



ELI
EUROPEAN
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Newsletter

Bringing Legal Experts Together



Inside this Issue

- 2 Cover Letter by Sir Geoffrey Vos
- 3 Spotlight Contributions by Prof Sarah Green and Prof Catherine Sharkey
- 7 Update on 2022 ELI Annual Conference
- 12 Projects and Hub and SIG Activities
- 16 ELI Representation
- 17 Other Updates

Cover Letter by Sir Geoffrey Vos, Master of the Rolls



Spotlight Contributions by Prof Sarah Green (Law Commissioner for Commercial and Common law) and Prof Catherine Sharkey (Segal Family Professor of Regulatory Law and Policy, New York University School of Law)

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Three Objectives on Blockchain Technology and Smart Contracts

By Sir Geoffrey Vos, Master of the Rolls

The widespread use of distributed ledger technologies (DLT) and smart contracts is inevitable. The growth in the adoption of blockchain applications closely tracks the uptake in internet usage. Blockchain is now where the internet was in 1995. We all know that the internet was unstoppable in 1995.

Lawyers and judges ought to have three objectives in relation to these technologies.

First and foremost, there needs to be sound legal infrastructure to allow those utilising the blockchain to operate within certain and predictable legal parameters. It is for this reason that *ELI's Principles on Blockchain Technologies, Smart Contracts and Consumer Protection* approved on 8 September 2022 are so much to be welcomed (see page 13). It was for the same reason that the UK Jurisdiction Taskforce (UKJT) published its *Legal Statement on the Status of Cryptoassets and Smart Contracts* under English law clarifying basic legal questions, but not constraining future technological developments. The UKJT is now about to issue a second legal statement clarifying whether one can validly issue and transfer equity or debt securities under English law using a system deploying DLT.

Secondly, there need to be streamlined dispute resolution processes that will encourage the technologists to choose a legal and jurisdictional basis for their dealings. They need to be able to resolve disputes that arise on-chain in a manner that is suited to the nature of the transactions they are undertaking with as little cost and delay as possible. That was the thinking behind the

UKJT's Digital Dispute Resolution Rules, which provide for arbitral or expert dispute resolution in very short periods; they allow arbitrators or experts to implement decisions directly on-chain using a private key, and for the optional anonymity of the parties. If we make it easy for legal remedies to be sought and obtained in the blockchain environment, those who espouse disintermediation will hopefully be persuaded to consider a legal foundation for their activities. Even when one is dealing in cryptoassets on-chain, the ability to vindicate legal rights is fundamental to the rule of law.

The third critical objective is for lawyers and judges to find ways to give investors confidence to embrace the use of DLT and smart contracts in mainstream industries. A dependable market that has embedded defences against cyber and crypto fraud will be needed if such confidence is to be achieved. When it is, there will be no industrial, financial or consumer sector in which it will not make sense for there to be data recording every aspect of every transaction immutably on-chain.

I will conclude by explaining why I take the side of those who argue that an entirely coded smart contract can properly be regarded as a legal contract. The real contract, I think, is not just the underlying written or oral agreement. One example will suffice. If I buy an autonomous vehicle pursuant to a traditional agreement, that agreement may provide that manufacturer will sell me data as I require it for the continuing operation on the vehicle. If I am located in Brussels and instruct my car to take

...there needs to be sound legal infrastructure to allow those utilising the blockchain to operate within certain and predictable legal parameters. It is for this reason that ELI's Principles on Blockchain Technologies, Smart Contracts and Consumer Protection ... are so much to be welcomed.

Sir Geoffrey Vos

me to Paris, the car will automatically call for the necessary data from the manufacturer so that it can do so. That data transfer and digital payment will occur pursuant to an entirely automated smart contract. But is it a real contract? In my view, it is because, if the manufacturer defaults and sends data that ends up taking me to Berlin instead of Paris, the underlying written contract would not be breached. Only the smart contract calling for data to take the car to Paris would be broken, and I could only sue for damages under that later smart contractual engagement.



Distributed Ledger Technology and Private International Law

By Prof Sarah Green, Law Commissioner for Commercial and Common law

Distributed Ledger Technology has given rise to a new generation of digital assets and a new era of transactions. In enabling the creation of digital assets that are unique, transferable and rivalrous, DLT has challenged received concepts of property and, in facilitating automated contracting, has made lawyers re-evaluate their expectations of contract law. Arguably, these are the easy parts. This new asset class (made up mostly, at the moment, of cryptographically-secured objects), poses particularly thorny problems for those trying to answer questions of private international law. The Law Commission of England and Wales has been asked to try and find answers to some of those questions. The objectives of the ELI principles: to

harmonise understanding of DLT and Smart Contracting concepts across jurisdictional boundaries, to provide guidance to lawyers in applying existing norms, to inspire future development, and to disseminate best practice, are laudable, apposite and essential. Never before has comity been so valuable a prize and yet so big an ask. The remit of the Law Commission is of course limited to reforming the law of England and Wales, but it rarely does so in a jurisdictional vacuum. Rather, it pays close heed to the notions, ideas, and experiences of other legal systems. In most cases, this is to provide comparative insight into its domestic proposals, and perhaps to learn lessons from results that have already played out elsewhere. When it comes to the analysis of private international law, however, there is more to it than this. The inherent interdependence of legal taxonomies on the global stage did not by any means begin with the emergence of DLT and blockchain technology. But its implications have become starker. This is partly because those taxonomies are, even on a domestic scale, being tested, and partly because it is not yet clear what should be done in response to the answers they provide.

The questions that private international law gives rise to in the context of emerging technology are pro-

found. In the first instance, such disputes can result in multiple issues, each with their own, distinct choice of law rule. Characterisation of an issue is therefore of central importance in any conflicts analysis, and should be conducted adopting a broad internationalist spirit. Where, for instance, an issue arising in relation to a particular transaction is characterised by a court as contractual, this will lead the court to apply the appropriate contract choice of law rule in order to determine which jurisdiction's law should govern the matter. Currently, such an inquiry can, in the absence of an express or implied choice of law by the contracting parties, give rise to questions relating to the place of characteristic contractual performance and the habitual residence or central administration of a particular party, in order to identify a factor that best connects the dispute with a territory and its system of law. These questions will not be easy to answer especially where the transactions concerned are conducted on a distributed ledger, with pseudonymous parties, and involve digital assets. Why? Because it is not obvious who, on the Bitcoin network, for example, can be said to be the party required to effect the characteristic performance of the contract. Even if one assumes that it might be possible, without undue artificiality, to describe the miners as

... DLT has challenged received concepts of property and, in facilitating automated contracting, has made lawyers re-evaluate their expectations of contract law.

Prof Sarah Green

providing services to other participants within the system, and to identify those services as characteristic of the operation of the cryptocurrency system, there are multiple miners who do not share a common habitual residence. If the purpose of the conflicts inquiry is to identify a 'real' or 'substantial' connection between an issue and a place, it is hard to see how this will work where the matter is conducted in a deliberately and expressly distributed, decentralised and remote way. As Professor Adrian Briggs astutely observes: 'If private international law is to continue to use connecting factors which select a law to be applied, a greater challenge may yet come from those new technologies which make a 'law of the place of . . .' rule seem, at least as a matter of first impression, contrived'. (Briggs, *The Conflict of Laws*, fourth edition, Clarendon Law Series, OUP, 2019, p 35).

If, on the other hand, the issue is characterised as proprietary, even deeper difficulties arise. Traditionally, proprietary questions (such as who has the superior title to an object of property rights) are answered with reference to the law of the place where the property is situated at the relevant time

(the '*lex situs*'). Many questions are yet unanswered in this context: how is the '*situs*' or location of a crypto asset to be determined? Is it where the holder of the private key is located? Is it where the participant resides or carries on business at the relevant time? If neither of these, how should the location of a cryptoasset be determined for the purposes of private international law? The International Institute for the Unification of Private Law (UNIDROIT) are examining this issue at the international level, and are beginning to explore bespoke solutions for proprietary questions in relation to cryptoassets. Even were such answers to be forthcoming, there remains the pertinent question of whether *situs* really matters in the context of assets that are dematerialised and exist on a distributed network.

It is clear that there are several layers of questions here for the Law Commission to answer. We are currently working on a Consultation Paper, to be published in mid-2023: [Conflict of Laws and Emerging Technology | Law Commission](#). We are in full listening mode, so anyone with views on this topic is very welcome to get in touch.

The objectives of the ELI principles: to harmonise understanding of DLT and Smart Contracting concepts across jurisdictional boundaries, to provide guidance to lawyers in applying existing norms, to inspire future development, and to disseminate best practice, are laudable, apposite and essential.

Prof Sarah Green

The Author

Professor Sarah Green was appointed as Law Commissioner for Commercial and Common law on 1 January 2020. She was previously Professor of Private Law at the University of Bristol. Prior to that, she was Professor of the Law of Obligations at the University of Oxford, having been a lecturer at the University of Birmingham from 2001–2010. Before embarking on her academic career, she was a software consultant at Accenture. Professor Green has written books and articles on a variety of issues including virtual currencies, blockchain issues surrounding intermediated securities, smart contracts, sale of goods law as applicable to digitised assets, negligence and wage theft.





PRODUCT

Products Liability in the Digital Age: Online Marketplaces

By Prof Catherine Sharkey, Segal Family Professor of Regulatory Law and Policy, New York University School of Law

ELI's Draft of a Revised Product Liability Directive (PLD) was approved by its Council on 5 July 2022. It aims at proposing solutions that will make the Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products fit for the digital age. The output drew, among other sources, from ELI's Guiding Principles for Updating the Product Liability Directive for the Digital Age Innovation Paper and its ELI Response to the European Commission's Public Consultation on Civil Liability. In September 2022, the European Commission published its Proposal for a Directive on adapting non contractual civil liability rules to artificial intelligence and for a Directive on liability for defective products. The ELI Team that drafted the PLD project will therefore reconvene to discuss how to respond to these two proposals. Prof Sharkey's reflections are on the PLD output.

Systems of strict product liability must address a number of novel issues in the digital era, principal among which is the extent to which online marketplaces can be held liable for defective products sold by third par-

ties on their websites. As online shopping continues to supplant in-person purchases at brick-and-mortar stores, traditional tort liability rules strain to fit an increasingly international business-to-consumer e-commerce landscape.

Recognizing the fresh problems posed to the old 20th century products liability regime by the new online platform economy, the ELI Draft of a Revised Product Liability Directive (Article 8(3)) advocates holding an online marketplace liable when it 'presents the product . . . in a way that would lead a consumer to believe that the product that is the object of the transaction is provided either by the online marketplace itself or by a trader who is acting under its authority or control[.]'¹ With this recommendation, the ELI nudges the Product Liability Directive into the digital age.

The 'consumer expectations' rationale underpinning the ELI recommendation attaches liability to entities that foster consumer reliance through their involvement in the distribution and/or sale of a product. In its earlier Guiding Principles,² the ELI cited *Bolger v Amazon.com, LLC*,³ one of a pair of California state appellate court decisions holding Amazon.com liable as a seller of defective third-party prod-

ucts. The Bolger court recognized that online marketplaces can situate themselves as the sole interlocutor between the third-party vendor and the consumer. Consumers' expectations are necessarily altered in light of the depth of online platforms' involvement in these transactions as well as the changing relationship between online platforms and third-party sellers.⁴ From the consumer's perspective, the platform, which provides the product information (and may even be identified as the seller of some, if not all, goods on the platform), processes payment, and deals with any returns or exchanges, fulfills many of the traditional functions of distributor and retailer.⁵

The rapid acceleration of online commerce not only dramatically shifts consumers' expectations, but also coincides with a technological and information revolution that affords new possibilities for product oversight and safety. A touchstone of products liability law, as it has developed in the United States, is to impose liability on those entities that are involved in creating the product and bringing it to the consumer on the view that they are best positioned to prevent against defective products entering the marketplace in the first instance and to internalize the costs of defects

when they occur. Strict liability soon expanded from manufacturers to retailers precisely because ‘the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer’s strict liability thus serves as an added incentive to safety.’⁶

This same deterrence-based, prevention-of-harms rationale was invoked in *Bolger*: ‘The strict liability doctrine derives from judicially perceived public policy considerations, ie, enhancing product safety, maximizing protection to the injured plaintiff, and apportioning costs among the defendants.’⁷ And it was elaborated upon in a more recent 2021 California State appellate court decision, *Loomis v Amazon.com LLC*: ‘[J]ust as a conventional retailer, Amazon can use its power as a gatekeeper between an

upstream supplier and the consumer to exert pressure on those upstream suppliers. . . to enhance safety.’⁸ Strict tort products liability, the court continued, ‘will inspire Amazon to align its ingenuity with efficient customer safety,’ given that ‘[o]nce Amazon is convinced it will be holding the bag on these accidents, this motivation will prompt it to engineer effective ways to minimize these accident costs.’⁹

Holding online platforms liable ‘beautifully illustrates the deep structure of modern tort law: a judicial quest to minimize the social costs of accidents—that is, the sum of the costs of accidents and the cost of avoiding accidents.’¹⁰ The imposition of liability on online platforms on grounds of their superior ability to prevent harms from newly emergent risks, ie, their status as ‘cheapest cost avoiders,’ re-

veals courts’ efforts to vindicate the regulatory needs of society by pinning responsibility on the entities in the best position to have readily reduced harms arising from the emergence of excessive risks.¹¹

‘[T]he ELI Draft of a Revised Product Liability Directive (Article 8(3)) ... nudges the Product Liability Directive into the digital age.

Prof Catherine Sharkey

The Author



Prof Catherine Sharkey is a leading authority on artificial intelligence in federal administrative agencies, public nuisance, punitive damages, and federal preemption. She has published widely in the fields of torts, business torts, products liability, administrative law, and remedies. Sharkey is co-author of *Cases and Materials on Torts* (12th edn 2020) (with Richard Epstein) and an adviser to the *Restatement Third, Torts: Liability for Economic Harm and Restatement Third, Torts: Remedies*. She was a 2011–2012 Guggenheim Fellow. Sharkey received her BA in economics summa cum laude from Yale University. A Rhodes Scholar, she received an MSc in economics for development, with distinction, from Oxford University, and her JD from Yale Law School, where she was Executive Editor of the Yale Law Journal. Sharkey served as a law clerk to Judge Guido Calabresi of the US Court of Appeals for the Second Circuit and Justice David H Souter of the US Supreme Court.

¹ European Law Institute, ELI Draft of a Revised Product Liability Directive (Draft Legislative Proposal of the European Law Institute, 2022) <https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Draft_of_a_Revised_Product_Liability_Directive.pdf>.

² European Law Institute, Guiding Principles for Updating the Product Liability Directive for the Digital Age (ELI Innovation Paper Series, 2021) <https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_PLD_for_the_Digital_Age.pdf>.

³ 267 Cal Rptr 3d 601 (2020), review denied (Nov 18, 2020).

⁴ *Bolger*, 267 Cal Rptr 3d at 605.

⁵ See Catherine M Sharkey, *Holding Amazon Liable as a Seller of Defective Goods: A Convergence of Cultural and Economic Perspectives*, 115 Nw L Rev 339 (2020).

⁶ *Vandermark v Ford Motor Co*, 391 P 2d 168, 171–72 (1964).

⁷ *Bolger*, 267 Cal Rptr 3d at 613.

⁸ *Loomis v Amazon.com LLC*, 277 Cal Rptr 3d 769, 784 (Ct App 2021) (quoting *Bolger*, 267 Cal Rptr 3d at 618).

⁹ *Id* at 786 (Wiley, J, concurring).

¹⁰ *Id* at 787 (Wiley, J, concurring).

¹¹ See Catherine M Sharkey, *Products Liability in the Digital Age: Online Platforms as ‘Cheapest Cost Avoiders’*, 73 Hastings LJ 1327, 1338 (2022).

Update on 2022 ELI Annual Conference

ELI is pleased to have welcomed over 200 guests to its 2022 ELI Annual Conference and Meetings at Universidad Carlos III de Madrid and to have secured over 200 registrants online.



Welcome Addresses

Participants of the 2022 ELI Annual Conference were welcomed by the Rector of Universidad Carlos III de Madrid, Juan Romo, and ELI President, Pascal Pichonnaz, in Madrid (Spain) on 5 September 2022.



Ole Lando Memoriam Lecture

On 5 September 2022, the Fourth Ole Lando Memorial Lecture took place. This year's speaker was Christina Ramberg (Professor, University of Stockholm), who delivered a speech on 'The Interaction Between Soft Law and Case Law – How Precedents Fulfill Ole Lando's Ambitions to Harmonise European Contract Law'.

Attendees and viewers also heard from friends and colleagues of Ole Lando who had sent in video messages on their memories of him. You can watch the Ole Lando Memorial video [here](#).



Keynote Speech by Valérie Masson-Delmotte

ELI is pleased to have secured Dr Masson-Delmotte, Co-Chair of the UN Intergovernmental Panel on Climate Change, to deliver the keynote on Climate Change.



In her keynote speech of 6 September, Dr Masson-Delmotte provided insights into the [Sixth](#) Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), the United Nations body that assesses the science relating to climate change.

Among other things, she noted that climate change is already affecting every region on Earth in multiple ways and that the changes we experience will increase with further warming. She then added that to limit global warming, strong, rapid,

and sustained reductions in CO₂ and other greenhouse gases and achieving at least net zero CO₂ emissions is required. There are options available now in every sector that can at least halve emissions by 2030: energy, land use, industry, urban, buildings, transport. The next few years will be critical and mitigation options should be put in place, including strategies to support low carbon lifestyles. Dr Masson-Delmotte underlined that the intensity of climate and related risks we will experience in the future will depend on our action today.

Panels on ELI Projects

Four days of the 2022 ELI Annual Conference provided ample opportunities to present and discuss progress in current ELI projects. The 2022 ELI Annual Conference Brochure is available [here](#).

The **Climate Justice – New Challenges for Law and Judges** panellists discussed the difficulties experienced in climate litigation, focusing on the liability of both corporations and States for unlawful actions and wrongful conduct. Read more [here](#).



Aneta Wiewiórowska-Domagalska
Chair



Henrik Andersen
Project Co-Reporter



Matthias Keller



Angel Manuel
Moreno Molina

The **Ecocide** reporters explained that the aims of the project are to support political and legal action which seeks to impose an EU-wide, trans-boundary crime to prevent damage to ecosystem(s). Read more [here](#).



Aneta Wiewiórowska-Domagalska
Chair



Fausto Pocar
Project Co-Reporter



Anaïs Berthier



Rodrigo Lledó



Antonius Manders

The **ELI-Mount Scopus European Standards of Judicial Independence** panellists discussed the importance of striking a balance between broad universal and specific rules, in the context of the selection criteria of judges. Read more [here](#).



Lord John Thomas
Chair



Sophie Turenne
Project Co-Reporter



Carolyn Hammer



Pablo Olivares
Martínez



Raffaele Sabato

The **Admissibility of E-Evidence in Criminal Proceedings in the EU** panel discussed the Project Team's draft legislative proposal and underlined that increasing cross-border criminality, as well as the risk of evidence laundering, called for the development of minimal standards regarding the admissibility of e-evidence in the EU. Read more [here](#).



Anne Birgitte
Gammeljord
Chair



Lorena Bachmaier
Winter
Project Co-Reporter



Silvia Allegrezza



Pedro Pérez
Enciso



Tania Schröter

The **Access to Digital Assets – Enforcement** panel looked at the Project Team's work, focusing on its proposed structure. Read more [here](#).



Teresa Rodríguez
de las Heras Ballell
Chair



Sjef van Erp
Project Co-Reporter



Louise Gullifer



Daria Rutecka



Dovile Satkauskiene

The Chair of the **Blockchain Technology and Smart Contracts** panel announced the results of the ELI Membership vote on the project, which was approved by an overwhelming majority. The panel discussed innovative aspects of the ELI Principles and their potential impact in this area. Read more [here](#).



Pietro Sirena
Chair



Sjef van Erp
Project Co-Reporter



Martin Hanzl
Project Co-Reporter



Raffaele Battaglini



Fabian Reinisch



Dirk Staudenmayer

The **Guiding Principles and Model Rules on Algorithmic Contracts** panel discussed the Project Team's work on (future) use cases and scenarios in the context of algorithmic contracts and consumer law. Among other things, external panellists underlined the need for such principles in the European legal community. Read more [here](#).



Teresa Rodríguez
de las Heras Ballell
Chair



Christoph Busch
Project Co-Reporter



Giusella Finocchiaro



Maria Peltoniemi

The **Fundamental Constitutional Principles** panel discussed the developments in the project. Among other things, the Reporter highlighted the fact that the Principles are not intended to replicate the drafting of a treaty or constitution, but to define some common values. Read more [here](#).



Pascal Pichonnaz
Chair



Takis Tridimas
Project Co-Reporter



Ralph Kaessner



Pauliine Koskelo



Katarzyna Sękowska-
Kozłowska

The **Guidance on Company Capital and Financial Accounting for Corporate Sustainability** panel focused on the project's output, which was approved by the ELI Council, as well as recent developments in the field. Read more [here](#).



Anne Birgitte
Gammeljord
Chair



Yuri Biondi
Project Co-Reporter



Colin Haslam
Project Co-Reporter



Corrado Malberti
Project Co-Reporter



Sven Gentner



Kerstin Lopatta

The **Third Party Funding of Litigation** panel discussed the importance of developing regulation in the field as well as the potential impact of the ELI project. Read more [here](#).



Lord John Thomas
Chair



Dame Sara
Cockerill
Project Co-Reporter



Elena D'Alessandro



Dina Komor



Rita Simon



Helena Soletto
Muñoz

2022 ELI Hub and SIG of the Year Awards

For the fourth time since the launch of the above awards, prizes were given in recognition of the contributions Hubs and SIGs make to ELI. The winners of the 2022 awards were the Austrian Hub, the Croatian Hub and the Environmental Law SIG.

The Austrian Hub is chaired Susanne Augenhöfer (Professor, University of Innsbruck), Walter Doralt (Professor, University of Graz) and Christian Koller (Professor, University of Vienna). In the preceding year, the Hub organised several webinars focusing on various topics from contracts to dispute resolution.

The Croatian Hub is chaired by Zoran Hačić (Attorney at Law/Managing Partner, Hačić & Bošnjak Law Firm, Zagreb), Emilia Mišćenić (Associate Professor and Chair of the Department of International and European Private Law, Faculty of Law of the University

of Rijeka), Hrvoje Pauković (Managing Director of the Insurance Association of Croatia) and Ivan Tot (Assistant Professor at the University of Zagreb, Faculty of Economics and Business, Department of Law). It organised a series of successful monthly webinars, targeted at the wider Croatian legal community. The Hub has won the award for the second time in a row.

The Environmental Law SIG is chaired by Alberto De Franceschi (Professor of Private Law, Chair of Private Law, Intellectual Property Rights and Environmental Law, Department of Economics and Management, Uni-

versity of Ferrara) and William Boyd (Michael J Klein Chair and Professor of Law, UCLA School of Law; Professor, UCLA Institute of the Environment & Sustainability). The SIG organised a number of successful seminars and webinars which attracted a lot of attention. The SIG has also won this award for the second time in a row.

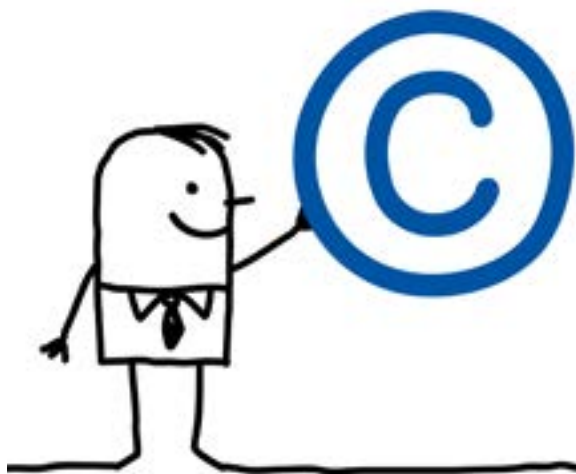
ELI congratulates the winners and thanks the Chairs and members of the Hubs and the SIG for setting such examples. ELI wishes to extend its gratitude to all the other ELI Hubs and SIGs that organised several events throughout the year.



ELI Members and Friends at the Gala Dinner in Palacio de Santoña on 7 September 2022.

Extract from the 2022 ELI Young Lawyers Award Winning Paper 'The Lost Philosophy of Copyright'

Tea Mustač (University of Rijeka, Faculty of Law) won the 2022 ELI YLA. She gave a presentation of the paper, an extract of which is available below, at the Evening Reception on 6 September 2022. The full version can be read [here](#).



Creative expressions are of great value to society. They inspire, lead to progress, and have an undeniable potential for bringing humanity together. For these reasons, it is essential to protect those who are able to accomplish such great things by simply expressing themselves. Not merely to incentivise them to contribute to human progress, but also to cherish and protect the personal connection they have with their work, to acknowledge the time, energy, and creativity they invested to produce the work in the first place. Copyright is the single most important instrument to achieve this. However, as science and technology have progressed, our copyright rules and principles needed to as well. Yet somewhere along the way, we seem to have forgotten what is worthy of protection and the reason for it being so important. We have effectively shifted the spotlight to the economic worth of a particular work and the material interests associated with its distribution, rather than on the personality of the author who produced it. Furthermore, when

trying to re-establish the balance between the involved parties, authors, consumers and publishers, the interest of the audience for whom the works are created were neglected. The new rules have, at least to a certain extent, mandated algorithmic content moderation to deal with potential infringements as fast as possible even if their efficient decision-making leaves the author unrecognized or a protected legitimate use of a work blocked.

Furthermore, it is crucial to keep in mind that, in the age of the Internet, publishing and distribution are possible at almost zero marginal cost and instead of using the Internet's ability to provide easy, world-wide access to works as an excuse for implementing strict rules of algorithmic control, this calls for a change of perspective. Our primary concern should be to protect the honour, reputation, and personality of authors and the integrity of their works. Once this protection is granted, we need to (re)establish balance with the public interest. People were

always free to use their copies of works (for legitimate purposes) as long as such use was not commercial and the reputation of the author was not affected – these principles cannot and should not change in the age of the Internet.

To conclude, considering the speed at which technology is evolving and the many different interests that require attention, such a loss of path can be forgiven but only if we acknowledge the error of our ways and change course. A continuous persistence of the claim that (newly) implemented rules achieve balance neither helps us move forward, nor makes the rules fair. The European Union once again has the opportunity to lead the world into the future of copyright, to use the modern technology for finding middle grounds instead of relying on algorithmic content moderation to provide quick solutions that satisfy neither side. One can only hope that the EU will seize the occasion and strive relentlessly towards finding a balance, wherever it may be and whatever it may mean.

Updates on ELI Projects and Other Initiatives

The following events took place in September and October 2022.

Guiding Principles on Implementing Workers' Right to Disconnect

Project Team Meeting

On 6 September 2022, the Team of the above project convened online for a kick-off meeting. Read more [here](#).

Guiding Principles and Model Rules on Algorithmic Contracts

Project Team Meeting

On 7 September 2022, the Project Team and Assessors held a hybrid meeting in the framework of the ELI Annual Conference. Read more [here](#).

Ecocide

PT, AC and MCC Meeting

On 13 September 2022, Co-Reporters of the project, met the Project Team (PT), Advisory Committee (AC) and Members Consultative Committee (MCC). Read more [here](#).

ELI's Prospective Project on Biometric Techniques

FRA Interview

On 14 September 2022, ELI's Scientific Director was interviewed in relation to a FRA project on Remote Biometric Identification (RBI). Read more [here](#).

Cross-Border Protection of Vulnerable Adults in the European Union

European Commission Study

On 14 September 2022, Richard Frimston, Co-Reporter of the above project, participated in a study commissioned by DG JUST of the EC. Read more [here](#).

ELI Cited by the Advocate General of the Court of Justice of the European Union

ELI Work Cited

On 15 September 2022, Advocate General Medina endorsed the provision on Force Majeure and Hardship in the ELI's Principles for the Covid-19 Crisis. Read more [here](#).

Admissibility of E-Evidence in Criminal Proceedings in the EU

PT, AC and MCC Meeting

On 27 September 2022, the Project Team (PT), Advisory Committee (AC) and Members Consultative Committee (MCC) of the above ELI met remotely. Read more [here](#).

Admissibility of E-Evidence in Criminal Proceedings in the EU

Promotion

On 29 September 2022, the above ELI project was presented by ELI Member, Aleš Zalar, at a training for judges and prosecutors, in Skopje. Read more [here](#).

Cross-Border Protection of Vulnerable Adults in the European Union

European Commission Meeting

On 29 September 2022, ELI experts participated in the Commission's Stakeholder Meeting on the Cross-Border Protection of Adults. Read more [here](#).

Join an MCC

ELI Members are invited to join one or more MCCs of the following [projects](#). The level of involvement in the MCC is not predetermined and, thus, it is for each MCC member to decide how much time to devote to it. Typically, Project Reporters will submit drafts to the MCC at least twice per year, ahead of the ELI Council meetings in February and September, and invite comments. You can register your interest to join the MCC by sending a message to [ELI Secretariat](#).

Third Party Funding of Litigation Project

AC Meeting

On 19 October 2022, the Reporters and Research Assistants of the above ELI project met the Advisory Committee for the first time. Read more [here](#).

ELI Reform of the Product Liability Directive

Team Meeting

On 25 October 2022, ELI's Team reconvened to discuss the drafts of the above project and to consider how to provide feedback on the Commission's proposals. More [here](#).

Updates on ELI Projects and Other Initiatives

ELI Approves ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection on 8 September 2022.

Distributed Ledger Technology (DLT, of which blockchain is an example) and smart contracts are technologies that have a huge potential to fundamentally change many areas of private law transactions. Ambiguities in this field, however, are slowing down the use of such technologies as most commercial parties in the blockchain field (from startups to banks) do not wish to risk non-compliance with applicable laws in this borderless field. The ELI Principles plug lacunae of legal uncertainty on the legal nature, status and consequences of using blockchains and smart contracts.

Whereas a blockchain is data, essentially, stored in blocks and organised in an append-only sequential chain, a smart contract is a computer programme that, upon the occurrence of pre-defined conditions, runs automatically and executes pre-defined actions according to the terms of a contract or an agreement. By one account, the global smart contracts market size is projected to reach EUR 1,5 billion by 2028, from EUR 308 million in 2021.

Clarification is also needed as to the rights of consumers when a transaction is concluded by using a blockchain or a smart contract. European Union law already strengthens the position of consumers, as they lack both bargaining power as well as knowledge and expertise in their dealings with businesses. For consumers, the functioning of blockchains and smart contracts is like a black box, which makes their position even more precarious. The Principles, therefore, also aim to spell out how consumer protection, as developed for more traditional transactions, functions in a coded environment, thus also making clear

to businesses how consumer rights function when they use blockchains and smart contracts.

Sjef van Erp, the Project's Chair and Co-Reporter explained: 'In this project we, first, wanted to clarify the legal consequences of transactions on a blockchain, more particularly the use of smart contracts (self-executing computer programmes). Following our conclusion that such a transaction could be legally relevant, we then focussed on the position of consumers whenever a smart contract would be used. How could consumers be given the same protection as they were entitled to if no such smart contract had been used?

A Use-Case-Approach (ie a descriptive and up-close exploratory examination of how a blockchain could function in a real-world context) was adopted at the commencement of the project to comprehend how blockchains and smart contracts might be used in practice. However, rapid developments led the team to focus more on the legal aspects of blockchains and smart contracts, both in a commercial and, at the European Commission's suggestion, consumer settings and to develop corresponding theories, which should ultimately result in Principles. Before theories were formulated as Principles they were tested against known use-cases to ensure their practicability.

The Principles elaborated by the Team follow an approach which is aimed at being both functionally equivalent to existing law and technologically neutral. To deal with the existing legal divergence in and outside Europe, the Principles are drafted in functionalist terms, avoiding jurisdiction-specific terminology as much as possible. Also, the Principles are formulated quite generally and in such terms



that, in light of rapid technological advances, both the risks of under- and overinclusion are avoided.

'In the course of this project, we tried to not only kickstart and enhance discussions within academia, but also involved legal practitioners to get a good overview of the blockchain/crypto industry's problems at the moment and where legal guidance is needed. Our Principles aim to give such first guidance within the existing legal framework. I am excited that we have now finished this amazing project and look forward to receiving feedback': Martin Hanzl, Project Co-Reporter.

ELI's Principles on Blockchain Technology, Smart Contracts and Consumer Protection will support legislators in drafting sets of specific rules that are more appropriate to contracts in this field whenever such a derogation from traditional contract law is fitting. They will also help judges in their roles as interpreters of the resulting legislation.

The output is available [here](#). A webinar on the topic took place on 24 October 2022 and can be seen [here](#).

Updates on ELI Projects and Other Initiatives

Below is an overview of other ELI initiatives that took place in September and October 2022.

ELI Webinar on the 30 Years of the Single Market

Ahead of the 30th anniversary of the establishment of the European Single Market on 1 January 2023, ELI hosted a webinar on 6 October 2022 to reflect on the European Single Market's achievements and to contribute to on-going discussions on its possible improvements, in particular in the realm of digitalisation.

Pascal Pichonnaz (Chair; ELI President; Professor, University of Fribourg) welcomed participants and explained that ELI assembled a team to contribute to discussions marking the 30th anniversary of the European Single Market, composed of Reporters of some of ELI's completed projects. He added that the speakers prepared written contributions, available [here](#), and that the webinar aimed at supplementing these.

Among other things, Christiane Wendorst (ELI Scientific Director; Project Co-Reporter of the ALI-ELI project on [Principles for a Data Economy: Data Transactions and Data Rights](#); Professor, University of Vienna), underlined the importance of a consist-

ent and holistic approach in tackling the data economy within the Single Market. She also suggested a period of reflection before further legislation is rolled out and touted the possibility of a European Data Code in future.

Aneta Wiewiórska-Domagalska (ELI Executive Committee Member; Project Co-Reporter of the ELI project on [Model Rules on Online Platforms](#); Senior Researcher at the University of Osnabrück) highlighted possible challenges that might arise concerning the enforcement of recently proposed platform rules, which will affect different areas of law at Member State level. This will require huge efforts as well as good coordination between different legal branches within national systems.

Juliette Sénéchal (Co-Reporter on ELI project on [Blockchain Technology and Smart Contracts](#) (until January 2021); Professor, University of Lille) discussed the single market and the uptake of digitalisation platforms, blockchains and non-fungible tokens (NFTs). Several questions arise that are of interest to users, industry and

government, such as what are the legal and economic values of the exclusivity conferred?

Bernhard Koch (Co-Reporter of the ELI project on the [Reform of the Product Liability Directive](#); Professor, University of Innsbruck) provided an initial assessment of the Commission's recently published draft of a revised Product Liability Directive, in light of ELI's work on the topic so far. He said that while the Commission's new proposal presents a major leap in the right direction, some provisions might still require closer scrutiny, such as the retention of the development risk defence and the long-stop limitation periods which still start when the product was 'placed on the market' even if the manufacturer continues to supply it with updates.

Teresa Rodriguez de las Heras Ballell (ELI Executive Committee Member; Author of [ELI's Innovation Paper on Guiding Principles for Automated Decision-Making in the EU](#), Professor, Universidad Carlos III de Madrid) lamented at the lack of predictable, reliable, consistent and all-embracing legal framework for ADM, and for the use of algorithmic and AI systems in the context of contractual transactions at EU level. Her key thesis was that a Digital Single Market for ADM will not thrive without a thorough analysis of existing rules as well as their 'ADM-readiness' check, performed also in the ELI project on Guiding Principles and Model Rules on Algorithmic Contracts. Only through such a holistic approach will a unified, clear, predictable, consistent, coherent legal framework emerge in this field.

The recording of the webinar is available on ELI YouTube channel [here](#).

Innovation Paper Call

After publishing a successful pilot Innovation Paper in January 2021, the '[Guiding Principles for Updating the EU Product Liability Directive for the Digital Age](#)', and a second Innovation Paper on '[Guiding Principles for Automated Decision-Making in the EU](#)' in May 2022, the Institute wishes to invite interested participants to submit their ideas for a third Innovation Paper by **19 November 2022**.

The author(s) of the selected submission will be given until 23 March 2023 to prepare their Paper, which will then undergo Membership consultation. Upon the ELI Council's approval, the Innovation Paper will be published and promoted by ELI (detailed deadlines are available [here](#)). Submissions should be sent to the ELI Secretariat using the template available [here](#).

Updates on ELI Hub and SIG Activities

The following events by ELI Hubs and SIGs took place in September and October 2022.

ELI Belgio-Luxembourg Hub Eighth Sustainability Seminar

On 26 September 2022, the Hub held a seminar on 'Regulating Trade in Forest Risk Commodities'. Read more [here](#).

ELI Environmental Law SIG Conference

From 27–30 September 2022, CER-CIS' third annual conference took place with the support of the ELI Environmental Law SIG. Read more [here](#).

ELI Croatian Hub Conference

From 28–30 September 2022, the Second Zagreb International Conference on the Law of Obligations was held with the support of the Hub. Read more [here](#).

ELI Digital Law SIG Seventh Seminar in Speakers' Series

On 28 September 2022, the SIG held a seminar in its Speakers' Series entitled 'Paradigms of EU Consumer Law in the Digital Age'. Read more [here](#).

ELI Insurance Law SIG Lecture

On 29 September 2022, the SIG held its inaugural lecture in its 'War & Cyber Exclusions' series. Read more [here](#).

ELI Belgio-Luxembourg Hub Ninth Sustainability Seminar

On 6 October 2022, the Hub held its ninth seminar on 'Corporate Sustainability: The Role of the Legal Advisor'. Read more [here](#).

ELI Austrian Hub Lecture

On 10 October 2022, the Hub held an evening lecture on 'Faire (Sprit) Preise durch Kartellrecht' as part of its 'Monday Seminar Series'. Read more [here](#).

ELI Belgio-Luxembourg Hub Tenth Sustainability Seminar

On 19 October 2022, the Hub held a seminar on 'Companies, Human Rights and Environmental Standard: New EU Initiatives'. Read more [here](#).

ELI Croatian Hub Eighteenth Webinar in its Series

On 17 October 2022, the Hub held a webinar entitled 'A Delicate Balance of Human Rights in the CJEU Case Law'. Read more [here](#).

ELI Digital Law SIG Eighth Seminar in Speakers' Series

On 26 October 2022, the SIG held a seminar on 'Media Freedom in the Digital Market'. Read more [here](#).



Updates on ELI Representation

Below is an overview of ELI's representational activities that took place in September and October 2022.



ELI Observers Participate in the UNIDROIT Working Group on Digital Assets and Private Law

31 August–2 September 2022.

The session was joined remotely by Prof Dr Pascal Pichonnaz (ELI President), Prof Dr Christiane Wendehorst (ELI Scientific Director), Dr Phoebus Athanassiou and Prof Teemu Juutilainen (both Co-Drafters of the ELI Principles on the Use of Digital Assets as Security). Read more [here](#).



ELI Representatives Participate in 43th UNCITRAL Working Group III Session in Vienna

16 September 2022

ELI's President, Prof Dr Pascal Pichonnaz and ELI's Executive Committee Member, Prof Dr Teresa Rodríguez de las Heras Ballell, represented ELI at the 43th UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) session. Read more [here](#).



Visit by the Georgian Lawyers for Independent Profession (GLIP) at the ELI Secretariat

21 September 2022

ELI's Secretary General, Dr Vanessa Wilcox, welcomed 14 representatives of ELI's prospective institutional member GLIP to the ELI Secretariat in Vienna. The meeting served as an opportunity to inform them of various ways of engaging in ELI activities. More [here](#).



ELI President Meets ELSA International and ELSA Switzerland Presidents

27 September 2022

ELI President, Prof Dr Pascal Pichonnaz, and ELI Secretary General, Dr Vanessa Wilcox, had a meeting with the President of ELSA International, Yuri van Steenwijk, and the President of ELSA Switzerland, Flavia Lehmann. Among other matters, the ELI Young Lawyers Award was discussed. Read more [here](#).



ELI Representatives Take Part in RAID Conference

10 October 2022

ELI's Executive Committee Members, Dr Aneta Wiewiorowska-Domagalska and Prof Dr Teresa Rodríguez de las Heras Ballell, and ELI's Scientific Director, Prof Dr Christiane Wendehorst, spoke at various panels at the above event. Read more [here](#).



ELI Representatives Participate in 76th UNCITRAL Working Group II Session

10–14 October 2022

ELI's President, Prof Dr Pascal Pichonnaz and ELI's Executive Committee Member, Prof Dr Teresa Rodríguez de las Heras Ballell, represented ELI at the 76th UNCITRAL Working Group II (Dispute Settlement) session. Read more [here](#).

ELI Welcomes its New Members

ELI is pleased to welcome the following individual and institutional Members that joined recently.

New Institutional Members

Association of European Administrative Judges (AEAJ)



The AEAJ was founded in 2000. Its Members are national associations, administrative judges from the Member States of the European Union.

International Association of Legal Science (IALS)



The IALS was established in July 1950 with a view to promoting the development of legal science throughout the world by using, in particular, comparative methods.

Center for AI and Digital Policy (CAIDP)



CAIDP is an independent non-profit research organisation that assesses national AI policies and practices, trains AI policy leaders, and promotes democratic values for AI.

University of Liverpool, School of Law and Social Justice



Comprising two distinct departments, the School of Law and Social Justice is a unique collaboration of experts in law, sociology, social policy and criminology exploring the impact of law in society, challenging injustice and promoting equality of opportunity.

New Individual Members

Mădălina Cocoșatu, National University of Political Studies and Public Administration, Romania

Mirko Faccioli, University of Verona, Italy

Rosa-Maria Fernandez-Riveira, Complutense University of Madrid, Spain

Stijn Franken, Leiden University, Netherlands

Elena Gramano, Bocconi University, Italy

Arturas Grumulaitis, Lawyer, Lithuania

Mark Harvey, Hugh James, United Kingdom

Ana Jezovita, University of Zagreb, Croatia

Hideki Kanda, Gakushūin University, Japan

Herbert Küpper, Institute for Eastern European Law, Germany

Rebecca Küter, University of Innsbruck, Austria

Ruth Lecher, Walther Schücking Institute of International Law at the University of Kiel; K&L Gates, Germany

Karine Lempen, University of Geneva, Switzerland

Luca Leone, Catholic University of the Sacred Heart, Italy

Caroline Hornum Martinussen, Aalborg University, Denmark

Paulo Manuel Mello de Sousa Mendes, University of Lisbon, Portugal

Catharina Michalek, University of Innsbruck, Austria

Marcin Mrowicki, Centre for Europe University of Warsaw, Poland

Sophie Robin-Olivier, University of Paris 1 Panthéon-Sorbonne, France

Rita Simon, Institute of State and Law of the Czech Academy of Sciences, Czech Republic

Elisa Stracqualursi, University of Pisa, Italy

Ceyda Süral Efeçinar, Piri Reis University, Turkey

Monika Szwarc, Institute of Law Studies of the Polish Academy of Sciences, Poland

Jozefien Vanherpe, KU Leuven Center for IT & IP Law, Belgium

Suzanne Walsh, Uniform Law Commission, United States of America

Rolf H Weber, University of Zurich, Switzerland

Rachele Zamperini, University of Pisa, Italy

New Sustaining Members

Stijn Franken, Leiden University, Netherlands

Hideki Kanda, Gakushūin University, Japan

Submit Suggestions



Submit Suggestions

ELI has recently introduced a suggestions box on its website. We welcome any feedback or ideas you may have. Your contributions may help to shape the Institute or its projects and other initiatives. To send in a suggestion, please click [here](#).

As we are a small organisation, we are unable to reply personally to all submissions or to provide individual feedback on the consideration of proposals. Nonetheless you can be assured that we value all suggestions and consider them very carefully. In the case of proposals for ELI projects, it is for the ELI Executive ultimately to decide on whether to pursue matters further.

Publications by ELI Members

Legal Theory of Auction was published by Routledge (Taylor & Francis) in September 2022. The book is authored by an ELI member, Dr Kristijan Poljanec, a postdoctoral researcher at the Faculty of Economics and Business, University of Zagreb. It explores auction sales from a legal angle and challenges the traditional tripartite concept of auctions as too narrow and not corresponding to the actual structure of auction relations. Following a brief introduction on economic theory, different auction models are examined against the following legal criteria, price formation, publicity, parties' autonomy, legal form and applied technology, to understand the nature of auctions and identify a legal concept underpinning them. The book also covers relations arising from *droit de suite*, financial and bidding agreements, to provide a comprehensive overview of lesser known legal relations that commonly arise in auction practice. More information about the book is available at Routledge's [website](#).



LEGAL THEORY OF AUCTION

Kristijan Poljanec



In the spring of 2022, 'Methods of Legal Interpretation of the Court of Justice of the European Union' by Koen Lenaerts (President of the Court of Justice of the European Union and Professor of European Union Law at the University of Leuven) José A Gutiérrez-Fons (Legal Officer of the Court of Justice of the European Union) was published by HVG-ORAC Publishing House, now ORAC Publishing House. This work is the first edition of the original book entitled 'Les méthodes d'interprétation de la Cour de justice de l'Union européenne', translated into Hungarian. The volume offers lawyers, academics and students interested in EU law a theoretical guide that will enable them to better understand the judgments of the Court of Justice of the European Union and useful practical assistance for all legal professionals faced with problems of interpretation of EU law.



To submit news of recent publications, please contact the [ELI Secretariat](#).

Events Calendar At-A-Glance

Please save the following dates. Stay up to date by visiting our [website](#) and following our social media channels.

Nov	9 Nov	ELI Digital Law SIG: The Legal Status of Artificial Intelligence <i>Online</i>
	10 Nov	ELI Insurance Law SIG: Insurance in Times of War: Selected Issues <i>Online</i>
	14 Nov	ELI Austrian Hub: Das neue EU-Datenwirtschaftsrecht <i>Online</i>
	15 Nov	ELI Croatian Hub: The 2022 Amendments to the Croatian Civil Procedure Act <i>Online</i>
	16 Nov	ELI Digital Law SIG: From Document to Data: Revolution of Contract Through Legal Technologies <i>Online</i>
	17 Nov	ELI Belgio-Luxembourg Hub: The European Union's Sustainable Finance Action Plan <i>Online</i>
	23 Nov	ELI Digital Law SIG: The Digital Estate <i>Online</i>
	24–25 Nov	ELI Croatian Hub & Business and Finance Law SIG: 5th International Conference on European Company Law and Corporate Governance <i>Online</i>
Dec	28 Nov	ELI Austrian Hub: Kollektive Rechtsdurchsetzung – Fluch oder Segen <i>Online</i>
	12 Dec	ELI Austrian Hub: Änderungsbedarf im Kartellschadensersatzrecht? <i>Online</i>
	13 Dec	ELI Croatian Hub: Civil Law Liability for Artificial Intelligence <i>Online</i>
	tbc	ELI Belgio-Luxembourg Hub: 11th Sustainability Lunch Seminar on 5G Regulation <i>Online</i>

European Law Institute

- Pan-European, democratic, membership-based organisation
- Uniting prominent jurists of all legal professions
- Aiming to improve the law in Europe
- Carrying out projects with immediate practical application

Members of ELI can contribute to its projects and gain access to an international network of jurists. Apart from other activities, ELI organises its Annual Conference and Meetings, bringing together Europe's leading experts in diverse fields of law.

Executive Committee

President:	Pascal Pichonnaz
First Vice-President:	Lord John Thomas
Second Vice-President:	Anne Birgitte Gammeljord
Treasurer:	Pietro Sirena
Other Members:	Bénédicte Fauvarque-Cosson Teresa Rodríguez de las Heras Ballell Aneta Wiewiórowska-Domagalska

ELI in Vienna

The Secretariat of ELI, which is hosted by the University of Vienna, is located in the heart of the Austrian capital, close to the main building of the University, the representation of the European Commission in Austria as well as the information office of the European Parliament.

We cordially invite you to visit us whenever you are in Vienna.



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