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THE PROTECTIVE PURPOSE OF THE CONTRACT AND THE LIABILITY OF AN EXPERT TOWARDS A THIRD PARTY IN CZECH, AUSTRIAN, AND GERMAN PRIVATE LAW

Jitka Matějková

Assistant Professor
Mendel University in Brno, Faculty of Business and Economics (Czech Republic)

Contact information
Address: Zemědělská 1, 613 00 Brno, Czech Republic
Phone: +420 545 132 257
E-mail address: jitka.matejkova@mendelu.cz

Ondřej Pavelek

Assistant Professor; Ph.D.
Mendel University in Brno, Faculty of Business and Economics (Czech Republic)

Contact information
Address: Zemědělská 1, 613 00 Brno, Czech Republic
Phone: +420 545 132 203
E-mail address: ondrej.pavelek@mendelu.cz

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ABSTRACT

The aim of the paper is to describe the so-called protective purpose of the contract, by demonstrating the liability of experts for damage caused by an imperfect expert opinion, incorrect advice, or information. The comparative method will be used in conjunction with analyzing the Czech, Austrian, and German arrangements – their continuities and differences.

Criteria for assessing whether this is a protective purpose of the contract and how these criteria vary in different legal frameworks are discussed in detail. The conceptual features of the expert as well as the assumptions of their responsibility for providing advice or information regulated in the individual jurisdictions are argued as well.

The article concludes that the protective purpose of the contract is demonstrated accurately in the case of the liability of the expert for damage which has been established on the basis of a contract. These are in particular cases where an expert draws up an opinion on behalf of the parties on the basis of a contract which is, however, concluded with merely one party. In the event of a breach of the contract, the expert is also responsible for the damage caused to a party that has not concluded the contract with an expert.

KEYWORDS

Protective purpose of the contract, an expert, damages, comparative methods

INTRODUCTION

Expert evidence is a very important part of court proceedings – civil, criminal and administrative. It plays an important role in standard private law contracts, typically in pricing property in purchase contracts. However, there is a situation when an expert's opinion is drawn up in error, whether negligent or even deliberate. Law representatives in Germany, Austria and the Czech Republic have had to deal with the issue of whether there is any responsibility of an expert for damage caused to the participant by incorrect expert evidence during or even without court proceedings. As Coester and Markesinis point out, the responsibility of experts takes on an additional importance as knowledge becomes very specialized. Experts are "selling" and "buyers" decide upon them.[1] However, the experts' liability for possible damage for incorrect expert evidence is not properly solved. Thus, the relevant circumstances causing experts responsibility for damage are discussed. The 2008 crisis was even more remarkable. Credit rating agencies as experts were sued for incorrect prediction of situations.[2]

An expert's responsibility for the damage caused to someone by incorrectly drawn expert's evidence or by a court decision based on this incorrect expert evidence is undoubtedly linked to the concept of the so-called "protective purpose of the contract". Modification in Germany and Austria Law Orders has changed in the twentieth century and the beginning of the twenty-first century. Czech case law, on the other hand, has undergone the first step to change in 2005 and definite turnover in 2014, when the new Civil Code of the Czech Republic was adopted.

The aim of this article is to focus on one of the fundamental areas of contractual practices - the breach of a contract and its legal consequences. From the scientific point of view especially interesting is the function of the *inter partes* principle. As a general rule in the area of obligation law, both contractual and tortious, the obligations are legally binding only *inter partes*, i.e. only between the parties; they do not reach *erga omnes*, nor *in rem*. However, in some cases, the debtor is liable not only to their creditor, i.e. the contractual partner, but also to contractual partners in consequent levels. Thus, it is necessary to discover whose rights the contract should protect which could be discovered by a comprehensive and systematic interpretation of the specific contract. The authors of the article aspire to answer the

[1] Michael Coester and Basil Markesinis, "Liability of Financial Experts in German and Aerican Law: An Exercise in Comparative Methodology," *The American Journal of Comparative Law* (2003): 275 // https://heinonline.org/HOL/LandingPage?handle=hein.journals/amcomp51&div=16&id=&page=.

[2] Horst Hammen, "Vertrag mit Schutzwirkung für Dritte, culpa in contrahendo und Haftung von Ratingagenturen" (Protection Contract for third parties, Culpa in contrahendo and Liability of rating agencies): 1-19; in: "Direito Privado e Desenvolvimento Econômico: Estudos da DJLV e da Rede Alemanha-Brasil de Pesquisas em Direito do Consumidor sobre o Direito Privado no século XXI," Organizadores: St. Grundmann, Chr. Baldus, Cl. Lima Marques, *et al*. (Porto Alegre, 2017).

question whether the so-called protective purpose of the contract violates the principle that the obligations operate only *inter partes* and thus expand the range of entities that are bound by such a contract, despite that they have not concluded. This protective purpose of the contract and its conflict with the principle that the obligations operate *inter partes* will be verified in the event of experts' liability for damage caused by incorrect expert opinion, advice or information. In this context, the conceptual features of the expert will also be defined. Given the importance of Austrian and German legal doctrine and case law, the intention of the authors is to compare the approach preferred by the Czech Civil Code with the approach regulated by Austrian and German legal systems. The article will thus determine whether the protection purpose of the contract is regulated in the jurisdictions compared here, and also if these criteria are different.

1. METHODOLOGY

The basic method used in the paper is a comparative one. It is used to determine the basic theoretical concepts of the protective purpose of the contract and the related liability of the expert for damage caused by incorrect advice and expert evidence. The paper is not limited to a comparison of legislation. The basic principles of legal science and jurisprudence will be analysed, too. In addition to the basic comparison method, the method of analysis and synthesis will be used. The comparative method undoubtedly helps improve the legal order and the view of a certain adjustment.[3] Recently, the comparison has become more important in the Czech Republic, particularly in private law. Husa emphasizes the importance of the comparative method. Central European states use comparison with the foreign law orders as an integral part of their decision-making process.[4] In the Czech Republic, legal traditions were formed during the 19th and early 20th centuries along with the German and Austrian legal sciences. In the 1950's, when the Czechoslovakian "socialist" civil code was adopted, there was a certain break and discontinuity with the previous legal development. At present, Czech private law returns to the original concepts formulated mainly in ABGB.[5] The comparative method seems to be the most appropriate not only to analyse the development of the legal regulation in similar

[3] Helmut Koziol, *Harmonisation and fundamental questions of European tort law* (Vienna: Jan Sramek Verlag, 2017), 1-2; and James Gordley and Arthur Taylor Von Mehren, *An Introduction to the Comparative Study of Private Law* (Cambridge University Press, 2006), 10.
[4] Jaakko Husa, *A new introduction to comparative law* (Oxford: Hart publishing, 2015), 9-11.
[5] Filip Melzer and Petr Tégl, *Občanský zákoník: velký komentář. Svazek I (Civil Code: Big commentary. Volume I)*, *§ 1-117* (Praha: Leges, 2013), 505.

legal jurisdictions, but also to enrich the Czech legal order in the area of private law as regards the legal development and modern legal culture.[6]

2. PROTECTIVE PURPOSE OF THE CONTRACT

Damages for breach of contract may be claimed by the contracting party only after the second contractor. Commitments are *inter partes*. However, there is an exception to this principle. The party of the contract whose interest is to serve the third party's apparent service can claim damages from that third party who caused the damage in the context of the contract.[7] Thus, there is not a direct participant in the contract, which is why they cannot claim for example the completion of the contract, but only compensation for damage. Typically, it is the preparation of expert evidence or a lease agreement and the protection of members of the tenant's household.

The following is example from the institute from the Austrian judicial practice. Decision, no. 3 Ob 67/05 of 2005,[8] by the Supreme Court of Austria resolved a dispute with an applicant intending to sell their painting at an auction.[9] The involved auction hall called upon expertise to verify the authenticity of the painting. The expert, however, arrived at a conclusion that it was a mere copy. Then, the painting was discarded on the basis of this review. The applicant, however, disagreed with the fact that the picture was not genuine and brought an action against the expert for compensation of damage caused to them by the fact that the painting was removed from the auction and not sold. The court subsequently re-appointed an expert to assess whether or not the painting was genuine. The expert thus concluded that the expert's evidence, on the basis of which the painting was discarded, was incorrect. In this case, it was necessary to answer the question of who is liable for the damage suffered by the applicant due to the rejecting of the painting because of an incorrect expert opinion - is the auctioneer or the expert responsible for evaluating the painting?

German courts have dealt with similar issues. In one of the first cases, the Bundesgerichtshof in Germany discussed the question of liability for a missing will. In this case, the father decided to write a will establishing his daughter as his own heir. He asked his attorney to arrange a meeting with a notary. However, the notary

[6] Jaakko Husa, *supra* note 4, 9-11.
[7] Helmut Koziol and Rudolf Welser, *Grundriß des bürgerlichen Rechts. Band II, Schuldrecht (Outline of civil law. Volume II, law of obligations)* (Vienna: Manzsche Verlags- und Universitätsbuchhandlung, 1996), 353.
[8] Supreme Court of Austria (2005, no. 3 Ob 67/05g).
[9] JuBl Sailer, "Haftung des Sachverständigen gegenüber Dritten," *Juristische Blätter* Vol. 131, Issue 3 (March 2009) // DOI: 10.1007/s00503-008-1579-0.

had several times postponed the meeting with an attorney. Finally, the person died without leaving any will, so the daughter was not named as the only heir.[10]

In both cases, the German and Austrian courts had to deal with the question of whether the third party rather than a contractor was liable for the damage.[11]

Both Austrian and Czech Civil Codes distinguish between contractual obligations and torts.[12] Authors of the Trademarks obviously found inspiration in Germany and Austria in Section 2913 of the Trademark, pursuant to which if the contractor breaches the contractual obligation, it is obliged to compensate for the damage caused to another contractual party, or even to a person in whose interest the obligation was.

By this provision, the institute of the protective purpose of contract was introduced into the Czech legal order. German and Austrian legal regulations served as models for European countries. Such a contract can be defined as a quasi-contractual relationship between a person with whom a third party has not concluded a contract without being a violation of the law.[13] By nature, this is an institute close to *culpa in contrahendo*,[14] as it is also a contractual obligation to pay damages without a contract being concluded.[15] In Austria, the protective purpose of the contract is not directly stipulated by law, but it was only a doctrine subsequently taken over by the case law, in the above-mentioned decision no. 3 Ob 67/05.[16]

However, the Czech and German legislators adopted this concept directly into the law. The basic rule governing liability for damage in Bürgerliches Gesetzbuch ("BGB" as follows) is Section 823 Subsection 1. Under the provision, a person who causes damage to life, body, health, and freedom of property is liable to pay damages. Section 823 Subsection 2 of the BGB declares that the breeder is also responsible for the breach of the law to protect a third party. Where the protection of the person also arises out of law, it can be invoked without fault; otherwise, fault

[10] Benjamin Büttner, *Umfang und Grenzen der Dritthaftung von Experten: eine rechtsvergleichende Untersuchung (Extent and Limits of Third-party Liability of Experts: a Comparative Analysis)* (Tübingen: Mohr Siebeck, 2006), 217.
[11] Steffen Leicht, *Die Qualifikation der Haftung von Angehörigen rechts- und wirtschaftsberatender Berufe im grenzüberschreitenden Dienstleistungsverkehr" (The qualification of the liability of members of legal and business consultancy professions in the cross-border trade in services)*, Studien zum ausländischen und internationalen Privatrecht, StudIPR 82, XVI (2002), 219.
[12] Helmut Koziol and Rudolf Welser, *supra* note 7, 356.
[13] Gert Brüggemeier, *Haftungsrecht, Struktur, Prinzipien, Schutzbereich Ein Beitrag zur Europäisierung des Privatrechts (Liability Law, Structure, Principles, Scope of Protection, A contribution to the Europeanization of Private Law)* (Springer, 2006), 20-116.
[14] Supreme Court of Austria (1986, no. 1 Ob 536/86).
[15] Urmas Volens, "Expert's Liability to a Third Person at the Point of Intersection of the Law of Contract and the Law of Delict," *Juridica International* XVII/2010 (2010): 176-187.
[16] Peter Rummel, *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch (Commentary on the general civil code): mit EheG, KSchG, MRG, WGG, WEG 2002, BTVG, HeizKG, IPRG, EVÜ: in zwei Bänden*, 2. Band, §§ 1175 bis 1502 ABGB; Nebengesetze. 3., neubearb. und erw. aufl. (Wien: Manzsche Verlags- und Universitätsbuchhandlung, 2002), 1526.

is required.[17] It was by the provisions of § 823 (2) of the BGB that the Czech legislator was inspired.

However, Germany did not accept the institute of "protective purpose of the contract" unambiguously. The protective purpose of a contract was first applied in *Capuzol case* (BGH NJW 1959, 1676).[18] The case circumstances were as follows. The tenant's daughter was infected in their leased apartment by tuberculosis because the landlord had not disinfected the apartment. At the end of the twentieth century, a case law was formed. The criteria of the protective purpose of the contract were defined.[19] The first one is the proximity of the relationship between the wrongdoer and the third person, the second one is the wrongdoer's awareness of the of the third person's interest, and the third condition is that the wrongdoer knows about these two assumptions, i.e. certain predictability.[20]

The Supreme Court of the Czech Republic had dealt with the protective purpose of the contract already before in 2014. However, this decision was perceived as very controversial as it weakened the traditional concept of contracts and offences. For the first time, the concept of the protective purpose of the contract was accepted in 2003 by the decision of the Supreme Court, no. 29 Odo 378/2001.[21] In this case, the compensation in the contract for control activities was discussed. The Supreme Court declared that the injured party could rely - in order to prove the existence of an unlawful act - on a breach of a contractual obligation not only if he is a wrongdoer contractor - the other party. It is sufficient to prove that the wrongdoer has breached his contractual obligation contract but it affected the third party - the injured party. This decision was criticised as it breaks down the main characteristics of the commitments *inter partes*. However, we consider that the protective purpose of the contract is primarily to protect the victim. In addition to *culpa in contrahendo*, there are also cases of consumer protection pursuant to Section 2939 of the Civil Code. There it is declared that jointly and severally liable is the person who sold the defective product, the damages are paid also by the person who imported the product for the purpose of its marketing within their business.

Predictability is related to the theory of adequate causality, which specifies the causality as a prerequisite for liability for damages. Nevertheless, in some

[17] Wagner in: Peter Ulmer, *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 5, Schuldrecht, Besonderer, Teil III: §§ 705-853 Partnerschaftsgesellschaftsgesetz, Produkthaftungsgesetz (Munich comment on the Civil Code. Volume 5, Obligation Law, Special, Part III: §§ 705-853 Partnership Law, Product Liability Law)*, 4th edition (München: Verlag C.H. Beck, 2004), 2100.
[18] *Capuzol*, Supreme Court of Germany (1959, no. NJW 1959, 1676).
[19] Carlotta Rinaldo, *Die Haftung Dritter in Deutschland und Italien. Eine handelsrechtliche Untersuchung zu Ratingagenturen und PartG (Third party liability in Germany and Italy. A commercial law investigation into rating agencies and PartG)* (De Gruyter, 2017), 43-60.
[20] Gert Brüggemeier, "Perspectives on the Law of Contorts: A Discussion of the Dominant Trends in West German Tort Law Hastings," *International and Comparative Law Review* Vol. 6, No. 2 (1983).
[21] Supreme Court of the Czech Republic (2001, no. 29 Odo 378/2001).

interrelated causes not all causes are equally significant. Some of them are important, major and decisive for a particular conclusion, others are less significant, but necessary for a certain effect, others are minor and insignificant for the outcome. The assessment whether causes are major or secondary is a matter of assessing all the circumstances of a particular case. In this context, Koziol mentioned that the protection purpose theory is based on the fact that the debtor is not liable for all consequences of breach of contract but only for breach of those interests whose protection was the purpose of the contract.[22] Thus, the debtor is not responsible for all consequences of breach of contract, but only for those which are foreseeable for them.[23] The damage suffered must therefore be an adequate consequence of the expert's unlawful conduct. In some cases it is difficult to define predictability, as it may not always be certain that the expert knows the purpose of the expert´s opinion. In terms of liability, it is also essential that the protective purpose of the contract leads to the extension of contractual liability to a person who, however, could not influence the content of the contract, i.e. rights and obligations. This may undermine the principle of will autonomy. The will is thus reduced to mere predictability, that is, the debtor could have assumed a fact and is therefore obliged. However, contractual liability is not a prerequisite for responsibility, but only unlawfulness, injury and a causal link. The principle of *pacta sunt servanda* thus comes to the forefront of the principle of will autonomy. The protective purpose of the contract leads to the empowerment of the creditor, but only in certain specific circumstances, a) the closeness of the relationship, b) the protective interest of the creditor, c) recognisability at the conclusion of the contract, and d) the need for protective effect.[24]

3. CONCEPTUAL CHARACTERISTICS OF AN EXPERT

As an expert is generally defined a person who has above-average knowledge in a particular field. Although German, Czech and Austrian regulations are commonly used by practitioners, there is no definition in any legal order. We must, therefore, rely on non-legislative definitions or definitions adopted by the case-law. For example, the European Expert Organization (Euro expert) defines it in its Code, Article 1 (a), (b), (c) and (d), as an independent and objective expert, who has a

[22] Helmut Koziol and Rudolf Welser, *supra* note 7, 353.
[23] Constitutional Court of the Czech Republic (2005, no. I. CC 312/05).
[24] Josef Šilhán, *Právní následky porušení smlouvy v novém občanském zákoníku* (*Legal consequences of breach of contract in the new Civil Code*) (Praha: C.H. Beck, 2015), 297-308; and Hans-Bernd Schäfer, "Efficient Third-Party Liability of Auditors in Tort Law and in Contract Law," *German Working Papers in Law and Economics* Vol. 2003, Paper 21 (2003).

high level of knowledge and practical experience in a particular field of expertise. This expert knowledge should be given by his higher education and practical experience.

The European Commission for the Efficiency of Justice (CEPEJ) also set out its requirements for experts in the 2014 Recommendation, which lists the basic requirements for experts.

The expert has duties that refer to their personal duties and duties that concern the procedure of the assessment itself. Firstly, the expert has to produce and report the expert opinion in person. They must take full personal responsibility and cannot delegate this responsibility to third person (Section 5 of the Recommendation).

Independence and impartiality are crucial. They are characterized for example by the prohibition of the expert from receiving instructions from a third party. The expert has to be not only personally independent but also independent of the outcome of the lawsuit and also of the interests of the parties. The general principles of independence and impartiality must be obeyed and followed. To be able to achieve those general principles, there are specific general professional principles and rules the expert should comply with. The expert has to safeguard all information concerning the circumstances that they determined during his fact-finding and assessment. To affirm their independence, the expert must give a public guarantee. This usually happens through the administration of the oath concerning their duties. In case the expert is in agreement, they may swear impartiality only once. In addition, the expert should possess and maintain a high level of technical and professional knowledge and/or practical experience in his professional field. They should keep up their knowledge not only concerning their expertise but also the principles guiding their activity(s).

The Recommendation (Section 7 of the Recommendation) describes damage claims in cases of culpably incorrect factual assessment and highlights that in some specific cases in which the expert has culpably failed to conduct a proper and correct assessment, the parties may have damage claims against the expert. In these cases, it will usually be necessary that the expert has prepared his expert opinion wrongly with intent or willful negligence. For the degree of fault, the assessment itself will count. The damage claims against the expert can be settled in a separate procedure. In addition, the Recommendation entitles the parties can also bring normal legal proceedings against the expert.

Both German and Austrian legal practice and doctrine agree that experts are to be defined on the basis of two criteria, which in essence correspond to the definition of an expert given by the European Expert Organization: independence and

expertise.[25] Expertise can be considered as the ability to provide expert judgment, to systematically and logically organize certain information and formulate conclusions to be reviewed. Independence then manifests itself as a guarantee that the expertise is based on their background and should not be influenced by someone else, as this may disrupt their expertise. The expert should be a truly independent person who evaluates the professional aspect of the matter and not the one serving.

According to Section 5 of the Czech Civil Code, a person who in public or in contact with another person enters into professional practice as a member of a particular profession or condition, indicates that they are able to deal with the knowledge and diligence associated with their profession or status. If they do not have this professional care, it is their burden. This provision regulates what is quite common - we expect a physician to give correct diagnosis; if we ask a lawyer for advice, we expect their advice to be correct. This provision tightens the conditions declared in Section 4 of the Czech Civil Code. It is presumed that every person has the intelligence of an average person and the ability to use it with ordinary care and caution, and that everyone can reasonably expect it from legal relations. They are professionals presenting themselves as members of a profession or state, i.e. persons who apply for a particular profession, such as a professional soldier, athlete, etc. These professionals are expected by others to negotiate using their qualities or skills. A person who does not act in this way must be held accountable for these consequences. The Supreme Court of the Czech Republic defined the court expert as a person who, through their expertise, assesses the facts which have been identified and communicates the result of that assessment in the court's expert evidence.[26]

This concept, adopted by the Czech legislative body in Section 5 of the Civil Code, originates in Section 1299 of the Austrian Civil Code from 1811. It governs the liability of the expert for the damage. The Austrian law order also imposes higher demands on professionals than on an average person. It is not crucial whether a person is a real expert or not; of greatest import is who claims to be an expert. What is decisive is if a professional is presenting their expertise externally. The mere inner conviction that someone is a professional is not sufficient. This may be the case in an advertisement when someone declares that they understand the matter and provides some information or advice.

The expert is the one who declares themselves to have some knowledge or experience, some expertise, and is independent. It is not important whether this really is true, just the fact that it gives others the impression that it is true and the others expect it from this expertise and independence.

[25] Bryan A. Garner, *Black's law dictionary*, 10th edition (St. Paul: Thomson Reuters, 2014).
[26] Supreme Court of the Czech Republic (2005, no. 33 Odo 324/2005).

4. EXPERT EVIDENCE IN COURT PROCEEDINGS

According to Section 125 of the Czech Civil Code, all the means by which the state of the matter can be ascertained, in particular the examination of witnesses, expert evidences, reports and statements of bodies, natural and legal persons, notarial or enforceable writings and other documents, examination and interrogation participants. Where the method of obtaining evidence is not prescribed, the court shall determine it. Expert judgment is the evidence by which the court finds a factual situation where expertise is needed to assess the findings. Their significance is, therefore, characteristic, also because, for example, the Czech Act on Special Procedures for Proceedings provides for the obligation to prove evidence by an expert if the court decides on the involuntary takeover of a person into the health facility or in the case of deciding on the limitation of the lawfulness. According to the Czech procedural rules, the court may appoint experts from many fields, but not law, as this would be contrary to the principle of *iura novit curia*; this does not exclude the provisions of an expert of a foreign law to which this principle does not apply.[27] The main task of a forensic expert is, therefore, to provide a conclusion on a certain issue, not a legal assessment, since this is the judge's responsibility. For example, it is not possible to order a forensic expert to produce a report on who caused a road accident. In this context, it is appropriate to draw attention to the difference between an expert opinion and a witness testimony. The difference is that, while an expert's work is based on forensic expertise, a witness reproduces what he perceives. Replacement of witness testimony by expert evidence (expert's examination), if the court takes expert testimony of a witness, represents a defect in proceedings that could have influenced the correctness of the Supreme Court decision of 26 November 1998, no. 3 Cdon 385/96.[28]

5. "PRIVATE" EXPERT OPINION

On the limit between a tort and a contractual liability, there is an expert opinion, which, although based on a court resolution, was prepared by a private expert. The Czech legislature admitted the existence of a so-called private expert opinion in the Civil Procedure Code; this cannot be found in Austria or Germany. Pursuant to Section 127a of the Civil Procedure Code, if an expert opinion submitted by a party to the proceedings has all the requisites required by law and includes an expert's statement that they are aware of the consequences of perceptively false expert opinion, the

[27] Alena Winterová, *Civilní právo procesní: vysokoškolská učebnice (Civil procedural law: university textbook)*, 6th edition (Praha: Linde, 6th ed., 2011), 57-59.
[28] Supreme Court of the Czech Republic (1996, no. 3 Cdon 385/96).

same procedure as in the case of an expert opinion requested by the court. In practice, the following situation may occur. One of the parties to the proceedings submits to the court an expert report containing the required particulars, including a clause. The court then looks at such an opinion as if it had done it itself. The main advantage is the speeding up of the proceedings, as the court does not have to carry out an expert review. The provision of the so-called private expert opinion was introduced in 2011. Until then, the court regarded the opinion submitted by a participant as a private one, as in Germany and Austria.

However, the new concept is highly criticized because even if the procedure is accellerated, it does not lead to an improvement of the submitted expert opinions. Also, the draft of the new Czech Civil Code from 2018 does not count on the so-called private expert opinion.

6. GRAVITY AND EVALUATION OF AN EXPERT OPINION

The key question that has been dealt with by the Czech Constitutional and Supreme Court is whether the court can assess the factual accuracy of an expert's report.[29] The courts have concluded that, although an expert's opinion is just one type of evidence that plays an irreplaceable role, it is not in a position higher than that of the others in accordance with the principle of free evaluation of evidence. The judge is thus obliged to evaluate the pieces of evidence in their mutual connection. The Czech Constitutional Court in its judgment of 20 May 2008, no. I. CC 49/06,[30] emphasized that it contradicts the principle of free evaluation of evidence that the court privileges an expert's opinion and transfers the responsibility for the accuracy of the facts to the expert. It has been made clear that the courts must not behave in a buck-passing manner transferring responsibility for resolving legal disputes to an expert.

According to the Section 132 of Civil Procedure Code, the court assesses the evidence at its discretion, namely each piece evidence separately, taking into account their relationships; in doing so, the court carefully takes into account everything uncovered in the proceedings, including the participants' testimonies. As stated above, an expert opinion cannot be privileged and must viewed in the same way as other evidence, although its importance is justified. The Czech Constitutional Court in its judgment of 30 April 2007, no. III. CC 299/06,[31] called for the whole process of expert opinion to be evaluated, including the preparation of expert examination, the provision of documents for experts, the course of expert examination, the

[29] E.g. Supreme Court of the Czech Republic (2009, no. 22 Cdo 1810/2009).
[30] Constitutional Court of the Czech Republic (2006, no. I. CC 49/06).
[31] Constitutional Court of the Czech Republic (2006, no. III. CC 299/06).

credibility of the theoretical basis by which an expert justifies his conclusions, the reliability of the methods used by the expert and the method of drawing conclusions by an expert. Thus, the Czech courts must not take expert opinions for granted, without evaluating the process of their formation or their basic requisites.

7. EXPERT'S LIABILITY FOR DAMAGE

While a contract expert is appointed on a contractual basis, typically a contract for work, in the case of an expert witness, the situation is different because they are established by a court decision. This distinction is significant from the point of view of the expert's subsequent liability. The relationship between an expert as a contractor and a client based on a contract is, by the Czech law, different from a relationship based on a resolution by which the court appoints an expert. In Austria, the relationship between the expert, the participants, and the court is a public law relationship.[32]

In these three compared law orders, there is an explicit provision on the liability of expert witnesses included only in the German Code (Section 839a of the BGB); not the Czech or Austrian one. The Czech and Austrian regulations are alike because they contain only a general provision regulating the obligation to act professionally if someone declares themselves to be an expert.

The basic regulation governing the liability of experts in Austria is Section 1299 of ABGB, which is specified by plentiful case law. Then there is a key provision of Section 1300 of ABGB, which regulates the responsibility for providing incorrect advice or information.[33] These provisions follow on Section 1297 of the ABGB, pursuant to which it is assumed that anyone who is reasonable is also capable of diligence and attention that can be applied to ordinary abilities. Whoever neglects this degree of diligence or attention in actions that shorten another's rights is liable for damage. According to Section 1299 of ABGB, whoever publicly subscribes to office, to art, to trade or craft; or who, without the necessity just voluntarily takes action whose execution requires special artistic knowledge or extraordinary diligence shows trust to their necessary diligence and the necessary extraordinary knowledge; it must, therefore, be responsible for their lack.[34] This provision governs both delict and contractual liabilities. The above-mentioned skills are merely demonstrative and, naturally, also apply to other expert sectors. Whether someone is an expert or not is

[32] Supreme Court of Austria (1931, OGH 1 Ob 1124/31 SZ 13/259).
[33] Peter Rummel, *supra* note 16, 386-389.
[34] *Ibid*.

not determined in Austria on the basis of their education, but, above all, on how they are profiled towards the public and what their real knowledge is.[35]

Pursuant to Section 839a of the BGB, if an expert witnesses deliberately or through gross negligence provides an incorrect opinion, they must compensate the party for the damage it incurred in consequence of the judgment based on this expert's opinion. This is a special provision to other standards.[36] This provision was amended by an amendment of 2002.[37] This is a new regulation that was part of the amendment package. Originally, this provision was to be added to BGB in 1975, when the Civil Procedure Commission proposed the text, but, in the end, it became part of BGB later in 2002.[38] The addition of BGB to this provision on the liability of court experts was justified by the unsatisfactory situation.[39] Experts were controlled by neither the parties nor the court; only contractual liability was applicable.[40] Nor was it possible for an expert to apply the regulation of liability for damage caused by an official. Thus, the general tortious liability - Section 823 BGB and liability under the Penal Code - had to be applied. This adjustment was also necessary in view of the importance of expert opinions in court proceedings. The aim of this reform was, in particular, to strengthen the rights of the parties in relation to the expert witnesses and the possibility of claiming compensation. It is clearly stipulated in Section 839a of the BGB that the damage must be caused by the fact that the judgment is based on that defective expert's report.[41] Consequently, Section 839a of the BGB does not apply, for example, if an expert damages a thing. It is true that Section 839a of the BGB applies only to experts appointed by the court, not to experts who draw up an expert opinion on the basis of a contract.[42]

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[35] Supreme Court of Austria (1996, no. 7 Ob 2113/96b).
[36] Otto Palandt, Gerd Brudermüller, Jürgen Ellenberger, *et al*., *Bürgerliches Gesetzbuch: mit Nebengesetzen insbesondere mit Einführungsgesetz (Auszug) einschließlich Rom I-, Rom II- und Rom III-Verordnungen sowie Haager Unterhaltsprotokoll und EU-Erbrechtsverordnung, Allgemeines Gleichbehandlungsgesetz (Auszug), Wohn- und Betreuungsvertragsgesetz, BGB-Informationspflichten-Verordnung, Unterlassungsklagengesetz, Produkthaftungsgesetz, Erbbaurechtsgesetz, Wohnungseigentumsgesetz, Versorgungsausgleichsgesetz, Lebenspartnerschaftsgesetz, Gewaltschutzgesetz (Civil Code: with secondary laws, in particular with the Introductory Act (excerpt) including Rome I, Rome II and Rome III regulations as well as the Hague Maintenance Protocol and EU Inheritance Law Ordinance, General Equal Treatment Act (excerpt), Housing and Care Contracts Act, BGB Information Obligation Regulation, injunction law , Product Liability Act, Leasehold Law, Residential Property Act, Pension Equalization Act, Civil Partnership Act, Violence Protection Act)* (München: C.H. Beck, 2017), 1379.
[37] Ulrich Magnus, "The reform of German Tort Law" (2003) // http://scholar.google.cz/scholar_url?url=https%3A%2F%2Fwww.raco.cat%2Findex.php%2FInDret%2Farticle%2Fdownload%2F82541%2F107387&hl=cs&sa=T&oi=ggp&ct=res&cd=32&d=12604090673238680078&ei=oG9QXMWaAsbZmQGV05K4BA&scisig=AAGBfm1qfSew2N2E4XKyEnyL-9qtdW484w&nossl=1&ws=1536x754&at=The%20reform%20of%20german%20tort%20Law.
[38] Wagner in: Peter Ulmer, *supra* note 17, 2100.
[39] Erwin Deutsch, "Zivilrechtliche Verantwortlichkeit psychiatrischer Sachverständiger" (Responsibility under Civil Law for Psychiatric Experts); in: H. Pohlmeier, E. Deutsch, and HL. Schreiber, eds., *Forensische Psychiatrie heute (Forensic psychiatry today)* (Berlin, Heidelberg: Springer, 1986).
[40] Thomas Thiede, "Civil Liability of Court-appointed Experts in German Law," *European Review of Private Law (ERPL)* 21(4) (2013) // https://nbn-resolving.org/urn:nbn:de:0168-ssoar-50898-1.
[41] Otto Palandt, Gerd Brudermüller, Jürgen Ellenberger, *et al*., *supra* note 36, 1379-1380.
[42] Wagner in: Peter Ulmer, *supra* note 17, 2100.

The Czech Supreme court dealt with the issue of liability of experts only in a few decisions. As in Austria, German judicature and doctrine are evident in these decisions. In the judgment of 30 July 2008, no. 25 Cdo 883/2006,[43] the Czech Supreme Court contended that a court-appointed expert who drew up an incorrect expert opinion is liable for damage incurred by a party to the proceedings in that the court granted a lower performance on the basis of this opinion. In the case of incorrect valuation of shares, when the expert opinion was the basis for the consideration in the framework of the settlement of minority shareholders, the Supreme Court of the Czech Republic concluded that an expert is liable for damage if there is a causal link between the breach of the obligation on the part of the expert and the material damage in the granting of a lower consideration for the forced purchase of shares than would be the case if the expert opinion was prepared perfectly.[44] Furthermore, the Supreme Court of the Czech Republic emphasized that the expert opinion must be a basis for the court's decision-making process, otherwise, it is impossible to establish liability.[45] However, the Supreme Court of the Czech Republic in its judgment of 28 July 2015, no. 25 Cdo 4000/2013,[46] concluded that, if an expert opinion was not an essential basis for the court's decision, the expert's liability for the damage caused by an incorrect expert opinion, which was supposed to consist of an incorrect amount of performance granted by the court, is not given. These decisions fully comply with the concept adopted by the German legislature. According to Section 839a of the BGB, the responsibility of the expert for damage is indispensable for the court to decide on the basis of the expert opinion. The question is, however, whether there is any decision or whether it must be a final decision.[47] We assume that responsibility for a defective report occurs only if the decision is final. The reason is that, until that time, the decision is not, in principle, enforceable. So, the fact that it was not performed on its basis cannot cause damage. If the aggrieved party does not file an appeal, the decision becomes final and, subsequently, the aggrieved party seeks compensation, it cannot exclude the expert's liability. However, the injured party's practice could be to the detriment of the injured party, i.e., the amount of damages could be reduced. Failure to lodge an appeal could cause a greater extent of damage, which is, in consequence, a breach of the prevention obligation pursuant to Section 2900 of the Civil Code.

The Czech Civil Code distinguishes between contractual liability and tortious liability. In case of breaching the law (Section 2910 of the Code of Civil Procedure),

[43] Supreme Court of the Czech Republic (2006, no. 25 Cdo 883/2006).
[44] Supreme Court of the Czech Republic (2012, no. 25 Cdo 2706/2012).
[45] Supreme Court of the Czech Republic (2016, no.25 Cdo 1307/2016).
[46] Supreme Court of the Czech Republic (2013, no. 25 Cdo 4000/2013).
[47] Otto Palandt, Gerd Brudermüller, Jürgen Ellenberger, *et al*., *supra* note 36, 1379.

the responsible party shall compensate the offended party for what was caused. Thus, in the case of tortious liability, the prerequisites for violating the law (illegality), causing harm, causal link and fault in the form of both intention and negligence; negligence is presumed. While in the case of contractual liability the prerequisite are not fault, but only illegality, causal link and the occurrence of injury (Section 2913 of Czech Civil Code).

The prerequisite for the liability of the expert appointed by the court is thus the fault, since it is a tortious liability, not a contractual liability - no contract between the parties and the expert is concluded. However, in the case of an expert agreed upon by contract, liability is no longer a fault. This concept is based on whether the expert freely assumes the obligations arising from the contract, and that the liability is more rigorous, i.e. objective.

8. LIMITATION OF LIABILITY

Forensic experts' liability is not unlimited. Liability in the form of intent or gross negligence is a prerequisite for liability pursuant to Section 839a of the BGB; not mere negligence. The reasons that led the German legislature to these restrictions are as follows.

First and foremost, it is about protecting the expert themselves, because they must be independent and impartial. In the Czech law, this argument would not be relevant because the responsibility of lawyers or notaries, whose activities can also be classified as an expertise, are given regardless of the form of fault. That is the so-called strict or objective liability.

The second reason is the fact that an expert witness is obliged to carry out an expert opinion.[48] Even this restriction would not stand up in the Czech law, because, for example, the Czech Law on Advocacy in certain cases stipulates the obligations of an ex officio lawyer. In the Czech practice, a reward for expert witnesses is a widely discussed issue, as it is very small and, in many cases, does not meet the needs of experts. The reason for limiting liability in Czech law could be only a lack of experts.

9. GROSS NEGLIGENCE

Section 839a of the BGB provides for gross negligence as a condition for the liability of a court expert, but is not defined by law.[49] At the same time, the distinction

[48] Thomas Thiede, *supra* note 40.
[49] Otto Palandt, Gerd Brudermüller, Jürgen Ellenberger, *et al*., *supra* note 36, 1379.

between negligence and gross negligence plays a crucial role in the case of an expert's liability. Thus, gross negligence is a term that has to be clarified by case law and doctrine. BGB has determined that a gross negligence means that care or even good care is ignored to a large extent.

The gross negligence is the behaviour of an expert in psychiatry who, without personally examining the patient, has produced an expert opinion claiming that there are circumstances that justify limiting their legal capacity.[50] In assessing the form of negligence, the circumstances of a particular case and the expert should also be taken into account. It depends on the judge's discretion. The situation is simpler if there are industry-recognized standards – typically, the *lex artis* procedure. Pursuant to Section 16 Subsection 2 of the Czech Penal Code, gross negligence is such a crime if the offender's attitude to the requirement of due caution testifies to the offender's obvious ruthlessness towards the interests protected by the Criminal Code.

10. LIABILITY FOR DAMAGE CAUSED BY ADVICE OR INFORMATION

The Civil Code contains special provisions on liability for damage caused by advice or information. Pursuant to Section 2950 of the Civil Code, any person claiming to pursue a professional status or otherwise acting as an expert shall replace the damage if it is caused by incomplete or incorrect information or by a harmful counsel given as remuneration for their knowledge or skills. Otherwise, only the damage caused by the information or by the Council consciously is compensated for.

The current regulation in the Commercial Code is a general regulation of special responsibilities regulated by other regulations, such as the Act on Advocacy, Notaries, or the Act on the Provision of Health Services, which governs liability for damage. The provisions of Section 2950 of the Civil Code apply to damage caused by a person to which no other regulation applies. It excludes some of the most frequently mentioned professions, but not experts who have no special responsibilities under a special regulation. Section 2950 of Civil Code applies to members of a particular state, such as lawyers, notaries, executors, doctors, car mechanics, etc., or to persons who claim a professional performance or otherwise act as experts – for example, a real estate agent who, although not having any qualifying exams, is claiming to be able to negotiate the sale or purchase of the property. The adjustment thus applies to professions that do not have a special law regulating their activities. Section 1300 of the ABGB governs the special responsibility of an expert who grants harmful advice for remuneration.

[50] Wagner in: Peter Ulmer, *supra* note 17, 2100.

In most cases, the wrong advice or information causes mostly material damage, not a non-proprietary loss. The question of the liability of an expert for damage and liability for damage caused by the advice is related to general liability for damage pursuant to Section 1295 of ABGB.[51]

Section 1300 of the ABGB provides for five assumptions. Expectations of liability for damage caused by an expert are, in accordance with Section 1300 of the ABGB, as follows: (a) information or advice provided; (b) information provided by an expert in their scientific field or art; (c) remuneration.[52] In Germany, a liability for damage caused by advice, information or expert is set out in Section 675 Subsection 2 of the BGB, which implies that anyone who advises or recommends someone is liable for damage caused by this advice, without prejudice to the liability arising from the contractual relationship, tort or other legal provision. According to these provisions as well as under ABGB, there may be an obligation to make good the damage in the event of a breach of contractual or tortious liability.[53] The responsibility as defined in BGB is then further regulated by other special regulations, such as those concerning the doctors.[54]

CONCLUSION

The so-called protective purpose of the treaty, as known by Austrian and German law, appeared in the Czech Republic's law order in 2005 for the first time in the Supreme Court decision. Until then, this was a concept rejected by the Czech law, on the grounds that the obligations were *inter partes*. However, since the new Civil Code came into force, there has been an important development, as the protective purpose of the contract is regulated directly in Section 2913 Subsection 2 of the Civil Code, following the example of the German BGB.

In Austria, the concept at issue was imported by case law. A comparison of these modifications to the so-called protective purpose of the contract applies to the case of a party to the contract being harmed by a wrongdoer who is not a party to the contract, but is aware of the parties' interest in the performance. It is distinct when the contract was concluded and the need for protective effect is liable for any damage resulting from the breach.

[51] Heinrich Honsell, "Die Haftung für Auskunft und Gutachten, insbesondere gegenüber Dritten" (Liability for information and advice, especially towards third parties) (2005) // http://www.honsell.at/pdf/FS_Nobel_fuer_Koller.pdf.
[52] Helmut Koziol and Rudolf Welser, *supra* note 7, 353.
[53] Ulrich Magnus, "Comparative Report on the Law of Damages": 185; in: Ulrich Magnus, ed. *Unification of Tort Law: Damages* (The Hague: Kluwer Law International, 2001).
[54] Otto Palandt, Gerd Brudermüller, Jürgen Ellenberger, *et al*., *supra* note 25, 1379-1381.

In Czech law, the assumptions of such liability have changed. This is a breach of contract and no fault is required. This makes it easier for the injured party to claim damages since they do not have to prove the fault. The comparison of the three law orders also shows that the criteria for assessing the protective purpose of the contract are very similar, as both Czech legal practice and doctrine assume the conclusions of both German and Austrian courts. The protective purpose of the contract is clearly evident in the case of an expert's liability for damage that has been established on the basis of a contract. This is particularly the case for an expert drawing up a contract-based report for the parties to the contract, but who has only concluded the contract with one party. If there is a breach of a contract and damage to the party that did not conclude the contract with the expert under the above conditions, the expert is also liable for the damage. In this case, both the legislation and the doctrine in each country coincide. They only differ in the time at which this concept was adopted into their legal orders or practice.

None of the compared legislations contains a definition of an expert although procedural rules, in particular, often refer to it. However, there is a consensus that the expert must be independent and should possess the appropriate expertise. What matters is the expert's relations with third parties, rather than whether he really is an expert. The role of experts in court proceedings is similar.[55] The difference with the Czech regulation is that it allows for a so-called private expert opinion to be used in court proceedings. All of the above legal systems contain provisions on the liability of experts, as persons with above-average knowledge. Only the German BGB explicitly includes the liability of court experts for the damage they have caused to the parties. Assumptions of liability of an expert witness pursuant to Section 839a of the BGB are very close to those of the Czech Supreme Court. Both Czech and German courts have a similar approach to this issue, and a restrictive approach is particularly evident. Moreover, it is based on the actual regulation in Section 839a of the BGB, since it is related to a fault as a wilful act or by a gross negligence, just as an expert's report must be the basis of a decision. The reasons for this limitation are not as detailed in the Czech case-law as they are in the German law order.

[55] Michael Faure and Louis Visscher, "The Role of Experts in Assessing Damages – A Law and Economics Account," *European Journal of Risk Regulation* Vol. 2, Issue 3 (September 2011): 376 // DOI:10.1017/S1867299X00001392.

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