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# Expert's Liability to a Third Person at the Point of Intersection of the Law of Contract and the Law of Delict

## 1. The problem

The question of expert's liability arises when an expert of a certain field provides information or an expert opinion to another person in relation to a proprietary matter on the basis of specialist knowledge that later proves to be incorrect.

If the opinion was provided under a contractual relationship, the person who entered into contract with the expert may exercise contractual remedies if the information or opinion proves to be incorrect—primarily claim for the compensation of damage. Contractual remedies cannot generally be used if there is no contract between the parties, or if a person in contractual relationship with the expert presents the expert's opinion to a third party. In this situation, expert's delictual liability is also excluded, since the expert has not committed an unlawful deed toward the recipient of the opinion.\*<sup>1</sup>

The purpose of this article is to explain the procedure for settling the above-mentioned situations in the legal orders of Estonia, Germany, and Switzerland, on the basis of the Draft Common Frame of Reference for European contract law\*<sup>2</sup> (hereinafter 'DCFR'). In principle, there are three routes to settlement: delict law, contract law, and quasi-contract law. Before the problems are settled, the following starting points need to be kept in mind.

Firstly, the principle of *mandatum tua gratia*\*<sup>3</sup> has been used since the times of Roman law to state that a person who gave advice to another person is not responsible for damages incurred through his or her advice, unless we

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<sup>1</sup> See C. v. Bar. *Gemeineuropäisches Deliktsrecht. Erster Band. Die Kernbereiche des Deliktsrechts, seine Angleichung in Europa und seine Einbettung in die Gesamtrechtsordnungen.* München: C. H. Beck 1996, p. 497.

<sup>2</sup> Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) Based in part on a revised version of the Principles of European Contract Law. Edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll. Munich: sellier. european law publishers 2009. Available at [http://ec.europa.eu/justice\\_home/fsj/civil/docs/dcf\\_r\\_outline\\_edition\\_en.pdf](http://ec.europa.eu/justice_home/fsj/civil/docs/dcf_r_outline_edition_en.pdf) (25.03.2010).

<sup>3</sup> Gaius Dig. 17, 1, 2: quod si tua tantum gratia tibi mandem, supervacuum est mandatum et ob id nulla ex eo obligatio nascitur. Citation: H. Honsell. *Die Haftung für Auskunft und Gutachten, insbesondere gegenüber Dritten.* – A. Koller (Hrsg.). *Dritthaftung einer Vertragspartei,*

are dealing with a contractual relationship or a delict. The basis of this principle is private autonomy, according to which everyone has to decide his or her matters on his or her own and does not need to follow anyone's advice. One expression of private autonomy is freedom of contract—everyone's right to decide whether, with whom, and on what conditions to enter into contract. The principle described is explicitly set forth in § 675 (2) of the German Civil Code\*<sup>4</sup> (hereinafter 'BGB'), stating that providing information or advice does not create liability, because liability for mere words would not correspond to the concept as generally accepted.\*<sup>5</sup>

Estonian and Swiss law lack a corresponding provision, but the starting point is the same. Giving advice to another person without a legal obligation to do so does not generally bring about a contractual or delictual claim against the adviser. The DCFR's Article VI–2:207 is also based on consideration that there is no general liability for advice or information provided by a person outside the legal commitment.

Secondly, the law of delict does not generally protect property as such. Only certain absolute rights are under protection. Liability in the law of delict is generally absent in the case of pure economic loss caused by carelessness. Such interests are protected under contract law.

The purpose of the law of delict is to establish general standards of conduct applied to everyone; the purpose of contract law is to protect the interest of performing a contract. Respectively, the interests protected by the liability systems of the law of delict and contract law are different: in the case of contract law, it is performance interest (positive interest: performance of agreements); in the case of the law of delict, it is integrity interest (negative interest: to avoid violation of rights).

In the German judicial arena, protection from pure economic loss under the law of delict is guaranteed in the case of a result of damage inflicted intentionally and against good morals, or if the unlawful deed is a violation of lawful obligations purposed to protect from pure economic loss.\*<sup>6</sup>

Such differentiation in liability in the law of delict is not incidental but a restriction purposefully prescribed by the legislators. Therefore, we are dealing not with lack in the law of delict but with a reasonable restriction to expansion of liability in the law of delict.<sup>7</sup>

In the case of wrong advice, it is generally pure economic loss that arises—a person relying on advice makes a proprietary decision (i.e., a bank grants a loan on the basis of the opinion of a real-estate valuator, a person buys securities according to a bank's recommendations, or businessmen conclude transactions with each other in reliance on audited annual accounts) he or she would not have made if knowing the correct information, or would have made under different conditions. Loss due to such decisions is generally not compensable in the law of delict.

If the recipient of the opinion or the third person has legitimately relied on expert opinion and the expert knew or had to know of the other person's reliance on his or her opinion, it is considered unfair in all of the legal orders under consideration to leave the risk of incorrectness of opinion solely to the person who relied on that opinion. Therefore, attempts have been made to find a way to ensure expert's liability for incorrect opinion also with respect to a person with whom the expert has no contractual relationship.\*<sup>7</sup> The DCFR and the Estonian Law of Obligations Act\*<sup>8</sup> (hereinafter 'LOA') provide for compensation for such damage *expressis verbis*. However, the dogmatic grounds for such liabilities are arguable in different legal orders.

## 2. The basis of the claim

### 2.1. Germany

According to the BGB, liability in the law of delict generally arises when a person has violated some sort of legal right provided by law or when damage was caused intentionally. The law of delict under the BGB as a rule does not protect from pure economic loss in instances other than those of intentional damage caused contrary to good morals, under the BGB's § 826.

Beiträge der Haftpflicht- und Versicherungsrechtstagung. St. Gallen 2005, p. 169 ff., also P. W. Heermann in: Münchener Kommentar zum Bürgerlichen Gesetzbuch. K. Rebmann, F. J. Säcker (Hrsg.). 5. Aufl. München: C. H. Beck 2006 ff., § 675, margin No. 110 (hereinafter 'MüKo').

<sup>4</sup> Bürgerliches Gesetzbuch. Available at <http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf> (25.03.2010).

<sup>5</sup> H. Honsell. Die Haftung für Gutachten und Auskunft unter besonderer Berücksichtigung von Drittinteressen. – V. Beuthien (Hrsg.). Festschrift für Dieter Medicus Zum 70. Geburtstag. Köln, Berlin, Bonn, München: Heymanns 1999, p. 211 ff., p. 213.

<sup>6</sup> C. v. Bar, U. Drobnig. Study on Property Law and Non-contractual Liability Law as they relate to Contract Law. Available at [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/cont\\_law/study.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf) (25.03.2010).

<sup>7</sup> C. v. Bar (Note 1), p. 497 ff.

<sup>8</sup> Võlaõigusseadus. – RT I 2001, 81, 487; 2010, 7, 30 (in Estonian). Available in English at [http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X30085K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5la%F5igusseadus](http://www.legaltext.ee/et/andmebaas/tekst.asp?l oc=text&dok=X30085K3&keel=en&pg=1&ptyyp=RT&tyyp=X&query=v%F5la%F5igusseadus) (25.03.2010).

Therefore, after the BGB's entry into force, judicial practice came to look for ways of bringing the damage inflicted by providing incorrect opinion or information outside a contractual relationship within the scope of application of the BGB's § 826. The position was taken that a person who provided information to third parties and knew it was incorrect is intentionally acting against good morals.<sup>9</sup> The same is said to apply, if, as a result of negligence, objectively incorrect information is provided 'for no good reason' to persons to whom this information has an identifiable importance and the provider of information has to consider the possibility of inflicting damage on the recipient. However, these principles have only been applied in a relationship between the provider of information and the direct recipient; the third person to whom the information was delivered by the direct recipient was left unprotected.<sup>10</sup>

One shortcoming of early judicial practice is considered to be withdrawal from the original meaning of the law, since the BGB's § 826 was never meant to provide for compensation of damages inflicted by gross negligence.<sup>11</sup> In principle, judicial practice has found that this provision also applies in cases of gross negligence in respect of circumstances that cause disregard of good morals. Hence, from gross negligence toward good morals, an intent to inflict damage is deduced.<sup>12</sup>

Consequently, the original scope of the BGB's § 826 is expanded to encompass pure economic loss inflicted through gross negligence.

The practice of expanding the scope of the BGB's § 826 is nowadays marginalising in nature. Newer judicial practice is working on the fiction of a silent contract for providing information<sup>13</sup>, expanding the scope of application of the basis of contractual and quasi-contractual claims, and trying to accommodate expert's liability under different parts of the BGB system of claims.<sup>14</sup>

Arising of a silent contract is assumed if (a) the advice or information has a recognisably relevant economic meaning to the recipient from the viewpoint of the provider of the information and (b) the adviser has special knowledge or is personally interested in giving the advice for economic reasons.<sup>15</sup> The BGB's § 826 is applied as the basis for liability only if the above-mentioned prerequisites are not met.<sup>16</sup>

On the basis of those principles, the situations in which an expert's opinion is relied on by a person who obtained the information directly from the expert without having a contractual relationship with him or her are settled. If a person who has had no direct contact with the provider of information—for example, being given the advice by a person who received it from the provider—relies on incorrect advice from the provider, creating contractual fiction is not sufficient. Such a situation arises when, for example, a person wishing to obtain a loan from a bank orders valuation of real estate from a real-estate assessor, wishing to use the real estate as security for his or her loan application. In this case, the bank has no contractual relationship with the real-estate valuator.

Therefore, an institution of contract with protective effects for third parties has been introduced.<sup>17</sup> Initially, the Federal Court of Justice<sup>18</sup> (hereinafter 'BGH') applied this in cases of information provided by a person appointed as an expert with approval from an official authority or some similar action, if the information was recognisably intended for presentation to a third party and had to express special probative value<sup>19</sup> according to the will of the seeker of advice.

According to the latest judicial practice, national or other public acknowledgement of expertise is no longer a prerequisite. The same BGH principles of liability apply when the interests of the third person are also protected under contract. The BGH practice does not enable exclusion of the extension of protection to third person by agreement; such agreement would be against good morals and non-applicable.<sup>20</sup>

<sup>9</sup> RGZ 91, 80, 81; 157, 228, 229; BGH NJW 1992, 3167, 3174.

<sup>10</sup> G. Wagner. – MüKo (Note 3), § 826, margin No. 61.

<sup>11</sup> The wording of BGB § 826 is as follows: "Person who inflicts intentional damage to another person contrary to good morals has to compensate the other person for the damage inflicted."

<sup>12</sup> H. Honsell (Note 5), p. 215 with onward references to judicial practice and the materials of compiling the BGB. According to the author's assessment, the latter is the reason for intentionally leaving infliction of damage due to gross negligence and against good morals out of the wording of BGB § 826, since a negligent intervention to other people's sphere of interests was not considered a strong violation that would require a reaction from the legislator.

<sup>13</sup> In German, *Fiktion eines stillschweigenden Auskunftsvertrages*.

<sup>14</sup> G. Wagner. – MüKo (Note 3), § 826, margin No. 62; P. W. Heermann. – MüKo (Note 3), § 675, margin No. 120; H. Honsell (Note 5), p. 219.

<sup>15</sup> BGH NJW 1991, 3167; BGHZ 7, 371; BGHZ 74, 103; BGH NJW 1990, 513; 1991, 352; G. Wagner. – MüKo (Note 3), § 826, margin No. 62; P. W. Heermann. – MüKo (Note 3), § 675, margin No. 122.

<sup>16</sup> G. Wagner. – MüKo (Note 3), § 826, margin No. 62.

<sup>17</sup> In German, *Vertrag mit Schutzwirkung für Dritte*.

<sup>18</sup> *Bundesgerichtshof*.

<sup>19</sup> BGHZ 159, 1; BGH NJW-RR 2004, 1464; BGHZ 127, 378; BGH NJW 2001, 514.

<sup>20</sup> G. Wagner. – MüKo (Note 3), § 826, margin No. 66 with further references to judicial practice.

Composition of delict under the BGB's § 823 (2) is also applied to expert's liability. Its prerequisite is the expert's violation of obligations pursuant to some specific law.<sup>\*21</sup>

In the case of an 'obligation with duties' between the parties in the meaning of the BGB's § 311 (2) and § 241 (2), the provisions of *culpa in contrahendo* (c.i.c.) are applied.<sup>\*22</sup>

However, this is not a specific expert liability, since in c.i.c., liability does not arise from particular trust the expert is enjoying but arises from the general obligation to disclose truthful information during the course of negotiations.

## 2.2. Estonia

Liability for incorrect opinion arises from LOA § 1048 in the chapter on the law of delict. The following legal relationships need to be distinguished with regard to the scope of application of this provision.

If information is provided under contractual relationship—for example, a person orders an expert opinion or certain data on a contractual basis—the relationships between the parties, including the expert's liability, are regulated by the contract (an order as a rule). In the case of breach of contract, contractual remedies specified in LOA §-s 100 *ff.* may be applied.

The contract between a provider of opinion or information and the person seeking advice can state that the opinion has to be passed on to a third person. In that case, it is a contract for the benefit of a third party in the meaning of LOA § 80.<sup>\*23</sup>

In LOA § 81, regulation of contract with protective effect for the third party is provided. Such contract is accompanied by an obligation to take into account the interests or rights of the third party to the same extent as the interests or rights of the obligee. Said obligation is presumed when (a) the interests and rights of the third party are at risk to the same extent as are the interests and rights of the obligee, (b) the intent of the obligee to protect the interests and rights of the third party can be presumed, and (c) the third party and the intent of the obligee in protecting the interests and rights of the third party are identifiable by the obligor. In the case of non-performance of the obligations specified in such a contract, the third party may claim compensation for damage caused thereto.<sup>\*24</sup>

According to the legal literature, there can be no contract with protective effect for a third party if the interests of the contracting party and the third party are contradictory. For example, when the seller of an immovable orders valuation of that immovable, the buyer cannot be the protected third person in the meaning of LOA § 81.<sup>\*25</sup>

The relationship between contractual and delictual obligations has been regulated in paragraph 2 of LOA § 1044.

According to this provision, compensation for contractual damage cannot be claimed under the law of delict, unless the purpose of the contractual obligation violated was to prevent such damage. Therefore, no claims can arise between parties in the case of contractual relationship under LOA § 1048.<sup>\*26</sup>

Information can also be provided under c.i.c. claim. In that case, claims against the expert who provided incorrect information or opinion arise from LOA § 115 (1) and § 14.<sup>\*27</sup>

The competition between contractual and lawful claims has been regulated in LOA § 1044 (1). According to that provision, the victim has a right to choose the basis of his or her claim. According to legal literature, an expert involved in pre-contractual negotiations who does not participate in the future contract shall not be liable on the basis of LOA §§ 115 and 14. The regulation in LOA § 1048 is applied to such an expert's liability.<sup>\*28</sup>

<sup>21</sup> H. Sprau in O. Palandt. Bürgerliches Gesetzbuch, Beck'sche Kurz-Kommentare. Bd. 7. 69. Aufl. München: C. H. Beck 2010, § 675, margin No. 47 (hereinafter 'Palandt').

<sup>22</sup> P. W. Heermann. – MüKo (Note 3), § 675, margin No. 116.

<sup>23</sup> See T. Uusen-Nacke. Kolmandat isikut kaitsev leping. Asjatundja vastutus kolmandate isikute ees (Contract with Protective Effect for a Third Party: Liability of an Expert to a Third Party). – Juridica 2003/8, pp. 536, 541 (in Estonian).

<sup>24</sup> LOA § 81 (2).

<sup>25</sup> T. Tampuu, M. Käerdi. – P. Varul *et al* (Compilers). Võlaõigusseadus III. Kommenteeritud väljaanne (Law of Obligations Act III. Commented edition). Tallinn: Juura 2009, p. 670 (in Estonian).

<sup>26</sup> See H. Tammiste. Asjatundja ebaõige arvamusega tekitatud puhtmajandusliku kahju hüvitamine (Compensation of Pure Economic Loss Resulting from Professional's Misstatement). – Juridica 2005/6, pp. 385, 389 (in Estonian); T. Tampuu, M. Käerdi (Note 25), p. 670; T. Uusen-Nacke (Note 23), pp. 536, 541.

<sup>27</sup> On the nature of c.i.c. claim, see CCSCd No. 3-2-1-89-06, paragraph 15. – RT III 2007, 3, 23 (in Estonian).

<sup>28</sup> I. Kull. – Võlaõigusseadus III (Note 25), p. 64.

Therefore, a certain number of expert's liability cases wherein there is no contractual relationship remain within the scope of application of LOA § 1048, if the aggrieved party is not the third person under protection. In the LOA system, one condition bringing about unlawfulness in the meaning of LOA § 1045 is incorrect expert opinion, in the case of which liability in the law of delict arises as provided in LOA § 1043.<sup>\*29</sup>

According to LOA § 1048, providing incorrect information or an incorrect opinion to another person or, regardless of receipt of new knowledge concerning the matter, failing to correct information or opinion already provided is unlawful if the expert enjoys particular trust due to his or her professional activities and the person who was given the information or opinion could expect to rely on such trust.

## 2.3. Switzerland

In the case of a contract between the expert and recipient of information, contractual liability is applied. Switzerland has chosen a different path from Germany for solving borderline liability cases of contractual and delict obligations. While in German practice, such cases are generally transferred to the scope of application of contract law, the tendency in Switzerland is to expand the scope of application of the law of delict.<sup>\*30</sup> Therefore, the concept of contract with protective effect for the third party is not so widely known in Switzerland.

In the Swiss Code of Obligations<sup>\*31</sup> (OR), the law of delict has been settled on the principle of a so-called general clause.<sup>\*32</sup> Thus, compensation for pure economic loss inflicted in consequence of negligence would be possible in principle. However, Switzerland has adopted the delict structure of German law, according to which in the case of infliction of damage arising from negligence, the prerequisite for obligation to provide compensation for damage is unlawful violation of some legal right.<sup>\*33</sup> Thus it is that, in the absence of a special protective norm, the prerequisite for obligation to compensate for damage according to OR Article 41 (2) is intent.<sup>\*34</sup> This provision tends to be interpreted restrictively, reducing its scope of application to mostly cases of violation of the prohibition of abuse of rights.

The courts have nevertheless affirmed the obligation of compensation for damage under the law of delict. It remains unclear whether it is applied under the general clause of OR Article 41 (1) or due to violation of the prohibition to inflict intentional damage as provided in subsection 2.<sup>\*35</sup>

The Swiss Federal Court of Justice has admitted that responsibility applies if a person provides information based on his or her specialist knowledge that is contrary to his or her best knowledge, shares false information as a result of negligence, or fails to disclose important circumstances known to him or her. The prerequisite for liability is the identifiably important effect of the expert's information on the recipient's decisions.<sup>\*36</sup> Therefore, the concept of unlawfulness in Article 41 (1) of the OR is being gradually expanded to conduct going against the principle of good faith that violates the trust of the third person.<sup>\*37</sup>

## 2.4. The DCFR

Similar settlement to the LOA approach can be found in Article VI-2:207 of the DCFR, which provides that loss inflicted on a person as a result of a decision made in reasonable reliance on incorrect advice or information has to be compensated for if (a) the advice or information is provided by a person in pursuit of a profession or in the course of trade and (b) the provider knew or could reasonably be expected to have known that the recipient would rely on that advice or information in making a decision of the kind made. Thus, this is a non-contractual liability.<sup>\*38</sup>

<sup>29</sup> See T. Tampuu, M. Käerdi (Note 25), p. 672.

<sup>30</sup> T. Guhl, H. Merz *et al.* Das Schweizerische Obligationenrecht mit Einschluss des Handels- und Wertpapierrechts. Achte Auflage. Zürich: Schulthess Polygraphischer Verlag AG 1991, p. 232.

<sup>31</sup> Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches (Fünfter Teil: Obligationenrecht). Available at <http://www.admin.ch/ch/d/sr/c220.html> (25.03.2010).

<sup>32</sup> OR, Article 41.

1 Wer einem andern widerrechtlich Schaden zufügt, sei es mit Absicht, sei es aus Fahrlässigkeit, wird ihm zum Ersatze verpflichtet.

2 Ebenso ist zum Ersatze verpflichtet, wer einem andern in einer gegen die guten Sitten verstossenden Weise absichtlich Schaden zufügt.

<sup>33</sup> T. Guhl, H. Merz *et al.* (Note 30), p. 173 *ff.*

<sup>34</sup> H. Honsell (Note 5), p. 217.

<sup>35</sup> BGE 111 II 474 E. 3; BGE 116 II 695 *ff.*

<sup>36</sup> M. Wick. Die Vertrauenshaftung im schweizerischen Recht. – AJP/PJA 1995/10, p. 1270 *ff.*, 1275.

<sup>37</sup> *Ibid.*

<sup>38</sup> With same explicitness, see also C. v. Bar, E. Clive, H. Schulte-Nölke (ed.). Principles, definitions and model rules of European private law: Draft Common Frame of Reference (DCFR). Full Edition. Vol. 1–6. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Munich: Sellier. European Law Publishers 2009 (4), p. 3345.

The standard for a claim in the law of delict in the DCFR is Article VI-1:101, according to which a person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage. This is not a general clause in the law of delict, and the prerequisites for its application are regulated in other provisions of Book VI.<sup>\*39</sup>

Systematically, this regulation is very similar to the regulation of the LOA. One element of unlawfulness in the meaning of Article VI-1:101 is described in Article VI-2:207 of the DCFR.

The relationship between liability in contractual and delict law is regulated in subsection c of Article VI-1:103. According to this, compensation for damage in the law of delict is not applied if its application would contradict the purpose of other rules of private law. The purpose of this provision is to establish clear priority of contractual liability over delictual liability if applying the law of delict would rule out attainment of the purposes of the contract law.<sup>\*40</sup> However, when the purpose of the contractual liability is not preclusion of liability, delict law and contract law are applied in parallel.<sup>\*41</sup>

## 3. Prerequisites for a claim

### 3.1. Trust of an expert

In the DCFR's Article VI-2:207 and in LOA § 1048, the prerequisite for liability for providing incorrect information or opinion is particular trust enjoyed by the provider as a result of his or her professional activities. Liability arises only in the case of particular trust in the statement when the provider of information knows about formation of such trust.<sup>\*42</sup> The prerequisite for liability is that the provider of information or advice acts in pursuit of a profession. The claim does not arise for everyone knowing the information, and it is not decisive whether the provider knew or could reasonably be expected to have known that someone would rely on the advice or information. Only cases in which advice or information was given to a specified circle of people are to be included in the scope of application of the DCFR's Article VI-2:207; i.e., the provider of information or knowledge has to know who may rely on the given information.<sup>\*43</sup> It is sufficient that a person belonging to that circle receive from a mediator information not personally intended for him or her.

Estonian legal literature has taken a view that the prerequisite for liability under LOA § 1048 is the provider's consideration for the third person's interests due to so-called objective trust that arises from provision of the information or knowledge.<sup>\*44</sup> For trust to be formed, it is sufficient if the expert has identifiable special knowledge and corresponding professional reliability. Often, simply the professional position of the expert as an auditor, sworn advocate, or real-estate valuator is sufficient for such trust to form.<sup>\*45</sup> An expert acting in the meaning of § 1048 can also be a person representing the other contractual party in pre-contractual negotiations who provides incorrect information or recommendations concerning the object of contract on which the other contractual party relies because of particular trust enjoyed by the representative, or his or her presumable professional expertise and special knowledge.<sup>\*46</sup>

It can be concluded from the indication of particular trust arising from the expert's professional activities in LOA § 1048 that provision of the opinion or information has to take place as a part of professional activity, part of which is advising people on proprietary matters. Therefore, experts in this meaning can include auditors, lawyers and other solicitors, tax advisers, notaries, architects, real-estate assessors, sworn translators, trustees in bankruptcy proceedings, bailiffs, investment advisers, and other specialists who advise persons on proprietary matters.<sup>\*47</sup> Similarly, in Swiss practice, the prerequisite for liability is also particular trust enjoyed by the expert.<sup>\*48</sup>

In German judicial practice, formation of a contract on providing expert information or opinion is also possible conclusively, when a person provides the information with an intention of being legally bound.<sup>\*49</sup> The

<sup>39</sup> *Ibid.*, p. 3087.

<sup>40</sup> *Ibid.*, p. 3119.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, p. 3345.

<sup>43</sup> *Ibid.*, p. 3346.

<sup>44</sup> M. Käerdi, T. Tampuu (Note 25), p. 390.

<sup>45</sup> See T. Uusen-Nacke (Note 23), pp. 536, 542; T. Tampuu, M. Käerdi (Note 25), p. 671.

<sup>46</sup> T. Tampuu, M. Käerdi (Note 25), p. 669.

<sup>47</sup> *Ibid.*

<sup>48</sup> M. Wick (Note 36), p. 1270 *ff.*, 1275; P. Loser. Die Vertrauenshaftung im schweizerischen Schuldrecht. Grundlagen, Erscheinungsformen und Ausgestaltung im geltenden Recht vor dem Hintergrund europäischer Rechtsentwicklung. Bern: Stämpfli 2006, p. 493.

<sup>49</sup> In German, *Rechtsbindungswille*.

latter has to be assessed in view of how the other party had to evaluate the conduct of the provider, considering all of the circumstances.<sup>\*50</sup> The presence of such intention has to be presumed if, in assessment of all the circumstances, a notion of the presence of intention to be legally bound arises and it is reasonable to draw such a conclusion because of certainty of return.<sup>\*51</sup> If existence of a contract cannot be ascertained, German judicial practice still settles certain cases on the principles of expert's liability if the provider's particular trust has been derived from a long-term or a planned long-term relationship between the provider and recipient of information.<sup>\*52</sup> For the planned long-term relationship, the provisions of the BGB's § 311 (2) 3) and § 241 (2) are taken as a legal basis. For the most part, these regulate the c.i.c. claim and were developed as part of the BGB right of obligation reform in 2002.

The prerequisite for a contract with protective effect for the third party in German law is knowingly compiling an opinion within the sphere of one's professional competence, or providing information identifiably meant for use by third persons.<sup>\*53</sup> Since most of the cases in Germany are settled in terms of contractual relationship, the obligation to protect the third person should extend to the provider of information according to the BGH, even when the interests of the seeker of opinion conflict with the interests of a possible third person. For example, it generally applies to ordering a valuation of an immovable by a person who shall present this to a bank as a valuation of a security.<sup>\*54</sup> The provider of information cannot exclude his or her liability by claiming that the person seeking an opinion had deceived him or her about the circumstances affecting the nature of his or her opinion, or left them non-revealed. The BGH does not apply § 334 of the BGB, which principally enables such objection, taking the position that the parties have ruled out such application through consequential declaration of intention. However, the liability of the provider of information can be excluded if he or she states in the opinion that he or she has not been given information that is necessary for providing a certain opinion, or that his or her conclusions are based on only certain information received from the originator.<sup>\*55</sup> Establishment that the circle of possible third persons was not known to the expert does not exclude liability.

### 3.2. Provision of information or opinion

Information or opinion provided by an expert is a body of claims or circumstances presented as factual data or recommendations, in reliance on which a third person can make a proprietary decision.<sup>\*56</sup> Section 1048 of the LOA is interpreted in such a way that liability also arises from presenting an opinion that cannot be purely factual information; an opinion inevitably includes subjective evaluation by the expert, at least to some extent.<sup>\*57</sup> German law does not require it to be a combination of facts and opinion; however, the information given has to be correct as well as complete. The same principles are proceeded from in Swiss practice.<sup>\*58</sup>

The problematic element is identification of the incorrectness of opinion. Accordingly, in Article VI–2:207 of the DCFR, it is emphasised that, although according to the wording of the provision, the prerequisite is 'incorrect advice or information' from the provider, it is nevertheless an inseparable concept. They are not mutually exclusive; pure advice cannot be incorrect. On the basis of the DCFR, the prerequisite for arising of liability is solely the combination of advice and a fact.<sup>\*59</sup> According to Estonian law, an incorrect opinion is an opinion that is arbitrary—i.e., an opinion that could not be formed on the basis of existing information through application of the relevant professional skills, or an opinion that has been formed on the basis of incorrect data.<sup>\*60</sup>

If the provider of opinion learns about the incorrectness of data after providing the data, the obligation to correct the data applies only under special circumstances in German judicial practice.<sup>\*61</sup> In the LOA, the obligation to correct the data has been set forth *expressis verbis*.

Providing information or an opinion is also a prerequisite according to the LOA and other legal orders under consideration. In the case of § 1048 of the LOA, it is stated that not just any kind of declaration by an expert

<sup>50</sup> H. Sprau. – Palandt (Note 21), § 675, margin No. 36 with further references to judicial practice.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*, margin No. 47 with further references to judicial practice.

<sup>53</sup> G. Wagner. – MüKo (Note 3), § 826, margin No. 66.

<sup>54</sup> BGHZ 127, 378; BGH JZ 1985, 951; P. Gottwald. – MüKo (Note 3), § 328, margin No. 124.

<sup>55</sup> BGH NJW 1998, 1059.

<sup>56</sup> For example, acquisition or transfer of certain property, awarding a certain contract, conclusion of some other transaction or deed that influences the financial situation of the person relying on the opinion.

<sup>57</sup> H. Tammiste (Note 26), pp. 385, 390.

<sup>58</sup> M. Wick (Note 36), p. 1270 *ff.*, 1275.

<sup>59</sup> C. v. Bar, E. Clive (Note 38), pp. 3347–3348.

<sup>60</sup> T. Tampuu, M. Käerdi (Note 25), p. 671.

<sup>61</sup> H. Sprau. – Palandt (Note 21), § 675, margin No. 39.

may be regarded as information or opinion. A declaration has to be presented in a certain form, generally at least being reproducible in written form, and accessible to third persons, to gain trust.<sup>\*62</sup>

### 3.3. Reliance on information

The other prerequisite for liability under the DCFR is infliction of damage due to violation of reasonable reliance.<sup>\*63</sup> Actual relying on the information or advice is not relevant; it is sufficient if there is the possibility of a victim relying on such information when making decisions. A person does not act under reasonable trust in the meaning of the DCFR if he or she knows or has to know that the information is incorrect or the opinion is not adequate, or the expert does not wish to take responsibility for the information.<sup>\*64</sup>

On the basis of LOA § 1048, whether third persons can reasonably rely on such information has to be identified from the expert's trust. The question is whether it can be presumed that the expert's opinion expresses a neutral and objective point of view that can be relied upon regardless of whether the expert has provided his or her opinion on request or as a representative of the other person. This depends on the position of the expert, as well as the nature of the opinion or information, and its form of expression.<sup>\*65</sup>

In addition to the objective aspect, the subjective trust of the victim in the correctness of the data is important as well. First and foremost, subjective trust cannot be considered to apply when the person knew about the untrustworthiness of the expert<sup>\*66</sup>, incorrectness of data, or inappropriateness of the opinion.

According to German judicial practice, the question of reliance on data is settled under the BGB's § 254 by the institution of the victim's complicity; all that counts is that the person knew or had to know about the incorrectness of data.<sup>\*67</sup>

In Swiss judicial practice, the decisive factor is whether the information or opinion received from the provider was a circumstance that affected the activities of the recipient.<sup>\*68</sup> Credulity is evaluated on the basis of the comprehension horizon of the recipient. Only information issued under an obligation with duties is taken into account. Therefore, no expert's liability arises when the expert makes a public statement—for example, sharing his or her opinion in a newspaper.<sup>\*69</sup>

### 3.4. Liability

In Estonia, LOA § 1050 applies to expert's liability; i.e., culpability and guaranteed liability arising from LOA § 103 does not apply where expert's liability is concerned.

According to the DCFR, the provider of information should be able to foresee that the information causes reasonable reliance.<sup>\*70</sup> Part of foreseeability of reasonable reliance is usually the importance of decisions made in reliance on such information.<sup>\*71</sup>

According to LOA § 1054, the expert is also liable for damage caused to persons he or she engages in his or her economic or professional activities on a regular basis, if the causing of damage is related to the expert's economic or professional activities. The same applies if the expert engages another person in the performance of his or her duties.

According to the BGB, the basis for liability in the case of contractual relationship is the BGB's § 280, and guilt shall be determined on the basis of § 276 of the BGB. The expert is liable for the person used for fulfilling contractual obligations under the BGB's § 278. Therefore, the expert has no right to relieve him- or herself from liability as would occur under the BGB's § 831 if the law of delict were to be applied to expert's liability. According to Swiss law, a prerequisite for liability is guilt.<sup>\*72</sup>

<sup>62</sup> T. Tampuu, M. Käerdi (Note 25), p. 671.

<sup>63</sup> C. v. Bar, E. Clive (Note 38), p. 3346.

<sup>64</sup> *Ibid.*, p. 3347.

<sup>65</sup> T. Tampuu, M. Käerdi (Note 25), p. 672.

<sup>66</sup> H. Tammiste (Note 26), pp. 385, 390.

<sup>67</sup> H. Sprau. – Palandt (Note 21), § 675, margin No. 42.

<sup>68</sup> In German, *Kriterium der Einflussnahme*, also see P. Loser (Note 48), p. 493.

<sup>69</sup> *Ibid.*, p. 497.

<sup>70</sup> C. v. Bar, E. Clive (Note 38), p. 3347.

<sup>71</sup> *Ibid.*

<sup>72</sup> M. Wick (Note 36), p. 1270 *ff.*, 1275; U. Sommer. Vertrauenshaftung, Anstoss zur Neukonzeption des Haftpflicht- und Obligationenrechts? – AJP/PJA 2006, pp. 1031, 1033.

### 3.5. Damage and the causal connection

In Estonia, damage must be determined on the basis of general provisions regulating compensation for damage and, therefore, similarly to contractual liability, The LOA's § 127 *ff.* are applied. In the case of the BGB, § 249 *ff.* are applied.

An obligation to compensate for damage under the DCFR presumes the existence of a double causal connection. An incorrect opinion has to be the cause of another person's decision, and damage has to be caused by that decision.<sup>\*73</sup>

The judicial situation under the LOA is the same. Since we are dealing with a case settled in the system of delict liability, there has to be a causal connection between violation of trust and the expert's activity, creating liability, and also a causal connection between damage and reliance on trust, concretising the liability.

The existence of a causal connection between damage and violation of obligations as a prerequisite for a claim for compensation for damages is equally necessary in the case of the BGB and OR.

## 4. Legal consequences

The purpose of LOA § 1048 is to protect people from the results of unfavourable proprietary decisions. Therefore, all economic loss inflicted as a result of reliance on incorrect opinion shall be subject to compensation. Thus, the LOA enables compensation for pure economic loss. The scope of compensation is to be determined individually for each case in accordance with the rule of purpose of the standard arising from LOA § 127 (2). The purpose of compensation for damages is to create the proprietary situation in which the victim would have been if he or she would not have relied on the incorrect opinion.<sup>\*74</sup> The same applies under OR and DCFR regulations.

In Germany, damage inflicted through trust in the correctness and completeness of the expert's opinion has to be compensated for.<sup>\*75</sup> Since under the German approach, a contractual relationship is involved, the aggrieved person has to be placed in the situation, via compensation, in which he or she would have been if the obligation would have been fulfilled as required—that is, the situation that would have obtained in the case of correct information or an adequate opinion.<sup>\*76</sup>

## 5. Evaluation

The purpose of liability of a person who has provided incorrect information or opinion on a proprietary matter to another person, outside a contractual relationship, is to protect the proprietary interests of the person relying on the opinion or information in the case of trust enjoyed by the provider of information. The main purpose of this composition of liability is the protection of reasonable reliance. It is especially clearly expressed in the laws of Estonia and Switzerland, and in the DCFR.

The settlements of Estonia, Switzerland, and the DCFR overlap in their sections on prerequisites for liability: liability arises if the expert is enjoying particular trust. The state of trust derives from the professional position of the expert.

The other prerequisite for arising of liability according to the LOA, OR, and DCFR is provision of incorrect information or opinion, or leaving the information or opinion uncorrected.

The third aspect is that arising of expert's liability presumes a proprietary decision made by a victim that is based on the information provided by the expert. It involves both whether the person relying on the opinion could reasonably rely on the state of trust of the expert and whether he or she relied on the accuracy of the opinion or information in good faith. In the case of meeting of such prerequisites, the expert is liable for damage inflicted on a third person that is due to his or her incorrect opinion if that expert is guilty of providing incorrect information or data—i.e., if the expert had to reasonably consider the possibility of someone relying on such information and nevertheless published the incorrect information.

<sup>73</sup> C. v. Bar, E. Clive (Note 38), p. 3348.

<sup>74</sup> T. Tampuu, M. Käerdi (Note 25), p. 672.

<sup>75</sup> H. Sprau. – Palandt (Note 21), § 675, margin No. 41.

<sup>76</sup> *Ibid.*, with further references to judicial practice.

As a legal consequence, the expert forms for him- or herself an obligation to compensate for the loss of the third person, the purpose of which is to create the situation in which the victim would have been if he or she would not have relied on the incorrect information or opinion. Thus, this is compensation for pure economic loss.

This settlement differs from the solution of Germany, the starting point of which is formation of contract between the expert and the third person. Judicial practice uses the fiction of a silent contract and presumes formation of a contract when the expert is enjoying a particular trust. If a contract is formed in such a way, it may be a contract with a protective effect for a third party that also includes people who are not parties to the contract. The obligation to protect the third person is not excluded even when the interests of the seeker of advice and the third person are in mutual contradiction.

The 'silently awarded contract with protective effect for a third party' concept has received strong criticism in the professional literature.<sup>\*77</sup> It is claimed that the concept adopted by the BGH has nothing to do with private autonomy, wherefore such cases should be dealt with under the law of delict.<sup>\*78</sup> It is also said that in its nature, expert's liability rather resembles the concept of violation of obligation arising as part of contractual liability, for which reason the system of contractual liability should be applied. To achieve that, it is suggested that contracts for providing information should be regulated by law or settled as a contract-like claim by the example of c.i.c. claim, for which § 311 (3) of the BGB is said to provide sufficient grounds.<sup>\*79</sup> In the scope of the theory of a contract with protective effect for a third party, severe difficulties are claimed to arise with respect to justification for leaving the right of the expert to present objections under the BGB's § 334 unapplied, for example, in cases wherein a person having entered into a (silent) contract has deceived the expert; as well as difficulties in addressing why the principle of complicity, or limitation of liability agreed upon between the expert and a party to the contract with relation to the third party, does not apply. Protecting third persons under a contract with a protective effect for third parties is also dogmatically problematic if the interests of the third person and the seeker of advice as a party to the contract are in conflict. According to the DCFR and LOA, the concept of a contract with protective effect for a third party does not apply to such persons.

The disadvantage of settlement under the law of delict taken as a basis in the LOA and DCFR is that, with this action, an exemption is made from the conception of unlawfulness accepted by the LOA, BGB, and DCFR, and to a great extent also Swiss law. This is not a violation of legal rights—a special legal relationship pursuant to the law is formed between the provider and the receiver of information in fulfilment of composition of trust.<sup>\*80</sup> Although this is not a contract, a heightened requirement to exercise due care is formed between the parties. Thus, in its nature, the regulation of expert's liability rather resembles a c.i.c. claim or the responsibility of an unauthorised representative. The position of LOA § 1048 and the DCFR's Article VI–2:207 in the law of delict can, therefore, be deemed arguable. The advantage of the delict responsibility in the LOA is that in the case of liability under the law of delict, the expert is only responsible for providing wrongful incorrect information. If the situation were to be regulated as an obligation pursuant to law, as in LOA § 14 and 15, the principle of guarantee liability arising from LOA § 103 would be applied on account of lack of a specific rule.

Both delictual and contractual settlements are difficult to combine with the existing liability system under the law of obligations. Therefore, there have been suggestions in legal theory to replace both concepts with expert's liability based on the principles of c.i.c. In accordance with such liability for breach of confidence<sup>\*81</sup>, it would be natural that the expert would be obliged to compensate the third party directly for the damage, regardless of the contract with the seeker of advice.<sup>\*82</sup> In the case of liability created on the basis of c.i.c. principles, it would be understandable for the statements of the expert to have to be interpreted according to the comprehension horizon of the third person and not of the person who entered into contract with the expert.

Liability for breach of confidence would be prerequisite upon provision of expert opinion being viewed as creating composition of trust, which is already being done in the legal systems under consideration here. The provider of information can limit the composition of trust, by presenting the data on which he or she has based the opinion during presentation of said opinion, and indicating the data needed for giving a complete

<sup>77</sup> H. Honsell (Note 5), p. 223; S. Lammel. Zur Auskunftshaftung. – AcP 1979 (179), p. 337 ff., p. 344; B. Grunewald. Die Haftung des Experten für seine Expertise gegenüber Dritten. – AcP 1987 (187), p. 285 ff., p. 294; E. Picker. Gutachterhaftung. Ausservertragliche Einstandspflichten als innergesetzliche Rechtsfortbildung. – V. Beuthien (Hrsg.). Festschrift für Dieter Medicus Zum 70. Geburtstag. Köln, Berlin, Bonn, München: Heymanns 1999, p. 397 ff. p. 400 ff.

<sup>78</sup> C. v. Bar. Verkehrspflichten: richterliche Gefahrsteuerungsgebote im deutschen Deliktsrecht. Köln, Berlin, Bonn, München: Heymann 1980, p. 233 ff.

<sup>79</sup> J. Köndgen. Selbstbindung ohne Vertrag. Zur Haftung aus geschäftsbezogenem Handeln. Tübingen: Mohr Siebeck 1981, p. 358; H.-B. Schäfer. Haftung für fehlerhafte Wertgutachten aus wirtschaftswissenschaftlicher Perspektive. – AcP 2002 (202), p. 809 ff., p. 826 ff.; B. Grunewald (Note 77), p. 299 ff.; G. Wagner. – MüKo (Note 5), § 826, margin No. 67; C.-W. Canaris. Die Reichweite der Expertenhaftung gegenüber Dritten. – ZHR 1999 (163), p. 206 ff., p. 220 ff.

<sup>80</sup> See T. Uusen-Nacke (Note 23), pp. 536, 541.

<sup>81</sup> In German, *Vertauenshaftung*.

<sup>82</sup> C.-W. Canaris (Note 79), p. 229.

opinion.<sup>\*83</sup> The expert can use the same method to limit his or her liability to the circle of persons who may rely on such information, and to determine the purpose for which this information may be used.

Relying on an expert's opinion forms part of composition of trust because the provider of information is to be reliable.<sup>\*84</sup> Therefore, liability for breach of confidence may be considered if the person relying on the opinion can reasonably view the provider of information as an expert. This is also a prerequisite in all of the judicial orders under consideration.

Proceeding from c.i.c. principles, one prerequisite for expert's liability would be presentation of an opinion under the obligation of one's duties.<sup>\*85</sup> Thus, liability could be considered only if the opinion has been provided during preparation of the contract. Since the expert generally prepares not his or her own contract when providing an opinion but the contract of a person seeking his or her opinion, the principles of third party liability should be applied in the case of c.i.c. claim. At that, the idea of a contract being prepared should be taken broadly—liability should include those cases in which the expert knows neither the other party to the future contract nor the exact content of that contract or the number of contracts awarded in the 'transaction'.<sup>\*86</sup> Limiting liability through a generally understandable transaction is said to be dogmatically and teleologically right, since it enables the expert's liability to be reasonably limited by foreseeability. Thus, for example, the liability of a person who has presented an opinion to the public would be limited since he or she did not present the information under obligation in conjunction with his or her duties as an expert and cannot therefore give a personal guarantee of the opinion against all possible activities that a person could plan in reliance on his or her opinion.<sup>\*87</sup> The same is presumed in the LOA, the DCFR, and Swiss practice, and it is also covered under contract with a protective effect for a third party.

In the case of liability for breach of confidence, the provider of the information or opinion should take account of, and bear, the risk that the person receiving his or her opinion will use it in a different manner than planned by the provider of opinion, and in so doing create liability for the provider of opinion. That risk resting with the provider of information is justified since the risk is principally 'governed' by him or her. The provider of information or opinion can eliminate the liability if he or she specifies in the opinion the purpose for which that opinion was provided.<sup>\*88</sup>

Settling of cases on the basis of the concept of liability for breach of confidence may come to the same conclusion as the systems under consideration. Its advantage when compared to implementation of the institution of the contract with protective effect for a third party as adopted in German law, is that a contract is formed with protective effect according to which a third person can be protected only when his or her interests overlap the interests of the person who awarded the contract, or at least corresponds to their general nature.<sup>\*89</sup>

Although liability for breach of confidence has not become a dominant basis for assessing expert's liability in German law, it has been adopted in Swiss judicial practice. Namely, the Federal Court of Justice holds the view that the c.i.c. claim is one version of liability for breach of confidence, the prerequisite for the arising of which is lawful special connection<sup>\*90</sup>, according to which the obligations to protect and explain arise between the parties.<sup>\*91</sup>

Special connection also arises with the expert knowingly presenting his or her expert opinion. Direct contact between the persons providing information and the person relying on it is not relevant. It is sufficient if the person who provided the information has stated—or it can be concluded from the provider's activities—that he or she wishes to be liable for the correctness of his or her information or opinion, and the other person has trusted such conduct in a way that has caused damage.<sup>\*92</sup>

In arguments against regarding liability for breach of confidence as an independent basis for liability, it is claimed that doing so constitutes artificial broadening of the institution of c.i.c. The latter should be applied only in the case of an obligation prior to awarding of the contract, or when a contract 'falls off' for some reason. It is also claimed that such interpretation would bring about blurring of the line between contractual and delictual law and would open up liability under the law of delict for compensation of pure economic loss.<sup>\*93</sup>

<sup>83</sup> *Ibid.*, p. 230.

<sup>84</sup> *Ibid.*, p. 232.

<sup>85</sup> *Ibid.*, p. 235.

<sup>86</sup> *Ibid.*, p. 236.

<sup>87</sup> *Ibid.*, p. 239.

<sup>88</sup> *Ibid.*, p. 239.

<sup>89</sup> *Ibid.*, p. 242.

<sup>90</sup> In German, *Sonderverbindung*.

<sup>91</sup> BGE 124 III 297; 130 III 345.

<sup>92</sup> H. Honsell (Note 3), p. 169 *ff.*

<sup>93</sup> *Ibid.*

Such criticism cannot be agreed with. The concept of the law of delict taken as a basis by the LOA and DCFR, as well as the concept of contract with protective effect for a third party in German law, represents blurring of the line between the laws of delict and that of contract. In one case, a path for compensation for pure economic loss is created with the law of delict, and in the other, persons not belonging to the protective area of the contract according to general rules are becoming artificially involved in the contract. Accordingly, there is no such thing as 'purely' the law of delict or 'pure' contract law. In that light, acknowledging liability for breach of confidence as an independent composition of liability in a similar way to the institution of c.i.c. would be, rather, a simpler and a clearer solution. At the same time, placing the provisions of expert's liability under the law of delict, and (vicariously) applying the provisions of delict law to it, does not prevent treating expert's liability as liability for breach of confidence.

## 6. Conclusions

In this article, the author has explored ways of resolving situations in which a person who is an expert in a certain field presents, on the basis of his or her professional knowledge, information or an expert opinion that later proves to be incorrect in connection with a proprietary matter to another person, with whom he or she has no contractual relationship, in view of the approaches of the legal orders of Estonia, Germany, and Switzerland, and according to the principles provided in the DCFR.

Estonian law and the DCFR try to extend protection under the law of delict to cases of infliction of pure economic loss, creating a special composition under the law of delict to do so. German judicial practice primarily works with the institution of a contract with protective effect for a third party as arising from the legal fiction. In Swiss law, the concept of liability for breach of confidence proceeds from, and all cases of liability are included under, the principle of liability under c.i.c. Such an approach is also supported by the minority opinion presented in German judicial literature.

As a result of the foregoing analysis, a conclusion was reached that including the concept of liability for breach of confidence as part of expert's liability was not excluded in any of the legal orders under consideration, and the prerequisites for expert's liability correspond to a great extent to the prerequisites proposed in the context of liability for breach of confidence in all of the legal orders considered.