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Comparative Study on the Liability of Classification Societies To Third Party Purchasers with reference to Turkish, Swiss, German and US Law

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I
INTRODUCTION

Classification Societies have grown remarkably, and their operations and functions have changed in the last 30 years. When they were first established back in the 19th century, these societies were issuing special certificates for ship owners. These certificates used to constitute a security for underwriters with respect to ships which sought insurance cover. In time, such certificates gained importance not merely for the underwriters, but also for charterers and purchasers of ships. Particularly in contracts for the sale and purchase of ships, it has long become standard practice to include a "class clause" that requires the classification of a ship by a classification society prior to her intended sale. Today, classification societies provide consultancy services in various aspects of multi-million-dollar shipping operations, in addition to their usual services.[1] The core function, however, of Classification Societies appears to be to inspect ships on behalf of governments, with a view to ensure that the ships comply with the standards set forth in international conventions (e.g. SOLAS, MARPOL), by international organizations (e.g. IMO) and by domestic regulations.[2] Accordingly, Classification Societies undertake a public duty to inspect the seagoing condition of ships and thereby assume responsibility for safety at sea.

Given their aforementioned status, which includes both public and private functions, the legal nature of the liability of classification societies and the question as to which liability regimes they should be subject to, are issues subject to review. At this point, the liability of classification societies to their customers and their liability to third parties who are not their customers, should be distinguished. As the relationship between a classification society and its customer is contractually based, the terms of the contract are decisive in determining the extent of the liability of the classification society. This paper, however, aims to analyze the liability of a classification society to third party purchasers of a ship. The legal position of other third parties, such as charterers, cargo owners, or those who have suffered personal injury, fall outside the scope of this paper. Notwithstanding this, some of the conclusions may be equally applied directly or indirectly to such third parties.

In cases which fall within the scope of this work, the owner of a ship obtains a class certificate from a classification society and the purchaser of

[1] For a detailed explanation of the functions of classification societies see D. Rhidian Thomas, Liability Regimes in Contemporary Maritime Law, London 2007,109 ff.; Jürgen Basedow/Wolfgang Wurmnest, Third-Party Liability of Classification Societies, Heidelberg 2005, 5-13.

[2] In Turkey, such authority to inspect ships on behalf of the government is granted through the 5th article of Law no. 4922 relating to the Protection of Life and Property at Sea (Official Journal: 14.6.1946/6333 – Norm: 3/27, p.1258).

the ship relies on this class certificate when deciding to purchase the ship. There is no doubt that the purchaser may hold his contractual counterpart (the seller) liable for the losses suffered due to unseaworthiness of the ship and/or to the fact that the ship is in a worse condition than expected. However, can the purchaser bring a claim against the classification society that issued the documents which led the purchaser to the decision to purchase the ship?

The question as to whether the losses of a third party, which relied on inaccurate and/or deficient information, can be claimed from the provider of that information has been intensely debated in Europe over the last 25 years. This question often arises concerning the information provided by persons such as consultants, experts, brokers or agents. The idea of the "*liability of an information provider to a third party*" appears in legal commentary as a corollary of "*breach of confidence*."[3]

This paper analyzes the legal nature of the liability of classification societies in providing incorrect information. During this analysis, the arguments regarding the legal nature of the liability for providing incorrect information will be reviewed in general. Of these arguments, special emphasis will be given to "*breach of confidence*," which is generally recognized as a type of liability. Thereafter, the liability of the classification societies will be analyzed within the framework of "*breach of confidence*" by a comparative survey of Turkish, German, Swiss and US laws. In the last section the conditions for "*breach of confidence*" as applicable to classification societies will be put forward "*de lege ferenda*," supporting a comparative review of the relevant legal commentaries, court decisions and existing regulations on the subject.

II
THE LEGAL NATURE OF THE LIABILITY FOR PROVIDING INCORRECT INFORMATION

When one intends to purchase a ship or conclude a contract of carriage, one always checks whether the subject ship has been classified or not. A "class clause" can be found in almost all sales contracts and charter parties. Accordingly, a class certificate issued by a classification society is required. The question that follows is can the purchaser of a ship hold a classification society liable for damage suffered if the ship, although in class, turns out to be significantly below the class standards?

[3]Cigdem Kirca, *Bilgi Vermeden Dolayı Üçüncü Kişilere Karşı Sorumluluk*, Ankara 2004, 7.

The answer to this question will be sought by taking a number of legal systems into consideration. The liability of a classification society to a purchaser of a ship for incorrect assessment is significantly different under different legal systems. For instance, while it is easier to pursue classification societies in tort under French law, which has a wide perception of tort liability, it is much more difficult under German, Swiss and Turkish laws, which adopt a narrower approach towards tort liability.

As the liability of a classification society to third parties due to incorrect information is an example of "liability for providing incorrect information," the legal literature on the latter is relevant to the liability of classification societies. The liability of information providers for incorrect information is generally recognized by the various legal systems, subject to certain strict conditions. However, the legal basis for this liability does not fit within the framework of contractual and tort liabilities.

In the absence of a contractual relationship between the classification society and the third party who relied on the information provided by the classification society, the third party cannot demand a contractual remedy. As for tort liability, in many cases the conditions for it do not exist as far as the information provider is concerned.

Difficulties in reconciling the liability of the information provider with principles of tort liability arose in cases in the US. Due to the evolving nature of US law through Court decisions, however, the problem was solved relatively quickly. New provisions regarding the "liability of the information provider" to third parties were inserted into conventional tort law principles.

A. Analysis of Liability in Tort for Providing Incorrect Information

1. In general

Under **French law**, which has a very wide perception of tort liability, it is accepted that a classification society which provides incorrect information will be liable in tort. In a dispute which was heard before the Nanterre Commercial Court in 1992,[4] Bureau Veritas was held liable by the court to the purchaser of MV "Elodie II" for issuing a class certificate when in fact the vessel had many defects.[5] According to Article 1382 of French Civil Code (FCC), the aggrieved party need merely demonstrate that he/she

[4] *Elodie II, The*, Tribunal de Commerce de Nantere, 26.6.1992, Revue Scapel 1992, D.M.f. 1994, 19 upheld by the Cour d'Appel de Versailles, 21 March 1996 (cited in Barbara Vaughan, "*The Liability of Classification Societies*," http://web.uct.ac.za/depts/shiplaw/assign2006/studpaps.htm (5.1.2010), 11). See also Thomas, 114 (footnote 23).

[5] For similar decisions of French Courts see, Basedow/Wurmnest, 35-36.

incurred damage and that the other party was negligent, in order to claim compensation. Under French law, the act of a perpetrator is presumed to be unlawful if the negligence of the perpetrator and the existence of damage can be demonstrated. It is, of course, possible for the perpetrator to avoid liability by proving that the act is not unlawful. Furthermore, French law also has a broad understanding of damages that can be claimed within the scope of tort liability and there is no separation between damages stemming from an infringement of "absolute rights"[6] such as property or bodily integrity and those stemming from violation of pecuniary interests. Therefore, damages incurred as a result of incorrect information may be pursued in tort, within the scope of French principles of tort liability.

The Swiss Federal Court, until recently, was of the view that the liability to third parties for incorrect information was of a tort nature.[7] Influenced by the Swiss Federal Court decisions, some Turkish legal commentators, emphasizing the lack of a contractual relationship between the information provider and the third party, are of the view that tort liability under Article 41 of the Turkish Code of Obligations should be interpreted widely, so as to cover the liability for providing incorrect information.[8]

However, when one reviews the provisions relating to tort liability under **German, Swiss, and Turkish law**, one can see that a remarkably narrower approach towards tort liability is adopted, in comparison to French law. This is the reason why liability for providing incorrect information is not considered within the scope of tort liability in German, Swiss, and Turkish law. In these legal systems, the aggrieved party must demonstrate negligence, damage, a causal link between the negligent act and the damage, and, finally, the unlawfulness of the negligent act.[9]

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[6]See footnote 11, infra.

[7]BGE (Decision of the Swiss Supreme Court) 111 II 473; BGE 112 II 347, 1A, 350; BGE 116 II 695, 4, 699. The Swiss Federal Court is of the view that he who provides information upon demand shall be liable for any erroneous information or for any undisclosed material information, which is known to himself and could have influenced the third party's decisions and such liability shall be a non-contractual one (BGE 116 II 695, 699). See also Veysel Baspinar, *Vekilin Özen Borcundan Doğan Sorumluluğu*, Ankara 2004, 222. For similar decisions of the Swiss Federal Court, where the Court held that the provider of erroneous information is liable in tort, see Fikret Eren, *Borçlar Hukuku Genel Hükümler*, İstanbul 2006, 1090 (footnote 464).

[8]Baspinar, 229, 239, 241.

[9]This is known as "doctrine of objective unlawfulness," which requires the demonstration of the unlawfulness of the act, and it is generally accepted in German, Swiss and Turkish Laws. See, Basil S Markesinis/ Hannes Unberath, The German Law of Torts Comparative Treaties, Oxford/Oregon 2002, 79 etc.; Andreas von TUHR *Partie Générale du Code Fédéral des Obligations – Vol.I* (translation: Maurice de Torrente and Emile Thilo), Lausanne 1933, 326; Henri Deschenaux/Pierre Tercier, *La Responsailité Civile*, Bern 1982, 69; Pierre Widmer/Pierre Wessner, *Revision et Unification du Droit De la Responsabilité Civile, Rapport Explicatif*, Switzerland 2000, 98; Luc Thevenoz/Franz Werro (editeurs), *Commentaire Romand, Code des Obligations I*, Basel 2006, 279; Haluk Tandogan, *Türk Mes'uliyet*

2. Difficulty in demonstrating unlawfulness

When analyzing the nature of liability for providing incorrect information, it is worth examining in detail the condition of unlawfulness, which constitutes a more serious obstacle than other conditions in establishing tort liability.

"Unlawfulness of an act" means that the act of the perpetrator breaches a norm which prohibits causing damage to others or which aims to prevent damage to others.[10] Such norms are commonly called "behavioral norms" and they aim to protect the rights and interests of persons. However, a limitation must be imposed here, as obviously the law does not protect any and all rights and interests of individuals. There would be no freedom of movement in a legal system which provided absolute protection for all interests, and commercial life and competition would not develop.

Above all, the law protects persons' "absolute rights." Absolute rights, which can be claimed (and must be respected) by all persons, can be separated into three groups: property rights; intellectual property rights; and personal rights.[11] An act by a perpetrator which breaches an absolute right, will amount to unlawfulness without any need for further assessment. This is acknowledged in legal literature as "*unlawfulness of result*" or as "*unlawful result theory.*"[12]

What happens in the case of the breach of other rights which fall outside the definition of absolute rights?

The breach of rights and interests other than absolute rights constitutes a breach of a pecuniary interest (e.g. loss of profit). The losses arising from a breach of a pecuniary interest are in general described by legal commentators as ***"pure economic loss,"*** terminology influenced by English and US

Hukuku (Akit dışı ve akdi mes'uliyet), Ankara 1961, 18; Tuba Akcura Karaman, *Üreticinin Ayıplı Ürününün Sebep Olduğu Zararlar Nedeniyle Üçüncü Kişilere Karşı Sorumluluğu*, Istanbul 2008, 178; Kemal Oguzman/Turgut Oz, *Borçlar Hukuku Genel Hükümler*, İstanbul 2005, 494; Selâhattin Sulhi Tekinay/Sermet Akman/Haluk Burcuoglu/Atilla Altop, *Tekinay Borçlar Hukuku Genel Hükümler*, İstanbul 1993, 476.

[10]Markesinis/Unberath, 80; Deschanaux/Tercier, 70; Tandogan, 25; Eeren, 549. [Ed. Note: This concept appears to be similar to the application of the *Pennsylvania Rule* in US admiralty law – the breach of a statute or regulation may be deemed negligence per se, to the extent the concept of inlawfulness is implicated. Otherwise, the analogous concept would appear to be the breach of the standard of reasonable care.]

[11]Deschenaux/Tercier, 48; Thevenoz/Werro, 270 n 19; Tandogan, 25; Eren, 554. In German: absolute Rechte; in French: droits absolus.

[12]See Deschenaux/Tercier, 71; Pierre ENGEL, *Traité des Obligations En Droit Suisse*, Bern 1997, 452; Thevenoz/Werro, 279; von Tuhr, 326; Walter Yung, *Les Responsabilité contractuelle envers les tiers Lésés, Études et Articles*, Geneva 1971, 419; Oguzman/Oz, 495; Eren, 554, 557; Kirca, 16 (footnote 77); Atilla Altop, *"Bankanın İvazsız Olarak Müşterisi Olmayan Üçüncü Kişilere Verdiği Hatalı Banka Bilgilerinden Sorumluluğu,"* İstanbul Kültür Üniversitesi Journal, V.1, No.1-2, June 2002, pages 25-55, 43.

common law.[13] Unlike absolute rights, a person's pecuniary interests are not automatically protected by law and such interests cannot be claimed against all persons. Pecuniary interest is protected only when there is a norm which aims to protect such an interest. Therefore, in order to argue the unlawfulness of an act which breaches a pecuniary interest, one must demonstrate the existence of a norm that protects the pecuniary interest that has been breached. This rule can be easily seen from German Civil Code (BGB). BGB § 823/II states that one who violates a norm that aims to protect an interest of an individual, has to compensate the damages caused by this violation. This paragraph is accepted as dealing with the damages to the pecuniary interest. So, damage to the pecuniary interest is compensated only if it is proven that such interest is protected by a norm. It should be noted that although there is not such a clear provision in Art. 41 of the Turkish Codes of Obligation, the doctrine unanimously accepts the German system. Therefore, in the Turkish system also, in order to claim compensation for damages to a pecuniary interest, the existence of a norm protecting the damaged interest must be proven firstly.

At this point it must be mentioned that mere violation of a norm will not suffice to render the act unlawful, it must also be the case that the violated norm aimed to protect the interest breached. In the absence of such proof, the mere violation of a norm will not be considered unlawful, in the sense required for tort liability. For instance, in most penal codes fraud is prohibited primarily to protect the public interest. However, this prohibition indirectly protects the interests of individuals as well.[14] Therefore, a fraudulent act also incurs tort liability.

In cases where a perpetrator acts intentionally to harm a third party, such an act will be considered unlawful and even immoral (Turkish Code of Obligations (TCO) Art. 41/II; Swiss Code of Obligations (SCO) Art. 41/II; German Civil Code (BGB) § 826), irrespective of whether an absolute right or a pecuniary interest was violated.

In order to understand whether providing incorrect information by a classification society can be considered unlawful or not, one must look at whether or not an absolute right (e.g. personal right or property right) of the third party who relied on the incorrect information was breached. For instance, unlawfulness would exist in a situation where a defect which was

[13]For more information on "pure economic loss" (les dommages purement économiques) see, Markesinis/Unberath, 52 -59; Franz Werro, *La Responsabilité Civile*, Bern 2005, 30, 31; Thevenoz/Werro, 270 N. 19; Gilles Petitpierre, *La Responsabilité du fait des Produits*, Geneva 1972, 35; Catherine Weniger, *La Responsabilité du fait des produits pour les dommages causés à un tiers au sein de la Communauté Européenne*, Geneva 1994, 58; Kirca, 15, 16.

[14]Eren, 558

not spotted by the classification society caused fire onboard a ship which was purchased in reliance of the class certificate, and the purchaser dies or is injured as a result. In such a case, mere provision of incorrect information by a class society is considered to be an unlawful act, without any need for further assessment of facts. Furthermore, the classification society may also be held liable to every other person whose absolute rights are breached. In fact, in the 1989 case of *Psarianos v. Standard Marine Ltd.*,[15] a US Court held the classification society liable to the relatives of the crew members who died when the ship sank due to a defect which should have been spotted by class.

However, the difficulty lies in establishing the basis of the "pure economic loss" (such as loss of profit) of a purchaser who relied on the information provided by a classification society. "Pure economic loss" includes loss of business opportunities, damages paid to cargo interests and/or charterers of the ship due to the non-fulfillment of obligations in relation to the ship, damages paid to crew members in tort due to bodily injury that occurred due to defects in the ship.** As may be noted, these damages arise due to breach of a pecuniary interest of a person, and not breach of an absolute right.

As pointed out above, in order to pursue damages in tort, the aggrieved party must establish either that the other party willfully acted to cause harm or that a norm that protects the particular pecuniary interest violated. Under Turkish law, for instance, there is no such norm which imposes on expert bodies a duty to provide information diligently.[16] Therefore, although it is wrong to provide incorrect information, it is not unlawful,[17] and the mere

[15]728 F. Supp. 438, 1990 AMC 139 -E.D. Tex 1989. Also see, Machale A. Miller, "Liability of Classification Societies from the Perspective of United States Law," 22 Tulane Maritime Law Journal 75 1997-1998

*Ed. Note: Under US law, an indemnification claim for personal injury damages paid to crewmen would not be considered pure economic loss, given that the indemnity arises out of personal injury. Damages paid to cargo interests, for damage to cargo, also would not be pure economic loss. However, damages paid due to failure to carry cargo or failure to make a charter commitment would be.

[16]For further discussions on the subject see Kirca, 39

[17]In the Swiss and Turkish Civil Codes there is a general rule of conduct which is known as the "rule of good faith" (Art.2). The legal doctrine does not regard the rule of "good faith" as a general behavioral norm in the sense discussed here. If the contrary is accepted, almost every negligent act would be violating this "good faith" rule and would be unlawful. Such an interpretation would widen the scope of tort liability too much. Therefore, the "good faith" rule is predominantly accepted to be a behavioral norm for the parties who have a contractual relationship. For further reading on this subject see Christine Chappuis, *Les Règles de la bonne fois entre contrat et délit, Pacte, Convention, Contrat, Melanges en l'honneur du Professeur Bruno Schmidlin*, Bale 1998, (Bonne foi), 231, (footnote 19). For Swiss Federal Court decisions to this effect see: JdT 1983 I 610 (ATF 108 II 305 (cond. 2b 311)); JdT 1983 I 610 (ATF 108 II 305 (cond. 2b 311)).

provision of incorrect information by class is not sufficient to establish unlawfulness.[18]

Although there is no such right, the regulations regarding specific professions must be considered, to see whether a duty is imposed on the members of a specific profession. As far as classification societies are concerned, the mere provision of an incorrect assessment report or a class certificate is not unlawful. As previously mentioned, the classification of ships is made due to the authority vested in the classification societies by governments[19] and the main purpose of such periodical classification of ships by classification societies is to ensure safety at sea in the public interest. Issuance of an incorrect certificate can only be unlawful insofar as it breaches a specific right which protects the third party's personal interests.

Therefore, in the absence of a specific regulation in the legislation, third parties who relied on incorrect information and incurred pure economic losses, cannot pursue damages in tort. Principles of tort liability are not suitable for seeking a remedy for pure economic losses in tort.

The same difficulty in compensating pure economic losses is also encountered in the common law legal systems. It is often argued that the standard principles of tort liability are not satisfactory, as far as the liability of the information provider towards a third party is concerned.[20] Under US law, in light of the decisions of a number of US judges, and given the apparent need, a regulation which aims to provide remedies for breach of the economic interests of third parties was introduced into the Restatement (Second) of Torts (Section 552).[21]

Given the difficulties in establishing unlawfulness and in pursuing remedies for pure economic loss in tort, the liability of classification societies towards third parties cannot be reconciled with the principles of tort liability. Furthermore, while remedies under tort liability aim to preserve the situ-

[18]Baspinar (241) is of the view that the breach of confidence of the recipient of the information by the information provider constitutes an unlawful act, so far as required for establishing tort liability.

[19]Also see *supra*, fn. 2

[20]Thomas, 114. Since pure economic losses cannot be pursued in tort under the common law legal system, satisfactory results cannot be obtained from tort liability in cases relating to classification societies. Some court decisions as to this subject are as follows: *Hamble Fisheries Ltd v. Gardner*, [1992] 2 Lloyd's Rep 1; *Simaan General Contracting Co v. Pilkington Glass Ltd (No 2)* [1988] QB 758; *East River SS Corp v. Transamerica Delaval Inc*, 476 US 858, 106 S Ct 2295, 90 L Ed 2d 865 (1986).

In England, where the "pure economic loss" rule is applied rather strictly, courts seem to be reluctant to hold classification societies liable. This approach is seen clearly in *The Morning Watch* [1990] 1 Lloyd's Rep. 547–559 relating to an 80-foot yacht, which was classed as A1 by Lloyd's Register and which had an under-deck corrosion which would have almost certainly prevented her from being classed as such, had she been surveyed properly. Phillips, J., nevertheless, refused to hold Lloyd's Register liable for the financial losses of the buyer (THOMAS, 115).

[21]For further information relating to provision 522 of the Restatement (Second) of Torts see infra section II, C, 3 and III, B.

ation right before the damage occurred to the aggrieved party, the remedy for providing incorrect information aims to protect the prospective interest of a third party. Therefore, it is clear that the principles of tort liability do not do enough to resolve the issue of liability towards third parties for incorrect information.

B. Analysis of the Liability in Contract for Providing Incorrect Information

Due to the insufficiency of the tort liability principles (e.g. as regulated under TCO Art. 41 /SCO Art. 41 /BGB § 823) some legal commentators have attempted to place the liability for providing incorrect information within the scope of contractual liability. At this point, it should be noted that if the recipient of information obtains that information directly from an information provider under a specific contract, then there exists a contractual relationship between the parties, and there is no doubt that disputes arising from such relationship will be resolved pursuant to the provisions of that contract. However, cases where there is a contractual relationship between the parties fall outside the scope of this paper. In cases which fall within the scope of this paper, the recipient of the information either does not communicate directly with the information provider, or, although there is a contact, it does not involve the parties to the dispute. However, despite the lack a contract, some commentators argue that an implied contract for provision of information comes about between the parties.[22]

The **German Courts** had adopted this approach for years.[23] Formerly (during the 1960s and 1970s), the German judiciary was of the view that an implied contract for provision of information is concluded between the recipient and the provider even in cases of little contact, or in cases where the recipient merely asks a simple question of the provider. The facts of the dispute which led to the landmark decision of the Imperial Court which is the judicial source of this view, are as follows:[24] A bank requested a document which showed the encumbrances on a property, on which a lien was imposed by the bank as security for credit. This document was issued by a notary, who at the same time happened to be the attorney of the debtor. The bank reviewed the document and accepted the debtor's credit request. Subsequently, the debtor defaulted and the bank could not recover part of the

[22]Basedow/Wurmnest, 44; Altop, 37.; Burcu (Kalkan) Oguzturk, Guven Sorumlulugu, İstanbul 2008, 156.

[23]BGH 29 October 1952, 7 BGHZ 371, 374; BGH 17 May 1990, 1991 NJW 32 ff (cited in Basedow/Wurmnest, 44); ALTOP, 37, 38, 39.

[24]RGZ 52, 365, 366 (cited in Kirca, 62).

credit, as there turned out to be more encumbrances on the property than those that had been disclosed to the bank. In the event, the Imperial Court held that there was an implied contract between the attorney and the bank. In reaching this decision the Court held that if a party whose profession involves the provision of information to others, is aware of the other party's need for the information and provides important information in this regard, then a contract is deemed to be concluded between the recipient and the provider of the information.

The German Courts extended the effect of this decision and even disregarded the need for direct contact between the recipient and the provider of the information, finding that indirect contact was sufficient for the existence of an implied contract. For instance, there is no direct contact between the recipient and the provider in a case where a bank obtained information about the credibility of a third party from another bank (the provider) and gave this information to one of its clients (the recipient). Despite no direct contact, the German Federal Court held that contract was deemed to exist between the parties.[25]

Acceptance of an implied contract is open to criticism as it deems parties who do not intend to enter into a contract, to be bound by a contract.[26] Subsequently, the German Federal Court by its decision in 1978,[27] abandoned this view on the grounds that an express offer by one party and an acceptance from the other is necessary to enter into a binding contract for provision of information.

To accept the existence of a contract between the provider of incorrect information and the recipient of the incorrect information in the absence of a clear contractual relationship, is in conflict with the main principles of the law of contract. Such an approach is harmful to persons' reliance on the law and excessively limits the freedom to enter (or not to enter) into a contract.

C. Analysis of the Liability for Providing Incorrect Information Separate from Tort and Contract

In light of the above, it can be seen that the liability of the information provider to third parties cannot be reconciled with the scope and nature of tort and contractual liabilities. As a result, a number of legal commentators have argued that the liability of the information provider is a different type of liability, which mainly stems from the breach of the "principle of good

[25]BGH NJW 1979, 1595, 1597 (cited in Kirca, 65).
[26]With the same opinion Basedow/Wurmnest, 44,45.
[27]BGH, WM 1978, 556, 557 (cited in Kirca, 64).

faith" (in the sense stipulated in Art. 2 of the Turkish Civil Code and Art. 2 of the Swiss Civil Code; § 242 BGB).[28] The most significant alternative sources of liability put forward are "*contracts protecting third party interests*" and "*breach of confidence*." In order better to understand these, it will also be necessary to analyze the differences between these and other similar precepts such as "*culpa in contrahendo*" and "*obligations without any duty of performance*."

1. General information on the different sources of liability

Certain obligations which cannot be classified under either tort or contractual liability, have been categorized by legal commentators as coming under a separate source of liability. Doctrines such as "*obligations without any duty of performance*," "*culpa in contrahendo*," "*contracts protecting third party interests*" and "*breach of confidence*" came about through such categorization. These, in essence, are all exceptions to the principle of privity of contract, as they support the application of remedies available in contract, in the absence of a contract. It should, however, be noted that the contractual liability regime is applied to these concepts only by analogy, for the purpose of filling the *lacunae* in this specific area of the law of liabilities.[29]

The main idea underlying these concepts is that, under particular circumstances there is a duty between two parties to protect each other's interests, even in the absence of a contractual relationship.[30] In other words, in some cases a quasi-contractual relationship arises from this protective duty, and a *"relationship of confidence"* is established between parties.[31] The most common cases which are said to include such a protective duty, are as follows:

- **Obligations without any duty of performance:** This is the main concept which covers all liabilities stemming from breach of the protective duty and

[28]With regards to "*contracts protecting third party interests*" see Karl Larenz, Lehrbuch des Schuldrechts, Band I, Allgemeiner Teil, 14. Auflage, München 1987, 227; Basedow/Wurmnest, 47. Also see the examples of rulings of the Turkish High Court of Appeals in relation to "*culpa in contrahendo*" liability: 19. HD 01.12.2005 T, 2005/2865E, 2005/11959K; 13. HD 13.11.1995 T, 9375E, 9860K.

[29]Accordingly see, ENGEL, 749; Necip Kocayusufpasoglu, *Borçlar Hukuku Genel Bölüm, V. 1, Borçlar Hukukuna Giriş – Hukuki İşlem – Sözleşme*, İstanbul 2008, 735 (fn 50).

[30]"Duty to protect" is first brought forward by Stoll in his book dated 1936 (Heinrich Stoll, *Die Lehre von Leistungstörungen*, Tübingen 1936, 26, 27). Prior to Stoll, those duties were believed to exist between parties to a contract. Subsequently, it is acknowledged that such duty to protect also exists between individuals without any contractual nexus. Such duty does not give one party the right to demand performance from the other, but merely entitles one to compensation when the duty is breached. Turkish High Court of Appeals decision in the same direction: Yarg. 13. HD., 13.11.1995 T., E. 9375, K.9860.

[31]Eren, 40; Kirca, 103.

of the relationship of confidence.[32] Since such relationship of confidence lacks contractual ground, it is designated as an obligation without a duty of performance.[33] "*Culpa in contrahendo,*" "*contracts protecting third party interests*" and "*breach of confidence*" can be grouped under this main concept.[34]

- ***Culpa in contrahendo*:** This concept suggests that a relationship of trust is established between the parties during contract negotiations and that the parties are under an obligation to protect each other's interest. Breach of this obligation leads to liability for "*culpa in contrahendo.*"[35] Accordingly, the negotiating parties are under a duty to refrain from acts detrimental to the other party. For instance, a party may be liable to the other if he/she, without any real intention to enter into a contract with the other, distracts the other party and causes him/her to lose profit and other business opportunities.

- **Contracts protecting third party interests:** If the consequences of the non-performance of a contract by a party imposes a risk on the health and safety or property of the other party and/or other third parties who are related to the performance of the contract, a special legal relationship is deemed to be established between the non-performing party and the third parties.[36] The non-performing party will be liable to the third parties. Further detailed information on this concept will be given below.[37]

- **Breach of confidence:** This concept was developed in Germany and arises when a third party influences the conclusion of a contract. Through this type of liability, which is of significant importance for this paper, a more effective protection is introduced for third parties, particularly against incorrect and misleading information and advertisements provided, for example, by banks, investment consultants and experts.[38]

In all the aforementioned special concepts, liability stems from the special relationship of confidence between the parties. This leads to the perception of "breach of confidence" as a supreme concept, under which all other liabilities which arise out of a relationship of confidence can be classified. As a result there is confusion among commentators when defining the con-

[32]Related with this institution see Oguzman/Oz, 37; Eren, 42; İlhan Ulusan, Culpa in Contrahendo Üstüne, Tribute to the memory of Prof. Dr. Ümit Doğanay Vol.1, İstanbul 1982, 316; Serozan - İfa, 252; Rona Serozan, "*Culpa in Contrahendo, Akdin Müspet İhlali ve Üçüncü Kişiyi Koruyucu Etkili Sözleşme Kurallarının Ortak Temeli: Edim Yükümünden Bağımsız Borç İlişkisi,*" MHAD, Year:1, Vol. 3, 1968, (hereafter Serozan, Edim) 123; Kirca, 98, 158.

[33]Kirca, 120; Serozon, Edim, 108, 121; Serozan, İfa, 252; Ergune, 121.

[34]Serozan, Edim, 108,121; Serozan, İfa, 252.

[35]For more information on "Culpa in contrahendo liability" see Engel, 747-755; Paul Piotet, Culpa in contrahendo et responsabilité précontractuelle en droit privé suisse, Berne 1963; Paul Piotet, « La responsabilité précontractuelle, spécialement du fait d'autri », Paul Piotet Contributions choisies, Recueil offert par la Faculté de droit de l'Université de Lausanne à l'occasion de son 80éme anniversaire, Genève, Zurich 2004, 722; SEROZAN, İfa, 252; Oguzman/Oz, 321; Eren, 1084.

[36]For further reading on this argument see the works cited in infra, fn. 42.

[37]Infra, sec. II, C, 2.

[38]Infra, sec II, C, 3.

cept of "breach of confidence." In this respect it is to be noted that the term "breach of confidence" is used often to describe tripartite situations, such as in the case of the liability of an information provider to a third party.[39] Furthermore, "breach of confidence" has been increasingly used in relation to the liability of a person who influenced a contract, although he/she was not a party to same, while in bilateral affairs the use of the concept of *culpa in contrahendo* has been preferred, such as the case of negligence during contract negotiations.[40] This paper utilizes the term "breach of confidence" in its narrower meaning, in other words to describe the situation when a third party influences the conclusion of the contract.

In the light of the above, it is proposed that the concepts of "contracts protecting third party interests" and "breach of confidence" be reviewed in detail, in relation to the information provider's liability towards third parties.

2. *Contracts protecting third party interests*

It was argued that the issue of liability of information providers to third parties can be resolved by deeming the contract between an information provider and recipient to protect the interests of a third party in relation to the information provided.[41] The supporters of this argument suggest that a third party, for instance, who purchased a house relying on the report obtained by the seller from a surveyor, will be included in the protective cover of the contract between the surveyor and the seller. However, it should be noted that the concept of "contracts protecting third party interests"[42] aims to protect third parties whose interests are in line with the interests of one of the parties to the contract. In fact, this concept renders a third party subject to the same conditions as an obligee (e.g. the seller) of a contract in the event of a breach by the obligor (e.g. an expert) of his/her duty of care, in order to avoid any unjust outcome for the third party.[43] For example, in the application of this concept, the children under a contract for the provision of medical care which was signed by their parents, the relatives of a tenant under a lease and subcontractors under a contract for the provision of labor have been included in the protective cover of the respective contracts. In all

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[39]See Serozan, İfa, 252; Altop, 87-91; Baspinar, 240.

[40]Serozan, İfa, 252.

[41]See Kirca, 70; Oguzturk, 218; ALTOP, 136, İbrahim Sedat Koyuncu, *Gemi Sınıflama Kuruluşlarının Faaliyetleri ve Sorumluluğu*, İstanbul 2008, 174.

[42]For more information on "*culpa in contrahendo*" liability see Engel, 747-755; Paul Piotet, Culpa in contrahendo et responsabilité précontractuelle en droit privé suisse, Berne 1963; Paul Piotet, « La responsabilité précontractuelle, spécialement du fait d'autri », Paul Piotet Contributions choisies, Recueil offert par la Faculté de droit de l'Université de Lausanne à l'occasion de son 80éme anniversaire, Genève, Zurich 2004, 722; Serozan, İfa, 252; Oguzman/Oz, 321; Eren, 1084.

[43]Basedow/Wurmnest, 49; Oguzturk, 218; Kirca, 110.

these examples the interests of the third party (e.g. children, relatives, workers) and the original obligee are in line with each other. On the other hand, in the first example the interests of the seller and the buyer of the house are incompatible. Therefore, it is submitted that to suggest that the buyer of a house is included in the protective cover of a contract concluded between the seller and a surveyor, is contradictory to the essence of the concept of a "contract protecting third party interests."

The German Federal Court applied this concept to third parties whose interests are irreconcilable with those of a party to a particular contract, in this way establishing the liability of the information providers.[44] The facts of the relevant decision of the Federal Court can be summarized as follows:[45] A person who intended to sell his house concluded a contract with an architect for a valuation of the house. The architect was aware of the fact that the valuation was required in order to be used during the sale of the house, and the buyer relied on the assessment of the architect when buying the house. Ten months after the conclusion of sale, serious defects were discovered in the roof of the house and the buyer sought recovery of his losses from the architect, arguing that had he been aware of the defects, he would not have bought the property. The German Federal Court held that the contract between the seller and the architect afforded protection to the buyer and that the architect was liable to the buyer under the provisions of the contract.

This decision invoked heavy criticism from commentators.[46] The inclusion of the buyer in the protective area of a contract concluded between seller and surveyor/expert, who have incompatible interests, was contradictory to the principle underlying the concept of contracts protecting third party interests.

3. Breach of Confidence

"Breach of confidence"[47] is often described as the liability of a third person who has affected a legal transaction, albeit not being a party to the same. The liable person may not only be the person who has provided inaccurate

[44]Basedow/Wurmnest, 49; Kirca, 71, 81, 184; Karabag Bulut, 109, 110.

[45]BGHZ 10 November 1994, 127 BGHZ 378 – 380 = JZ 1995, 306 (cited in Basedow/Wurmnest, 49)

[46]For example see Claus-Wilhelm Canaris, *Shutzwirkungen zugunsten Dritter bei "Gegenläufigkeit" der Interessen*, JZ 1995, 442 sqq. (cited in Basedow/Wurmnest, 49; Kirca, 110); Kirca, 110, 111; Karabag Bulut, 111, 112

[47]Christine Chappui/Bénédict Winiger, "La responsabilité fondée sur la confiance", Journée de la responsabilité civil, Geneve 2000; Ariane Morin, "Definition de la Responsabilité fondee sur la Confiance au regard de la Jurispudence recente du Tribunal Federal (Suisse)," SJ 2000 II, 237-259; Serozan, İfa, 252; for information on the confidence liability of the banks see Atilla Altop, *Türk, İsviçre ve Alman Hukuklarında Bankaların Verdikleri Banka Bilgilerinden Dolayı Hukuki Sorumlulukları*, İstanbul 1996, 87-91.

information, but may also be one who has been involved during the negotiations of a contract as an agent or an assistant.[48] The liability of a third person who provides inaccurate information, which is the main subject of this paper, is just one of several different aspects of "breach of confidence."[49]

Today, the existence of "breach of confidence" as an additional source of liability distinguishable from contractual liability and tort liability, is widely acknowledged by commentators, by judicial decisions and even by legislative provisions. At a glance, the current situation with respect to "breach of confidence" under Swiss, German and US (which has recognized this liability for a long time) law, may be summarized as follows:

The Swiss Federal Court has expressly recognized in its recent rulings that a person who provides information, assumes a liability to a third party to whom the information is provided.[50] Many commentators have debated the concept of "breach of confidence," particularly after the Swissair decision of 1994 and the Grossen decision of 1996. In Swissair,[51] the Swiss Federal Court held that Swissair had created a relationship of confidence by allowing the use of the name "Swissair" in the advertisements of its subsidiary IGR, which had subsequently become bankrupt, and held Swissair liable to the customers of IGR. In the case of Grossen,[52] the Wrestling Federation changed the terms of the conditions of entrance to a tournament, after having already announced them, and prevented a contestant, who, relying on the previous conditions had believed himself eligible, from participating in the tournament. In Grossen, Swiss Federal Court held the Wrestling Federation liable as a result of breach of confidence. In another case in 2008,[53] the Federal Court held an audit company liable to a claimant, who had relied on the information in a special audit report regarding the financial situation of a company. In all these rulings, the Swiss Federal Court expressly recognized the existence of an independent source of liability, situated between contractual and tort liabilities.

The concept of "breach of confidence" was first developed **in German law.** Canaris, one of the first scholars who analyzed this liability in Germany, regarded "breach of confidence" as a main overarching concept

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[48] For further explanations on the confidence liability of the representatives of the parties, see Turhan Esener, *Mukayeseli Hukuk ve Hususiyle Türk- İsviçre Borçlar Hukuku Bakımından Salahiyete Müstenit Temsil*, Ankara 1961, 133.

[49] See Kirca, 136; Gurpinar, 219; Serozan, İfa, 252; Oguzturk, 152.

[50] Some decisions to this effect: BGE 120 II 331; BGE 121 III 350, 355; BGE 124 III 297; BGE 134 III 390. For more information on "liability of confidence" in Swiss law see Morin, 161-197; Kirca, 135-187. Also see the articles in «La responsabilité fondée sur la confiance » Journée de la responsabilité civil, 2000, Genéves 2003 (dir. Christine Chappuis/ Bénédict Winiger).

[51] JdT 1995 I 359 (ATF 120 II 331- BGE 120 II 133, 1994).

[52] BGE 121 III 350, 1996.

[53] BGE 134 III 390, 2008.

and preferred to use the designation "*culpa in contrahendo* liability of a third person" to describe "breach of confidence" in the narrower sense as it is used in this paper.[54] However, "*culpa in contrahendo* liability of a third person" as designated by Canaris, and "breach of confidence," which is the subject of this paper, are nothing but two different terms which in essence refer to the same liability. In this paper the preference is to apply the concept of "*culpa in contrahendo*" to bilateral affairs. In contrast to Canaris, this paper describes the liability of a provider of information to third persons as "breach of confidence,"[55] in particular, in cases where the information provider influences the formation of the contract. Similarly, German legal doctrine, with the influence of Canaris, is of the view that the liability of the information provider to third parties is a breach of confidence (or "*culpa in contrahendo* liability of a third person" as suggested by Canaris).

Despite this position, the German Federal Court until recently preferred to apply the concept of "contracts protecting third party interests" instead of "breach of confidence,"[56] and as a result was heavily criticized. In fact, German legislation denied the approach of the Federal Court by the enactment made in 2002, in § 311 of BGB.

By the 2002 enactment of the BGB, liability with respect to the supply of information obtained a statutory basis in § 311, Para. 3.[57] The German legislation refrained from designating the liability as "breach of confidence" or "*culpa in contrahendo* liability of third party," instead defining it in the following terms: "*an obligation arises in particular if the third party, by enlist-*

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[54]Claus-Wilhelm Canaris, *Die Rechtweite der Expertenhaftung gegenüber Dritten*, ZHR 1999,206 sqq., 220 sqq, 235 (cited in Kirca, 115 fn 601).

[55]Supra, sec. II, C, 1.

[56]For more information on "contract protecting third party interests" supra, sec. II, C, 2

[57]BGB § 311, "Obligation Created by Legal Transaction and Similar Obligations":

Unless otherwise provided by statute, a contract between the parties is necessary in order to create an obligation by legal transaction or to alter the content of an obligation.

An obligation with duties in accordance with §241 (2) also arises as a result of

1. entry into contractual negotiations,
2. preparations undertaken with a view to creating a contractual relationship if one party permits the other party to affect his rights, his legally protected interest or other interests or entrusts them to that party, or
3. similar business contact.

An obligation with duties in accordance with §241 (2) may also arise towards persons who are not intended to be parties to the contract. Such an obligation arises in particular if the third party by enlisting a particularly high degree of reliance materially influences the contractual negotiations or the conclusion of the contract.

ing a particularly high degree of reliance, materially influences the contractual negotiations or the conclusion of the contract."[58]

This provision does not cover all the same issues stemming from the concept of "breach of confidence." In essence it suggests that an implied contract exists between the person who materially influenced the contract by inviting reliance and the person who incurred damage from this reliance, and that the aggrieved party may seek reimbursement for his/her losses.

Under **US law**, liability to third parties as a result of the provision of incorrect information has been recognized for a long time. As in Continental law, the legal nature of this liability has been debated in US law. The liability, given its *sui generis* nature as argued in this paper, could not be reconciled with the definitions of tort and contractual liabilities, which led to the adoption of a new source of liability described as "negligent misrepresentation". It is notable that US, like German and Swiss law, recognizes the liability of the information provider to third parties as a source of liability separate from the standard tort liability and contractual liability regimes. With the influence of judicial decisions which recognized such liability, the conditions of this liability were originally set out in Section 324 A of the Restatement (Second) of Torts, under the heading of "liability to third persons for negligent performance of undertaking."[59] This provision imposed a

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[58]BGB§ 241(2) , "Duties arising from an obligation:"

By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance.

An obligation may also, depending on its contents, oblige each party to take account of the rights, legal interests and other interests of the other party.

As seen above, BGB § 241 consists of two paragraphs. The first paragraph specifies that an obligation comes along with "a duty to perform" and the second one specifies that an obligation also includes "a duty to take account of the rights, legal interests and other interests of the other party." This latter duty is the "duty to protect" generating from the relationship of confidence. Therefore, BGB § 241 accepts that an obligation includes both a duty to perform and a duty to protect.

Such an obligation (containing duty to perform and duty to protect) can surely be created by a contractual relationship. This is clearly stated in §311(1). The question to be answered is whether such an obligation could be created without a contract, or not. BGB § 311 (2) and (3) answers this question. These paragraphs consists the legal basis for the institutions of "culpa in contrahendo" (in BGB § 311(2)), "contracts protecting third party interests" (in BGB § 311 (3), sentence 1) and "breach of confidence" (in BGB § 311 (3), sentence 2). Furthermore, the wording of the regulation does not limit such institutions and is so chosen to allow the expansion.

[59]Section 324 A Restatement (Second) of Torts:

"Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

liability to third persons for negligent performance of an undertaking, but only applied to physical harm to the third person. Given this limited application, Section 324 A could not provide the desired outcome. Losses to a third person who relied on the incorrect information often came about in the form of "pure economic loss," and Section 324 A failed to provide a remedy for such losses. However, US Courts, taking into consideration the increasing need for remedies for such losses, did not remain inactive, and made a number of rulings which allowed for the reimbursement of the pure economic losses of third persons.[60] As a result, a provision was introduced in Section 552 of Restatement (Second) of Torts in 1977, under the heading "information negligently supplied for the guidance of others," which states that the supplier of false information shall be liable to third persons who relied on this information causing them economic loss, and sets out the conditions of such liability.[61]

Although the provisions in the Restatement (Second) of Torts, issued by the American Law Institute, are not legally binding rules of law, they have been adopted by many States and Courts in the US. The Courts take Section 552 into consideration when ruling on cases for example relating to the liability to the purchaser of particular goods for an incorrect assessment report on the same.[62]

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[60]In 1922, the Court of Appeals of New York in the leading case of *Glanzer v. Shepard*, 233 NY 236, 135 NE 275 (1922) allowed the reimbursement of pure economic loss (pecuniary loss) of a third party. In Glanzer, the Court held that the claimant, who overpaid for beans relying on the erroneous weight certificate issued by a well known weighing company, could recover his damages from the weighing company. The Court stated that the third party's purchase of beans was based solely "on the faith of their certificate," and that the weighing company owed a duty of diligence "not only to him who ordered the weighing, but to him also who relied on it." Therefore, a buyer as a third party to a contract for certification, was able to recover from the certifier solely for the pure economic loss it incurred as a result of the misstatement in the certificate.

[61]For the text of Section 552 of Restatement (Second) of Torts see *infra*, III, A.

[62]For example, in *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 826 F 2d 424, 1988 AMC 207 (5th Cir. 1988) the United States District Court for the Eastern District of Louisiana recognized that a purchaser of fuel oil has a cause of action based upon negligent misrepresentation against an independent surveyor who issues an analysis of the purchased commodity at the request of the seller. In so holding, the district court relied on provision 552 of the Restatement. Similarly, in *Royal Embassy of Saudi Arabia v. S.S. Ioannis Martinos*, 1986 AMC 769 (E.D.N.C. 1984) (cited in MILLER, 103), the United States District Court for the Eastern District of North Carolina, citing section 552 of the Restatement, accorded a ship-owner a cause of action against the cargo underwriter's surveyor who allegedly failed to use due care in the detection of defects in the surveyed ship. Moreover, in *Somarelf v. American Bureau of Shipping*, 704 F. Supp 59, 1989 AMC 1061 (D.N.J. 1988), the United States District Court for the District of New Jersey determined that a ship-owner had a cause of action against a classification society for negligent misrepresentation based upon the issuance of an erroneous certificate of measurement. Similarly, in the leading case of *Otto Candies, LLC v. Nippon Kaiji Kyokai Corp.*, 346 F. 3d 530, 536, 2003 AMC 2409, 2410 (5th Cir. 2003) which is a prejudication and will be mentioned below many times, the United State District Court for the Eastern District of Louisiana, citing section 552 of the Restatement, accorded to a ship owner a cause of action against a classification society. [Ed. Note: Restatements of the Law, produced by the

Under **Turkish law**, the liability of an information provider towards a third party has been mooted only by legal scholars, as the matter has not been addressed by the Turkish Court of Appeal, nor is it addressed by any statutory provisions. However, the liability of the information provider towards a third person is, on the whole, acknowledged by Turkish legal commentators.[63] It is inevitable that in time legal provisions will be enacted in this matter, taking into account the developments in Switzerland, Germany and the United States. In fact, given the increasing need, a draft provision relating to breach of confidence was introduced by Article 209 of the Draft Turkish Commercial Code.[64] This draft Article relates to the situation where a parent company in a group of companies uses its credibility to induce third parties to enter into transactions with other companies in the group. In such a case, the parent company will be held liable to the third parties, if the third parties incur damage in their transactions with other companies in the group. It should be noted that the Swissair decision of the Swiss Federal Court was taken into consideration in the formulation of draft Article 209.[65]

This provision in the draft Commercial Code only relates to the breach of confidence of a parent company. Although the provision is arguably not sufficient to meet the increasing need, it is important because it clearly emphasizes the need to pass such legislative provisions in the new Turkish Code of Obligations.

Although there are no statutory provisions relating to breach of confidence and the liability of information providers towards third parties, this does not preclude the matter from being resolved within the framework of Article 2 of the Turkish Civil Code (TCC). It is generally acknowledged that there is a *lacuna* with respect to the liability of information providers towards third parties and that this *lacuna* could be filled by the Judge in accordance with Article 1 of TCC, and by applying the provisions for contractual liability by analogy.[66] Therefore, the courts may decide that the breach of confidence principle applies, even in the absence of a relevant

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American Law Institute, are exactly what they are entitled: restatements of principles of law distilled from existing case law. However, individual sections of the Restatements, when adopted by the highest court in a particular jurisdiction, become and have the force of positive law.]

[63]Serozan, İfa, 252; Kirca 136; Gurpinar, 219; Oguzturk, 152.

[64]Article 209 of Draft Turkish Commercial Code:

"If the reputation of a conglomerate reaches to a level that evokes confidence in the society or among consumers, the dominant company shall be liable for the consequences of such confidence evoked by the reputation"

[65]Draft Turkish Commercial Code, Ministry of Justice of the Republic of Turkey, Ankara 2005, 475, 476.

[66]Supra, text to fn. 30, 31, 32.

statutory provision, as they did in relation to "*culpa in contrahendo*" and "*contracts protecting third party interests*." which were based on Article 2 of TCC. When reaching their decisions, the courts must also consider the provisions and precedents in Swiss and German law, which are the sources of the Turkish law of liabilities.

In the following part of this paper, the conditions for the liability of information providers are delineated and analyzed, with a view to assisting in any legal codification of the concepts discussed.

III
THE CONDITIONS FOR THE LIABILITY FOR PROVIDING INCORRECT INFORMATION AND THE APPLICATION OF THESE CONDITIONS TO THE LIABILITY OF CLASSIFICATION SOCIETIES

A. Conditions of Liability

In this section, the conditions for the liability of the information provider, acknowledged in comparative law, will be analyzed. This paper aims to contribute to court decisions especially in Turkey (and also the other countries), and also aims to contribute to any codification work *de lege ferenda*. In such an analysis, it is important to examine Swiss, German and Turkish legal doctrine, court decisions, and legislation, in particular BGB § 311 and Section 552 of Restatement (Second) of Torts.

As mentioned above, breach of confidence acquired a statutory basis in **Germany**, by way of **BGB § 311, Para. 3,** which was enacted in 2002. This provision states that: *"Such an obligation arises in particular if a third party by enlisting a particularly high degree of reliance materially influences the contractual negotiations or the conclusion of the contract."*[67]

This provision not only covers the liability of experts for the provision of incorrect information, but also covers the entire scope of breach of confidence, including for example cases involving agents and representatives. Although this is a statutory provision, it is not sufficient to deal with all issues arising out of breach of confidence. The wording of § 311 states two principal conditions for liability: (1) existence of a special relationship of confidence between the parties; (2) influence of the information on the aggrieved party's contractual relationship.

[67]Supra, fn. 56 for the full text of BGB § 311.

In addition to these two conditions, according to German, Swiss and Turkish legal regimes[68] two further conditions are required for the breach of confidence: (3) the information provider must foresee that the information will be used by other persons; (4) the information provider must obtain a pecuniary interest in exchange for the information.

At this point it is worth pointing out the remarkable similarity between the conditions of liability acknowledged in German, Swiss and Turkish legal regimes and the conditions of US law as reflected in Section 552 of the Restatement (Second) of Torts.

Restatement (Second) of Torts, Section 552: Information negligently supplied for the guidance of others.

> (1) One, who in the course of his business, profession and employment, or in any other transaction in which he has a pecuniary interest **[condition 4]** supplies false information for the guidance of others in their business transactions **[conditions 2 and 3]**, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> > (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
> >
> > (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.
>
> **[Text in square brackets added]**

Three conditions, out of the four conditions required by German, Swiss and Turkish legal doctrines, can be observed. Only the first element, requiring a special relationship between the parties is missing from Section 552. Section 552 makes no reference to "special relationship."[69] Instead, the

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[68]German scholars with the same point of view include: Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht*, München 1971, 442, 538; Claus-Wilhelm Canaris, *Schutzgesetze, Verkehrspflichten, Schutzplichten, FS für Karl Larenz zum 80. Geburstag*, München 1983, 95; Kaiser, 194, 223,226, 227. (all those cited in Kirca, s. 197, 199, 200).

Turkish jurists with the same point of view: Kirca, 197; Altop-Banka, 88; Serozan, İfa, 252.

[69]Miller, 108.

defendant's knowledge of the recipient's intention to supply the information to a third party, and of the recipient's intention to rely on that information, is accepted as sufficient to establish liability.

A more detailed examination of the elements noted above will be carried out below. There are similarities with respect to this liability under the two different systems of law (Civil law – Common law). The similarities suggest that although the legal systems are different, the needs of commercial life and practice are similar, and that the law evolves in the same direction to meet such needs. US law has been in search of a solution to this issue for years. Section 552 of the Restatement (Second) of Torts dates back to 1977.

Separating the conditions for the liability of the information provider to third parties into general and special conditions, will be helpful for the purposes of this paper. The general conditions are the standard conditions for contractual liability (negligence - causal link - damage), as it is acknowledged that the provisions of contractual liability may by analogy be applied to breach of confidence. The special conditions, on the other hand, are the four conditions necessary to establish breach of confidence. All general and special conditions must be met in order to establish breach of confidence. Each of these conditions will be analyzed separately, with emphasis on evaluating the same in relation to the liability of class societies towards third parties for the provision of incorrect information.

B. Special Conditions for Liability

1. Existence of a special relationship of confidence

The information provider must act in a way that creates a relationship of confidence, as far as the persons who rely on the information are concerned. In other words, the third party who uses the information must have a justifiable confidence in the information and information provider, taking into consideration factors such as the information provider's professional knowledge, name, reputation and influence.[70] The existence of such a relationship of confidence should be sought in the facts of each particular case.

The professional standing of the information provider is an important aspect in the creation of a relationship of confidence. It is beyond dispute that classification societies have sufficient standing to create a basis for a relationship of confidence, given their authority, economic strength, international position and the fact that little can be achieved in the shipping business without the class certificates they issue. However, this does not mean that a classification society will automatically be held liable to third persons

[70]Serozan, İfa, 252.

on account of an assessment made of a ship, because otherwise a classification society may be held liable to an unlimited number of persons on account of a single assessment of a vessel. Such unlimited liability does not accord with the general principles of the law of liabilities.

A classification society will only be liable to a third party with whom a justifiable relationship of confidence has been established. In other words, a third party must be justified in relying on the assessment report issued by a class society. Detailed and up-to-date information, which was provided for a particular transaction and which renders examination from other sources meaningless, will constitute a basis for the third party's justifiable confidence.[71] Otherwise it cannot be argued that the third party's reliance is justifiable. Auditors' approval of annual financial statements as part of their statutory obligations, is a typical example in this respect.[72] An auditor cannot be held liable by creditors of a company, who have given credit to the company relying on the annual financial statement which was negligently approved by the auditor. However an auditor creates a special relationship of confidence if he issues an interim financial statement or states that the annual financial statement has not changed, with a view to obtaining credit for the company in a particular matter.

The same proposition applies for the class certificates issued by classification societies in the ordinary course of business. A classification society cannot be held liable towards a third party purchaser of a ship under breach of confidence, merely because it routinely issued a class certificate in the ordinary course of business. Such classifications and routine inspections of ships primarily aim to ensure safety at sea within the framework of public interest, rather than protecting ship purchasers and third party interests.[73] Safety at sea means prevention of accidents and collisions. In this context, third parties may only seek remedy from classification societies for loss of their property and any possible bodily harm, and cannot hold class societies liable for damages to their commercial interests (pure economic losses).[74] It is noted that the English Courts pay specific attention to this particular aspect in claims against classification societies. In many cases the English Courts have refused to hold classification societies liable, on the ground that the purpose of a report of a classification society is to protect public interest and safety at sea, but not the purchaser of a ship. This can clearly be seen in a leading decision of 1990.[75] In this case, the claimant noticed some corro-

[71]Kirca, 191.
[72]Kirca, 191.
[73]Thomas, 115.
[74]Thomas, 126, 127.
[75]*Morning Watch, The* [1990] 1 Lloyd's Rep. 547.

sion in the deck of a yacht, which had been classed as "100 A1" by Lloyd's Register. Although this corrosion would normally preclude classification of the yacht unless rectified, Phillips, J., as he then was, refused to hold Lloyd's Register liable to the claimant. Phillips, J., relied, *inter alia*, on the proposition that the classification of ships serves to protect safety at sea rather than to protect the interests of third party purchasers.[76]

In light of the above, it may be suggested that the routine classification of a ship by a class society will not be sufficient to create a relationship of confidence between the classification society and the purchaser of the ship. In order to establish such a relationship, the classification society's assessment of the ship must be made for a specific transaction which involves the third party purchaser, must include the results of the assessment and must be up-to-date. The 1995 case of *Cargill Inc. v. Bureau Veritas*[77] is a good example in this respect. In this case, the Court did not find the presence of a class certificate in a bundle of documents supplied to the purchaser sufficient to hold the classification society liable, and stated that special up-to-date information must be provided to hold class liable.[78]

Therefore, periodical survey reports issued by classification societies will not be enough to create a justifiable relationship of confidence with respect to third party purchasers of ships. In order for such a relationship to exist, a class society must issue a special report, which includes findings of an assessment made specifically for a particular legal transaction.

Similarly, if during the negotiations of a contract for the sale of a ship the classification society were asked to provide the results of the ship's prior surveys, such provision of information would not create a relationship of confidence. This is because there has been no specific assessment made for that particular prospective transaction, which is prerequisite to establishing a relationship of confidence. In addition, since the classification society when issuing its routine class certificate does not know that the certificate will be used in a sales contract, the condition which requires the classification society to foresee that the information will be relied on (as explained in more detail below), has not been met either. As mentioned above, the main purpose of the routine issuance of a class certificate is to ensure safety at sea rather than to produce a supportive document in a sales contract.

2. Influence of the information on the decision of the third party

The incorrect information must have affected the decision making process of the aggrieved party in concluding the contract. This condition is stated in

[76] *Morning Watch, The* [1990] 1 Lloyd's Rep. 547, at 549.
[77] 902 F. Supp 49, 1996 AMC 577 (S.D.N.Y. 1995).
[78] See also Thomas, 140, 141.

BGB § 311: *"Such an obligation arises if the third party . . . materially influences the contractual negotiations or the conclusion of the contract;"* and in Section 552 of Restatement (Second) of Torts: *"One, who . . . supplies false information for the guidance of others in their business transactions, is subject to liability . . . ."*

This condition is met if a purchaser justifiably relies on the classification of a ship by the classification society in making the decision to purchase a ship. It should be emphasized however, that the mere presence of a class certificate among relevant documents made available during the negotiations for the sale and purchase of a ship, will not mean that the decision to purchase the ship was based on the class certificate. A claimant will have the burden of proving that he/she primarily relied on the class certificate when deciding to purchase the ship. In fact, in 1995, two claims for damages failed in the Southern District of New York, (*Cargill Inc. v. Bureau Veritas*[79] and *Carbotrade S.p.A. v. Bureau Veritas*[80]) on the ground that reliance on the class certificate could not be proved.

At this point it should be emphasized that demonstration of the fact that the purchaser primarily relied on the class certificate will not suffice to fulfill this condition. Such reliance must also be justifiable. For instance, in concluding the sale and purchase of a ship, it will not be deemed justifiable to rely on a class certificate which is not up-to-date and which has not been issued specially for the transaction in question. The class certificate also only relates to the seaworthiness of the ship at the time she was classed. A class certificate does not suggest that the ship's condition at the time she was classed will remain unchanged at a later date.[81] On this particular aspect, however, it is enough merely to make reference to *Cargill Inc. v. Bureau Veritas*,[82] in which it was held that the reliance on a class certificate present in a bundle of documents provided in a transaction, does not by itself lead to the classification society's liability.

On the other hand, if the classification society provides information regarding the current state of the ship, and this information is provided in order to be utilized in a particular contract, then the purchaser's reliance on such information in making the decision to purchase the ship will be deemed justifiable. The decision in the leading case of *Otto Candies L.L.C. v. Nippon Kaiji Kyokai Corp*[83] is a good example of such a proposition. In this partic-

[79]902 F. Supp. 49, 1996 AMC 577 (S.D.N.Y. 1995).

[80]901 F. Supp. 737, 1996 AMC 561 (S.D.N.Y. 1995).

[81]Miller, 99, 100.

[82]Supra, fn.79.

[83]United States Court of Appeals for the Fifth Circuit, 346 F 3d 530, 536, 2003 AMC 2409, 2410 (5th Cir. 2003); also in supra, fn 61.

ular case, the claimant decided to purchase a second hand Japanese ferry, which was out of class. The contract was subject to classification of the ship. Nippon Kaiji Kyokai Corp (NKK), knowing that the report would be relied on in the sale and purchase contract, inspected the ship and classed her, upon which classification the claimant concluded the sale contract and purchased the ship. The claimant later decided to bring the ferry to Florida and to transfer her class to ABS Classification Society. Only then was it discovered that there were many deficiencies in the ferry which, in fact, should have precluded her classification by NKK. The rectification of these deficiencies cost the Claimant USD 300,000, and the Claimant sought recovery of this loss from NKK. The claim was successful and the court held that the claimant's reliance on the class certificate issued by NKK in deciding to purchase the ship was justifiable.

3. Awareness of the possibility of use of the information by others

Although this condition does not feature in BGB § 311, there is unanimity among German scholars and German court decisions regarding the existence and the necessity of this condition.[84] A similar condition appears in Section 552 of Restatement (Second) of Torts, in that the information needs to be supplied *"for the guidance of others in their business transactions."* This wording suggests that the information is provided in order to be used by other persons, and that the information provider must be able to foresee that the information will be used by third parties.

The key aspect of this condition is that the information is intended to be used in a transaction with a third party and that the information provider is aware or ought to be aware of such a potential use. The information does not need to be given directly to the third party, nor does the information provider need to know the identity of the third party. For the purposes of this condition, it is sufficient to demonstrate that the information provider could foresee that the information so provided would be used in a transaction with a third party.

It should be stressed that the information provider must have been able to foresee that the information would be relied on in making the contract, and the information must have been provided for this purpose in the first place. Otherwise, the information provider cannot be held responsible for information which is common knowledge and which was not provided to be used in a specific transaction. In this respect, Canaris states that incorrect information supplied by an institution (e.g. the German National Standards

[84]Claus-Wilhelm Canaris, *Schutzgesetze, Verkehrspflichten, Schutzplichten, FS für Karl Larenz zum 80. Geburstag*, München 1983, 95; Kaiser, 227 (cited in Kirca, 199, 200).

Institute), which is responsible for general quality control and testing of goods (in order to maintain specific standards in a specific market), does not result in the liability of the institution to customers because of breach of confidence.[85] Indeed, it cannot be expected that an information provider will be liable to every person who has in some way relied on the information they provided in the course of their profession and in their area of expertise. Furthermore, confidence liability cannot be established on information available in the newspapers and/or magazines. A limit must be imposed on the persons who can claim damages. Otherwise, information providers may be held liable to an unlimited number of persons under contractual liability principles, and such a situation is contrary to the essence of contractual liability.

As mentioned above, Section 552 of Restatement (Second) of Torts, requires that the information supplier must have been able to foresee that the information will be relied on by third parties. In parallel to this requirement, many US Courts require that a classification society be aware of a third party and their potential interest in order to hold the classification society liable to the third party. For instance, in the leading case of *Otto Candies LLC v. NKK*, the facts of which were summarized above,[86] the court established liability primarily based on the fact that the class society knew that the class certificate would be used in a particular transaction for the sale of a ship. This decision was also upheld by the US Court of Appeals, 5th Circuit.

It should be mentioned that the English Courts place significant weight on the information provider's ability to foresee that the information will be used by other persons. It should also be noted that English Courts, unlike US Courts, have adopted a rather hesitant approach as far as the liability of classification societies towards third parties is concerned, and in many cases have ruled that the classification society cannot be held liable to third parties.[87] English Courts have often based their judgments on the proposition that the classification societies were not aware of the fact that their class certificate would be relied on by a third party in their contractual negotiations with the recipient of the information.[88]

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[85]Claus-Wilhelm Canaris, *Die Rechtweite der Expertenhaftung gegenüber Dritten*, ZHR 1999, 238, 239; Claus-Wilhelm Canaris, *Die Haftung des Sachverstaendigen zwischen Schutzwirkung für Dritte und Dritthaftung aus culpa in contrahendo*, JZ 1998, 607 (cited in Kirca, 203, fn. 1102)

On the other hand Eidenmuller argues that there is a special relationship of confidence between that Institute and the consumer. In so arguing he relies on the fact that such quality controls are made in consideration of the fact that the goods will be bought by consumers (Horst Eidenmuller, *Vertrauensmenchanismus und Vertrauenshaftung, Verantwortung in Recht und Moral, hrsg. Von Ulfrid Neumann*, Stuttgart 2000, 135 (cited in Kirca, 203, fn. 1102).

[86]Supra, fn 61, 82.

[87]Thomas, 115.

[88]*Morning Watch, The* [1990] 1 Lloyd's Rep. 547; also see supra, fn 74, 75.

4. Existence of a pecuniary interest in providing the information

In order for the information provider to be held liable, the direct or indirect pecuniary interest of the information provider must be demonstrated.[89] Such interest may be in the form of fees directly earned in exchange for the information, or in the form of indirect gains such as an increase in reputation. For instance, automobile dealers, real estate brokers, auctioneers, travel agents, stock brokers, investment consultants, professional experts and banks, provide information in exchange for an economic benefit in the form of payment or commission. Furthermore, the provision of information and financial reports by banks without a charge does not amount to a simple *ex gratis* service, for the reason that in such cases although the banks do not earn a direct economic advantage, their reputation is increased, which will eventually lead to a financial profit. This situation is clearly defined in Section 552 of Restatement (Second) of Torts as provision of information by "*[o]ne, who in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest.*" As may be noted from the wording of Section 552, if the information is provided in the course of business, profession or employment, it seems that pecuniary interest is established in principle, irrespective of whether any fees are received in exchange of the information so provided. It is of course possible that such information is provided only as a favor, without a pecuniary interest involved. If it is proven that the information is really given as a favor then the information provider cannot be held liable. For instance, information given by the board of directors of a company during a festival was accepted as having been provided without there being a pecuniary interest.[90]

Looking in turn at the situation under German law, it is noted that BGB § 311 does not include an express condition of similar kind. Although not expressly stated in BGB § 311, German legal commentators have often sought the existence of this condition.[91]

[89]Kirca, 198; Oguzturk, 153, 158; Serozan, İfa, 252. In the same direction, Swiss Federal Court (BGE 116 II 697, 698), ruled that a lawyer shall not be liable (even in Culpa in Contrahendo) for advices he/she has given free of charge (without any gain of economic interest).

[90]Kirca, 198.

[91]Hans Peter Walter, *Die Vertrauenshaftung: Unkraut oder Blume im Garten des Rechts?*, ZSR 2001, 98; Horst Eidenmuller, *Vertrauensmenchanismus und Vertrauenshaftung, Verantwortung in Recht und Moral, hrsg. Von Ulfrid Neumann*, Stuttgart 2000, 125, 135. (all these writers are cited in Kirca, 198, fn. 1070). For other German scholars with this view see Oguzturk, 153, 158, fn 369.

C. General Conditions of Liability

Even if all the special conditions set out above are met, this will not be sufficient to establish the breach of confidence by the classification society, and therefore liability to third parties. In each case it must be demonstrated that the general conditions have been met. As stated earlier, it is accepted that provisions regarding contractual liability can generally be applied to the relationship of confidence by analogy.[92] In this context, a quasi-contractual relationship is introduced by the statutory provision in BGB § 311. This contractual relationship however, does not impose an obligation of performance, but instead imposes a protective obligation or duty, to avoid causing damage to the counterparty. Therefore, if a party *provides incorrect information* and by that *causes damage* to the counterparty, this would constitute a breach of the protective obligation, and lead to liability.

Given that the provisions regarding contractual liability are also applicable to breach of confidence, the standard conditions of contractual liability (negligence – causal link – damage) need to be met, as well as the aforementioned special conditions.

In the light of the above, the classification society must be ***negligent*** to be held liable to a third party. In other words, the classification society must fail to act with due diligence in gathering the relevant information and providing it to the recipient. Applying the statutory presumption of negligence in contract (TCO Art. 96; SCO Art. 97), the classification society will be presumed to be negligent. The classification society may however rebut this statutory presumption by proving that it has not been negligent.

A third party claimant must also establish that there is a ***causal link*** between the negligence of the class society and the losses caused. For instance, in a case where the classification society fails to spot some defects in a ship and the ship is involved in an accident, it must be clearly demonstrated that these same defects in the ship caused the accident to be able to seek recovery of damages from the classification society. This is important when determining the extent of the liability of the classification society in cases of total loss. For instance if a ship classed with a classification society sinks, could the owner of the ship seek recovery of the entire loss from the classification society? This question has been debated in many recent decisions of the US Courts.[93] In addressing this question, the US Courts have

[92] Supra, text to fn. 29

[93] *Sundance Curises Corp. v. American Bureau of Shipping*, 7 F. 3d 1077, 1084, 1994 AMC 1 (2nd Cir. 1993); *Cargill, Inc. v. Bureau Veritas*, 902 F. Supp 49, 1996 AMC 577 (S.D.N.Y. 1995); also see B.D. Daniel, "*Potential Liability of Marine Classification Societies to Non-Contracting Parties*," *in University of San Fransisco Maritime Law Journal, Vol. 19, Issue 2 (2006-2007)*, 259-263.

argued that there is a substantial difference between the fees received by a classification society and the amount of damages claimed; that a classification society is not the insurer of a ship, and that a classification society when classifying a ship does not act with the intention of assuming the risk of the total loss of the ship. Indeed, the moderate fees charged by classification societies for classification of ships is a clear indicator of the fact that a classification society does not intend to assume the risk of the total loss of the ship. Nevertheless, if the defects which were not spotted by the classification society do in fact cause the total loss of the ship then it is submitted that due to the nature of the causative link, the classification society should be held fully liable. On the other hand, if the defects were not the only cause of the total loss of the ship, then a classification society will not be liable for the entire damage, but will only be liable for the amount of damage that corresponds to the extent of its negligence. Of course, the possible existence of force majeure, or the negligence of the aggrieved party and/or a third person must also be taken into consideration. For instance, in the event of the failure of the ship owner to have the defects repaired, or in the event of gross fault and/or negligence of the Master in navigating the ship, the causal link between the negligence of the classification society and the damage caused is severed.

The aggrieved party needs also to prove the existence of **damage**. A classification society which provided incorrect information, shall be liable for the losses of a purchaser of a ship who relied on that information. The damages which can be recovered are for the losses that would not have been suffered had the correct information been made available to the purchaser. Such damages are described as "reliance damages" in legal commentaries.[94] The extent of the reliance damages should be separately evaluated for each individual element of damages claimed. Generally, such damages will include the repair costs of the defects. In some cases, the entire value of a ship which was lost due to a defect may make up the damages claim.

At this point it should be noted that certain damages, which may be claimed from the classification society as reliance damages (such as repair costs to rectify the defects, and loss of income during the repair process), may also be claimed from the seller under the sales contract. As far as such damages are concerned, the aggrieved person may pursue damages in contract from the seller under the sales contract, or may seek recovery from the classification society based on breach of confidence. In such cases, the seller and the classification society are deemed to be jointly liable (TCO Art. 51; SCO Art. 51). A classification society that satisfies the damages claim of the

[94]Kirca, 207; Ergune, 118.

purchaser may seek reimbursement for such payment from the seller, to the extent that the damages corresponded to the extent of the negligence of the seller. It should also be remembered that a classification society will not be liable at all if the negligence of the seller is so gross as to sever the causative link between the negligence of the classification society and the damage caused.

IV
CONCLUSION

As the analysis above shows, pursuit of a remedy against experts who were negligent in providing information within their field of expertise is not possible according to the customary principles of tort or contract.

Damage caused to the property and/or harm to the person of a third party, however, due to an incorrect assessment by a classification society, does lead to tort liability (BGB § 823; TCO Art. 41; SCO Art. 41). This is due to the fact that a person has an absolute right to his/her property and a breach of these absolute rights results in tort liability for the person breaching those interests. On the other hand, if the acts and/or omissions of a classification society breach other interests of a person, that are not absolute rights, such acts and/or omissions do not automatically incur liability in tort. Such damage, which is described as "pure economic loss" in common law jurisdictions, often arises in the form of losses of an economic nature, such as loss of profit, or compensation paid to other parties. In order for the breach of economic interests to incur liability, special express legislative regulations must be introduced. Presently however, there is no existing regulation expressly protecting the economic interests of a third party from losses caused by experts' incorrect assessments. Therefore, third parties who suffer economic loss due to the incorrect assessments of experts, cannot pursue damages through standard tort provisions.

Furthermore, due to the lack of a contractual agreement between the expert and the third party, the third party cannot pursue damages in contract either.

In some cases however a special "relationship of confidence" is established between the expert and the third party, even in the absence of a contract. It is generally acknowledged that a "relationship of confidence" is established between an expert and a party to a legal transaction, in the situation where confidence has been placed in the expert by the party in its dealings relating to that legal transaction. In such cases, it is submitted that it would be unjust not to hold the expert liable for his/her incorrect representations. Today, it is generally accepted that an expert who provided incorrect

information should be liable to the party with whom a relationship of confidence was established. This liability is described as "breach of confidence".*

Although the legal nature of breach of confidence has been debated by legal commentators for a long time, the current prevalent view is that breach of confidence constitutes a third type of liability between contractual and tort liabilities. Breach of confidence has obtained statutory ground in Germany with the insertion in 2002 of the relevant provision (§311) in BGB. As far as Turkish law is concerned, it is submitted that there is a *lacuna* which must be filled by the judge by way of article 1 of the Turkish Civil Code. The judge will be filling the *lacuna* by applying by analogy the provisions relating to contractual liability.

Classification societies, as experts in the assessment of ships, may therefore be held liable for breach of confidence to third party ship purchasers with whom a relationship of confidence is established. However, such a relationship of confidence is not established as far as the classification societies' periodical ship inspections and assessments are concerned. Such routine classifications and inspections of ships are carried out on account of authority granted by governments. They specifically aim to protect safety at sea and to uphold the public interest. Therefore, holding classification societies liable to third party purchasers for such inspections and assessments cannot be reconciled with the fundamental principles of the law of liability. It would lead to the proposition that a class society can be liable to an unlimited number of third parties, with whom no contractual relationship ever existed. On the other hand, the situation is markedly different with respect to cases where classification societies are acting for private interests and reasons, e.g. the extra-ordinary survey of a ship to be utilized in a particular sale and purchase transaction. In such cases, it must be judged on an individual basis whether a relationship of confidence has been established between the classification society and the purchaser of the ship. It is, therefore, important to clearly specify the necessary conditions for the establishment of a relationship of confidence. This paper has attempted to delineate the conditions for breach of confidence that are generally accepted in comparative analyses. This study aims to contribute to court decisions applying comparative law, and to prospective legislation on the subject.

In this paper, the four special and three general conditions that must be met in order to establish breach of confidence have been analyzed in detail. The reason why these conditions are so extensive is arguably due to the

*Ed. Note: Under U.S. maritime law, the doctrines of quasi-contract, contract implied in law, and third party beneficiary would apply to situations covered by "breach of confidence" as described by the author.

exceptional nature of confidence liability. In order to establish breach of confidence in the case of classification societies: (1) the assessment of a ship must have been specifically prepared in order to be utilized in a particular sale and purchase transaction; (2) the purchaser's decision to purchase must be based on this assessment; (3) the class society must anticipate that the assessment report will be used by other persons; and (4) the class society must obtain a direct and/or indirect economic interest from the particular assessment of the ship. In addition to these special conditions; negligence, a causal link and damage, which are the basic elements of liability, must also be present.

If all of these conditions have been met, a third party purchaser of a ship may seek recovery of damages from the classification society, on the grounds of breach of confidence. The damages which can potentially be recovered include the repair costs (which were incurred as a result of the ship being in a worse condition than represented), damages paid to third parties (due to the fact that the ship could not perform voyages during the repair period), and profits of which the purchaser was deprived during the repairs.