

Eric: Hi, this is Eric Hess with The Encrypted Economy. This week, we have Drew Hinkes partner at K&L Gates on the podcast to talk about the limits of code deference. He is quite prolific in the digital asset space. He's one of those lawyers, he's a professor. He manages a law practice. He's active on social media and he writes very thoughtful law journal articles like his latest, The Limits of Code Deference, which I've dropped the link for into the show notes. I'll give them extra credit because 20 minutes before we were supposed to tape this podcast, my computer crashed, and he waited graciously, and he only charged me half his going rate.

So, I really appreciate that with that said, Drew manages to make this concept very understandable for anybody who's a non-lawyer, so don't be intimidated by it. And he's a professor, so he knows how to explain things. Act as a professor for a law, he also acts for MBAs. So, he knows how to speak, to business, to lawyers, to developers.

So, he has a wide-ranging appeal. And before I bring you Drew, please, this note share, share this podcast. If you enjoy it. My numbers have seen a nice. I want to see four-digit downloads. I'm not there yet, so I need your help to make that happen. With that, I hope you enjoy this podcast. And so, you can share and get me closer to that goal.

With that, I bring you Drew Hinkes.

Welcome to The Encrypted Economy, a weekly podcast featuring discussions exploring the business, laws, regulation, security, and technologies relating to digital assets and data. I am Eric Hess, founder of Hess Legal Counsel. I've spent decades representing regulated exchanges, broker-dealers, investment advisors, and all matter of FinTech companies for all things, touching electronic trading with a focus on new and developing technologies.

So, this is Eric Hess with The Encrypted Economy and I've Andrew Hinkes partner at the law firm of K&L Gates. He's also an adjunct professor for both NYU Stern and NYU law, K and L Drew's transactional regulatory and litigation practice focuses on digital assets, blockchain, smart contracts, and how these new technologies interact with existing law and regulation and impact legal relationships.

Welcome to the show before I get into that. So, thanks so much for coming on. Thanks for having. I gave it a little bit on your background, but do you want to give it a little bit more about what brought you to digital assets and your, your journey?

Andrew: Sure. Thanks so much. Again, it's great to be here.

I got involved in interested in Bitcoin in 2013 when actually a friend's younger brother started trading it. And I was a lawyer. I was working primarily in litigation at the time, and I knew very little about cryptocurrencies blockchains, but my initial impression was you got to be careful. These things are ill-defined under the law, and you want to make sure that you're not doing something that's illegal.

My friend's response was no you're missing it. This is a potentially transformative technology and really something that's up your alley. I have a technology background prior to going to law school. And so, for me, these technologies, and these systems and all the really interesting questions that they create just fit me like a hand in a perfectly shaped.

From about 2014 on, I decided that this is what I wanted to focus my legal career on. And I guess things are going well since I'm here talking to you today.

Eric: Excellent. Excellent. And I warned you about this at a time, a personal event in your life that shaped your values and world.

Andrew: Sure. So, I grew up in Miami, which is a very diverse place.

There's extreme wealth and extreme poverty. There are people from all over the world and growing up in Miami gave me a perspective and an understanding of the world. And then I went to college in the Midwest, in a community that was very different. And so, it showed me that things are different as you go to different places.

People have different experiences. Not to preconceive or judge because you never know exactly what anyone is dealing with and what challenges they're looking at the time. It gave me a lot of insight as to the different circumstances in which people can be raised in, come from. And ironically, some of those experiences are what drew me into cryptocurrency and blockchain technologies, because there are obviously some pretty material opportunities to use this technology as a democratizing force and as a leveler of various financial-economic planning.

Eric: Excellent. So, Drew and I did not have a talk before the podcast, but we figured, what could go wrong to move on to the topic of the podcast? What do you think about whether chimpanzee sanctuaries should be vaccinating the primates against COVID-19 or not?

Andrew: My opinion is that you should be asking you a doctor or a Primatologist that question. I'm just, a lawyer that tries to help people deal with some sort of a very narrow band of technical.

Eric: As good answer. Good answer. No, actually that was a levity. So, Drew wrote, an article on the limits of code deference, which he published in the Journal of Corporation Law, which talked about how you enforce the law in smart contracts at a very high level.

And I read this article very well written, and I encourage everybody to do so as well because it's a very important topic as we start to think in terms of the overall encrypted economy. And decentralized, the decentralization of projects and smart contracts. Drew, why did you choose this particular topic to write this article about?

Andrew:

So, for me, the idea of these assets and technologies becoming legally significant really solidified when I tried to understand the data. From 2016. And in my view, the Dao was really the structure, the project, the events that really showed in stark relief, how there were going to be challenges brought by the law intersecting with code.

And if you recall, the Dao was a project that did not use an incorporated form and allow token holders to vote on. The use of the property and it was a bold and audacious project pretty early on in the history of crypto and very early on in the history of the theorem that became very popular and crashed spectacularly.

When someone exploited what appears to be a defect in it, And since then the Dao and the resolution of the Dao brought forth a tremendous number of ethical issues, legal issues, economic issues. It basically previewed everything that we're still struggling within the legal world as affects these assets and these systems and these structures.

And so, notwithstanding the spectacular success and failure of the Dao. We still see folks experimenting and using decentralized technology in ways that are increasing. And an under-explored area of this is what happens. If people have disputes forget about an attack or a hack where somebody steals a whole bunch of value from third parties.

What happens if there are parties that are trying in a good-faith way to conduct their affairs, using code-driven projects and code-driven structures, and there's a bonafide dispute. It occurred to me that litigation could be really damaging. You could be a hit paralyze, a project, or it could altogether just destroy a product.

Because of the way that law imposes its will over systems. And so, looking at the Dao, thinking about the conflicts that were created there as well as some discussions that we've had that I had with a friend of ours named Gabriel Shapiro, who probably his name, if not, he himself has probably popped up on this podcast for some other podcasts involving decentralized technology.

After a few of those discussions, I came to determine that it made a lot of sense to think about if you are going to use technology to coordinate the actions of a number of parties, and to allow those parties to control property, there needed to be ways to handle disputes, a project like the Dao didn't really conceive of this.

It wasn't on their radar at the time, or they never got there so to speak but moderate. Implementations of decentralized technology in Daos have started to think about how to deal with the problem of the law. And so, I thought it made sense to look at what we learned from the Daos success and failure, as well as a few attempts to insulate and build around Daos with legal rappers to figure out how people are approaching.

This problem of code is code until the law steps in. And then the law is going essentially. Whatever the code provides, how can we address this problem? Where are there tension points? Can it, can you design around this? Can you contract around this? And if not, what does that mean? That was the basic idea of the

paper.

Eric: Great. And so, to take a step back from all that, to start off with the smart contract, let's talk about a little bit what a smart contract is. I'll let you take that one.

Andrew: Sure. So, a smart contract is a direction given to a computer. It's a piece of code that tells the software how to execute.

There has been some very creative and intriguing messaging around smart contracts as a technology. That's going to change commercial relationships, perhaps even eliminate the need for transactional lawyers. And while that's interesting to think about, and maybe one day the technology will evolve to that point, for now, you can think about smart contracts as code that can automate certain transactions. Those transactions and the execution of

the code can be part of a series of representations and agreements that could amount to a legally enforceable agreement or legal contract, but smart contracts themselves.

Are not necessarily legal contracts, they're best understood and thought of as instructions to computers.

Eric: Great. And so, when disputes occur that are related to smart contracts, whether or not they've could be contemplated as a contract in and of themselves with other things or as part of a contract, what types of disputes do they typically create and how are they different from traditional disputes?

Andrew: So, they aren't that different from traditional disputes in the sense that you're going to have a dispute over the execution of code, because some sort of expectation is not met. You expected the code to do something, and it didn't cause you harm. You might want to bring a claim against somebody else, whether it's, you're going to ask them to do something, to fix the problem, or whether you're going to run off the court file.

A piece of paper usually called a complaint or a petition for some relief and ask the court to determine whether you're entitled to that. What with smart contracts though, is that there's some additional complexity because smart contracts are generally designed to operate in certain ways. Once the terms of the contract are put into motion, they're difficult to change.

And that limits what courts can do. They can't tell the code to rewrite itself in the middle of the transaction. So, if the code takes control over digital asset and will only give up control over digital assets under a certain set of circumstances, If a court orders that the asset be turned over there, isn't really a legal person that can effectuate that.

Court order can't rewrite code. And so, as a result, you've got structural differences in the way that assets controlled by smart contracts to be handled versus assets controlled by legally addressable entities. If there's a bank, for instance, that holds some asset, a court can send an order to the bank and say, you need to turn over this asset to this receiver or trustee, for instance.

And banks are legally addressable. They are, they understand that they're subject to court orders and they will generally either respond in some meaningful way to the legal order or comply. It could be that based on the structure of smart contracts, certain types of orders cannot be complied with. And I know that there's always going to be someone that says there's always a human behind a smart contract, but ultimately that human may or may not be able to change the thing that they have.

The result is that certain remedies that are available by courts may or may not be available to be implemented against assets that are controlled by smart contracts. You might only be able to have ex-post or ex ante remedies as opposed to remedies that affect assets while they're in the process of being transacted bias.

Eric: And so, in the context of a dispute or raising a dispute, how does it differ when the dispute is the result of the code? Let's say a coding error or some unintended consequence within the code versus the representations that occur outside of the code, perhaps marketing and other collateral materials.

Andrew: Sure.

So again, you're generally going to have a legally addressable actor or legal entity. That's bringing the complaint, it's going to be a person or it's going to be an entity. And they're going to say that they expected, or they had agreed that certain things were going to occur and that they did not. If there is a representation in marketing materials that said, when you take a right, you're going to, or when a certain thing occurs, you should expect an outcome and that outcome does not occur.

Then you might have a relatively easy claim to break. It would be relatively simple to explain to a judge. I was told this was going to incur. I changed my position to my detriment, expecting that would occur, and it didn't happen. When you get into claims that are based on the way that smart contract code operates.

Now, you've got a whole different set of considerations. First who wrote the code or is responsible for it. How do you explain that those expectations were not met? Because if it's something along the lines of there was a series of nine smart contracts that were supposed to execute in a certain way in order for this transaction to occur, and I think that there was a problem in the way that the fifth one acted, which resulted in the subsequent for not acting properly, which then deprived me of some assets. It really is a question of what level of detail is necessary to state your claim in front of the court. It could be that you simply say I expected these code segments to work in a certain way and they didn't and as a result, I was deprived of some property. Did not have my expectations met. I think it's going to be up to the lawyer or the party making the claim to determine how in, in what level of detail they want to make that allegation. Certainly, it's simpler to say, I was told that you were going to drop a gallon of milk off at my house and you didn't do it.

Versus there was this intricate machine that was supposed to result in a gallon of milk being dropped off at my house. And this, this one particular segment of the code that was supposed to be.

And how does that change with code transparency? If the code is transparent to the person who's relying on it, is that enough?

So, when we talk about certain types of claims, including torts, meaning non-contract claims alleging damage. We talk about reasonable people. There's this idea that there's an average person out there that behaves in an objectively reasonable way. And a lot of tort law revolves around whether someone was acting reasonably or not.

One of the things that is going to be considered is whether a reasonable user of this system should be required to read the code and understand it. Prior to using it. It would seem to me at the moment that there is a very small population out there that can program and reasonably understand Solidity Code.

For instance, let's say we're talking about Ethereum. And so, it seems unreasonable or unlikely that a court would say in the case of a dispute. You, as the user of some smart contract platform really should have audited the code yourself to understand what you were doing before you decided that you're going to commit some commercial assets to the code.

That seems too unlikely. On the other hand, if you've got a project that says here's a Drew's magic machine, you put a dollar in, and these three things are supposed to happen. So put your dollar in. It might be enough that a reasonable person would rely upon the representations. This question, really, what you're getting at here is where is the agreements in a smart contract or a venture that's built out of smart contracts?

There's a great paper by Coney and Hoffman that talks about smart contracts as being part of a legal contracting stack. And that when you think about a smart contract, generally, there's going to be a set of representations and communications at least for smart contracts that are used by two parties to transact and that all of those representations and all those understandings together with the code and have the code operate, we will create the contract and that it's usually unlikely that any party is going to rely upon and need to audit the code.

To understand what's going to happen because it would generally be I'm going to deliver the milk at noon and you're going to pay me a dollar. Great. No problem. Oh, and we're going to use this code to, to handle certain part of what we agreed to. Okay, great. The code itself is not going to be the thing that is analyzed.

It's going to be the overall agreement or representations that were made as part of the agreement.

Eric: And what about jurisdiction? Are there unique jurisdictional issues that you encounter in a claim for smart contract?

Andrew: So, there's a button. Sure. So, there's a bunch of different types of jurisdiction.

You have to think about there's subject matter jurisdiction, which means it's the type of claim that the court can deal with. And then there's jurisdiction over the dispute as far as is the court in the right place to handle the dispute and jurisdiction over the parties. Meaning are the parties located in a place where this is the court that can actually exercise power?

Subject matter, like we talked about, you're going to have torts and you're going to have contract claims involving smart contracts. I was damaged. Cause this thing didn't work properly, which would seem like a tort claim. Or I had an agreement. We were going to use this technology to accomplish the agreement.

And one party didn't do what they were told or what they were expected to do, which would be a breach of contract. As far as jurisdiction over the dispute. Generally speaking, a dispute, a claim accrued. In a place where someone is damaged or where a transaction that was supposed to occur did not occur or occurred in a way that was defective.

If we're talking about internet blockchains, online transactions, it's hard to determine which court has jurisdiction over the internet. The, there has actually been two cases that have looked at the question of where a transaction on a blockchain occurs. One of them was the one of the Tezos matters of a federal court in California.

The other one was a co a case involving I think it was a trademark is feud actually involving something called Alibaba coin that I believe was out of the Southern district of

New York, Southern district of New York case, more or less looked at and applied to the precedent that applied to internet commerce generally and said, we've you a transaction?

Where the party accepted the transaction, which is where the human being was sitting, when they press the button on their computer. And we don't really care if the blockchain has nodes in this country or has nodes in that country because we have made this rule for, in that commerce where we've you know, we haven't really cared where the servers located.

We've really cared about where the transaction is created and course. The Tezos court looked at things a little bit. They looked at a bunch of different factors, including where the blockchain nodes were, including where the server hosting the website that was acting as the front end was and determined that they were going to think about all of those factors.

So, from a jurisdictional perspective, it probably makes sense to think about existing internet jurisdiction. With the understanding that some courts may look at additional factors, but if you are looking at where a smart contract transaction occurs, a good place to think about is where the party. But this is a lot more complicated if you're dealing with centralized ventures like that, because who is DAO?

That's an interesting question is a Dao, a legally addressable entity. Is that a legal Dao where there's an entity that's formed and the governance of that entity is conducted by people who are using smart contracts or are using digital assets as a way of participating in govern. Or is the Dao not an expressively address, legal entity, where there's a bunch of people that are using technology to signal what they want to have happen some asset that's also controlled by that technology in the case of a Dao that isn't incorporated a court might look at the facts and might decide that they're going to use gap fillers or default rules in order to look at the facts and assign them legal significance. They could say that looks like a general partnership or a joint venture which might have some very bad consequences for the people involved.

There are also some states that have created default rules for groups that don't act under illegally addressable entities. A lot of things that we think about as traditional organizations, actually, we're not generally legally addressable entities, churches, religious organizations. Sometimes don't incorporate labor unions sometimes do not actually incorporate.

They're just a loose affiliations of parties acting together. So, some states like Georgia in particular actually have civil procedure rules that talk about unincorporated entities, still being able to see would be sued and procedures to designate a representative. So, there's, there's a lot to, too.

In what looks like about a seven minute rambling monologue there. So, I'm going to be quiet here, Eric. I'll let you let you get this back on the way.

Eric: No, no, no. It's a, but it's an important point when you consider basically bringing claims against smart contracts is where it is and who the parties are.

And you even touched on a point with regards to Daos there's a lot of discussion recently about the, whether a Dao should be illegally illegal. Or, you know, traditionally in a lot of

cases, Dallas, aren't, they're just formed. But a lot of times the participants don't understand that potentially impacts their liability.

Since there's no entity to Sue now it's the individuals and it's that topic I actually want to return to after exploring some of the process components for bringing claims. So, in bringing a suit against a decentralized venture, you may not know where that venture is. You also talked about some of the complexities.

In, if you do bring a claim, how do you once the claim is brought. The various things that have to occur after that claim, whether it was a discovery hold or even things after the judgment injunctive relief, both of those scenarios involve an actor, inserting themselves into the process and undertaking those actions where in a decentralized venture, they may not exist.

You want to expand on that? The complexities of that a bit and how sometimes courts or even Daos manage those, those kinds of situations.

Andrew: Sure. So, if you want to Sue somebody, at least in the United States, you usually file something called a complaint. And the complaint lays out the legal theory and the facts that according to the plaintiff, that is the party that's asking for relief believes are necessary to explain on a broad level, why they're entitled to a judgment and to extensively recovery.

The first thing in a complaint is the name of the parties. Well, first you have the name of the court. Then you have the name of the party. So, it's Eric versus Somebody who are you suing. If you're suing a down or a venture that uses smart contracts, the first thing you got to think about is who am I suing?

If there's a Dao that is not legally incorporated, you may or may not be able to figure out exactly who you transacted with. If you used a piece of software that is functionally an appliance online, where there isn't a legally, illegal entity that stands behind. You may not know with whom you actually transact transacting.

You may not transact it with anybody at all. And that can get very complicated because if you can't name a defendant, then you can't serve them with process, which means give them something called a summons that tells them what they need to respond to the complaint in a copy of the complaints and attachments.

If you don't give somebody a summons and a copy of the complaint under us law, you cannot proceed in your case against them. So, you got to figure out who I am serving. And so if you're serving or if you want to Sue it. Unincorporated entity, you have to figure out who is the person or the entity that stands for that party.

And that's the question of who an agent is or who represents that party in the case of an unincorporated Dao where they maybe aren't using a legal entity, there are a bunch of different theories, none of which have actually been tested to my knowledge in a court case, that's been appealed. Law created, but it's basically assumed that if a bunch of people acting together without a legal entity to control some property would be considered either a joint venture or a general partnership.

Now, this conclusion has a bunch of really important implications. The first of which is everybody is the entity. Everybody is the collective. That means if you want to Sue Dao ABC, that is not incorporated, all I need to do is find any participant in that doubt entity, and serve them. And I can claim that they are, that they stand for their participants and their agents have, and they would then be representative of the Dao.

And then the burden shifts to that person to try to assert otherwise I only own the tokens. I've never voted. I don't control anything. I just bought and sold these things. There are some real questions as to who is, and is not actually representative. Imagine a Dao that requires token holders. Would anybody who holds any token, be an agent that could be sued.

Hypothetically, you could serve a crypto exchange and say, because you own tokens or you are holding tokens for third parties, you are acting on behalf of this decentralized group of people. It would be a weird outcome. I'm not sure if it would work, but literally you could hypothetically make the argument that anybody who holds the tokens, even if they're not participating actively in governance, might be someone who could be served.

Now, most of these projects, don't require participants to give name, address, phone number, social security number participate. And they generally don't geoblock participants. So, you might have a difficult time finding someone to serve. And if you can even figure out who they are, locating them and serving them because service is an in-person thing.

You generally have to physically provide somebody with a piece of paper. And get proof that you have served them. However, you only probably just need one. And if you can get that one, then that party, or that person is on the hook to respond. And that means even if they have great arguments, they probably have to spend some money to get out of that position.

And it's not entirely clear as to if that person says, I literally just bought these tokens. I don't know anything about anything. I certainly didn't have any involvement in any of these decisions. It's not clear exactly how a court would look at that

argument.

Eric: And certainly, the court wants to know ultimately that somebody, if there's an agreed party, somebody arguably needs to be liable, at least in the eyes of law.

So if you have a case where that liability has been accepted and it's a corporate thing, there's a path for that, but in the absence of that, is it a case of duck goose, and whoever manages to, you know, who doesn't get picked, they escape, but that increases the risk for the person who's your mate who remains meaning, if you're a member of a Dao and everybody's done a phenomenal job of insulating themselves against potential liability, then it really.

Seems to put the burden on the person who is least protected, in that group, because everybody else has. Yeah. Yeah.

Andrew: So, it's the bear theory. I don't have to be able to outrun a bear. I have to be able to outrun the slowest group of the slowest person in my group.

In order to be safe from the bear.

Eric: That beats my duck goose example, for sure.

So yeah, a hundred percent.

Andrew: Exactly.

Yeah. And that's one of the potential vulnerabilities involved in using a Dao that does not have legal significance, or that's not a legal entity. It, because it could become every participant for themselves. And then those participants could end up roping in the other known participants.

So, because those, if you're a JV or a general partnership, you might have. Full joint and several liability for the entire venture. So that means that there's a Dao that controls \$200 million worth of assets. And someone gets a judgment against you for unlucky unfortunate. You, they might get a judgment against you for that whole 200 million, it would be you and your context as a representative of this entity. But, maybe, maybe you're a small-time player. It may be, you don't really have much in the way of assets and you certainly don't have any ability to get to that asset. And I think that those arguments would be brought up.

Does that type of issue exist in a Dao entity on some level, meaning even under the law, Dao entity, if it's incorporated, it is protected from my ability to some extent, but a judgment against the Dao. If there are members that are known and the Dao is less known from a regulatory context, certainly a regulator could go after the participants under promotion promoter liability, or what have you.

But does that also have an implication under just, a normal lawsuit under the court system? May? Sure.

Sure. So, w one of the most important reasons to incorporate is that you are given a shield. From liability for the actions that are undertaken under the auspices or under the guise of the entity.

So, if you and I decided that we wanted to, I don't know, manufacturer yeah. Ceiling fans. And we went out and we entered into a bunch of contracts, and we bought a bunch of raw materials, and we built a factory and made ceiling fans. And then, great. It's a, the German Eric ceiling fan. Fine one day, the sudden fan falls and hits somebody and hurts them.

And we default on paying the lease on the factory and our metal supplier. We stiff the metal supply for several months. If we don't have incorporated entity, those folks can say I had to deal directly with Drew with Eric so I can go and I can recover directly against Drew and Eric.

However, if we make, E and D fan co and it's an incorporated, it. And it complies with all corporate formalities. And it's the party that enters into all of these contracts. Then in the absence of us abusing the corporate form or additional facts of us committing some sort of fraud, generally all those obligations belong to the company, not to us.

And so corporate form is an incredibly powerful thing as far as. The ability to organize and to shift risk. It's a thing that used to be at least under the English common law tradition, an

exception from the rule that only legal breathing humans were legal actors. It used to be that you had to actually get a charter from the crown in order to act under a fiction now, because it's so helpful for organizing capital and for building out the economy.

So rather incorporating an entity is pretty much, easy proforma process for all the corporate lawyers out there who are shaking their heads. At me, the entity is easy. All the corporate documents and understanding the allocation of liabilities and rights is complicated. And that's why corporate lawyers get paid well to draft things like bylaws and operating agreements, frankly.

But these are really critical risk shifting organizational techniques. And they are the reason that people, the reason that people use them is so that they can engage in commerce without taking on personal risk. So going directly to your question, if there's an LLC that enters into some transaction and, or a corporation that enters into a transaction, there's a claim to yeah.

Generally speaking, in the absence of facts involving abuse of the form or fraud, the individuals acting through that entity are generally protected from liability.

Eric: And, but in the context of a Dao, let's say that the entity itself is, you know, obviously there's no. Managing the Dao. There's no person to serve against the Dao.

Does this also raise some of the bear chasing issues where the Dao has outrun some of its identified members?

Andrew: you're talking about a legally incorporated entity with decentralized governance, or is it a group of people,

Eric: Assume that it is an illegally organized entity with decentralized governor?

Andrew: Sure. So illegally organized entity in every state that I'm aware of in the United States has to have a registered agent for service of process, whether it's an outside company or a designee the, the location and the officers, directors, or members are generally going to be public or available from the relevant state secretary of state.

So, it's not difficult to figure out who you serve and who the representatives are, whether those individuals are liable for the bad acts that led to the presumed. It's a separate question, mostly because if it's an entity you're contracting with it's the entity that is liable, unless there's an individual who is abusing the corporate form or committing fraud in some manner, generally, that's the law about when you can do what's called piercing the veil, which is avoiding the corporate form and going directly against a bad actor.

Personally, generally speaking, there needs to be something beyond the regular operation of the business in order to Pierce, to bales. Running out of money is not considered one of those things that actively deceiving people committing some other bad acts under most jurisdictions law that I'm aware of would allow you to Pierce the corporate veil.

It's not simply being a bad business.

Eric: Okay. So, in terms of forming a Dao entity in terms of trying to limit liability, because in some cases, if the Dao, I think in your article, you note that, it may not be possible for a

Dao it completely insulates itself. So, it may, they can't have terms that are so arduous that a court could look at it and say, we're not going to enforce this because it's ludicrous.

You can't completely insulate yourself against every single form of liability. We don't accept it. And maybe we should talk about that first, how, how do the courts view like in, in the, where the Dao itself is you're not out running the Dao itself is outrunning the bear and outrunning running participants.

If the Dao has been constructed in such a way that is so remote from any potential action. Is that going to be enforced by the court?

Andrew: So, in the United States, we are, our law is very flexible, and it generally allows parties that are dealing in good faith, provided that there is no overreaching duress or anything else to arrive at agreements.

And for those agreements generally to be enforceable now, just because we're allowed to agree to do something doesn't mean that we can agree to do that. If I agree to go and commit a crime, that's generally not going to be considered an enforceable agreement where if I say, you know what, Eric, I am not going to do that where you could then Sue me and say you agreed to go commit this crime.

And we have the enforceable contract. And there's other things that we can't necessarily do by agreement. A parents and a child cannot agree to vary the drivers, the driving age by private agreement a building owner and a demolition company, can't decide that they're going to demolish a house. At a time, that's at their convenience in derogation of a zoning law.

And as we've learned from some of our ICO's in the 20 17, 20 18 vintage private parties, can't put in a contract we agree that this thing we're selling, isn't a security and have that be binding on regulators. There is a very strong line of cases in the United States that says you cannot waive obligations that in years of the public benefits, you cannot waive obligations or law that are intended to protect third parties. So, you could do a lot by private agreement, but you can't wave securities laws. You can't waive the ability of a party to Sue altogether because a waiver of a, of the ability to Sue in a litigation becomes a defense or a counterclaim against the claim itself.

You would Sue saying the Dao hurt my feelings and the result with the response would be you should dismiss this because there is already a waiver of the ability to go and seek redress from the courts in this contract, where you said that you would not Sue overheard feelings in these transactions.

And then it would be up to the court to decide whether that was in fact, a complete defense to the lawsuit or not. And what's critical here is it is not something that keeps me as the guy with the hurt feelings from filing the lawsuit, from serving you or from having from you having an obligation to respond, it might be an absolute defense to any liability of my claim, but you still have to go through the motions.

You still have to deal with the paperwork. You still have to spend the money and you still have to actually assert the defense. This goes for waivers. This goes for covenants, not to Sue. This goes to release. And so, there is no way through an agreement to functionally

deprive someone of their ability to walk up to that clerk's window and file your complaint.

Unless a court has already entered, what's called a pre-filing injunction. And that is where the court says to the clerk do not accept more paperwork from Hinkes. Hinkes is not allowed to file lawsuits here. This is again, not something that you can do by a private agreement. This is something that's an extraordinary remedy, generally used against serial filers that are abusing the system or harassing somebody by using the legal system.

They're rare. They don't happen very often. And they're not something that you can do through a private agreement between two parties. So, the best agreement in the world that says you waive your ability to Sue me. You're enjoined preemptively from suing me. You've released any claims that you would have in the field.

Cannot stop somebody from filing the complaint. It simply creates defenses or perhaps counterclaims.

Eric: Trying to basically have the members or people entering into these contracts, waive the right to sue doesn't work. It certainly it itself may be subject to attack. So, I think you talked about other ways to manage that, where it limits the ability of a claimant to bring a dispute without depriving them of that fundamental ability.

Do you want to expand on the best practices that can be pursued that?

Andrew: I don't know that the industry has matured to a point where there are best practices in the sense that you would expect where best practices are tried and true ways of dealing with problems. There have been a few brave and bright people who have offered a couple strategies.

The paper that you referenced earlier, looked at the medic cartel loughs pact and looked at the allows operating agreement as to ways that folks that are trying to build. Decentralized ventures through legal entities. I've tried to address this problem and this problem of getting people to defer to the operation of the code.

Rather than Sue each other in court is what gave rise to the name of the paper, which is the Limits of Code Deference. So, we use the term code deference to describe the attempt, to get parties who are engaging in these ventures to resolve their disputes and defer to the code and not to resolve this feuds perhaps in the conventional legal system.

So, we've seen a few different strategies. We've seen folks that attempt to use waivers and use covenants, not to. Preemptively when entering into one of these ventures and we have seen, and that's a strategy that as I explained before, creates impediments increases the opportunity costs of trying to Sue and creates good defenses for the venture itself.

And so, what it does essentially is it makes it more difficult to actually get relief by Suing we've also seen ventures that attempt to create onboard dispute results. So that instead of going into somebody's, you can propose a new project. Or an action that would essentially reverse the action that you claim harmed you in some way you can also, in certain cases,

ask that the thing that Harvey would be reversed, as opposed to it'd be in the context of a new project or new proposal, some of these ventures will allow you simply to.

Take your ball and go home. You can do what sometimes is called rage, quit, or exit the venture. And then there are other ventures that sort of take the contrapositive approach, not the opposite, but the other way of thinking about it, which is everything that happens through the distributed governance is effectively thought of as an approved action of the entity.

Which means that it is prime aphasia going to be viewed as valid. And so, if somebody wants to try to avoid that, they essentially have to Sue as though the corporate secretary took the notes down wrong. They had suicide centrally for relief from what they would say was a misprint. And the argument there would be, even though everybody voted that we should change our logo to blue instead of green, the way that we voted resulted in the vote being recorded wrong.

Improperly or wrongly showed the outcome being green since we all voted for blue, but it was merely the recording of the outcome of our vote is green. The court should order that those, that re that record would be amended or reflecting, reflect the actual vote. And again, this is a fact sensitive.

Type of suit that would have to be brought. You would again be able to find a legally addressable entity to serve. And it could be that a court would have to get into some very nitty gritty issues of how do we know what everybody voted on? Where are the records of the vote? How do we know that is the system that malfunctioned and how can you prove that?

And again, none of these provisions, none of these strategies can stop somebody from suing, but they can make lawsuits difficult. They can make lawsuits expensive. And they can create defenses or in certain cases, counterclaims against the party that is suing all of which makes it less attractive to go and Sue, and there might be folks who just want to Sue because they just want to Sue.

And none of this will matter to them, but for most people that are actually interested in getting relief for some perceived wrong, all of these strategies can direct those people back to on-board resolution as a better alternate.

Eric: What are your thoughts about on chain dispute resolution, meaning like a third party on chain, third parties, like a Clara's for example, I,

Andrew: I want to stay away from specific implementations or companies, but on chain resolution could be viewed as kicking the can down the road, so to speak because it's unclear as to whether on chain resolution comports with due process.

Where even if there is an on chain dispute resolution outcome, a party couldn't Sue over that saying, I didn't get a chance to present evidence. I didn't get a chance to give testimony is to not accord, with fundamental, constitutional fairness, and therefore court ignore that nonsense. It's not binding on me.

And I want you to adjudicate my dispute according to the law. And there have been cases where parties have used alternative dispute resolution provisions, and then the court has found that those ADR provisions are illusory because. The means of dispute resolution doesn't really exist, or because it does not allow anybody to actually get relief or because the relief does not accord with due process, you're not allowed to give evidence.

You're not allowed to advocate on your own behalf. There's a rubber stamp process and says you lose a hundred percent of the time. And so, I'm not saying that any of the on chain EDRs will suffer the fate of some of these really obviously illusory, ADR systems and strategies. But my suggestion is that, unless it is something that Accords with constitutional due process, it is possible to attack.

However, these systems like the contractual dispute resolution that we mentioned before, do continue to shift the incentives, do continue to shift the burdens, and do continue to increase costs because you have to, maybe you have to go through this ADR. Then one to attack later. And then perhaps the entity can have an additional argument, which is you agree to ADR, you went through ADR, you got a resolution that you didn't like, and now you're trying to side again, breach your agreement that you made with us that said that you are going to agree to be bound to this ADR.

And so, by putting up additional roadblocks, by creating additional expense and complexity, it makes suing to get compensation or. Less attractive and makes operating within the confines of what is available on the system. More attractive.

Eric: Great. So, this was epi before we break any other points you want to raise on the limits of COVID

Andrew: there's a lot in the paper.

If anything, that I'm talking about is interesting to you or to your product or to some of the, that you're developing, I would encourage you to pull the paper and take a look. It is written for lawyers, but I think that developers would definitely find some of the arguments and some of the examples helpful, and the good news is it's academic literature.

So, it's out there for free. I encourage everybody to read it.

Eric: Yeah, no, it is an excellent paper. Now, the reason why I wanted you on to talk about it today. So, thanks so much for joining us. It was great to have

you, Andrew.

Andrew: All right, Eric. Thanks for having me. And thank you.

Eric: Before we break, where can people find out more about, about you?

Whether it's social media or whatever.

Andrew: Sure. So, I'm on Twitter and I'm pretty active on there. My handle is at propel. I also have a website. It's my name www.Andrew.pincus.com. And of course, I work for the law firm of K&L Gates. And so, you can find information without me on their website as well.

And obviously I love to interact with folks who are active in the company. I'm always trying to learn about new projects and new developments. So please feel free to be in touch.

Eric: Excellent. Thanks so much.

Andrew: Thank you.