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Expertise as Social Institution: Internalising Third Parties into the Contract*

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I. Expert Liability - an Implicit Dimension of Contracting?

1.A Landmark Case in German Law

A property owner intends to sell his house. He asks an architect who is the official and registered expert of the local bank *(Sparkasse)* to write an elaborate expertise about the value of the house and pays him the usual fees. Under the influence of the owner, the architect does not properly check the roof so that the factual statements in his expertise become flawed. On the basis of the expertise, the buyer pays a price which is unproportionally high. For factual reasons, the buyer cannot get relief from the seller and sues the architect.

In a landmark decision of 1995, the German High Court *(Bundesgerichtshof)* construes – generously disregarding the principle of contractual privity but in accordance with a long series of precedents - an analogy to a third party beneficiary contract.[1] The expertise contract between seller and architect is supposed to contain an implied term, according to which the architect owes a contractual duty of correct performance – in technical terms: not only integrity interest but performance interest - to a third party, the buyer.[2] Moreover, disregarding its own precedents according to which a fiduciary relation between mandator and beneficiary would have to exist, the court boldly extends the construction which is already bold in itself, to competitive market situations, like the house market, where parties have antagonistic interests. Finally, disregarding the explicit wording of § 334 BGB, German civil code, which allows contractual defences against the third party, the court does not permit the architect to raise any defence stemming from his contract with the seller, who after all was responsible for the flawed expertise. The architect has to pay full damages to the buyer.

This recent expansion of expert liability to third parties with antagonistic interests on the other side of the market – a judge-made law *praeter legem* if not *contra legem*[3] -

* I would like to thank Gralf Calliess und Vaios Karavas for their comments.

[1] BGHZ 127, 378 – Dachstuhl. The first precedent was already decided in 1902, RGZ 52, 365.

[2] To be precise, according to the implied terms construed by the court, the architect is not under obligation of specific performance to the buyer, but once he performs, he owes a duty of care, including correct performance, not only to his contractual partner (the seller), but to a third person who is not a party to the contract (the buyer).

[3] Critics of the court use this strong language, e.g. Honsell (1999): 233. See also Medicus (1999): 258f.

entails high financial risks for a whole range of professionals, auditors, accountants, tax consultants, architects, accident insurance experts – and more recently analysts in the stock market. And there is a whole variety of concrete projects of considerable scale that their expertise is contracted for: complex acquisitions of property, large credit operations, construction projects, high risk financial transactions. Usually there is a triangular situation: the *expert* – in our example the architect - and two partners to a project, one of them the *mandator* – our seller - contracting with the expert who is supposed to give expert advice on the project, the other the *beneficiary* – our buyer - the third party who as a rule does not participate in the expertise contract. Frequently, the situation extends into a multilateral relation, including fourth, fifth, sixth ... umpteenth additional actors. They may directly cooperate in the project, they may be potential partners, they may finance the project via credit or support it with a guarantee, they may form part of a subsequent transaction chain, or they may be outsiders who suffer a damage from the project risks, and so on *ad infinitum*. The flood gates are open.

The threat of open floodgates are the main reason why in most legal orders, expert liability to third parties is a highly contested subject.[4] Although there seems to be a broad consensus that expert liability should in principle go beyond the narrow boundaries of the bilateral expertise contract, the underlying principle is rather obscure, and the details of liability, particularly the scope of the protected persons, are hopelessly controversial.

2.Open questions

(1) *Underlying principle?* Why should expert liability toward third parties be an implicit dimension of contract? It is only Germany, Austria and Switzerland that construe a third party beneficiary contract while many other legal orders in the civil and common law world treat it as a question of tort law. And there are voices that argue for quasi-contractual, quasi-tort constructions and, last not least, for "contort" solutions as a third way, independent from contract and tort. My point is: Whatever doctrinal construction is chosen, the substantive question remains the same: Is there in tort, contort or quasi-contract a "special relation" – in the words of a British judge "equivalent to contract"[5] (!) - that justifies the expert's duty of care particularly toward the third person? Under what conditions does a relation between strangers qualify for such a "special relation" so that the expert becomes liable toward the third person, similar to the contractual liability between expert and mandator? In its substance this is the same question which from a different vantage point contract law is asking again and again: Is there an implied term, a hidden clause, a latent obligation, a deep structure, a dangerous supplement, in the contract which requires that third parties be internalised into the contractual liability regime? For the discussion of implicit contracting, expert liability has the attraction of the extreme and the paradigmatic. While in the normal situation, implied terms do nothing but change somewhat the standards of duties within an existing contract between two parties, in expert liability the implicity of contract asserts that "in reality" there exists a third party to the

[4] Comparative law analysis of expert liability in English and German law, Bar (1994). In general, Kötz (1990); (1996); Gottwald (1994); Müller (1995); Ebke (1996); Schönenberger (1999). For the floodgate problem in comparative perspective, Banakas (1996); Spier (1996).

[5] Hedley Burne & Co. Ltd. v. Heller & Partners Ltd (1964) A.C. 465 (H.L.), 529 and 539 (per Lord Devlin).

contract. Im-plicity of third parties means here com-plicity of a hidden parasite who is not only profiting from the valuable expertise itself, but who is also insured against its risks, without paying for it. Expert liability transforms – whatever its doctrinal construction - a voluntarily agreed bilateral liability risk into an judicially imposed trilateral or even multilateral one. Is it not a blatant fiction to call this expansion an implicit dimension?

(2) *Scope of protected persons?* This is the crucial question for the law in action, whatever doctrine the law in the books is using. Tort law starts with a rather broad scope and is at pains to identify criteria that limit the infinite liability for purely economic loss. It looks for restrictions of an unlimited liability of the expert toward an infinite variety of persons that are causally influenced by the expert's wrong information. Vice versa, contract law starts with the narrow scope of privity and has problems including additional beneficiaries. Both approaches aim at protecting persons which are affected by the expertise in a comparable way to the party to the contract. In practice, the courts differ dramatically. Using the criterion of foreseeability, some US-courts have drastically expanded the liability risk toward an almost indefinite range of third persons. French courts attempt to identify limits within the infinite chain of causation principle. German courts try to determine the "objective" purpose of the expertise contract in order to limit the beneficiaries. British courts try the same by applying the "particular transaction rule" within a case-by-case approach.[6] Is it realistic to say that there is something latent in the expertise contract that determines the number of protected persons?

(3) *Conditions of liability?* Equally controversial are the standards of duty of care that are owed to the third party. Are they determined in the contract between mandator and expert and then transferred to the beneficiary? Or do they result from standardization processes in the market? From decisions of professional organisations?

(4) *Restrictions of expert liability?* What about defences that the expert can raise against the mandator. Are they available to the expert against the beneficiary? What about exclusion of liability? Is there a third party effect? Can the expert exclude liability against the beneficiary?

II. The Origin of Implicit Dimensions: Institutional Embeddedness of Contract

Does the concept of implicit dimensions of contract lead us here any further? Indeed, it does. However, one needs to abandon the narrow juridical concept of "implied terms in fact / in law" and related concepts of purely contractual interpretation. In order to make explicit the implicit dimension of contracting, law would have to look beyond the limits of the interpersonal relation and to inquire into those social institutions in which the contract participates, and into conflicts between them. Implicit aspects of contract have their origin in the "embeddedness" of contract in a variety of social institutions, outside the text and outside the interpersonal relation of the contracting parties. In identifying the institutions where the contract is embedded in

[6] Caparo Industries Plc v. Dickman (1990) 2 A.C. 605.

there is a certain but limited amount of assistance from external disciplines. Recourse to the economic concept of "complete contracting" is helpful as are sociological theories of economic transactions, but only to a limited degree.[7] The main work has to be done by legal theory and contractual doctrine, namely to identify social institutions relevant for contract and to reconstruct them within the boundaries of the legal discourse.[8]

Indeed, institutional economics and empirical sociology suggest to interpret implicit dimensions of contract as a matter of the context of economic transactions. What is needed, they would propose, is a thorough empirical analysis of both the recursive patterns of interaction of the contracting parties, and the stable conventions of the market. The advantages of such a contextualist approach as compared to pure legal hermeneutics which unfolds the meaning of contractual texts are obvious[9]. Relying on the richness of empirical details, judicial decisions will become more realistic. They will profit from the "tacit knowledge" of spontaneous orders, i.e. individual interaction patterns and collective customs of the trade.[10] Since legal decisions will be informed by social norms, their legitimacy will grow and the chances of compliance will increase.

However, there are serious limitations to a spontaneous order approach if it is used to inform legal decision-makers. Interactional patterns and social customs inform legal arguments only about the results of underlying social conflicts, not about the conflicts themselves. They may be a wise or an unwise compromise, they may result from balanced negotiations or from a unilateral imposition of power, a sophisticated response to conflicting demands or thoughtless compliance with outmoded traditions, rational discourse or blind evolution, but in themselves they do not reveal the collisions between social systems to which the contract is exposed. Thus, patterns and customs do not provide for what legal argument would need urgently: a critical reconstruction and reflection of the meaning of those social practices in which the contract is participating. Things get worse when in the concrete conflict – as in our case of expert liability - there exists no reliable interactional pattern or enduring custom of the market that could be identified. What is left is nothing but conflict between different social practices which the law now is supposed to decide.

My suggestion is, thus, not to abandon the contextual approach but to push it further. Do not just look for existing patterns and customs in the structural coupling of colliding social systems, but analyse the collision itself and do so from the standpoint of legal argumentation. Reconstruct the internal rationalities and the internal normativities of those social institutions that seek to impose their contradictory demands on the contract. This will produce the surplus value needed for legal argument. Once the collision is understood, a critical evaluation of the colliding normative principles, a careful re-assessment of the compromise found in actual patterns and customs, and a reasoned rule of preference between conflicting social practices will inform the legal decision.

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[7] For complete contracting Cohen (2000); Craswell (2000); for social embeddedness Granovetter (1985).

[8] An exemplary analysis that pursues such a division of labour between socio-economic analyses of contract and legal theory and doctrine is Collins (1999) *passim*.

[9] For a systematic overview in terms of different contractual techniques, see, Campbell and Collins, in this volume*.

[10] On tacit knowledge Polanyi (1958): 69 and *passim*; on spontaneous orders vs constructivism Hayek (1973): 17ff., 85ff., 118ff.; (1976): 11ff., 54ff.

As I have argued at length elsewhere, for such an extended contextual approach, contract law needs to provide for an autonomous social reality construction which reformulates the contractual relation in terms of the polycontextural character of contemporary society.[11] To make a long story short: Social embeddedness of contract today does not mean its integration into a comprehensive social framework symbolised by coherent behavioural patterns and social customs, rather it means the conflict-ridden exposure of contract to a multitude of highly developed social rationalities that collide with each other. This situation may be described as a difference of language games, but it entails more than to decide between two language games of contracting, the descriptive language of the historian and the normative language of the lawyer.[12] A concrete contract is written in terms of several language games which simultaneously impose their rules on the agreement.[13] In making explicit these implicit dimensions of contract, the law takes account of the conflicting requirements of three social practices in which the contract always already participates (1) the ongoing interactional relation of the parties, its history and its context, (2) the economic institutions of financing the transaction, (3) most importantly in our context, the social institutions within the productive process in which the contract is embedded.

III. Three Implicit Dimensions of Transaction

What is gained for the problem of expert liability if it is re-examined in the context of these three configurations and their conflicts? In the current debate on expert liability, it has become common practice to present exclusively one of them as the very basis for deciding on third party liability. Contextualist lawyers point to the contractual relation, legal economists point to markets and hierarchies, legal sociologists point to relations of trust. In our perspective all three appear as narrow and one-sided approaches. Instead, we shall identify as basis of expert liability fundamental conflicts between these contracting worlds. In particular, the conflicts concern the boundaries of the obligation. An expertise transaction participates in different language games – in the contractual interaction of mandator and expert, in the economic context of monetary operations, in the social context of producing the expertise. Each of these contracting worlds imposes on the transaction a different "privity", i.e different boundaries, different rules of membership, different principles of exclusion and inclusion. The language games involved display variations of bilateral, trilateral and multilateral obligations. While in many types of contract, the implied configurations have more or less identical boundaries, it is the peculiarity of the expertise transaction that is exposed to a collision of different privities which contract law is asked to decide.

1. Interaction of the Parties to the Contract

Over and over again, attempts have been made to identify the foundations for expert liability toward third parties in the contractual relation itself. In Germany, courts started with constructions of a silent agreement between mandator and expert

[11] See Teubner (2000) and critical comments by Macneil, Gerstenberg, Campbell.
[12] Campbell and Collins, in this volume*.
[13] See the concept of „internormativity" developed by Belley (1998): 203ff.; (2002): 142ff.; from a systemic point of view Crone (1993): 162ff.; Müller (1997): 146ff.

according to which the expert will be liable toward outsiders.[14] Since third party beneficiary contracts were solidly established and the general erosion of the privity principle had already begun this seemed an elegant solution. But again and again this had been rejected as a blatant fiction. Thus the courts moved from fiction toward contextual interpretation, to terms implicit in the contract.[15] But the criteria they were using had their origin clearly outside of the contractual interaction. Basically, they inquired whether the transaction is creating considerable risks for third persons *(Leistungsnähe)*, a question which obviously cannot be answered by either silent agreement between the parties or by norms and practices that emerge in the history of their interaction.

Actually, all the dimensions of the bilateral interaction – whether explicit or implicit, whether classical, neo-classical or relational – militate against the inclusion of third parties into the liabilities of the expertise contract.[16] What is worse, the contract is not the solution; it is part of the problem. Contract itself is at the very root of the collision of privities. The contract between mandator and expert is actually building up a relation of co-operation, of trust and of mutual interest responsiveness between them. And it is this mutual dependency relation between the mandator and the expert that creates or at least strengthens the interest conflict involved. Thus, recourse to the actual negotiation of the parties, their agreement in its details, the history of their interaction, the co-operative relation between them, the norms that emerge over time - all this has never uncovered and will never uncover traces that would serve as foundation for liability toward third parties. It is recourse to other social practices outside of the parties' interaction that may justify this liability which is only poorly covered by contractual rhetoric.

2. Economic Institutions

What about the embeddedness of the expert contract in economic processes? Does the recourse to the context of monetary operations provide criteria for third party liability? Contracts are not simply interpersonal relations of negotiation, consensus and performance; they participate in wider economic institutions, in markets, economic organisations, financial arrangements, transaction chains, co-operative networks. And indeed, economic concepts related to these institutions - avoidance of opportunistic behaviour and the idea of complete contracting - have been presented to justify expert liability toward third parties.

One economic argument for expert liability is to reduce the risks of opportunistic behaviour.[17] Monetary sanctions of liability will serve as a deterrence against deceptive expertise. Of course, this is a valid argument and economic calculation may indeed determine the optimal sanction which steers a middle course between deterrence of the expert's opportunism and the beneficiary's opportunism to use expert liability as a cheap insurance against speculative risks.[18] However, economic analysis in itself does not and cannot provide the standards defining what counts as the expert's opportunistic behaviour, and what not. What is the economic mechanism that could possibly determine the expert's behaviour as opportunistic? Rational

[14] Starting 1902, RGZ 52, 365.
[15] For a recent case analysis, Zugehör (2000).
[16] Gernhuber (1989): 518ff; Picker (1999): 400ff.; Esser and Schmidt (2000): § 34 IV 2c.
[17] For implied terms in general Cohen (2000).
[18] Ewert (1999): 200.

action? No, rational choice may determine under what cost/benefit relations rational actors will respect social norms of professional expertise. However, these norms do not result from the action of self-interested actors, rather "the rational pursuit of self-interest is constrained by social norms".[19] Mandator and expert delineate their respective interests but they will never agree on liability for third parties. This is the reason why the concept of complete contracting does not help in this context.[20] Judges who mimic the behaviour of rational actors in contracting would never come up with the expert's liability toward third persons. Transaction costs minimisation? No, this is an approach that reckons openly with opportunism defined as seeking for self-interest with guile.[21] Transaction cost considerations come into play when parties choose institutional arrangements to protect themselves against opportunism from the other side. Cost-benefit calculations? No, these are made once the social norm exists, the intensity of the sanction and the probability of sanctioning is known. To be sure, there are social norms that are emerging within economic institutions (e.g. rules of cooperation, competition, hierarchy etc.). But expertise responsibility are social norms that are defined in the context of science, morality or politics, in any case in non-economic contexts.

3. Social Relations

Thus, the implicit dimensions of contracting, where principles of expert responsibility toward third parties are established, seem to refer to non-economic social relations. In the current debate, four related social configurations are offered as the implicit source of expert liability: trust, profession, institution.

Trust is at present re-discovered by economists and sociologists[22]. It refers to a social situation in which risky actions are undertaken without sufficient security about future developments.[23] Lawyers as well are using the category of trust in our context and propose reliance liability as a complement to contractual liability.[24] No doubt that trust is the right category to describe the social relation between the expert and the beneficiary who due to his reliance on the expertise takes a risky decision. Under certain circumstances this trust deserves to be legally protected. But trust is a ubiquitous social phenomenon and its juridification has produced very specific legal constructs against which it makes no sense to re-interpret them as an expression of trust. The crucial question, whether a social trust relation should be supported by legal sanctions or not, cannot be answered by the inner structure or by the intensity of the trust relation itself.[25] Unlike contract which contains in itself the conditions under which a legal obligation is created, trust is in itself legally empty. For its promotion to legal status it needs external criteria. It is the object of trust, the social

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[19] This is of course hotly debated. For a reference in the rational choice camp that makes this point Elster (1988); (1991); (1994). Elster gives a classification of those social norms that cannot be derived from rational choice principles (consumption norms, norms against behaviour contrary to nature, norms regulating the use of money, work norms etc.)

[20] Convincing arguments by Picker (1999): 402ff. It is indicative that Köndgen (1999) attempts to utilize the economic concept of complete contracting for third party effects in general, but when it comes to expert liability (44ff.), feels compelled to resort to sociological concepts (expectation, trust, role conflicts, profession).

[21] Williamson (1985).

[22] For a detailed economic analysis of trust Ripperger (1998); for its organisational analysis Kramer (1999); for socio-legal studies on trust in contract Lane and Bachmann (1996); Deakin et al. (1997)

[23] For a sociological theory of trust Luhmann (1979): Ch. 4.

[24] The protagonist of a legal concept of trust in German law is Canaris (1971); (1995); (1999).

[25] Luhmann (1979): Ch. 4.

institution toward which trust is oriented, that decides about the legal relevance of trust.[26]

Profession is another social configuration which lawyers use as a basis for expert liability.[27] Referring back to mediaeval concepts of "public calling" and "common carrier" it revitalises old status obligations that are supposed to complement modern contractual obligations. Even in the absence of a binding contract, members of a profession carry specific obligations to other people as a consequence of their position in society. But there is a strange asymmetry in the concept of professional obligation. It is as asymmetric as the complementary concept of consumer protection would be. It derives rights and duties from the social status of only one person within a complex social relation, instead of taking all the different positions in a multilateral relation and their interdependence into account. Furthermore, it relies too much on self-regulation in professional associations, instead of looking to the requirements of the whole social relation in which the association is just one part. And it is much too static stressing the established norms of a status role, instead of looking to the dynamic process of norm production in a social configuration that from the beginning involves other autonomous actors than just the professional.

If our goal is to make visible the social configuration as a whole in which the transaction participates, one would have to leave aside asymmetric status concepts like professional responsibility (or consumer protection). One would have to identify the entire multilateral social context in which the productive aspects of the transaction takes place. One would need to look at the social dynamics and not only to a set of rules around the role of a professional. Mere roles are not sufficient, instead the dynamic interplay of operations, structures, boundaries and systems need to come into play. For this purpose, the concept of *institution* seems to be most adequate.[28] Against the concept of profession it has three advantages. Institutions reflect the whole social system involved and not only partial aspects. At the same time, as complexes of social norms, institutions bridge the focal social system to the legal system, in our case to the concrete contract, by their very normativity. Finally, institutions are more than just sets of norms or existing customs. They are coherent complexes of normative structures within full-fledged social systems, and are the result of more or less explicit reflection of their social function and their contribution to other systems. Seen from the side of law, institutions and not social systems as such are the object of legal decisions to accept the social norm in question as legal or not.[29] Contract law decides on the legal positivisation of social institutions when it refers to the implicit dimensions of contract.[30] These may be economic institutions, as mentioned above, or wider social institutions.

IV. Expertise as a Social Institution

[26] Leenen (1990):119ff., comes very close to this position
[27] Lammel (1979): 345ff; Hopt (1983); (1986); (1987); (1996).
[28] The concept of institution which has been rather neglected after a promising start, Romano (1918); Hauriou (1965), has experienced a remarkable revival. For sociology, Friedland and Alford (1992) Selznick (1992); for organizational analysis, Powell and Di Maggio (1991); Scott (1995); for economics Williamson (1985); Furubutn and Richter (1997); Klein (2000); for socio-legal analysis, MacCormick and Weinberger (1986); Black (1997).
[29] Luhmann (1965): 12f.; (1985): Ch, II.4 and 6.
[30] Teubner (1992): 1446ff.

The foundations of expert liability, as we said above, cannot be found if one looks to economic institutions (market, economic organisation, financing practices, networks). But what about "expertise" as an autonomous social institution? Indeed, expertise bridges scholarship (natural sciences, social sciences, humanities) with other social practices. Of course, expertise is not to be identified with science as a social system in its own right. Professional expertise serves other social ends than the advancement of knowledge as such. But it brings necessarily the institutional logic of scientific inquiry into social fields that are governed by a different rationality.[31] Expertise cannot simply be equated with any production of information by professionals. Rather, people turn to independent expertise as a special institution, once they experience the limits of negotiation, of economic exchange, of political power processes, of legal conflict resolution, of family relations or friendship for resolving their problems. They separate the issue involved from its familiar context and subsume it under the rationality of expertise which differs sharply from their day-to-day practices.

As a consequence, scientific expertise in mundane projects suffers from orientation conflicts. It is a highly fragile social institution which is exposed to a paradoxical situation. Although it is introduced into other social fields in order to help to resolve some of their pressing problems, it depends at the same time on strict insulation against the interference of their competing rationalities.[32] While science itself as a social institution enjoys at least the protection of the ivory tower, an institutional separation from the exigencies of social life in universities and scholarly publications, expertise is systematically exposed to the temptations of influence, persuasion, power relation, family ties, and profit. This inherent risk of expertise is the very reason why the above mentioned social mechanism of trust in expertise cannot not give sufficient protection, but needs to be supported by law.

There are many rules of public law that aim to protect the integrity of expertise. Public law regulation on education, on professionalisation, on academic degrees, on licensing, and on monitoring and supervision of experts have played an important role forming expertise as a "public service".[33] The important point here is that expertise as a rule is not – cannot be and should not be - integrated into public administration.[34] Instead, public law utilises a type of regulation that is supposed to respect the autonomy of independent expertise also within the public sector and to shape its rules as to insulate it against the pressing demands of power politics and bureaucratic administration. Thus, law seeks to guarantee the interplay of three crucial orientations - function, contribution and reflexion[35] - within the institution of expertise itself. The question of function is: What is the role of expertise in the social context involved? How can expertise combine its potential with ongoing social processes? The question of contribution is: What are the advantages that different actors gain from the knowledge production of expertise? The question of reflexion is: How can these two divergent perspectives be reconciled? Public law regulation does not answer one of these questions directly. Rather, it creates procedures and obligations that allow for an internal balancing of function, contribution and reflexion within the dynamics of expertise itself. But it interferes directly in cases of blatant

[31] For this problematic relation Luhmann (1990): 616ff.
[32] Sciulli (1992): 205ff.
[33] Lammel (1979): 362ff.
[34] For all kind of „public services" that do not fall into public administration, Teubner (1998): 402ff.
[35] Luhmann (1984): Ch. 2; (1997): 757ff.

"misuse" when the subtle mechanisms of self-regulation are perceived as not to work properly.

Once expertise is utilised in the private sector, the same problem comes up but now in a different institutional context. Of course, buying and selling expertise is nothing new in the private sector, but under the auspices of ongoing privatisation processes, the production of knowledge for projects in the private sector is increasingly taking place as an economic transaction. If the institution of expertise is no longer under a public law regime but under a regime of private contracts, how will its institutional integrity survive?[36] Do the rules of private law have the capacity to guarantee – or at least to facilitate - an autonomous balancing of function, contribution and reflexion?

One solution in the private sector is collective action in the private sector. Private standardisation associations are a case in point.[37] Private actors create non-profit associations that become independent of the short-term interests of their founders. Although these associations act in commercial contexts, their institutional design increases their chances to display of sufficient autonomy to develop a firm normative orientation toward principles of independent inquiry. Their character as an autonomous formal organisation facilitates reflection processes – within the organisation and/or in the context of a larger public – that strike a precarious balance between their social function and their contribution to private projects. The sensitivity of public opinion against a "politicisation" of these associations and against other forms of structural corruption testifies to a successful institutionalisation of expertise in the private sector.

But what about buying and selling expertise via a bilateral contract? If the provision of expertise – and here comes the crucial question - "is to be delivered by contractual mechanisms, what conditions of implicit dimensions need to be established for this mechanism for delivery to operate as intended?"[38] Here, a fundamental conflict, the direct collision between the principles of contractual loyalty and expertise impartiality, comes to the fore.[39]

Expertise, if it is supposed to work properly, needs to be supported by (in)visible hand mechanisms which guide its orientation firmly toward principles of scientific inquiry. Application of rigorous methodical standards, orientation toward a comprehensive body of concepts and theories, reliance on inter-subjective consensus in the community of experts, strict insulation against interference of outside political or economic interests, neutrality and impartiality in relation to the interests of the clients involved, are primary among them.[40]

Bilateral contracting on the other side creates for the expert the legitimate obligation of co-operation, trust, interdependence and loyalty toward the economic interests of the mandator. The expert is under the contractual obligation to further the interests of his client, to use his scientific-methodical instruments to advance the position of his

[36] This is the general theme in Teubner (1998).
[37] Joerges, Ladeur and Vos (1997).
[38] Campbell and Collins in this volume MS 3.*
[39] For theorising the larger historical and social background of these conflicts, see Sciulli (1992): 40ff.
[40] For a recent comprehensive reformulation of the fundamental social norms in the scientific community, Ziman (2000): 28ff.

partner to the contract, who after all finances the expertise.[41] In the contractual perspective it would appear even as illoyal if the experts took into account other interests than those of his partner, worse, if he took into account antagonistic interests on the other side of the market, worse even, if he balanced these interests against each other independently.[42] The contract favours legitimately the expertise's orientation toward its contribution to the mandator at the expense of its contribution to other social actors and at the expense of its social function.

Thus, private law faces a sharp collision between two legitimate self-regulatory institutions – contract and expertise. The situation can be compared with private arbitration where the ethos of dispute resolution by third parties clashes with the ethos of self-interest in contracting. In the case of the private expertise, the ethos of contract - privity, particularism, interest orientation, utility, and loyalty - clash directly with the ethos of scientific inquiry - public knowledge, universalism, disinterestedness, originality and scepticism.

Judicial intervention or non-intervention – that is the question. It is frequently suggested that private law leave this collision of self-regulating institutions to meta-self-regulation.[43] Especially economists tend to recommend this strategy as "penalty default".[44] If parties fail to write a contract which would include the third person, the incompleteness is presumed to be inefficient, whether unintended or strategic, and the court's approach should be to deter this behavior and encourage complete contracting. The foreseeable result would be an evolutionary process, a "drift" toward unmediated interest competition, in which over time private independent expertise will transform itself into partisan expertise.[45] The constant pressures of the institution of contract will gradually change the institution of expertise into a procedure which will become known (not necessarily as "junk science" but) as partisan expertise. In the long run, people will get used to second-order observation: Who paid for the expertise? And they will act accordingly. As a consequence, independent private expertise via bilateral contracting will vanish from the market. In commercial situations where expert information becomes necessary, the other side of the market will be compelled to provide for its own partisan expertise. Then law's job will be more limited, to make sure that deceit and fraud are somewhat reduced in those frequent situations when partisan advice is sold on the market as "independent" expertise. At this point it becomes clear why a mere orientation of law toward contractual patterns and conventions of the market which had been discussed above is problematic. They do not but record the result of blind evolutionary processes – in our case the "drift" of independent expertise to partisan expertise - without making visible that two legitimate self-regulatory regimes are conflicting.

Judicial intervention is needed, however, if the integrity of independent expertise is to be maintained within the private sector. More abstractly, it is needed to facilitate an internal reflective balancing of institutional contributions to social actors (the mandator, beneficiary, others) against its social function (advancement of knowledge in non-scientific sectors of society). This is the reason why it is an important matter of

[41] Philippsen (1999): 9.
[42] Philippsen (1999): 23.
[43] Honsell (1999): 233.
[44] Cohen (2000): 83.
[45] This is the central tenet of the theory of societal constitutionalism, Sciulli (1992): 40 ff.

public policy to declare that expertise comprise a legally "protected sphere" within civil society. Thus,

> "the state in essence buffers these enterprises 'artificially' from all other spheres' more 'natural' condition, that of immediate competition within economic and political market places"[46]

Once this is accepted, the option is either to exclude bilateral contracts generally from expertise matters, or to search for spaces of compatibility. Now, it is obvious that an outright prohibition of bilateral contracting is counter-productive. Contracting expertise serves here as a flexible and productive social mechanism that makes expertise responsive to projects in different areas of social life.[47] It is a healthy antidote to the old disease that expertise as an independent social institution has in itself a tendency of following its self-interested path of inquiry and loses contact with the social project that are at its roots. In many situations there are good reasons for a tightly written contract to discipline the internal dynamics of expertise and to oblige the process of inquiry to its contribution to a concrete project, if only it can be avoided that the contract undercuts the principles of independent inquiry.

Thus, the task at hand is to search for spaces of compatibility between contract and expertise, to search for a legal regime that furthers an internal reflection on the balance of function and contributions. Here, third party liability comes in. It appears as an adequate means to create a space of compatibility. It provides a solution for a typical collision of contracting worlds. It does so by redefining "privities", i.e. the external boundaries of the interpersonal relations. While the concrete project, whether in the technological, social, scientific or medical sector, requires one comprehensive multilateral relation, which formalises the agreed upon co-operation of several actors, the concrete contract and the economic market relation is fragmenting the multilateral complex into various strictly bilateral relations. The "privity" of the relation is defined differently by the contract and by the project. Third party liability dissolves this conflict of different privities in favour of the multilateralism inherent in the expertise. Via liability law, the social institution of expertise forces the bilateral contract to transform itself into a multilateral obligation. The conflict between multilateral social networks and the bilateral economic transactions forces the law to account for third party effects of contracting, even if this contradicts the sacred privity of contract, reduces allocative efficiency and increases transaction costs.

If then as a matter of law, responsibility for third parties is included into the contract, the one-sided contractual duty of loyalty is counter-balanced by a liability supplement toward the other participant in the project. Thus, despite its contractual loyalty, private expertise can regain its requisite neutral and impartial orientation. Independent expertise as an institution, as a complex of social expectations, thus represents one of the non-contractual elements of contract which – as a matter of law - the private autonomy of the parties has to respect.[48] Whenever expertise is organised under a

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[46] Sciulli (1992): 207.
[47] For a general account, Luhmann (1990): 616ff.
[48] This refers of course to Durkheim's famous formulation of „non contractual elements of contract" which in our words represent the embeddedness of contract in various social institutions, Durkheim (1933): 206. It is indicative that the German courts use the concept of „purpose" to internalise the non-contractual elements into the contract. The courts define the „purpose" of an expertise contract „to create trust and to serve as an instrument of proof", BGHZ 127, 257, 261.

private law regime, the requirement that it is complemented by third party liability is a necessary implicit dimension of this regime.

What happens here to the collision of language games? Once third party liability is introduced, the fundamental conflict between contractual loyalty and disinterestedness of expertise which seemed to be irreconcilable is not resolved by law in favour of the one or the other. Rather, it is transformed into something else. There are two major moves involved. (1) Seen from the perspective of social contribution, the third party liability rule changes the asymmetric contractual obligation to the interests of the mandator into a symmetric obligation to the interests of both parties to the project. This is important enough since it creates equidistance to the commercial interests involved and allows the expert to balance their interests against each other. But this is a limited perspective, since it takes only individual interests into account. (2) Seen from the perspective of expertise's social function: the second move transforms the expert's obligation to personal interests into his *obligation to the project*.[49] With this new project-orientation, liability achieves to institutionalise what we were looking for. Expectations of contractual loyalty with its potential of corrupting independent expertise will be "translated" into the impersonal, disinterested, and objective orientation of expertise. At the same time, expertise is no longer free to escape into the lofty space of self-sufficient logic of discovery, but the legal bonds of contractual loyalty and the bonds of third party liability tie it firmly down and "translate" abstract knowledge into the concrete expertise which is needed for the real world project.

To express our result in one quasi-magic formula: *third party liability symbolises the transformation of interest-bound expertise into project-bound expertise.* The existence of this liability is a highly visible threshold that separates two institutions. It draws a limit between partisan expertise where knowledge its (legitimately) used for the pursuit of private interests and independent expertise where knowledge is applied in an disinterested way with in-built controls of reliability and where it is independent from personal loyalty and reciprocity considerations. Expert liability to third party marks the boundary between the fields of economic and scientific rationality.

It should be stressed again that it is not the abstract ideal of scientific inquiry as such, but the close intertwinement of both, independent expertise and the concrete project, that lies at the roots of third party liability. "Project-bound expertise" – this is the institutional *idée directrice.* This idea unfolds along two implicit dimensions of contracting. As such, expertise imports principles of the scientific community that need now to be respected in the contract: disinterestedness, impartiality, independence, orientation on methodical standards, and responsibility toward each participant in the realisation of the project. The details of third party liability – doctrinal construction, scope of beneficiaries, standards, defences and exclusion of liability – however, are to be determined in an institutional perspective which is informed by the concrete project to which the expertise is under obligation.

[49] From a different theoretical perspective, the trust relation, Canaris (1999): 234ff. stresses the project-orientation of expertise as the relevant legal criterion. Again from a different perspective, the special factual relation which shuts the floodgates of infinite expert liability, Picker (1999): 440ff., focuses on the project which binds expertise even without a contract.

V. Project-oriented Expertise: Selected Legal Issues

1. Adequate Doctrinal Construction

To find the adequate doctrinal construction for an institutional liability toward third parties is not an abstract exercise on the *tabula rasa* of sociological jurisprudence, rather it depends on historical contingencies of how different national legal systems have drawn the fine line between contract and tort in general which in its turn depends on how they developed the conceptual potential (and/or deficiencies) of several specific doctrines, like implied terms, consideration, contractual privity, *culpa in contrahendo*, third party beneficiary contracts, on the one hand and special tort relations, duty of care, *respondeat superior*, compensation for pure economic loss, limits of causation on the other hand.[50] In this context it has often been mentioned that there is a striking identity of the criteria for third party liability, whatever the doctrinal construction. These criteria are: the professional position of the expert; the relevance of the information for the third party; the concrete circumstances of the production and transportation of the information; foreseeability of the usage of the information by third parties; the amount of reliance on the information.[51] This is also true for the implicit dimension of "project-bound expertise". In the inner structures of this private institution we find the conditions of the special relation "akin to contract" that tort and quasi-tort law is looking for, as well as the famous non-contractual element of contract law.[52]

In legal orders that have opted for a contractual solution, a fierce battle is raging between two camps of legal doctrine. One camp – among them the courts - favour third party beneficiary contract and its doctrinal derivatives. They start with the contract between mandator and expert and extract from its implicit dimensions the liability of the expert toward the non-contracting beneficiary.[53] The other camp – among them eminent scholars - fight for *culpa in contrahendo* liability of non-contracting partners. They start with the second contract involved, the project contract between the mandator and the beneficiary, and extract from its implicit dimensions a quasi-contractual liability of the expert who is not participating in the contract but as close to it "as if" he were a partner.[54]

From our institutional perspective, both are right and both are wrong at the same time. It is right to find the origin of the liability in the "implicit" dimensions of the expertise contract, although they are non-contractual. And it is equally right to see it an "implicit" dimension of the project contract, although they are non-contractual. But they are both wrong since they miss the crucial element of "binding" the expertise tightly to the project. The key-concept to third party liability is interdependence of the two contracts, in our terms, the legal obligation of expertise to project and *vice*

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[50] See Bar (1999).
[51] Schneider (1999): 252.
[52] I have a certain preference for a contractual solution of expert liability which, I hope, is not exclusively determined by national bias. The main reason is that expert liablitiy is oriented to performance interest and not to integrity interest. The beneficiary does not suffer from the realisation of a risk that the expertise entailed for his belongings, rather he suffers from performance risks of a transaction of a valuable good, the information.
[53] Main protagonist BGH 127, 378 – Dachstuhl.
[54] Main protagonist Canaris (1999): 222ff. Cf. also Adolff (1997): 118ff.; Neuner (1999): 135.

versa.[55] Thus, for legal orders that are gradually developing a doctrine of "connected contracts", like *groupe de contrats* in the francophone world, network contract and connected contract in the Anglo-Saxon world, *Vertragsverbund* in the German speaking countries, the doctrinal foundation most adequate to the institution of project-bound expertise should indeed lie here.[56] Project-oriented expertise relations would be just another case of a whole variety of contract networks with more than two actors involved.[57] In these relations, the law regularly discovers implicit dimensions beyond the mere party consensus in bilateral contracts.[58] As a matter of course, in contract networks quasi-contractual liabilities emerge between parties that have no explicit contractual ties.[59] Obviously, this is a promising perspective for the future. However, at present, only second-best solutions are available in legal doctrine, i.e. contractual or quasi-contractual constructs, each with their well-known deficiencies.

In my view, third party beneficiary contract is at the end more adequate to the institutional dimension of project-expertise than is *culpa in contrahendo* of third parties. The latter has been originally created as a liability of third parties (*Sachwalter*) who are not formally participating in the contract but who fulfil three conditions: (1) they act within in the "camp" of one of the contracting parties, (2) they themselves have a substantial economic interest in the transaction which makes them to "quasi-parties" to the contract, (3) however, they act in such a way that the other party to the contract has reasons to trust them.[60] Independent experts clearly fulfil the third condition, but they stand in diametrical contrast to the first and second one.[61] Disinterestedness in the economic stakes of either party to the project contract is a necessary precondition of project-bound expertise. Thus, independent experts should not be treated within the same legal category as are partisan experts, who are acting in the same camp as the one party who furnish information to the other party. To put both into the same category as *culpa in contrahendo* suggests, would blur the fundamental legal distinction between advocacy expertise and independent expertise. The liability standards of independent experts should not be downgraded to the standards of partisan advice.

There is another reason to prefer third party beneficiary contract. If the problem at hand is to reconstruct in law a comprehensive multilateral institution like project-bound expertise, *culpa in contrahendo* would only arrive at three (or more) bilateral relations that are isolated against each other. Conversely, third party beneficiary contract explicitly opens the conceptual space for one overarching legal relation, in which the interdependencies between the project, the expertise and the interests of

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[55] This is where Picker (1999): 432ff. identifies the „special relation" needed for liability for purely economic loss.

[56] For network contracts, Adams and Brownsword (1990); Rohe (1998). For a general concept of "connected contracts" which would cut through contract law and company law Gulati, Klein and Zolt (2000).

[57] Picker (1999): 440ff., argues to qualify expertise relations as „connected contracts" which would be the „special relation" as basis of liability

[58] For "connected contracts" in general Gulati, Klein and Zolt (2000) 929f.; for *Vertragsverbund* in German law Gernhuber (1989): 711; Heermann (1998): 93; 96ff.; 106.

[59] For networks in general, Teubner (2002): 325ff. For heterarchical networks Rohe (1998): 195ff.; for just in time networks Lange (1998): 195ff.; for virtual enterprises Lange (2001): 188ff., 192; for franchising networks Teubner (1991): 129ff.; Baumgarten (1993): 169ff.

[60] Emmerich in: Rebmann, Säcker and Rixecker (2001): vor § 275, 172ff. The leading monographs on *Sachwalterhaftung* are Wiegand (1991): 30ff.; Henke (1997): 16ff., 53, 132f.

[61] Canaris (1999): 226 downplays the importance of this difference.

several actors can be reconstructed, and rights and duties of all the parties involved can be fine-tuned in relation to each other.[62] Still a second-best solution, third party beneficiary contract comes closest to the institutional core, the unitary network of three closely interconnected transactions.

2. Scope of Protected Persons

The most difficult concrete problem is to determine which among the persons, that are exposed to the risk of the expertise and rely on it for relevant decisions, will be entitled to claim third party liability. What are legitimate criteria to determine the scope of protected persons? Several court decisions have applied the criterion of foreseeability of the informational contact between expert and beneficiary-victim.[63] As a consequence, financial liability of auditors and accountants has expanded to an almost infinite number of investors. Other courts have looked to the degree of exposure to risk, some have manipulated the doctrine of causation in order to limit the number of protected persons. From our institutional perspective, all three criteria are misplaced. The relevant legal question is not to identify the integrity interest of all those persons who while relying on certain information take risks and suffer damages. Rather, the task is to take account of the specific institutional integrity of expertise. If project-bound expertise is the social institution in which the contract participates, then it is the obligation to the project that defines the limits to its responsibility to third persons.[64] Here again, the intertwinement of expertise and project decides who is entitled to liability and who not. The limits of the project determine the limits of special responsibility for others persons, and not foreseeability of damage, exposure to risk or principles of causation. Accordingly, the expert is responsible for the performance of his information transaction exclusively to the participants to the concrete project. Third party liability - an implicit dimension of project-bound expertise - is not a general responsibility for the integrity interest of outsiders. As we said above, it is a countervailing device to the asymmetry of contracting. It serves to protect the complex expertise relation against its bilateralisation through contract, but it does not serve as a general insurance against risky transactions that rely on expert information.

Equally misplaced are typical contractual criteria. In order to determine the scope of protected persons, courts again and again search for indicators that refer to intentions of the parties, subjective knowledge of the destination of the expertise, concrete contacts between expert and beneficiary. These are misleading criteria, insofar as they are supposed to identify the will of the parties to *create an obligation* to the third party. In our institutional perspective, third party liability comes in independently of such an explicit or implicit agreement. It emerges even against the will of the parties. The central criterion is: Who participates in the project? One should hasten to add that the concrete circumstances of the three transactions involved do play a role in the determination, who is protected and who not. But there is a fine line

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[62] Of course, it needs to be stressed that the reduction to consensus of two parties which the term "third party beneficiary contract" suggests is misleading. It should be replaced by "third party beneficiary obligation" in order to stress the non-contractual institutional character of the underlying expertise relation which is internalised into the contract via judge-made law.

[63] For a careful comparative analysis, Ebke (1995): 498ff.

[64] Picker (1999): 440ff. arrives at the same result from a different starting point. Canaris (1999): 234ff. who favours a liability based on trust, stresses this point, but admits at the same time that trust as such provides for no criteria and needs to be supplemented by additional criteria. Here is exactly the point where the institution of „project-bound expertise" comes into play and provides for criteria.

to be drawn: These circumstances serve as indicators for the delimitation of the concrete project, but not as indicators for a bilateral agreement on the expert's liability. It is in the hands of the contracting parties to define the scope of information needed in the project-bound expertise, but it is no longer in their hands to determine the subsequent third party liability.

Participation in the project as criterion is easy to apply in the core area when there is a full-fledged project contract for which the expertise is required. Independent expertise for concrete sale, credit, investment projects are cases in point. Here the scope of protected persons is determined by contractual participation in the project. More difficult to define is a project that does not rely exclusively on contract. An example: After a car accident, the victim pays an independent expert for an assessment of the damage; the person responsible for the accident and her insurance pay relying on its correctness. In our view it is decisive that the expertise is bound to the concrete project of compensation for the concrete car accident, thus, the expert is liable to three actors, the victim, the person responsible for the accident and to the insurance company.[65] It is not the legal contract, but the economic project, more generally the social project that decides about the scope of protected persons.[66] Project-orientation provides guidance also for auxiliary activities. When a sale of a house is supported partially by a bank credit and backed up by the guarantee of another actor, all the actors involved, buyer, seller, bank and guarantor have a claim against the expert in terms of umpteenth-party beneficiary contract.[67] The project orientation would also include refinancing and insurance activities as covered by the "real finality" of the expertise.[68]

Difficulties arise when the project changes its character over time. Again an example: The expertise is at the end utilised for a credit operation instead of a sale of the object.[69] Indeed, here we enter the grey area of a social system's identity. Again, one should not look only to the project as such, but to its interrelation with the expertise and define the limits accordingly. In the change from sale to credit one would have to distinguish. If the requirements for a sale expertise are different then no liability toward the creditor, if they are the same then the expert is liable.

Similar difficulties arise when the group of project participants becomes more or less indeterminate. If there is a clearly defined small group of participants to the project then third party liability will cover each of them. The more, however, the group of potential participants moves into the direction of the public at large, the less justified is third party liability.[70] Given the public character of disinterested expertise, this may sound somewhat counter-intuitive. But here we reach the institutional limits of private law liability. There are many legal rules that support the neutrality of public expertise, private law liability one among them. Third party liability is adequate for situations where expertise is committed to a project with calculable risks. Thus, it protects the

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[65] Steffen (1999): 96.

[66] For the generalization from legal contract to economic project, Canaris (1999): 236; Picker (1999): 440ff.; for the inclusion of projects from different „contracting worlds" Teubner (2000): 402ff.

[67] For the extension of expert liability toward the bank who gives a credit for the sale BGH NJW 1987, 1758; for the extension toward a guarantor of the transaction BGH JZ 1998, 627.

[68] Picker (1999): 443.

[69] This was the situation in the case BGH NJW 1987, 1758. The court held the expert liable inspite of the project change from sale to credit.

[70] Here, the limitation of an indefinite scope of beneficiaries comes in as a legitimate concern of law. For the argument see BGH NJW 1987, 1758, 1760 and particularly Picker (1999): 438ff.

integrity of expertise. But it loses its adequacy when it comes to support the general production of public knowledge. An incalculable liability risk would no longer protect but stifle the integrity of expertise. This type of liability makes sense only in the context of project-bound expertise. For example, a private consumer testing institution cannot be made liable to all potential buyers of the product in terms of expert liability.[71] In the case of auditors one should distinguish between two types of liability. If they fulfil their statutory duties of writing the yearly report, their statutory liability towards the enterprise and its affiliates comes in and should not be expanded via judicial interpretation. If however, they write a special report on demand of the enterprise in relation to a concrete investment, credit or sale project then third party liability legitimately comes in.[72]

Transaction chains require a similar distinction. If the risk of the subsequent transactions is identical, then expert liability applies. If the risk is increased then the expert is not liable to the subsequent buyers.[73] In all three cases it is the idea of compensating for contractual bilateralisation that limits the scope of protected persons. Aspects of calculation of risk and its insurability come in legitimately in shaping concretely the institution of project-bound expertise. If the primary aspect of expert liability is to stabilise this private institution, then professional insurance is reinforcing this aim and the limits of insurability are of relevance for the limits of expert liability.

What about third party protection of actors with antagonistic interests on the other side of a competitive market? Is the architect in our example liable to expectations of the buyer and his financial satellites, or should his liability be limited to those persons for whom the seller bears certain responsibilities? This has been a long controversy, particularly for the doctrinal construct of a third party beneficiary contract. However, for project-bound expertise, antagonism of interests is as irrelevant as is a fiduciary relation between mandator and third persons.[74] It is their participation in the project at hand that counts to make the expert liable to them, whatever their relations to the mandator are. The existence of cut-throat competition on the market and non-co-operative relations, antagonistic interests or the absence of any fiduciary element of the project-parties do not militate against expert liability; just to the contrary, the very antagonism of interests strengthens the requirement of strictly independent advice and supportive third party liability.

What about the distinction of partisan counsel vs. independent expertise? It should be stressed that partisan counsel in itself is a time-honoured social institution. And it needs a careful “institutional analysis”[75] in order to determine which set of expectation is required in a concrete social situation.[76] Tax counsels, lawyers and accountants are cases in point. As a rule their advise is partisan advocacy; they exploit professional knowledge legitimately for furthering the interest of their mandator. If their expertise is utilised by the other party, there is no third party liability

[71] Canaris (1999): 238. The monograph by Boecken (1998): 120ff. demonstrates against its own intentions the paralyzing effects of a liability toward an infinite number of creditors.
[72] For this distinction BGH JZ 1998, 101; Canaris (1999): 233f.
[73] Hopt (1987): 1746; Canaris (1999): 211.
[74] BGHZ 127, 378; BGHZ 138, 257. See also Zumbansen (2000): 443.
[75] For the concept of institutional analysis and its methods, Selznick (1969): 35ff.; (1992): 229ff.
[76] Cf. the criterion of the expertise’s function in the concrete situation, Canaris (1999): 233.

required.[77] However, there exist rather exceptional situations where these typically partisan professions take over the role of a neutral expert.[78] A case in point is the recent practice of "third party legal opinions" where the second partner to the project explicitly asks for a (binding) legal opinion of the first partner's lawyer.[79] There are other situations, e.g. the so-called "tax opinions" or "comfort letters", in which the interrelation of project contract and expertise contract make clear that independent advice of a lawyer, accountant, tax counsel or another partisan expert is required.[80]

Another fascinating situation is the case of politically biased research institutions when they are asked to provide expertise on concrete projects. Again, the expert-mandator-contract does not furnish criteria but the broader institutional context of function/contribution/reflection. At first glance, they seem to be a classical case for project-bound third party liability. And the closer they are to governmental institutions (subsidies, public role), the stronger the argument for their liability. However, there is a case to be made for the virtue of partisan advice here. Consider "People's Institute of Mother Gaia Autopoiesis" which is financially supported by members of the ecological movement. If their advice is sought in a legal and/or political controversy on ecological issues where both parties present scientific evidence to corroborate their claims, their expertise is part of an adversary institution of truth-seeking. In such a context, they are supposed to deliver advocacy expertise, and a third party liability would be a threat to their necessarily partisan, one-sided, interest bound inquiry. And the argument for advocacy expertise – exploiting any knowledge available to drive an explicitly one-sided partisan view to its limits – will be stronger than that for independence, disinterestedness and neutrality.

3.Exclusion of Liability and Contractual Defences

This is the Achilles' heel of contractual doctrines, particularly of third party beneficiary contract.[81] *Nemo potest trasferre* provides the argument for exposing the third party to all defences that the mandator could raise against the expert. It is especially true for exclusion of liability. The third party cannot have more rights than the mandator, that is what logic dictates. The results are rather strange. In cases where expert liability toward third parties is most urgently needed it becomes dependent upon the collusion of mandator and expert. The courts try to avoid (some of) these undesirable results by inventing just another contractual fiction: Not only do they base expert liability on the fiction of the parties' implicit intention to expand the liability to the third party, now they create a second fiction according to which the expert implicitly agrees not to raise contractual defences against the third.[82]

The weak spot vanishes once an institutional perspective is taken. As soon as implicit dimensions are no longer interpreted as referring to the parties' intentions nor to their

[77] This was the situation in a case where the third party was influenced by partisan expertise for the mandator in settlement negotiations, BGH WM 1962, 933. The courts are also reluctant to create the fiction of a „silent" agreement between a lawyer and third persons to whom ge gives information, BGH WM 1978, 576; BGH NJW 1991, 32.
[78] This is especially true when they give advice in investment projects, BGHZ 74, 103; BGHZ 100, 117; BGHZ 116, 209; BGHZ 123, 126. Then expert liability toward third parties becomes the rule.
[79] See Gruson et al. (1997); for German law, Adolff (1996).
[80] Grunewald (1987): 301; Adolff (1996): 122ff.; Neuner (1999): 135.
[81] Canaris (1995): 444f.; (1999): 216ff.
[82] BGH 127,378,385; BGH JZ 1998, 624,625.

wider relation, but as referring to those economic and social institutions in which their contract participates, then third party liability is no longer a derivative liability of a bilateral contract but an originary liability of a trilateral expert-clients relation. This liability need not be derived from the mandators' rights and duties. It is not exposed to the defences that the expert could raise against the mandator.[83] It cannot be influenced by their contractual exclusions of liability.[84] Rather, liability toward the third party which has its roots in the expert's membership in the scientific community, is a direct responsibility to the third party.[85] It comes into life at the moment when the contract mandator-expert enters the private institution.

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[83] This is the dominant opinion independent of the particular construction, see particularly BGH 127, 378 – Dachstuhl.
[84] Minority opinion: Esser and Schmidt (2000): § 34 IV 2c. The dominant opinion allows liability exclusion, see Gernhuber (1989): 533f.; Canaris (1999): 230f.; Schneider (1999): 273.
[85] Esser and Schmidt (2000): § 34 IV 2c.

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