulatory and policy framework governing virtual currency activities and other transformative financial technologies. He currently teaches one of the first virtual currency law courses in the country, which explores the emerging legal and regulatory framework under the corporate, securities, commodities, banking, money transmission, anti-money laundering, fintech, tax, and commercial laws governing virtual currency and block chain activities.
- Professor Comizio has written extensively on a wide range of virtual currency law issues including *Virtual Currencies: Growing Regulatory Framework and Challenges in the Emerging Fintech Ecosystem*, 21 N.C. Banking Inst. 131 (2017) <https://scholarship.law.unc.edu/ncbi/vol21/iss1/10/>, and *The cyber threat looming over virtual currencies*, *American Banker* (May 6, 2021). He is currently under contract with Wolters Kluwer, CCH Inc. to write a casebook entitled *Virtual Currency Law: The Emerging Legal and Regulatory Framework*, to be published in 2021.
- He has been featured in the *American Banker's* annual "Washington Insider's Survey of the 25 Most Influential People Involved in Financial Services Regulatory Issues." He also has regularly appeared on television, internet media, and radio discussing current financial services regulatory issues, including NPR, Fox News, Bloomberg TV, Wall Street Journal Online, Dow Jones Online and CBS radio, and has been widely quoted on financial services issues in the Wall Street Journal, New York Times, Washington Post, USA Today, Financial Times, Reuters, Bloomberg and other major newspapers and publications.
- Professor Comizio joined AUWCL from Fried Frank Shriver Harris and Jacobsen LLP, where he was a partner and chaired their banking practice. Prior to that, he was a partner and chaired the banking practice at Paul Hastings LLP, and a partner at Thacher Proffit and Wood LLP. Prior to private practice, he was for many years the deputy general counsel of the U.S. Department of the Treasury's Office of Thrift Supervision (currently the Office of the Comptroller of the Currency) and its predecessor, the Federal Home Loan Bank Board, and a senior attorney in the Division of the Corporation Finance in the U.S. Securities and Exchange Commission. In 1994, he led an interagency task force related to the U.S. Senate and House financial services committee hearings held in response to widely publicized abuses in the initial public offering market for banks. This task force was widely credited with initiating comprehensive regulatory reform of this area at both the federal and state level. He also served on numerous interagency task forces focused on transactional and regulatory matters.
- He has served as a member of the Governing Committee of the U.S. Conference on Consumer Finance Law and the Board of Advisors of the University of North Carolina Law School Center for Banking and Finance. He is also the former chairman of the Trusts and Investments Subcommittee of the American Bar Association's Banking Law committee and the Advisory Board of the George Washington Law School Center for Law Economics and Finance. He recently served as a member of the Economic Policy team's Financial Institutions subcommittee for the Biden-Harris campaign.
- Professor Comizio received his master's degree in global policy from the School of Advanced International studies, Johns Hopkins University in 2020, his LLM from the Georgetown University Law Center in 1983, his JD from the Pace University School of Law in 1980 where he was case and comments editor and his BA from Fordham University in 1977.

BLOCKCHAIN LAW

- **A. Introduction-What is a crypto blockchain?**

- A crypto blockchain is generally a public, “**decentralized [online] ledger of all transactions across a peer-to-peer network.**” Using this technology, participants can confirm transactions without a need for a central clearing authority.” *Making sense of bitcoin, cryptocurrency and blockchain, PwC*

https://www.google.com/search?q=what+is+the+blockchain+in+crypto&rlz=1C1GCEA_enUS887US887&oq=what+is+the+blockchain+&aqs=chrome.1.69i57j0i20i263i512j0i512l8.8027j0j15&sourceid=chrome&ie=UTF-8

- Why is the blockchain important?
- It is the only official ownership record of crypto transactions
- any attempts to destroy or alter the blockchain may have significant impact as crypto continues to embed itself in the US and Western economies

BLOCKCHAIN LAW

- **B. Crypto is here to stay**
- Since the advent of bitcoin in 2008 it has quickly exploded into an emerging financial ecosystem composed of an ever growing number of digital assets that are non-government backed currency.
- Today, virtual currencies have an aggregate global market cap of more than \$3.0 trillion at 11/2021 and growing
- Bitcoin boom: Over 50 million US retail crypto investors in 2022
- Gemini, Cornerstone and other studies show that almost 25 percent of U.S. consumers-50 million people will own crypto by the end of 2022; 31% of millennials (ages 18-29) invest
- It poses exciting possibilities in payment systems, money transmission, mobile payments, finance, potential increased financial inclusion, and increasing investment opportunities for both retail and corporate investors.

BLOCKCHAIN LAW

- Recent stories have trumpeted Coinbase's highly successful initial public offering, as well as investments of billions of dollars in Bitcoin by public companies such as Elon Musk's Tesla and Microstrategy.
- An increasing number of major U.S. banks are investing in the Bitcoin boom. Morgan Stanley, JPMorgan Chase, BBVA, USAA, U.S. Bancorp and State Street all have recently announced the introduction of Bitcoin-related products, services, investments and ventures
- In this light, crypto is here to stay and is gradually embedding itself in both the U.S. and global economy.
- But see other views: see, e.g., SEC's Gensler doesn't see crypto lasting long, Fox Business News (updated September 21, 2021)(referencing SEC Chairman Gensler comments at a virtual webinar hosted by the Washington Post: "he doesn't see much long-term viability for cryptocurrencies." <https://www.foxbusiness.com/markets/sec-gensler-cryptocurrencies-lasting-long>

BLOCKCHAIN LAW

- **C. BUT-Ongoing Legal, Regulatory and Law Enforcement Concerns**

- At the same time, crypto has been dogged from its inception by law enforcement and regulatory concerns-and now even national security concerns regarding its uses related to illicit activities:
- Use in narcotics trafficking, terrorism, money laundering and other illegal activities
- Online hacking and theft of crypto accounts-recent U.S. prosecution of record \$3.6 billion crypto theft from Hong Kong's Bitfinex exchange
- Ransomware-use of opaque "private coins"
- the new "quantum threat": hostile nation states developing new powerful quantum computer technology to attempt to compromise blockchain ledgers *See Comizio, The cyber threat looming over virtual currencies, American Banker (May 6, 2021)*
- Unregulated crypto trading exchanges outside the US: insider trading, manipulation, fraud and facilitating illegal activities
- Crypto is part of the discussion of policy issues related to Russia's invasion of Ukraine
- has raised national security concerns that crypto can be used to evade effective sanctions regimes through, among other things, unregulated crypto trading exchanges; interestingly enough, Ukraine government has raised crypto donations for its defense and humanitarian aid, and recently adopted laws making it permissible legal tender *See March 9, 2022 Biden Executive Order on Digital Assets (crypto raises "national security" and "global financial stability" issues)*

BLOCKCHAIN LAW

- **D. Virtual currency-government legal/regulatory responses globally**
- China: in early October 2021, the central bank of China announced that all crypto related transactions are illegal and forbid overseas crypto trading exchanges from opening accounts for its citizens: <https://fortune.com/2022/01/04/crypto-banned-china-other-countries/>.
- The Central Bank of Russia has recommended a similar ban under Russian law for all crypto activities; however, it recently announced it is moving forward with a digital ruble: <https://www.coindesk.com/policy/2022/02/16/bank-of-russia-proceeds-with-digital-ruble-renews-push-for-crypto-ban/#:~:text=The%20Bank%20of%20Russia%20plans,about%20such%20services%2C%20Forbes%20wrote.>
- On the other hand, some countries have issued their own cryptocurrencies, including **Ecuador, Senegal, Singapore, Tunisia**, though these countries will not be standing alone for long with announcements that Estonia, Japan, Vietnam, Palestine, and Sweden-and even the U.S.-are actively exploring various forms of central bank digital currencies.
- Japan has long standing national laws governing crypto activities through its New Funds Settlement Laws
- In January, The Federal Reserve Board issued for public comment Money and Payments: The U.S. Dollar in the Age of Digital Transformation, a paper described as “the first step in a public discussion between the Federal Reserve and [its] stakeholders about central bank digital currencies.”

BLOCKCHAIN LAW

- EU (European Banking Authority, UK and the FATF have also issued guidance to consumers and raised regulatory concerns, particularly on anti-money laundering and terrorist financing matters related to customer due diligence
- The U.S. has no comprehensive regulatory scheme of virtual currency regulation; rather, there is an emerging legal and regulatory framework driven by state and federal government and regulatory agencies as they determine that crypto shares characteristics found in more traditional regulated financial services, products, activities and investments.
- Examples: securities, banking, money transmission, commodities, commercial, anti-money laundering, tax, data privacy, cybersecurity and Constitutional commercial speech issues regarding Big Tech bans on crypto products and services advertising.

BLOCKCHAIN LAW

- **E. What are possible arbitration issues that could arise from crypto activities**
- **1. Arbitration clauses/agreements** related to customer account transactions with crypto currency trading exchanges similar to broker-dealer industry provisions
- Potential issues: unlike broker dealer arbitration agreements, no industry wide SROs similar to FINRA in the US, and there are no nationally licensed crypto trading exchanges-need for model agreement, but no regulatory force behind it.
- **2. Arbitration of crypto customer account hacks**-unsettled law about liability apportionment
- **3. Arbitration of blockchain “smart contracts”**-how will these contracts be viewed and interpreted-lawyer’s role may change as contracts are embedded in digital code: eliminate trust and record issues?

BLOCKCHAIN LAW

- 4. Uniform Commercial Code/UCP issues regarding collateral arrangements involving crypto collateral and arbitration of lending agreements
- **5. Commodities transactions-crypto derivatives products**-issues similar to broker-dealer account arbitration
- **6. Need for AAA rules to change/evolve** to address crypto issues? Impact on **judicial arbitration, contractual arbitration or by stipulation.**
- **7. In the near term will arbitrators understand cutting edge crypto matters,** including ever-evolving laws, regulations and issues-need for specialized training/group?
- **8. M&A activity-deals involving companies conducting crypto activities-** how will standard arbitration clauses be impacted?

The background is a gradient of blue, transitioning from a lighter shade at the top to a darker shade at the bottom. In the four corners, there are decorative white line-art patterns that resemble circuit traces or neural network connections, with small circles at the end of the lines.

QUESTIONS