The implied duty of a service provider to warn about a risk of construction defects resulting from a contract with a third party, with emphasis on defects resulting from design failures: A case study on the precontractual and contractual duty to warn in English, German and Dutch law and in the Draft Common Frame of Reference

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THE IMPLIED DUTY
OF A SERVICE PROVIDER TO WARN
ABOUT A RISK OF CONSTRUCTION
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JOASIA LUZAK
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aan de Universiteit van Amsterdam
op gezag van de Rector Magnificus
prof. dr. D. C. van den Boom
ten overstaan van een door het college voor promoties
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Faculteit der Rechtsgeleerdheid
Moim Rodzicom

"W szczęściu zawsze znajdziesz kawałek domowych pantofli."

Aldous Huxley
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No one said that writing a PhD would be easy, to the contrary, I remember well that during my interview I was specifically warned that most PhD candidates take way longer to finish their dissertation than they intended and that everyone goes through phases of doubt, of not being able to look at the manuscript anymore, of discouragement. I am sure that if not for the constant support that I was given by my two supervisors, Marco and Gerard, I would have had many more of these moments. With them just a few offices away, always ready to answer any of my questions or inquiries, I had a very much-needed back up during these past years. I would like to thank them for always being there and for helping me in any way that I let them do so, which admittedly might have not been often enough at times.

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Joasia Luzak
Amsterdam, 1 September 2011
Chapter 1. Introduction.

1.1. Subject, aim, research questions and structure of the book.

This book concerns the implied precontractual and contractual duty of a service provider to warn about a risk that might emerge from a contract with a third party in the construction sector, in the situation where the client is either a consumer or a consumer-like party. It is a case study on English, German and Dutch construction law as well as on the regulation of the precontractual and the contractual duty to warn in the Draft Common Frame of Reference\(^1\) (further in this book called the ‘DCFR’).

In the construction sector the client is usually forced to work with many service providers. He may go to an architect (further in this book called the ‘designer’) to have his building designed, to a building constructor (further in this book called the ‘builder’) to have it built, and to engineers and other specialists to receive advice on specific parts of the construction process. Moreover, due to the complexity of modern day construction projects, he might have to employ more than one builder or let the builder hire sub-contractors that specialise in certain high-tech elements of the construction process. This means that the client usually works with at least a few professional service providers, whom are all at risk of making a mistake during the performance of their tasks and thus endanger the success of the whole construction. Therefore, the question may arise whether and under what conditions any of these service providers may be under a precontractual and/or a contractual duty to warn about a risk that might emerge from a contract between their (future) client and a third party in the construction process. Three examples may illustrate this:

whether the builder is liable for breach of the precontractual duty to warn the client.

A designer is employed by the client to design a plan for a building with a few stories. Additionally, the client employs a specialist engineer to help with the engineering parts of the construction, e.g. the heating and ventilation systems. The engineer suggests amendments to the design plan in order to properly fit the heating and ventilation systems in the building. The designer does not intervene having less technical knowledge on the subject. When the construction is finalized, it turns out that in the summer months the temperature at the highest floor of the building reaches 40 degrees. The client refuses to pay the designer’s remaining salary claiming, inter alia, that the designer should have warned him that the change the engineer made in the design plans could lead to overheating of the top floor of the building. The question then would be whether the designer had to warn the client about a potential mistake that the engineer made in the design of the ventilation and heating systems.2

The aim of this book is to present the findings of research establishing the existence and scope of a specific duty to warn of a service provider, namely: an implied duty to warn a client about a risk that might emerge from a contract with a third party in the construction sector. In this book the arguments that resulted in the acceptance or rejection of such a duty to warn by legislators and courts are analysed. This duty to warn was studied in three different European legal systems in order to compare various regulations of the duty to warn across Europe, so that some insight on a future European regulation of a duty to warn, in general, might be gained. This book is not normative in the sense that it does not contain my views on the need for (the recognition of) such duties, but investigates whether or not, and if so: under which conditions such duties may exist, how they are to be performed and what the consequences would be if the service provider would breach such a duty.

In recent years contract law provisions in the Member States of the European Union have been extensively researched in order to form a uniform set of the main European contract law provisions. As a result of that research the Principles of European Contract Law3 (further in this book called the ‘PECL’), the Principles of European Law on Service Contracts4 (further in this book called the ‘PELSC’) and finally the DCFR have been published. The outcome of the research presented in this book might influence the future development of a general framework in European contract law as regards duties to warn and is intended to serve as a comparative basis for the current regulation of the duty to warn in the DCFR.

The main research question addressed in this book is:

Under what conditions does a service provider in the construction process have a precontractual or a contractual duty to warn towards his consumer-client about a risk that might emerge from the client’s contract with a third party in

2 All the above mentioned examples will be further discussed in this book.
Upon answering the question, the scope of the duty to warn and its regulation in these three countries may be compared to gain insight into the regulation of the precontractual and the contractual duty to warn on a (small) European scale. Then, the regulation of the precontractual and contractual duty to warn in the DCFR is examined and evaluated; in as far as it applies to services in general and to construction contracts in particular. The comparison between the regulation of the duty to warn in England, in Germany and in the Netherlands with that in the DCFR provides insights as to how representative the regulation of the DCFR is and might enable other researchers and reviewers to propose alternative solutions, if need be.

To answer the main research question first it is analysed when for a service provider a precontractual and a contractual duty to warn about a risk coming out of the contract with a third party emerges, which duty binds professional parties when they did not have an express contractual obligation to that extent. What would that duty to warn be based on? It is considered whether the duty to warn is regulated in any statutes or whether it follows from the application of standard forms of contract that parties included in their contract or whether courts have implied it.

I will also look whether the duty to warn is included in the main examples of standard forms of contract that are currently used in the construction industry. In such a case, the duty to warn would be based on an express contractual obligation. However, in further chapters I demonstrate that when a duty to warn is recognised by the courts, its origin as an implied or express term does not influence its scope or the conditions under which it is to be performed. For that reason, even though such express obligations themselves are not within the scope of this book, cases where the duty to warn is based on such an express obligation may shed additional light on the aspects of the duties to warn that are within its scope. Moreover, I demonstrate that under German and Dutch law, where the contract does not contain an explicit obligation, the parties would nevertheless be bound by such a duty on the basis of the principle of “good faith”, which in the Netherlands is even codified. That means that cases where the source of the duty to warn is a provision in a standard contract form may also shed some light on the scope of non-express duties to warn. Since the doctrine of “good faith” is generally not recognised in English law, the English standard contract forms have been given less attention in this book, taking into account that whatever regulation of the duty to warn they might provide it would be unlikely to be upheld by English courts under general rules of fair dealing.

As it has been mentioned, the aim of this book is not only to establish the scope of the duty to warn but also its existence. Arguments might be raised that this chapter should focus only on determining the scope of the duty to warn. The existence of the duty to warn is for instance not questioned in Germany and in the Netherlands. Nevertheless, the source of this duty is different. In my view, this in itself justifies an investigation as to when exactly, and under which circumstances there is a duty to warn. Moreover, where the existence of the duty to warn may as such not be questioned in Germany and in the Netherlands, English case law remains to be

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5 In such a case the duty to warn might be seen as an express contractual obligation, however,
contradictory with respect to the recognition of an implied duty to warn of a client as to the risk coming from the contract between the client and a third party. Although such a duty is generally recognised in the doctrine, I will demonstrate that such a duty to warn only recently gained more recognition in the judgments of the higher English courts. C. Jansen has so far given the most comprehensive discussion of this subject. Since the date of the publication of his book, many things had influenced regulation of the duty to warn, e.g. the duty to warn has been introduced as a statutory duty in the Netherlands, there was a first review of this implied term given by the English Court of Appeal which finally confirmed the doctrinal assumption that there is a duty to warn in English law. Due to such developments, the discussion of the existence and scope of the duty to warn may nowadays be more specific, which this book tries to show. Therefore, chapter two answers to the question whether and to what extent the duty to warn is recognised in Germany, the Netherlands and England, by presenting the sources of the duty to warn in English, German and Dutch law, by defining the duty to warn and by outlining its scope in these legal systems. These elements are then further elaborated on in the following chapters.

In the following three chapters the duty to warn of specific service providers is analysed on the basis of national case law and literature. Firstly, the focus is on the builder’s, then the designer’s and finally the sub-contractor’s duty to warn. The third chapter on the builder’s duty to warn is the most extensive one in the whole book, since the builder is the main contractor of the client and as such he is involved in most of the construction process. As a result, he has the best chance to notice defaults of other professional parties. This means that the duty to warn of the builder is likely to have the broadest scope in comparison with the duties to warn of other professional parties involved in the construction process. As a consequence, and not surprisingly, most cases on the duty to warn are about the builder’s liability.

Cases on the designer’s duty to warn, which is the subject of the fourth chapter, are much less frequent. For reasons that are explained in that chapter, notably the designer’s precontractual duty to warn plays a significantly smaller role than the builder’s precontractual duty to warn. As a result, the fourth chapter focuses mostly on the contractual duty to warn of the designer.

The fifth chapter on the sub-contractor’s duty to warn has been divided into two parts, one dealing with the sub-contractor’s duty to warn the builder and one dealing with the sub-contractor’s duty to warn the client.

In these three chapters the scope of the specific service providers’ duty to warn is established. The case law gives us an indication as to what factors may influence the scope of the given service provider’s duty to warn and for whose defaults he might need to warn the client about. Furthermore, it is discussed how far a service provider’s duty to warn reaches.

While analysing the scope of the duty to warn, in these three chapters, other research questions are answered:

10 The reason why this book has a part on the sub-contractor’s duty to warn the builder who is not a consumer(-like) party is given in part 1.2.2. of this chapter.
• What would trigger the duty to warn, having regard to the content of the information and instructions at hand?
• Is mere ambiguity or uncertainty already sufficient to give rise to the duty?
• Would the duty only be brought about in case of an inconsistency or incorrectness?
• How attentive must the service provider be when analysing the information and instructions gathered or received, in order for him to be able to identify a problem that may give reason for the issuance of a warning?
• Does he have to specifically look for gaps, ambiguities, inconsistencies, and mistakes?
• Does the fact that the client himself might be a competent party or that he was assisted by others, who were sufficiently competent to recognise the problem before the incident occurred, influence the service provider’s duty to warn?

Chapter six focuses on the various requirements that are set in English, German and Dutch law in order to make a service provider give an effective warning to a client. One part of this chapter focuses on the question: what constitutes a proper warning? Various aspects of this question are addressed in this chapter: in which form should the warning be given, e.g. in writing or orally, and how precise should the warning be, e.g. what language should be used to convey the warning? Another question is to whom the warning should be given. It might (have to) be issued to the client himself, to his various representatives, to a party who has a direct contractual link with the party that is giving the warning, or even directly to the party who is liable for the default that the warning concerns, even if there is no direct contractual link between that party and the party issuing the warning.

The second part of this chapter focuses on another question: is a mere warning sufficient? Or does a warning only then release the service provider from liability if it is sufficiently effective? This part concerns the specific situation when a warning has actually been given, but the order or instruction to the professional party are not changed as a result of this warning. E.g. in the construction sector the builder might warn the client that the materials chosen by the designer will not stop water from entering the basement of the client’s new house, but the client does not order other materials. May the builder then continue the construction process with the materials chosen originally by the designer despite knowing that the final product will probably not fulfill its function properly? May the service provider assume in such a case that the client took upon himself the risk of a faulty construction by not following the warning? Or does the professional party rather need to take extra measures, e.g. by repeating the warning, for instance until he is sure that the client understood all the dangers? Or should he even refuse to perform the service knowing that the end product will be faulty? Will the service provider be liable for the client if the latter one decides to sue for the faults in the end product? When may the service provider be sure that he performed his service in a risk-free way and will not be held liable?

Chapter seven concerns the liability of the service provider for the breach of the duty to warn and its scope. It is divided into three parts. The first part concerns causality. If, for instance, the builder breached his duty to warn about a designer’s mistake, is it the breached duty to warn or the designer’s original mistake that is seen as having caused the damage to the client? The second part concerns the system of liability that is chosen in English, German and Dutch law for the breach of the duty to warn. If, based on the findings of the first part of this chapter, both the builder and the
designer would be seen as having caused the damage to the client, may the client claim damages from both parties, in full or in part, or does he have to sue them separately? Finally, the last part of this chapter concerns the possibility of the service provider to limit his liability based on the defence of the contributory negligence. It gives an answer to a question whether, for example, even if the builder is fully liable, the fact that a part of the problem is caused by the fact that the designer employed by the client made a mistake may lead to a limitation of the builder’s liability on the basis of contributory negligence. Should the service provider still be liable in full in such a case, or is the client’s claim for damages limited or even excluded if the client – or a third party engaged by the client, e.g. a designer – should or at least could have noticed the problem in the instructions himself? In other words, if the fact that the client could be seen as competent himself or that he was assisted by others who were sufficiently competent to recognise the problem before the incident occurred does not stand in the way of the emergence of a duty to warn altogether, should it not at least lead to a limitation of liability on the basis of the doctrine of contributory negligence?

Also in this chapter more attention is given to the liability of the builder for the breach of his duty to warn about another parties’ mistake than to a breach of the designer’s duty to warn. That is justified for two reasons. Firstly, as already mentioned, the designer’s implied duty to warn about a risk coming from a third party is generally less often recognised. Secondly, cases where the designer is held liable for the breach of the duty to warn about a mistake coming from a builder’s incorrect performance of the designer’s plans are mostly based on the designer’s explicit duty to supervise the performance of the design by the builders and engineers. The duty to warn about any mistakes he should have noticed during his supervision is an essential part of that obligation to supervise and therefore must be qualified as an express obligation to warn. Such cases therefore remain outside the scope of this book.

Chapter eight analyses how the duty to warn of the service provider in the construction sector had been introduced and regulated in the DCFR. This chapter is divided into sections that correspond with the titles and subject matter of the remaining chapters in this book. The purpose of this chapter is to illustrate the scope of the regulation of the duty to warn in the DCFR in the light of the research questions that had been considered in this book.

Finally, conclusions are presented in chapter nine. This chapter takes into account the fact that the outcome of this research might influence the future development of a general framework in European contract law as regards duties to warn. Therefore, a comparison of the provisions on the duty to warn in the DCFR and in the other legal systems is given in this chapter. Such a comparison might shed some light on the differences that exist between the scope of the duty to warn in various legal systems, which might be then explored in future works on the European regulation of a duty to warn.

1.2. Scope of the book.

While reaching for this book, the reader might have certain expectations as to what he might find in it. In this section, I explain why certain subjects have been added to this book and why certain others have no place in it.
1.2.1. Designer’s duty to warn.

Despite the fact that the scope of the book encompasses both the contractual and precontractual duty to warn of all the parties involved in the construction sector, the discussion on the designer’s precontractual duty to warn is relatively short. The reason for this is the following. In case a contract is concluded by the parties as a result of negotiations during which a professional party owed a precontractual duty to warn to the client, this duty in practice is mostly absorbed by that professional party’s contractual duty to warn or, as the case may be, by that professional party’s obligation to provide an end result, which is fit for its purpose. In practice, in the case where either a contractual duty to warn or a duty to provide an end result, which is fit for purpose, exists and when that duty is breached, the client would choose to claim damages for breach of the latter duty. One of the reasons for this is that damages are obtained much more easily and much more generously in case of a contractual relationship than in case of merely precontractual liability. As a result, in all three legal systems the precontractual duty to warn is less regulated than the contractual duty to warn is. This means that there is not an abundant amount of case law or literature on the precontractual duty to warn, certainly not when compared with the contractual duty to warn. Moreover, the scope of this book is limited to the duty to warn that a professional party would have in respect of a risk coming from another professional party. The designer is often the first party employed by the client. Therefore, when the client would be negotiating and concluding contracts with other professional parties, which might bring about some risk to the client, the designer, most likely, would have already been employed by the client and would then have a contractual duty to warn about those risks. That might explain why the precontractual duty to warn of, in particular, the designer is neither explicitly regulated nor discussed in any of the three mentioned legal systems, and why case law on the designer’s liability for breach of a precontractual duty to warn is almost completely absent. As a consequence, the designer’s precontractual liability for failure to warn is not discussed to the same extent, as is the builder’s precontractual duty to warn.

Moreover, also the scope of the contractual duty to warn of the designer is described on the basis of fewer examples than in case of the builder’s duty to warn. The reason for that is that this book focuses on the implied duty to warn of the service providers about a risk coming from a third party. In many cases, the designer will have an explicit obligation to warn the client about a mistake of a third party, since the contracts concluded with the designers usually oblige them to supervise the construction process and all parties involved therein11.

1.2.2. Subcontractor’s duty to warn.

One of the service providers whose duty to warn is presented and evaluated in this book is the builder’s sub-contractor. As it has already been mentioned, the complexity of the construction sector forces the client to co-work with many different constructors or leave an option for the main builder to hire other parties himself. Those parties would then be the builder’s sub-contractors. Since the client does not have a contractual duty to warn with the sub-contractor it might seem that the sub-contractor’s duty to warn should not be discussed in this book. However, the subcontractor may have a precontractual or a contractual duty to warn the builder (his

11 This has already been mentioned in part 1.1. of this chapter.
own client), which in turn might influence the builder’s own duty to warn the client. Also, since the builder may be seen as a professional party himself, i.e. a client who is competent and might have actual knowledge about the service he orders, when the sub-contractor’s duty to warn the builder is confirmed in this book, it might be expected that under similar conditions the builder’s duty to warn a client that is not competent would be established, as well. If a competent client needs to receive a warning, this applies even more so to a client who is a consumer. In other words, there is relevance between the sub-contractor’s duty to warn the builder and the builder’s duty to warn the client. This is the reason, that even though this book focuses on the duty to warn a client who is a consumer or a consumer-like party, the sub-contractor’s duty to warn the builder is discussed in it.

Moreover, this book also discusses the sub-contractor’s possible duty to warn the client. This might be confusing to the reader at a first glance, since the book focuses on pre contractual and contractual duties to warn without covering the duty to warn in tort, and the sub-contractor typically has no contractual relation with the client. For this reason, the sub-contractor’s duty to warn the client is not discussed extensively in this book. In certain cases, however, the court or an arbitrator would assess that the sub-contractor’s duty to warn was not exhausted by the sub-contractor just giving a warning to the builder and not to the client. In such cases, mostly when it would be obvious that the builder would instantly ignore the duty to warn, the sub-contractor could be considered to have a duty to warn to the client directly. This could then be seen as a consequence of his contractual or precontractual duty to warn the builder. In German law, this duty to warn the client would be based on the contractual construction of the Vertrag mit Schutzwirkung für Dritte, a construction that has been established in doctrine and case law in order to remedy perceived insufficiencies of the German tort law. In English law the courts would not discuss the nature of that duty to warn, not differentiating in practice between contractual and tortious liability of the professional party. It has been confirmed in recent case law that a professional party may owe a duty in tort to his client, concurrent with his duty in contract. Such (admittedly: atypical) situations are briefly addressed in the chapter on the sub-contractor’s duty to warn.

1.2.3. Client’s duty to warn or inform.

This book intends to illustrate the professional service provider’s duty to warn. It presents the results of research as to the scope of the duty to warn of the

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professional party, whether it would be a builder, a designer or a sub-contractor. Of course, when we talk about the duty to warn of one contractual party, we might wonder whether vice-versa the client does not himself have a certain duty to inform the service provider. For example, it is quite reasonable to expect that the client communicates to the service provider he has employed, what his expectations are and what he considers relevant, especially if these expectations are not of the regular kind (e.g. when the client together with the designer agreed on having a swimming pool built in a diamond shape, the client should mention that unusual shape to the builder). Also it seems to lay in the best interest for the client to fully cooperate with the service provider and to volunteer information. The more information the professional party has, the easier it should be for the client to prove that the service provider was supposed to warn the client about the default in the service. Since for the professional party to be able to warn the client, it has to be aware of the fact that the warning would be relevant for the client. However, in certain cases, the relevance of the warning for the client will be clear. This is true, in particular, when the graveness of the risk for which the service provider would have to warn makes it clear that it should be given regardless the client’s situation (e.g. if a building might collapse in case a specific, mistakenly chosen by the designer material is going to be used in the construction, obviously the builder must warn the client thereof if he notices the wrong choice).

Therefore, it may be assumed that in some cases the client would have a duty to inform the service provider about certain circumstances (e.g. if a client knows that the examination of the construction ground proved it was insufficiently stable to support the planned construction, he has to inform the builder of the findings of the engineer who had conducted the soil examination). Moreover, under certain circumstances the client might not only have a duty to inform the service provider, but even a duty to warn it. It is possible to imagine that the client would know that asbestos was used in the original plating of the walls. The client has then the duty to warn the service provider since the service provider must take precautions to protect himself and others against the dangers that constructions built on asbestos bring about. It is difficult to imagine that the client would not issue such a warning, since it is in his interest to have the service provided to him properly performed. However, in case the client does not issue such a warning, he should not expect the professional party to bear liability for potential damages suffered by him and it could even be expected that the service provider would have a claim against the client. This matter, however, has been left outside the scope of this book. The aim of this book is to contribute to the future development of the service provider’s duty to warn at the European level and it leaves the findings on the client’s duty to warn to other researchers to discover.

1.2.4. Public procurement.

In this book, the arguments that resulted in the acceptance or rejection by legislators and courts of duties to warn towards consumers and consumer-like clients are analysed on the basis of statutory provisions and case law. For reasons of feasibility as well as because the focus of this book is on consumer contracts, the specific position of the State as a contracting party – with the possible role of public law, in particular of public procurement legislation – was left outside the scope of this book.
1.3. Terminology.

In order to prevent confusion, this section defines certain terms used in this book.

1.3.1. Duties to warn.

The subject of this book is the precontractual and the contractual implied duty of a service provider to warn about a risk that might emerge from a contract with a third party in the construction sector, whereas the client is a consumer or a consumer-like party. To provide a definition of the duty to warn is not as simple as one might expect.

Firstly, an explanation needs to be given here as to the definition of the duty to warn as used in this book. There is a difference in legal terminology between ‘duties’ and ‘obligations’. Obligations are only such duties which in case of breach lead to a claim for damages on the basis of the expectation interest, while the term duty is meaningless in the abstract and may only be evaluated on a case by case basis. Namely, in order to establish whether a person breached a duty one would have to look e.g. at the intensity of the duty. Moreover, duties may not be owed to anyone in particular and their enforcement may be left to public bodies. This book concerns in particular obligations to warn, since it intends to point out cases in which the breach of such a duty (an obligation) would give a client a claim for damages against a service provider. It is worth mentioning that the draftsmen of the PELSC and the DCFR used the term ‘pre-contractual duties to warn’ and ‘contractual obligation to warn’, exposing the difference between legal consequences of not giving a warning on two different stages of performance: the pre-contractual and the contractual stage. Since this book describes both the precontractual and the contractual stage, in theory, two different terms would have to be used to illustrate the need for a warning to be given by a service provider. However, in order not to create confusion, in this book I mostly use the broader term ‘duty to warn’.

Finally, as it has already been mentioned in previous paragraphs, it should be noted that two types of duties to warn will be discussed in this book: the precontractual and the contractual duty to warn. Precontractual duties to warn are duties that apply before the contract is concluded between the parties. Contractual duties to warn are duties that apply after the contract is concluded between the parties. However, in practice some precontractual duties to warn of a service provider may turn into contractual duties to warn with the moment of the conclusion of the contract. Moreover, at the precontractual stage the service provider is only required to investigate the existing situation, e.g. the soil at the construction site or a prepared design, in order to make his offer. This implies that the chances that a problem is or
should be noticed already at the precontractual stage, by definition, are slimmer, than
they are at the contractual stage, when the service provider is actually performing his
contract. At this stage, he will look more intensely at the surrounding conditions for
his performance. Both elements might explain why there is, in general, more case law
and literature on the contractual rather than precontractual duty to warn17.

The duties to warn discussed in this book do not encompass situations that are
dealt with under such doctrines as misrepresentation, Irrtum or dwelling. The reason
for that is that this book is devoted to a very specific duty of a service provider to
warn, namely about a risk coming from a third party. This represents the positive side
of the duty to warn, namely the need to give certain information and warnings to the
client during the precontractual negotiations or during the performance of the
contract. Misrepresentation is an example of the negative side of the duty to warn,
namely the duty not to deceive nor misrepresent. However, since in this case the
service provider’s own behaviour is the cause of the risk for the client, and not the risk
coming from a third party, such a duty does not fall within the scope of this book.

The right of a party to be informed, and the corresponding duty for the other
party to inform the first party, weigh heavily since the execution of that right or (non-)
performance of that obligation often has serious consequences for both parties. We
live in the information age, where knowledge is the key to success, not only at the
legal scene, but also basically in every sphere of our lives. Access to information and
the possession of information became crucial mostly due to the development of mass
communication tools, which enabled people to gather seemingly endless amounts of
information within a relatively short amount of time. In most cases the limits of the
information that may be gathered and accessed by a person, are that person’s
comprehension and memory capabilities. It does not come as a surprise that the duty
to inform gained tenfold on importance in the past decades.

I mention here information and the duty to inform, while the subject of this
book concerns the duty to warn and warnings. Is it possible to separate these two
concepts, however? And how is advice related to these two concepts?

The literal meaning of these words may be checked in any dictionary. For
instance, Collins Cobuild Advanced Learner’s English Dictionary yields the
following results: “information about someone or something consists of facts about
them”18, “advice - if you give someone advice, you tell them what you think they
should do in a particular situation”19, “a warning is something which is said or written
to tell people of a possible danger, problem, or other unpleasant thing that might
happen”20. On the basis of these definitions taken from a basic linguistic tool, one
would assume that you might warn someone without informing him or advising him
at the same time. The simplest warning that comes to my mind is: “Watch out!” This
simple exclamation conveys a possible danger to another person, but there are no facts
given away while doing it, thus it cannot be information as well, right? However, if I

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17 Problems with establishing precontractual duty to warn were also discussed by: M. A. B. Chao-
18 Collins Cobuild Advanced Learner’s English Dictionary, Glasgow: HarperCollins Publishers, 2006,
p. 744
p. 22
p. 1636
tell another person to watch out, is it not an advice as well since I think he should do, after all? Can you formulate a warning in a way that it would not be an advice as well? Moreover, apart from situations when dangers are immediate and easy to state, for a warning to be taken seriously, it should most certainly consist of facts about what a possible danger is and what risks does it bring about. It seems to me that these three concepts should not be dissected to the point where an artificial distinction between them may be found, since it does not seem to have any practical use.

Not surprisingly, the legal concepts of information, advice and warning are not well defined either in any of the three legal systems that are taken into account in this book: English, German and Dutch law. The answer to the question what constitutes information, advice and warning, and what the relations between these three concepts are, is thus not easy to give from either legal or linguistic perspective and is never objective. Making a clear distinction that A is information but not a warning or an advice, that B is an advice but not an information nor a warning, etc., does not seem to always work in practice since these concepts tend to appear together or even interact with each other. It has already been mentioned in some literature, that it is not really possible to pinpoint exactly where one concept starts and another ends, whether we are still dealing with the duty to inform or maybe we are talking about the duty to advise, or we just entered the scope of the duty to warn. Nevertheless, it seems safe to assume that a ‘warning’ always points to a possible risk for the party that is addressed, whereas ‘information’ or ‘advice’ not necessarily does so.

1.3.2. Client.

As has been mentioned in the previous paragraph, the aim of this book is to analyse a service provider’s duty to warn a client about a risk that might emerge from a contract with a third party in the construction sector. This book is not limited to but focuses on the service provider’s duty to warn a consumer or a client resembling a consumer (described as a consumer-like client), since the relation between professional service providers and consumers is of particular interest to me. When a service provider is employed by a consumer, that service provider’s duty to warn may be justified by the fact that the service provider will be more easily aware of and will have more knowledge of the risk than a client who is uninformed and inexperienced in matters of construction. The scope of the book encompasses within the definition of a client also consumer-like clients which means clients who are not consumers but who do not differ much from consumers when it comes to vulnerability, lack of experience as well as lack of access to information.

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Sometimes the client who is a consumer is in fact a competent party – for instance in the situation where the consumer client himself is an engineer and studied construction processes – or when the client was assisted by competent staff. One of the research questions considered in this book is whether the service provider’s duty to warn is influenced by the competence of the client.

Certain illustrations in the following chapters refer to cases in which the client is not a consumer at all, but rather a large organization. However, the latter cases are presented here only when a service provider had a duty to warn the client even though, given the capabilities of such a client, it could be assumed that such a client would have had the experience or knowledge about the construction to have discovered the risk himself. The position of a non-consumer client then to some extent resembles the position of a competent consumer client. If under such circumstances the service provider nevertheless had a duty to warn the non-consumer client, he is likely to have had a similar duty to warn a consumer or a consumer-like client under the same circumstances. For that reason, the conditions that have to be met for the service provider to have fulfilled his duty to warn towards a non-consumer will most likely also have to be met when the duty to warn a consumer is concerned. Cases where a non-consumer may invoke damages for a breach of the service provider’s duty to warn may, therefore, shed light on the service provider’s duty to warn a consumer.

1.3.3. Builder

The builder is understood broadly in this book. It could be a main contractor of the client but also any of the client’s contractors who is responsible for building just a part of the construction.

1.3.4. Designer.

In this book, with ‘designer’ I generally refer to an architect. However, in some cases, the client will employ an engineer who may act as a designer for a specific part of the construction process. In such cases, this is explicitly mentioned in the book.

1.3.5. Service provider and professional party.

In this book, ‘service provider’ is used as a general term used for describing any professional party employed by the client in the construction process, i.e. builders, designers, engineers, sub-contractors, etc. It is used interchangeably in this book with the term ‘professional party’, which is at times used in order to mark the difference between the professional capacity of the service provider and the private capacity of a consumer.

1.3.6. Risk.

The research presented in this book concerns the duty to warn about a risk that might emerge from a contract with a third party. There are various situations that

might endanger the purpose of the construction itself or other interests of the client, e.g. his financial stability. This book focuses mostly on the main risk to the construction, namely the risk of a defect in the construction that would be caused by the work of another, third party. Since the risk of the defective construction is the one most often discussed in case law, it does not come as a surprise that the scope of the duty to warn of the service providers is presented in this book mainly on the basis of examples pertaining to that specific risk.

Certain other risks, e.g. responsibility for recommending other parties to be involved in the construction process or for recommending specific construction materials to be used, that later turn out to be unreliable, are also discussed in this book.

Outside the scope of this book remains the duty to warn about a specific risk that the construction works would last longer or be more expensive than the client expected. Firstly, it is often the professional party who causes the delay that would warn the client about that, after stumbling upon obstacles in timely performance. Secondly, such a risk should be obvious to the other professional party who is supervising the whole construction process and notices one of the other parties endangering either the time or the money schedule. As it has already been explained duty to warn is an explicit contractual duty in the supervision contracts and that leaves this risk out of the scope of this book. It is also feasible that e.g. during precontractual estimation of the construction works the builder would know that the time or expenses schedule prepared by the designer is not going to be realistic. However, again, he should then warn the client about a risk coming from his own person (as he would not be able to fulfil his obligations as estimated). In rare cases that he would be aware about other parties not being able to fulfil their obligations on time or within the costs agreed, he might have had duty to warn that would have fallen within the scope of this book. However, due to the rarity of these occasions they had not been discussed in this book either.

As the previous paragraph shows, there are many risks to the construction about which the service providers might need to warn the client, which are not discussed in this book. A choice needed to be made as to what risks will be discussed in this book. It might be said that this book paints a one-sided picture due to such a choice. To a certain extent this statement is true. However, this choice enables me to present an in-depth study of a detail of the whole picture.

1.4. Party autonomy versus solidarity.

The emergence of a duty to warn is not self-evident in contract law. The principle of party autonomy is traditionally considered as one of the pillars of contract law in the Member States of the European Union23. From this principle it follows not only that a person is free to make its own choices, but also that he is responsible for the choices he has made. This implies that in principle every party must safeguard its own interests. Therefore, a party should prevent itself from concluding a contract

under the influence of false perceptions; if need be, it is expected to investigate whether the service or good offered meets its expectations and needs and not rely on a third party to warn it that there is a risk involved in concluding that contract. When a contract is performed over a longer period of time – e.g. a contract for the construction of a house – the client must determine whether he wishes to supervise the performance of the contract himself or to have it supervised by an expert third party (e.g. a designer).

The principle of party autonomy is at odds with the principle of solidarity. On the basis of this principle, a contracting party, e.g. a service provider, may be under an obligation to take the interests of the other party into account when performing a contract, which includes the duty to warn about a risk coming from a third party. Such an obligation may follow as a matter of course from the nature of the contract, as is nowadays generally accepted in the case of a medical contract between a doctor and his patient. In such a case, the duty to inform is aimed at enabling the other party to make an informed choice. More recently in some legal systems it is argued that any service provider may be under a duty to take the other party’s interests into account. This is especially the case with the duty to warn, a duty by which the service provider is required to inform the client of possible detrimental consequences to the client’s interests. Such risk may be brought about by various factors, but in this book the focus is placed on the risk caused by actions of a third party. For example, when the client requests a subsequent service provider to base his performance on the work of a previous service provider (as is the case where a builder is required to follow a design prepared by a designer), there might be a need for a warning that the first service provider endangers the success of the whole project by improperly performing his part of the construction process. The duty to warn is meant to enable the client to change his initial choice and thus to prevent the detrimental consequences to take place. It is clear that the duty to warn is in the interest of the client, but as a failure to warn may lead to liability for the service provider, such a duty might seem to be contrary to the interests of the latter.

1.5. Some arguments for and against the duty to warn.

The recognition of a duty to warn, both on the abstract level and in a concrete case, is ultimately based on a legal, political or ethical value judgement: when a party to a contract knows or – on the basis of its expertise – should know that the other

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party’s interests are about to be compromised, it should guard the other party from such problems. In this respect, one could argue that the service provider, who is normally a professional party, is in a much better position than the client to discover mistakes of other service providers. Before carrying out the service, he will normally have to analyse the other service provider’s input in order to determine what exactly has to be done. The same will go for instructions or directions issued during the performance of the contract. In doing so, the service provider may discover all sorts of gaps, ambiguities, inconsistencies, and mistakes that may cause problems if they are followed without clarification or correction. On the basis of notions such as ‘fairness’ and ‘solidarity’, one could argue that in such a case the service provider should take the interests of the client into account and therefore warn the client of the possibility of such future problems with a third party.

This legal, political or moral judgement can be supported with an economic argument: when a party has acquired information relevant to its counterpart, societal costs are lower if it is required to inform the other party thereof than when the other party is expected to independently acquire the information. Especially where the service provider not only should know, but also actually does know of the possible error in the instructions he received, imposing a duty to warn on the service provider will hardly lead to extra costs for it. Moreover, providing a warning would most likely prevent future disputes between the parties.

On the other hand, it can be argued that the ‘expert’ party has had to make an effort in order to acquire the expertise (studies, experience). If that expertise brings about an increase of its obligations – and subsequently of its liability – this may take away the incentive for acquiring the expertise: if that party does not purport to be an expert, a duty to warn might not emerge. This disincentive for specialisation could be especially detrimental if the aggravation of obligations and liability is not supported by (extra) remuneration. Moreover, this invites ‘free rider’-behaviour on the part of the other party, who may see less need to safeguard its own interests properly, as the service provider can be held liable if it fails to warn for dangers. In that case, at least part of the responsibility is shifted on to the expert party.

A duty to warn will, however, not make sense if the client already knows of the problem to which the warning should refer. The same argument applies if the service provider realizes that the client is already aware of the problem. This could happen when the client is more competent than the average client, or is assisted by another professional and competent party. Imposing a duty to warn on the service provider would then seem unnecessary for the client’s protection. On the other hand, the mere fact that the client is competent or employs a professional party does not guarantee that the client actually does notice the problem and (subsequently) takes action upon that. This means that a choice has to be made here between a possibly

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unnecessary warning and the occurrence of a risk that is not discovered in time. Since, in general, the costs of a warning will be rather insignificant in comparison with the costs of coping with the risk that occurs, the preference should be quite obvious\textsuperscript{28}.

In some cases, providing a warning may conflict with the service provider’s own interests. This is particularly important when the warning would lead the other party to refrain from concluding a further contract, e.g. when the builder warns that the design plans are too risky or costly for the client and the client decides not to construct that building. In other cases, the warning could lead to the conclusion of a new or complementary contract, e.g. when a builder mentions to the client the need for an additional layer of insulation in the walls. However, some consumer behaviour research\textsuperscript{29} on satisfaction of the clients indicates that in the long run performing a duty to warn generally is even in the service provider’s own interest. Namely, by warning the client of defects the service provider may gain the trust of the client and may convince him that the service provider pays attention to the client’s interests. In such cases it is more likely that the client will be satisfied with the services of that service provider and will not only stay loyal to him during this construction process and for future contracts, but may even recommend him to his family and friends, therefore bringing more work his way.

1.6. Place of the research in the development of European contract law.

European contract law is built on two diverging pillars. The first pillar consists of law issued by the European Union. The European Union has enacted several directives in the area of contract law, thus introducing harmonised fields of contract law within the existing national legal systems. The development of European contract law through directives occurs more or less haphazardly: whenever the European Commission saw a specific need to regulate – primarily to remove hindrances to the internal market or to protect consumers – and it could convince the European Parliament and the Council of Ministers of that need, a directive in a specific area was promulgated. The European legislator did, however, not have much eye for the consistency of the Europeanised areas of contract law, leaving this part of European contract law look like a patchwork. Moreover, the European Commission mostly ignored the area of service contracts\textsuperscript{30}. The most important attempt to provide for uniform rules on liability for service providers was made with the proposal for a directive on liability for services\textsuperscript{31}, but it encountered so much resistance that the proposal was withdrawn. Only in 2006 a general directive on provision of services in the internal market\textsuperscript{32} was enacted. However, this Services directive in principle does

not affect the contractual relations between the service provider and the client\textsuperscript{33}. As a result, the directive contains only a few substantive rules that may influence the contractual relation between a service provider and its client\textsuperscript{34}. Moreover, there are several directives on public procurement\textsuperscript{35}; however, these only are relevant for the tendering phase. As procurement procedures are not part of this research, I will not go into this any further either.

The second pillar consists of ‘soft law’, i.e. common principles primarily based on comparative research. In this area, the Principles of European Contract Law (PECL)\textsuperscript{36} have been influential, originally especially in academia but nowadays more and more also in decisions of the highest courts in the Member States. The Study Group on a European Civil Code has further developed this part of European contract law by, inter alia, developing principles on specific contracts, such as the aforementioned PELSC\textsuperscript{37}.

Recently, these two pillars of European contract law have come together as the European Commission, in its Communication to the European Parliament and the Council concerning European Contract Law and the revision of the acquis: the way forward (Communication of 11 October 2004, COM (2004) 651 final), indicated its intention to have a ‘Common Frame of Reference’ based on the existing European legislation (the acquis communautaire) and the soft law developed by the Study Group on a European Civil Code and other organisations. In the area of service contracts, the PELSC was to form the basis of the Common Frame of Reference.

In 2009, an (academic) Draft Common Frame of Reference (DCFR) was published\textsuperscript{38} which opens the way to further works on creating the Optional Instrument\textsuperscript{39}. The DCFR contains many rules derived from the PECL, taking into

\textsuperscript{39} At the moment of publication of this manuscript the works on the Optional Instrument for the European Contract Law have intensified and it is expected that during the Polish Presidency of the European Commission such an Optional Instrument will be adopted. It is unlikely that it would contain provisions regarding services contracts, however, such provisions could be expected to be added to it at a later day. (source: speeches during the conference in Katowice on 23-24 September 2010 on European consumer law and the new Polish Civil Code)
account the critical notes on some of the PECL provisions brought out after its publication as well as other legal developments. As far as the PELSC is concerned, it has largely been taken over in the DCFR. The DCFR does not contain all provisions of the PELSC (e.g. it was possible to remove some repetitions by using a more general level of provisions based on the PECL) since it deviates from some of them, and is thought to improve others. However, most of the provisions and principles are the same in the PELSC and in the DCFR. In this study, it is shown that in many legal systems duties to warn are important in the case of the law on material services, such as construction contracts.

As has already been mentioned, the purpose of this book is to determine the existence and scope of a specific duty to warn of a service provider, namely: a precontractual and a contractual duty to warn a consumer-client about a risk that might emerge from a contract with a third party in the construction sector. On the basis of the answer to that main research question it may be later determined what role duties to warn are to play in European contract law and how such duties will be imbedded in such a system. The previously conducted research on the PELSC and recently finished research on the DCFR have included the duty to warn among their provisions. However, whether the duty to warn had been given adequate attention and therefore a proper form in the DCFR (and in the PELSC) is to be seen. As mentioned in the following paragraphs on methodology, this book, on the basis of comparative, functional method, tries to demonstrate whether or not the regulation of the duty to warn in the DCFR (and in the PELSC) deserves further attention. This might be of particular interest for future academics and politicians involved in preparing the Optional Instrument.

1.7. Methodology.

With regard to duties to warn, the Comments to the PELSC and to the DCFR show important differences between the approach in England towards such duties, which is reserved, and the more advanced approach in Germany. This book

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gives a more in-depth analysis of the function the duty to warn plays in common and continental law respectively as a result of using the comparative, functional methodology\(^47\). The scope of the research is, of course, limited, as has been stated in Chapter 1.1 of this book, to a study of certain aspects of the duty to warn. Upon defining in previous paragraphs the aim of this research, its research questions, as well as explaining the relevance of this research, this paragraph focuses on the methodology thereof.

At present, European contract law is only just developing, which means that in order to be able to answer the above-mentioned research questions, use is therefore made of the methodology of comparative law. Comparative method allows a comparison between various national legal systems that have differently regulated the duty to warn in order to see what solutions are available to a European legislator and what inspired the academics working on the DCFR. On the basis of a study of English, German and Dutch law it is investigated what role precontractual and contractual duties to warn play in construction law. To that extent, this book contains an analysis of existing legislation, case law and legal literature. Specific attention is paid to the DCFR, where an attempt is made to achieve an overarching system of rules governing service contracts, including an elaborate scheme for the duty to warn. The PELSC is dealt with as an authoritative source of inspiration for the provisions of the DCFR, which, as explained above, are largely based on the provisions of the PELSC, which, however, sometimes have more extensive comments explaining their meaning or origin.

For reasons of feasibility, the number of countries to be compared in this book had to be limited. The three chosen national legal systems include English, German and Dutch law. As has already been mentioned the intention was to analyse the regulation of a precontractual and a contractual duty to warn in both common and civil law countries. England is a good representative of the common law countries, since it is the most important Member State using this legal system. Within the chapters on English law, reference is made not only to English but, occasionally, also to Canadian case law. The main reason for this is that the UK Supreme Court (formerly: the House of Lords; further referred to as the ‘UKSC’) itself sometimes takes into account the verdicts rendered by the Supreme Court of Canada, as part of the overseas experience, i.e. how the given problem has been looked at and solved in other common law countries\(^48\). The UKSC is helped by the fact that the English law has had a great influence on Canadian case law. Until 1949 the English Privy Council was the court of last resort for Canadians. English law was applied directly in Canada up to the moment when local laws were created, but even then, English law tremendously influenced these local laws. That is why especially older Canadian case law (from before the Second World War) does not deviate much from the line established by English case law. This similarity has started to weaken recently – simultaneously with the Europeanization of English law, Canadian law started to be


influenced more and more by the case law of the United States of America. Nevertheless, the UKSC continues to refer to Canadian cases where it seeks inspiration for its own decisions. As a result, some Canadian cases have obtained certain authority for the English courts when deciding matters pertaining to, i.e., construction contracts. As a consequence, also in English literature reference is made to such cases. This is true in particular with regard to the duty to warn, which developed in Canada earlier than in England and Wales. Therefore, in a study on English law on the duty to warn in construction cases, reference to Canadian law cannot be missed.

Subsequently German and Dutch law have been chosen in order to represent civil law countries. The choice of these two legal systems has not been incidental. Although broadly recognised in both countries, the duty to warn is regulated rather differently in Germany and in the Netherlands. Only in the Netherlands the duty to warn has been codified, which followed rich case law on the duty to warn developed in this country. Therefore, the Netherlands has been chosen to give an example of a possible codification of the duty to warn in a future European contract law. Germany is one of the civil law countries where there is also an abundant amount of case law on the duty to warn, but this duty has not yet been codified. In practice, in German law, the duty to warn is often recognised as a part of some other codified duty. It seemed interesting to include in the comparison not only a civil law country where the duty to warn is codified, but also a civil law country where the duty to warn has not been codified, and to see how the duty to warn is treated in such a legal system without an explicit legal basis in the codified law itself. In a way, one may look at Germany as creating a bridge between the codification of the duty to warn in the Netherlands and the recognition of the duty to warn in the case law of a common law system such as that of England. Of course, it could have been interesting to add a comparison to other legal systems differently regulating the duty to warn in Europe, e.g. France or Belgium, but due to the necessity to finish this research within a few years as well as certain language barriers, these countries had been excluded from the research scope.

To answer the main research question of this book valid objects to compare within the chosen legal systems needed to be found. With this in mind, a detailed analysis of the national case law was conducted, which allowed for a comparison of legal systems not only based on their legal provisions but mainly on the judicial decisions given in response to similar situations. This functional method is used since it allows for comparison of how different law systems solve the same problem irrespective of different legal concepts they may use. Such similar situations in the analysed legal systems include e.g. the designer making a mistake in his design plans that should have been recognised by the builder and the builder not warning the client about this, or the builder making a mistake in the performance of his contractual obligations and another builder, who followed up on the first builder’s works, not warning a client about this even if he should have seen that mistake. The presented similarities and differences between judicial responses to such situations, i.e. under which circumstances to oblige a professional party to give a warning to a consumer, in three different national legal systems are then evaluated on the basis of following criteria: clarity and legal certainty. This evaluation is made in order to assess whether,
within the framework of harmonisation of contract law, the solutions that give the most legal certainty and clarity to the consumers have been chosen in the DCFR.

Therefore, the yardstick for evaluating various regulations of the duty to warn in the mentioned legal systems is clarity and legal certainty. Whether certain rules and their enforcement are considered to be ‘better’ or ‘more clear’ is evaluated from the point of view of a consumer and which rule is easier understood by him and is easier applied by him. The presentation of the regulation of duties to warn in these four legal systems – the legal systems of England, Germany and the Netherlands, and its regulation in the DCFR – as well as their comparison and evaluation may indicate which solutions are clearer and give more legal certainty. On the basis of the functional methodology of comparative law the question is answered whether, within the framework of harmonisation of contract law, the solutions that give the most legal certainty and clarity to the consumers have been chosen in the DCFR. This is done by outlining potential inconsistencies and gaps in the current regulation of the duty to warn as well as presenting alternative options that have been adopted in certain Member States. Normative suggestions, as to whether further development of the precontractual and contractual duties to warn is needed or a retrograde step is to be preferred to refrain from formulating such obligations, are left out for future researchers to be made. This might happen, for example, in the process of preparing the regulation of service contracts that could be included, at a later stage, in the Optional Instrument.
Chapter 2. Emergence, source and scope of the duty to warn – in general.

In this chapter I intend to analyse whether in construction law there is a duty to warn about a risk coming out of the contract with a third party, which binds professional parties when they did not have an express contractual obligation to that extent. What would that duty to warn be based on? I will consider whether the duty to warn is regulated in any statutes, or whether it follows from the application of standard forms of contract that parties included in their contract or whether courts have implied it. This chapter presents not only the potential sources of the duty to warn in English, German and Dutch law but also defines the duty to warn and outlines its scope, which will be further elaborated on in the following chapter.

2.1. English law.

2.1.1. Contractual duty to warn.

The problem with recognising the duty to warn is not a new one in English construction law. Already in the 19th century, it appeared to be problematic to define the contractual obligations of parties and to set up their limits. The duty to warn was never considered as one of the main obligations of the parties. To the contrary, its existence and binding force remains repeatedly put in doubt. The prevailing opinion, which I share, is, however, that despite all the criticism there has always been some evidence of its existence.

One of the problems with the duty to warn relates to the lack of a clear definition thereof. Some authors see the duty to warn as an obligation of a contractual party to inform the other party of his own breach of contract. For others, it is a more general obligation pursuant to which the parties are obliged to warn each other not only of their own breach of the contract, but also of any breaches by any other persons or any other inconsistencies within the contract or related to its performance, which

51 In such a case the duty to warn might be seen as an express contractual obligation, however, I will argue that even without the provision on the duty to warn in the standard form of contract the parties would be bound by the duty to warn taking into account the “good faith” rule. This will be the situation in German and Dutch law.


could result in the unsatisfactory completion of the construction\textsuperscript{55}. The scope of this book concerns only the duty to warn about a breach of a contract by the third party or about any other inconsistency within that third parties’ contract.

One of the reasons that contribute to the lack of clarity in the English regulation of the duty to warn is the fact that there is no statutory regulation on the duty to warn. Such a duty has not been included in the most popular standard forms of contract that are applied to contracts between service providers and clients in the construction sector\textsuperscript{56}. Until the Housing Grants, Construction and Regeneration Act of 1996\textsuperscript{57} there had been no statutes regulating the rights of the parties in the construction process. As a result, the detailed rights and obligations of the parties were set out in the standard forms of contract. The tendency in English law had been for major parties in the construction sector to issue their own standard forms of contract. Moreover, builders, designers and engineers use different standard forms of contract. Additionally, most standard forms are regularly and often updated\textsuperscript{58}. This means that it is difficult to discuss and evaluate how potentially such standard forms of contract might influence the duty to warn.

Most commonly encountered and applied are the standard forms of contract produced by the Joint Contracts Tribunal (“the JCT”). The JCT was established in 1931 and since then produces standard forms of contracts, guidance notes and other standard documentation for use in the construction sector\textsuperscript{59}. It consists of members of various associations representing service providers active in the construction sector, employers, local authorities and sub-contractors. The Standard Building Contract (“the JCT form”) is one of the standard forms of contract produced by the JCT that is applied in all types of building work\textsuperscript{60}. In the 2005 edition of the JCT form\textsuperscript{61} there is no clause on the duty to warn of the builder in case he knows or should have known about the design defects\textsuperscript{62}. However, clause 2.1 stipulates that the builder should perform his work ‘in a proper and workmanlike manner’\textsuperscript{63} that may be understood as with a ‘reasonable skill and care’\textsuperscript{64}. Since the English courts invoked the duty to warn

\begin{thebibliography}{9}
\bibitem{} Further discussed in the following chapter.
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\bibitem{} << http://www.jctltd.co.uk/ >> lastly checked on 26.01.2011
from an obligation to act with a ‘reasonable skill and care’\(^{65}\) it is possible that a duty to warn could be seen as a result of the obligation described in the clause 2.1 of the JCT form. Pursuant to clause 2.3 the builder has an express duty to inform the designer of any discrepancies between the design plans and documents that he receives\(^{66}\). This duty is sometimes seen as a source for the express duty to warn of the builder\(^{67}\). Moreover, while pursuant to clause 3.10 the builder is obliged to follow instructions given to him by the designer, if

“In the Contractor’s [the builder – JL] opinion compliance with any direction (...) or any instruction issued by the Architect/Contract Administrator [the designer – JL] injuriously affects the efficacy of the design of the Contractor’s Designed Portion (...), he shall within 7 days of receipt of the direction or instruction by notice in writing to the Architect/Contract Administrator specify the injurious effect, and the direction or instruction shall not take effect unless confirmed by the Architect/Contract Administrator”.

The designer would issue these instructions to the builder during the construction process. That does not imply a duty to warn (notify) as to the defects that the builder discovered or should have discovered in the design plans itself, but only as to the risks of specific alterations of the design plans that would be introduced later in the construction. Still, a limited duty to warn could be inferred from this provision\(^{68}\). However, it has also been argued\(^{69}\) that the fact that the JCT form contains certain express obligations of the builder, including a limited duty to warn, does not leave room for the implication of other duties of the builder, such as the duty to warn of defects in design plans. As a general rule, English law does not interfere by imposing more obligations on the contractual parties than those they chose to oblige themselves to, in case those parties conclude a detailed and specific contract\(^{70}\). It seems therefore that the standard forms of contract should not be seen as an automatic source for a duty to warn of a professional party in the construction sector.

In the above paragraph it has been stated that the duty to warn, also in its narrower definition, is not imposed on parties by English statutes on construction law. The parties to the contract might choose to regulate the duty to warn explicitly, which then binds them accordingly. If there is no explicit contractual term on the duty to warn, one might think that the duty to warn could be implied, based on the general

\(^{65}\) That obligation has also been codified in Section 13 of Supply of Goods and Services Act 1982: ‘there is an implied term that the supplier will carry out the service with reasonable care and skill’.

\(^{66}\) M. F. James, Construction Law, Houndsmills: MacMillan, 2001, 2 ed., p.5-6

\(^{67}\) further discussed in the chapter on the builder’s duty to warn


contractual principles, e.g. good faith\textsuperscript{71}. The principle of good faith is not recognised in English law \textit{per se}\textsuperscript{72}. In certain cases, the application of the good faith principle can be recognised in practice\textsuperscript{73}, but these exceptional cases do not lead English doctrine or judges to accept the general application of good faith to contractual (and even less so to precontractual) dealings. The term might be implied into a contract either in law (by statute or at common law) or in fact\textsuperscript{74}. A term might be implied \textit{at common law} in case it can be inferred from the actions and intentions of the contractual parties that this term is necessary for the performance of that contract. The test of ‘necessity’ is harsher than the test of ‘reasonability’, since the term might be implied only if the contract would not work without that term\textsuperscript{75}. Terms may be implied \textit{in fact} if it can be proven that parties intended to include these terms in the contract, despite not having expressed that intention during contractual negotiations. In practice it is, however, difficult to prove that both parties would have agreed to include a certain clause into a contract. Additionally, in case the contract concluded between the parties is detailed and individually negotiated, it would be more difficult to convince the court that the parties intended to include other clauses therein, taking into account that the parties had a possibility to express their wishes\textsuperscript{76}. As has been mentioned before, the duty to warn is not regulated in any statute, which would then demand it were implied in law. Since the parties usually describe the contractual obligations of the builder and the designer in their construction contracts in details, it seems very hard to prove that the duty to warn should be implied in fact by the court if the duty to warn is not mentioned explicitly as one of the express contractual terms. The remaining option is to find the duty to warn implied in common law. Then, the question whether the duty to warn might be implied into a contract should be seen in the light of whether it is ‘necessary’ for the contract to contain that clause. Let us look at English case law to see whether the duty to warn is in practice implied by English courts either in law or in fact.

\textsuperscript{71} O. Hayford, ‘Did you know… A “Construct Only” Contractor Can Be Liable For Design Defects?’, Mondaq, 07/07/2009, 2009 WLNR 12902774
The duty to warn in its broader scope has been recognised in the English case law, following earlier judgments of the Supreme Court of Canada\textsuperscript{77} in which this duty to warn had also been recognised\textsuperscript{78}.

In the Canadian case of \textit{Nowlan v. Brunswick Construction Ltd.} \textsuperscript{79} the builder’s duty to warn the client about the risk coming out of the contract with a designer has been recognised. The facts of the case were as follows. Mr. Nowlan concluded a contract with the company Brunswick Construction Ltd. for the building of his house, which was to be realized according to plans prepared by an independent designer – employed directly by the client prior to concluding any agreement with the builder. Pursuant to Article 11 of the “General Conditions of the Contract” the builder undertook an obligation to

“Give efficient supervision to the work using his best skill and attention”.

Pursuant to Article 9, the client might have had employed an independent engineer who would then have

“General supervision and direction of the work”, but still “the contractor [the builder - JL] shall have complete control, subject to Article 11, of his organization”.

The court stressed that it was clear from the evidence,

“That the Owners [the client - JL] did not engage the architects [the designer - JL] to supervise the construction. They relied entirely upon the experience, judgment and skill of the Contractor [the builder - JL] in this respect”.

Unfortunately, for Mr. Nowlan, the design plans prepared for him contained a serious omission – i.e. they contained no provisions for ventilation of roofs and walls, which upon materialization of the whole project by the builder led to leaks and further to a very serious rotting condition of the structure of the house. The court had no doubt that even though

“The damage might not have occurred but for the poor design of the building”,

the builder and the designer

“Were jointly and severally liable as concurrent wrongdoers”.

\textsuperscript{77} As has been mentioned in the introduction to this book, Canadian law is still closely bound with English law and the Supreme Court of Canada does not hesitate to base its verdicts on the House of Lords cases (as was the case here). In turn, the House of Lords itself sometimes takes into account the verdicts rendered by the Supreme Court of Canada, as part of the overseas experience, i.e. how the given problem has been looked at and solved in other common law countries. See, for instance, National Westminster Bank plc v. Spectrum Plus Limited and others and others, [2005] UKHL 41, <<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd050630/nat-1.htm>> (lastly checked on 26.01.2011)


The following excerpt from *Hudson’s Building and Engineering Contracts*\(^{80}\) was cited in the justification of the judgment:

“So a contractor [the builder - JL] will sometimes expressly undertake to carry out work which will perform a certain duty or function, in conformity with plans and specifications, and it turns out that the works constructed in accordance with plans and specifications will not perform that duty or function. It would appear that generally the express obligation to construct a work capable of carrying out the duty in question overrides the obligation to comply with the plans and specifications, and the contractor [the builder - JL] will be liable for the failure of the work notwithstanding that it is carried out in accordance with the plans and specifications. Nor will he be entitled to extra payment for amending the work so that it will perform the stipulated duty”.\(^{81}\)

On the basis of that authority, the majority of judges decided that

“The appellent [the builder - JL] was under a duty to warn the respondents [the client - JL] of the danger inherent in executing the architect’s [the designer’s - JL] plans”.

It could be argued that this case provides an example of the express provision in the contract obliging the builder to warn the client about defects within the design. Yet, it should be noted that the general provisions of the contract were vague and the court did not state that the duty to warn was expressly taken from the written contract. To the contrary, the way the judgment is formulated seems to indicate that the court relied more on the good faith behaviour of the professional party and the fact that the construction should be fit for its purpose\(^{82}\). In the legal literature, this basis for a duty to warn is also treated with caution. Clause 2.3 of the JCT Standard Form is given as an example of an express provision in the contract, obliging the builder to inform the client about defaults. Pursuant to this clause, if the builder finds any discrepancy in or divergence between the documents there set out, he must give written notice thereof to the designer. It is simultaneously stressed out that such a provision would not oblige the builder to actively seek for any such differences between documents, and would not even oblige him to draw the attention of the client to obvious errors. In the case at hand it is arguable whether the builder could be seen as having been employed to warn the client about the default of the designer. It seems more likely that the builder’s duty to warn could be treated as an implied duty to warn\(^{83}\).

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\(^{81}\) The reference to *Hudson* in this case had been criticized in the later edition of this textbook: I. N. D. Wallace, *Hudson’s Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 545. It has been said that this passage was more appropriate to interpretation of contracts containing express performance undertakings. However, the writers of *Hudson* said also: “Nevertheless, whatever may be said of its application to the facts, there is no reason to doubt the correctness of the underlying principle in the majority judgment.”


\(^{83}\) Seen as such also by: L. A. Rutherford, S. Wilson, ‘Design defects in building contracts: a contractor’s duty to warn?’, Construction Law Journal, 1994/10, p. 90-99
This case is quoted whenever English courts debate whether in a given case the builder’s duty to warn existed or not\textsuperscript{84}. In some cases, the exact fulfilment of the builder’s express contractual duties would not suffice to indemnify him from any potential faults, which shall occur in the constructed object\textsuperscript{85}. However, whether in case the builder noticed or should have noticed any fault within the design, he had an obligation to warn the client of the presence of this default and should not proceed with the construction process as if everything was in order, was still questioned. It has to be pointed out that even in the\textit{Nowlan} case one of the judges – Judge Dickson – dissented. He reasoned, in accordance with the hitherto case law, that the builder was only obliged to perform his contractual obligations and that the duty to warn was not one of them:

“The obligations of the building contractor [the builder - JL] to the owners [the client - JL] are contained within the four corners of the contract and nowhere else. (...) There is nothing in the contract which imposes a duty on the contractor [the builder - JL] to detect faults in the design plans prepared by the owners’ architects [the client’s designer - JL] or imposes a duty to inform the owners [the client - JL] that the plans are faulty in design”.

Some other courts refusing to recognise the duty to warn in later cases in England shared his view\textsuperscript{86}.

Just as in Canada, the duty to warn had been recognised in certain older English case law. In\textit{EDAC v. Moss}\textsuperscript{87} the builders believed that part of the design prepared by the designers (independent contractors of the client) was faulty. There was no express contractual obligation on the builder to warn the designers or the client of this default neither was the builder obligated to inspect and assess the design. However, Newey J. who was the Official Referee\textsuperscript{88}, that is the judge deciding the case, stated that there was an implied term in the building contract concluded between the client and the builder pursuant to which the builder was obliged to act with the reasonable skill and care of an ordinary competent builder. Moreover, the judge recognised an implied term that the builder was obliged to warn the client of design defects, in as far as he believed they existed.

The same judge confirmed his point of view in another case,\textit{Victoria University of Manchester}\textsuperscript{89}, in which he \textit{inter alia} stated that:

“The University alleged that a duty to warn was to be implied. The contractor did not admit the allegation, but the matter was not argued at length because in


\textsuperscript{86} E.g. The University Court of the University of Glasgow v. William Whitfield and John Laing (Construction) Ltd. (Third Party) [1989] 5 Const LJ 73; (1988) 42 BLR 66


\textsuperscript{88} Since 1998 instead of ”Official Referees” these judges are known as “Judges of the Technology and Construction Court”.

These judgments have been, however, criticized in the English literature\(^{90}\) as not fulfilling the ‘necessity’ requirement and therefore not giving grounds for implying a term on the duty to warn in law. Indeed, the judge referring these cases does not give a justification for why the duty to warn should be implied into a contractual relationship aside being convinced that a builder should act with the reasonable skill and care and that it would not make sense for the builder to carry out a construction of which he knows that it would either not work at all or not satisfactorily. Arguments brought up by the judge sound logical from a practical and economical point of view, but could be questioned as to their legal basis. That is why these judgments, while important when analysing the emergence of the duty to warn in English law, are not quoted in more recent judgments that debate whether there is a duty to warn binding a professional party.

A few years after these judgments had been rendered, the more traditional approach to the duty to warn, i.e. reluctance in implying such a duty to a contractual relationship, has been confirmed\(^{91}\). The Queen’s Bench Division considered the case *The University Court of the University of Glasgow v. William Whitfield and John Laing (Construction) Ltd.*\(^ {92}\), in which the designer claimed that he was supposed to have been warned by the builder about the defects within the design he had prepared himself. Both the designer and the builder were independent contractors employed directly by the client – with no contractual link existing between them. When the client sued the designer, he subpoenaed the builder, claiming that the latter one had a duty to warn either the client or the designer and if that warning had been issued, the default would not have taken place. Based on this reasoning the designer claimed a contribution of damages from the builder. Firstly, the court considered whether the builder had a duty to warn the client or the designer acting as the client’s agent. It stated that

> “Where there is a detailed contract of the nature found here, there is no room for the implication of a duty to warn about possible defects in design. (…) If, as I take to be the position in the circumstances of this particular case, there was no room for the implication in the contract of an implied duty to warn the building owner of defects in the architect’s design, it follows (…) that there should be no wider duty in tort”.

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\(^{92}\) *The University Court of the University of Glasgow v. William Whitfield and John Laing (Construction) Ltd. (Third Party) [1989] 5 Const LJ 73; (1988) 42 BLR 66*
Furthermore, the court considered the possibility that the builder had the tortious duty to warn the designer himself (and not as an agent of the client) on the facts of the above-cited cases:

“It seems to me that the decisions in EDAC v. Moss and Victoria University of Manchester can stand with more recent decisions if they are read as cases where there was a special relationship between the parties, but not otherwise, and bearing in mind the difficulties in analyzing the meaning of the words “special relationship” and “reliance” (…) In the present case, the third party [the builder - JL] did not know that the plaintiffs [the client – JL] or the defendant [the designer - JL] were relying on them in matters of design (…) I wish to make it plain that I am not suggesting that there are no circumstances in which a term may be implied or a duty owed in tort requiring a contractor to warn a building owner of defects in the design. I have already referred to the possibility of a special relationship where the contractor knows that the building owner is relying upon him. In addition, if by his contract the builder undertakes to achieve a particular purpose or function, he will not be relieved of the duty to achieve that purpose or function by the deficiency of designs, which he is also under a duty by the contract to follow”.

The court in the last case distinguished its facts from the facts of the previous two mentioned cases. The conclusion in this case was that the builder’s duty to warn the client about the risk coming out of the contract with designer is seldom recognised. The court explicitly mentions that where the contract is formulated in a detailed manner, there is no room left for an implied term on a duty to warn, since the parties had been able to include that clause explicitly in their contract.

Similarly, as far as the duty to warn in tort is concerned, it has been stated that if there is no place in a contract for a duty to warn, it might not be recognised in tort either. However, the door was left open to adjudicate future cases differently if in such future cases there was a special relationship between the parties that made the client and the designer specifically rely on the builder to grant them such a warning. The existence of this special relationship between the client, the designer and the builder does not exclude these cases from the scope of research discussed in this book, since it does not mean that the builder was employed to grant such a warning to the client. To the contrary, it seems that the client would simply trust that the builder would warn him due to the respect that the latter should have for the client’s interests. The existence of this special relationship between the client and the builder seems to be based on a principle similar to the principle of ‘good faith’. Furthermore, if the contract binding between the parties was very explicit and the builder obligated himself therein to achieve particular goals, he would not be able to defend himself in case of non-fulfilment of these goals by claiming that there was a defect in the design. That means that the builder had at least the duty to warn the client about a defect in the design, in case when this defect would or already has impeded his performance of

93 Relation between the tortious and contractual duty to warn in English law is further discussed in the introduction.
94 See also: Robinson v PE Jones (Contractors) Ltd, [2010], T.C.L.R. 3 (QBD (TCC)), Construction Law Journal 2010, 26 (3), p. T79-119 where it was held that “in principle a builder can owe a duty of care in tort to his client, concurrent with his duty in contract, in relation to economic loss”.

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the contract. According to Bolton, the builder should also be held liable in case when he has the “actual” knowledge of the defect and still fails to warn the client\(^95\).

This last judgment was often referred to in the following years when other judges diverted from the \textit{EDAC v. Moss}\(^96\) case. In one of these cases - \textit{Oxford University Press v. Stedman}\(^97\), for example, the court stated that \textit{EDAC v. Moss} was based \textit{inter alia} on the reasoning of \textit{Duncan v. Blundell}\(^98\), where it was said:

\begin{quote}
“Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if he cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him chooses to supersede the workman’s judgment by using his own”.
\end{quote}

Applying this reasoning to the case before it, the court stated that the client obviously did not rely on the builder, because he also employed a designer. In the court’s opinion, it would be highly impractical if the builder were obliged to warn the client about the defects in the design, in case when there was a designer specifically employed to perform such duties. That is why the court did not recognise the builder’s duty to warn the client of any design defects. Another factor, which in the eyes of the court confirmed that there was no duty to warn, was the fact that in this case the parties concluded a very detailed contract. As a result, the court decided that there was no room to imply that the builder had such a duty to warn.

It has to be noted here that if the reasoning of the court was further supported in English law, there could be no talk about the existence of a duty for the builder to warn, at all. Namely, in case the default would originate in the construction process for which the builder would bear responsibility, he would be liable for the damage suffered by the client anyway, regardless of there being a duty to warn or not. In case the builder is not seen as having to warn about the default he noticed or should have noticed in the work of another specialists employed by the client, it seems that there is indeed no default about the existence of which the builder would have to warn.

Based on the cases presented above, it could be stated that English courts are very reluctant to recognise the contractual duty of a professional party in the construction sector to warn about the default or risk coming out of the contract or from a performance of a third party. In case law from that period, however, courts did hold the builders (and sub-contractors) liable for not warning the clients and/or designers about defects in the design\(^99\). Nevertheless, even if the builder was held to be liable to the client, the court preferred not to (expressly) relate this liability directly

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\(^{95}\) S. Bolton, ‘The Builder’s Duty to Warn of Defects in Design’, BIA News No. 97; source: the Department’s of Building and Housing (BIA) of New Zealand website – \texttt{<<www.bia.govt.nz/publicat/news97/duty.html>>} (lastly checked on 01.10.2008); at this moment (26\(^{th}\) of January 2011) available at request only \texttt{<<http://www.dbh.govt.nz/bia-news-index>>}  
\(^{98}\) Duncan v Blundell (1820) 3 Stark 6, 171 ER 749  
to the builder’s duty to warn, relying instead on his obligation to exercise the due amount of care, it often being recognised as an implied term in the contract – e.g. in *Lindenberg v. Canning* 100.

Pursuant to the facts of *Lindenberg v. Canning*, the builder was supposed to carry out the demolition of some walls, which according to the design plans delivered to him were supposed to be non load-bearing walls. It turned out that the designer had made a mistake and the demolition of these walls disturbed the structure of the construction. The client started proceedings against the builder claiming that he had been negligent in performing his obligations. The same judge, who adjudicated the cases *EDAC v. Moss* 101 and *Victoria University of Manchester* 102, also tried this case. The judge followed his earlier reasoning, notwithstanding the later judgments like *Oxford University Press v. Stedman* 103. The judge pointed out that the builder was obliged to act with the care to be expected of an ordinary competent builder. He took note of the fact that even the chimneybreast was indicated as non-load bearing on the design, which should have given the builder rise to doubt the design. The judge was convinced that at least the defect regarding the chimney was clear to the builder, because the builder suggested postponing demolition of that chimney.

“*In view of the inadequacy of the plan and the likelihood that the 9” walls were supporting the ceiling, Mr Canning [the builder – JL] should I think have proceeded with the very greatest caution. At the very least he should have raised with Mr Carlsh [the designer – JL] doubts as to his plan and asked whether Mr Carlsh was sure that the 9” walls were not load-bearing. Even if Mr Carlsh had given assurances Mr Canning would I think have been prudent to have put up temporary propping, but in the absence of such assurance he should undoubtedly have done so. (...) I think that he behaved with much less care than was to be expected of the ordinary competent builder and that he therefore acted in breach of contract*”.

This case reinstates the view on the duty to warn applied in *EDAC v. Moss* 104 and *Victoria University of Manchester* 105, i.e. application of an implied term to act with reasonable skill and care 106. From this follows that the builder should have warned of defects caused by a third party, i.e. the designer, which are evident enough that the builder knows or ought to know they exist 107.

Taking into account that this case has been adjudicated by the same judge, whose reasoning has been so thoroughly criticized, it would be difficult to state just on the basis of this case that the builder has a duty to warn about defects in the design

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100 Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71
107 To be discussed in the following chapters.
in English law. A different judge confirmed the existence of the duty to warn in the case *Bowmer & Kirkland v. Wilson Bowden Properties Ltd.* This judgment did not focus explicitly on the duty to warn, however.

It is no wonder that while adjudicating one of the recent cases *Plant Construction v. Adams* the Court of Appeal stated:

“There appears to be no authority in this court which considers whether and in what circumstances a contractor or a subcontractor has a duty to give a warning, if he appreciates (or ought to appreciate) that work which he is contractually obliged to perform is inadequate”.

However, this and another newer case confirm that such a warning might nevertheless be expected from the sub-contractor. Since the duty to warn of the subcontractor reflects the duty to warn of the builder, the same might be induced for the builder’s duty to warn. Nevertheless, it must be noted that in *Plant Construction v. Adams*, the duty to warn has been recognised as a part of another duty:

“JMH [the sub-contractors – JL], with others, had a duty to guard against the risk of personal injury to a potentially large number of people. That duty extended to giving proper warnings about the risk”.

Therefore, once again English courts do not directly imply a term on the duty to warn to the contract but divulge it as a part of another duty that may be implied into a contractual relationship. Still, this case is recognised as the first review of the implied term of the duty to warn by the English Court of Appeal in the doctrine. The argumentation of the Court of Appeal has also been evaluated as allowing for the duty to warn to be recognised in future cases not only where imputed rather than actual knowledge of the professional party was alleged, but also where a design defect was only economic and not dangerous. It is due to these recent judgments that the implied duty to warn may be seen as constituting part of the English construction law.

In a recent case, *Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd.*, the contractual duty to warn of the structural engineer (who was

113 These cases will be further elaborated on in the following chapters on the scope of the duty to warn.
115 *Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd.* (2007) 1 BLR 526
acting in a competence similar to a designer in this case) towards the builder was recognised explicitly. In that case, the structural engineer had a contractual relationship with both the client and the builder. He was employed to advise and design some temporary works that were conducted at the construction site; however, supervision and inspection of the construction were not mentioned in his contract as one of his obligations. Despite the absence of an express contractual duty to warn for the engineer the court adjudicated that:

“An engineer employed by an owner [the client - JL] in respect of permanent works who observes a state of temporary works which is dangerous and causing immediate peril to the permanent works in respect of which he is employed, is obliged to take such steps as are open to him to obviate that danger. This includes warning of an immediate danger to those works caused by an imperiling act by the contractor [the builder - JL] (...). It seems to me that that follows, partly as a matter of common sense, but also because the engineer is, after all, instructed in relation to the permanent works as a whole. It would appear strange if he is under a duty to take such steps as he can to see that they survive for say, the next 25 years, or whatever the design life for the building is, but is not obliged to take any steps to warn of an immediate danger to those works caused by an imperiling act by the contractor [the builder – JL] (...). It has often been said that the foundations of the common law are (one hopes) based upon common sense. The finding in this case of a duty to warn on the part of a structural engineer in the circumstances of this case, where deep basement excavations are performed without temporary support threatening a collapse of the whole structure (which occurred in fact), fully accord with common sense and the principles applicable to the scope of duty of a professional such as Mr. Fidler [the engineer - JL].”

Since the contractual duty to warn in this case had not been an express term, the court chose to imply it in common law into the contract. The court confirmed also that next to the contractual duty there was a tortious duty to warn binding the engineer, as well. On the basis of the recent cases it might be argued that the contractual duty to warn is recently more easily implied into a contractual relationship116.

2.1.2. Precontractual duty to warn.

While there were always problems with defining the contractual duty to warn in English law, at least there were some cases that recognised its existence and on their basis we might discuss the source and the scope of that duty to warn. This is not the case as far as the precontractual duty to warn in English law is concerned.

The precontractual duty to warn, just like the contractual duty to warn, is not regulated by any statute in English law. The most likely legal basis for the precontractual duty to warn would be its reliance on the good faith principle. However, as it has already been mentioned, in general, the good faith principle is not recognised in English law in either precontractual or contractual dealings. As far as the need to give certain information and warnings to the client during the precontractual negotiations is concerned, English law does not recognise a positive precontractual duty to inform. It is commonly accepted that every party during precontractual negotiations is responsible for gathering information on his own and taking care of his own interests. What is recognised in English law is the negative side of the duty to inform, i.e. precontractual duty not to deceive nor misrepresent, but the parties do not have a general duty to disclose all information. Since mere non-disclosure is not treated as misrepresentation may there be any talk of a duty to warn of e.g. a builder to the client when the builder notices a default in the design plans before he enters into a contract with the client?

This question has been answered in the affirmative as far as tender proceedings were concerned. In the case Department of National Heritage v. Steensen Varming Mulcahy the court took into account that the builder might have a duty to warn the design team about a default in the design plans as soon as he notices that default.

“(…) both DNH [the client – JL] and BB [the builder – JL] should have objected to the design at the time of tendering, or in default of such objection being accepted, BB should have refrained from tendering”.

Constructions requiring tender proceedings do not fall within the scope of this research, since they are usually conducted by public entities and big private companies, which do not resemble consumers and could not fall under the protection provided for consumers. However, if even in cases of construction where the client itself is a big construction company the duty to warn might bind one professional party against another professional party in the precontractual phase, it could be assumed that the same would apply in case it would be the consumer who would need to receive a warning.

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120 In the mentioned case the client was the British Library.
In general, however, the precontractual duty to warn will not be easily assumed. This is also the reason why in the following chapters the precontractual duty to warn in England will barely be mentioned, since there is no case law to be found to define the scope of the precontractual duties to warn of a professional party in the construction sector in respect of the risk coming from a third party. If any precontractual duty to warn would be found, it would most likely be owed in tort, however, certain conditions would have to be met in order to recognise such a duty to warn. This tortious duty to warn would fall outside the scope of this book, contrary to the contractual setting discussed earlier. Even in case of an independent tort, not related to the precontractual relationship between the parties, certain conditions must be met in order to recognise such a duty to warn.

2.2. German law.

2.2.1. Contractual duty to warn.

In German construction law parties have a rather wide amount of discretion when concluding building contracts. Generally, such contracts are governed by BGB-provisions on contracts for work. However, it has to be noticed that many of these BGB-provisions are not mandatory and can therefore be substituted by or modified into provisions more acceptable to the contractual parties. That is what the parties to building contracts usually choose to do as the BGB-provisions have been formulated and written down in the BGB in a too general form to be effectively applied in the construction business. As a result, the final outcome – namely, the building contract – while corresponding to the general formal requirement of a contract for work, in practice greatly varies from case to case, both with regard to the specific obligations and to the rights that it establishes.

Attempting to make the process of concluding building contracts easier, the German Committee for Contract Procedures in Building Works (DVA) drew up rules for the contract procedures to be observed in the construction industry: the Vergabe- und Vertragsordnung für Bauleistungen (VOB). These rules have been

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123 Bürgerliches Gesetzbuch, i.e. the German Civil Code
124 Der Werkvertragsrecht des BGB, regulated in BGB in § 631 and further
127 B. Rauch, _Architektenrecht und privates Baurecht für Architekten_, Köln: Rudolf Müller, 1995, p. 300-313
128 Deutschen Vergabe- und Vertragsausschuss für Bauleistungen.
divided into three parts\textsuperscript{130}: VOB/A contains a general regulation on awarding public building contracts\textsuperscript{131}, VOB/B contains general contractual provisions for the performance of building contracts\textsuperscript{132} and VOB/C contains general technical contractual provisions of building contracts\textsuperscript{133}. In this research we will concentrate on the provisions of VOB/B, which are mainly applied in practice by private parties and which regulate the obligations that the parties need to fulfil during the performance of the contract, including the duty to warn. The general provisions of VOB/B have been changed a few times – the latest amendments having been made in the year 2002\textsuperscript{134}, when the whole German legal system on contractual liability was reformed. The parties to the building contract can apply VOB/B-provisions if both parties agree thereon explicitly\textsuperscript{135}. In case the construction has been planned by a public law company which then announces a tender for that construction to take place, application of the VOB/B-provisions is compulsory.

Other parties have of course full discretion to apply VOB/B-provisions in their contract, either in their entirety or just some of them. In practice, most of the building contracts are concluded by usage of standard VOB/B terms\textsuperscript{136}. The provisions of VOB/B constitute ‘general terms of building contracts’, substituting the default provisions of the BGB. Due to the character of VOB/B-provisions as preformulated contractual terms in building contracts they are to be considered as standard contract terms (\textit{Allgemeine Geschäftsbedingungen}, AGB\textsuperscript{137})\textsuperscript{138}. As such, they have to be in conformity with the legislation on standard contract terms, until 2002 contained in the law on AGB-provisions\textsuperscript{139} and since then with the corresponding provisions of the BGB\textsuperscript{140}. This implies that the VOB/B-provisions are subject to the substantive judicial control as general contractual terms\textsuperscript{141}.

As mentioned in the previous paragraph, in practice the parties to a building contract usually apply the provisions of VOB/B\textsuperscript{142}. § 4 No. 3 of VOB/B\textsuperscript{143} expressly

\textsuperscript{131} B. Rauch, \textit{Architektenrecht und privates Baurecht für Architekten}, Köln: Rudolf Müller, 1995, p. 313
\textsuperscript{132} B. Rauch, \textit{Architektenrecht und privates Baurecht für Architekten}, Köln: Rudolf Müller, 1995, p. 314
\textsuperscript{134} Further referred to as presently binding VOB/B provisions.
\textsuperscript{136} B. Rauch, \textit{Architektenrecht und privates Baurecht für Architekten}, Köln: Rudolf Müller, 1995, p. 300
\textsuperscript{137} Allgemeine Geschäftsbedingungen, i.e. standard contract terms
\textsuperscript{139} Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen
\textsuperscript{140} BGB §§ 305-310
obligates the builder or the designer (generally a professional party) to inspect the construction site and to warn the client of any observed inaccuracies. Pursuant to the present version of VOB/B, the professional party has a duty to warn the client immediately, in written form, of any observed inaccuracies as to the future performance of the contract, quality of the materials delivered by the client or performance of other professional parties. The source of this duty is presumed to lie in the general rule of “good faith” (“Treu und Glauben”, § 242 BGB). Therefore, § 4 No. 3 of VOB/B should be interpreted, in accordance with § 242 BGB, as a provision that is supposed to protect the client from excessive damage, which could result from the non-reception of the warning on time. ‘If the service provider had doubts as to (…) the obligations and their performance of another party (…)’ – the text of the provision of the VOB/B clearly indicates that the duty to warn of a builder or a designer in Germany encompasses also a duty to warn about the risk to a client coming out of a contract with a third party.

The duty of a professional party to warn could also arise on the basis of application of other provisions of VOB/B. For example, § 3 No. 3 of VOB/B regulates the duty for the professional party to review the documents received from the client and to warn the client if any inaccuracies are or should have been noticed. The aim of this provision is to discover any inaccuracies that might be found in the construction documents prior to proceeding with the construction itself, which could reduce potential loss to the client. The provision of § 4 No. 1 of VOB/B might also be a source for the duty to warn of the professional party. Namely, if the professional party considers instructions of the client to be unnecessary or pointless, he should inform and warn the client about it. The professional party is obligated to
follow these instructions, even if he considers them to be unnecessary, unless these instructions contradict any legal or safety regulations. The aim of this duty is to make sure that the construction would be fault-free and would satisfy the client’s needs and aims, without the client having to cover costs for unnecessary works. These two mentioned provisions regulate the duty to warn of the professional party in case the documents or instructions come from the client. In my opinion, it is most likely that they also apply in case another party employed at the construction site would give the documents or instructions. In such a case these provisions could be invoked together with the provision of §4 No. 3 VOB/B as the source of the duty to warn of the professional party about a risk coming from a contract with a third party.

In the described situation, when the abovementioned VOB/B-provisions are incorporated into the building contract, the duty to warn is based on an express contractual provision. Such express duties to warn are obviously outside the scope of this book as such. However, in German literature and case law it has been emphasized that the builder does not only have a duty to warn the client about a default in the design plans in the case when the VOB-provisions were implemented in the contract. The question, what character such duty to warn then has, has been debated in German case law. Part of the German case law considers such a duty to warn as an auxiliary contractual duty based on the general rule of “good faith” as well as on BGB-provisions regulating contracts for work. However, it has also been argued that the duty to warn might even be regarded as a main contractual obligation, even if the VOB/B-provisions have not been implemented into the contract concluded between the parties. That the builder is under such a duty to warn is as such not under debate.

152 T. Großkurth, Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten, Hamburg: Verlag Dr. Kovač, 2008, p. 75-77
155 The qualification of the duty to warn as a main or auxiliary contractual duty has a practical relevance in German law, e.g. the prescription periods are different for these duties; B. Rauch, Architektenrecht und privates Baurecht für Architekten, Köln: Rudolf Müller, 1995, p. 107; see also: T.
The OLG Bremen in a judgment of 15 February 2001\textsuperscript{156} stated that the only role of the VOB/B-provisions was to specify the duty to warn, which was already applicable under the “good faith” principle\textsuperscript{157}. The OLG Karlsruhe in the judgment of 28 October 2002\textsuperscript{158} also stated that the duty to warn was applicable due to the application of the “good faith” principle to contractual provisions – in the same manner, as it would have been applied if the VOB/B-provisions had been implemented into the contract. The court based its assumption on the grounds that in both cases, the builder would be obligated to perform his work without any defaults. The OLG Karlsruhe stated explicitly that in case the builder refrained from warning the client of the builder’s own default; he could be held liable for the default of his own work pursuant to BGB-provisions on contractual liability for breach of warranty. The same reasoning could not be applied, in general, according to the court, to justify the builder’s liability for damage resulting from not warning the client about the defaults of other parties involved in the construction process. However, the court considered the importance of the builder’s duty to complete his own contractual obligations without any defaults and saw therein a possible source of his duty to warn about defaults of other parties. The court stated that defaults in the designer’s plans or in the works of other builders employed at the same construction site might have led to the result that the builder would not be able to complete his own obligations in the proper, faultless manner. In such a case, his duty to warn was deemed to be broad enough to encompass defaults made by other parties. However, the court made it clear in this case that the builder had no duty to warn the client about circumstances in which the default in performance of another party would not influence his own work.

This judgment seems to suggest that in case the parties did not conclude a VOB/B-based contract, the builder would not as easily be held liable for not warning about a risk coming out of contract with a third party. It would only be recognised in case the default caused by the other party would influence the performance of the builder’s own obligations. In practice, however, it is likely that almost any default made by the designer in his plans or by another builder or sub-contractor in their works would influence the whole construction and thus also the builder’s own work\textsuperscript{159}. That means that the duty to warn about default of another professional party has a broader application than might be expected based on this judgment.

For example, in the case of 20 January 2004\textsuperscript{160}, OLG Dresden decided that the builder had a duty to warn based on the § 242 BGB about the default by another professional party in the construction process. Before the builder started his works on the construction site, another professional had cleaned and plastered the building. The plastering had been faulty and did not guarantee the construction would not suffer any damage due to dampness. The question in this case was whether the builder had the duty to warn the client that the other professional performed his work faultily. The court had doubts in this case whether the § 4 No. 3 of VOB/B could put such a duty to warn on the builder in this case, taking into account that it was doubtful whether the builder could be considered as ‘building on’ the work already provided by the

\textsuperscript{156} OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10
\textsuperscript{157} To be discussed in the following chapters.
\textsuperscript{158} OLG Karlsruhe, 28.10.2002, 7 U 87/02, BauR 2003, 10, p. 638
\textsuperscript{159} This influence has been understood broadly by German courts, see e.g. a case discussed in the chapter on the duty of the builder to warn the client by OLG Hamm, 09.07.2009, 21 U 46/09 (full text found on <<www.ibr-online.de>>, lastly checked on 04.12.2009)
\textsuperscript{160} OLG Dresden, 20.01.2004, 14 U 1198/03, IBR 2004, 615
professional who did the plastering. Their tasks were not really interrelated, which meant that it was difficult to see the professional who did the plastering as the builder’s predecessor, whose work influenced the performance by the builder of his own obligations. However, the court was adamant that these doubts did not need to be resolved, since the builder had in any way a duty to warn the client based on § 242 BGB. The court decided that aside the duty to warn from § 4 No. 3 of VOB/B, the builder was under a general duty to warn, based on the duty to act with good faith as expressed in § 242 BGB. The builder has to warn the client pursuant to this duty whenever he should have recognised that the previous works at the construction site have been performed faultily, if he should have realized that even if he would perform his tasks fault-free, that performance would not prevent the client from suffering damage. This does not necessarily have to mean that the performance of the builder’s obligation was dependent on the performance of the professional who did the plastering.

The reasoning presented in this judgment has been criticized in a commentary to it\textsuperscript{161}. The commentator agreed with the outcome of the case, the recognition of the duty to warn of the builder, but he thought that the link between the work of the professional who did the plastering and the builder was and should have been recognised as obvious, which would then mean that the builder had the duty to warn based on the provision of the VOB/B. I agree with his evaluation of the facts in the given case that indicate, especially taken into account other German case law which goes further in assuming the link between two professionals\textsuperscript{162}, that the OLG Dresden could have assumed that the builder relied on the previously performed works at the site. The commentator did not see the provision of the BGB as a source of the duty to warn or as a more far-going provision than the provision of the VOB/B but rather argued that both these provisions have the same purpose. According to him the provision of VOB/B is just a specification of the provision of BGB.

From the above, it seems that in German law the professional parties will have a duty to warn the client under either the provisions of VOB/B or under § 242 BGB. However, the circumstances in which the duty to warn arises have been limited by German courts.

And so, OLG Köln has adjudicated it on 16 January 2007\textsuperscript{163} that the builder would not have a duty to warn the client about the designer’s mistake in case the risk could be seen as having silently passed on to the client. In the given case the builder was supposed to plaster the walls of the building, when he noticed that the walls thereof were covered with salt and damp. The designer, who was also a supervisor of the construction site, knew of these defaults but nevertheless allowed the builder to proceed with his works as originally planned, which led to the end product being faulty. The court decided in this case that in general the builder has a duty to warn the client about such a default, but in special circumstances this duty will not bind the builder. Namely, according to the court’s judgment, in case when the client silently takes over the risk, the builder might rely on the fact that the competent client or his representative took the risk upon himself consciously. The court decided that this

\textsuperscript{161} F. Weyer, ‘Muss Landschaftsbauer auf fehlenden Feuchtigkeitsschutz des Sockelputzes hinweisen?’, IBR 2004, 615

\textsuperscript{162} See further in the chapter on the builder’s duty to warn to the client.

\textsuperscript{163} OLG Köln, 16.01.2007, 3 U 214/05, IBR 2007, 242
situation took place here. The designer’s knowledge was attributed to the client in this case based on § 166 BGB\textsuperscript{164}. This case is inconsistent with other German case law and therefore it needs to be stated that one should not infer too much from this case. A rare assumption has been made in this case that since the designer knew about the default in the construction the client was thus deemed to have been informed about it as well and was therefore deemed to have consciously decided to take the risk of the default on himself. However, it is commonly accepted by German courts that the warning about the default should be given directly to the client and not to the designer\textsuperscript{165}. This seems to suggest that the knowledge of the designer about the default will not always mean that the client is aware thereof, too, especially if it is the designer’s original default that is causing a risk to the whole construction\textsuperscript{166}.

OLG Celle decided another exceptional case on 25 September 2003\textsuperscript{167}. The builder in this case would have been under a duty to warn since he did notice the designer’s mistake in the design plans. However, the builder then addressed the designer, who explained to him why this type of construction was to be used in the given case and how this was not a mistake. These explanations convinced the builder who then proceeded to perform his original tasks. When the construction turned out faulty, the client claimed damages from the builder for his breach of the duty to warn him. The Oberlandesgericht ruled that in general, the builder has the duty to warn the client and any warning given to the designer would not release him of his liability. However, in this case the builder was seen as no longer having doubts about the default in the design plans and therefore as no longer having a reason to give a warning to the client. The court stated that the builder has the duty to warn only in a situation where he knew or should have known about the default. When the designer explains to him in a plausible way that the perceived default is in fact not a default, thus convincing him that the design plans are in fact faultless, the builder is released from his obligation to warn the client about it. Under the circumstances of the given case the court convincingly showed that the builder did not have a duty to warn here. However, in most cases the builder who would just convey his warning to the designer and not to the client would most likely still be held partially liable\textsuperscript{168}.

\textsuperscript{164} “(1) Soweit die rechtlichen Folgen einer Willenserklärung durch Willensmängel oder durch die Kenntnis oder das Kennenmüssen gewisser Umstände beeinflusst werden, kommt nicht die Person des Vertretenen, sondern die des Vertreters in Betracht.
(2) Hat im Falle einer durch Rechtsgeschäft erteilten Vertretungsmacht (Vollmacht) der Vertreter nach bestimmten Weisungen des Vollmachtgebers gehandelt, so kann sich dieser in Ansehung solcher Umstände, die er selbst kannte, nicht auf die Unkenntnis des Vertreters berufen. Dasselbe gilt von Umständen, die der Vollmachtgeber kennen musste, sofern das Kennenmüssen der Kenntnis gleichsteht.”


\textsuperscript{166} And so, e.g. in case OLG Oldenburg, 24.04.2008, 8 U 4/08 (full text found on <<www.ibr-online.de>> last checked on 04.12.2009) the court decided that even if the designer gives a specific instruction to the builder to continue with a task that has been obviously not properly designed, the builder should not rely on that instruction and still warn the client about that default.

\textsuperscript{167} OLG Celle, 25.09.2003, 5 U 14/03, IBR 2004, 614

\textsuperscript{168} F. Weyer, ‘Unternehmer verletzt Hinweispflicht nicht, wenn Architekt seine Bedenken plausible zerstreut!’, IBR 2004, 614; see also chapter 6 on the question whether a sole warning suffices.
When it is the client who has the actual knowledge about the default, prior to the builder warning him about it, the court might release the builder from his duty to warn. In the case of 13 March 2003 OLG Düsseldorf decided that there is no duty to warn for the builder in case the client has already been fully and extensively informed about the potential risk, although the burden of proof that the client was informed and warned will rest on the builder. The court decided in this case that the function of the duty to warn is to give the client the necessary clarity about risks and problems in the construction and their sources. If the client already has this knowledge before the builder would have approached him, there is no need to provide an additional warning.

However, it needs to be mentioned again that the builder most likely would only be released of his duty to warn in case the client had an actual knowledge of the default himself. In the case of 11 October 2001 OLG Celle adjudicated that the fact that the client was competent enough to have recognised the default in the construction, and was assisted by an equally competent designer, did not mean that the builder was released of giving the warning to the client. Any professional builder should have recognised the mistake made by the designer in his plans under the circumstances of this case, which meant that the builder had the duty to warn. The builder’s duty to warn did not change due to the mere fact that the client was himself competent and additionally could benefit from the advice of a designer employed by him. However, the court decided, on the basis of the facts of the case, to completely release the builder of his liability for the breach of this duty, due to grossly negligent behaviour of the client and his representatives.

Since the builder needs to know of or should have realized the default, it seems logical that in case the builder was not in a position to discover that default, he could not be held liable for not giving a warning to the client about it. When may the builder claim ignorance of the default with certainty that the default remained outside the scope of what he should have inspected or recognised? Certain boundaries have been placed for the emergence of the duty to warn in case the default was not easily recognisable for the builder.

In the case of 6 December 2005 OLG Köln stated that the builder would not have a duty to warn in case of a default that was difficult to recognise. If the default lies within the work prepared by other specialists, who have expertise in the given

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169 OLG Düsseldorf, 13.03.2003, 5 U 71/01, IBR 2003, 1077
171 Another exception to this rule will be discussed in the following chapter. See: OLG Bamberg, 14.08.2009, 6 U 39/03, IBR 2011, 76, which will be discussed in chapter 3.
175 The scope of this side of the builder’s duty to warn will be further discussed in the following chapter.
177 OLG Köln, 06.12.2005, 22 U 72/05, IBR 2007, 192
field of construction and have not recognised the default themselves, then the client
may not expect from the builder that he will be even ‘smarter’\textsuperscript{178}. Moreover, the court
stated that the builder might rely on the statements of other specialists employed at the
construction site, unless they are clearly wrong \textsuperscript{179}. The builder in this case was
employed to deliver materials and to build an air-conditioned room according to the
plans prepared by the specialists in air-conditioning employed by the client. The
construction turned out to be faulty – the desired velocity between warming up and
cooling off of the complex was not reached – due to a default in the design plans. The
client claimed damages from the builder, stating that the builder should have
recognised that default and warned him about it. The court confirmed that since the
work of the builder had been faultless, the only ground for potential liability of the
builder could be his breach of the duty to warn about the default in the design plans.
The fact that even specialists employed by the client to prepare the design plans did
not see the problem and that the expert appointed by the court admitted that he had
had problems in finding the exact default within the plans, meant that it could not be
expected from the builder to have such technical knowledge. The court stated
additionally that the builder could have assumed that the specialists would explain all
technical problems of the installation of the air conditioning.

Finally, it is interesting to mention here already\textsuperscript{180} that the builder will not
have to warn the client when the losses that the client suffers could not be avoided
even if the builder would give the warning. In this case, as there would not be a causal
link between the lack of warning and the loss of the client, the builder could not be
held liable for client’s losses. For example, in the case of 19 November 2009\textsuperscript{181} the
OLG Celle considered a case in which the builder was employed by the client to
install sanitary, heating and electrical installation in the house. The house was built by
another builder specialising in construction of pre-fabricated houses and was
supposed to fulfil the requirements for a ‘low energy house’. However, the
requirements were not met and as a result the client ended up having to pay high bills
for his energy use. Since the first builder constructing the house was insolvent at the
time when the construction was finished, the client claimed his losses from the builder
employed to install heating installations. The client suffered and claimed compensation for two sorts of losses: the cost of the repair that the house needed and
the cost of high energy bills. The second builder claimed that he could not prevent the
high use of energy while installing heating systems on an already defectively designed
and built house. Therefore, the second builder argued, he should not be held liable for
any of the client’s losses. Additionally, it was stressed that it was the client’s
obligation to provide a perfect foundation for the second builder to work on. The
client claimed that the second builder should have warned him that the first builder
had not properly performed his works, as a result of which the air flow in the house
was not as tight as it should have been, which would lead to the possibility to order
the first builder to repair the house and to decrease energy use within it. The court
shared the second builder’s view and declared that even if the second builder had
warned the client, then the client would have to make the same costs for the repair of
the house and for energy bills as when the warning was not given. According to the

\textsuperscript{179} Contrary to the previously described case OLG Celle, 25.09.2003, 5 U 14/03, IBR 2004, 614, here
the builder did not express his doubts to the designer and did not receive any reassurances from him.
\textsuperscript{180} This matter will be further discussed in chapter 7.1 on causality.
\textsuperscript{181} OLG Celle, 19.11.2009, 6 U 96/09, IBR2010, 1369
court it was already too late to prevent these costs, since if the builder had to give a
warning it would have been at the moment he started his work at the construction site,
and already then the house was defective. Additionally, the court took into account
that until the moment the judgment was given it was not proven that the client had
tried to repair the construction and the court declared that irrespective of the client’s
defence (i.e. that he had no financial means to do so), he contributed to his own high
energy bills by not remedying the original default in construction when he had found
out about it. Taking it all into account the court concluded that the lack of warning did
not contribute to the client’s damage, both for cost of repair of the house and cost of
high energy bills, and the second builder could not be held liable for not performing
his duty to warn about the first builder’s mistake.

The court in this case did not state explicitly that there was a breach of the
duty to warn by the builder. The judgment rather only mentions that in a situation
when the warning could not prevent the client’s losses, the builder could not be held
liable for the damage suffered by the client. Under the circumstances of this case it is
clear that normally a warning should be given, since, as the court itself states, the
builder needs to warn about any default that would not allow the client to receive a
perfect end product. Consequently, it seems clear that there was a breach of the duty
to warn in this case, since the second builder did not warn the client about the default
that should have been obvious to him. In such a situation, as the judgment shows, the
builder may still not be obligated to compensate the client for his damages, when
there was no causal link between the lack of a warning and the loss. Yet, in my
opinion, the court made a significant mistake in this case by not differentiating
between the different losses sustained by the client. I agree that even if the warning
had been given the client would not have avoided paying the cost for the repair of
the house. Therefore, the lack of warning did not contribute to this loss of the client.
However, if the second builder had warned at the moment of starting his work about
the default of the first builder then the client would have had a chance to repair the
construction as soon as possible and to restrict the high energy costs for himself.
Taking this into account it seems wrong that the court claimed a lack of a causal link
between these further losses to the client and the lack of warning. In regard of this
second sort of damage to the client, the builder had a duty to warn, which he had
breached. The court should, therefore, have made it clear that with regard to this
second type of loss, despite the fact that the builder had breached his duty to warn and
the fact that there was a causal link between the lack of warning and this second loss
sustained by the client, this damage would not be compensated by the builder, due to
it being apportioned to the client as a result of his own gross negligence in having the
building repaired on time once he did become aware of the default. Moreover, the
court’s reasoning fails to recognise that even if the client would not be able to claim
damages in this situation, he is still left with other possible actions as far as breach of
the builder’s contractual obligations is concerned, e.g. price reduction or termination.
I am, however, not aware whether or not these remedies were in fact claimed by the
client.

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182 See further chapter 7 (as to the liability and apportionment).
2.2.2. Precontractual duty to warn.

The contract concluded between the client and a professional party involved in the construction is a private law contract, which means that until the moment of its conclusion the parties are free to negotiate its provisions. Already in this precontractual stage it may happen that the professional party has certain duties towards the client, especially information duties that might include a duty to warn the client. In the German legal system it is commonly recognised that the professional party would have precontractual duties of care and precontractual duties to inform towards the client, which if breached would lead to the liability of the professional party on the basis of *culpa in contrahendo*. Specific regulations of these precontractual duties in contracts concluded with consumers are not to be found in the German BGB or even in rules on construction procedures, like VOB. *Culpa in contrahendo* has been, however, recognised in case law on the basis that parties already by initiating business contacts might create a trust relationship that obligates them to care for each other’s interests and that puts duties of care and duties to inform, including a duty to advise and a duty to warn, on them. It seems, therefore, that the general source for the precontractual duty to warn would be the same as for the contractual duty to warn – the provision on good faith in the German Civil Code, § 242 BGB.

For example, in the case of 9 July 1987 the BGH clearly stated that the builder could have a precontractual duty to warn. The case concerned a builder who was employed to deliver and install a power station at the glass production workshop of the client. Unfortunately, the chosen and installed power station was insufficiently powerful and faulty and could not be used by the client. The client claimed damages from the builder arguing, *inter alia*, that he should have been warned that this particular power station was improper for this construction. The BGH decided that the lower instance court had not properly considered this argument and should revise its judgment. The BGH stated that according to the good faith principle the builder should inform, advise and warn the client who does not have the necessary knowledge about the design and application of the installation prior to the conclusion of the contract. The builder should, therefore, make sure that the installation as ordered by the client could actually fulfill the client’s needs and wishes. The BGH pointed out that these precontractual duties should apply especially in a situation when the installation ordered and conducted is innovative and untried, which was the case, and it was the builder who suggested using this particular material and/or method in the first place.

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185 Certain precontractual duties in case a public contract for construction is being awarded have been regulated in VOB/A, but these regulations will be just briefly mentioned in this book since they mostly regulate granting of public law contracts.
187 See for the application of the provision of § 242 BGB to precontractual situations: H. Roth in: *Münchener Kommentar BGB*, 2007, § 242, 72, p. 134-135; e.g. applied in OLG Koblenz, 31.03.2010, 1 U 415/08, IBR 2010, 313
188 BGH, 09.07.1987, VII ZR 208/86, BauR 6/87
In such a case the builder was obliged to fully inform, advise and warn the client of all the disadvantages and risks involved with choosing this innovative installation.

In the above-described case the BGH compared the precontractual duty to warn with that of a designer who would intend to use new, innovative materials in the construction. Therefore, it seems that the BGH would be inclined to apply this duty to warn also to designers. Possibly the precontractual duty to warn would not be limited only to builders: analogically to the text of provision § 4 No. 3 VOB/B it would bind any professional party whom the client would intend to employ and who would find himself in a trust position towards the client.

It is worth mentioning here that provisions of the VOB/A regulate fully the precontractual stage of concluding a construction contract. However, as has been mentioned in the introduction to German construction law, these provisions apply to awarding public contracts and regulate mostly competition procedures for granting public contracts. It is conceivable, however, that private parties would agree to regulate their relationship on the basis of all or some of the provisions of the VOB/A. For example, § 9 of the VOB/A states that the builder needs to receive a full, clear and complete description of what kind of works he will be expected to do and possibly also a duty to warn the client that due to insufficient information given e.g. by the designer in the design plans, the client might need to pay more for the construction that he assumed would be necessary. In my opinion, this type of provision could possibly be applied also by private parties to a contract, when the builder makes an offer to a client based on design plans delivered to him.

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189 For the duty to warn of a designer applying novel materials see: BGH, BauR 1976, 66 f.
190 B. Rauch, Architektenrecht und privates Baurecht für Architekten, Köln: Rudolf Müller, 1995, p. 347
2. Dem Auftragnehmer darf kein ungewöhnliches Wagnis aufgebürdet werden für Umstände und Ereignisse, auf die er keinen Einfluss hat und deren Einwirkung auf die Preise und Fristen er nicht im Voraus schätzen kann.
3. (...) (3) Die für die Ausführung der Leistung wesentlichen Verhältnisse der Baustelle, z.B. Boden- und Wasserverhältnisse, sind so zu beschreiben, dass der Bewerber ihre Auswirkungen auf die bauliche Anlage und die Bauausführung hinreichen beurteilen kann.”
192 OLG Rostock, 07.12.2006, 1 U 19/06, IBR Werkstattbeitrag
2.3. Dutch law.

2.3.1. Contractual duty to warn.

The source of the duty to warn may be found in different places in the Dutch legal system. Since the year 2003, the duty to warn of the builder is clearly defined in the Dutch civil code (“BW”) in the Article 7:754 BW, which is originally based on one of the provisions of the Uniforme Administratieve Voorwaarden voor de uitvoering van werken (“UAV 1989”) namely its Paragraph 6 Sec. 14. It was, however, recognised much earlier in practice by the Dutch courts and doctrine on the basis of the general duty to act in good faith. Furthermore, it may happen that many different standard provisions apply to different building contracts. Usually, these standard provisions also encompass an express contractual provision on the duty to warn. However, it is important to mention that the provisions on the duty to warn in the standard provisions are based on the general duty to act in good faith. This means that the parties to the contract would be seen as having a duty to warn even if the standard provisions were not incorporated into a contract and article 7:754 BW would not apply, as is the case with the designer’s duty to warn. The duty to warn would bind these parties even if there were no express contractual provision on it in the standard contract terms.

Article 7:754 BW provides that the builder must warn the client of inaccuracies in the design of which he is or should have been aware. The same duty applies in case there are defaults or inaccuracies within the materials the builder is provided with by the client. According to this provision, the term “materials” encompasses: the ground on which the builder is supposed to perform his contract, plans and drawings, calculations and other documents, which the builder may receive from the client. This is the main source of the builder’s duty to warn in the Dutch legal system.

On the basis of this article, the builder would be bound by a duty to warn the client of a default by a third party (e.g. when a designer introduces a certain risk with his design or when the land that the client intends to purchase for construction is not suitable for it) even if this duty to warn has not been specifically written down in his contract. The decisive factor seems to be the builder’s knowledge of the risk, taking

193 “De aannemer is bij het aangaan of het uitvoeren van de overeenkomst verplicht de opdrachtgever te waarschuwen voor onjuistheden in de opdracht voor zover hij deze kende of redelijkerwijs behoorde te kennen. Hetzelfde geldt in geval van gebreken en ongeschiktheid van zaken afkomstig van de opdrachtgever, daaronder begrepen de grond waarop de opdrachtgever een werk laat uitvoeren, alsmede fouten of gebreken in door de opdrachtgever verstrekte plannen, tekeningen, berekeningen, bestekken of uitvoeringsvoorschriften.”


into account that the provision prescribes the duty to warn only for situations when the builder is or should have been aware of the default\textsuperscript{197}.

The government set specific general conditions for the construction sector in the above-mentioned UAV 1989. The UAV 1989 contain general conditions for a construction contract. The provisions of the UAV 1989 have been accepted in cooperation with organizations representing different parties from the professional construction sector as well as consumer organizations. These provisions are most often applied when the projects are financed by the state or by local governments. However, many private projects are conducted in accordance with these provisions as well\textsuperscript{198}.

Paragraph 6 Sec. 14\textsuperscript{199} of the UAV 1989 provides that the builder is liable for any prejudicial consequences suffered by the client if the builder proceeded to execute his performance without pointing out obvious faults or defects with respect to the construction (inadequacy of construction materials, construction methods, client’s instructions or directions, etc.) to the client. This way, the builder acts in breach of good faith. While the provision specifically points out that the builder is supposed to warn about the default before he starts his performance\textsuperscript{200}, in my opinion this provision should be applied \textit{a fortiori} as to defaults that the builder might find out while performing his obligations.

Another commonly used set of standard contract terms is the Algemene Voorwaarden voor Aannemingen in het bouwbedrijf 1992 (‘AVA 1992’). These standard provisions are usually applied when construction is performed within smaller, already existing buildings (repairs, etc.).

In the AVA 1992, Article 5 Sec. 6\textsuperscript{201} provides that the builder is obligated to indicate to the client deficiencies within the construction or construction methods, which the client demanded to be performed, as far as the builder was aware of these deficiencies or should have been aware of them.

\textsuperscript{197} M. A. B. Chao-Duivis, ‘Informatie en mededelingsplichten: een causaliteitsprobleem’, BR 1991/2, p. 91


\textsuperscript{199} “Indien de constructies, werkwijzen, orders en aanwijzingen, bedoeld in § 5, tweede lid, dan wel de bouwstoffen of hulpmiddelen, bedoeld in § 5, derde lid, klaarblijkelijk zodanige fouten bevatten of gebreken vertonen, dat de aannemer in strijd met de goede trouw zou handelen door zonder de directie daarop te wijzen tot uitvoering van het desbetreffende onderdeel van het werk over te gaan, is hij voor de schadelijke gevolgen van zijn verzuim aansprakelijk. Het in dit lid bepaalde is van overeenkomstige toepassing op de in § 5, vierde en vijfde lid, bedoelde gevallen.”


\textsuperscript{201} “De aannemer is verplicht de opdrachtgever te wijzen op onvolkomenheden in door of namens de opdrachtgever voorgeschreven constructies en werkwijzen (…), voor zover de aannemer deze kende of redelijkerwijs behoorde te kennen.”
As far as the duty to warn of the designer is concerned, the main provision that may apply to it is Article 7:401 BW. This article obligates him, as a provider of services covered within the scope of Article 7:400 BW, to act with the care of a good provider of services. The very general duty of care that has been regulated by this article, applies also to design contracts. Further specification of the duty to warn of the designer might be found in case law, but on the basis of this article one might already expect of the designer to act with proper skill and due carefulness. The designer should act in a way that does not endanger the result of the construction, which might mean the necessity for the designer to issue a warning to the client in case he notes such a risk.

The designer’s contract with the client used to be subjected to the Standaardvoorwaarden 1997 Rechtsverhouding Opdrachtgever-Architect (“SR 1997”). It was standard practice to include these provisions as standard contract terms to the designer’s contract. Moreover, a special set of provisions existed, which regulated the relation between the client and the engineers-office (“RVOI”). In the year 2004, a new set of provisions has been agreed upon that applies to both contracts between the client and the designer and contracts between the client and the engineer (De Nieuwe Regeling 2005 – simply meaning: the new regulation – abbreviates as “DNR 2005”). The DNR 2005, therefore, was to unify the provisions of the SR 1997 as well as those of the RVOI and to enable the client to have the same general provisions applicable to a contract with a designer as well as to a contract with engineers and other consultants. The introduction of the DNR 2005 does not mean, however, that the other regulations may no longer be chosen and applied by the parties to the construction process. To the contrary, although it is advised to apply the provisions of the DNR 2005 in their entirety, the parties to the contract are always free in formulating their contractual terms. Certain organizations to which designers and engineers belong might recommend the contract to be concluded together with the application of e.g. the DNR 2005. They publish and distribute only those standard contract terms to their members making it more likely that the parties will choose to apply these provisions in future contracts upon having become acquainted with them. Finally, in 2006 a new set of standard contract terms has been issued that is intended to apply specifically to contracts concluded by designers with clients who are consumers or consumer-like parties – De Consumenteregeling 2006

202 “De opdrachtnemer moet bij zijn werkzaamheden de zorg van een goed opdrachtnemer in acht nemen.”
203 “De overeenkomst van opdracht is de overeenkomst waarbij de ene partij, de opdrachtnemer, zich jegens de andere partij, de opdrachtgever, verbindt anders dan op grond van een arbeidsovereenkomst werkzaamheden te verrichten die in iets anders bestaan dan het tot stand brengen van een werk van stoffelijke aard, het bewaren van zaken, het uitgeven van werken of het vervoeren of doen vervoeren van personen of zaken.”
204 Asser-Kortmann-De Leede-Thunissen, 5-III, 1994, nr. 60
205 See also: S. van Gulijk, European Architect Law. Towards a New Design, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 46
206 Standaardvoorwaarden 1997 Rechtsverhouding Opdrachtgever-Architect
207 Regeling van de verhouding tussen opdrachtgever en adviserend ingenieurs-bureau
Rechtsverhouding consument-architect (“CR 2006”)\textsuperscript{210}. This regulation is based on the DNR 2005 but it is significantly more limited in its scope. Namely, the practical application of DNR 2005 to consumer contracts had been questioned since its provisions are often very detailed and technical and not always necessary in smaller contracts. That is why the CR 2006 has been created as a lighter version of the DNR 2005 in order to be more consumer-friendly. It applies only to contracts concluded by consumers with the designer, and not with engineers\textsuperscript{211}. While the simplification of the provisions that are to apply to consumer contracts is definitely beneficial for consumers, the standard set of provisions of the CR 2006 does not contain a provision on the designer’s duty to warn or the duty to inform the client, contrary to the provisions of the SR 1997 and the DNR 2005, which will be discussed in the following paragraph. The consumer still possibly could claim that the designer had such a duty to warn based on his obligation to inspect the construction site and coordinate the construction process, which may be given to him according to the standard description of the designer’s task (CR 2006 Taakbeschrijving) that is attached to the standard contract terms. The client could also make use of the provision of the Article 7 Sec. 2 of the set of standard contract terms of the CR 2006, where it has been said that the designer should be held liable for any ‘professional mistake’\textsuperscript{212}. The professional mistake is defined as any default that would not have been made in given circumstances by any careful designer who acts with normal diligence, with experience needed to perform his tasks and who uses right materials\textsuperscript{213}. It is feasible that when, in the circumstances of the given case, any careful designer should have recognised the default in the builder’s work the lack of warning about it to the client could be seen as a professional mistake of the designer leading to his liability.

Article 11 Sec. 5 of the SR 1997\textsuperscript{214} says that the designer is obligated to inform the client timely of any risks. These risks encompass the alteration of construction costs as well as costs for assistance, which are related to the change of already made requirements, the making of new ones, the changing or postponing of making decisions or the making of savings on construction, which influence the design. In case the designer does not have an express contractual obligation to warn the client, e.g. due to his supervisory task during the performance of the construction, he might still be obligated to warn the client of certain risks involved with the construction on the basis of this provision. As an example may serve a case when the client approaches the designer after the design has been already prepared and informs him that he intends to employ a different builder than they previously agreed upon. The new builder might not be as highly specialised in similar constructions but is less expensive to hire. In such a situation, the designer may be expected to warn the client

\begin{itemize}
  \item De Consumentenregeling 2006 Rechtsverhouding consument-architect
  \item “een tekortkoming die een goed en zorgvuldig handelend architect onder de desbetreffende omstandigheden en met inachtneming van normale oplettendheid en met de voor de opdracht vereiste vakkennis en middelen uitgerust, heeft kunnen en behoren te vermijden”
  \item “De architect licht de opdrachtgever tijdig in over de gevolgen en eventuele risico’s, - wijziging van de bouwkosten en de advieskosten daaronder begrepen – die zijn verbonden aan het veranderen of vermeerderen van de gestelde eisen, aan het veranderen of uitstellen van beslissingen en aan het doorvoeren van bezuinigingen of andere wijzigingen met betrekking tot de opdracht.”
\end{itemize}
of the risk involved with cutting costs versus preserving quality of the construction\textsuperscript{215}. This duty is clearly related to the duty of care from Article 7:401 BW since the designer would need to act with the care of a good designer in order to make the client aware of the potential risk to the contract.

Another source of the designer’s liability may be found in the regulation of Article 16 of the SR 1997, pursuant to which the designer is sometimes liable for acts of third parties. This provision shall be interpreted as pointing out that the designer has the duty to warn the client of “obvious” defaults in the work of third parties. The “obviousness” shall be such that the designer as a professional party should not have any doubt as to its existence. If the designer forsakes to grant the warning to the client, he shall be then found liable for the default of the third party based on article 16 of the SR 1997\textsuperscript{216}.

Article 11 Sec. 10 of the DNR 2005\textsuperscript{217} states that the advisor (i.e. not only the designer or the engineer, but also the builder or the sub-contractor if their contracts include a provision on giving advice to the client as far as the design or some part of it is concerned) is obligated to warn the client in case the information or data given by the client or in his name, or decisions made by the client or in his name, manifestly contain such shortcomings or show such deficiencies that the advisor would have acted in defiance of standards of reasonableness and fairness if he did not warn the client and just continued with the construction process.

Whether the duty to warn emerges in a certain case might be dependent on the competence of the builder and the competence of other professional parties employed by the client\textsuperscript{218}. For example, the mistake may originate from the actions of the designer but the builder might not be the only other professional party involved in the construction that could warn the client about that mistake. The client may employ another specialist who may be more competent than the builder in the field in which the mistake is made. Should that influence the existence of the builder’s duty to warn? The arbitral courts used to, in most cases, declare the builder not liable when the client employed a professional advisor who was responsible for the part of construction within which the default originated\textsuperscript{219}. In such cases it was most often


\textsuperscript{216} M. A. M. C. van den Berg in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), Bouwrecht in kort bestek, Deventer: Kluwer, 2007, p. 280; this article has not been discussed by S. van Gulijk in the same paragraph of the 2010 edition of this book.

\textsuperscript{217} “De adviseur is verplicht de opdrachtgever te waarschuwen indien inlichtingen en/of gegevens verstrekt door of namens de opdrachtgever of beslissingen genomen door of namens de opdrachtgever klaarblijkelijk zodanige fouten bevatten of gebreken vertonen, dat hij in strijd met de eisen van redelijkheid en billijkheid zou handelen als hij zonder waarschuwing bij de vervulling van de opdracht daarop zou voorbereiden.”

\textsuperscript{218} On the complications that might arise if this criterion is used, read further: M.A.B. Chao-Duivis, ‘Informatie en mededelingsplichten: een causaliteitsprobleem’, BR 1991/2, p. 82-86

\textsuperscript{219} It is worth to note here that the position of the arbitral court seems to be in contradiction with the decision of the Dutch Supreme Court in the landmark case of 18.09.1998, NJ 1998, 818 (KPI/Leba): in that case the Dutch Supreme Court recognised that the knowledge or competence on the side of the client does not influence the existence of the duty to warn of the builder. This matter will be further discussed in the following chapter and not elaborated on here, taking into account that it concerns the duty to warn about the professional parties own mistake. See more on this matter in: N. E.
decided that the builder might have relied on the professionalism of the advisor and believed that the advisor would give the warning to the client if need be. For example, in the case of 15 November 2002 220 the client claimed that the builder had the duty to warn him about insufficient thickness of the coating. In the given case before choosing which coating to use the client, the designer, the builder and the sub-contractor together all visited a manufacturer of the coatings and observed the production process of the coating that they eventually decided on. The client thought it was decisive in this case that the builder observed the same production process as the designer and the sub-contractor (a specialist in this case), claiming that the builder had to have had enough knowledge to have a duty to warn about the unsuitability of this coating for the given construction. The court adjudicated that the sole fact that the builder followed the same course on the production process as the designer and the sub-contractor did not make him competent as far as coating was concerned. As a result, the court ruled that the builder did not have a duty to warn in this case. The court specifically took into account that the designer and the sub-contractor, who was a specialist in this particular production process, of which fact the builder was aware, approved the given production process.

In the case of 3 March 2006 221, the arbitrational court found the builder liable for the breach of the duty to warn in case the client employed separate professional advisors: the designer and the director of the construction. It has been stated in this verdict that the fact that professional advisors support the client does not influence (the existence or emergence of) the builder’s duty to warn. However, in that case the arbitrational court considered that the default should have been obvious to the builder and therefore his breach of the duty to warn was grossly negligent. In case of gross negligence of the builder, the arbitrational court tends to hold the builder liable for breach of the duty to warn even though an advisor with special competence assisted the client 222.

Recently, Dutch arbitration courts seem to follow the Dutch Supreme Court’s position more often in this matter 223. For example, in the RvA-case of 18 November 2009 224 the client expected the builder to warn him about a risk coming from a method of construction that was chosen in the design. The designer planned to lay a pile of turfs in a pyramid form that could lead to sagging of the ground as a result. However, this design method was not faulty, it only increased the risk of sagging of the ground after performance of the construction. One of the questions raised in this case was whether the builder had a duty to warn in case the client was a competent one. The arbitration court stated clearly that in order to determine whether the builder had a duty to warn on the basis of Paragraph 6 Sec. 14 of the UAV 1989, it needed to look only whether the default was a clear one and what kind of competence did the

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Tijssens, ‘De betekenis van de deskundigheid van de opdrachtgever voor de waarschuwingsplicht van de aannemer naar Nederlands en Duits recht’, TBR 2009/138


221 RvA 03.03.2006, nr. 25.856, BR 2007, p. 255; further discussed in 3.3.1


223 HR 18.09.1998, NJ 1998, 818 (KPI/Leba)

224 RvA 18.11.2009, nr. 30.728, TBR 2011/49
builder have. It was therefore not relevant, whether the client was competent himself.\textsuperscript{225}

It might be interesting to observe here that the implied duty to warn of a professional party that is being analysed in this book might differ significantly from an explicit duty to warn. When the parties to a contract agree on its terms and conditions and choose to have a specific duty to warn as one of the contractual obligations they might decide together on the scope of this duty, as well as on the consequences of its breach. This means that the parties might, for example, agree that the professional party would be seen as aware of any default made by a third party in the construction process, regardless whether this default was obvious or not, whether it should have been noticed by that party or not.\textsuperscript{226} At the same time, the parties might also decide to expressly limit (or broaden) the liability of the professional party in case the warning is not given, or to exclude the application of the contributory negligence defence. Taking into account the fact that one of the parties to this contract is a consumer, the contractual clause will of course have to comply with the fairness requirements, e.g. the professional party may not exclude his liability for breach of a duty to warn the client in all circumstances, since that clause would be considered unfair. In this respect, the implied duty to warn might be seen as a more standard one, since specific parties’ intentions as to its scope will be difficult to prove, which means that the courts and arbiters would see its scope through general rules.

2.3.2. Precontractual duty to warn.

There is no doubt in the literature that the new article 7:754 BW encumbers the builder also with a precontractual duty to warn.\textsuperscript{227} The text of this article makes it clear that the builder has the duty to warn the client at the moment of conclusion of his contract as well as while performing it. Since the warning is to be given when the builder is concluding a contract with the client, the text of the article suggests that the builder has a duty to warn also in the precontractual phase, when the contract has not yet been signed.\textsuperscript{228} It does not, however, imply that the builder is obliged to actively look for defaults and risks that he could warn the client about. The builder has a duty to warn as far as he had the knowledge or should have been aware of such risks. Since the builder’s role before the conclusion of the contract is limited, mainly to the estimation whether he can perform the design presented to him by the client and at

\textsuperscript{225} Other aspects of this case will be further described in the following chapters. The same sentiment has been expressed in the following recent cases: RvA 19.11.2009, nr. 29.623, \texttt{http://www.raadvanarbitrage.info/default.aspx} (lastly checked on 15 July 2011); RvA 29.07.2010, nr. 31.139, \texttt{http://www.raadvanarbitrage.info/default.aspx} (lastly checked on 15 July 2011)

\textsuperscript{226} See e.g. RvA 31.03.2010, nr. 29.444, \texttt{http://www.raadvanarbitrage.info/default.aspx} (lastly checked on 15 July 2011)


\textsuperscript{228} This could mean that the builder is obliged to warn the client about defaults he should have noticed even if the client decided to conclude a contract with someone else. The potential builder’s liability for the breach of the duty to warn could then only be tortious.
what cost, only risks that are or should have been evident to the builder in the process of making such estimations would give rise to his duty to warn229.

What is more uncertain is whether the builder has the duty to warn if parties to the contract choose the application of the UAV 1989 to it? Since in Paragraph 6 Section 14 UAV there is no mention of the duty to warn binding the builder at the moment of conclusion of the contract, it could be argued that in the system of the UAV 1989 there is no place for a precontractual duty to warn230. However, taking into account article 7:754 BW and the fact that the UAV 1989 does not regulate the duty to warn in the precontractual phase, it is argued that the precontractual duty to warn, defined by article 7:754 BW, would be applicable also in cases in which provisions of the UAV 1989 are used by the parties231.

Does that mean that without the introduction of article 7:754 into the Dutch Civil Code and based only on the provision of the Paragraph 6 Section 14 of the UAV 1989 the precontractual duty to warn would not be recognised? Also before the introduction of the article 7:754 BW the Dutch courts recognised the precontractual duty to warn in certain cases when the default in the design plans had been obvious and the builder was deemed to have known or to should have known about that default232. The legal basis for that precontractual duty to warn could be found then in the good faith and the principle of fair dealing that have been recognised in the precontractual phase in Dutch law233. In accordance with these principles, a party has to act with respect to the justified interests of the other party that it is aware of. The financial interest of the client in finding out that there are defaults in the design before the construction commences definitely belongs to the justified interests that the builder should take into account. If the builder warns the client in the precontractual phase the client still has the chance to adjust his construction plans appropriately to his budget, without having to rectify mistakes already made and make the necessary corrections conform to what has already been erected. In the gravest cases, the client could even give up on his construction plans. After the performance of the construction has started, however, the measures that the client would have at his


230 Some not very clear reasoning as to this effect may be found e.g. in: RvA 07.07.2004, no. 25.119, BR 2005, p. 732, in which the arbiter rejects the duty to warn based on the UAV 1989, while at the same time recognising that in certain cases the professional party might have the duty to warn in the precontractual phase – without giving any legal basis for that


233 HR 15.11.1957, NJ 1958, 67 (Baris/Riezenkamp)
disposal to rectify the situation would be seriously limited. Thus, the precontractual duty to warn follows from the basic principles of the Dutch law and even if it had not been codified, the Dutch courts would have recognised it\textsuperscript{234}.

The above-mentioned Article 5 Sec. 6 of the AVA 1992 does not regulate the duty to warn of the builder in the precontractual phase specifically, either. However, since it seems that according to this provision the builder will be liable in any case if he knew or should have known of the deficiency in the plans, it seems as if that provision would apply regardless of whether the builder realized the default before or upon concluding a contract with the client.

Two other sections in this Article 5 indicate the application of the builder’s duty to warn in the precontractual phase. Firstly, Article 5 Sec. 4\textsuperscript{235} states that in case of certain constructions, if it is necessary, the builder needs to acquire information as to the position of the wiring prior to commencing his work. Then, Article 5 Sec. 5\textsuperscript{236} makes it clear that the builder is considered as knowledgeable as to the construction laws that had been in force at the moment he presented his offer to the client. This points to a certain duty to gather information on the side of the builder, which might increase the scope of his duty to warn, since it could be more easily assumed that he had or should have had the knowledge necessary to warn the client.

The provisions of the SR 1997 and the DNR 2005 that have been discussed above also do not exclude their application to the precontractual phase. It is imaginable that before the design contract will be signed, the client will share his ideas and demands with the designer and if the latter knows that some of them are risky or not feasible he should warn the client thereof immediately and not only after the contract has been signed, which could increase the costs of the client since he would already be stuck with the contract he committed to\textsuperscript{237}. However, as has been already mentioned in the introduction, the scope of this research concerns the duty to warn of a professional party as to the risk coming out of a contract with a third party. The designer is normally the first party that would be employed by the client in the construction process, since only upon having design plans the client might go looking for someone who will agree to work with them. That means that the designer’s duty to warn for defects in the construction process stemming from a contract with a third party almost inevitably can only be a \textit{contractual} duty to warn. Situations in which the designer’s duty to warn as to the risk coming out of a contract with a third party would be \textit{precontractual} – i.e. a duty that applies before the contract with the designer is concluded – are hardly feasible, at least in traditional construction contracts where


\textsuperscript{235} “Indien de aard van het werk hiertoe aanleiding geeft, stelt de aannemer zich voor aanvang van het werk op de hoogte van de ligging van kabels en leidingen.”

\textsuperscript{236} “De aannemer wordt geacht bekend te zijn met de voor de uitvoering van het werk van belang zijnde wettelijke voorschriften en beschikkingen van overheidswege, voor zover deze op de dag van de offerte gelden. De aan de naleving van deze voorschriften en beschikkingen verbonden gevolgen zijn voor zijn rekening.”

\textsuperscript{237} Similarly, on the increased costs for the client in case the builder warns him only after the contract has been signed: C. E. C. Jansen, H. W. R. A. M. Janssen, ‘De precontractuele waarschuwingsplicht van de aannemer’, BR 2004/363, p. 371
the client is a consumer or consumer-like party. In the following chapters, the precontractual duty to warn of the designer will therefore not be discussed.

2.4. Comparison.

This chapter was focused on finding an answer to the question what are the legal grounds for the existence of the duty to warn in the three analysed legal systems. It seems that the contractual duty to warn about a risk coming from a third party has various legal sources in all three analysed legal systems. In England it is the least regulated and the least developed, *inter alia* due to the fact that it is not put in any statute or standard contract provisions, but mostly because of a lack of an established authority in English case law. The English cases presented in this chapter suggest that even though there is a tendency to see the need for the recognition of the duty to warn of a professional party in the construction sector as to a risk coming from a third party, the courts have a problem finding a legal source for that duty to warn. This is definitely a result of the principle of good faith not having been specifically recognised in English law. Still, as we could have seen, despite the courts struggling to find the legal basis for the duty to warn, it is being recognised in practice. The English courts have recognised that when such a duty of a builder or a designer binds them, it may have its source in the implied contractual terms, but only in two situations. Firstly, it is presumed to originate from the general obligation of the professional party to fulfil its explicit contractual duties, i.e. when the default shall impede or influence other explicit obligations of a builder or a designer, he is obligated to warn the client thereof. Secondly, it is presumed to have its source in the special relationship binding the professional party with the client – i.e. reliance by the client on the knowledge that the professional party is supposed to posses. These seemed to be the main prerequisites to claim that there was a duty to warn binding the professional party in the given case. However, this implied duty to warn would most likely be then recognised in tort. As I have already mentioned, the courts seemed reluctant to recognise either the contractual or the tortious duty to warn and it depended on the circumstances of each case whether or not a builder or a designer was bound by that obligation. For example in case the building contract was formulated in a very detailed manner, it was often decided by the English courts that there was no room left to imply either in fact or in law that the professional party was bound by a contractual duty to warn.

Although in recent years we could observe a tendency to more frequent recognition of the duty to warn in English case law, it must be stressed that it still has not been recognised as one of the main or more important obligations of the parties. As a rule the English courts recognised a duty to warn as part of another obligation of the professional party. The most common duty of the professional party to be considered as encompassing the duty to warn is the duty to act with proper and due care. However, in a few cases the duty to warn was observed as constituting part of another duty, e.g. a duty to guard against the risk of personal injury.

Already on the basis of the presented arguments it seems that the legal position of the client in England is the weakest of all three systems mentioned. Not only there is no clarity whether the duty to warn may be recognised in contract or in tort by the English courts, but also consumers will not even be able to assess what other obligation of the professional party the duty to warn falls under. This means that parties to a construction contract are far from being in a legally certain position when
they try to estimate whether there was a duty to warn binding the professional party and what consequences may be implied from its breach.

The duty to warn seems to have the most solid legal grounds in the Netherlands. It has been explicitly introduced to the Dutch civil code and thus its legal source is the strongest possible in a civil law country. In the Dutch legal system the duty to warn is explicitly implied by law. This provision has been added to the BW for the contract between the client and the builder after the duty to warn having been repeatedly recognised in practice – by courts and in various general conditions that are applied in the construction sector. Whether the duty to warn would bind the professional party in the construction sector on the basis of the statutory provision, standard contract terms or interpretation of older case law, it always has its roots in the application of the principle of good faith. This means that if no set of standard contract provisions is being used, the general provision of the Dutch civil code will still apply and give protection to the clients. Therefore it seems that the clients in the Netherlands have the most legal certainty that the professional party is bound by his duty to warn.

In Germany the duty to warn has been expressly established in the standard contract provisions that are being used as commonly as the ones binding in the Netherlands. And also similar to the situation in the Netherlands, if the parties to a contract do not apply the standard contract provisions, that does not mean that there would not be a duty to warn binding a professional party. To the contrary, it has been established both in case law and in German literature that the duty to warn in the standard contract provisions is just a specification of the duty to warn which was already applicable under the principle of good faith. Therefore, both the Dutch and German legal systems are clear in basing the duty to warn of a professional party acting in the construction sector to the principle of good faith and an obligation of that party to act in accordance therewith. The scope of the duty to warn will be discussed in the following chapters, but it is worth to note already that the scope of the duty to warn is not influenced whether a building contract incorporated the VOB/B-provisions or whether the provisions of the German Civil Code are applicable to it.

The dispute in the German legal literature concerns the character of the duty to warn. Namely it has been questioned whether the duty to warn, when it is not expressly regulated in contractual provisions, should be treated as an individual, main obligation, explicitly implied by law on the basis of the “good faith” rule. It’s important to note that when the duty to warn is not considered to form a main obligation of the professional parties, it may constitute a part of another main obligation of such parties. The most common situation in German law is the combination of a duty to warn and a duty to inspect. For example, when a builder is obligated to inspect the construction site and the work of his predecessors, then he also has a duty to warn the client of defaults that he encountered during his inspection. A negligent behaviour of the builder, i.e. an omission to conduct an inspection, results in the breach of not only his duty to inspect but also of his duty to warn. Contrary to the situation in the English legal system, this uncertainty as to the character of a duty to warn does not decrease legal certainty for consumers. They may remain certain that they will be able to claim damages for a breach of a duty to warn, regardless whether this duty is seen as an individual obligation of the professional party or whether it constitutes a part of another obligation.
The source of the precontractual duty to warn is correlated to the source of the contractual duty to warn in all three countries that have been analysed. Since in England there is no clear source for the contractual duty to warn, the same applies to the precontractual duty to warn. The principle of good faith is even less likely to apply in England to the precontractual phase of negotiations, since in English doctrine it is assumed that the future contractual partners might only have negative precontractual obligations towards each other, e.g. a duty not to deceive nor misrepresent. That assumption does not seem to leave space for the application of the positive precontractual obligation to warn. However, it might happen in practice that a need would arise for the recognition of such an obligation as it has been presented on the basis of the case described above.

In the Netherlands the statutory provision on the contractual duty to warn applies also to the precontractual dealings between the parties. It has been recognised in the literature that also the regulation of the duty to warn in standard contract provisions could be used in the precontractual phase, despite it not containing a clear phrasing on that.

In Germany precontractual duties to warn are not regulated explicitly, contrary to the contractual duties to warn which have been regulated in VOB/B. However, the literature and case law make it clear that the precontractual duty to warn should also be recognised in practice on the basis of the application of the principle of good faith. This could be claimed since the existence of a trust relationship is being recognised in the precontractual phase which obligated parties to act with due care towards each other.

From the above summary it can be concluded that there are vast differences between the sources of the duty to warn in English, German and Dutch legal systems. However, it must be observed that to some extent the differences seem to be more theoretical than practical. In all three countries the duty to warn mostly stems from a more general obligation. In English law, in recent years the courts have recognised more and more cases where the contractual parties were obligated to warn each other for the defects because of the general duty to act with proper and due care. In German case law it can be said that the duty to warn is a part of the general duty of the professional party to act with good faith. Only in the Netherlands the duty to warn is considered to constitute a main contractual obligation between the parties. It developed over time from the application of the ‘good faith’ principle. Ultimately then, the duty to warn in these three legal systems would have the same source – proper performance of its obligations by the professional party, whether it would be on the basis of good faith or of due care. However, the clear legal framework adopted in the Netherlands as far as the duty to warn the client is concerned provides the consumers with the most legal certainty. A Dutch consumer does not need to consider how likely it is that his claim damages for breach of a duty to warn will be recognised by Dutch courts, and if not whether he needs to sue for breach of another, more general obligation encompassing a duty to warn.

According to the definitions of the contractual and precontractual duty to warn both in Germany and in the Netherlands it seems that the professional party will be obliged to warn the client whenever he would be aware or should have been aware of the risk coming from the contract that the client concluded or was about to conclude with a third party. Since in England the duty to warn is not clearly defined it is difficult to estimate whether such an assumption of the scope of the duty to warn
would apply also to an English professional party. The following chapters should give us answers as to the scope of the duty to warn binding builders, designers, engineers and sub-contractors in these three legal systems.
Chapter 3. The builder’s duty to warn the client.

While this book intends to present how various professional parties in the construction sector are bound by a duty to warn towards the client and other professionals in case they noticed or should have noticed a default in the performance of a third party, this chapter focuses on the duty to warn of one professional party only: the builder. The builder is understood broadly in this book. It could be a main contractor of the client but also any of the client’s contractors who is responsible for building just a part of the construction. This chapter is the most extensive one in the whole book since in case the builder is the main contractor of the client he is then involved through most of the construction process and has the best chance to notice defaults of other professional parties. This means that the duty to warn of the builder is likely to have the broadest scope in comparison with the duties to warn of other professional parties involved in the construction process.

In this chapter, mostly on the basis of case law, I will try to present the scope of the builder’s duty to warn the client. The case law gives us an indication as to what factors may influence the scope of the builder’s duty to warn and for whose defaults he might need to warn the client about. On the basis of the presented case law, triggers of the duty to warn will be pointed out. Furthermore, it will be discussed whether the fact that the builder is bound by a duty to warn means that he needs to actively look for the defaults in the construction and if not then how attentive the client may expect the builder to remain. The fact that the client himself might be a competent party will also be taken into account to assess the scope of the builder’s duty to warn. It will be also considered whether in case the client prescribes certain materials for the builder to use or recommends or even orders him to work with a specific other professional party this influences the scope of the builder’s duty to warn.

3.1. English law.

3.1.1. Contractual duty to warn.

As follows from the chapter on the emergence of the duty to warn in England, the duty to warn of the professional party in the construction sector as to the risk coming out of a contract with a third party is hardly ever recognised in practice if that duty has not been expressly stipulated in the contract. Where it would be recognised without such explicit regulation in the contract, it is most likely to occur when there is an obvious default in the design plans prepared by a designer who had been employed by the client. One might think that the builder should not be liable in such a situation, since it is clearly the designer’s mistake that leads to the default in the construction. Indeed, in general the client will have a claim against a designer if the prepared project has been faulty unless the designer has excluded or limited his liability. However, in case the designer has indeed limited or even excluded his liability it would be more beneficial for the client to hold liable the other professional party involved in the construction process – the builder. Some case law might suggest that in case there was a default in the design that the builder could have discovered during his work and could have warned the client and/or the designer about that, the builder
could be held liable for the client’s damage in full. That would leave the client in a position to claim all of his damages from the builder for the breach of the duty to warn. How much simpler it would have been if the builder had notified the client that he believed there was some incorrectness in the plans according to which he was going to proceed. In most cases, if the builder pays damages in full to the client, he might have recourse on the designer for at least part thereof since the fact that the builder knew of the defect in the design seems not to absolve the designer from his responsibility for this defect.

If the duty to warn is recognised, however, how far should the builder’s vigilance stretch? Are builders even obliged to search for potential problems, ambiguities or even the slightest uncertainties and warn the client or the designer about their existence? In the JCT Standard Form of 1963 there was a duty placed on the builder to notify the designer about any discrepancies that he might find between the design plans. However, the courts interpreted that clause as the builder having a duty to warn the designer only about obvious mistakes in the plans and not as a duty to investigate whether there were such discrepancies between these documents. Based on the Nowlan case, the duty to warn would extend to all defects that were obvious to the builder. This means that the scope of the duty to warn depends in a large extent on the skill and judgment of the builder. The same follows from the EDAC v. Moss case, a case that has been already mentioned in the chapter on the emergence of the duty to warn. Newey J. stated there:

“I think that if on examining the drawings or as a result of experience on site Moss [the builder – JL] formed the opinion that in some respect the design would not work, or would not work satisfactorily, it would have been absurd for them to have carried on implementing it just the same (...).”

The court does not expect the builder to look for the defects and risks in the design but when one should be clear to him, he should have a duty to warn. Could the duty to warn be extended to cases where there was no actual knowledge of the defect?

In Victoria University of Manchester the client independently employed the designer company and the builder. The builder was obliged to implement the design prepared by the designer company, who in turn specified even the materials, which the builder was supposed to use. One of these materials proved to be insufficient to fulfil its aim, i.e. provide resistance to water. The court adjudicating this case decided that the builder had a duty in tort to warn the designers of the defects in their design, in case he believed them to exist. What should trigger such duty to warn? The court stated:

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238 Baxall Securities Ltd and Norbain SDC Ltd v. Sheard Walshaw Partnership (2001) 1 BLR 36
239 Pearson Education Ltd v. The Charter Partnership Ltd (2007) 1 BLR 324
241 London Borough of Merton v. Stanley Hugh Leach Ltd. (1985) 32 BLR 51
"Belief that there were defects required more than mere doubt as to the correctness of the design, but less than actual knowledge of errors".

The cited sentence creates a very unclear test. However, it can be argued on its basis that also in certain cases where the builder does not have an “actual knowledge of errors” he could be held liable for the breach of his duty to warn. This could mean that there are certain defects and risks that the builder should know about as a reasonable professional. Still, this test does not seem to extend as far as to place on the builder a duty to find defects and detect risks. This test was applied in regard of the tortious duty to warn, one might argue though that it could also be applied in regard of the contractual duty to warn. As it has been already mentioned in the introduction, English courts did not clearly differentiate between the tortious and contractual duty to warn. Taking into account that the tortious duty to warn might not be broader than the contractual duty to warn, it seems that the rules that apply to the tortious duty to warn could be also applicable to the contractual one.

In *Lindenberg v. Canning* the same judge stated that the builder should warn the designer, who was seen to be acting as an agent of the client, as to any ‘suspected’ design defects. Once again, the builder’s duty to warn seems to be limited to the defects that should be easy to discover for the reasonably competent builder.

As it has been mentioned in the previous chapter on the emergence of the contractual duty to warn, the judge who recognised the duty to warn in these cases has not given a clear justification for the existence of the duty to warn under the given circumstances. These cases could not be considered as the only authority for determining the scope of the duty to warn in English law. Fortunately, the point of view presented above could be confirmed by the arguments given in the case *Bowmer & Kirkland v. Wilson Bowden Properties Ltd.* The judge adjudicating this case stated that it is:

“A feature of good workmanship for a contractor to point out obvious errors, or if there is doubt or uncertainty in the plans, specification or other instructions, to ask for clarification so that the uncertainty is removed”.

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249 Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71
252 Bowmer & Kirkland v. Wilson Bowden Properties Ltd. (1997) 80 BLR 131
The builder’s contract obligates him in most cases to constructing a building for the client pursuant to the design plans that the client delivers and at the construction site that the client points out. The builder’s duty to warn does not only encompass the warnings about risks coming out of the design plans but also associated with the construction site. It is conceivable that the client would be convinced by the developer or by the seller of the land that it is suitable for the construction that the client has in mind while in reality it would have not been so. The builder could then have set the client straight by warning him about the unsuitability of the land for the given construction. By issuing such a warning, the builder would then inform the client of risks involved with e.g. buying a certain piece of land for a given construction and would prevent the client from concluding a contract that would be detrimental to him. Some of the English case law\textsuperscript{253} points out that the builder’s obligations are not limited only to careful examination of the construction site in order to decide whether the design might be realized there and whether there will not be any impediments thereto. It rather seems that the standard of care put on the builder is higher and that he will be obligated to warn the client not only of any defects that might be observed within the construction site but also of defects that might appear on the adjoining lands or that are related to the subsoil. The builder would have this duty to warn in case any other careful and competent builder would have done so.

In Batty v. Metropolitan Property Realisations C of A\textsuperscript{254} the builder, working together with the developer\textsuperscript{255}, inspected land on one side of the valley and upon that inspection concluded that the construction could take place there. However, on adjoining land and on the other side of the valley there were certain signs that indicated the need for subsoil examination, which would have then proved that the land was susceptible to landslips. The lawyers of the builder tried to argue that the obligation to conduct such an examination would have placed a too heavy burden of care on the professional parties to the contract. If such a duty would bind the builder he might be forced to conduct detailed and complicated investigations in order to ensure himself that every condition for construction has been satisfied and that he will not be held liable for not showing enough professional care and not warning the client of the defect he should have known about. They argued that the builder should have such duty only in case

“He does happen to look at it [the neighbouring land – JL] and sees a possible danger”,

but that he was under no duty to specifically take into consideration adjoining land.

The court decided that, on the basis of the facts of the case, any careful and competent builder would have conducted further land investigations. Two things need to be pointed out. Firstly, the court decided that it does not matter whether the defects could have been observed at the land owned by the builder or not. This means that the builder will not be able to defend himself by claiming that he did not have access to the particular piece of land. As the court stated

\textsuperscript{255} In the judgment jointly called ‘the builders’.
“The extent of the builders’ duty to investigate and examine the land before building on it was to be determined by what a careful and, competent builder would have done in the circumstances and therefore, it was not limited to observable defects on land owned by the builders or to which they had a legal right of entry if a careful and competent builder would have observed defects on neighbouring land and would not have built until there had been further investigation of the site and adjoining land or he had received a satisfactory expert’s report on the condition of the subsoil”.

Secondly, the court did not see any reason to limit the builder’s liability. The attorneys of the builder had argued that even if the builder was under a duty to further investigate it was “not a very heavy one”, i.e. the builder was not e.g. obliged to conduct subsoil investigation and should therefore not be held liable. The court did not share this point of view, stating that

“A builder’s liability for defects in the land was not limited to ensuring that the foundations complied with the building regulations”.

Taking into account the defence arguments of the representatives of the builder, the builder had no clause in his contract that would oblige him to investigate the land adjoining to the construction grounds. However, the court deemed the builder to be encumbered with this duty to investigate and then warn even if it was not an explicit contractual duty. The builder might not be employed to investigate the land on which the construction is to take place; however, he needs to do so in practice in order to properly fulfil his construction duties.

This very limited case law still enables us to draft the scope of the builder’s duty to warn. It might be filled in also by the cases on the duty to warn of the sub-contractor, taking into account that the duty to warn of the sub-contractor is based on the duty to warn of the builder256.

The scope of the builder’s duty to warn might be influenced also by the competence or actual knowledge of the quality problems (or possibility to gain such knowledge) of the client or other specialists that the client employs.

As far as the client’s competence and actual knowledge was concerned, one of the first cases, which mentioned the potential relation between the client’s competence and the builder’s duty to warn, was Lynch v. Thorne257. There, it was stated that the client was

“No expert himself in the mysteries of architecture and house building”.

Additionally, the Court of Appeal had no doubts whatsoever that the client relied entirely upon the skill and judgement of the builder. However, Lord Evershed M.R., adjudicating this case, stated that:

"For the plaintiff [the client - JL] obviously one cannot help feeling a great deal of sympathy; but a grown adult man is presumably capable of taking

256 Further discussed in chapter 5.
257 Lynch v. Thorne, [1956] 1 W.L.R. 303
competent skilled advice if he wants to; and if he elects not to do so but to make a bargain in precise terms with someone else, then, though no doubt he does rely upon the skill of the other party in a sense, he only does so in the sense that he assumes that the other party, as was the fact in this case, will do the job he has promised to do competently and, at best, that he believes that the house he is going to build will be a habitable house. But that is far short of importing into the transaction any such overriding condition or warranty”.

Upon the facts of this case it might be argued that not only if the client had experience with the construction process or employed someone who had such experience, but even if he had just a possibility to gain the necessary knowledge – e.g. the possibility to employ a specialist advisor, it would exclude the liability of the builder. This point of view, however, has not been confirmed in more recent case law258.

One might also consider whether the duty to warn, which has been placed on the builder, would alter if the construction concerned was at least partially a novelty, e.g. new materials were used or in a novel composition, the construction concerned some novel design, etc. In such a case, it might be argued that also the builder might not have been able to warn the client of the possible future defects resulting from the previously unknown design or usage of materials chosen by the designer. The courts seem to treat this matter differently, though. Namely, it is considered that the builder has to consider the proposed novel solutions twice as carefully in order to discharge his duty of acting with reasonable skill and care and he needs to bring all the potential risks involved to the attention of the client259. The court decided that the professional party cannot simply make an assumption that a material used in a novel construction would act in the same way as it used to do in different conditions. In respect of a design, which is “at and beyond the frontiers of professional knowledge”, such assumptions are not justified260. Thus if the builder sees that in the design plans novel materials have been prescribed to be used, he should inquire even more as to their suitability for the construction.

3.1.2. Precontractual duty to warn.

Even though the above-presented cases have not always given us a clear view on the scope of the builder’s duty to warn in England, there is at least some case law that I could discuss and analyse in this book. As far as the precontractual duty to warn

258 Aurum Investments Limited v. Avonforce Limited (in liquidation), [2001] 2 All ER 385; 78 Con. LR 115, (2001) 17 Const. LJ 145, [2001] Lloyd’s Rep. PN 285; (2001) 3 TCLR 21, which will be discussed in chapter 5 since it concerns the influence of the competence of the client on the subcontractor. In the Canadian case Nowlan v. Brunswick Construction Ltd. [1975] 2 S.C.R. 523, 8 N.B.R. (2d) 76, 2 N.R. 164, 49 D.L.R. (3d) 93 the position of the designer and his liability for preparing a negligent project did not influence the judgement on liability of the builder. The client had a possibility to employ an engineer entitled to survey the work done by the builder, but he did not use his right. The court thought this to be a relevant indication that the client was depending solely on the experience and skill of the builder. The absence of the designer or the engineer advising the client during the materialization phase of the construction process seems to place a heavier burden of care on the builder in the Canadian law.


260 Independent Broadcasting Authority v. EMI Electronics and BICC Construction, [1980] 14 BLR 1
of the builder in England is concerned, however, this is not the case. I have not found any cases discussing even a potential precontractual duty of the builder to warn the client. Taking into account the fact that the source for even the contractual duty to warn is not properly established, the lack of case law on the precontractual duty to warn does not come as a surprise.

3.2. German law.

3.2.1. Contractual duty to warn.

In this paragraph I will discuss both cases concerning contracts in which the VOB/B-provisions have been implemented into a building contract, as well as cases in which provisions of the BGB are applied. However, in practice this distinction does not seem to influence the scope of the builder’s duty to warn261.

Generally it can be stated that the scope of the builder’s liability for not warning the client about the mistake in the design plans has been numerously elaborated upon by German courts262. In a judgment of 28 January 2003, the OLG Hamm rightly noticed that the exact scope of the builder’s duty to warn could not be defined in general terms and depended on the particularities of each case263. Such particularities may encompass inter alia the specifically prerequisite knowledge of the builder, the form and scope of his contractual obligations, contractual aims, as well as whether his obligations lay within the scope of his standard field of practice. The duty to warn seems to be the broadest when it concerns situations, which would normally lie within the scope of the builder’s obligation. For example, if the client ordered pre-fabricated materials, ready to be used by the builder, there is no doubt that the builder would be under a duty to warn the client if there was some default within these materials264. According to the standard practice the builder would have been obligated to take care of the supply of such materials and that was why his competence therein could not give rise to any doubts265. The duty to warn would be as important when it would concern obligations of another builder, also employed at the construction site, on whose work the builder would have to rely to some extent266. The narrowest duty to warn is applied with regard to selecting the planned method of construction, due to

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261 In Chapter 2 I explained that where the VOB/B are not applicable and therefore no duty to warn is imposed on the builder on the basis of the VOB/B, such a duty is in fact based on § 242 BGB.
264 E.g. OLG Brandenburg, 09.05.2007, 13 U 103/03, IBR 2007, 550
the fact that it belongs strictly to the designing phase, in which the client usually employs his own specialists, namely designers or engineers.

Still, as has been mentioned in the chapter on the emergence and the source of the duty to warn, the builder might have a duty to warn if he noticed or should have noticed a default within the design plans. In general, the builder does not have the duty to inspect the work of the designer and other professionals employed at the construction site. However, in case they make a mistake that should have been obvious ‘at a glance’ to the builder, he should warn the client about that. According to Digel, the number of cases in which the builder is held liable for not having warned the client about the default in the design plans is increasing.

For example, in the case of 17 December 1993 the OLG Düsseldorf considered a case in which the builder was employed to cover the balcony of the client with the top layer of water-resistant materials. The designer in this case did not provide in his design for any water-resistant base materials to cover the balcony’s floor. The top layer itself could not successfully protect the balcony from rainfalls. The client claimed damages from the builder for improper performance. The builder defended himself by saying that his performance was without any defaults and that it was the mistake of the designer that caused the damage. The court decided that the builder, before commencing with his own work, was obliged to check whether the previous state of the balcony’s floor guaranteed sufficient protection against rainfall if used as a base for the top layer that the builder was supposed to place. Pursuant to § 4 No. 3 VOB/B the builder was supposed to warn the client that he saw a risk in performing his work as he had been ordered to do. The builder should have issued the warning also in case he was not nor would have been employed to cover the balcony’s floor with the basecoat.

Also in the more recent case of the OLG Celle of 12 December 2001 it was stated that if the builder’s performance could be influenced by the preliminary works performed by another entity or even by plans made by a designer, the builder had the duty to inspect such work or such plans in order to establish whether they had been diligently prepared and constituted a solid basis for his future work. If there was a possibility that they might have hindered his performance, the builder had the duty to warn the client thereof. Once again the provision of § 4 No. 3 VOB/B was applied, however, OLG Celle discussed also the scope of the duty to warn. The court stated that the limits of the duty to warn were set by the standard of reasonableness and had to be adjudicated individually and separately for each case, due to the specific circumstances of each case. What will be demanded from the builder in each particular case, depends on the professional knowledge that can be expected of the builder, on his knowledge of the factual situation – of works performed by the previous builders at the construction site – as well as from all other circumstances.

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268 A. Digel, ‘Fachunternehmer muss auf fehlerhaftes Lüftungskonzept des Fachplaners hinweisen!’, *IBR* 2008, 148
which should be looked upon by the reasonable and diligent builder as significant\(^{272}\). The court noticed also that the builder’s duty to inspect and to warn the client could be less significant or that he could be completely released from it, in case the client employed a specialist to perform these other works\(^{273}\). However, when the default e.g. in the design plans should be obvious to the builder, the sole fact that there was a specialist employed by the client will usually not release the builder from his liability\(^{274}\). In case the builder does not fulfil that duty, his own performance is negligent and he shall be held liable. In the mentioned case the builder was indeed found liable, even though there was a specialist employed by the client, due to the fact that the default should have been obvious to the builder.

In the case of 23 April 2002\(^{275}\) the OLG Dresden further elaborated on the builder’s duty to warn the client about a default in the designer’s plans. The court stated that generally pursuant to provision § 4 No. 3 VOB/B the builder was obligated to warn the client of the default in the planned method of construction. This obligation encompasses also the duty to inspect whether the designer’s plans are appropriately prepared in order to reach the construction aims adopted by the client\(^{276}\). The court stated, however, that the builder should be liable for not fulfilling his duty to inspect and warn only when the default in the designer’s plans should have been obvious to him, given the knowledge, which could have been expected from a professional acting in his field of expertise\(^{277}\). That means that, although the builder is expected to assess the designer’s plans, he would not be held liable for not warning the client of defaults which could not have been obvious to him as a common builder but which would have been obvious to any other competent designer\(^{278}\).

In the above described case the court decided that the builder should have the duty to inspect whether the designer’s plans are sufficient to reach the client’s aims. In the case of 8 February 2008\(^{279}\) OLG Düsseldorf confirmed that the builder’s contractual obligations are not limited to just performing the agreed tasks, but stretch out to making sure that the construction will be as functional as the client wished for it to be\(^{280}\). This obligation is not diminished when the builder performs exactly as the parties have agreed upon or in accordance with all the technical rules then binding. The construction will be faulty when the end result envisaged by the client will not be achieved, also if it happens due to the faulty design plans or materials delivered by the client. The builder may avoid liability for the faulty construction only if he warns the client about the defaults that he saw or should have seen within the default plans,

\(^{273}\) OLG Celle, 16.03.2000, 13 U 126/99, IBR 2001, 178; OLG Köln, 10.03.1987, 22 U 221/86, BauR 1988, 241; for the list of old cases on this subject see: ZfBR 1998, 244
\(^{275}\) OLG Dresden, 23.04.2002, 15 U 77/01, BauR 2003, 2, p. 262
\(^{278}\) The fact that the builder’s liability in given circumstances should only be limited to cases in which the builder should have recognised the default in the design (which means when the default had to be obvious to any diligent, reasonable builder) was stressed some years earlier in German literature, see e.g. G. Kaiser, *Das Mängelhaftungsrecht in Baupraxis und Bauprozess*, Heidelberg: Müller, 1992, Rdnr. 328, 330 f., p. 649 ff.
\(^{279}\) OLG Düsseldorf, 08.02.2008, 23 U 58/07, IBR 2008, 665
\(^{280}\) This judgment has been based on a verdict of BGH, 08.11.2007, VII ZR 183/05, NJW 2008, 511.
delivered materials or previously conducted works while checking their fitness for and usefulness to the whole construction. Once again, the court determines that the boundaries of this duty to warn should be set by the expertise that the builder could be expected to have and by all circumstances of the case.

As it has been mentioned in the chapter on the emergence of the duty to warn and signalized in the above paragraph, the builder might not be expected to warn the client of the default in works of a designer or of another builder in case he did not have sufficient knowledge to recognise it\textsuperscript{281}. Let us take a closer look at the judgments of German courts, which specify the scope of the builder’s duty to inspect and warn in order to see what kind of expertise, and diligence is needed from the builder.

In the case of 19 July 2006\textsuperscript{282} OLG Köln adjudicated a case in which the client employed an expert builder to conduct some deep foundation works with the use of displacement piles without lost tubes. At the moment of the conclusion of the contract, when the parties agreed on this construction method, the client was not yet in possession of the soil expertise conducted at the construction site. Later, the specialists who prepared it presented the soil expertise to the builder; however, it was incomplete and inaccurate. After the construction had been conducted, certain cracks appeared on the walls due to the use of the displacement piles. It turned out that the construction method used was not suitable for that particular construction site. The specialists who prepared the soil expertise clearly had made a mistake and should not have presented the ground under the construction as allowing this construction method. The question was whether the builder should have noticed the default in the soil expertise and warned the client about that. The court decided that the builder in this case should not have trusted in the soil expertise presented to him. The court stated that, in general, the builder is not required to inspect the soil himself or to order such an inspection and he may trust in the soil expertise presented to him by another specialist. However, the builder needs to review that soil expertise as to its plausibility and to check whether it is complete and if not, he needs to warn the client about that. The scope of the duty to warn should be even broader in case the builder, as in this case, is a specialist in a given construction method and knows what kind of risks to expect. Additionally, the court mentioned that it did not matter that the soil expertise had not been given to the builder before the contract was concluded and before the builder committed himself to a certain construction method. The builder was required to give a warning to the client at the moment that he realized the risk to the construction, whether he realized this during the performance of his works or even afterwards.

In the above case it was decided that the builder should have had the necessary knowledge to suspect a default in the plans delivered to him, especially since he was a specialist in the given construction method and should know what conditions needed to be fulfilled in order to apply it. In the case of 16 September 2008\textsuperscript{283} OLG Hamm also found the builder in breach of his duty to warn on the ground that the default in the construction should have been easily noticeable by him due to his competence. The builder was in this case a garden and landscape builder and was employed by the client to build a garden annex next to his newly built house. His work was not in itself

\textsuperscript{281} M. O. Hilgers, ‘Einbau einer Klimaprüfkammer: Muss Auftragnehmer klüger sein als ein Fachingenieur?’, IBR 2007, 192; OLG Köln, 06.12.2005, 22 U 72/05, IBR 2007, 192

\textsuperscript{282} OLG Köln, 19.07.2006, 11 U 139/05, IBR 2007, 420

\textsuperscript{283} OLG Hamm, 16.09.2008, 26 U 31/06, IBR 2009, 1176
faulty. However, the question was whether he should have noticed that the masonry works conducted previously, which were in direct contact with the soil, were not sufficiently waterproof. The court decided that the builder had such a duty to warn, especially since it was considered the ‘daily bread’ of the garden and landscape builder to check whether the construction was sufficiently waterproofed. This default was also easily noticeable for the builder. The waterproofing materials were black, thus they should stand out from the construction site. If the builder started his works on material that was not black, that fact should immediately have lit a red lamp with him that the construction was not sufficiently waterproofed. By not warning the client, the builder acted negligently in this case.

In the case of 27 May 2008 OLG München decided that the builder who was employed to build in a heating system does not have to know whether the materials he was provided with would manage to heat up the whole construction in a way that the client expected it to. The builder would have had to have the knowledge of an electrician to be capable of calculating that. Instead, the court decided that the builder did not have to study the electrical components of the heating system and could trust in the expertise of the company, which delivered the materials and advised the client on choosing them. The court included in its judgment the fact that the expert consulted by the court had stated that it is not, in general, expected from builders to have knowledge about the electrical components of construction.

Therefore, if the default in the plans or the work of previous builders should be visible for the builder, the builder will be held liable for not inspecting the construction site sufficiently and not warning the client about the risk to the whole construction. However, when the default lies within the area of expertise that the builder is not familiar with nor should be competent in, the builder cannot be held liable if he does not notice and warn the client about that default.

In certain constructions the builder will have a free choice of the construction materials he would have to use, in others this choice will be taken away from him. The construction materials might be chosen by the designer, who might even order the materials himself and have them delivered to the construction site. Alternatively, the designer could also choose the materials but leave it to the builder to order them. The builder would be then limited to ordering such materials as had been specified by the designer. In the last two cases, the builder might still be liable for not warning the client that the materials were not suitable for the given construction, even though it was the designer who prescribed them. The builder has in such a situation a duty to inspect such materials and warn the client if he considers them faulty or insufficient to reach the aim that the client intends to achieve with his construction.

For example, in the case of 17 March 2011 the OLG Karlsruhe considered whether the builder should warn the client that the concrete that he was ordered to use by the designer needs a long time to dry. The court decided that since the builder was aware of the construction grounds and knew that after laying down the concrete it

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284 OLG München, 27.05.2008, 28 U 4500/04, IBR 2009, 325; IBR 2009, 326; IBR 2009, 1213
287 OLG Karlsruhe, 17.03.2011, 13 U 86/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011); see also: G. Hein-Röder, ‘2/3 Planungsverschulden bei Ausschreibung ungeeigneten Baumaterials!’; last correction: 23.06.2011 (full text found on <<www.ibr-online.de>>)

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would be surrounded on three sides with foil, he should have been aware that the
drying time of the concrete would be prolonged. This means that the builder should
have warned the client about a risk of proceeding with other stages of the construction
process before the concrete dries out. The fact that the concrete and the method of its
application was chosen by the designer, who had sufficient professional knowledge to
know of this risk, did not influence the scope of the builder’s duty to warn, according
to the court.

This duty to warn has its limits, however, in the professional knowledge that
can and should be expected of the average builder. The builder is not obligated to
weigh, calculate and thoroughly examine such materials. The builder has a duty to
warn only when any other average builder would have noticed and recognised a
default in the same circumstances 288.

The liability of the builder for not warning the client that materials intended to
be used were not suitable for the particular construction was considered in the BGH’s
judgment of 12 December 2001 289. The BGH stated in this case that the builder
should be released from his liability in a case when the materials, which were used at
the construction site, were a novelty and during the time when the decision was made
about their application in the construction there was no common knowledge that their
particular characteristics made them unsuitable for that construction. The court
recognised that according to the state of knowledge at the time of adjudicating the
case there was no doubt that the usage of other materials would have been more
beneficial for the construction and would enable the achievement of the client’s aims.
However, according to the state of knowledge in the year 1991 when the decision was
made, which materials to apply, the choice to use that particular brand of materials
was perfectly reasonable and could therefore not lead to the builder’s liability. The
court expressly denied also the possibility of the builder’s liability for non-fulfilment
of his duty to warn the client that the materials, which would be used in the
construction, were novel and that some of their characteristics had not been tried out
in practice, yet. Objectively, the court recognised that such a duty to warn existed.
However, in this particular case the court did not find that non-fulfilment of such duty
resulted in causing the client any loss. The court stated that due to the fact that the
builder was not a producer of those materials he could not have had more knowledge
thereof than the producer had and so the builder was justified to rely on the producer’s
assurances that such materials were suitable for the planned construction.

In general, the builder will not be released from this duty to warn as to the
default in the materials even if the client is a professional party himself, with an
expertise as to these materials. In such a case the builder would still be expected to at
least review the materials in order to see whether there are no clearly visible faults 290.

The builder’s duty to warn is not limited to the defaults in the construction that
have been made by the designer. As it has already been mentioned the builder needs
to warn the client about any risks that might prevent the client’s aim in the

288 OLG Brandenburg, 09.05.2007, 13 U 103/03, IBR 2007, 550; H. Locher, U. Locher, Das private
Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten, Hamburg:
Verlag Dr. Kovac, 2008, p. 25-26
289 BGH, 12.12.2001, X ZR 192/00, BauR 2002, 6; the same reasoning was applied in a newer case:
OLG Brandenburg, 09.05.2007, 13 U 103/03, IBR 2007, 550
290 S. Bolz, ‘Fachkundiger GU: Entfällt Prüfungs- und Hinweispflicht des NU für bauseitige
Betonlieferung?’, IBR 2008, 24; under all circumstances of the case the builder might be exceptionally
released of his duty to warn: OLG Saarbrücken, 21.08.2007, 4 U 448/03, IBR 2008, 24
construction to be achieved, despite the builder performing his work correctly, in case the builder knew of these defaults or should have known about them. Is the builder then obligated to warn the client about the risk coming from the performance of another party than the designer that is working at the construction site, e.g. another builder?

As has already been mentioned in the previous chapter, in a judgment of 15 February 2001 OLG Bremen recognised the builder’s duty to warn in a case where the VOB-provisions had not been implemented into the contract, stating that the principle of “good faith” obligated the builder to protect the client from suffering any loss, which in this case came from a contract with another builder. The client was the owner of the land on which he intended to have a house built. To this end he employed two builders: one was supposed to conduct deep excavation works and then fill the hole with sand as a foundation for further works, the other was supposed to build the house thereon. After the construction was completed it turned out that the first builder had performed his work negligently as a result of which cracks appeared on the inside and on the outside of the house. The client claimed damages from both builders, claiming that the second builder should have inspected the works of the first builder before he commenced his own works. The court stated that indeed every builder who commences work at the construction site, which follows some works that have already been performed there and who has to rely to some extent on those previous works, is obligated to inspect their result and even to make some inquiries thereto. Namely, he is obligated to make sure that the previously performed work and used materials constituted a suitable ground for his own work and that they did not have any features that could undermine the quality and effect of his own work. The scope of such duty to warn depends on the characteristics of the particular case, which the court states with reference to an earlier judgment of the German Supreme Court.

What could influence that scope was for example the experience and professional knowledge that could be expected from every builder, his knowledge of the previous works performed at the construction site and of all circumstances, which a diligent and reasonable builder should acknowledge as bearing some importance during his inspection of the site. It was then stated that the scope of the builder’s duty to warn would be as broad as his inspection of the construction site would be essential for reaching the planned construction effects. On that ground the court recognised that in case of the construction of the whole house from scratch, the duty to warn should be the broadest. In case the builder would not want to or could not properly inspect the works performed by his predecessor, e.g. when he knew he was not experienced enough in that field or did not possess the required knowledge thereof, then he should have employed a specialist in that field to help him perform his duties. It seems, however, that the court did not consider all consequences that its

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292 OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10
294 BGH, 4.11.1965, VII ZR 239/63, Schäfer/Finnern, Z 2 410 Bl. 29
decision might have. For example, the court did not take into account which party would have to pay for the expertise of an additional specialist that the builder would employ and how such a decision would influence the general costs for the construction and for the builder’s work.297

In another judgment of 20 July 1994, the OLG Düsseldorf elaborated on the duty to warn of the builder about a risk coming from the performance of another builder. In that case the builder was employed to finalize the working space in a newly constructed building. Before he commenced his work, he had noticed that at that particular working space there had already been some construction debris present – as a result of the original construction. The court stated that in such circumstances the builder had the duty to warn the client that there was a danger of damage to the exterior insulation of the cellar by the debris that had been left at the construction site. Once again, it was stressed by the court that as soon as the builder spotted something at the construction site that he knew could endanger the whole project – he should have immediately warned the client thereof.

Indeed, it was stated in the case of 30 November 2005 by OLG München, that the full and proper performance by the builder of his contractual obligations does not limit itself to just completing all his tasks faultlessly in isolation from other parts of the ongoing construction. In particular, the builder should be concerned and required to check the work of his predecessors at the construction site, on whose work the results of his own performance might rely. However, even if the builder assumes that his own work will not suffer due to the default in the works of another builder, he still has the general duty to cooperate with other professional parties at the construction site and to act in good faith. This obliges him to warn the client of the risk to the construction as a whole. OLG Düsseldorf in the case of 11 October 2007 has explicitly stated this. This case gives us also one possible explanation why the client would claim damages from the builder who did not warn him about the default in the works of another builder and not directly from the builder who made the default. Namely, in this case the builder who performed faultily was insolvent by the time the damage manifested itself in the construction.

In a decision of 25 May 2011 the OLG Brandenburg considered a case in which a builder was employed by the client to install a borehole heat exchanger for his house. The house came already equipped with two heat pumps that were installed more than 10 years earlier by another builder. The builder renewed the heating system and integrated the old heat pumps within it. Shortly after the construction was completed it turned out that the new heat exchanger despite working, i.e. processing water, did not emanate any heat. The check-up of the whole construction revealed that the two old heat pumps stopped working at a certain point and disrupted the whole system. The client claimed that the builder had a duty to warn him about the risk of

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300 T. Großkurth, Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten, Hamburg: Verlag Dr. Kovac, 2008, p. 28
301 OLG Düsseldorf, 11.10.2007, 5 U 6/07, IBR 2008, 432
302 OLG Brandenburg, 25.05.2011, 13 U 83/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)
303 The facts of the case do not make it clear whether the pumps stopped working altogether or whether they continue to work but not at a level that would allow the heating system to provide sufficient heat
not exchanging these two old heat pumps. The court agreed that in general the builder has a duty to inspect the previous works conducted at the construction site and see whether they constitute a proper foundation for his own works. The builder is obliged to check whether if he continues upon the work of another builder, his own work will be able to lead to the result that the client aimed at. It did not even matter in this situation that the heat pumps were already installed and hidden within the walls of the house – the builder still needed to make sure that if he integrated them into the heating system he was creating, they would work properly. However, it was proven that at the moment of the client’s acceptance of the builder’s work these two heat pumps were still working properly. This signified to the court that if the builder had inspected the heat pumps before he commenced his work, he would not have found them lacking, which meant that he would not have had a duty to warn in this case (since there was no default at that moment). Taking into account that the client had failed to prove that the heat pumps had stopped working before he accepted the builder’s work, the court could not find the builder at fault for breach of his duty to warn.

It seems reasonable not to hold the builder responsible in this case since if the already installed system that he is building upon works at the moment the builder is performing his construction tasks, he should not be expected to predict its future performance. This is different, of course, if it is obvious to him that there is any risk to future proper functioning of the installation, e.g. if the longevity of the pipes in the mentioned case was ca. 11 years, and the builder would be conducting his tasks 10 years after the pipes were installed, then he should warn the client that these old pipes are likely to need replacing within the coming year. Such a duty to warn could be demanded of the builder, since he is supposed to contribute to giving the client a fully functional construction, which will be discussed here next. In the mentioned case, no one had raised an issue of how long these pipes could be expected to function properly.

A question may be asked as to what kind of defaults the builder needs to warn the client about. In general, the builder has to facilitate the client’s aims in the construction and it seems that whatever these aims might be, the builder should warn the client if reaching them becomes doubtful.

In the case of 8 November 2007304 the BGH decided a case in which the builder was employed to install a heating system in the client’s forester’s lodge. The lodge was not connected to the public electricity network. Before employing the builder the client consulted with another company about designing and purchasing a power station that would sufficiently warm the whole house and provide electricity. The builder installed everything in accordance with the plans prepared by that company and the client. When the construction was finished it turned out that the house was not sufficiently heated by all installations, since the power station did not have sufficient capacity to provide that. The client claimed damages from the builder, claiming that he should have known that the power station would not be sufficient for his needs. Firstly, the German Supreme Court stated that the construction does not fulfill the contractual requirements laid down for it not only when it is technically faulty but also when it does not satisfy the functionality that the client clearly expected of it. Secondly, if the functionality expected by the client has not been reached as a result of faulty work of another specialist – in this case: the company

to the house. The judgment states only that the heating does not work ‘weil die Sonden nicht in Ordnung sind’.

304 BGH, 08.11.2007, VII ZR 183/05, BauR 2008, 344
designing and delivering the power station – the builder could escape liability if he warned the client about the risk involved with the contract with that third party. Thirdly, even if the power station was built by another specialist at about the same time that the builder was beginning his construction works, i.e. laying down pipes, the builder could and should still inquire as to what kind of power station was being prepared and whether it was sufficient to provide heat for the whole construction.

In the case of 9 July 2009\textsuperscript{305} the client employed a builder to construct a glass porch at the front entrance of the building. The client wanted that glass facade to be parallel to the steel construction installed on the inside by another builder that would still be visible through the glass. Despite the glass construction having been performed correctly, the parallelism was not achieved due to the unbalanced steel construction that had been performed if not in a faulty than in an uneven way. The court – OLG Hamm – decided in this case that the builder is not only obliged to warn the client about technical defaults in the construction but also about optical ones, since these may also lead to damage for the client, especially in case the client had a special interest in reaching a certain optical result and that interest was or should have been clear to the builder. Therefore, the builder had the duty to warn that the works performed previously at the site would not make it possible to achieve the optical result wished by the client in combination with the proper performance of contractual obligations by the builder. Of course, the general rule applied according to which the duty to warn would emerge only in case the builder should have known about the default.

The German courts made it clear that the builder would be obligated to warn the client not only about technical defaults in the construction that other builders had made but also about any risks that could endanger the aim and functionality that the client expected from that construction. However, the scope of the duty to warn of the builder does not go as far as to protecting the client from insolvency of other professional parties the client chooses to employ\textsuperscript{307}. For example, in the case of 19 November 2009\textsuperscript{306} the client claimed that the builder should have warned him during performance of his construction works (installation of heating and electric systems) that the previously employed builder, who constructed the whole house, made a mistake, which would lead to the increase of energy use. The warning was not given and when the client realized himself that the first builder had improperly constructed the ‘low energy house’ ordered by the client, the first builder was already insolvent so the client could not claim his losses from him. Still, the OLG Celle did not find the builder in breach of his duty to warn as far as the losses of the client coming from the first builder’s insolvency were concerned, i.e. for the costs of repair of the house that no longer could be claimed from the first builder. Since the client would need to bear the same costs for repair of the house whether the warning was given during construction of the heating installation or afterwards, there was no causal link between the client’s losses and the lack of a warning. The court stated also that the scope of the duty to warn is to protect the client from the faulty works of one professional party influencing the works of another professional party and, therefore, not giving the client the desired final result. However, the duty to warn does not go as far as to protect the client from insolvency of other professional parties the client chooses to employ\textsuperscript{307}.

\textsuperscript{305} OLG Hamm, 09.07.2009, 21 U 46/09 (full text found on \texttt{<www.ibr-online.de>}; lastly checked on 04.12.2009)

\textsuperscript{306} OLG Celle, 19.11.2009, 6 U 96/09, IBR2010, 1369

\textsuperscript{307} See chapter 2 for a further discussion of this case.
The builder does not only need to warn the client about the risk coming from the contract with other independent contractors of the client, but, in general, from any risk coming to the construction – also from his own sub-contractors. In the case of 12 November 1999\(^{308}\) the OLG Düsseldorf adjudicated about the builder’s duty to warn the client of the sub-contractor’s default. The builder had employed another company (the sub-contractor) to perform some work on the basis of which the builder could perform his own work later on. Pursuant to the applicable § 4 No. 3 VOB/B the builder had the duty to inspect and inform the client of any inconsistencies in the construction. If this duty was negligently performed or not performed at all, then pursuant to § 13 No. 3 VOB/B\(^{309}\) the resulting defect would be looked upon as the builder’s defect. The court stated, referring to other judgments\(^{310}\), that the builder had then an obligation, as any other builder who performed work, which depended on the prior work of another builder, to inspect this prior work and the materials used thereby. The builder needs to make sure, beyond any reasonable doubt, that the so far performed works constitute a solid base for his own work and do not have any characteristics, which could endanger the proper performance of his own work. If the builder had performed his inspecting duties, he would have been able to discover defects in the sub-contractor’s work and warn the client thereof. The gross negligence of the builder in not fulfilling this duty made him liable for the sub-contractor’s own default.

In most cases the builder would be liable for the performance of his sub-contractor on the basis of his responsibility for persons he employs in order to perform his contract with the client. This liability is based on § 278\(^{311}\) BGB. However, it is imaginable that in certain cases the builder would contractually try to limit or exclude his liability for the sub-contractors he employs. In such a situation, as this judgment shows, the builder might still be liable for the client’s damage. The ground of the builder’s liability would then be non-performance of his duty to warn, i.e. of one of his own obligations.

There are also cases in which the default clearly came from the designer, however, in case there were two builders employed by the client, one of them could have a duty to warn of the designer’s default, whereas the other builder could have a duty to warn of the risk coming from the first builder, who did not warn the client about the designer’s default and created a faulty work himself, by building on a faulty design. A good illustration of that is the OLG Hamm’s case of 18 July 2002\(^{312}\) both builders, which had been employed by the client were found to be solidary liable to him. The case concerned the construction of an indoor tennis centre. According to the design plans the first builder was supposed to include ashes as one of the building materials applied for the creation of one layer of the centre’s floor, although these ashes were inappropriate for the intended construction. The court stated that this fact,

\(^{308}\) OLG Düsseldorf, 12.11.1999, 22 U 71/98, BauR 2000, 3, p. 421
\(^{309}\) "Ist ein Mangel zurückzuführen auf die Leistungsbeschreibung oder auf Anordnungen des Auftraggebers, auf die von diesem gelieferten oder vorgeschriebenen Stoffe oder Bauteile oder die Beschaffenheit der Vorleistung eines anderen Unternehmers, haftet der Auftragnehmer, es sei denn, er hat die ihm nach § 4 Nr. 3 obliegende Mitteilung gemacht."
\(^{310}\) OLG Düsseldorf 13.11.1992, 22 U 113/92, NJW-RR 1993, 405
\(^{311}\) 'Der Schuldner hat ein Verschulden seines gesetzlichen Vertreters und der Personen, deren er sich zur Erfüllung seiner Verbindlichkeit bedient, in gleichem Umfang zu vertreten wie eigenes Verschulden. Die Vorschrift des § 276 Abs. 3 findet keine Anwendung."
\(^{312}\) OLG Hamm, 18.07.2002, 21 U 82/01, BauR 2003, 1, p. 101
namely the unsuitability of the ashes’ usage should have been obvious to both builders – they did not need to possess any special knowledge to recognise this – and therefore they should have suggested to the client to change the construction materials so as to reach the intended aim of the construction. The OLG Hamm stated that both the builder who used the ashes in the floor foundations as well as the builder who followed his work at the construction site and who knew that the first builder had applied ashes were liable for the damage suffered by the client in result thereof.

In the above-presented cases we could see mainly deliberations on the duty to warn of the builder, who performed his work upon the work other builders had done at the construction site. German courts, however, have also considered the opposite situation, i.e. whether the builder who started his work at the construction site had the duty to warn about risk coming from other builders, who would be performing their work when he had already finished his tasks at the construction site. In general, a builder may trust that if he performs his contractual obligations fully and correctly, the following builder will be able to build upon his work without causing any defaults, provided he obeys all the standard technical requirements\(^ {313}\). However, in certain cases a duty to warn could arise in regard of the materials and construction techniques the subsequent builders should use so that the construction as a whole would be fully consistent. It seems that this could happen in two types of situations. Firstly, the first builder might have such a duty to warn in case the first builder used unusual materials or techniques himself, that the following builder might not expect to have been used and that could not be built on in a standard way of construction\(^ {314}\). Secondly, the first builder might have such a duty to warn in case he knows that the following builders are not competent enough to perform their contractual task and guarantee the success of the whole construction\(^ {315}\).

This duty to warn has been recognised by the OLG Köln in the judgment of 22 December 1993\(^ {316}\). Pursuant to the facts of this case, the client concluded separate construction contracts with several builders. They were to renovate his balcony and each was directly employed by the client to perform specific partial works within the whole construction process. When the construction was finished, it turned out that the materials used by different builders were together not fully waterproof and the construction suffered some damage. During the proceedings it was proved that each builder diligently performed his own obligations, however, the plans pursuant to which each of them performed his work were made negligently. As a result, the construction as a whole did not fulfil the client’s expectations. The client sued all builders and was successful in his claims. The court stated that although each builder performed his own work diligently, if one looked at the effect of only particular phases of the construction, in isolation from the whole project, still a builder, who had known that his work would constitute the basis for future performance of other builders at that site and who had recognised that there were inconsistencies between the tasks assigned to builders but still had not warned the client thereof, should be


\(^{314}\) S. Büchner, ‘Schnittstellen: Wer haftet für Mangel?’, *IBR* 2004, 9; H. Merl, ‘Prüfungs- uns Hinweispflicht hinsichtlich Arbeiten nachfolgender Unternehmer?’, *IBR* 2007, 131


\(^{316}\) OLG Köln, 22.12.1993, 16 U 50/93, NJW-RR Zivilrecht 1994, 9, p. 1045
liable if the whole construction turned out to be faulty. The court stated that such a builder had the obligation to warn the client, prior to the execution of his contractual obligations, that his contractual obligations were not compliant with the obligations of other builders, who were supposed to perform their work at the construction site upon finalization of his work there. The reason that each individual builder was supposed to warn the other before starting with his own work seems to be that the other builders should not have to be forced to adjust their work to the first builder, only because he performed first. It might have been a better solution to change the materials used by the first builder, instead of the third one, for example. The court stressed that in this case there could be no doubt that all builders employed by the client were liable for the default within the construction.

In the case of 12 May 2000\textsuperscript{317} the builder was employed by the client to construct windows and door lintels. The builder received from the client only the accredited, ready to be performed, construction plans, designed in the scale 1:100, plus plans prepared by the structural engineer. He did not receive any executive plans prepared on the basis of the accredited plans. As a result, the builder constructed lintels on the basis of plans prepared by the structural engineer, not being aware of the fact that they differed from the executive plans. There was no doubt that the lintels were prepared diligently and properly. However, it turned out during the further construction process that builders who performed subsequent works, took as a basis for their work the executive plans and as a result the construction as a whole was inconsistent. The client claimed that the first builder had the duty to compare the accredited construction plans with the plans prepared by the structural engineer and to warn him about the inconsistencies between these plans. The OLG Düsseldorf stated, however, that the accredited construction plans could not constitute the basis for the builder’s work. In case the builder did not receive executive plans, he was justified to build on the basis of plans prepared by the structural engineer. The court decided that it was perfectly reasonable for the first builder to rely in such a situation upon plans prepared by the structural engineer. Moreover, the first builder did not have the duty to compare both plans and to warn the client about the inconsistencies therein, due to the fact that pursuant to § 3 No. 3 VOB/B the duty to inspect and warn binds the builder only when the inspection is necessary to properly fulfil his contractual duties\textsuperscript{318}. That is why it was concluded that since the first builder was not aware of the difference between the plans, he did not have the duty to warn the client of the fact that the subsequent builders would have to follow his lead and to apply the plans prepared by the structural engineer. The court stressed that under the given circumstances it is the role of the subsequent builders to make sure that they perform their work in such a way that it would be consistent with previously done work at the construction site.

It can be stated that there is no general duty to inspect the works of the following builder or to warn the client about the default in them\textsuperscript{319}. The duty to warn would bind the builder in case he knows or should have known that on the basis of the works performed by him the following builder might not be able to perform free of

\textsuperscript{317} OLG Düsseldorf, 12.05.2000, 22 U 197/99, BauR 2000, 9, p. 1339


fault. In the case of OLG Dresden of 11 December 2002 it has been stated that in general, the builder has the duty to perform his work in a way that it will be a suitable ground for the following construction works. The builder might assume that the following builders will use the known rules of construction and does not need to inspect their work. This assumption could be safely made when the following builders are professional parties. The builder will fail in performing his contractual obligations if he constructs his part of the building in a way that is not suitable to constitute a basis for the construction works that are yet to come, even if they are performed faultlessly. In such a case the builder might have a duty to warn the client that the following works need to be adjusted. Additionally, the builder might have the duty to warn if he knows that the following builder would perform his works negligently.

A factor that might influence the builder’s duty to warn is the fact that a professional party is representing the client. Does the knowledge and experience of another specialist employed by the client, e.g. a designer, influence the scope of the builder’s duty to warn? In the BGH’s case of 18 January 2001 the client employed the builder to perform a number of renovation works in his house. The client hired also a director of the construction, who was supposed to supervise the whole construction and who represented the client. The builder was *inter alia* obligated to secure the basement against the influence of humidity, pursuant to provisions of the original contract. In practice, the builder did not perform this work. The builder claimed that during the construction process the director of the construction amended the contract and released the builder from this particular obligation. The BGH stated that the director of the construction was not empowered to change the original contract. However, it was stated that the builder in any case had the duty to warn the director of the construction of possible consequences of cessation of works on safeguarding the basement from humidity influences. In case the director of the construction would ignore the warning given to him by the builder, the latter was obligated to directly warn the client. The court expressly stated that even if the competence and professional knowledge of the director of the construction could be attributed to the client, this fact in itself did not release the builder from his duty to inspect and warn the client.

The OLG Bremen in its judgment of 15 February 2001 also stated explicitly that every builder is in general responsible for the work he is supposed to perform, which encompasses also the responsibility for the inspection of the work performed by that builder’s predecessors in order to make sure that his own work would be performed in an appropriate manner. That obligation does not change, according to the court, when the client employs a designer to inspect the construction or to coordinate the builders’ different performances. The client needs to be sure that each

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324 BGH, 30.06.1977, VII ZR 325/74, NJW 1977, 1966, BauR 1977, 420
325 OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10
builder will diligently perform his own contractual obligations without having to inspect his work on a standing basis or employing other professionals to do that.

Additionally, in the case of 29 April 2005\textsuperscript{326} OLG Düsseldorf stated that the builder has the duty to warn especially as to such parts of the construction that are commonly known to often be a source of risks to the construction. The court decided in this case that all the materials and works used to cover parts of the construction in order to protect it from the humidity need to be examined and inspected carefully and more so than other parts of the construction. This obligation of the builder does not change, in general, due to the fact that the client employs another professional party that could advise and warn him against these risks, as well.

This reasoning was further developed e.g. by the OLG Düsseldorf in the case of 15 July 2010\textsuperscript{327}. In this case the designer made a mistake in his design plans by not providing proper sound insulation of the windows in the client’s house. The builder was found by the court as having a duty to warn the client about this default in the design plans. The court stated that the presence of a professional client or of his professional advisors did not liberate the builder from conducting his own tests. He is still liable, even when the professional client or his professional advisors would have tested the design plans and could have discovered the default. Only when the builder has specific grounds to believe that tests conducted by other professional parties are as full and as reliable as his own tests would be, may he withhold from conducting his own tests which would allow him to check whether the design plans will allow him to construct what the client had in his mind. Pursuant to the court, the builder may not be released from his duty to warn if it is clear that if he conducted his tests and shared his doubts about design plans, the client might have avoided his losses. The court concluded that the sole fact that a professional designer provided in his design plans for some noise control measures does not release the builder from his duty to test whether the design plans are faultless. Of course, the builder’s scope of liability might be limited under such circumstances\textsuperscript{328}.

The above-described cases confirm that in German law the fact that the client has the professional knowledge, which could be comparable with that of the builder or the designer, releases neither the builder nor the designer from their duty to warn the client\textsuperscript{329}. In other words, if the client employs separate parties, like e.g. a director of construction, to supervise the work done by the builder or designer, this does not mean that the latter parties may treat their obligations less seriously.

It must be noticed, though, that in some cases it was decided that if the competence of the client or another person employed by the client was higher than that of the builder, then the builder would not be under a duty to warn. Even in case the builder actually knew of the default, he still might be considered to not have to warn the client about that\textsuperscript{330}.

Namely, the OLG Hamm in the case of 28 January 2003\textsuperscript{331} stated that in general the builder is not under an obligation to warn when the client employed a designer or a director of the construction site, from whom a higher degree of professional knowledge and experience could be expected than from the builder with

\begin{itemize}
\item \textsuperscript{326} OLG Düsseldorf, 29.04.2005, 23 U 157/04, IBR 2006, 1445
\item \textsuperscript{327} OLG Düsseldorf, 15.07.2010, 5 U 25/09, IBR 2010, 675
\item \textsuperscript{328} This will be further discussed in chapter 7.3.
\item \textsuperscript{329} H. Locher, U. Locher, \textit{Das private Baurecht}, München: C.H. Beck, 2005, p. 100
\item \textsuperscript{330} See the case discussed below: OLG Düsseldorf, 13.03.2003, I-5 U 71/01, BauR 2004, 1, p. 99.
\item \textsuperscript{331} OLG Hamm, 28.01.2003, 34 U 37/02, BauR 2003, 7, p. 1052
\end{itemize}
respect to the circumstances in which the default arose\textsuperscript{332}. That case develops an earlier statement of the same court\textsuperscript{333} that the scope of the duty to warn of the builder could be narrowed when a competent client or specialists employed by him perform the necessary inspections at the construction site themselves. Then, the court also stressed that the abovementioned rule applies only in the case when the builder could rely on the fact that the client had more experience and knowledge therewith than he did.

The OLG Düsseldorf in the case of 13 March 2003\textsuperscript{334} stated that in some circumstances in which the client would employ another specialist, the builder would be released from his duty to warn, pursuant to the provision of § 4 Nr. 3 VOB/B. Generally, the court confirmed that the builder had the duty to directly warn the client and to do so in writing\textsuperscript{335}. However, then the court stated that in some cases the scope of the duty to warn could be reduced, when the client had employed specialists from which fact the builder could conclude that the client had had a possibility to obtain the necessary information and warnings\textsuperscript{336}. Moreover, in that particular case the court found that the builder could be released from his duty to warn in whole, due to the fact that the client had been informed and warned by such a specialist of all the circumstances, which endangered the construction process and due to the fact that the builder had been aware of that warning by the specialist to the client. In such a case, pursuant to the court, the builder was reasonable to assume that the client was in a position to fully estimate the risk related with the proceeding with the construction and was not obligated to repeat the warning.

Also in the decision of 14 August 2009\textsuperscript{337} the OLG Bamberg considered a case in which the builder did not warn the client about a designer’s default that should have been obvious to him, namely: a lack of proper waterproofing of the wall and the fact that the designer had not followed the DIN-construction norms. The court stated clearly in this case that the scope of the builder’s duty to warn is not unlimited. One of the factors on which the existence of the builder’s duty to warn depends, is the competence of the client and of other specialists employed by him. That does not mean, of course, that just by employing a professional designer to advise him, the client loses his right to be informed and warned by the builder about potential problems with the design. However, builders may, in general, assume that designers and other specialists employed by the client, who have more professional knowledge than the builder as to the design phase of the construction, would properly perform their contractual obligations. As a result, the builder does not have a duty to warn when he may assume that a competent client (also due to having competent advisors) recognised and consciously undertook certain construction risks. This applies specifically to situations, as in this case, in which the design plans were based on the advice of special experts, who chose a certain method of construction while being

\begin{enumerate}
\item \textsuperscript{333} OLG Hamm, 18.07.2002, 21 U 82/01, BauR 2003, 1, p. 101
\item \textsuperscript{334} OLG Düsseldorf, 13.03.2003, I-5 U 71/01, BauR 2004, 1, p. 99
\item \textsuperscript{335} Exceptionally, though, a warning could be granted orally – see further in the chapter on whether a sole warning suffices
\item \textsuperscript{336} BGH, ZfBR 1998, 244
\item \textsuperscript{337} OLG Bamberg, 14.08.2009, 6 U 39/03, IBR 2011, 76
\end{enumerate}
aware of the risks involved therewith. As the court stated, in such a case the builder does not have to be ‘smarter’ than the experts employed by the client.338

3.2.2. Precontractual duty to warn.

As it has been mentioned in the chapter on the emergence of the duty to warn, the precontractual duty to warn has been recognised in German case law. The scope of the precontractual duty to warn can be, therefore, evaluated on the basis of case law.

In the case of 17 February 1993339 OLG Hamm adjudicated over a case where a builder specialising in underground works was employed to install and connect certain pipe trenches in, what he was assured of, was class 3 to 5 soil. Prior to the conclusion of his contract he received the description of the project and the plans prepared by another specialist, but no soil expertise. Only when the builder started his work, he found out that the soil was definitely class 2 soil, which influenced the performance of his work to the extent that he had to bear additional costs to perform it. The builder claimed damages from the client for performance of this extra work, the client defended himself by claiming that the builder should have inspected the soil before he made a price calculation for his services, on the basis of which the contract was concluded, and should have warned the client that the soil was of a different class than they had thought, which would result in an increase of the costs of construction. In such a case, the client would have the possibility to adjust the contract with the builder and to look for other construction options. The court decided that the builder in this case did not have a duty to warn the client. According to the court, the builder may trust in the correctness of the plans and descriptions of the project delivered to him, when they specifically point out a soil class that is there to be expected. In such a case there is no reason for the builder to ask additional questions and make inquiries as to the soil. The builder’s obligations would have been different, however, if the description he had received would have been obviously incomplete.

It has been stated in the report340 of another case of 14 November 1996341 adjudicated by OLG Celle that in case the plans and descriptions leave even a small amount of doubt, the builder should warn the client thereof. The circumstances of the case were very similar to the ones described above. However, here in the descriptions received by the builder it was stated that the soil class was “in general” from 3 to 5 and the client had added that he would not take any responsibility for the factual statements in the description. The court decided that the client had made it clear that he had not conducted sufficient soil examination himself nor had hired other professional parties to do so and that he would leave this to the professional party he would be contracting with. The builder should have inquired about that, and warned if necessary, since there was room for doubts left by the terms of the documentation received from the client whether the client knew the consequences of not conducting further soil examination.

In general, the German courts might encumber the builder with the precontractual duty to warn, claiming that already in the stage when the contract offer is being made the builder might need to point out to the builder certain inconsistencies.

338 See also: H. Scheel, ‘Entfällt Prüfungs- und Hinweispflicht des Auftragsnehmers bei Einschaltung von Sonderfachleuten durch den Auftraggeber?’; IBR 2011, 76
339 OLG Hamm, 17.02.1993, 26 U 40/92, NJW-RR 1994, 406
in the planned construction\textsuperscript{342}. However, it seems that when the plans that the builder receives are very specific and complete and the builder would not be able to estimate their incorrectness prior to conducting some own research or starting his works, the duty to warn would not bind him. In such a case, the responsibility for the faulty plans would lie fully on the client who delivered incomplete and misleading plans to the builder\textsuperscript{343}. This seems to suggest that just as with the contractual duty to warn the builder will in these cases not be required to actively look for a default to warn the client about and that his duty to warn would bind him only in cases where he should have seen the default ‘at a glance’\textsuperscript{344}.

In the case of 16 July 1993\textsuperscript{345} OLG Köln adjudicated over such a case. The client wanted to have a special garage door installed in his family house. He picked, together with his designer\textsuperscript{346}, a certain model because it fit together with the front door to his house. He approached a specialist in the installation of garage doors who fulfilled his wish. The chosen model of the garage door had a special construction of windows, which led, upon installation, to decreasing the height of the usable entrance to the garage from 2,01m to 1,73m. As the court stated that meant that if the client wanted to park e.g. a jeep in his garage\textsuperscript{347}, he would not be able to do so. The client refused to pay for the job performed by the builder and the builder raised a claim against the client for payment. The court decided in this case that despite the fact that the garage door was installed faultlessly and despite it fulfilling the aim for which it was installed, i.e. closing the garage, the builder could not claim compensation for the work performed from the client. The court stated that the builder had a duty to inform and warn the client about the disadvantages of choosing this particular model of door. The builder had years of professional experience and as such had to know all the practical risks involved with installing the door chosen by the client and could have pointed out to him that choosing another model of door would be better for him. The duty to warn of the builder was not influenced by the fact that the client had chosen this model on his own and was adamant about having his garage door coordinated with his front door. Even if the builder thought that the optical characteristics were the dominant ones for the client, he still had a duty to inform and warn him about technical peculiarities involved with choosing this door. Additionally, in this case a question arose whether the builder should have his duty to warn limited or even excluded in case a designer, i.e. another professional party represented the client. While the court decided that the designer definitely had more knowledge about garage doors than the client, it could not be said that the designer was more knowledgeable than the builder; moreover, he did not have to know about the technical specifications of this particular model of garage door.

The court was very clear in this case that the builder had a precontractual duty to warn the client that the material chosen by him and the designer might not have

\begin{itemize}
\item \textsuperscript{342} K. Englert, ‘Baugrunderschwernisse: Folgen der Angabe falscher Bodenklassen’, IBR 1993, 417
\item \textsuperscript{343} K. Englert, ‘Unternehmer darf auf Angabe von Bodenklassen vertrauen!’, IBR 1994, 95
\item \textsuperscript{344} T. Großkurth, Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten, Hamburg: Verlag Dr. Kovac\textsuperscript{\textregistered}, 2008, p. 24
\item \textsuperscript{345} OLG Köln, 16.07.1993, 19 U 42/93, BauR 1993, 728
\item \textsuperscript{346} In general, it is the designer who has a duty to advise and warn the client about the materials to be used in the construction: B. Rauch, Architektenrecht und privates Baurecht für Architekten, Köln: Rudolf Müller, 1995, p. 142; P. Löffelmahn, G. Fleischmann, Architektenrecht. Architektenvertrag und HOAI. Leistungspflichten. Honorar und Haftung. Bausummenüberschreitung., Düsseldorf: Werner, 1995, p. 111
\item \textsuperscript{347} It might be important to notice that the client did not have a jeep or a SUV at that point of time. The court considered a hypothetical situation here.
\end{itemize}
been suitable. Before the contract had been signed the builder should have informed and warned the client about disadvantages involved in choosing a model that the client picked since it was or should have been clear to him that the client was at a risk of following through with an unusable design. It seems also that the fact that the client had a professional advisor who could have chosen a better model of garage door, as well, did not influence the precontractual liability of the builder.

In a recent case of 31 March 2010 the OLG Koblenz considered the question whether the builder in the precontractual phase had breached the duty to warn the client about the mistake of a designer, but found that no such duty existed in this case. The case concerned construction of a university building. Since the client was not a consumer, this case will not be discussed here in detail. Still, it is interesting to mention here that in this particular case the court, after mentioning the builder’s contractual duty to warn on the basis of § 4 Nr. 3 VOB/B, considered also his precontractual duty to warn. The court stated that, in general, in the tender and offer-making phases of the construction process the builder has no precontractual duty to warn the client about the designer’s default, since the builder only looks at the design plans from the perspective of conducting necessary calculations to make an offer. This means that the builder is unlikely to notice a design default and should not be held liable for not doing so. However, the court stressed that in exceptional circumstances this precontractual duty to warn will bind the builder, namely when the contract documents (and data in them) are clearly false or incomplete. This means that if the builder should have been aware that the offer he was presenting to the client could not be deemed reliable, due to the obvious mistakes in the design plans that the builder had based his offer upon, then the builder may not demand extra pay for extra work that he had to conduct and that was not included in the design (nor his offer) due to that mistake. The principle of good faith goes against the builder making such a claim.

3.3. Dutch law.

3.3.1. Contractual duty to warn.

In Dutch law a regular builder, who is employed by the client to perform the construction based on the project delivered to him by the client, is obligated to perform it in compliance with all the professional requirements. It has to be taken into account, though, that such a builder does not control every part of the construction process and the complete success thereof would depend not only on his skills and competence. In general, the builder should then not be liable for the defaults, which would result from the faulty design or wrong directions given to him. However, in case the faults in the design or wrong directions were of such a nature that the builder

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349 OLG Koblenz, 31.03.2010, 1 U 415/08, IBR 2010, 313
as a professional party knew them or should have recognised them, he would be liable for these defaults under article 7:754 BW.\textsuperscript{351}

Therefore, in Dutch law there is nowadays a statutory obligation for the builder to warn the client of a risk that comes from the contract that the client has with the designer, as long as the default in the design was or should have been recognised by the builder. Also in case the client employs directly other contractors aside the builder and the builder is or should be aware of the risk coming out of that contract or its performance, he should warn the client about that.

In general, the Dutch doctrine and courts\textsuperscript{352} agree that it can be expected from a regular builder to recognise defaults within construction plans and within the construction itself, which he should have noticed as a professional. Whenever he recognises such a default, he has the duty to warn the client thereof. Where he, as a professional, need not have noticed the default and indeed did not notice it, the builder would not be liable even if the final construction were faulty due to the defaults in the design or in the directions given to him.\textsuperscript{353} The duty to warn the client does not imply a duty to investigate and supervise for the builder, since he is only liable for not warning the client of the defaults or risks that he knew or should have known about. In performance of his contractual obligations, he will have a duty to investigate the design and, e.g., the work of other contractors, but only in so far as such is needed for him to perform his work. In this process, he might find out risks and defaults that are not related to his own work, but if he recognises or should have recognised these risks and defaults at that moment he would be expected to issue a warning thereof to the client. This has been recognised in Dutch law in practice\textsuperscript{354} even before the appropriate provision has been added to the Dutch civil code.\textsuperscript{355} The case mentioned below did not involve a client who was a consumer, however, the ruling in this case

\textsuperscript{351} Also under the old Dutch Civil Code in which the duty to warn had not been explicitly worded, it had been widely recognised in practice, e.g. Asser-Kortmann-de Leeede-Thuinissen, 5-III, 1994, nr. 537; Asser-van den Berg, 5-IIIC, 2007, nr. 98; HR 25.11.1994, NJ 1995, 154 (Stokkers/Vegt); HR 18.09.1998, NJ 1998, 818 (KPI/Leba); P. C. W. Viëtor, A. Moret, ‘Informatie in de aannemingsovereenkomst’, BR 2006/86, p. 405; see also paragraph 2.3.1.


\textsuperscript{354} E.g. HR 18.03.1932, NJ 1932, p. 925 (Mook/Sap III); RvA 23.02.2009, nr. 29.963, TBR 2009/133; see also the footnote above

\textsuperscript{355} Art. 7:760 sec. 2 and 3 BW plus art. 7:754 BW
would surely be upheld also for a consumer-client, which means that it retains its relevance for this research.

For example, in the case Stokkers/Vegt\textsuperscript{356}, Stokkers (the client) employed construction company Vegt (the builder) to lay a special floor on Stokker’s factory premises. Some time after the job was done, Stokkers noted some cracks appearing in the floor as well as that the floor was laid out unevenly. Vegt defended himself by saying that the foundation, which was already laid out on the floor when he started his work, prevented the next layer from being laid out evenly. The Dutch Supreme Court stated that one might expect the builder in such a situation to inform the client before the construction takes place exactly what requirements the foundation of the floor is supposed to fulfil. In that way the further works could be performed diligently. Moreover, the builder might even be obligated to inspect the foundation of the floor in order to estimate the scope of these requirements. The Dutch Supreme Court clearly said that the builder has the duty to warn the client timely about the incorrectness in the design, which he knew or should have known about. The builder’s duty to warn encompasses also the obligation to warn the client about defaults and inadequacy in materials provided to the builder by the client, which means also the foundation for the builder’s work.

In this case, that was adjudicated before the addition of Article 7:754 to the Dutch Civil Code, it has been clearly stated that the builder is not expected to just perform his contractual task, but that a situation might require him to protect the interests of the client by giving a warning to him. The builder clearly had to warn in this case about the risk associated with following the client’s instructions. This obligation bound the builder even when it was not his performance that would have been faulty. This risk came from the faulty performance of a third party, but the builder still needed to issue a warning to the client. It had either been the designer’s mistake to not properly plan the foundation or the previous contractor’s mistake that had laid out that foundation in a faulty manner. Perhaps it was too late for the builder to warn the client that the foundation should be laid out in a different way, but he still could have prevented further damage and unnecessary costs to the client by pointing out that the foundation needed adjustment before starting his own work. The Dutch Supreme Court did not have any doubt that in case the builder knew or should have realized that the foundation was insufficient for the prescribed construction, he should have warned the client about that.

The builder’s duty to warn has its roots in one of his main obligations, namely the duty to carefully perform his contractual obligations\textsuperscript{357}. However, it has been repeatedly recognised by the Dutch courts that the builder is not obligated to a meticulous examination of the design plans delivered to him. He shall only conduct a marginal check and is obligated to warn the client only of defaults, which should be evident to him upon such loose control check\textsuperscript{358}. This means, for instance, that the

\textsuperscript{356} HR 25.11.1994, NJ 1995, 154 (Stokkers/Vegt)
builder does not have to re-check calculations of the designer as far as the planned construction is concerned in order to discover whether these calculations are correct\(^\text{359}\).

For example, in the case of 24 June 2010\(^\text{360}\) the client claimed that the builder should have warned him that the wall that he was building around a parking ground would be at a risk of sagging and crumbling. The designer had incorrectly planned the wall, without taking into account the wind load that it would have to withstand, as well as its general loadbearing function. The RvA decided in this case that the builder did not have a duty to warn the client about these mistakes in the design plans since the incorrect relation between the height and thickness of the wall was not an easily noticeable default therein. To the contrary, the builder would have had to re-calculate the design plans in order to be able to state that there was a default in them. This was seen as a too far-going duty to be placed on the builder.

It differs from case to case, whether in the given situation the builder should have recognised the default. Different factors are taken into account when answering the question of the builder’s liability, e.g. how evident the default was and what level of professionalism could be expected from the builder\(^\text{361}\). The test is subjective: whether it could have been expected from the builder under the given circumstances to recognise the default\(^\text{362}\).

For example, in the case of 12 December 1978\(^\text{363}\) the designer neglected to conduct appropriate examinations of the ground and as a result did not warn the client nor the builder that the planned construction would not hold at the designed construction terrain. The client claimed that the builder should also be liable for the resulting default in the construction (cracking) due to the fact that he did not warn the client of the default in the design. The court stated, however, that it was the responsibility of the designer\(^\text{364}\) and not of the builder to conduct the necessary soil examination and that without it, and only on the basis of the design plans, the builder could not have known that the construction would be faulty. The need for conducting the soil examination could have been evident only for a party who was preparing the

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\(^{363}\) AIBk/RvA 12.12.1978, BR 1979, p. 230

\(^{364}\) See more on that in: S. van Gulijk, European Architect Law. Towards a New Design, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 57-58
design and conducted the ground’s probing. The builder was presented only with the
design plans, which had already been accepted by the governmental construction
inspection, thus the court was convinced that the builder had no reason to doubt the
soundness of these plans. In this case the builder was not found to be obliged to warn
the client about the risk that the designer was putting the client at due to the fact that
this risk was not nor should have been obvious to the builder.

It is important to point out at this point that the client often claims damages
from both the designer and the builder, due to the fact that he might not get the full
compensation for the damage he suffered from only one of them. The contracts, which
the client concludes, often contain a clause on exclusion or limitation of liability\textsuperscript{365}. Such a situation also occurred in the case described above. The court declared the
designer liable for not conducting the soil examination; however, the designer’s
liability had been contractually limited. For that reason the client tried to claim
damages from the builder as well, which, in this case, has been denied. This case may
serve as an example as to cases in which the designer invokes an exemption clause in
his contract, which leaves the client only with an option to seek damages with the
builder, though his error is often less serious than the designer’s\textsuperscript{366}.

In the case of 16 November 1990\textsuperscript{367} it was claimed that the default should
have been evident to the builder even upon a marginal check. The court had no doubts
that the difference between the colour or the structure of the boarding, which was
applied by the builder, and the boarding, which was previously applied, was very
obvious. The court adjudicated that the builder should either have warned the designer
or the client itself before he started his work. The need of issuing the warning should
in this case have been even more apparent to the builder since it was him who had
previously been employed to apply the boarding at this construction site. As a
consequence thereof, it was clear that the builder knew of the differences in colour.
Since the builder had the knowledge necessary to recognise the default, he was under
a duty to warn; consequentially, he should have warned the client about the
discrepancies in the design.

Also in a more recent case of 3 March 2006\textsuperscript{368} there was no doubt that the
builder should have warned the client about the default in the design. The builder was
employed to renovate the existing installations according to design plans delivered by
the client. Upon performance of the builder’s work there were complaints as to
insufficient ventilation as well as to too hot temperatures in the rooms and of the cold
water from the tap. The defaults were the result of the incorrect design provided to the
builder. However, the arbitralional court stated that the builder should have realized
that the prolongation of the ventilation pipes in the floor would lead to the increase in
the temperature in the room. It should have been equally obvious to the builder that
the distance provided for in the design between the pipes with the cold tap water and
the ventilation pipes was too small and would result in the cold tap water not being as

\textsuperscript{365} To be discussed in the following chapters; Asser-van den Berg, 5-IIIC, 2007, nr. 102-106
\textsuperscript{366} It should be noted that the possibility for a designer to limit his liability towards a consumer by an
exemption clause in standard contract terms is restricted by the fact that such a clause is presumed to be
unfair under article 6:237 under f of the Dutch Civil Code. Nevertheless, where under the
circumstances of the case it would be proven that the clause is in fact not unfair, the designer may still
invoke the clause, and the client would still be forced to seek damages with the builder.
\textsuperscript{368} RvA 03.03.2006, nr. 25.856, BR 2007, p. 255
cold as it should have been. Due to the obviousness of the mistakes in the design it had been adjudicated that the builder should have recognised them and warned the client about them. The builder in this case was deemed to be professional enough to realize the mistakes in the design plans and thus had a duty to warn the client about them instead of just blindly following the design plans.

A recent case of 21 June 2010\textsuperscript{369} concerned a construction for which a designer planned to use a specific Wiehag-facade. The builder had never installed such a facade before, but upon ordering the materials he had received them together with specific handling instructions. However, the handling instructions from the producer of the material contradicted the design plans prepared by the designer: in the instructions it was for instance said not to put the facade on the southern side of the building, whereas the design prescribed exactly that construction. Instead of warning the designer and/or the client about these discrepancies, the builder ignored the handling instructions and followed the design to the letter. That resulted in damage to the construction. The arbitration court stated that such a clear difference between the handling instructions and the design should have been obvious to the builder and therefore, he had a duty to warn the client about the fact that performance of the design plans would not lead to proper construction.

In some cases, the client precisely specifies the materials and the construction method the builder was supposed to use during the construction or even points out to him which manufacturers and retailers to use. Of course, with the client, in the contracts included within the scope of this book, being either a consumer or a consumer-like party, in most cases the client would not choose construction materials on his own. Most often, the client would prescribe these materials upon recommendation of the designer. Therefore, the builder might have a duty to warn that the designer made a mistake in choosing these materials. That constitutes clearly a part of the builder’s duty to warn about a risk coming out of a contract with a third party. By such an action, the client limits the builder’s freedom of choice. The question is whether the builder should be liable for the breach of his duty to warn when there was a default in the materials used by him, which had been specified by the client and used specifically on the client’s demand. The risk to the construction comes here from the materials that the client procures from the third party, or orders the builder to procure from that party.

The Dutch Supreme Court considered this question in the Moffenkit case\textsuperscript{370}. In this case, the Dutch Supreme Court decided that the client could not hold the builder liable for the construction defaults, which had originated exclusively from the use of the unsuitable materials, which the builder had procured from the third person only on the client’s demand.

In this judgment, no difference was made between cases in which the material to be used was not suitable in general for the particular construction and those in which the material in itself should have been good, but this specific batch of it did not fulfil the necessary requirements\textsuperscript{371}. The RvA, however, did make this distinction in

\textsuperscript{369} RvA 21.06.2010, nr. 29.886, <http://www.raadvanarbitrage.info/default.aspx> (lastly checked on 15 July 2011)

\textsuperscript{370} HR 25.03.1966, BR 1966, p. 296, NJ 1966, 279 (Moffenkit)

later judgments. The RvA mentioned for the first time in the Monoliet\textsuperscript{372} case that while the builder should not bear liability in case the materials were not suitable to be used in general in the construction (and the builder did not breach a duty to warn thereof)\textsuperscript{373}, he should be held liable for the defaults in the specific batch of materials, which were used in the client’s construction.

In a later case of the RvA\textsuperscript{374} it has been adjudicated that the client should also not bear the manufacturer’s risk for the construction materials that have been prescribed by the client, and thus the arbitral court made a further distinction from the ruling of the Dutch Supreme Court. This broadens the scope of the builder’s liability since pursuant to the arbitral court if it is not known publicly that the construction material chosen by the client or the designer on his behalf is not suitable for that construction, the builder would be held liable for any defaults resulting from the use of this material. The proposed solution takes into account that the builder would have a right of redress towards the supplier of the faulty construction material and the supplier towards the manufacturer. However, this case has been criticised as leading to an unfair risk division in case the client prescribed the material\textsuperscript{375}, since the whole risk of the development of technology is placed on the builder while it is the client who chooses the faulty material. It is not just the batch of the material that has been delivered to the client that has been inappropriate for the given construction, but the material itself. The fact that the builder is a professional does not matter in the circumstances of the given case, since even to professionals the defaults of this material have not been known at that time. That means that it does not matter either that the client might have been advised by a designer, another professional party who would still not be able to determine that the material was faulty. This puts the builder and the client in the same position as to the knowledge of that material. That fact, in my opinion, should be decisive as to why the builder should not be held liable for such a default. The reasoning presented in this case has not been repeated anymore in any further case\textsuperscript{376}. On the contrary, in the recent case of 29 July 2010\textsuperscript{377} the client chose a specially laminated pinewood for window frames. This material started decaying some time upon conclusion of the construction. The arbitration court decided that the builder had no duty to warn the client about the wrong choice of construction material since at the time the choice was made specially laminated pinewood was (from the professional point of view) an acceptable choice for window frames. The fact that the window frames were placed outside the elements of the house’s facade did not change this situation. This meant only that the client would need to give special attention to the maintenance of the frames and the builder still did not need to warn the client about the risk of using pinewood as a construction material. The RvA in this case clearly expressed modern views on the risk division in case of a default that can only be seen when the construction technology improves. In

\textsuperscript{372} RvA 10.11.1977, nr. 8464, BR 1978, p. 72


\textsuperscript{374} RvA 13.01.1984, nr. 11.458, BR 1984, p. 750

\textsuperscript{375} Commentary of H. O. Thunnissen to RvA 13.01.1984, nr. 11.458, BR 1984, p. 750; Asser-van den Berg, 5-IIC, 2007, nr. 92


In general, it is the designer and the client who are responsible for the choices they make while designing the construction. Only in case the builder should have noticed their mistake, i.e. when it was an obvious default in the design plans, the builder has the duty to warn about it. When the loss that the client suffers is caused by a decision that can be seen as a ‘mistake’ only with hindsight, and at the moment when the construction choice was made it was one of the professionally acceptable choices to be made, then clearly the builder should not bear liability for it.

It is interesting to note that in different sets of standard terms this problem has been solved differently. Provisions of the AVA 1992\(^{378}\) support the view of the Dutch Supreme Court in the Moffenkit\(^{379}\) case, while provisions of the UAV\(^{380}\) after its revision in 1989 support the view expressed in the Monoliet\(^{381}\) case. Since the introduction of article 7:760 BW\(^{382}\) in the Dutch Civil Code, in 2003, the regular Dutch courts will more often heed the line expressed in the Monoliet\(^{383}\) case than the one from the Moffenkit\(^{384}\) case. Section 2 in fine of this Article is interpreted as implying that the risk of the default in the material, which has been prescribed by the client and, which in general should be sufficiently fit to be used in the construction, should stay with the builder. It has been pointed out in the comments\(^{386}\) to these cases that if the client had not prescribed a specific material to be used by the builder, the builder might still have purchased defective material, even when he would have ordered it personally. In this case, it seems fair that the risk should stay with the builder. The client chooses a material, which is, in general, fit to be applied in the given construction and it is just the delivered batch of this material that does not fulfil all the necessary requirements. The builder’s liability in this case is based on a risk that every professional faces while doing business and that risk should not be transferred to the client.

In the RvA-case of 22 December 2009\(^{387}\) the builder was renovating apartments in a building complex, including the balconies of these apartments. After the construction had been completed, it turned out that some balconies had leak water running down their sides, which led to the forming of limestone stalactite at the bottom of the balconies. Moreover, some of the balconies had cracks running across

\(^{378}\) AVA 1992, afd. A/B, art. 4 Sec. 2; criticised by M. A. van Wijngaarden, BR 1993, p. 284
\(^{379}\) HR 25.03.1966, BR 1966, p. 296, NJ 1966, 279 (Moffenkit)
\(^{380}\) UAV Art. 5 Sec. 4
\(^{381}\) RvA 10.11.1977, nr. 8464, BR 1978, p. 72
\(^{382}\) 7:760 BW: (...) 2. Is de ondeugdelijke uitvoering echter te wijten aan gebreken of ongeschiktheid van zaken afkomstig van de opdrachtgever, daaronder begrepen de grond waarop hij een werk laat uitvoeren, dan komen de gevolgen voor zijn rekening, voor zover de aannemer niet zijn in artikel 754 bedoelde waarschuwingsplicht heeft geschonden of anderszins met betrekking tot deze gebreken in deskundigheid of zorgvuldigheid tekort is geschoten.
3. Lid 2 is van overeenkomstige toepassing in geval van fouten of gebreken in door de opdrachtgever verstrekte plannen, tekeningen, berekeningen, bestekken of uitvoeringsvoorschriften.’
\(^{383}\) ibidem
\(^{384}\) HR 25.03.1966, BR 1966, p. 296, NJ 1966, 279 (Moffenkit)
their entire width. The arbitration court, after inspecting the construction site, decided that the design should have provided for counter flushing on all floors of the building. The builder claimed that he had renovated the building according to the design plans, which had not provided for such counter flushing and according to the builder counter flushing should have been included as the specified method of construction. The RvA did not share the view of the builder and declared that he had a duty to warn the client about the clear lacks in the design plans. The arbitration court stated that the balconies are on the west side of the building complex, which means they receive the heaviest rainfalls. The builder should have known the consequences of this position and therefore had a duty to warn about the necessity to undertake measures to counter potential risks involved therewith. This case shows that sometimes the builder will try to avoid liability for the damage to the construction by claiming that he was not instructed to use a certain material or a method of construction that if it had been applied could have prevented the loss. However, if the omission on the side of the client should have been obvious to the builder or he should have been aware of the risk that it could bring about, he had a duty to warn the client thereabout.

It is important to repeat here that this does not mean that the builder will need to look for these omission and inconsistencies in the design plans. In the RvA-case of 10 December 2010\textsuperscript{388} the client suffered leakages in his cellar. The client claimed that it was the ground water that leaked over the construction of his cellar and that there was a mistake in the design in describing the level of the ground water; a mistake that the builder should have warned him about. The design plans had been made over a year before the construction began, which justified to the client the necessity and obligation of the builder to re-check the level of the ground water. Moreover, the client claimed that the builder should have had doubts as to the design when during the construction he needed to pump out more ground water than he had expected, as well as when he discovered that the floor of the cellar was positioned higher than planned. The arbitration court did not follow the reasoning of the client. The RvA decided that just on the basis of the availability of the design plans that specified the level of the ground water that the builder did not need to inspect whether it had been correctly noted down. The builder could have trusted in the competence of the designer and the data noted by him. The fact that there was more ground water pumped out during the construction than expected could have resulted from other reasons than incorrect calculation of the ground water level in the design plans and the higher level of the cellar’s floor also did not make the performance of the design plans impossible.

In this verdict the arbitration court seems to create a rather wide exception for the builder’s duty to warn. From the facts mentioned by the client it seems that the builder should have had some doubts as to the correctness of the design plans, especially since circumstances could have changed during one year that passed between preparing the design plans and starting construction works. However, the RvA decided that it was not enough to justify placing on the builder an obligation to actually re-check the data mentioned in the design plan.

Similarly, the client may mention specific sub-contractors or suppliers to the builder, and demand that the builder use their services. This leads to the builder having to work with a third party in performance of his own contract on the request or

demand of the client. Most authors think that in this case the liability for the non-performance or improper performance of such a sub-contractor should be borne by the client. However, some authors also think that the builder’s duty to warn remains intact in this situation. This would mean that the builder still has a duty to warn with regard to both the initial choice of a specific sub-contractor made by the client and the eventual later non-performance or improper performance by such a sub-contractor when the sub-contractor performs his own contract in a faulty way. The builder should then remain liable for the defaults in the work performed by the sub-contractors regardless of whether they were employed on his own initiative or due to the client’s order.

There is no specific provision in the Dutch civil code regulating this matter in the construction sector. However, pursuant to the general provision of Article 6:76 BW the builder should bear the liability for the improper performance of other persons who he employed, like sub-contractors. The Dutch Supreme Court points out that the rule is clear in the Article 6:76 BW and, in general, does not provide for an exception when it was the client who ordered the builder to work with specific sub-contractors. One of the reasons for lack of such an exception might be that the client could have contracted himself with the sub-contractors and included them directly in the construction process. This suggests that there had to be reasons for the client to have the builder conclude contracts with sub-contractors in his own name in such cases – e.g. the client did not want to coordinate works of various sub-contractors with each other. However, according to the Dutch Supreme Court, the application of this provision might be restricted by the ‘good faith’ rule. In certain circumstances the facts of the case might make it unjust for the client to claim damages from the builder for the default of the sub-contractor that the client had chosen himself, e.g., if the builder was opposed to cooperation with the sub-contractor chosen by the client, but was more or less forced to accept the client’s wish. This exception of the rule has been accepted in the Dutch doctrine, as well. It needs to be interpreted restrictively.

For example, in the case of 18 October 1983, the builder was ordered by the client to employ a particular sub-contractor for the construction and the sub-contractor performed his work under direct supervision of the client and had not been in touch with the builder. Then it was decided that the builder should not be liable for the sub-contractor’s mistakes. Since the sub-contractor had only been in direct contact with the client in this case, it would seem that the ‘good faith’ rule could intervene with the general liability rule of Article 6:76 BW. Other factors, e.g. whether the client encumbered the builder with the duty to coordinate the works of the sub-contractors and whether the builder tried getting in touch with that sub-contractor, may also play a role in answering this question.

389 Asser-Kortmann-de Leede-Thunnissen, 5-III, 1994, nr. 502; Asser-van den Berg, 5-IIIC, 2007, nr. 94; to be discussed in the following chapters.
391 “Maakt de schuldenaar bij de uitvoering van een verbintenis gebruik van de hulp van andere personen, dan is hij voor hun gedragingen op gelijke wijze als voor eigen gedragingen aansprakelijk.”
392 HR 21.05.1999, NJ 1999, 733 (B./W. also known as ‘The fraudulent co-worker’)
393 Asser-Hartkamp, 4-I, 2004, nr. 328
394 RvA 18.10.1983, nr. 10.653, BR 1984, p. 172
395 However, the arbitralitional court adjudicated the case before the abovementioned verdict HR 21.05.1999, NJ 1999, 733 (B./W. also known as ‘The fraudulent co-worker’) has been made, which means that it cannot be said with certainty that this arbitralitional verdict would be upheld nowadays.
When the client appointed or ordered the builder to appoint a specific subcontractor, only in case the improper performance of the subcontractor’s duties originated in his insufficient skills and experience and constituted so called “structural inadequacy”, this could lead to the exclusion of the builder’s liability, according to Dutch legal literature\(^{396}\). Otherwise, i.e. when a subcontractor that is sufficiently qualified for the job makes an incidental mistake, the builder should remain liable, even in case when he did not choose the subcontractor himself, as this risk is a normal entrepreneur’s risk he could have encountered also with a person he would have chosen himself\(^{397}\).

The provisions of the UAV 1989 similarly deal with the improper performance of subcontractors and suppliers (that is a professional party supplying construction materials), with one significant difference. In case of an improper performance by a subcontractor chosen by the client, it is the client who is liable for the additional costs of the construction, which could have been avoided if not for the default. However, it is the builder who is liable for the results of an improper performance of the supplier. This difference does not find any proper explanation in the Dutch legal system, it is argued in literature\(^ {398}\).

The scope of the builder’s duty to warn for a mistake of a third party, usually the designer’s, is influenced by both his competence and that of the third party\(^ {399}\). The RvA used to, most often, not find the builder liable for not performing his duty to warn in case the client (or the director of the construction employed by the client) had more actual or professional knowledge with respect to the default than the builder did. For example, in the case no. 7698 from 1977\(^ {400}\) the RvA decided that the builder had no duty to warn about the water resistance aspect of the basement walls and the swimming pool walls due to the fact that it fell under the typical responsibilities of the director of the construction, for whose actions the client bore responsibility himself. This case seems to suggest that the builder had no duty to warn since the designer/director of the construction was more qualified than the builder to recognise the mistake. However, if the mistake originated from the design and therefore was already apparent from the design plans, like the improper provision of water resistance of the swimming pool, it is not likely that the designer, while performing his duties as a director of construction, would discover that mistake and warn about it. It is after all the same person and it may be difficult to notice mistakes in one’s own work. That is also the reason why the duty to warn of the builder about the mistakes of a third party is so important. Of course, it is understandable that the builder would have the duty to warn only about the defaults that he could or should have noticed, as


\(^{397}\) The reasoning is here quite similar as to whether the builder is liable for defective materials that were provided by the client.


\(^{399}\) P. Vermeij, ‘Bouwen in strijd met de voorschriften van het Bouwbesluit, enkele publiek- en privaatrechtelijke aspecten voor de praktijk’, BR 2009/39, p. 214-216; on problems that arise while this criterium is used see: M. A. B. Chao-Duivis, ‘Informatie en mededelingsplichten: een causaliteitprobleem’, BR 1991/2, p. 82-86

\(^{400}\) RvA 1977, nr. 7698, Bloemlezing 1976-1981, p. 71
a professional party. If the competence of the builder does not allow him to spot certain mistakes, it could not be expected of him that he would warn about them.\footnote{See the case described below: RvA 16.02.1999, nr. 19.582, not published; after: M. A. van Wijngaarden, M. A. B. Chao-Duivis, \textit{Serie Bouw- en Aanbestedingsrecht, deel 14}, 's-Gravenhage: Uitgeverij Paris, 2010, p. 63 (No. 782)}

In my opinion, the sole fact that there is a competent third party employed by the client should not release the builder from his duty to warn about that third party’s mistake.\footnote{Not only in case the builder acted with gross negligence by not warning the client, see the case described previously in this paragraph: RvA 03.03.2006, nr. 25.856, BR 2007, p. 255, but also in other situations that have been recognised in the case law of the Dutch Supreme Court, e.g. HR 18.09.1998, NJ 1998, 818 (KPI/Leba), HR 25.11.1994, NJ 1995, 154 (Stokkers/Vegt); N. E. Tijssens, ‘De betekenis van de deskundigheid van de opdrachtgever voor de waarschuwingsplicht van de aannemer naar Nederlands en Duits recht’, TBR 2009/138} This is substantiated by the decision of the Dutch Supreme Court in the landmark case of 18 September 1998,\footnote{HR 18.09.1998, NJ 1998, 818 (KPI/Leba)} which will not be discussed here at length taking into account that it concerned a duty to warn about the client’s mistake and not a mistake by a third party. In that case, however, the Dutch Supreme Court recognised that the mere knowledge or competence on the side of the client could not be sufficient to release the builder from his duty to warn the client. There is no reason to think that this judgment would be any different in case it concerned not a professional client but a client who employed a professional advisor, e.g. designer.

There is a clear discrepancy between the view of the Dutch Supreme Court and the RvA here. Tijssens conducted research on the verdicts of the RvA from the date of publication of the KPI/Leba judgment until the year 2008 to see whether the RvA changed its point of view. Out of sixteen verdicts that were of relevance for this subject, only five\footnote{E.g. RvA 03.03.2006, nr. 25.856, BR 2007, p. 255; discussed in previous paragraphs and in the previous chapter} followed the new line of the Dutch Supreme Court and the rest confirmed the ‘old’ point of view that the competence of the client should release the builder from his duty to warn. Tijssens did not find any justification for the inconsistency in the RvA verdicts, namely: why in some of the RvA verdicts the line of reasoning of the Dutch Supreme Court is followed and why in others it is not.\footnote{N. E. Tijssens, ‘De betekenis van de deskundigheid van de opdrachtgever voor de waarschuwingsplicht van de aannemer naar Nederlands en Duits recht’, TBR 2009/138}

However, more recent cases of the RvA seem to suggest that the arbitration court is nowadays following the verdict of the Dutch Supreme Court more often. In these cases the RvA states that the builder’s liability should, ‘in principle’, be evaluated on its own, without taking into account other parties that were involved in the construction process. This means that, in general, the arbitration court would not take into account the competence of the other parties advising the client. However, if circumstances of the given case would require it, this factor would also be taken under consideration. This reasoning follows the one given in the judgment of the Dutch Supreme Court. However, it might be interesting to trace future development on this subject, since the arbitration court left the possibility open to still take into account the competence of the client’s advisors. How the arbitration court will use this leeway, e.g. whether it will tend to take into account the client’s competence as often as
before, just by claiming it necessary based on the circumstances of the case, remains to be seen.

One other option that remains is for the RvA to find the builder liable for breach of his duty to warn even if the client has a competent advisor, but then the arbitration court might limit the amount for which the builder is liable. For example, in the case of 18 May 2011\(^{407}\) the RvA found that the builder had a duty to warn the client despite the client had employed also a professional construction specialist as his advisor. However, due to the presence and competence of the client’s advisor the RvA decided to limit the builder’s liability to 60% of the client’s loss based on the client’s contributory negligence\(^{408}\).

It might be interesting to mention one other case on this subject, which does not fit within the discussed trend. In this case\(^{409}\) the RvA seems to go even further than the Dutch Supreme Court did. Namely, the RvA clearly states that the competence of the client should never release the builder from his duty to warn. The Dutch Supreme Court, has only stated that the competence of the client is not the only factor determining the builder’s liability for his breach of the duty to warn and that the court should take into account all circumstances of the given case in order to estimate whether the builder breached his duty to warn or not\(^{410}\). Its commentator, Chao-Duivis has criticized the verdict of the RvA since the arbitral court upon stating that the builder has a duty to warn did not consider whether in the circumstances of the given case the warning actually had to be given. It seems unlikely that this case will be followed in the future.

Previously, the influence of the competence of a party who is seen as a client’s representative and who makes a mistake on the scope of the duty to warn of the builder was discussed. Sometimes the client employs more than one builder within the same construction. In case the designer makes a mistake within the design plans it is interesting to discuss whether the scope of the duty to warn of a builder about this mistake will be influenced by the fact that there were other builders who also could have warned the client. In the RvA-case of 20 September 2010\(^{411}\) the client indeed employed two builders to work on his roof, and additionally he performed a significant part of the works himself. This meant that there were three parties involved in the construction of the roof. Ultimately, the roof ended up not having the necessary damp-resistant insulation layer. The builder, who was then sued for not performing his duty to warn the client about the missing insulation, had mounted the basic foundation for the roof. Then another builder put a zinc layer directly on this

\(^{407}\) RvA 18.05.2011, nr. 32.198, <<http://www.raadvanarbitrage.info/default.aspx>> (lastly checked on 15 July 2011)

\(^{408}\) Division of liability will be further considered in chapter 7.

\(^{409}\) RvA 15.04.2008, nr. 71.193, TBR 2008/132 with note of M. A. B. Chao-Duivis. This case will not be further discussed in the main text here since it concerns the duty to warn of a sub-contractor (considered as a builder) to the builder (professional client). The mistake referred to the construction of a steel plate being supported only on one corner by a pole, which support turned out to be insufficient. This mistake in the design plans should have been obvious to the sub-contractor who should have warned the client (his client) about it and the scope of that duty to warn is not influenced by the possibility that a professional client, the builder, could have noticed that mistake himself.

\(^{410}\) Also discussed in the note of M. A. M. C. van den Berg to: Rechtbank Den Haag, 22.10.2008, 306268/H/ZA 08-784, LJN: BG4175 (Hartol/Global Stone), TBR 2009/130

underlaym. Finally, the client finished off the roof with the last necessary layers. The arbitration court decided that the builder could not be held liable here for not warning the client, since he could have assumed that the following builder, before laying down the zinc, would install the insulation. The client did not ask the builder to coordinate the construction and therefore he had no duty to inquire whether his works were in accordance with the works of other specialists employed by the client.

The situation in this case required the builder to warn about a risk that might have happened in case other parties involved in the construction did not continue this process in a specific way. The builder is, however, not required to foresee what risks might appear in the future works at the construction site, unless he is specifically encumbered with supervision and coordination duties of the whole construction.

As it has already been mentioned, the builder must have enough competence to recognise the mistake in the designer’s plan in order for him to have a duty to warn the client about that mistake. In a case of 16 February 1999, the builder was held not to be liable for the damage suffered by the client as a result of improper use of the lime mortar. The client demanded the use of that kind of mortar and the designer was aware that it would be the first time the builder would have to use that mortar in his career, that he had no prior experience therewith. That is why the RvA adjudicated that the client could not have expected a warning from the builder about the insufficient solidity of that mortar.

The arbitral court did not recognise the builder’s duty to warn either in the case of 20 June 2000. The court adjudicated that in the given cases the circumstances were such that neither the builder nor the client was competent to spot the default within the construction before it was finalized. Namely, the client hired a separate party to perform some works on the floors. The builder was aware of that fact. As the builder was no specialist in the tasks performed by the separate party he would be able to estimate whether the works were performed, but not whether they were duly performed. The court stated that the builder had no duty to warn in this situation since he had no idea what to warn about. The client could not have expected the builder to have such expertise as the separate advisor whom he (the client) employed to perform this specific work.

In the case of 3 November 2010 the RvA stated that the design, which provided for the construction of eaves made of untreated oak was risky and not very common. The client could not expect the builder in such a case to warn him about a potential damage that might result from following this design, since the builder did not have and could not be expected to have the specific knowledge that would allow him to see the risk.

However, when the builder is aware of the lower competence of the designer employed by the client, he should pay more attention to the design plans and warn the client of any faults therein. The scope of the builder’s duty to warn about the mistake of a third party could be broadened, in such a situation. In the case of 7 April 1986,

414 RvA 20.06.2000, nr. 21.692, BR 2001, p. 67
415 RvA 03.11.2010, nr. 27.398, <<http://www.raadvanarbitrage.info/default.aspx>> (lastly checked on 15 July 2011)
the builder was aware that the designer was an acquaintance of the client and was not a specialist in construction. The court adjudicated that the builder should have realized that the designer had not conducted any construction calculations. Furthermore, though it has not been decisively estimated whether the designer excluded his liability towards the builder in tort, there was no doubt that he has done so towards the client in contract. The builder was at least aware of the fact that the designer was not a professional party, that there had been no calculations made and in the end he took responsibility himself for the design plans while applying for a construction permit, by signing it. As the result, the court placed full liability for the faulty design and thus for the defaults within the construction on the builder.

Moreover, if the builder works with other specialist constructors that were not chosen by the client, but who were employed by the builder himself, then the knowledge of such constructors would be attributed to the builder. For example, in the case of 9 February 2010⁴¹⁷ the Court of Appeal Leeuwarden had to decide whether the builder could be held liable towards the client for sub-contractor’s breach of the duty to warn. The builder in this case employed a sub-contractor to install the roof at the client’s house. Unfortunately, the bricks on the outer walls of the house were laid too high which led to extra pressure on the roof construction and the roof was faulty. The client claimed that the builder, since he was the professional party the client had a contract with for performance of this roof with, should have warned him that the walls were built too high. The builder argued against this, claiming that it was his sub-contractor who performed the works and that the sub-contractor did not warn the builder about this risk nor that he had to warn about it. However, the builder acknowledged himself that any builder knows that walls should be brought to their full height only after the roof had been set in place. The court agreed with that and therefore had no doubts that the sub-contractor had a duty to warn the builder about this default and that this mistake was attributable to the builder based on Article 6:76 BW.

In the arbitrational case of 24 March 2011⁴¹⁸ the builder employed a sub-contractor to lay down the floors in the house of the client. The material chosen by the designer for these floors was natural stone. The sub-constructor, as a professional in handling of natural stones, should have been aware that natural stones are functionally not suitable to be used as a building material on the outside of the house, which was what the designer had planned for. Since the knowledge of the sub-constructor was attributed to the builder, who had hired him, the builder was seen as having the duty to warn the client about the risk of using prescribed construction materials. Of course, the builder may then have a recourse claim towards the sub-contractor, which the arbitration court in this case considered, as well⁴¹⁹. Of course, if the builder should have recognised this default himself, the builder and the sub-contractor might share the liability for the damage of the client. In that case the builder would not be able to reclaim the full amount of the damages he would have to pay the client⁴²⁰.

Certain cases of the arbitration court point to the fact that not only competence of the client and his advisors might influence the existence and scope of the builder’s

⁴¹⁷ Hof Leeuwarden, 9.02.2010, 200.014.649/01, LJN: BN3873
⁴¹⁹ This will be further discussed in chapter 5 on the duty to warn of the sub-contractor.
⁴²⁰ See more in chapter 5 on the duty to warn of the sub-contractor as well as in chapter 7 on the liability.
duty to warn, but also the actual knowledge of the client of the risk. Whenever the
builder can prove that the client knew of the default, then he might expect not to be
held liable for not having warned about it.

In the case of 6 December 2006, upon completion of the construction, some
leakages were discovered. The client claimed that the builder had a duty to warn him
about the improper way the previous builders performed their work, as well as about
the fact that the layer of putty at the windows would not always be thick enough to
prevent leakages due to the incorrect sizes of the windows that have been ordered for
that construction. The builder defended himself by claiming that the client was aware
of both facts and did not need an additional warning about that. The arbitral court
accepted the builder’s defence. It has been stated that the client as well as his director
of the construction had expressed doubts about the work of the other builders, before
the builder commenced his own work. Both the client and the director of the
construction were also aware during the construction works that it would not always
be possible to maintain the required layer of putty due to the incorrect sizes of the
windows. Nevertheless, they still insisted on the builder installing these windows
without any delay. Therefore, the client was seen as having consciously taken the risk
of the improper design. In case the client together with the designer, who also acted
as a director of the construction, not only is aware of the default in the construction
but rather consciously chooses for the construction to be carried out as originally
planned, the builder would not be seen as still having a duty to warn towards such a
client. This could, of course, be different if new risks come to light that the builder
knows or should realise the client had not taken into consideration when choosing to
have the construction to be carried out as planned.

Also in the case of 29 November 2004 the client was seen as having
accepted the risk himself. The builder in this case was employed to rebuild an old
school into two apartments. When the construction had been completed it turned out
that the apartments did not fulfil the necessary legal norms. The client claimed that the
builder should have warned him about that discrepancy, pursuant to Article 5 of the
AVA. The question may be raised here whether it should be the builder who would be
liable for the default in the construction, taking into account that he performed the
contract pursuant to the design plans he had received. The designer was as aware as
the builder of the legal norms that had to be observed in this construction project. The
arbitral court adjudicated that the client could not be seen as an amateur in the
construction field, taking into account that he employed a professional designer to
assist him in his choices. As a consequence, the knowledge of the designer should be
attributed to him. Furthermore, the client together with the designer and the builder
discussed the plans for the construction in details, many times mentioning the legal
norms that the construction had to fulfil, as well. The court adjudicated that in such a
case the builder did not have to additionally warn the client about the necessity to
comply with the legal norms and warn him that the designer’s plan is faulty. In the
circumstances of the case it can be assumed that the client accepted the risk that the
potential buyers of the apartments might not accept the way in which the construction
had been performed.

421 RvA 6.12.2006, nr. 27.433, BR 2007, p. 266
422 This decision is in line with the Supreme Court’s decision in NSC/Pongers, HR 08.10.2004, NJ
2005, 52, BR 2005, p. 634, with casenote by M. A. M. C. van den Berg. This case will not be discussed
here taking into account that it concerned a duty to warn about the client’s mistake and not a third
party’s mistake.
423 RvA 29.11.2004, nr. 24.637, BR 2007, p. 527
In the case of 18 November 2009 the arbitration court had to decide whether the builder had a duty to warn about risks coming from the design. The client in this case requested a particularly risky method of construction to be used, which had been included in the design, i.e. laying a pile of turfs in a pyramid that could lead to sagging of the ground as a result. The RvA stated in this case that the design itself was not faulty, only risky. The design itself was not malfunctioning; it just increased the chance of sagging of the ground after the construction was finished. Other professional parties who inspected the grounds after the loss had been suffered stated as well that the construction method used was one of the acceptable options, even if it was a risky one. Since the client was aware of the increased risk from the beginning of the construction the builder was seen as not having a duty to warn in this case.

It seems understandable not to expect of the builder to warn the client about a risk that the client already knows about. However, one might wonder whether the client, while being familiar with the possibility of the risk itself, knows how grave the risk is and basically whether he is fully informed about it. It seems a bit hasty to completely release the builder from his duty to warn whenever the client has any information about the potential risk. That is what the RvA did in the case of 19 July 2010. The builder in this case was not seen as having any duty to warn based on two facts. Firstly, he did not have sufficient technical knowledge to discover the mistake in the designer’s construction calculations. Secondly, the client while trying to prove that the builder had a duty to warn him about the designer’s mistake mentioned that another constructor had asked him whether the design calculations were correct. The arbitration court did not think that because one constructor notices the possibility of a default in the design, it should have automatically been apparent to the other builder as well. Moreover, the RvA stated that apparently the client had received a warning from one professional party and it had not influenced him. The RvA did not see the need for a more explicit warning to the client. While it might be reasonable to expect of the client to show some initiative in protecting his own interests and upon receiving any warning to conduct some inquisitions of his own, I do not believe that this fact should be a decisive one in determining whether the builder should warn the client or not. Of course, in combination with the first argument of the RvA, i.e. the lack of competence of the builder to notice the default, it makes sense that under the circumstances of this case the builder had no duty to warn.

It is interesting to note that in the case of 23 October 1996, despite seeing the need for a warning the court decided that the builder should not be held liable for not issuing it, since there was no causal link between the lack of warning and the damage. The case pertained to the construction of a basement. The court stated that in general everyone ordering such construction expects to have a dry basement built. According to the court, the builder failed in his duty to warn the client that the design, which was chosen by the client did not guarantee such result, i.e. the basement would not remain dry in all circumstances. However, the court came to the conclusion that even if the builder would have issued such a warning to the client, the client still would have chosen for the same method of construction, due to the fact that it was relatively cheap and technically correct. Thus, the direction would not have been changed and the defect would have appeared anyway. The court decided that the
builder should not be held liable in such a situation for not issuing the warning to the client.

The RvA in the case of 30 December 2010 also stated the lack of a causal link\textsuperscript{427}. In this case there was a default in the design plans, which led to the floors not being pervious to the water flow, which the builder should have warned the client about in the first place. However, the arbitration court decided in this case that if the builder had warned the client, then, at the most, he would have received an additional instruction to install a submerged pomp with a float valve. The client would, of course, have to pay the builder for this extra work since it had not been provided for in the original contract. This means that there is no difference between the situation that would result from the builder having given the warning to the client and having breached his duty to warn, since in the second case the client still has to pay for installation of this pump and the costs would not have been lower if the warning had been given, according to the RvA. Since there is no causal link between the lack of warning and the damage, the client could not claim any damages from the builder.

These cases seem to suggest that the builder will be held liable for the breach of his duty to warn only in cases when the warning could have influenced the client in changing his mind as to making a potentially risky decision, or when the warning would lead to the client choosing another construction method than the one that would be used after the risk materializes. In other words, when there would not be a causal link between the lack of warning and the damage that the client would suffer subsequently, there would not be a ground to hold the builder liable for the breach of the duty to warn.

3.3.2. Precontractual duty to warn.

While the introduction of the article 7:754 to the Dutch Civil Code took away most doubts as to the matter whether the builder has a precontractual duty to warn towards the client, it had in fact been recognised in Dutch law significantly earlier\textsuperscript{428}.

In the case of 26 June 1974\textsuperscript{429} the client complained about the sewer system that the builder created on the basis of the design provided to him. The sewer system was not functioning properly since it had not been connected to proper pipes. The court stated that the builder should have realized from the design plans that he was given that the sewer system would be faulty and should have warned the client and the designer about that. The builder was deemed to have sufficient knowledge to realize that the construction would not be functioning correctly if realized according to the design plans. According to the court the builder should have expressed his doubts during the precontractual discussions that he had with the client and the designer on the planned construction. Instead, he gave assurances to the client that the construction would function properly. As a result of this behaviour the builder failed to fulfil his duty to warn towards the client and was held liable in this case.

Another case of 21 April 1978\textsuperscript{430} concerned a construction which turned out not to be water resistant. The client had demanded in this case that his construction

\textsuperscript{428} see case law described in this paragraph
\textsuperscript{429} RvA 26.06.1974, nr. 7143, BR 1974, p. 760
\textsuperscript{430} RvA 21.04.1978, nr. 8411, BR 1978, p. 697
was water resistant and that the builder had given a guarantee for at least 5 years for water resistance of the construction. A paragraph to this effect was added to the contract between the builder and the client. At the same time, the design plans provided for such design and use of such construction materials that did not guarantee the water resistance of the construction. The court decided that there was a clear contradiction between the design plans and the provisions of the builder’s contract. The design plans did not provide for a water resistant construction, while at the same time the builder was expected to give a guarantee for water resistance thereof. The builder accepted the contract together with its provision on a guarantee for water resistance. The court decided that the builder had a duty to warn the client even before he entered into a contract with him, but at the latest during the performance of his work, that there is a contradiction between these two documents. The builder had then a duty to inquire what the client’s intentions are: whether he expects the builder to proceed according to the design plans or whether he wants him to deliver a construction, which is guaranteed to be water resistant. If he performed his duty then, if the client demanded from him a water resistance construction, the builder might have demanded extra payment for the extra work he would have to perform. In the case, the builder claimed that he had informed the designer that for the given construction he cannot give a guarantee of water resistance and that the designer agreed therewith. There was no written evidence thereof. In the end, the court decided that the builder had a duty to warn the client and that he accepted the terms of the contract as they were, which meant that the builder should be encumbered with the costs of extra construction measures that he needed to take in order to guarantee that the construction would be water resistant for the coming 5 years. As in the previous case, the builder had or at least should have had enough knowledge to recognise the default in the design plans and thus should have warned the client that there was a risk in the contract between him and the designer.

Also in the case of 8 March 2001, the precontractual duty to warn of the builder has been established. The client together with the designer demanded from the builder to drain water of the ground by using a certain drainage method that was not correct in the given circumstances. The court of first instance decided that while in general it is the client who is responsible for the correctness of the design that has been prepared in accordance with his wishes, there could be important reasons to place some of that responsibility on the builder. In the given case, the court stated, the builder as an experienced professional had to realize that the prescribed drainage method had not been the right one and should have warned the client about that. The court made it clear in this case, that it is not expected from the builder to study the design plans in detail in order to make sure that there is no default or risk involved with performing them. One of the reasons that this is not expected from the builder is the fact that the builder often has a very short time to look through this material before coming up with an offer to the client, while the designer can take his time and plan everything meticulously. However, the court reasoned that every builder should at least globally study the design plans even if only to responsibly prepare his offer for the client. In the given case, the default was significant enough that the builder should have noticed it even by such a global study of the design plans. The court stated that the builder had the duty to warn the client and to request certain clarifications, since even before entering into the contract with the client the builder should have take into

431 RvA 08.03.2001, nr. 21.407, BR 2001, p. 122
account the client’s interest. The fact that the client had an independent advisor to help him make construction choices did not influence the builder’s duty to warn in the view of the court. The only factor that was decisive for establishing the duty to warn was the builder’s knowledge as to the default in the design plans, which he should have had.

This case has been appealed from and in the verdict of 19 December 2002\(^{432}\); the appellate court overturned the initial ruling. However, the possibility of recognising a precontractual duty to warn was not questioned in this new ruling. Instead, it has been decided that the builder in the given case could not have known that the designed drainage system would not be appropriate for the given construction. It has been confirmed in this judgment that in certain cases, in which the risk coming out of the design should be obvious to the builder, the builder would be expected to warn the client about that. Under the circumstances of the case the builder did not recognise the risk nor should have he done so, thus he was released of his liability towards the client.

The above-mentioned cases clearly illustrate that a precontractual duty to warn is recognised by the Dutch courts and the precondition for that is that the builder knew or should have known of the default in the design plans. Since the builder does not have a duty to research the design plans in detail, he would not be considered to have to know of the default unless it is an obvious mistake that he could not have missed during his general review of the design plans.\(^{433}\) In the contractual phase the builder does not have to look for defaults in the design plans either, however, it is expected that the builder would work based on the design plans which means he would use them on a daily basis. During his work with the design plans the builder might be expected to notice defaults in the design plans. As far as the precontractual phase is concerned, the builder would most likely take the design plans into consideration only in so far as it helps him to estimate the costs of the construction. This means that the builder would be expected to warn the client only about really obvious and gross defaults in the design plans.

For example, in the RvA-case of 9 December 2009\(^{434}\) the builder was employed by the client to renovate 2 out of 23 houses that at that time were being renovate on the same street. Only after the renovation was completed it turned out that the foundations of the houses needed reparation, which undermined the whole purpose of the previous renovation. The client claimed that the builder should have been aware of the need to repair the foundations and should have warned him about it. According to the client, the builder should have noticed, before he even have made his offer to the client, that the facades of the houses had cracks in them and he should have realized that these cracks were caused by the instability of the houses’ foundation. However, the arbitration court shared the opinion of the builder in this case that the cracks in the façade and on the roof that he could have noticed during his short visit in order to prepare his offer, were not that serious. Since the defaults were

\(^{432}\) RvA 19.12.2002, nr. 70.582, BR 2003, p. 59


not obvious enough for the builder to discover them without a thorough inspection, and such inspection was not required of him at the moment of preparing the offer, the builder was seen as not having a precontractual duty to warn the client. This means that the builder could not be held liable for the damage suffered by the client as a result with proceeding with construction. Also, if the client wanted the builder to repair existing defaults, the builder could claim additional compensation for these repairs.

3.4. Comparison.

This chapter analysed the scope of the builder’s duty to warn, paying close attention to what triggers such a duty to warn and how attentive the builder should be in performance of his obligations as to mistakes and risks coming from other parties to the construction. It has also been considered whether the competence of the client or the fact that a professional party is assisting him could influence the scope of the builder’s duty to warn. Finally, it was discussed whether the fact that the client prescribes certain materials for the builder to use or recommends him to work with a specific other professional party influence the scope of the builder’s duty to warn.

The analysis of English case law, as mentioned in the part on emergence of the duty to warn in England, leaves us with much confusion regarding the builder’s duty to warn and its scope, especially when it concerns the designer’s mistakes. Initially, the courts took the view that the explicit contract terms prevail. This meant that when the building contract stated that the builder was obligated to follow the design plans to the letter, his duty was to do precisely and only that. Even if he would notice that the design plans deviated from what the client was aiming to reach, the builder had no duty to warn the client thereof. The courts assumed that an opposite situation would constitute a too burdensome obligation for the builder and that he was supposed to only perform his contractual duties. This solution, however, put a heavy burden on the client’s side, because usually he was capable of noticing the default only after the construction was completed. Then the client was encumbered to conduct the necessary repairs and readjustments of the building. In more recent years, however, the English courts, albeit reluctantly, began to change their line of thinking. Nowadays, it seems, the builder would not be released from his liability just by claiming that he was fulfilling his contractual obligations and performing his work according to the design plans delivered to him, since it would be taken into account whether the builder noticed or should have noticed the default in the plans. The builder does not have to possess an actual knowledge of the error in the design plans; it is sufficient when he believes in its existence. However, such belief still does not obligate the builder to actively search for discrepancies in the design plans. The builder needs to warn the client about the defaults that he could have spotted without having to conduct thorough inspections. Basically, the English courts apply the test of the careful and competent builder to assess whether in the particular circumstances of the case the builder should have noticed and then have warned the client of the default. Additionally, the builder might be obligated to warn not only about the default in the design but also about a risk coming from another professional party involved in the construction process. For example, the builder’s duty to warn might encompass the need to examine the land adjoining the land on which the construction was supposed to take place in order to warn the client that he should not be purchasing a particular land for a given construction. Again, one might draw a
tentative conclusion that the test that the court will use to assess the scope of the builder’s duty to warn would be that of a competent and careful builder. This conclusion in only a tentative one, since there is not much case law in English law to base it on. Taking into account the conclusions of the previous chapter, i.e. the absence of a clear source for the duty to warn in the English legal system and the reluctance of English courts to recognise a duty to warn, this does not come as a surprise. It leads, however, to certain difficulties in determining the scope of the duty to warn in England, which are sure to have a negative effect on the clarity and legal certainty of these rules to the consumers.

The analysis of German and Dutch law leads to the opposite conclusion. The richness of case law and decisions on the builder’s duty to warn clearly shows certain limitations of its scope.

And so, in German law the builder’s duty to warn seems to be very broad, which corresponds to the broad scope of duties of the builder during the construction. The builder’s duty to warn has been considered separately with regard to the fact about whose defaults he was obligated to give warning to the client. Basically, it can be argued that a builder is obligated to warn the client of the defaults in work of a designer as well as in that of other builders or his own sub-contractors even. It is worth to note at this point that in German law a default does not only encompass a factual defect, which could endanger the construction, but also an inaccuracy, which would lead to a non-fulfilment of the client’s aims regarding the construction.

In the first case, when the default appears within the design plans, the builder’s liability in Germany could be diminished or he could be completely released thereof due to the fact that the plans were prepared by a specialist – a designer. Still, in case a builder should have noticed the default, the German courts consider him to be concurrently liable for the damage resulting thereof, together with the designer. In such a case, the fact that the client employs another specialist who could also advise him and warn him as to the default will not limit the builder’s liability. The builder does not have in such a case a duty to inspect the design prepared by the designer but his duty to warn encompasses any mistakes that should have been obvious to him ‘at a glance’. That means that the duty to warn has limits in the professional knowledge that could be expected from an average builder.

Dutch law establishes liability of the builder for such defaults in the design that should have been obvious to him without conducting any special research as to that. The Dutch builder has to conduct only a marginal check of the design plans and if on the basis thereof he should have noticed the default, it is assumed that he should have warned the client. The obviousness of the default in the design plans and the level of experience of the builder are taken into account to estimate whether he was under a duty to warn the client in the given case or not.

When there is more than one builder working at the construction site and one of them causes the defect, the courts consider the scope of the builder’s duty to warn from a different point of view. Then the question appears as to the scope of the duty to warn of the other builder – the one who did not cause the defect but maybe should have noticed it and should have warned the client thereof. The German courts concluded that the other builder should be obligated to warn the client of such defect only when it could be expected of him to inspect the work of the builder who caused the defect. This point of view takes into account that the builder who would be starting to work at the construction site where previously some construction work had
been done, would have to rely on the previously performed works. Then it is reasonable to expect him to inspect such earlier works in order to make sure whether they constitute a sound ground for his future work and to warn the client of any defaults therein.

There is less case law on this subject matter in the Netherlands, but just like in Germany a builder starting work at the construction site will as a rule not have a duty to warn about defaults resulting from works of other builders that perform their work after him. The builder is not required to foresee what risks might appear in the future works at the construction site, unless he has coordination obligations, as well. However, we could also observe in German case law that the first builder starting the work at the construction site could also be found liable for defaults resulting from the construction in case the future works performed there were based on his performance and he should have noticed that either the following builders would not be able to build upon his own work due to lack of competence or due to unexpected materials or techniques used by him. This qualification has not yet been considered in Dutch law.

Additionally, the Dutch builder should warn the client of the defaults he should have noticed in the works of other builders who performed on the construction site before him. The rule that the builder is liable for the materials delivered by the client is broadened here to encompass also the construction site. That means that when the builder enters a construction site he should carefully examine it and either accept it or not.

The Dutch builder shall also be liable for incidental mistakes made by sub-contractors employed by him upon the demand of the client. Such mistakes might have happened also in cases when the builder hired these sub-contractors of his own will. However, in certain situations the liability of the builder for structural inadequacy of the sub-contractors work might be limited or even excluded when the ‘good faith’ principle would oppose the assumption of the builder’s liability for such a default. This would, for instance, be the case if the builder objected to the employment of the given sub-contractor, but relented in doing so due to the pressure of the client and the default caused was of the nature the builder warned the client about.

Generally, we could see that the scope of the builder’s duty to warn in German law relies to a huge extent on the particularities of the case, such as what professional knowledge is expected from the builder or what were his contractual obligations. The fact, however, that the client employed another specialist whose competence and professional knowledge could be attributed to the client, may not on itself release the builder from his duty to warn the client. This would change in case the client’s or his representative’s professional knowledge would be higher than that one of the builder. In case the default lies in the area of expertise that is more familiar to the client than the builder, the builder would not be under a duty to warn the client. Otherwise, it is only when the builder has specific grounds to believe that the tests and inspections conducted by other specialists employed by the client were as full and as reliable as the ones he could conduct himself, may he forego conducting these tests.

In the Netherlands the general rule is that the client’s competence or actual knowledge should not influence the builder’s scope of the duty to warn. If the builder recognised or had sufficient experience that he should have recognised the default in the construction, he had a duty to warn the client thereof. If the client or another party employed by the client is found to have a higher degree of expertise than the builder in respect of the area where the default appeared or had employed a specialist in that
area, the builder might not have a duty to warn the client about such default. It should be noted, however, that the most recent case law tends to evaluate the builder’s duty to warn independently of obligations and competence of other parties involved in the construction process. On the other hand, when the builder should have realized that the specialist employed by the client had less competence than an average specialist, he should inspect e.g. design plans delivered to him more carefully since the scope of his duty to warn might be broadened then. The builder was considered to be completely released of his duty to warn in case the client not only had an actual knowledge of the default but rather consciously decided to take upon himself risks associated therewith.

In English law it might be interesting to note that in case the builder might have a duty to warn about a default in the design that arises due to the designer planning on using novel materials, the fact that the materials to be used are novel does not limit or exclude the duty to warn of the builder. To the contrary, English courts considered that in such a case the builder might have to be even more careful than usual in his assessment of the applicability of the material prescribed by the designer.

The German courts assessed the matter of the necessity of the builder giving a warning to the client about the novelty of the materials used in the construction. It was decided that although objectively such warning should have been issued by the builder, the non-fulfilment of the duty to warn did not cause the client any damage – due to the fact that the client would turn for advice to the producer of the new material, who would pass on to him the same information the builder already received. That was the court’s decision, however, in my opinion it seems that it was made rather presumptuously. The court did not take into account that the client might have responded to a warning given by the builder by asking the builder to use other materials, which had already been successfully used in previous works, instead of asking the producer for information on it. In that case the causal link between the lack of warning and the damage might not have been broken.

It is worth to note that there used to be no consensus in Dutch literature and case law as to who should bear liability for faulty materials chosen or recommended by the client, when the materials used were suitable for the construction in general, but the specific, delivered batch of them had been faulty – the client or the builder, as the arbitral courts followed a different interpretation of the law than the ordinary courts. Today there is little doubt that it is the builder’s liability that will prevail, as the arbitral court’s opinion has been laid down in the statutory provision of article 7:754 BW.

Taking into account how few English cases there are that establish the contractual duty to warn of the builder, it is no surprise that no cases or legislation could be found pertaining to the precontractual duty to warn. As it has been mentioned in the previous chapters, it is feasible that such a duty to warn would be recognised in practice at one point. However, without any case law nor regulation thereof the only thing that could be said about its potential scope is that it would certainly not be broader than the scope of the contractual duty to warn.

There have been a few German cases in which the precontractual duty to warn has been specifically mentioned. In these cases, the German courts recognised the builder’s duty to warn in case the builder should have noticed the risk to the contract without having to conduct specific inquiries and inspections. It seems that just as with the contractual duty to warn, the builder will have a precontractual duty to warn only
when the default should have been clearly obvious to him. The difference between the scope of the contractual and the precontractual duty to warn is that in the case of the precontractual duty the obviousness of the default should have been even more easily noticeable to the builder. That means that in the precontractual phase the builder should be able to spot the default ‘at a glance’, already when just browsing through the plans in order to prepare his offer to the client. Whereas in the case of the contractual duty, the builder would need to pay more attention to the plans in order to be able to perform the construction which means that he will take more ‘glances’ at them and will have an opportunity to discover more defects. As a result, defaults that may have escaped the builder’s attention at the precontractual stage due to no fault of his may become obvious at the contractual stage and give him a contractual duty to warn. Just as with the contractual duty to warn, the fact that the client might employ a professional advisor does not seem to be influencing the scope of the precontractual duty to warn of the builder.

Dutch case law clearly recognised the precontractual duty to warn of the builder as to a risk coming from a third party even before it was regulated in the Dutch Civil Code. The scope of the precontractual duty to warn of the builder is similar to his contractual obligations, since only when the builder knew or should have known of the default he would have been under a duty to warn about it. The scope of the precontractual duty to warn is a bit narrower since the builder would not be expected to know about the default unless it was a really obvious mistake, e.g. in the design plans. The builder does not have to study and inspect the design plans fully in the precontractual phase, nor does he work upon them daily, as is the case in the contractual stage of the construction. The builder would need to examine the design plans only in so far as he needs to estimate the costs and the feasibility of him performing the given construction and he would be bound by the duty to warn in as far as during that examination he should have noticed the risk.

As far as the builder’s contractual duty to warn about the designer’s default is being compared, it is necessary to mention that nowadays the situation of the builder in all three legal systems does not differ significantly. In all of them it is considered that the builder’s duty to warn about the defects in the design plans should not be understood too broadly, due to the fact that the client employs specialists whose task is to evaluate the design plans and that the builder usually does not possess the knowledge, which is needed for such an evaluation. Since the English courts stopped giving priority to the builder’s contractual obligation to simply follow the design plans to the letter, all systems recognise the builder’s duty to warn the client if there is a default within the design that the builder should have been aware of. In all systems the concurrent liability of the builder and the designer is recognised[^435]. Still, English law does not provide us with an established authority as to the recognition of the builder’s duty to warn, which points to a weaker position of English clients, leaving them less legal certainty as to the claims they may successfully bring against the builder. The lack of clear case law on this matter may leave consumers without sufficient clarity on the scope of the builder’s duty to warn in England, preventing them from claiming damages for breach of such a duty. As far as the scope of the German and Dutch builder’s duty to warn is concerned, the case law gives us plenty of indications when the builder might be expected to be held liable if he does not warn the client about the default in the design. However, even in the Dutch system, where

[^435]: To be discussed in the following chapters.
the duty to warn is codified, there is no possibility to give precise specifications as to the scope of the builder’s duty to warn, since certain requirements for that can be evaluated only on a case by case basis. Still, there is no doubt that one of the most important indications as to whether the builder should have a duty to warn is the level of professional knowledge and expertise that could be expected of him in the area where the default had manifested itself. Analysis of the above-discussed German and Dutch case law shows that consumers have been given certain guidelines there as to which requirements need to be fulfilled for them to be able to claim damages for breach of a duty to warn.

All three legal systems that have been analysed recognise also the builder’s duty to warn as to the risk coming from parties in the construction process other than a designer. The scope of that duty to warn is also dependent on the knowledge and expertise of the builder acting as a careful average builder.

Finally, the scope of the precontractual duty to warn is in all three systems not specified in as many details as the scope of the contractual duty to warn. In Germany and the Netherlands the main conclusion coming out of the comparison of the scope of the contractual and precontractual duty to warn is that they are alike, but that the scope of the precontractual duty to warn does not stretch as far as the contractual one’s. It may be assumed that if the precontractual duty to warn would be accepted at all in England – so far there is no case law where such a duty is accepted in the first place – the scope thereof would certainly not stretch further than the scope of the contractual duty to warn.

In sum, while there is clear evidence that the precontractual duty to warn of the builder is recognised in at least Germany and the Netherlands, it will almost certainly have a more limited scope than the contractual duty to warn has. That the builder may be under a contractual duty to warn is undisputed in Germany and the Netherlands and seems to be accepted nowadays also in England. The lack of clear case law on the duty to warn in England still constitutes an obstacle to consumers having legal certainty as to their rights in case a builder breaches his duty to warn. Contrary, while Dutch and German laws leave assessment of certain requirements of the scope of the builder’s duty to warn to be dependent on the circumstances of a given case, they set certain guidelines that give consumers more clarity as to when there might have been a breach of a duty to warn.
Chapter 4. The designer’s duty to warn the client.

Despite the fact that the scope of the book encompasses both the contractual and precontractual duty to warn of all the parties involved in the construction sector, the regulation of the precontractual duty to warn will not be discussed that much in this chapter. In case a contract had been concluded by the parties as a result of negotiations during which a professional party owed a precontractual duty to warn to the client, this duty in practice is mostly absorbed by that professional party’s contractual duty to warn or even by that professional party’s obligation to provide an end result, which is fit for its purpose: in practice, in the case of a breach of the duty to warn the client would choose to claim damages for breach of the contractual duty to warn or for failure to achieve that end result. One of the reasons for this is that damages are obtained much more easily and much more generously in case of a contractual relationship than in case of merely precontractual liability. As a result, in all three legal systems the precontractual duty to warn is less regulated in all three legal systems than the contractual duty to warn is. This means that there is neither an abundant amount of case law or literature on the precontractual duty to warn, certainly not when compared with the contractual duty to warn. Moreover, the scope of this book is limited to the duty to warn that a professional party would have in respect of a risk coming from another professional party. The designer is often the first party employed by the client. Therefore, when the client would be negotiating and concluding contracts with other professional parties, which might bring about some risk to the client, the designer, most likely, would have already been employed by the client and would then have a contractual duty to warn about those risks. That might explain why the precontractual duty to warn of, in particular, the designer is neither explicitly regulated nor discussed in any of the three mentioned legal systems, and why case law on the designer’s liability for breach of a precontractual duty to warn is almost completely absent. As a consequence, the designer’s precontractual liability for failure to warn is not discussed to the same extent, as is the builder’s precontractual duty to warn.

This chapter, mostly on the basis of case law, focuses on the scope of the designer’s duty to warn the client. The case law gives us an indication as to what factors may influence the scope of the designer’s duty to warn and for whose defaults he might need to warn the client about. On the basis of the presented case law, triggers of the duty to warn will be pointed out. However, in many cases the designer will have an explicit duty to warn the client taking into account that the designer’s contract usually obliges him to perform certain supervisory tasks. Such duties are not the subject of the research presented in this book, since it focuses on the implied duty to warn. This means that the presentation of the scope of the designer’s duty to warn is not complete, as it should be combined with the research on the explicit duties to warn of the designer. It will only be discussed whether when the designer does not have supervision duties he is still obliged to actively look for the defaults in the construction and if not then how attentive the client may expect the designer to remain. Another question considered in this chapter will be whether the fact that the client is assisted by other professional parties who are sufficiently competent to recognise the default before any loss is caused to the client influences in any way the scope of the designer’s duty to warn.
4.1. English law.

4.1.1. Contractual duty to warn.

As regards the scope of the designer’s duty to warn, it has to be pointed out that his obligations normally are not fulfilled the moment he finishes his design, even if the client does not expressly charge the designer with the supervision over the construction. English case law shows that designers are obligated to take part in the construction process in order to correct their initial designs later on, if needed. The designer will, of course, be liable for the original defaults in his own design plans. Moreover, in case other parties make changes in the design or when the design is no longer as functional e.g. when the engineering or the construction works show that the original design is not related to the work that need to be actually performed, the designer might have a duty to warn the client about that. In such a case, the designer is also obligated to warn the client of any defaults, which occurred both within the design as well as in the process of its realization, i.e. of the builder’s defaults, that have emerged during construction, which need to be set straight:

“The architect [the designer - JL] is under a continuing duty to check that his design will work in practice and to correct any errors which may emerge.”

That, of course, does not exclude the possibility of contractual parties explicitly excluding such an obligation of the designer. However, if the parties did not agree to the contrary, the designer will have a duty to warn the client about defects that might appear during the construction process as a result of the design being adjusted and applied in practice by other parties. Such a duty to warn would bind the designer if he would notice certain risks endangering the proper performance of the construction during his visit at the construction site. In such situations the designer has an express duty to warn the client of the risk as part of his duty to inspect the construction site. Therefore, in most cases, the designer’s duty to warn the client about defaults that he notices during the construction process because of his supervisory duties will not fall within the scope of this research. Such duties to warn will therefore not be discussed here either.

Occasionally, however, there are situations where the designer does not have an express contractual duty to supervise and inspect the construction site. This was the case in Hart Investments v. Fidler and Larchpark with regard to the structural engineer, who was employed by both the client and the builder and who acted also as a designer. As has been described in the previous chapter, the court decided that such a duty should in this case be implied in his contract. The implied duty to supervise and inspect implied also the designer’s duty to warn the client and the builder when he noticed a risk to the whole construction in the builder’s performance. How broad was the scope of that duty to warn? The court stated:

438 See more on the duty to warn in such situations: S. van Gulijk, European Architect Law. Towards a New Design, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 116-117
439 Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd. (2007) 1 BLR 526
“(….) I do not consider that the consulting engineer’s [who in this case could be seen as the designer - JL] duty of supervision extends to instructing the contractors [the builder - JL] as to the manner in which they are to execute the work (…) What is said, however, is that when the consulting engineer knows, or ought to know that the contractors are heading for danger whereby damage to property is likely to result, then he owes the contractors a duty of care to prevent such damage occurring. If he sees the contractor is not taking special precautions without which a risk of damage to the property is likely to arise, then he, the consulting engineer, cannot sit back and do nothing. I am not sure that the consulting engineer’s duty extends quite that far, but even if it does, I do not believe that he is under a duty to do more than warn the contractors to take the precautions necessary (…)”.

The court seems here to be a bit at a loss precisely which measures the designer should have undertaken in order to prevent the occurrence of the potential damage to the construction. It is said rather clearly, however, that in such a situation, the designer would have a duty to warn the builder about any risk that he might know or should have known about. The court’s hesitation about whether the duty of the designer extends quite that far relates to the designer’s duty to take special precautions, therefore to do something more than just to warn.

The construction process nowadays has become complicated to such an extent, that often it no longer suffices for the client to employ only the designer and the builder. With every year, designers are ordered to design more complex buildings, by usage of modern technology and materials, which they had no experience with previously. The complications to the construction process apply even with regard to consumer contracts as more and more clients demand the use of special environment-friendly construction solutions or look for innovative technology to be applied in their buildings. In such cases, where special knowledge or skill is needed to complete the design, third parties – specialists in the given field – are often involved in the construction process. Thereupon the designer shall not in general be responsible for the work to be done and actually done by these specialists, which is beyond the capability and skills of the designer. The designer shall remain only responsible for the coordination of the whole work. The general rule remains, as specified in the case Oldschool v. Gleeson, that:

“The duty of care of an architect or of a consulting engineer [the designer - JL] in no way extends into the area of how the work is carried out. Not only has he no duty to instruct the builder how to do the work or what safety precautions to take but he has no right to do so, nor is he under any duty to the builder to detect faults during the progress of the work. The architect [the designer - JL], in that respect, may be in breach of his duty to his client, the building owner, but this does not excuse the builder for faulty work. I take the view that the duty of care which an architect or a consulting engineer [the designer - JL] owes to a third party is limited by the assumption that the contractor [the

441 Oldschool and another v. Gleeson (Construction) Ltd and others (1976) 4 BLR 103
builder - JL] who executes the works acts at all times as a competent contractor [the builder - JL]. The contractor [the builder - JL] cannot seek to pass the blame for incompetent work onto the consulting engineer [the designer - JL] on the grounds that he failed to intervene to prevent it"442.

However, the court in the case Investors in Industry Commercial Properties Ltd. v. District Council of South Bedfordshire and Another443 stressed out one essential exception to this rule:

“If any danger or problem arises in connection with the work allotted to the expert, of which an architect [the designer - JL] of ordinary competence reasonably ought to be aware and reasonably could be expected to warn the client, despite the employment of the expert, and despite what the expert says or does about it, it is in our judgement the duty of the architect [the designer - JL] to warn the client. In such a contingency, he is not entitled to rely blindly on the expert, with no mind of his own, on matters which must or should have been apparent to him”.

Moreover, in this case, it has been pointed out by the court that the professional party (the builder or – like in this case – the designer) would not be able to escape from his liability towards the client by claiming that it was another party to the contract who had the duty to warn the client.

One other aspect of the designer’s duty to warn about a risk coming from a contract with a third party that might fall under the scope of this research is the designer’s duty to warn the client about financial problems of another professional party (about to be) engaged by the client (e.g. bankruptcy, insolvency)444. When the designer is aware of or should have been aware of such financial problems – especially if it is the designer who recommended this particular party (a builder, an engineer or another designer etc.) and the client relied on this recommendation – he might have a duty to warn about that. The fact is that usually the client does not know the construction market and entities operating thereon and he would rely on the designer’s (or builder’s etc.) opinion, as a professional from within the construction environment. It does not mean that the designer has a duty to recommend such third party to the client. If, however, the designer makes such a recommendation, he should be careful whom he recommends to the client and if asked for an opinion on different entities, he would better warn the client of any unreliable third parties if he were aware of their incompetence or other faults and their possible engagement in the construction process445. Otherwise, it might be stated that a negligent misstatement

442 This view has been confirmed also in previously described case: Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd. (2007) 1 BLR 526
was made and such a careless designer might be forced to pay damages instead of the insolvent or bankrupt third party.\footnote{Nelson Lumber Co. Ltd v. Koch (1980) 111 DLR (3d) 140 (Canada) (Court of Appeal); Pratt, Valerie v. Swanmore Builders Ltd (1981) 15 BLR 37; [1980] 2 Lloyd's Rep 504; Pratt, Valerie v. George J. Hill, C of A, (1987) 38 BLR 25}

4.1.2. Precontractual duty to warn.

The scope of the designer’s \textit{precontractual} duty to warn in English law has not been elaborated on by the English courts at all, as far as my research shows. The designer is most likely to be the first professional party hired by the client in the construction process, as the earlier part on the designer’s \textit{contractual} duty to warn indicates. This means that there is no other party yet employed by the client who could bring some risk to the construction about which the designer would have a duty to warn. Of course, it may happen that already in that precontractual phase the designer would notice certain defaults in e.g. the building ground that the client asks him to look at as a future construction ground. However, if the designer were employed by the client to prepare design plans then his duty to warn would be a \textit{contractual} one. If the client does not employ the designer, then it is more likely that the client would seek recourse from the parties he ended up employing. It is feasible that these parties would be insolvent and the client would turn to the designer that was involved in the precontractual phase only, however, in my research on English law I have not encountered a case like that, nor have I found any literature on English law in this respect.

4.2. German law.

4.2.1. Contractual duty to warn.

The designer’s duty to warn the client is based on the provisions of VOB/B (mainly, § 4 No. 3) and the BGB (§ 242)\footnote{This has been discussed in the chapter on emergence of the duty to warn.}, just as the builder’s duty to warn is built thereupon. As it has been discussed in the previous chapters, when the abovementioned VOB/B-provisions are incorporated into the building contract, the duty to warn is based on an express contractual provision. However, in German literature and case law it has been emphasized that the duty to warn the client is not limited to the situation when the VOB-provisions were implemented in the contract since it is based on the general duty to act with good faith.\footnote{BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518; OLG Bremen, 15.02.2001, 5 U 69/00c, BauR 2001, 10; OLG Karlsruhe, 28.10.2002, 7 U 87/02, BauR 2003, 10, p. 638; OLG Dresden, 20.01.2004, 14 U 1198/03, IBR 2004, 615; C. E. C. Jansen, \textit{Towards a European building contract law}, Tilburg: Tilburg University Press, 1998, p. 284-285; A. Metzger, ‘Prüfungs- und Hinweispflicht gegenüber einem baukundigen Auftraggeber’, IBR 2006, 88; T. Großkurth, \textit{Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten}, Hamburg: Verlag Dr. Kovač, 2008, p. 18-21; H. Locher, U. Locher, \textit{Das private Baurecht}, München: C.H. Beck, 2005, p. 100} In general, therefore, the designer is obliged to warn the client of any defaults he noticed or should have noticed in the materials delivered or used by other parties or in the performance of...
work by other professional parties working at the construction site. However, since the designer is often employed only in the first phase of the construction, preparing the design plans, he does not have as many opportunities to notice a default as the builder does. That is, unless the designer is specifically employed to supervise the construction site during the construction works, but that gives a clear contractual obligation to the designer to look for any potential defaults and prevent them. This situation does not fall under the scope of this book. The question of this paragraph is thus when the designer may have an implied contractual duty to warn?

In the case of 28 November 2006, decided by OLG Bremen the client employed a general contractor who in turn employed the designer to prepare general design plans for a dairy farm. Additionally, the general contractor employed a technician to plan all the engineering details of that construction. The designer also represented the client to employ a builder who was to install a copper heat exchanger. The copper heat exchanger had been connected to the heating system by the builder, which caused corrosion. The builder was not, however, held liable for the default in the construction, which resulted purely from insufficient planning, which the builder neither noticed nor should have noticed. As a consequence, the builder did not have a duty to warn the client about the default. Therefore, the general contractor, representing the client claimed damages from both the designer and the technician. The court decided that the designer, in general, is not responsible for any default in the design plans, but only for those that he himself made. In case there is another professional party employed that plans specific elements of the design, e.g. a technician, the designer will be liable for the defaults in that technician’s plans only in case his knowledge would allow him to notice these defaults or if he should have had sufficient knowledge to recognise these defaults. Therefore, it is necessary in every case, such as this one, to establish whether the designer had or should have had the necessary capability to assess the performance of the technician and whether he should have noticed the default in such a case. If yes, then the designer would have been under a duty to warn. In the given case, the technician was specifically employed to plan the heating system. The court decided that the designer did not have a duty to warn about the default in the technician’s plans since it is not expected from the designer that he is capable of reviewing construction materials from the engineering perspective.

Similarly, on 2 August 2000 OLG Frankfurt presided over a case in which the designer was only one of the parties that were making decisions about the design of the construction. Namely, the designer was employed by the client to make original design plans of a building with a few stories. Additionally, the client and the builder employed a specialist engineer to help with the engineering parts of the construction, e.g. the heating and ventilation systems. When the construction had been finalized, it turned out that in the summer months the temperature at the highest floor of the building reached 40 degrees. The client refused to pay the remaining salary of the designer claiming, inter alia, that the designer should have warned him that any change in the design plans prepared by the designer could lead to overheating of the top floor of the building. While recognising the duty to warn of the designer in such a situation in general, the court did not find a duty to warn of the designer in the given case. It was decided that the designer could not be expected to give a warning to the

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449 S. van Gulijk, European Architect Law. Towards a New Design, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 113
450 OLG Bremen, 28.11.2006, 3 U 40/06, IBR 2008, 281
451 OLG Frankfurt, 02.08.2000, 9 U 60/99, IBR 2003, 87
client about such a specific part of the construction that does not belong nor should be expected to belong to the general knowledge of any designer. Additionally, the fact that the client employed another engineer, a specialist to assess exactly this kind of problems, implicitly released the designer from his duty to warn.

It seems that as a rule the designer has a duty to warn about a faulty construction of windows by an engineer that does not give sufficient protection from the sun in the summer. The sole fact that the designing engineer would be a specialist himself would not release the designer from his duty. The duty to warn would bind the designer in case he had or should have had sufficient knowledge to recognise the default and if he had reasons to doubt the experience and knowledge of the engineer. However, in the OLG Frankfurt case mentioned above, a specialist, who was employed by the client some time later in the construction process, changed the original plans prepared by the designer. This could be viewed as a client’s rejection of the designer’s project and solutions. This might in turn suggest that the warning given by the designer would not have been effective either and therefore point to a lack of causality between the lack of warning and the default.

The case law presented above suggests that one possible situation in which the designer might have a duty to warn occurs when there is more than one professional party employed at the designing phase.

The duty of the designer to warn is treated broadly in the German case law and literature. The designer shall also be held liable in case the client bears costs, payment of which could have been avoided, if the designer had performed his main contractual obligations: to inform, to advise and to warn the client by explaining to him how the construction should be performed. One of the first duties of the designer is to make sure that the client is aware of his obligation to pay for the construction works when the client enters into a contract with other professional parties that will perform at the construction site. It seems to be rather obvious that the client should be aware thereof, but the OLG Köln nevertheless indicated that the designer has to warn the client thereof when he should have realized that the consumer was unaware of that obligation. Moreover, the designer has the duty to warn the client when the structural engineers falsely calculated the construction costs, if that default was or should have been known to him. However, the designer’s liability might be diminished even if he confuses the client as to the amount of money.
for which the design plans could be performed by not taking into account the miscalculation of the structural engineers. That will be possible in case the client should have realised, as a result of maintaining the level of diligence required of every reasonable person, that plans, which had been presented to him, could not have been reasonably performed for the amount of money, which was conveyed by the designer. The designer might also be held liable for not warning the client that the total costs of the construction might overreach the client’s financial capabilities.

In the case of 16 December 2003 decided by OLG Düsseldorf the designer was held liable for not warning the client about the possibility that the costs of the construction could be higher than estimated. The court stated that to the general obligation of the designer belongs the estimation of the financial capacity of the client during the preparation of the design plans. The designer is then obliged to tailor the design plans appropriately to that financial capacity. The client in this case employed the designer to prepare the design plans for the reconstruction of a building. After he had received the first rough estimate of the construction costs, but before the full estimation of construction costs had been made, the client decided to buy the property, which was to be reconstructed. As a result of discrepancies between the final financial estimation of the construction costs and the first, rough estimate the client suffered severe financial losses. According to the court, the designer had an auxiliary contractual duty to warn the client about the economical risks associated with the dependency between the calculated costs of the construction and the financing of the building project, unless it could be concluded from the circumstances of the case that the client was aware thereof and took these risks into account when planning his expenses. In the mentioned case the designer did not give the client an explicit warning as to the risks and therefore he was found liable. An unspecific warning that the costs of the construction might still rise is not seen as sufficient to release the designer from his liability. The designer should have mentioned specifically that the early purchase of the ground was risky, while naming categories of costs that still had to be calculated and could influence the decision of the client on the purchase.

It should also be mentioned that the designer might be held liable when he recommended to the client or even advised him to employ a particular builder, who later on turned out to be untrustworthy or even insolvent. The designer shall be held liable in such a case, if he should have been aware e.g. that the financial situation of the builder might lead to an unsatisfactory, negligent performance. The designer could also be liable in case the client decides to employ builders too early (or too late), i.e. at a moment when the construction site is not yet prepared for them to start their work, in which case the client could end up having to pay them daily salaries.

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without them performing any work for that money. The designer should warn the client in such a case that it is yet too early to employ specialists. The above-mentioned obligations seem to me to go very far. On the one hand, such a far-reaching duty may seem understandable taking into account the fact that the designer has more knowledge and experience and it is easier for him to pay attention to all the details of the construction process, its organization and coordination. Still, these judgments seem to suggest that the German legal system is very protective of consumers in the construction sector.

In the case of 22 March 2002 OLG Düsseldorf considered whether the competence of the client influenced the designer’s duty to warn in such a case. According to the facts of this case, the client employed both the designer and the builder to construct family houses. Upon the knowledge of the designer, the client concluded a contract with the builder, in which contractual penalties for any delays were provided for. Such delays occurred in this case, however, the client did not enforce the contractual compensation, due to the fact that the designer did not draw his attention towards that possibility at the right time (i.e. at the moment of acceptance of the construction). The client claimed compensation from the designer in the amount of the contractual penalty. Taking into account the general protective approach to the clients acting in the construction sector, the decision of the court was surprising since it decided that the designer had no duty to warn the client about the necessity to apply the provision on contractual penalties. The court recognised that the designer fulfilled not only the role of the common contractor of the client, but also of his professional advisor, bound by various information duties. One of these duties was the duty to advise the client that he had to apply the provision on contractual penalties up to the point of accepting the constructed building. However, these duties of the designer cannot be generally defined and the court stated that they would need to be assessed in every case separately, based on the circumstances thereof and *inter alia* on the competence of the client. The court agreed with an earlier statement of the German Supreme Court that the designer could even be seen as being released from his duty to warn altogether when the client had sufficient professional knowledge himself. In this particular case, the client was a businessman whose company had performed various installations for ca. 20 years and the court decided that he should be well aware of his rights and obligations.

The designer’s liability has also been recognised in case of his negligence in the preparation of an application for the issue by the authorities of the building permit. To start the planned construction a builder in the case of 2 July 1990 adjudicated by OLG München required a prior building permit issued by the authorities. Surprisingly enough, such permit had been granted to the builder on time despite the fact that the application had been negligently prepared. When the authorities noticed their mistake, they revoked the permit. At that time, some construction work had already been performed. Pursuant to the authorities, the revocation was the result of the negligently prepared application for the issue of the building permit. Quite often the client would employ a lawyer to prepare such

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464 OLG Düsseldorf, 22.03.2002, 5 U 31/01, NJW-RR Zivilrecht 2002, 17, p. 1098
465 BGH BGHZ 74, 235 [239]
It has been stated that the designer still might be concurrently liable with the lawyer, if they both should have recognised the problem, which would be the ground for the revocation of the permit by the authorities. However, the designer would cease being liable if the problem was legally too complicated for him to fully understand it. In such case the designer need only have warned the client of the complexity of the problem. It seems logical to assume that after receiving such warning from the designer the client would then turn for explanations to the lawyer and he would subsequently receive an advice from the lawyer. If the legal advice was faulty or the client decided not to heed it, there would be no causality between the lack of warning from the designer and the damage suffered by the client. Still, that means that the designer is not obligated to warn the client that there might be problems in the application for a building permit, which he cannot sufficiently comprehend, explain and correct. The same applies when the designer spotted the problem and went to the lawyer for an explanation, suggesting him also to introduce changes to the application, but was then assured by the lawyer that everything was properly prepared. In both situations only the lawyer would be liable for defaults in the application. However, the above-described situation is not the only one concerning the obtaining of the building permit in which the designer might be found liable for defaults in the application. If there were any delays with obtaining the building permit and the designer had not warned the client that he might encounter problems while applying for that building permit, the designer shall be held liable for additional costs resulting from such delays.

4.2.2. Precontractual duty to warn.

The scope of the designer’s precontractual duty to warn is even more limited than his contractual duty to warn. In general, the first step in every construction is its design. Only upon having prepared the design plans there might be talk about finding a builder who would make them come true and the beginning of the construction phase. This means that prior to the employment of the designer the construction most often does not exist, which means there is nothing the designer could warn the client about. That does not mean that the designer can’t be under a precontractual duty to warn; in fact, there are examples in case law that prove otherwise, but these cases do not pertain to risks stemming from the performance by a third party.

469 In theory, it is possible to think of a hypothetical example. For example, a case in which the designer would be employed to plan renovation of a house. Then we could say that the designer might have a precontractual duty to warn about previously negligently performed works on that site by other designers and builders. However, as further mentioned in this paragraph, it is often difficult to estimate when the contract with the designer had actually been concluded, whereas if the contract is concluded, the precontractual duty to warn is basically absorbed by the contractual duty to warn. This is one of the reasons why it seems more likely that the client would argue that the designer has breached his contractual duty to warn.
470 In the case law reference may be found mostly to cases in which the designer would have to warn the client about a risk coming from him personally and not from the contract with a third party, e.g. the designer not having been entered into an official list of designers (OLG Stuttgart, 17.12.1996, 10 U 130/96, BauR 1997, 681) or the designer not correctly stating the height of his salary (OLG Köln,
It can also be said that it is often difficult to establish an exact moment when the contract between the client and the designer had been entered into, especially since the requirement of a written form of that contract is not always held on to\(^471\). However, if in the process of negotiations between the designer and the client, when both parties consider themselves still in the negotiation process, the designer would find himself in a position where he has certain information that could change the mind of the client about proceeding with a certain construction method or material that had been recommended by another designer, for example, he should inform and warn the client about that.

4.3. Dutch law.

4.3.1. Contractual duty to warn.

The designer’s role in the construction process has been long recognised in the Dutch law and been divided into three phases: the designing phase, the tender phase and the supervision phase\(^472\). During each of these phases the scope of the obligations of the designer changes. In each of them, he is bound by the duty to warn, though on different grounds.

In most cases that have been adjudicated by the Dutch courts the designer had an express obligation to advise or warn the client, which means that these cases do not fall under the scope of this book. In the designing phase the designer’s express role is to advise the client on what solutions to apply and what materials to use. In the tender phase, the designer plays an advisory role towards the client during the process of choosing the builder and other contractors. In the supervision phase, the express contractual obligation of the designer is to look out for mistakes in the ongoing construction process and if he finds one, he is obligated to warn the client about that\(^473\). However, there are certain situations in which the designer might be considered to have a duty to warn towards the client even if it does not follow from his main contractual obligations. These cases will be discussed in this paragraph.

In the modern world, the construction projects differ a lot from the ones that have been designed in the last centuries. Technology progresses and that constantly raises the level of professionalism needed to duly finalize the construction, e.g. to apply all the energy-saving and innovative communication solutions that the client would like to have installed in his house. This is the reason why even in consumer cases the client may feel obligated to employ more than one designer and to accept his cooperation with various sub-contractors (usually engineers). Often it is the designer who points out to the client the necessity of asking some other professional for an advice. The client may employ these advisors himself – independently from the

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designer. However, he may also authorize the designer to conclude a contract with such advisors on his behalf, but in his own name. In that case, the advisors are then the designer’s sub-contractors. When the client concludes contracts with the advisors himself, the designer, in general, remains liable only for his own work. However, pursuant to the provisions of the SR 1997, the designer has a duty of coordination of the tasks performed by different advisors and needs to take care that every delivered partial work fits constructionally into the whole design\(^{474}\). That is why it is expected from the designer to warn the client in case there are some inconsistencies in the works performed by the advisor, particularly when the designer as a professional party is aware of these inconsistencies. Such a duty to warn follows indirectly from the obligation of the designer to coordinate the works of other advisors. In case the warning is not granted, the designer shall bear the liability for the damage that results from not issuing the warning\(^{475}\).

In the case of 17 January 2000\(^{476}\), the court adjudicated that the designer in general may rely on the advice he receives from the advisors, when they are professionals in their fields. However, in case this advice is so inaccurate that the designer with his standard professional knowledge should have seen this inaccuracy, he is obligated to warn the client thereof. The standard of the professional knowledge that the designer needs to show is that of the reasonably competent and reasonably careful designer with normal professional skills\(^{477}\).

In the case of 22 June 1999\(^{478}\), the client employed a separate construction advisor upon the advice of the designer. The court adjudicated that the designer was not liable for the accuracy or for a timely delivery of advice given by the advisor to the client. However, the court deemed the designer responsible for the whole design, including its technical and coordination part. It is the role of the designer, according to the court, to define the full scope of the advisor’s obligations and to coordinate his own work with the work of the construction advisor. The designer should also realize that the narrower the advisor’s duty is, the broader his duty to inspect and warn on the technical side of the construction shall be. The court decided that the designer shall be liable for any inconsistencies between the tasks performed by him and those, which were delegated to the construction advisor. It seems clear then that when there is more than one professional party employed by the client, the designer’s role is to coordinate their work. In this role, the designer represents the client and has the authority to make some decisions in his place\(^{479}\).

As it has been mentioned, the designer only then has a duty to warn the client about a mistake of another advisor, if he knew or should have known about this mistake. For example, in the RvA-case of 6 October 2009\(^{480}\) the client employed an installation advisor who provided the client and the designer with instructions as to how to proceed with the construction as far as the ventilation systems were concerned.

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\(^{474}\) Art 5 Sec 4 and Art 49 of the SR 1997. The DNR 2005 does not contain any similar provisions.


\(^{476}\) AIBk 17.01.2000, BR 2000, p. 970


\(^{478}\) AIBk 22.06.1999, BR 2000, p. 150

\(^{479}\) S. van Gulijk in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), *Bouwrecht in kort bestek*, ‘s-Gravenhage: IBR, 2010, p. 229; see further upon the duty to warn from Article 16 of the SR 1997 in paragraph 2.3.1.

Unfortunately, some of these instructions were incorrect and the client held the designer responsible for not warning him about the fact that the ventilation system will be insufficient. The RvA decided in this case that, as a rule, the designer may rely on the advice given by the installation advisor and that his own responsibility is to act on this advice by properly designing the construction according to the parameters and instructions he received from the installation advisor. It cannot be demanded from the designer, stated the arbitration court, to substantially check the plans prepared by the installation advisor, since he does not possess the necessary, specialised knowledge for that. The designer would, therefore, only then have a duty to warn the client if the mistake made by a third party was an essential one, easily noticeable even to a designer without a specialised knowledge and competence. This was not the case in the circumstances of this case.

In this case the RvA gave guidelines as to what kind of mistakes made by other professional parties designers have to warn about the client and it based its reasoning on the same requirements that are applied to the duty to warn of the builder. The standard of care that the designers would be expected to perform seems to be comparable with the standard of care of the builder.

A specific case emerges when the client employs more than one designer to cooperate with each other. Within such a designing team, each of the designers receives a specific task he needs to perform. However, he is simultaneously obligated to cooperate closely with other designers in order for the design to be integral. Each of the designers is liable for completion of his own tasks. However, there is a possibility for them to be held liable for defaults in the tasks performed by other designers, in case these defaults were so obvious that any professional designer should have recognised them. Each of the designers has the duty to warn the other designer and the client in case there is some inconsistency or default within his colleague’s work when any professional designer should have recognised it. The standard for recognising that default would be the standard of a designer acting with proper skill and care, pursuant to article 7:401 BW.

The designer could also be bound by a duty to warn the client that the suggestions of the builder to change certain aspects of a design may bring more risk to the client. In some cases, the builder would take a more active part in the designing phase of the construction and issue certain suggestions and advices, which may be accepted by the client and incorporated into construction plans. By issuing such suggestions, the builder takes over the designer’s role and responsibility, which could mean that the designer takes over the responsibility of the builder, in turn. Therefore, it does not come as a surprise that the builder would claim that the designer should have warned him and the client in case there were some defaults within his suggestions and that his acceptance of the suggestions transferred the liability towards the designer. While the existence of the designer’s duty to warn has not been denied in such cases, in general, neither the builder’s defence would be accepted. It has been recognised that the acceptance by the client and by the designer of the builder’s

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482 This has been discussed in the chapter on the emergence of the duty to warn.

For example, in one of the above-mentioned cases – the case of 22 June 1994\footnote{Rva 22.06.1994, nr. 14.256 and 14.257/AIBk 22.06.1994, BR 1995, p. 603} – the builder had adjusted the roof design and the designer and the client had accepted the adjustment. Later on, it turned out that the new roof design was faulty. The builder claimed that the designer had accepted his propositions and thus they had become part of the original design for which only the designer should be liable. The court did not agree with this point of view. The court stated that the builder had a specific professional knowledge as to the roof construction, which both the designer and the client lacked, and thus they based their decision on the builder’s recommendation. The acceptance of the builder’s recommendation by the designer should not lead to the client’s contributory negligence in this situation. The builder remained liable for the suggested changes in the design. Still, the fact that the builder remains liable for his suggestions does not release the designer from his duty to warn the client in case such warning is needed and the designer may be expected to have realised the defect in these suggestions. He is obligated to critically evaluate the builder’s suggestions and if he should have noticed defaults therein but had not, he would be found liable, as well. The consequences of the improper performance of the duty to warn by the designer could be assigned to the client pursuant to Article 6:101 Sec. 1 BW.\footnote{See also paragraph 8.3.}

In the tender phase the designer is seen to be responsible to check the financial accounts of the builders. However, the designer’s liability as to not giving the client particular warnings regarding the choice of a builder who shortly afterwards becomes insolvent, is rarely recognised by the Dutch courts.\footnote{HR 10.07.2009, RvdW 2009, 871; S. van Gulijk, \textit{European Architect Law. Towards a New Design}, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 87; S. van Gulijk in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), \textit{Bouwrecht in kort bestek}, ’s-Gravenhage: IBR, 2010, p. 227; AIBk 15.01.1986, BR 1986, p. 373; AIBk 21.12.1998, BR 2000, p. 79}

The general lack of liability of the designer for the bankruptcy of another professional that was employed by the client upon a designer’s recommendation has been clearly stated in the case of 15 January 1986.\footnote{AIBk 15.01.1986, BR 1986, p. 373} However, in the case itself, taking into account its special circumstances, the court recognised the co-liability of the designer. Namely, the designer invited a few builders to make an offer for the construction and then recommended one of them to the client. The recommended builder went bankrupt shortly after the work was commissioned to him. The court decided that the designer did not make any inquiries as to the builder nor recommended to the client to take such steps. The court stated that even only based on the fact that the offer made by this particular builder was significantly lower than offers made by other builders, the designer should have had doubts as to his reliability. It would seem to be reasonable to expect from the designer to perform a financial check on the builder before he makes his recommendation in a standard case. When the circumstances give rise to additional suspicions, not conducting such an examination should be considered as constituting gross negligence. Taking into
account the gross negligence of the designer’s actions the court decided that he should be held partially liable for the damage suffered by the client.

4.3.2. Precontractual duty to warn.

Just as in English and German law, also the research on Dutch law did not lead to discovering any case law in which the designer’s precontractual duty to warn had been elaborated on. Once again, the reason for that might lay in the fact that the designer is usually one of the first parties employed by the client. That might mean that the designer would already be employed by the client and have contractual duty to warn at the time he needed to warn about a risk coming from another party.

4.4. Comparison.

This chapter gave an overview on the scope of the designer’s duty to warn. It was supposed to answer questions as to what factors trigger the designer’s duty to warn, how attentive the designer should be in performing his contractual obligations and whether the competence of the client or the fact that he employs other specialists that are more qualified to recognise a default in the construction process might have an influence on the designer’s duty to warn.

The scope of this book is limited to the duty to warn that does not follow from an explicit contractual provision, therefore it does not encompass the duty to warn of the designer for a mistake of the builder that he notices during his supervision of the construction process, when the designer is employed to do so. However, in English case law it has been recognised that even if the designer does not have an express contractual obligation to supervise the construction process and warn the client about risks coming from the third parties, e.g. the builder, he might have an implied duty in that scope. The test of an ordinary, competent designer is applied in order to assess whether the designer should have noticed the defect in the builder’s performance not resulting from the flaw in the design plans. In general, the designer does not have a duty to inspect the works of the builder or other specialists and detect defaults therein. However, if a default arises, which should be obvious to a designer with an ordinary competence, the designer is deemed to have known about it and to have the duty to warn the client.

In German law the designer’s duty to warn corresponds to that existing under English law, however, it has been elaborated on more extensively in German case law and literature. The client usually employs the designer in the first phase of the construction process: to prepare the design plans. Sometimes he also conducts an inspection at the construction site, which falls outside the scope of this book when it belongs to his explicit contractual obligations. There is no doubt that the designer’s duty to warn is less strenuous than that of the builder, since the designer would have less opportunities to notice the default in the construction if he is not employed specifically to supervise the construction process.

In Dutch law the designer is also liable for not warning the client about defaults in the construction caused by third parties that he had or should have noticed. The standard of care put on the designer is, just like in English or German law, that of a reasonably competent and reasonably careful designer. The designer needs only to warn about an easily noticeable mistake in the works of a third party.

All three systems create a similar test for the recognition of the designer’s duty to warn, which should be clear for the consumers. The only difference that may be
found between the legal certainty that these laws contribute to, is the fact that the
designer’s duty to warn have, again, be subject to more discussions and considerations
under German and Dutch laws.

In England it was stated that in case a client employs any specialists, it does
not release the designer of his liability to warn the client just because there is another
professional party who should have noticed the default and who had a duty to warn.
The recognition of the breach of the duty to warn of one professional party employed
at the construction site does not automatically mean that the client may not hold
another party liable for the breach of the duty to warn, as well.

Also the duty to warn of the German designer encompasses situations in which
he observes or should have observed, as a reasonable, competent designer,
inaccuracies in the work of the builder or another specialist employed at the
construction site. The fact that the default arose in the area for which another
specialist was responsible does not release the designer of his duty to warn in case he
should have noticed that default himself, having sufficient knowledge for that.

The Dutch designer often needs to coordinate the works of other specialists
and, while it cannot be demanded of him to have the knowledge equal to these
specialists as to their work, he is also required to issue warnings to the client as to any
obvious defaults in their work. Also, in case there is more than one designer working
on the design plans, or it is the builder who changes the design, the designer, although
he has no duty to inspect the changes made in detail, might be held liable for not
warning the client about the obvious mistakes in them.

In German case law some other aspects of the designer’s duty to warn were
exposed. Firstly, in case a designer recommends to the client a builder or another
construction specialist, he should warn the client of any circumstances that might
influence that builder’s performance, e.g. that builder’s financial problems. Each such
recommendation should be cautiously considered. Secondly, a designer bears
responsibility for the estimation of the costs of the construction. He has a duty to warn
the client that the expected costs of construction might be exceeded or that there are
cheaper solutions, which could be applied in the construction, other than the ones
suggested e.g. by the builder.

The English courts also decided that the designer should make his
recommendation to the client with the awareness that he would be liable for breaching
his duty to warn in case a person recommended by him proved to be unreliable (of
which fact the designer should have been aware from the beginning).

Contrary to England and Germany, in Dutch law the designer is not obligated
to warn the client as to the other parties the client wants to conclude contracts with,
e.g. in case there is a risk of insolvency. Only in certain, specific circumstances the
designer would be obligated to issue such a warning. On this one point Dutch law
seems to be more reluctant to recognise the designer’s liability than English or
German law.

The analysis of English, German and Dutch law indicates that the scope of the
designer’s contractual duty to warn is practically the same in all three legal systems.
The one point that draws attention is that liability of the Dutch designer for
recommending to the client specialists who then turn out to be incapable of
performing their work duly and timely, is less certain than in the English and German
legal systems.
It is difficult to estimate the scope of the designer’s *precontractual* duty to warn for defaults by another party, since there is hardly any case law on it and hardly any mentioning of it in literature. The reason for that might lay in the fact that the designer is usually one of the first parties employed by the client and by the time he needs to warn the client about risk coming from other parties employed in the construction process, he already has a contract with the client and his duty to warn would be a contractual one. Another reason might be that it is sometimes difficult to estimate when exactly the contract with the designer was concluded and therefore the client might claim that the contract was concluded early in order to proceed with contractual claims against the breach of the contractual duty to warn which is more clearly regulated than the precontractual duty to warn. The court may evade answering difficult questions as to applicability of the precontractual liability in such situations by accepting that the contract was concluded at an earlier date and that the designer’s duty to warn was a contractual obligation.
Chapter 5. The odd case of the sub-contractor’s duty to warn.

The scope of this book encompasses the contractual or pre-contractual duty to warn of a professional party towards the client and does not cover the duty to warn in tort. In the construction sector, where a sub-contractor is involved, that sub-contractor has a contract with a builder. Therefore, it would be the builder to whom the sub-contractor might have a contractual or a precontractual duty to warn about a risk coming from a contract with a third party, e.g. a designer. The sub-contractor’s duty to warn the builder is not very specific, taking into account the fact that the relationship between these parties is just another kind of a builder-client relationship. The difference would be that the client in this case is a professional party himself and therefore possesses competence that might make him be easier aware of defaults in the construction on his own. In general, this book discusses the duty to warn of a professional party to a client who is a consumer or a consumer-like party. This means that cases on the sub-contractor’s duty to warn the builder do not fall under the scope of this book. However, having taken into account the close relationship between the builder’s duty to warn the client and the sub-contractor’s duty to warn the builder, it seems valuable to mention in this book also this aspect of the duty to warn. Namely, if a sub-contractor is obliged to warn a professional party about a default in the construction, this would apply even more so with regard to a contract between a builder and a consumer-client. The sub-contractor’s contractual duty to warn the builder could, therefore, shed some additional light on the builder’s contractual duty to warn the consumer-client. This is the reason why this chapter starts with paragraphs on contractual and precontractual duty to warn of the sub-contractor towards the builder.

As the sub-contractor does not have a contract with the client, he will not have a contractual or precontractual duty to warn the client, either about defaults of the builder or of the designer. For this reason, the sub-contractor’s duty to warn the client is not covered in this book as a separate duty to warn. In certain cases, however, the judge or an arbitrator would assess that the sub-contractor’s duty to warn was not exhausted by the sub-contractor just giving a warning to the builder and not to the client. In such cases, mostly when it would be obvious that the builder would ignore the duty to warn at the spot, the sub-contractor could be considered to have a duty to warn to the client directly. This could then be seen as a consequence of his contractual or precontractual duty to warn the builder. In German law this duty to warn the client would be based on the contractual construction of the Vertrag mit Schutzwirkung für Dritte, a construction that has been established in doctrine and case law in order to remedy insufficiencies of the German tort law. In English law the

judges would not discuss the nature of that duty to warn, not differentiating in practice between contractual and tortious liability of the professional party. Such atypical situations will be briefly addressed in this chapter, in the last paragraphs on every legal system discussed in this book.

It is also worth mentioning in this short introduction that the construction sector seems to be organized differently in these three countries. Whereas in England the client usually employs a builder and a designer and leaves them discretion as to the selection of their co-workers and sub-contractors, it seems, from the cases I examined and which will be presented in the following chapters, that in Germany, and in quite a few cases also in the Netherlands, the client employs most of the parties working at the construction site directly. The result of such differences is predictable – in England the client often encounters problems with holding a professional party contractually liable for breach of the duty to warn due to the fact that this professional party was employed by e.g. a general constructor and there was no contract concluded between the client and this professional party. Liability may then arise only in tort, which could mean that a different standard for liability would be applied. The English courts have prevented that problem from materialising by applying the same standards to contractual and tortious liability for breach of the duty to warn. This means that while adjudicating a case, an English court focuses on whether to grant damages to the wronged party instead of establishing whether there was a contractual relation between the parties. As a result, the sub-contractors will often be found liable towards the clients in tort, as I will conclude based on the cases presented in the following paragraphs. In Germany, as we will see from the presented cases, this problem does not appear that often. As the client most often directly employs builders and engineers performing work at the construction site and enters into contractual relationships with all of them, there is usually no need to appeal to either tortious liability or the construction of the Vertrag mit Schutzwirkung für Dritte to claim damages for the breach of the duty to warn. In the Netherlands clients (in practice often represented by the designer they have already employed) are also more active in entering into contractual relationships with more than one builder and employ also additional specialists, e.g. engineers. Still, the builders also employ sub-contractors, often recommended to them by the client, when the client for some reason did not want to enter into a contractual relationship with the sub-contractor himself. In the latter case, the sub-contractors have a contractual relationship with the builder only and if they have a duty to warn, it is primarily to the builder. We will see whether this difference in the organization of the construction process implies that there is a significant difference in the scope of the sub-contractor’s duty to warn the client in English, German and Dutch construction law.

This chapter illustrates the scope of the sub-contractor’s duty to warn his client, which is the builder. Moreover, in this chapter a question will be answered whether and if yes, then in what situations the sub-contractor should warn not only the builder but directly the client, as well, despite not having a contractual relationship with the client.

491 To be discussed in the following chapters.
5.1. English law.

5.1.1. Contractual duty to warn the builder.

The specific task division in the modern construction process and the complexity thereof forces the client to cooperate with many contractors. It is a real hardship for clients who have never had anything to do with the construction and are clueless as to the complexity of the building process. The client is usually unaware that to build a house he will not only need to hire a designer and a builder, but often a whole construction team or various specialists for minor, but important construction parts. That is one of the reasons that it is more common nowadays for clients to employ directly one main contractor and leave to him to co-work with other companies, which would take minor parts in the construction process – i.e. with sub-contractors.

From the analysed cases, it seems that in the English construction process the client usually employs one builder. Such a builder is considered to be a ‘general contractor’ and he is authorized to employ other builders whose task it is to perform minor, specific works at the construction site. These other builders are the general contractor’s sub-contractors. We will now examine their duty to warn.

In one of the newest cases on the duty to warn - Plant Construction v. Adams\textsuperscript{492}, the client employed the builder to install two engine mount rigs in pits at the client’s building, pursuant to the plan prepared by the client’s structural engineer and his indications. The builder performed the work together with its sub-contractor and employed a consulting structural engineer. During the construction process the support that had been temporarily used by the builder’s sub-contractor, as prescribed by the structural engineer, failed and in result part of the roof collapsed. The client instituted proceedings against the builder and the case was settled. Then the builder claimed damages from the sub-contractor and the structural engineer, which have been quantified by reference to the agreed payment to the client. The case concerned mostly the duty to warn, which the sub-contractor had in respect of the builder. Neither party questioned the fact that the supports were inadequate. The sub-contractor had noticed this during the construction process and he had pointed that fact out and warned the builder thereof, suggesting another solution. The builder refused to make any changes, claiming that the client would have declined them and assured the sub-contractor that the supports would hold. The question arose in this case whether the sub-contractor fulfilled his duty to warn by relying on the assurances of the builder or whether he should have done something more.

The court adjudicating this case stated that the sub-contractor was expected to

“Use due care and skill to appreciate the inadequacy of the propping and to advise and warn”

the builder thereof and to not just rely on the assurances made by the builder. The Court of Appeal considered the line of the case law formed in this respect during the preceding years, finding this matter of not only great importance but also of high difficulty. As it has already been mentioned in the chapter on emergence of the duty

to warn, there was no real authority on which the Court of Appeal could base its verdict as to whether the duty to warn should be recognised in this case. Finally, it was decided that

“These temporary works were, to the knowledge of JMH [the sub-contractor - JL], obviously dangerous to the extent that a risk of serious personal injury or death was apparent. JMH [the sub-contractor - JL] were not mere bystanders and, in my judgement, there is an overwhelming case on the particular facts that their obligation to perform their contract with the skill and care of an ordinarily competent contractor carried with it an obligation to warn of the danger which they perceived. (...) The fact that other people were responsible and at fault does not mean, in my judgement, that on the facts of this case JMH [the sub-contractor - JL] were not contractually obliged to warn of a danger. (...) JMH [the sub-contractor - JL], with others, had a duty to guard against the risk of personal injury to a potentially large number of people. That duty extended to giving proper warnings about the risk”.

The Court of Appeal noticed that the sub-contractor did give such a warning, which, however, has not been heeded. The court noticed:

“What more could JMH [the sub-contractor - JL] have done? Generally speaking, the answer is that they could have protested more vigorously. (...)

The judge made no express finding about what would have happened if the sub-contractor had protested more vigorously. On this ground, the Court of Appeal allowed the appeal partially, asking the judge to reconsider the decision by taking into account the mentioned doubts.

In the abovementioned case, the Court of Appeal decided that the contractual relationship between the builder and the sub-contractor contained an implied term that the sub-contractor would speak up if asked to do something dangerous, even if other entities would have been responsible for that defect 493. That means that if it was evident for the sub-contractor that this method was risky, he should have warned the main contractor – the builder – about that risk, even if the client and the builder agreed upon a certain manner of construction. Furthermore, just like in the previously mentioned case Lindenberg v. Canning 494, it was decided that in case the warning was given but then was ignored, the party aware of the potential danger should have taken further steps to prevent the risk from happening 495. Unfortunately, the Court of the Appeal did not define these further steps, leaving this matter to be reconsidered by the lower court judge, who had decided this case in the first instance. Taking into account other judgments and theoretical possibilities the appellate court might have clarified these further steps as, for example: an obligation for the sub-contractor to stop proceeding with the construction until the instructions had been changed; or a sub-contractor’s tortious duty to warn the client in case the builder refused to listen to

494 Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71
495 This matter will be further discussed in Chapter 6.
him. Unfortunately, none of these measures has been pointed out by the court. One can wonder, also, whether the verdict would have been the same, if the risks involved were lower. For example, the Court of Appeal left for future consideration situations in which the defects did not endanger anyone. Probably, in case when there was no risk of personal injury involved the duty to warn would not have been as strenuous. However, in the doctrine the restraint of the Court of Appeal had been evaluated as leaving room for the future recognition of the duty to warn of the builder or subcontractor in cases in which the design defects would not only lead to a dangerous situation but even just to an economic loss for the client. Moreover, while in this case the Court of Appeal acknowledge implied duty to warn because of the actual knowledge of the sub-contractor of the defect, again the Court of Appeal seemed to leave room to recognising this duty to warn even in case of the imputed knowledge.

The process of defining the scope of the duty to warn was continued in the case *Aurum v. Avonforce*. On the facts of this case, the client employed one company to do some designing and constructing work, which in its scope encompassed also some excavating work. The builder (who in this case was also a designer) was being advised by the structural engineers and employed specialists in underpinning (the sub-contractor). The sub-contractor was employed by the builder to perform some specialist excavating work – underpinning of one particular wall – and did that diligently. However, after the builder started some further excavating works within the area in which the underpinning was done, it failed and as result part of the walls collapsed. During the court proceedings the builder claimed that the sub-contractor had a duty to warn him of the need to provide additional supports for the underpinning in case of doing any further excavation works in that area.

The court admitted that there could be no dispute that

“There are circumstances in which a contractor may be under a duty to warn his client that the work that he has been instructed to carry out is dangerous (...) It has now been held by the court of appeal that if the duty to warn arises, it is part of the duty to act with the skill and care of an ordinarily competent contractor. (...) where a contractor is asked to do work, he is likely to be under a duty to warn his client if he knows that the work is dangerous, and that duty will not be negatived by the fact that the client is being advised by a professional person who knows, or ought himself to know, that the work is dangerous”.

The court pointed out, however, that the law in this respect is “cautious and incremental” and refused to broaden the scope of the duty to warn in this case:

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“In the present case, Mr Brown [counsellor on behalf of Avonforce, the builder - JL] seeks to persuade me to extend to\textsuperscript{500} the duty to warn further than ever before. First, the warning that he contends should have been given did not relate to the suitability or safety of the work that Advanced [the sub-contractor - JL] was asked to carry out. Rather, it related to the suitability of work to be done by others in the future which might affect the safety of the work that it had carried out. Secondly, this is not a case where Advanced [the sub-contractor - JL] knew that the work that was to be done in the future would in fact be carried out in a dangerous manner so as to affect the safety of its own work. (...) the mere fact that the alleged duty to warn did not relate to the work that Advanced [the sub-contractor - JL] was asked to carry out is not necessarily fatal to the case (...) if Advanced [the sub-contractor - JL] had understood (...) that Avonforce [the builder – JL] intended to carry out the excavation in the way that it did, then it would have been under a duty to warn Avonforce [the builder – JL] of the dangers involved. (...) But on the facts of this case, Advanced [the sub-contractor - JL] did not know that Avonforce [the builder – JL] intended to carry out the excavation in the way that it eventually chose to carry it out. (...) I do not accept (...) that it is sufficient to establish the duty to warn that it was possible that Avonforce [the builder – JL] would carry out the excavation in the way that it did. It seems to me that it is unreasonable to impose a duty to warn in such circumstances”.

The court summed up the case

“(…) law is moving with caution in this area. In my judgement, a court should not hold a contractor to be under a duty to warn his client unless it is reasonable to do so”.

It has to be pointed out that although the duty to warn has not been recognised in this case, the court followed the judgment given in \textit{Plant Construction v. Adams}\textsuperscript{501}. Based on the facts of that case, which was described above, it was decided in \textit{Aurum v. Avonforce} that the sub-contractor was not required to give a warning to the builder. Namely, the defects about which the sub-contractor might have had to warn the builder about did not exist at the time the sub-contractor performed his duties and their future appearance was conditional upon the choices made by the builder and work performed by other parties. This factor was decisive for the court. Since the sub-contractor did not have actual knowledge of the defect, he could not have had an implied duty to warn. The phrasing of the judgment is crucial – it seems that in future the court would recognise the duty to warn about a risk coming out of the performance of the contract by a third party, if there was a greater likelihood of the risk materialising or if it were more evident, as ascertained \textit{ex ante}, that the defects would appear than as was the case here\textsuperscript{502}. This seems to imply that the Court of

\textsuperscript{500} The mistake comes from an original text of the judgment.
\textsuperscript{502} S. Jackson, ‘Good faith in construction – will it make a difference and is it worth the trouble?’, Construction Law Journal, 2007/23, p. 420-435;
Appeal has broadened the scope of the duty to warn, and not limited it – as some legal commentaries to this case suggest\(^{503}\).

5.1.2. Precontractual duty to warn the builder.

Just as in case with the designer’s precontractual duty to warn, I have not found any case law on the sub-contractor’s precontractual duty to warn. One reason for it might be that cases between two professionals would be more easily and more often settled. When the client claims damages from the builder for a default in the construction, the builder might seek redress on the sub-contractor for the sub-contractor not having warned him in case the sub-contractor noticed the default during the precontractual stage. There is a direct contractual link between these two parties, which might make claiming damages directly from each other easier.

5.1.3. Duty to warn the client.

Sub-contractors usually enter into a contractual relationship only with the builder as a result might be bound by their contractual duty to warn the builder. It is clear that in such a situation there is no privity of contract between the client and the sub-contractor, as a general rule\(^{504}\). However, there are two ways in which the client may hold the sub-contractor liable. Firstly, there is a possibility of “name-borrowing” procedures, based on which e.g. the client may be authorized by the builder to sue the builder’s sub-contractor in the builder’s name\(^{505}\). While this might allow the client to claim damages directly from the responsible party, namely the sub-contractor, he can recover damages only in as far as the builder was harmed by the sub-contractor’s actions, since the client is suing in the name of the builder. This leaves this solution to be quite complicated legally and have reduced practical value\(^{506}\). The other option for the client is that the sub-contractor might still be found liable in tort towards the client for not warning him directly as to the default within the works of the builder or the designer\(^{507}\). In England, the most common cases pertaining to the duty to warn are actually not cases instigated by clients against the builders, but cases instigated by those clients against the sub-contractors. The reason for that might be that the sub-contractors are usually only addressed when the main contractor is insolvent. In case the main contractor is solvent, the client would claim damages from him, most often by claiming that the delivered product, the building, is not fit for the purpose it was supposed to serve. In such cases, there is no need for the client to claim damages from the sub-contractor, and no need to invoke the builder’s breach of the duty to warn either, since the conditions for a claim against the builder on the basis of the defective end-product to succeed are in practice much easier to fulfill. However, in case the builder is insolvent, the client may claim damages only in tort against the sub-contractor, which leaves him with having to prove that there was a breach of the duty


\(^{507}\) O. Hayford, ‘Did you know… A “Construct Only” Contractor Can Be Liable For Design Defects?’, Mondaq, 07/07/2009, 2009 WLNR 12902774
to warn by the sub-contractor. Another reason why the sub-contractor would be sued directly by the client might be that the builder had contractually limited or excluded his liability for the work of the sub-contractor. Also then the only remedy available to the client is to hold the sub-contractor liable in tort.

In the case Plant Construction v. Adams\(^{508}\), which has been discussed in the paragraph on the sub-contractor’s contractual duty to warn the builder, the court adjudicated that the sub-contractor should have done something more than just warn the builder about the default that he noticed in the construction. The reason for that might have been that the default presented a serious danger to the whole construction and well-being of people present at the construction site. The court did not state clearly what extra measures the sub-contractor should take aside stating that he:

“(...) could have protested more vigorously.”

The court did not specify what it meant by such a more vigorous protest but the simplest solution for the sub-contractor to escape liability for not giving a proper warning seems to be to issue more warnings and maybe also to issue them not only to the builder but also to the client directly. Especially in cases like this one, when the builder clearly did not listen to the warning given to him and did not change his instructions as to the construction process, the sub-contractor should have acted with more caution and could be expected to pass on his doubts to the client.

In one of the leading Canadian cases regarding the duty to warn of sub-contractors, namely District of Surrey v. Carroll-Hatch & Associates\(^{510}\), it was decided that the fact that the engineers who were employed by the designer did warn the designer of the potential risks associated with the construction was irrelevant, because the engineers had a duty to warn the client directly. Usually it is concluded that the designer is working for the client and that the warning given to him should be considered as a warning given directly to the client\(^{511}\). When as here, there was no direct contractual link between the engineers and the client it would have seemed to be even more the case. However, on the facts of this case the court decided otherwise – finding the tortious liability of the engineers towards the client.

This reasoning would seem to place a very burdensome obligation on the engineers or the builder, if not for the factual circumstances of this particular case. The facts were that the engineers advised the designer, who had hired them himself, to conduct a proper soil test upon examining shallow soil pits. The designer informed them (falsely representing his client) that the client could not afford such an extensive soils test and that there would not be any further tests conducted. The designer did not inform his client about the engineers’ recommendation at all. Furthermore, just before the commencement of the construction, the client had inquired about the soil reports and the engineers issued then a letter to the client, upon being so instructed by the designer, in which they referred to the shallow pits they examined without stating


\(^{509}\) The relevance of Canadian law to the interpretation of English law has been elaborated on in the introduction to this book.


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directly the necessity of further soil tests and thus they misled the client. When the client had discovered defects in the design, he claimed damages from both the designer and the engineers. The engineers defended themselves by claiming that they were entitled to assume that the designer would communicate their recommendations to the client.

The court stated that the evidence clearly showed that the designer was rejecting the recommendations given to him as soon as they had been made – without taking any time to consult these matters with the client. This should have warned the engineers that the client might not have been informed about their recommendations. This was all the more true when the client in fact inquired about the soil reports. Finally, the engineers claimed that the designer was the client’s

“Agent for receiving communication from Carroll-Hatch [the engineers – JL] and that the knowledge of Church [the designer – JL] was thus the knowledge of Surrey [the client – JL]. In those circumstances, it was contended, Surrey [the client - JL] must be deemed to have known that the structural engineers had recommended that a deep soil report be obtained”.

Again, the court refused to grant the engineers this line of defence. It was decided that this defence was also based on the engineers’ assumption that the designer informed the client of the engineers’ requirements, which assumption was unjustified, as had by then already become clear to the engineers. If the designer acted as an agent of the client, then this would have been a situation where

“The knowledge of the agent was not the knowledge of the principal”.

From this case it follows that if the designer employs sub-contractors and they warn him e.g. of the need for further soil reports and the risk of proceeding without such reports, such sub-contractors might still be held liable in negligence to the client for failing to give that warning directly to the client, notwithstanding the fact that there was no contract between the engineer and the client. It is worth to notice, though, that firstly, on the facts of this case it should have been obvious to the engineers that the designer had not informed the client of their recommendations. Secondly, it was stated that at this stage of the construction – the design stage and not the supervision stage – the designer did not act as an agent of the client towards the engineers but rather acted as an independent contractor. That means that the message given to the designer should not have been treated as a message given directly to the client. In any case, the engineer should always make certain that the client would be notified of any problems related to the construction of the building.

As mentioned above, if the relationship between the client and the designer is in the form of an agency, then the warning by the sub-contractor of defects in the design given to the designer shall prove to be sufficient. In English case law it has been expressly stated that the builder has a duty to warn the designer if he is acting as an agent for the client 512.

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In *Kensington etc. Health Authority v. Wettern* 513 the Queen’s Bench Division’s court accepted the authority of *District of Surrey v. Carroll-Hatch & Associates* 514, but distinguished from it. There it was stated that the warning given by the engineers to the designer was sufficient to release them from their duty to warn. The court could distinguish this case because, in all probability, it was stated that the engineer did not have any duty to examine the materials in which the defect was found. When he accidentally spotted these defects, he immediately notified them to the designer – which exhausted his duty to warn.

It has already been mentioned that the competence or actual knowledge of the client might influence the scope of the duty to warn of the builder 515. This applies in particular with regard to the duty of the sub-contractor towards his client, the builder.

In the *Plant Construction v. Adams* 516 case the client was advised by his own engineer who knew about the possible risks in the construction. This did not, however, diminish or abolish the tortious duty to warn of the sub-contractor, because the sub-contractor was aware of these risks and knew that what he was employed to do was dangerous. Therefore, the fact that the client could have had or had the same knowledge, as the professional parties performing the contract did not influence the scope of the duty to warn placed on the sub-contractor.

This problem was also discussed in a recent case *Aurum v. Avonforce* 517 regarding the duty to warn. Here the court stated that:

“As here, the contractor is not aware of what is proposed, and at its highest, the case is that it ought to have known that what occurred might have been proposed, it seems to me that the position is quite different. In such a case, I consider that it is relevant to the question of whether there is a duty to warn that the client is being advised by an independent professional person”.

This last case does not change the line of thinking formulated in *Plant Construction v. Adams* 518. The factual situation here was, namely, different, because the defects, which originated at the construction site, had been caused after the party who was supposed to have the duty to warn (sub-contractor) already had finished its work and, which is more important, these defects could have been avoided if the builder would have used other construction methods. This means that the sub-contractor had enough competence to realize that the construction method applied by the builder was dangerous and should have been changed. However, he did not know and had no reasons to suspect that the builder would choose this faulty method. In such a situation, the fact that the builder employed his own professional advisers and could have had the necessary knowledge to avoid creating these defects should obviously be taken into account.

513 Kensington & Chelsea and Westminster Area Health Authority v. Wettern Composites Ltd and Adams Holden & Pearson (1985) 1 Con LR 114; (1985) 31 BLR 57; [1985] 1 All ER 346
515 See chapter on the builder’s duty to warn in English law.
5.2. German law.

5.2.1. Contractual duty to warn the builder.

As mentioned in the introductory paragraph, in Germany the client usually employs several builders himself, or a designer does so as the client’s agent, and each of them is employed to construct a particular part of the whole construction. In the strict sense of the word, the German construction industry therefore rarely makes use of ‘sub-contractors’. The individual builders’ duty to warn the client and each other has been elaborated on in the previous chapter, but let us shortly remind ourselves that the builder under German law is obligated to inspect the work of other builders working at the construction site and warn the client if there are any defaults therein in particular in case he needs to rely on this other builder’s performance.

What happens if the builder delegates his contractual obligations to another builder to be performed, i.e. when there is a sub-contractor involved? In most cases, taking into account that a builder is seen as a professional party, the sub-contractor’s duty to warn the builder will be easily seen as fulfilled.

For example, pursuant to a judgment of the OLG Celle of 29 May 2000\(^{519}\), when it is the sub-contractor of the client who notices the default, a warning given to the builder, with whom the sub-contractor has a contractual relationship, suffices to release him of his liability. Namely, the court stated that the sub-contractor diligently fulfilled his duty to warn the builder, when he gave the warning to the representatives of the builder, which had been present at the construction site. In that case the builder’s representatives seemed to disregard the sub-contractor’s warning. The court stated that if the representatives of the builder still insisted to apply the previously agreed upon method of the construction, regardless of the reason for their behaviour it should not lead to the liability of the sub-contractor.

5.2.2. Precontractual duty to warn the builder.

As the use of sub-contractors is rare in Germany, given the organization of the German construction process, it is not surprising that my research did not reveal any German case law on the sub-contractor’s precontractual duty to warn the builder. In fact, as the ‘sub-contractors’ almost always have direct contractual links with the client, any precontractual duties to warn would normally be owed to the client and not to other builders.

5.2.3. Duty to warn the client.

The liability of the sub-contractor towards the client has a special character in German law. It would appear at first glance that such liability would be tortious in nature. However, in practice the courts would base the sub-contractor’s liability on the breach of a contractual duty to warn the client. This raises the question why a contractual duty to warn the client could arise in a situation where the sub-contractor does not have a direct contractual relationship with the client. In this respect, it should be noted that the German law of tortious claims is limited and most often cannot be

\(^{519}\) OLG Celle, 29.05.2000, 7 U 40/99, BauR 2002, 1, p. 93
applied in case the damage was limited to pure economic loss\(^\text{520}\). That led the German courts and lawyers to look for solutions outside the standard boundaries of purely contract or purely tort remedies, with the focus directed on the more general notion of the law of obligations\(^\text{521}\). As a result a special contractual construction, the *Vertrag mit Schutzwirkung für Dritte*, has been recognised, firstly in a case note to a judgment from the German Supreme Court\(^\text{522}\) and subsequently in the case law itself, in order to overcome the shortcomings of tort law\(^\text{523}\). Based on this construction, the rights of a third party, in our case the rights of the client, may under certain conditions be protected just as if he were a contractual party. The client would not have a right to demand performance of the contract but he would have a right to demand that care is taken in case the contract is being performed, and that means also performance of the duty to warn by the sub-contractor\(^\text{524}\).

In the case of 28 October 2004\(^\text{525}\) the client hired a general contractor to renovate his gas station. The general contractor sub-contracted the concrete works on the roadway leading to the gas pumps to another company while still leaving to himself certain preparatory works on that roadway. The end result was unsatisfactory – there were lots of cracks and holes in the concrete. The sub-contractor claimed that he should not be held liable vis-à-vis the client for the default in construction, since it appeared due to faulty preparatory works performed by the general contractor. The court – OLG Karlsruhe – disagreed and held both parties liable for the damage. The court confirmed that indeed it was faulty work of the general contractor that led to the default in the roadway. However, the sub-contractor should have recognised that default and therefore, was obligated to warn the client about that. The court stated that the purpose of the duty to warn is to protect the client from damage. Therefore, any professional party employed at the construction site should check whether the works of another constructor on which that party relies and builds are suitable as a basis for his own work and whether they do not have any characteristics that could endanger the success of the whole construction. This duty to warn still applies if the sub-contractor were to give a warning about a default in the works prepared directly by the general contractor. The fact that the general contractor was a professional party did not justify the exclusion of the duty to warn towards the client, since it was ultimately the interest of the client that was at stake in the construction.

A tentative conclusion could be reached that in case the sub-contractor is employed at the construction site he would have a duty to warn the builder in the same scope that his general contractor, a builder, has it towards the client.

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522 Case note Larenz, BGH, 25.04.1956, NJW 1956, 1193
5.3. Dutch law.

5.3.1. Contractual duty to warn the builder.

Generally, pursuant to the Dutch legal literature and judgments, the sub-contractor employed by the builder has certain obligations to the builder, which in turn the builder has to the client (as his direct contractor), e.g. the duty to warn. The question then is whether also the sub-contractor might have a duty to warn the builder about the risk coming from a contract with a third party, e.g. the designer or another sub-contractor. Unlike the situation in, in particular, England, there are much fewer judgments dealing with the sub-contractor’s duty to warn in comparison to the builder’s duty to warn. As has been mentioned in the introductory chapter, it is mostly the client holding the builder liable in court for not warning him, as the builder generally is the party responsible for the whole construction. Since the client often employs all specialists directly himself, the sub-contractors relationship will not appear as often in this system, either. In general, however, it might be assumed that all the characteristics of the builder’s duty to warn the client apply to the sub-contractor’s duty to warn the builder, as both the builder’s and the sub-contractor’s duty to warn would be based on the same statutory provision of article 7:754 of the Dutch Civil Code and the same standard of care would apply. This means inter alia that the sub-contractor only has to warn about a mistake in the design when it would have been contrary to good faith to proceed with the construction without having warned the builder. Moreover, the duty to warn binds the sub-contractor only when the default should have been easily recognisable to him which means that he does not need to inspect the construction in details, looking for potential defaults, as well as he does not have a duty to re-check designer’s calculations.

While deciding whether the sub-contractor should have the duty to warn it is important to take into account the level of competence of the sub-contractor and the builder. However, the sole fact that the builder has the same competence as the sub-contractor or even a higher competence than the sub-contractor does not automatically mean that there was no duty to warn on the side of the sub-contractor, as is demonstrated by the case Fliesen Körkemeeyer/Ottink Meteg of 8 September 2006. In this case, the builder and the sub-contractor were both working in the business of delivering and laying down floors. The builder took on a job that he could not do himself, so he asked the sub-contractor to perform it for him. After the work has been performed, it turned out that the design of the floor was faulty and did not provide for proper support. The question was raised whether the sub-contractor had a duty to warn the builder as to the risk coming out of the design in case the builder was as professional as the sub-contractor itself was. The appellate court decided that the sub-

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528 See e.g. RVA 16.06.2009, nr. 71.297 and 27.630,
529 See e.g. RVA 4.11.2009, nr. 71.462 and 31.037,
530 HR 8.09.2006, C05/151HR, BR 2007/52, p. 265 (Fliesen Körkemeeyer GmbH/Ottink Meteg BV)
The contractor had no duty to warn in this case. The factors that weighed down to this verdict were *inter alia*: the fact that the builder was as professional as the sub-contractor in the same field, that the builder accepted the contract with the client agreeing to performance pursuant to the design plans, and that in case it was expected of the sub-contractor to discover the default in the design the same should have applied to the builder. The builder appealed from this verdict and the Dutch Supreme Court upheld his appeal. The Dutch Supreme Court clearly stated that the sole fact that the builder is a professional party himself does not take away the duty to warn of the sub-contractor as to the defaults that he knew or should have known. In this judgment, it was made clear that the sole fact that both parties act as professional does not mean that the party who knows or should have known of a risk may assume that this risk is also known by the other party and consider its duty to warn redundant. One reason for that might be, that usually while accepting the job the builder goes through the design plans just globally, in order to estimate the cost of the construction and its feasibility. Only upon performing the construction, more attention is paid to the design plans. In case the default in the design plans concerned the tasks that only the sub-contractor would be performing, global reading of the plans by the builder might not have discovered that default. Therefore, it would be safer for the sub-contractor to err on the side of caution by giving one too many warning than one too few to the builder and to not assume that the builder is already aware of all the problems and difficulties. This decision is in line with the more general view in Dutch law that a builder is still held to have a duty to warn towards a client who is either a professional party himself or is being assisted by another professional.

In the RvA-case of 7 May 2010 the builder made a mistake by instructing the sub-contractor to use in the construction of the floors only red lead and some biocides, without mentioning the need to cover the ground with fluid-containment foil. The sub-contractor performed his tasks in accordance with the instructions of the builder. The RvA took into account the experience of the sub-contractor with such type of constructions as was used in this case and it decided that it should have been obvious to the sub-contractor that there was a default in the design plans. He needed to warn the builder about the risk of not using the fluid-containment foil. This duty to warn bound the sub-contractor despite the fact that the builder was seen as having enough specialist knowledge to foresee this risk. The fact that the builder contributed to the damage was taken into account in assessing the scope of the liability of the subcontract for the damage.

The sub-contractor might be released from his duty to warn, when he does not have access to all necessary information and data about the construction or the use thereof. For example, in the case of 27 May 1991 improper paving stone was used (9mm thick instead of 15mm). The court decided that the sub-contractor would have a duty to warn only if he knew what kind of loads would be transported over it, so that he actually had a chance to realize that the used material was inappropriate for that.

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531 The question whether the competence of the client influences the builder’s duty to warn was discussed previously in 3.3.1.; see also: M. A. B. Chao-Duivis, ‘Aspecten van de waarschuwigsplicht van de aannemer’, BR 2007/46, p. 231; M. G. Costers, ‘De waarschuwingsplicht van de onderaannemer’, BJB 2006/64


533 More on that may be found in chapter 7 on liability.

purpose. In the given case, the sub-contractor was not given any details over the planned use of the pavement and he had no information over the load that would be applied thereon. As he would not have known what he would need to warn about, the court ruled that he had no duty to warn.

In this case, the design did not provide for sufficient building materials, which means that there was a question whether the sub-contractor who was supposed to use them, needed to warn as to the unsuitability. The court decided against such a duty to warn because the sub-contractor did not and should not have known what the destination of that construction was. Therefore, the sub-contractor could not have been expected to realize that the materials were not fit for the purpose aimed at by the client.

In the RvA-case of 26 October 2009 the builder acknowledged that the design was lacking certain important details, e.g. the indication of specific places in which rear timber needed to be applied in the construction. The problem appeared when the rear timber was applied by the sub-contractor in certain places under the plasterboards that he put on the ceiling, to provide it with more support. The sub-contractor claimed that he had no contractual duty to apply rear timber, since he was performing the construction according to the design plans, which meant that he performed some extra work by applying the rear timber and he should receive additional remuneration for that work. The builder claimed that the sub-contractor should have known that more support for the ceiling is needed and should have warned the builder about the mistake in the design, especially since the sub-contractor applied the rear timber in certain places in the construction when it was not mentioned on the design plans. According to the builder, the fact that the design plans did not mention the application of the rear timber did not make it an extra work for the sub-contractor, since it was an obvious mistake in the design. Additionally, the builder claimed that the sub-contractor should compensate him for not applying the rear timber in certain other places in the construction that the builder deemed to be crucial. The arbitration court decided in this case that the sub-contractor had no duty to warn the builder. The RvA is aware of the process of application of plasterboards and usually it does not require more support and application of the rear timber. Therefore, the sub-contractor did not have a duty to warn the builder about the rear timber support not being mentioned on the design nor did he have a duty to apply rear timber in specific places in the construction. The sub-contractor may therefore claim additional remuneration from the builder.

In this case the arbitration court stated that the default in the design was not an obvious one, which meant that the sub-contractor did not have to be aware of it and warn about it.

The duty of the sub-contractor to warn has been recognised in a few cases when the competence and actual knowledge of the sub-contractor was such that he

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535 Similar reasoning may be found in RvA 9.06.2011, nr. 31.952, <<http://www.raadvanarbitrage.info/default.aspx>> (lastly checked on 15 July 2011)
should have been aware of the default and therefore should have warned thereof. For example, in the case of 2 May 1990\textsuperscript{538} the sub-contractor was employed to install specific armature. It could be expected from the professional installation specialist that he would have had the necessary knowledge and competence to know how to install and connect armatures properly. The court considered this and decided that the sub-contractor had a duty to warn the builder that the armatures in the given case were not suitable to be built in the ceiling in the way desired by the client. In this case, the duty of the sub-contractor to warn has been recognised since the sub-contractor, as a professional party, should have known that with the materials he received he could not reach the aims envisaged by the client. The sub-contractor had then a duty to warn as to the mistake in the design.

In the case of 11 December 2009\textsuperscript{539} after the sub-contractor started performing his works, i.e. drilling in order to place foundation piles under a house, there was lots of sludge coming to the surface when the drill was being pulled up. The sub-contractor assigned a specialist to conduct certain, not planned, acoustic measurements in order to see whether the construction was being properly performed. The measurements showed some inconsistencies, but nothing overly worrying. The sub-contractor continued the drilling and there was a lot of mud and slime coming to the surface. Additionally, the sub-contractor could notice a high usage of concrete. These all circumstances put together with the knowledge of the sub-contractor that prior to his works some initial drilling was performed with a drill of a bigger diameter should have raised his doubts as to the regularity of the construction. The sub-contractor had a duty to warn the builder about this in such circumstances.

Also in the case of 24 March 2011\textsuperscript{540} the sub-contractor as a professional in handling natural stones was seen as having a duty to warn the builder that these natural stones were not suited as a building material to be used outdoors. Since the sub-contractor did not mention the risk of the design, he was seen as being liable towards the builder for breach of his duty to warn, while the builder was in turn held liable towards the client.

5.3.2. Precontractual duty to warn.

A precontractual duty to warn may also rest on the sub-contractor. It corresponds with his contractual duty to warn in that it does not become effective unless he had or should have had knowledge of the default in the design. Since he is not expected to research the design plans in details, his duty to warn should not be seen as one with a broad scope.

For example, in the case of 15 July 2003\textsuperscript{541} the design did not provide for sufficient space for wiring in the floor, describing the floor’s depth in an incorrect manner. Both the builder and the sub-contractor received the design plans before concluding their contracts. The builder claimed later that the sub-contractor had a duty to warn him about such an obvious mistake in the design. The court decided, however, that the sub-contractor had no duty to warn. The court stated that before conclusion of the contract the sub-contractor only assessed the design plans from the perspective of

\textsuperscript{538} RvA 2.05.1990, nr. 14.048, BR 1990, p. 634
\textsuperscript{540} RvA 24.03.2011, nr. 30.921 and 71.681, \texttt{http://www.raadvanarbitrage.info/default.aspx} (lastly checked on 15 July 2011)
\textsuperscript{541} RvA 15.07.2003, nr. 70.647, BR 2004, p. 981
estimating the price for his services and did not take into account the quality of the
design. The positioning of the wiring in the floor does not influence the costs of the
construction for the sub-contractor, thus it cannot be held against him that he was not
attentive to this default at that moment of time. The moment it should have become
clear to the sub-contractor that the design had been faulty was when the sub-
contractor tried fitting in the installation in the construction and that was seen as the
moment that the sub-contractor had to warn about the default in the design. That is in
fact what the sub-contractor has also done in this case. The court adjudicated that the
sub-contractor properly performed his duty to warn ex Paragraph 6 Section 14 UAV
1989 by warning the builder before he commenced the installation.

It is important to note that in this case it is not questioned whether the
precontractual duty of the sub-contractor to warn could exist under the regime of the
UAV 1989 (or Article 7:754 BW, as the case might be). Moreover, the court makes it
clear that the sub-contractor’s precontractual duty to warn would concern only
obvious mistakes that the sub-contractor knew or should have known while assessing
the design plans delivered to him from the cost estimation perspective.

In the RvA-case of 11 December 2009 the damage to the construction was
caused due to the sub-contractor placing foundation piles under a house that were of a
smaller diameter than the holes in which he was placing them. The holes were drilled
previously by another constructor in order to see whether or not there were obstacles
in the ground for placing these piles. The sub-contractor was not involved in these
original inspection works and the RvA decided that he did not have a pre-contractual
duty to warn that there is a discrepancy in the diameter of the holes and the piles. This
discrepancy usually does not cause any problems in the construction; therefore the
sub-contractor did not have to be aware of potential risks thereof prior to starting his
own works.

5.3.3. Duty to warn the client.

The Dutch law does not contain a similar construction to German law, which
would enable to hold the sub-contractor contractually liable for breach of his duty to
warn to the client. The tortious liability of the sub-contractor to the client could,
however, be recognised, just as in English law. However, the practice in the
Netherlands shows that the client mostly chooses to claim damages from his main
contractor, who usually is better established and has more funds. The builder might
then have a right of redress towards his own contractors.

The difference with English law is that in Dutch law when the sub-contractor
warns the builder but the warning is not conveyed further to the client and the builder
continues with the construction, not heeding the warning, the court would hold the
builder solely liable for the damage resulting from that default. The sub-contractor is
not obligated to approach the client and give him the warning in such a situation. This
could follow from the fact that according to the provision of Paragraph 6, Sec. 14 of
the UAV, the warning does not need to be directed to the client. It is sufficient when

15 July 2011)
543 See previous paragraphs on existence of the duty to warn in this case after the performance of
contractual obligations had started.
the warning is given to a representative of the client544. Moreover, in the Dutch literature545, it has been argued that even in case a professional party would know that the warning it gave would not be conveyed to the client directly, the professional party would not have a duty to warn the client directly, unless it considered a case in which the risks endangering the construction were grave.

5.4. Comparison.

This chapter focused on the sub-contractor’s duty to warn. The analysis of the scope of the sub-contractor’s duty to warn conducted in this chapter shows what triggers the duty to warn of the sub-contractor and how that scope compares to the scope of the builder’s duty to warn. Moreover, a research question was answered whether and in what situations the sub-contractor has to convey the warning directly to the client despite not having a contractual relationship with the client.

In English law, the client usually employs one builder, who would be a general contractor and who then employs other builders to perform minor, specific works at the construction site. These builders are the general contractor’s sub-contractors. The sub-contractor’s implied duty to warn extends to the defects he noticed or should have noticed in work unrelated to his own. It seems thus that whenever a sub-contractor has a duty to warn its scope would be similar to the builder’s duty to warn. That means, in practice, that the scope of the duty of the sub-contractor to warn is as unclear in English law as is the scope of the duty to warn of the general contractor himself.

As mentioned above, in Germany the construction process is organized in a different way than in England. Namely, the client usually employs several builders himself and each of them is employed to construct a particular part of the whole construction. As a result, sub-contractors are not often engaged in the construction process, and therefore a duty to warn of the sub-contractor as such is not recognised very often.

The Netherlands resembles Germany in the way that the client often decides to employ a few builders or a few specialists himself. However, at times the builder would employ certain other builders or engineers as his sub-contractors and they would not have any contractual relationship with the client. In general, the sub-contractor’s duty to warn the builder would correspond with its scope to the builder’s duty to warn. The sub-contractor will have a duty to warn when he knew or should have known about the default in the works of a third party.

Additional complications arise when we consider that sub-contractors conclude contracts usually with the general contractor and not with the client himself. This means that they cannot have a contractual duty to warn the client. However, the English courts might recognise such a duty to warn in tort. English courts stated that the sub-contractor’s duty to warn, if he notices any defects and dangers in the construction, is not limited to giving the warning to his main contractor. The sub-

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tor is then obligated to make sure that the warning will reach the client by giving the warning directly to the client. He cannot simply rely on his main contractor relaying the warning to the client. Especially, when the risk of damages arising as a result of the spotted default is high, the sub-contractor’s duty to warn does not stop at issuing a warning to his main contractor. Moreover, the English sub-contractors will have the duty to warn regardless of whether the builder or the client employs other specialists who could notice the default and give a warning about it. The scope of the duty to warn of the sub-contractor is not influenced by the client’s knowledge or competence, just as it was the case when it was the builder who had a duty to warn.

In Germany when the sub-contractor is being employed he might also have a duty to warn the client directly – based on the special German law construction of the Vertrag mit Schutzwirkung für Dritte. Since the purpose of the duty to warn is to protect the client from the damage, the sub-contractor might have a contractual obligation to warn the client directly about the risk coming from his own main contractor.

Contrary to English and German law, the client in the Netherlands would most probably not claim his damages from the sub-contractor. Since the client is not obliged to warn directly the client, unless the mistakes would seriously endanger the construction, the court would assume that the sub-contractor fulfilled his duty to warn by warning the builder. The exhaustion of the sub-contractor’s duty to warn in such a situation does not leave any room for the client to still raise claims against the sub-contractor. In the Netherlands it is the main contractor of the client that is usually being sued. The main contractor may then later use his right of redress on the sub-contractor. This means that the sub-contractors might be found liable for not warning the builder but in practice not for not (also) warning the client directly. In cases, when the sub-contractor warns the builder but the warning is not conveyed further to the client and the builder continues with the construction, not heeding the warning, the court would hold the builder solely liable for the damage resulting from that default. The sub-contractor is not obligated to approach the client and give him the warning in such a situation.

In this respect we can see important differences between these three legal systems, not so much in the scope of the duty to warn itself, since this seems to correspond with the scope of the builder’s duty to warn, but in the way the client can claim damages for the faulty construction and for non-performance of the duty to warn. In English law, the client can claim compensation from other builders, who noticed or should have noticed a default in the work of other builders working at the construction site, but only in tort. This gives a possibility to consumers to claim damages from a professional party for breach of his duty to warn, even when there was no contractual relation between these parties. However, this does not necessarily benefit consumers by giving them more legal certainty, since the claim for damages in case there was a breach of a duty to warn in tort is rarely admitted by English courts and it requires the fulfilment of complicated prerequisites. In most cases it is, therefore, unclear to consumers whether their claim against such an additional party would be successful. In German law, as it has been mentioned in the chapter on the scope of the builder’s duty to warn, builders will be liable for not warning the client of the negligent work of other builders working at the construction site in case they had to rely in some part on their job. That does not exclude other grounds for liability of German builders towards the client, however, e.g. in case they did not have to rely on the other builder’s work but still noticed the default in his work. Furthermore, there is
the special construction of *Vertrag mit Schutzwirkung für Dritte*, which, under certain conditions, allows the client to claim contractual damages from the sub-contractor even though there is no contractual relationship between them. This special German legal construction gives more legal certainty to consumers, not only by allowing them to claim damages not only directly from their contractual parties but also from other parties involved in the construction process who contributed to the client’s losses, but mostly since the rules of liability under this quasi-tort construction are very clear in German law. In Dutch law the builder is in general liable for performance of his sub-contractors. For reasons explained in the previous paragraph, the question whether the sub-contractors may be held liable towards the client in tort has not been addressed very often. This comparison leads us to the conclusion that in respect of the sub-contractor’s duty to warn it is the German system that gives the most clarity and legal certainty to consumers in case they receive a faulty construction product. German consumers may claim their damages in such cases either from the builder, who is seen as having the responsibility for the performance of sub-contractors’, or directly from the sub-contractors. This gives consumers more protection e.g. in case one of the professional parties becomes insolvent.

As far as the precontractual duty to warn of the sub-contractor is concerned, I have not been able to find much case law on it. Most likely, the client makes his claims against the builder directly and if the builder searches for redress with his sub-contractors at all, then it is likely that these cases are settled out of court. The example presented on the precontractual duty to warn in the Netherlands shows us that its scope would correspond to the scope of the precontractual duty to warn of the builder, which means that only so far as the sub-contractor knew or should have known about an obvious risk from a third party from the study he conducts of, for instance, the design plans, in order to make his offer to the builder, he would have a duty to warn.
Chapter 6. Requirements for an effective warning.

This chapter will present various requirements for giving an effective warning by a professional party to a client. Firstly, in the paragraph on what constitutes a proper warning, various aspects of this question are addressed: in which form should the warning be given, e.g. written or orally, and how intense should the warning be, e.g. what language should be used to convey the warning? However, in my opinion, simple adherence to the proper form and substance of the warning does not automatically mean that the warning has been properly given. Another factor that could influence such assessment would be to whom the warning has been given. It might (have to) be issued to the client himself, to his various representatives, to a party who has a direct contractual link with a party that is giving a warning, or even just to a party who is liable for the default that the warning concerns. Therefore, a question that will also be considered in the paragraph on what constitutes a proper warning is to whom the professional party should give a warning to be released of his duty to warn.

A separate paragraph in this chapter concerns a specific situation when the warning has actually been given but the client does not change his order or instruction to the professional party. E.g. in the construction sector the builder might warn the client that the materials chosen by the designer will not stop water from entering the basement of the client’s new house, but the client does not order other materials. May the builder continue the construction process with the materials chosen originally by the client despite knowing that the final product will probably not fulfill its function properly? May the service provider assume in such a case that the client took upon himself a risk of a faulty construction? Or does the professional party rather need to take extra measures e.g. by repeating the warning, for instance until he is sure that the client understood all the dangers? Or should he even refuse to perform the service knowing that the end product will be faulty? Will the service provider be liable for the client if the latter one decides to sue for the faults in the end product? When may the service provider be sure that he performed his service in a risk-free way and will not be held liable?

6.1. English law.

6.1.1. What constitutes a proper warning?

Unfortunately, the form of the warning that should be given to the client had not really been a subject of discussion in England. This does not come as a surprise, taking into account the reluctance of recognising the duty to warn in English law. If the emergence and the scope of the duty to warn is put in doubts and is still a subject of discussion that does not make discussing the form of the duty to warn fruitful. In the case Plant Construction v. Adams the court stated that:

“That duty extended to giving proper warnings about the risk”.

The court did not determine what it considered as a proper warning, whether it had to be detailed, given in oral or written form. The judge in the case *Aurum v. Avonforce*[^547], which discussed and clarified the case *Plant Construction v. Adams*[^548], added:

“It has now been held by the court of appeal that if the duty to warn arises, it is part of the duty to act with the skill and care of an ordinarily competent contractor. What is to be expected of such a contractor will depend on the particular facts of the case”.

Again, the test is not very clear, since it might change from case to case; depending on the circumstances of the case, what form the warning is to be given in. It might be assumed, that an ordinarily competent contractor would, at least, need to issue a clear warning.

In English law not much attention is paid as to whom a professional party should warn about the default in order to be released from liability for improper performance of his duty to warn. This might be the result of the duty to warn being recognised both in contract and in tort law. When a builder warns the client he might fulfil his contractual duty to warn the builder but breach his tortious duty to warn towards the designer. And, for the purposes of this book more importantly, the same applies to the sub-contractor who warns the builder, but neglects to warn the client when he notices that the builder ignores the warning. Moreover, if the builder chooses to warn the designer instead of the client, he might breach his contractual duty to warn the client. However, a designer is often perceived as the representative of the client and a warning given to him should be considered as a warning given directly to the client[^549], which means it releases the builder from both his contractual duty to warn the client and his tortious duty to warn the designer. For example, in *Lindenberg v. Canning*[^550] it was stated that the builder should warn the designer, who was seen to be acting as an agent of the client, as to any ‘suspected’ design defects[^551]. Yet, in *District of Surrey v. Carroll-Hatch & Associates*[^552], it was decided that the fact that the engineers who were employed by the designer did warn the designer did warn the designer of the potential risks associated with the construction was irrelevant, because the engineers had a duty to warn the client directly. The court deemed this to be the case, on the facts of this case – finding the tortious liability of the engineers towards the client. The court had no doubts that in this case it should have been clear to the engineers that the client might not have been informed about their warnings and recommendations. In such a case, when the professional party has evidence that the warning did not reach the client through his representative, he should pass on this warning himself.

The mere warning by the sub-contractor to the builder, his direct contractual party, does not always release the sub-contractor from liability towards the client.


[^550]: Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71


This is because, unlike the designer, the builder may not be seen as the client’s representative, implying that the sub-contractor may not expect, save evidence to the contrary, that the warning to the builder has (also) reached the client.

6.1.2. Does a sole warning suffice?

We now come to the question what should the builder do upon discovering or suspecting some default in the design. Is it then sufficient to notify the client or the designer thereof? When such a warning is ignored, will the fact of it having been given suffice to release the builder from his liability?

In *Lindenberg v. Canning* 553, the court elaborated whether the builder’s duties might be discharged upon the moment he issued a warning to the client or to the designer. It was suggested by the client that the sole warning given by the builder should not have freed him from his liability. The court stated that the builder should have discussed his doubts with the client’s construction supervisor. However, even in case when such a surveyor would assure the builder that everything was in order and that the plans were accurate, the court decided that the “prudent” builder would still use some additional safety measures at his construction site. If no assurances were given, the necessity of the application of safety measures should have been even more evident. It could be concluded then that even if the builder warned the designer of potential defects in the design, he may not always rest assured by the designer’s explanations. Although it is the designer who is the best qualified to estimate the pros and cons of the design, if he gives assurances that do not resolve the doubts of the builder, the builder would be expected not to follow them, i.e. to pass on his warning to the client, take an advice from a third party, etc.

This point of view has been confirmed in the newer case *Plant Construction v. Adams* 554. The Court of Appeal in this case stated that the sub-contractor should have protested more “vigorously” and not just limit himself to issuing a single warning. However, the court did not further specify the exact measures that the builder could and should have taken in order to avoid future liability for breach of its duty to warn 555. The case was reconsidered and the trial judge doing so stated 556:

“The crucial question is whether the JMH [the sub-contractor - JL] could and should, in the last resort, have refused to continue to work if the safety of workmen was at risk, as it had in the case of the ring main. I am clear that it could and should have done so”.

Therefore, it seems that the builder may not stop at bringing the defects and risks in the construction to the attention of the designer 557. If the builder does not manage to change the mind of the designer as to how to proceed with the construction and if the

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553 Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71
defect endangers the safety and health of people, the builder might be obligated to cease performing his work. Since suspension of the performance of work is a rather serious step, the builder might be inclined first to try to convey the warning to the client directly in case the designer does not change his instructions upon receiving the warning. That does not necessarily mean that giving a warning to the client would release the builder from its liability in case the client would also not listen to the warning and the builder continued with the faulty construction. However, it seems more likely then that the builder’s liability would at least be diminished.

The situation looks different in the case of an engineer, whose duty would not ordinarily extend to supervision of the construction elements in which the defect originated, which was the situation at hand in Kensington & Chelsea and Westminster Area Health Authority v. Wettern Composites Ltd and Adams Holden & Pearson. In that case, the client engaged both a designer and structural engineers to construct an extension to the hospital. During the construction process, the engineers noticed some defects in the mullions and pointed this fact out to the designer. Nothing was done, however, to remedy these defects in practice. After the construction had been finalised and the defects could be seen, the client instituted proceedings against both the designer and the engineers’ company, claiming that they had acted negligently. The court stated:

“(…) I recognise that the extent of the duty of both the architects and structural engineers is no more, and no less, than the obligation to exercise the ordinary skill and care of competent practitioners in their respective fields judged by the standards prevailing at the time. (…) As to the structural engineers, their duty would not ordinarily extend to supervision of the fixing [of the mullions – JL].”

The engineers thus had no duty to examine mullions in search of any potential defects. However, when they nevertheless became aware of such defects, they had the duty to warn the designer thereof. The court noticed:

“(…) the duty in my view was to notify the architects as to those defects in the fixings of which the structural engineers had knowledge, and not the duty to supervise others to put the defects right. (…) The giving of the warning by the structural engineers was much to be commended, and the duty that lay upon the structural engineers was fulfilled. They had no reason to assume that the architects would continuously neglect to give the fixing proper attention”.

In a case when there is no duty to inspect but the service provider happens to notice the default and has to warn about it, the duty to warn is limited only to giving a fair warning – the engineer is not obligated to follow whether it is heeded.

However, when the case concerned a structural engineer who also had design duties, like in Hart Investments v. Fidler and Larchpark, even if he did not have an express contractual duty to supervise the court implied such a term to his contract and

559 Kensington & Chelsea and Westminster Area Health Authority v. Wettern Composites Ltd and Adams Holden & Pearson (1985) 1 Con LR 114; (1985) 31 BLR 57; [1985] 1 All ER 346
560 Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd. (2007) 1 BLR 526
with that the engineer’s duty to warn. As it has already been mentioned, the court considered in such a case that the engineer had a duty to prevent the damage from happening when he noticed that the way the builder performed his obligations brought with it unnecessary risks. The court stated that the engineer had to

“Take such steps as are open to him to obviate that danger. This includes warning of an immediate danger to those works caused by an imperilling act by the contractor [the builder - JL].”

Conveying a warning seems to be only the first, most basic step that the engineer could take in such a situation and if that warning was not adhered to the engineer might have to take other measures to prevent the potential damage. The court did not specify what sort of measures the engineer then should take.

6.2. German law.

6.2.1. What constitutes a proper warning?

In older German case law the form of the issued warning was discussed. In the BGH judgment of 10 April 1975\(^{561}\) it has been stated that pursuant to the provision of § 13 No. 3 VOB/B, the warning should be given in writing, so that the warning expressed therein would be taken seriously due to its explicit and clear nature. That means that the builder would have to clearly state what the default might be and what risks for the whole construction it could cause, so that the client could not easily ignore or dismiss that warning\(^{562}\). However, the BGH decided that in certain circumstances the oral warning given to the client would be sufficient to diminish the builder’s liability for damage, which arose when the client ignored such an oral warning given to him\(^{563}\). The BGH mentioned that if it is established that the oral warning has been so clear that the client had to have been aware of the risks involved in ignoring it, and if the warning had been given directly to the client, and not to his representatives, that oral warning should release the builder at least from part of his liability to the client. In case the builder gives the warning to the client’s representatives and they decide to ignore it, the builder should then directly address the client.

In the case of 30 March 1995, decided by the OLG Hamm\(^{564}\), the client employed builders to finalize the construction pursuant to plans prepared by his designer. Upon finalization of the construction it turned out that the construction was not entirely water-resistant and the client initiated proceedings against the builders claiming damages from them. The builders defended themselves by stating that they had fulfilled their duty to warn by orally explaining the problem to the director of the construction (employed by the client) and that they followed the construction plans given to them by the client. The plans and supervision were faulty, not their work.

\(^{561}\) BGH, 10.04.1975, VII ZR 183/74, NJW 1975, 1217

\(^{562}\) T. Großkath, Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten, Hamburg: Verlag Dr. Kovác, 2008, p. 38; It is worth mentioning here that the provision of BGB does not prescribe a requirement of written form.

\(^{563}\) See also: C. E. C. Jansen, Towards a European building contract law, Tilburg: Tilburg University Press, 1998, p. 493

\(^{564}\) OLG Hamm, 30.03.1995, 17 U 205/93, BauR 1995, 6, p. 852
they claimed. OLG Hamm was of a different mind, however. It was stated that pursuant to § 13 No. 3 VOB/B the builder, who found himself in such circumstances as described above, was obliged to give a written warning to the proper addressee and only then it could be stated that he had performed his duty to warn. This had not taken place in this case. First of all, the warning was given orally, not in writing. As mentioned above, pursuant to the German case law an oral warning could have been sufficient, if it was given in such a clear way, that the client would be fully aware of the danger resulting from ignoring it. In this case, the builder had simply expressed his surprise about the way the construction was supposed to proceed and had not clearly issued a warning about the risk involved therewith. Secondly, it was stated that the warning was not granted to the proper addressee – namely, the client himself. The builder just gave his warning to the director of the construction. The court relied in this case on the earlier judgment of the German Supreme Court, where it was said that when the designer or the director of the construction, who participated in formulating the faulty plans, does not listen to the warning issued by the builder, the latter is obligated to give his warning directly to the client. As a result, the warning issued in that case was deemed to be insufficient.

Even when the warning had been given to the client and had been sufficiently clear but had not been given in a written form, the builder could end up being liable for damages to compensate the client who did not listen to the warning. Such an example of the builder’s liability can be found in the case of 7 July 2000. In that case the builder was employed to lay pipes in the bathroom of the villa belonging to the client, according to the plans that the designer prepared and using materials that were prescribed to him. After the works were completed and winter came, it turned out that the pipes had not been fully insulated and were not resistant to frost temperatures. As a result, some of the pipes froze and then broke. The OLG Hamburg decided that the builder was negligent, because he had not sufficiently thought about the possible influence the low temperatures would have on the installed pipes and as a result, had not properly warned the client that additional insulation was necessary to protect the installation. The fact that the builder had pointed out vents in the wallpapering during a meeting with the designer and the client and had mentioned that there was not sufficient protection from frost could not release the builder from his liability since pursuant to § 13 No. 3 VOB/B such statement should have been given to the client in writing. However, the builder was not held fully liable, since the court decided that at least some oral warning had been given to the client in the presence of the designer, which led the court to diminishing the liability of the builder to 1/3 of the client’s damage.

In unusual circumstances an oral warning might even release the builder from all liability for the improper form of the warning. In the case of 10 April 2003 OLG Koblenz recognised that the duty to warn should be fulfilled in writing and that the oral warning in normal cases does not release the builder from his liability, but as previous courts it determined that the liability of the builder could be diminished if he

565 BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518
567 BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518
569 To be discussed in the next Chapter.
570 OLG Koblenz, 10.04.2003, 5 U 1687/01, BauR 2003, 1728
at least could prove he gave certain oral warnings. Under the circumstances of the given case, i.e. the client was also an engineer, which meant that he was deemed competent enough to be capable of assessing the risks the builder mentioned to him, the oral warning given by the builder was seen as sufficient to even fully release him from the liability for not performing his duty to warn in writing. However, this case has been marked as clearly exceptional\textsuperscript{571}.

In a more recent case of 12 July 2006\textsuperscript{572} OLG Jena stated that the liability of the builder may not be limited when the warning given is not fully informative, convincing or clear and does not show all negative consequences of not following it. An oral warning could limit or even release the builder from his liability only if it fulfilled all these conditions.

It seems, therefore, that if the oral warning would not lead to the release of the builder from liability, it would at least diminish it, even though the warning has not been issued in the required form. Both when the warning is in writing and when it is given orally, the warning only releases the builder from liability in full or diminishes that liability if the warning given to the client was complete, clear and not likely to be misinterpreted. The client should be fully informed what kind of risk he is at danger and what kinds of damage he might expect\textsuperscript{573}. However, it needs to be mentioned, that even if the oral warning would suffice to limit or exclude liability of the builder, it is risky for him to rely on it since it would be difficult to prove that such a warning had been given\textsuperscript{574}.

The above-described cases introduce certain conditions that need to be fulfilled for a proper warning. The warning needs to be: fully informative, clear, convincing, and show all negative consequences of not following it.

In a recent case of 16 March 2011\textsuperscript{575} the OLG Brandenburg added additional requirements. In this case the builder was installing exterior insulation on a bungalow of the client, but unfortunately, the design and materials that he was provided with were faulty. The court in this case reiterated that the builder should indeed give a clear warning to the client, pointing out all possible negative consequences of not abiding by this warning. However, the court added to these theoretical requirements\textsuperscript{576} that giving the warning to the right recipient and at the right time was as important as its comprehensiveness\textsuperscript{577}.

Interestingly, in a case of 3 February 2010\textsuperscript{578} the OLG Hamburg made a comment suggesting that if the builder has a duty to warn the client about a risk, then

\textsuperscript{571} M. Preussner, ‘Mündliche Bedenken können beachtlich sein!’, IBR 2003, 1081
\textsuperscript{572} OLG Jena, 12.07.2006, 2 U 1122/05, IBR 2007,1077, IBR 2007, 303
\textsuperscript{574} T. Karczewski, ‘Wann schließt ein Bedenkenhinweis die Haftung des Auftragnehmers aus?’ , IBR 2007, 303
\textsuperscript{575} OLG Brandenburg, 16.03.2011, 13 U 126/09, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011).
\textsuperscript{576} The court does not discuss specifics of the duty to warn under the circumstances of the given case.
\textsuperscript{577} See also: H. Scheel, ‘Keine Haftung für Mängel bei erfolgtem Bedenkenhinweis!’, IBR 2007,303, last correction: 12.07.2011, (full text found on <<www.ibr-online.de>>)
\textsuperscript{578} OLG Hamburg, 03.02.2010, 4 U 17/09, IBR 2010/323; see also: T. Steiger, ‘Schaden durch Arbeitsraumverfüllung: Grenzen der Prüfungs- und Hinweispflicht’, IBR 2010/323
its scope is limited to pointing out that risk to the client. In the court’s opinion, the builder does not need to suggest to the client how to avoid that risk or other methods of construction that he could use that would diminish or eliminate that risk. In that particular case, the client had some support systems used in the cellar to protect it from caving in during the next phases of construction, but these supports turned out to be insufficient. The court did not find the builder as having the duty to check whether the support system used by another builder upon the designer’s order was sufficient, which meant he also did not have the duty to warn about this default. The court then stated that even if the builder had a duty to warn, he would only need to warn that some supports should be applied, which is what the client’s other employees already had told the client. The duty to warn of the builder does not reach as far as to instruct the client in what number and how to apply these supports, since there are other professional parties responsible for that.

In this case the court decided that the builder had no duty to check whether the support system used by the designer was sufficient. It is left unsaid whether if the builder had checked the support system he could spot the default in it ‘at a glance’ or whether, in order to evaluate the risk to the cellar he would have had to conduct complex calculations. This distinction seems to be an important one to me, since if the builder easily could have seen the default within the installed support system, then, in my opinion, he would not have fulfilled his duty to warn just by saying to the client that support systems needed to be used. Taking into account that pursuant to the German case law analysed above the warning needs to be fully informative, then the builder would have to point out to the client that despite the installed supports there is still a risk to the construction. Only in case that the default would not have been easily noticeable for the builder, I would see the reasoning of the court in this case in line with the general trend in German case law.

Let us now consider whether in practice the professional party’s warning has to be issued directly to the client or whether it could be issued to one of his representatives, e.g. the designer, the director of construction. The provision of the § 4 No. 3 VOB/B states clearly that the professional party should warn the client directly, but the German courts chose to interpret this provision broadly.

579 Similar reasoning has been adopted in a case of OLG Koblenz, 03.05.2011, 5 U 141/11, IBR 2011, 403. In this case the client was not a consumer, therefore it will not be discussed in details here. It is still important to notice that the court decided in this case that if the builder points out to a risk coming from another professional party, and that professional party clearly had some doubts himself about this risk, then it may not be demanded of the builder to keep on repeating his warning and making it more specific. The commentary to this case suggests, contrary to the reasoning of the court, that the fact that the professional party who made a default had doubts himself about it, should lead the builder to believe that the professional party did not recognise the problem and therefore, the builder should warn further. See: F. Weyer, ‘Hinweispflicht des Unternehmers: in welchem Umfang gegenüber sachkundigem Auftraggeber?’, IBR 2011, 403

580 Compare: OLG Düsseldorf, 17.12.2009, 5 U 57/09, IBR 2010/618, a non-consumer case where the designer also did not provide for a sufficient support system of a ceiling. The court here concluded that the builder should have warned the client that the number of supports placed was insufficient and should have also mentioned the risks and negative effects of such a mistake. Only then was the builder seen as having performed his duty to warn.

In the OLG Düsseldorf’s judgment of 20 July 1994\textsuperscript{582} (as described in one of the previous chapters) it was stated that if the builder related his suspicions to the designer employed by the client and the designer would show his disregard thereto, the builder would then be obligated to immediately report his doubts to the client. OLG Düsseldorf did not question then the right of the builder to issue the warning to the designer as a representative of the client. However, it was stressed that in case the builder had any doubts whether the designer would notify the client of the builder’s suspicions, he should make sure that the client received them.

In the case of 19 December 1996\textsuperscript{583} the BGH decided that the warning issued to the designer and not to the client had been insufficient and did not release the builder from his liability. In the given case, the court specified that pursuant to § 4 No. 3 VOB/B the builder needs to warn the client directly. In certain circumstances, the warning given to the designer instead of the client could be accepted as a sufficient performance of the duty to warn, but that did not apply in the given case. The court decided that the risk to the client is not diminished if a warning is given by the builder to the designer in case the risk has been caused by the actions of the designer or in case the designer upon having the warning does not acknowledge it and decides to proceed with the original design. The builder should not rely on having performed his duty to warn in such a situation.

However, when it is the sub-contractor of the client who notices the default, pursuant to a judgment of the OLG Celle of 29 May 2000\textsuperscript{584}, a warning given to the representatives of the builder, with whom the sub-contractor has a contractual relationship, might suffice. Namely, the court stated that the sub-contractor diligently fulfilled his duty to warn the builder, when he gave the warning to the representatives of the builder, which had been present at the construction site. In that case the builder’s representatives also seemed to disregard the sub-contractor’s warning. The court stated that if the representatives of the builder still insisted to apply the previously agreed upon method of the construction, it should not lead to the liability of the sub-contractor either towards the builder (since he was deemed to have been warned with his representatives having had received the warning) or the client (since the sub-contractor’s contractual duty to warn obliged him to warn only the builder). In certain circumstances, when public safety or interests of other parties are at stake, the liability of the sub-contractor towards the client might still exist\textsuperscript{585}.

6.2.2. Does a sole warning suffice?

Even if the client had been fully informed and warned by the builder, this does not necessarily mean that the builder would be released from his liability if he continued with the original construction plan in case the warning would not persuade the client. In certain situations, it seems that the builder needs to do more than just warn the client. In the case of 20 July 2004\textsuperscript{586} the builder was working on securing a wall at the construction site according to the structural plans delivered to him by the

\textsuperscript{582} OLG Düsseldorf, 20.07.1994, 22 U 15/94, NJW-RR Zivilrecht 1995, 10, p. 214
\textsuperscript{584} OLG Celle, 29.05.2000, 7 U 40/99, BauR 2002, 1, p. 93
\textsuperscript{585} Further discussed in the following paragraph on the basis of the case OLG Brandenburg, 07.11.2007, 13 U 24/07, IBR 2008, 1112.
client. After performing some initial works the builder noticed that the structural plans delivered to him were incorrect and that the wall would, due to its instability, endanger the whole excavation and people working there. The builder warned the client about this risk and notified him that any works based on the structural plans delivered to him could not be further performed. The client contacted the builder and asked him to ‘remove the default’ and continue with the works as planned originally. The builder once again gave a full warning to the client, pointing out at all potential risks and refused to perform any further work based on the plans delivered to him, fearing for the life and safety of his employees as well as the material damage that he could cause. The client terminated the contract with the builder and claimed damages from him for breach of his contractual obligations to perform the work. The court – OLG Karlsruhe – issued a very clear judgment in this case. In general, a builder is obliged to follow the instructions and plans delivered to him by the client, even if he warned the client about certain risks involved in performing them and the client decided not to listen to his warning and ordered that the construction works continued as originally planned. However, exceptionally the builder might refuse to perform his contractual obligations when any further execution of construction works, going against the warning that had been issued, would contradict legal or regulatory aims, especially if it would endanger life and limb. In the given case the builder was released from its liability towards the client.

In the case of 7 November 2007 OLG Brandenburg decided that the builder cannot be released from his liability in case he warned the client, but the client decided to proceed with the original plans anyway and the builder followed his instructions, in case the interests of third parties were at stake. The builder in the given case was employed to extend a conduit system next to a public street. Part of the builder’s contractual obligations was to make sure that during his works he would secure the avenue trees from any damage. The builder sub-contracted these works and the sub-contractor warned the builder that if he would follow through in accordance with the construction plans, damage to the trees would be unavoidable. The sub-contractor was instructed to stick to the design plans as a result of which the trees were damaged. The client claimed compensation from the builder and the sub-contractor and the court held both of them liable. The court decided that the fact that the sub-contractor warned about the danger to the trees did not release him from his liability since in this case the sub-contractor had not only to follow his contractual obligation but also legal duties to implement safety precautions in order to protect the interests of third parties. It was irrelevant for the outcome of the case whether the warning had been given to the client or not. What mattered was that if the contractual obligations collided with the safety obligations the sub-contractor should have withheld himself from performing his contractual obligations in order to protect the interests of third parties (not only the client but also other inhabitants of that area).

In the both above-mentioned cases it was decided that if the builder followed through with faulty construction works, this endangered not only the aim of the construction as expressed by the client, but also the interests and wellbeing of other parties. In these situations the builder may not rest upon just giving the warning and fully informing the client. He should either try to be more persuasive and change the

587 In such a case, pursuant to §4 No. 1 VOB/B the builder does not have a right to terminate the contract with the client and refuse performance of his contractual obligations; see also: T. Großkurth, Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten, Hamburg: Verlag Dr. Kovace, 2008, p. 46-47
588 OLG Brandenburg, 07.11.2007, 13 U 24/07, IBR 2008, 1112
mind of the client as to how to follow with the construction or he should refuse to perform such dangerous works.

6.3. Dutch law.

6.3.1. What constitutes a proper warning?

In the case of 7 October 1983 the court recognised the builder’s duty to warn the client of the default within the roof construction design. The roof collapsed due to the improper drainage system of the roof, which was incorrectly designed and which did not allow for the successful outlet of the rainwater. The court explicitly said that the improper performance by the builder of the duty to warn that the design contained a default should lead to his liability for the whole damage suffered by the client. The builder claimed that he did warn the client. Based on the statements of witnesses the court decided that the warning given by the builder had the form of pointing out to the client the less correct drain pipes locations without mentioning the lower capacity of the whole drainage system of the roof. The court adjudicated that the non-explicit warning given to the client was insufficient in the given situation, however, it should be taken into account in determining the range of the builder’s liability and thus, the court diminished the liability of the builder to only half of the damage suffered by the client.

A case decided by the RvA on 9 June 1992 concerned the improper construction of the floor in a shopping mall. The client requested that natural stones be used in the construction. The designer had chosen white and blue stones to represent the logo of the company in the floor. After the construction had been performed, some cracking appeared in the floor. The client claimed damages from the builder for not warning him of the defaults in the design and of the unsuitability of the building material chosen by the client. The builder tried to defend himself by stating that he warned the client that the blue-dyed cement did not always seem to be resistant. The court adjudicated, however, that making a (general) statement that a certain type of building material did not always appear to be resistant and capable to fulfil its function could not be treated as the warning, which the builder was obligated to give to the client. Other statements issued by the builder were also considered insufficient by the court. For that reason, the court recognised the builder’s full liability for the damage.

The warning, which the builder gives to the client, needs to be explicit, clear and justified. For example, in the case of 29 June 1990 the builder pointed out to the designer another method of construction, which he had successfully used in the past. The RvA, however, adjudicated that this was not enough to constitute a warning or even to indicate that the builder had second thoughts as to the method of construction chosen by the designer.

In the RvA-case of 27 January 2010 the builder notified the client that he wanted to mill the top layer of concrete in the foundation of the construction,

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589 RvA 7.10.1983, nr. 11.380, BR 1984, p. 166
590 RvA 9.06.1992, nr. 15.276, BR 1993, p. 316
591 Recently repeated in: RvA 23.02.2009, nr. 29.963, TBR 2009/133
592 RvA 29.06.1990, nr. 13.639, BR 1991, p. 154
however, the client did not follow this suggestion because he did not want to stop the construction process for the time needed to mill the foundation. After the client suffered damages because of the lack of milling, the client claimed that the builder should have warned him about the mistake in the design that did not provide for this procedure. The suggestion of the builder was not seen as a proper warning, since it did not point out the fact that without the milling the foundation will not constitute a suitable ground for laying down tiles. The RvA stated that the builder had to make sure that the client was aware of the consequences of laying down the tiles on the floor without first milling the foundation – only then the duty to warn would have been satisfied594.

From these judgments given by the Dutch courts it seems that the word “warning” is narrowly interpreted. Only when the issued statement would explicitly point out the dangers may we speak about a warning being issued by the professional party to the client that exempts the builder from full liability595.

For example, in the case of 17 December 2009596 the builder warned the client that the extra fire extinguishing hose was designed to go above the water pipes by 15 cm and he suggested to the client to put the hose next to the pipe. The client, however, did not change his original instructions. The arbitration court sees this remark of the builder as a clear warning, especially since it even contains a suggestion to the client of how to eliminate the risk and how to improve the design.

The suggestions how to eliminate the risk and clear indication of the consequences of not changing the original design plans is not required if the builder cannot be expected to have knowledge thereof. For example, in the RvA-case of 9 June 2010597 the builder noticed cracks in the walls during the renovation of the building. The builder pointed out these cracks to the designer and had received instructions from him to cover these cracks with mortar. The builder claimed that he had warned the designer about the cracks, even though he did not know (and therefore did not mention) why the cracks were present in the walls nor what the consequences of their presence would be. The arbitration court decided that the builder had correctly and fully performed his duty to warn in this case, taking into account the fact that he was not obliged to further inspect the grounds of the construction and its foundation in order to discover the origin of the cracks. The designer and the engineer who calculated the construction details had this duty. This verdict indicates that the details of how the warning is given to the client may depend on the knowledge of the builder, as well. This is understandable, taking into account that the sole existence of the duty to warn depends thereon, too.

It is not required that the warning is given in the written form\textsuperscript{598}, however, it is the builder who needs to prove that he did warn the client. Taking into account his own best interests, the builder had better pass such a warning in writing. For example, in the case of 7 October 1983\textsuperscript{599} the court stated that it was clear from the construction report that there were second thoughts as to the applied dilatation method. It did not, however, mean that these doubts led the builder to issue an actual warning to the client. There was no written evidence of the warning having been given. The court had to conclude that the builder had not performed his duty to warn\textsuperscript{600}.

What if the builder gives the warning to the director of the construction who then decides to ignore it without notifying the client thereabout? Is the builder then obligated to warn the client directly? Pursuant to the provision of Paragraph 6, Sec. 14 of the UAV, the warning does not need to be directed to the client. It is sufficient when the warning is given to the director of the construction, who represents the client. In Dutch literature\textsuperscript{601}, it has been argued that the obligation for the builder to give a warning directly to the client in person should take place only in extreme cases. For example, when the director of the construction would be obviously incompetent or when the not abiding of the warning would lead to very serious negative consequences for the client. It seems, thus, that in these extreme cases, the builder should have approached the client, taking into account the serious consequences that might follow, even if the designer would have assured the builder that the client was notified and had decided to follow through with the construction as it was.

This has been confirmed in case law. In the case of 11 April 2001\textsuperscript{602}, the client was not aware of the letter the builder had sent to the designer in which he warned about the defaults within the construction. The court decided that the builder could not be held accountable for that fact. It is the duty of the designer, as the director of the construction and representative of the client, to pass on the warning to the client. The builder was therefore relieved from liability.

Also in a more recent case of 19 November 2009\textsuperscript{603} the RvA had to decide whether the builder should be liable for performing a design according to which the concrete walls were supported by an unsatisfactory number of piles. The arbitration court found that the builder discussed the necessity and design of these walls with the designer and the designer insisted on further performance of the construction according to the design plans. The RvA saw that as sufficient evidence of the builder performing his duty to warn the client.

\textsuperscript{598} Oral warning was given e.g. in RvA 20.09.2010, nr. 31.537, << http://www.raadvanarbitrage.info/default.aspx>> (lastly checked on 15 July 2011) and the client confirmed it. Also in the case of Rechtbank Zutphen, 15.09.2010, 113543/HA ZA 10-1346, LJN: BN7235, the court decided that the warning need not be given in a written form.

\textsuperscript{599} RvA 7.10.1983, nr. 9555, Tva 1984/1, p. 26

\textsuperscript{600} Also in the case of RvA 23.06.2010, nr. 32.421, << http://www.raadvanarbitrage.info/default.aspx>> (lastly checked on 15 July 2011) the builder claimed to have warned the client during their meetings, but since the client denied it the builder did not prove having performed his duty to warn.


6.3.2. Does a sole warning suffice?

What happens when the warning itself is properly given, but the client or his representatives do not listen to the warning given by the builder and decide to follow the original design? Where he had first warned the client’s representatives, he may warn the client – and, as was discussed in the previous paragraph, in extreme cases he may even be required to do so -, but if the client still refuses to heed the warning, the builder is put in a very delicate position: he has to make a decision whether the circumstances justify e.g. his denial to perform further work or to terminate the agreement he has with the client. The courts do not give us a uniform answer to this question.

For example, in the case of 19 November 1981 604, the RvA decided that the builder is not free to decide whether to continue with the construction process or stop it, in case he issued a warning after which the client decided to carry on with the construction nonetheless. That would mean that the builder could not terminate his work for the client in case the client does not listen to his warning and does not change his instructions. The builder is simply not given a choice to stop with the construction due to him disagreeing with the instructions of the client. However, in the case of 14 April 1999 605 the RvA adjudicated to the contrary of the previous judgment. It has been decided in the given case that the builder had not only the right but also an obligation to stop the construction works and should not be liable for the damage resulting from that decision. The difference between these two cases is the risk that the builder was taking on himself by continuing with the construction upon his warning being ignored. In the first case the builder terminated performance of his work because he realised that if he followed the design plans the end result would not be fully fit for the client’s purpose. He warned the client about that risk, but the client decided not to change his instructions. In the case of 14 April 1999 the risk was higher – the safety of the construction site and workers was endangered.

The problem is that with most cases it is difficult to estimate upfront what the potential damage to the construction might be as a result of the default. Thus it is difficult to say in this respect that the builder would have to terminate the agreement with the client in case of a serious damage and in other cases his duty to warn would be fulfilled just upon granting a warning. It seems that it will depend solely on the circumstances of the given case whether the builder would be justified in his refusal to continue with the construction process. However, when the builder knows that the warning he had given had reached the client or the client’s representatives and the warning concerns a risk that will not lead to endangering anyone, the builder might expect to have to continue with the construction works as he had been ordered.

An explicit warning may not suffice. In particular, the professional party may remain liable if he diminishes its meaning by other statements or assurances that he makes, or even by his own behaviour. The judge or an arbitrator would assess the clarity of the warning taking into account all circumstances of the case. It does not seem to matter whether the professional party conveys the warning directly to the client or whether he gives it to the client’s representative, unless it is obvious that the representative would neither heed the warning, nor convey the warning to the client.

An example may be found in a case of 19 February 2007, where the question was considered whether the builder should be released from his liability in case he warned the client but nevertheless created certain expectations for the client. In this case, the builder was supposed to work on the floor of the showroom that belonged to the client. The client, with the designer, specifically chose a material for the floor that was difficult to install and the builder warned the client explicitly that when using this material, there would be a risk that cracks would appear in certain areas and that the colour most likely would differ in places, with a possibility of certain stains appearing. The builder showed to the client a reference floor made of this material in which certain cracks and stains were visible and told the client that he may expect such a floor. The client informed the builder that he wished to proceed with the construction as planned. The floor that had been made for the client showed many more and more visible cracks and stains than the floor that has been shown to the client as a reference. The arbitral court adjudicated in this case that the builder should be held liable for the damage that the client suffered by receiving a floor that has been faulty. The builder indeed gave explicit warnings to the client that there might be problems with the floor, but at the same time, he also created expectations with the client promising him a floor that would look like the reference floor that has been showed to the client. The implicit promise that the builder had given to the client by showing him the reference floor took away the substance from the warnings that had been given to the client, since the client then could have expected that the floor he would receive would not be worse than the one he had seen. This behaviour of the builder made his warning ineffective and could be seen also as improper performance of his duty to warn.

6.4. Comparison.

The first research question that this chapter gives an answer to is what constitutes a proper warning and more specifically: in which form the warning should be given.

As far as the form of the warning that needs to be given is concerned, English law is silent on that matter. It might be deduced that from the requirement to give a proper warning follows a necessity to, at least, give a clear and explicit warning.

In German law the warning the builder is supposed to give should be formulated in writing. However, in some cases the courts released the builder from his liability, or at least diminished it, on the basis of a warning given orally, provided that the warning has been given in a clear enough way to fully present the danger to the client.

In the Netherlands the warning issued to the client by a professional party needs to be explicit, clear and justified. It should contain a clear indication of the risk and give a suggestion on how to avoid it, as long as the professional party should be aware of these solutions. In case the warning does not fulfil these conditions, it will most likely be deemed as not issued at all, thus not releasing a professional party from his liability towards the client. If the warning had been explicit, but later a professional party makes a statement that might diminish its meaning, that might still lead to the liability of the professional party for breach of his duty to warn. On the other hand, in certain circumstances even an insufficient warning might diminish that liability. The written form of the warning is not a formal requirement in Dutch law,
however, since the burden of proof of the warning having been issued rests on a professional party obligated to give it, it is in his own interest to use the written form.

A comparison of these requirements (or lack thereof) leads us to the conclusion that the Dutch system in this respect brings the most clarity and legal certainty to the consumers. The lack of English case law elaborating on the method of providing a duty to warn to consumers leaves a huge gap in this legal system. It is unclear for consumers whether if they receive an oral warning, they may still claim breach of a duty to warn, as well as what elements such a warning should contain to be considered a proper warning by the courts. German law is in this respect more clear. The requirement of a written form originally provided clear requirements for giving a warning and gave legal certainty to consumers when they may claim a breach of a duty to warn. However, the fact that case law created an exception from the rule of granting the warnings only in writing, may nowadays lead to certain doubts among consumers as to whether they may still claim damages for breach of a duty to warn if the warning was given only orally. Taking this into consideration, the Dutch system seems to offer the most clarity to consumers by not creating a formal requirement but instead assessing the quality of the warning in order to determine whether it was a proper warning.

Additionally, in all legal systems the question was considered with regard to the problem to whom a builder shall direct his doubts about the correctness of the construction and whom he shall be obligated to warn – only to the client, or instead thereof to his representatives? It is a common practice for the client to employ a designer or a director of the construction (either an engineer or a builder who is not involved in the particular construction process) to represent him towards other parties present at the construction site.

Generally, in German law it was stated that a warning given to the representative of the client, whether it was a designer or a director of the construction, was sufficient. However, if the circumstances of the case indicated that such representative did not take the warning seriously and there could be doubts whether the client would receive it from his representative, then the builder’s obligation was to issue that warning directly to the client. This could lead us to the conclusion that the builder’s duty to warn would be sufficiently executed in case he gave the warning to the client’s representative, even if that representative would not change the method of construction questioned by the builder. It was stated that only when that construction method was clearly inconsistent with the professional requirements of the construction, the builder’s duty to warn would not be fulfilled by issuing such a warning. The court did not deliberate, however, on what further obligations shall the builder have in such a case.

In Dutch law it has been established that a warning given to the representative of the client, e.g. the designer or the director of the construction employed by the client, should release the professional party from his liability even if the warning would not be related further to the client. Only in extreme circumstances, when a professional party should be aware of the incompetence of the client’s representative or knew that not heeding the warning would have serious negative consequences for the client, the warning should be given directly to the client.

In English law, the warning may normally be directed to the client’s representatives. However, when the professional party (the builder or the subcontractor) has evidence that the warning did not reach the client through his representative, he should pass on this warning himself.
The starting point in all legal systems is the same: the warning may be given to the client’s representative. However, it seems that when there is evidence that the representative does not convey the warning to the client and does not heed the warning himself, in England and Germany the builder would be required to warn (also) the client in person, whereas this would be true in the Netherlands only in extreme cases.

Next, this chapter focused on answering the following research question: is a mere warning sufficient?

In English law it has been adjudicated that a prudent professional party should not just limit itself to giving a single warning, but might need to take some other measures in order to protect the client from suffering losses. The courts did not really specify what these other measures could be, i.e. whether a professional party should repeat his warnings, take additional security measures or even suspend his work. It seems logical to assume that at least the simplest measures would need to be undertaken, i.e. a repetition of the warning.

In German law, similar to English law, a professional party will also need to sometimes do more than just warn the client about the risk coming from a third party. German case law points out that in situations when more than just economic interests of the client are endangered, but the risk is directed at interests of either third parties or health and life of people, a professional party might need to refuse to perform his work if the client does not change his instructions upon having been warned of the danger linked to following these instructions. Again, there is no clear answer as to what other measures a professional party might use in case the client does not listen to the warning that has been given to him.

In this respect, the situation is the least clear in the Netherlands, as there has been no agreement reached in the Dutch case law as to what kind of steps a professional party should take if his warning is not heeded and it seems that it will be established on a case by case basis whether a professional party should have taken other measures than just warn the client in case the client does not listen to the warning. If we take into account the facts of the cases discussed, it seems that, just as in German law, the builder might refuse to perform further works when the risk is directed at health and life of people.

In all three systems the courts have considered the problem of an insufficient warning. In none of these three analysed systems clear rules have been established as to what the obligation of a professional party should be when the client does not follow the warning given to him. The courts mention the importance of the warning to be clear, convincing and informative, in order to make sure that the client has a chance to actually understand the risk involved in not following the warning. In case the warning is not that clear or informative at least partial liability for the losses that the client would suffer by not following the warning should stay with a professional party that did not warn sufficiently. What happens when the professional party gives an informative warning, but the client nevertheless decides not to listen to it? It is questionable in which situations a professional party would be seen as having a duty to take extra safety measures or to stop with performance of work in case the client did not listen to the warning. German law clearly indicates that the suspension of work by the builder could be required in case health and life of people or interests of third parties would be endangered. English and Dutch law are less clear on that matter. Even in German law a problem with the qualification of a case might arise,
since it is sometimes difficult to foresee what kind of consequences a default in the construction might cause and whether they would involve e.g. harm to the health or life of others. This matter seems to be in dire need of further regulation.

This chapter focuses on the consequences of the breach of the duty to warn. In situations as discussed in this book, when a professional party has a duty to warn the client about the risk coming from another professional party, two parties might have breached their contractual duties: the party whose actions led to the risk and the party who did not warn about that risk. That raises lots of interesting questions as regards liability.

Firstly, the matter of causality will be considered in the following sections. What actually caused the damage to the client: the default in the performance of contractual obligations by one professional party or the lack of warning about that default from another contractual party? In the legal systems discussed in this book the damages can be claimed only from a party whose non-performance or improper performance of the contractual obligations is linked to the damage, therefore, it is important to consider whether the breach of the duty to warn would be in causal link to the damage of the client. If not, then by breaching the duty to warn the professional party would not have to be afraid of having to pay damages to the client when the latter suffers some damage as a result of the default.

Upon elaborating on the matters of causality, various systems of liability will be considered. Causality influences which party could be held liable towards the client, but in case both parties may be seen as having contributed to the damage, there are still a few possibilities open: the parties may be held solidary, divided or jointly liable, and either be held liable in full or in part.

Finally, the defence of contributory negligence will be discussed. Even if, according to the given liability system, a professional party should be liable in full for the breach of the duty to warn, there are still certain defences available to him, of which the defence of contributory negligence is the most important. When a professional party did not warn the client about a default of another professional party, whose actions could be attributed to the client, or in case when the client employed or should have employed other specialists who might have also discovered that default, one might consider the ‘own fault’ of the client in the emergence of the default. If the court would recognise such ‘own fault’ of the client, then on the basis of the contributory negligence defence the scope of the liability of the professional party who breached his duty to warn would be limited.

Taking into account that there are no significantly different rules between claiming liability for the breach of the precontractual and contractual duty to warn, this chapter does not differentiate between the contractual and precontractual liability. Moreover, as it has already been mentioned, in most cases the liability is being claimed for the breach of the contractual duty to warn. Where the rules on liability could differ, it has been mentioned in the following sections.

7.1. Causality.

Nowadays, the client whose building had been constructed negligently usually institutes proceedings against both the builder and the designer. If any other party – e.g. an engineer or a sub-contractor – was involved in the construction process, he would usually also be sued. There are several reasons for this. Firstly, for the client it is often extremely difficult to assess what caused the damage: a defective design
domain of the designer) or defective workmanship (for which the builder would be liable). To avoid instituting proceedings against the wrong party, the client usually plays it safe and sues any party involved in the construction process. Furthermore, even if it is the defective design, which caused the damage, the builder could still be held liable if he had breached his duty to warn the client thereof. Conversely, if the default was caused by the builder by a negligent performance of his duties, it might have been possible for the designer to discover it during his visits at the construction site, in which case the designer may be held liable for not warning the client thereof. An additional reason for suing both the builder and the designer is that contractual provisions may limit their liability and thus by suing both of them the client has a higher chance of recovering his damage in whole.

Within the scope of this book we can distinguish a case of non-performance by the builder of his duty to warn the client in case of a default in the design plans. It is the designer who should be liable for the original default in the construction. However, in case the default was such that the builder should have recognised it, we may wonder whether and in what scope the builder should be liable for it, possibly next to the designer. It can be argued that if the client had delivered to the builder a faultless construction plan, the builder would have built a perfect construction and would have performed his duties to the letter. He would not have infringed his duty to warn because there would not have been anything to warn the client about. Thus, the primary source of the default in the construction can be found in the faulty design plans delivered by the client. However, if the default was such that the builder recognised it or should have recognised it, then the damage that is going to originate from the faulty construction could have been prevented if the builder would have fulfilled his duty to warn. This does not alter the fact that the designer has made a mistake in his design plans and might be held liable for that. However, one could argue that the damage was caused, at least partially, also by the builder’s non-performance of his duty to warn and that there is a causal link between the damage that occurs and the builder’s non-performance of a contractual duty, which is necessary to hold the builder liable for the damage.

The question then is: whom shall the client hold liable for his damage? The client could potentially claim damages (1) in full from the designer as a professional party who originally caused the default, (2) in full from the builder since if the builder would have warned the client the damage would not have occurred, (3) partially from the builder and partially from the designer thus recognising that both parties were responsible for the damage, (4) in full from both the designer and the builder.

This paragraph focuses only on matters of causality, explaining whether the designer or the builder could be seen as parties that should be liable to the client. How the liability is attributed in England, Germany and the Netherlands, i.e. in what percentage these parties are liable towards the client is discussed in the next paragraph. Let us take a look how the matter of causality is dealt with in the three countries that are being analysed in this book.

7.1.1. English law.

As has been discussed in the previous chapters on English law, the duty to warn, although mentioned from time to time in case law and literature, did not really receive proper attention and has not been sufficiently established in England. That explains why in a few cases that have dealt with the duty to warn and its breach the English courts did not give a clear ruling on who should be seen as having caused the damage to the client and who should bear liability for that.

As far as causality is concerned, the question whether the designer or the builder should be responsible for the client’s damages in case one party made a default and the other breached its duty to warn about it, has been barely considered. It is worth noticing that although the designer has been said to have the duty to inspect how his design is being carried out, he has no duty to actually instruct the builder on his work or any other duty in respect of the builder\(^{610}\). The designer performs his inspection only in the interest of the client. In clause 1.5 of the JCT 1998 it has been established that, notwithstanding any obligation of the designer to the client, irrespective of inspections or valuation in certificates, the builder is wholly responsible for carrying out and completing the construction in accordance with the terms of his contract. This means that even if the client may hold the designer liable for not carrying out inspections in the appropriate way, this does not release the builder from his liability. In *Oldschool v. Gleeson*\(^{611}\), the court put it as follows:

“No only has he [the designer - JL] no duty to instruct the builder how to do work, or what safety precautions to take, but he has no right to do so; nor is he under any duty to the builder to detect faults during the progress of the work. The architect, in that respect, may be in breach of his duty to the client, the building owner, but this does not excuse the builder for faulty work”.

This points out that the builder’s obligation to perform construction should be seen as a result obligation. That means that in case the builder does not deliver a perfect end result, he is seen as a party responsible for that. Does it mean, however that the builder is then seen as the only party who caused the damage even if the default could be attributed to another professional party, as well?

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\(^{611}\) The act provides that a person who is liable to a claimant for a loss may recover a just and equitable contribution from another person who is liable in respect of the same damage. However, the defendant remains liable for the whole amount of the loss even though there may be overlapping responsibility; *Oldschool and another v. Gleeson (Construction) Ltd* and others (1976) 4 BLR 103
In the Canadian case of *Nowlan v. Brunswick Construction Ltd.* 612, the builder tried to defend himself by claiming that if not for the defect in the architectural plans the quality problem associated with the construction would not have appeared. The court was clear, however, stating that:

“The defendant is a concurrent wrongdoer and the fact that the damage might not have occurred but for the poor design of the building does not excuse him from the liability (...)”.

The first case discussed above concerned a situation in which the builder made a default, which should have been recognised and warned about by the designer. The second case concerned the default of the designer about which the builder should have warned the client. Therefore, it seems that regardless which professional party made a mistake and which one breached its duty to warn, they both remain to be seen as liable for the client’s damage 613. Neither the builder 614 nor the designer 615 will in such a situation be automatically released from his liability for the default in the design plans in case the other professional party breached his duty to warn.

However, there have been some arguments raised that in case the builder could have noticed the default in the design plans during his inspection and should have warned the client about that, this should release the designer from his original responsibility for the design, since there would be no causal link between the default in the design and the damage that occurred 616. In *Baxall Securities v. Sheard Walshaw* 617 the court decided that:

“The claimants had an opportunity to discover the absence of overflows by means of a reasonable inspection by their surveyors, their professional advisers. Because of this reasonable opportunity to inspect, the architects were not in a sufficiently proximate relationship to the claimants in respect of defects that could have been discovered by that inspection.”

This seems to suggest that the English courts might in exceptional circumstances consider the causal link between the party who originally caused the default and the damage as severed and proclaim only the party who breached his duty to warn as liable. In my opinion, the breach of the causal link will not happen that often in cases falling within the scope of this book, since the ‘reasonable opportunity’ to inspect suggests existence of the duty to inspect on the side of the party that breached his duty to warn. When the professional party has a duty to inspect, he has also an explicit duty to warn about the defaults he had discovered or should have discovered, which does not fall within the scope of this book.

614 Oldschool and another v. Gleeson (Construction) Ltd and others (1976) 4 BLR 103
615 Pearson Education Ltd v. The Charter Partnership Ltd (2007) 1 BLR 324
617 Baxall Securities Ltd and Norbain SDC Ltd v. Sheard Walshaw Partnership (2001) 1 BLR 36
7.1.2. German law.

In case the damage of the client could be attributed to more than one professional party, the problem arises whom the client should hold liable. Again, let us look at the complicated situation of the builder not fulfilling his duty to warn about the default in the designer’s design. The builder has an obligation to fulfil his contractual duties, which includes a duty to warn when he recognised or should have recognised the default. Improper performance of the builder’s duty to warn automatically leads to the full liability of the builder for any damage on the side of the client. At the same time, the designer is obligated to perform his services properly, which means that in case the default is to be found in the design plans, the designer bears responsibility for that. In German case law and literature it has been consequently stated that since both professional parties had a possibility to prevent the client’s damage from happening, they have both contributed to the damage and the causal link between the damage and the breach of contractual obligations is there for both of them 618.

How that liability will be divided between the parties and whether the builder has a possibility to demand the diminishment of his liability based on the defence of the contributory negligence will be discussed in the following paragraphs.

In practice, German courts did not always consider matters of causality. In most case law it is not taken into account whether the lack of a warning given by the builder to the client caused the damage to the construction, e.g. when the default was caused by a faulty design. Therefore, it might happen that the German court will hold the builder liable for breach of the duty to warn even if there is no direct link between it and the damage that occurred – simply applying the view, which is widely accepted in the doctrine, that the builder should in such a case be held liable 619. The justification for that might be that the builder is under an obligation to deliver a particular result to the client: a default-free, fully functional construction 620. However, in the past few years the German courts gave a few decisive rulings on the matters of causality which leave us to hope, that in the coming years the liability for breach of the duty to warn will never be established without first considering whether that party’s mistake contributed to the damage.

In its judgment of 8 November 2007 621, where the BGH referred the case back to the appellate court, asking it to recheck certain findings in light of its new judgment, the BGH suggested that the appellate court should consider also the matter

621 BGH, 08.11.2007, VII ZR 183/05, BauR 2008, 344
of causality. In the opinion of the BGH the builder had a duty to warn, but that still left open the question whether, if that warning had been given, it would have convinced the client to change the power station that he intended to install in the forester’s lodge into a more suitable one. The BGH stated that if that were not the case, then the appellate court should not recognise the liability of the builder, just as the builder would be released of his liability if he had actually granted a warning to the client and the client nevertheless chose to still install the same power station.

Also in the case of 27 May 2008 OLG München considered the question of causality. In this case the court stated that the builder had no duty to warn about the fact that the heating system that he was employed to install was insufficiently powerful. The builder did not have the knowledge necessary to assess the power of the electrical components of this system, the court decided. What was also relevant in this case, was the fact that the heating system that the builder was to install at the construction site had been chosen by the client together with a company that specialised in these heating systems. It had been proven during the court proceedings that an employee of that company had warned the client about the limited power of the heating system, to which the client then replied that he could use an extra space heater to achieve the level of the warmth he required. The court stated that especially in such a case the builder should not be held obligated to give a warning to the client, because the client not only had already been warned by a specialist but also obviously did not intend to change his opinion on the construction materials that were chosen. If he did not even change his opinion after having been warned by a specialist, he was certainly not likely to have changed his opinion after a warning by the builder. As a result, the damage would have occurred even if the builder would have warned the client. This implies that even if the builder would have been under a duty to warn, there would not be a causal link between the occurrence of the damage and the builder’s breach of the duty to warn.

Due to a lack of a causal link the OLG Celle did not find the builder liable for breach of the duty to warn in the case of 19 November 2009. Under the circumstances of this case, the client ordered a ‘low energy pre-fabricated house’ to be built by the first builder, and then he had another builder install heating and electric systems in it. The first builder did not fulfil all necessary requirements to lower the energy use for the client, which was a default that should have been easily noticeable by the second builder. However, the court decided that the second builder could not be held liable for client’s losses (i.e. mainly the cost of the repair of the house), since even if the builder had warned the client in this situation, the warning would not have prevented that damage to the client. In the end, the client would have to pay for the repair of the house and whether it had happened during the construction process or after the heating systems were installed, was irrelevant from the point of view of costs that the client would have to bear.

Recently the OLG Hamburg in the case of 3 February 2010 took the question of causality into account while considering the duty to warn of a builder who was employed by the client to fill in and close a working space at the client’s property. Previously, another builder had excavated that ground, upon which yet another builder created a cellar for the client. Upon completion of all these works, it

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622 OLG München, 27.05.2008, 28 U 4500/04, IBR 2009, 325; IBR 2009, 326; IBR 2009, 1213
623 OLG Celle, 19.11.2009, 6 U 96/09, IBR2010, 1369
624 See chapter 2 for a further discussion of this case.
625 OLG Hamburg, 03.02.2010, 4 U 17/09, IBR 2010/323; see also: T. Steiger, ‘Schaden durch Arbeitsraumverfüllung: Grenzen der Prüfungs- und Hinweispflicht’, IBR 2010/323
turned out that the construction of the cellar had not been properly supported, and when the last builder closed the ground around it, the walls of the cellar partially caved in. The question was whether this last builder could be held liable for the client’s loss as a result of not conducting tests to check the supports of the cellar and as a result of not warning the client that the supports already installed were insufficient. The court decided that there was no causal link between a lack of warning and the client’s loss. Namely, if the builder had warned the client, the scope of his duty to warn obliged him only to pointing out to the client that he should use a support system in the cellar. The scope of the duty to warn does not reach as far as to oblige the builder to advise the client, who already receives professional advice about this from another expert, as to the method of support system that should be used. Since the client in this case was aware of the risk and the need for the support system (the designer instructed another builder to install some supports), the warning of the builder would not have changed the client’s position. Therefore, the court did not find the causal link between the lack of a warning and the client’s loss and declared that the client under such circumstances could not hold the builder liable. This judgment seems a bit harsh, since upon having been warned also by the builder about the risk to the construction if support system is not used, the client might have reconsidered and reinforced the support system in place.

In the cases where the requirement of causality is mentioned, the German courts are rather clear that the professional party should not be held liable for the breach of the duty to warn if there was no direct link between the lack of warning and the damage. The lack of this link can be shown by proving that the client did not intend to change his mind regardless what opinion he would have gotten as to his plans.

In the case of 8 November 2007 the BGH considered also the matter of the burden of proof in the case of a potential breach of the duty to warn. In general, the matter of the burden of proof consists of three elements: (1) who bears the burden to prove that the duty to warn exists, (2) who must prove whether or not the warning had been given and (3) who bears the burden of proof that the lack of a warning has led to the damage, i.e. that there was causality between the breach of the duty to warn and the damage. In the given case the German Supreme Court considered the second and the third of these questions. It stated that contrary to the views expressed so far in the literature and certain judgments, the breach of the duty to warn is not a factor in the evaluation whether the builder should be held liable for the faulty construction. The liability for the default can be established only by looking at the factual or legal defect in the work performed by the builder. It is rather that the proper performance of the duty to warn might free the builder from his liability for the factual or legal defect. § 4 No. 3 and § 13 No. 3 VOB/B state clearly in which cases there is a default in the construction and consider it to be the builder’s default even if the default originates in the design plans or materials delivered to the builder or work of a previous builder on the site. The client does not need to prove a causal link between the damage and the breach of the builder’s duty to warn. The builder may free himself of this liability by proving that he performed his duty to warn. It is for the builder, therefore, to prove that the warning was given to the client, in order to free himself from the liability.

626 BGH, 08.11.2007, VII ZR 183/05, BauR 2008, 344
627 See also: OLG Brandenburg, 25.05.2011, 13 U 83/10, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)
The view of the BGH is clear: the builder should be held liable already on the basis of the non-performance of a perfect end result, and the performance of the builder’s duty to warn might be used by him as a defence to escape that liability. In such a case, the builder has a burden of proof either that he had given the warning or that there was no causality between the lack of warning and the damage that followed. At the same time, the client does not need to prove that the builder had a duty to warn him in a given case, since the builder already bears liability for the improper performance of the construction. Surprisingly, this judgment of the BGH is not perceived in literature as taking away from the client the burden of proof that the builder had a duty to warn him in a given scope – the first of the three elements regarding the burden of proof628. The judgment is interpreted restrictively, on the facts of the given case, as the builder having the burden of proof either that he had given the warning or that there was no causality between the lack of warning and the damage that followed. Therefore, it is the client who needs to prove that the builder had the duty to warn him. If the client succeeds, the builder might then still escape liability by proving that either he had given the warning to the client or that even if he had warned the client, the client would not have listened to his warning and the damage would arise in any case. While the BGH mentioned in its judgment that its view is contrary to some of the previous case law and the opinions expressed in the literature, it seems that the doctrine decided to disregard this judgment and continue with its previous view.

This contrary view was also expressed in the judgment of 4 March 2008629 of OLG Rostock. The court decided here that the burden of proof that the builder had a duty to warn the client about the default in the design plans rests on the client. The client could claim damages for the breach of the duty to warn about the default in the design plans only upon having proven that the builder had that duty, in the first place. The court does not assume here that any default in the design plans could be attributed also to the builder unless he warned the client about it. The court decided that in case the construction is faulty and the client claims damages from the builder, the client needs to prove that there is a default within the construction for which the builder should be liable. In case the client proves that the damage was caused because of an underlying default in the design plans, there is no general co-liability of the builder, together with the designer, for that default. Therefore, it is not that the builder would have to prove that he warned the client in order not to be held liable. Upon proving that there was a default in the design plans, the client still needs to prove that this was a default that the builder knew or should have known about. Only in this case the damage could be attributed to the negligent performance of his duties by the builder, taking into account that the builder fully performs his contractual duties not only by building without any defaults of his own but also by protecting the client from defaults caused by other professionals involved in the construction process, if he knew or should have known about these defaults. Under the circumstances of the given case, the client did not prove that the builder knew or should have known about the default in the design plans.

In case the professional party had a precontractual duty to warn the client, as a result of what the client would have decided not to conclude the agreement, the damages for the breach of that duty to warn might lead to restoring the client into the

629 OLG Rostock, 04.03.2008, 4 U 79/05, IBR 2008, 383
position he would have been if the agreement had not been concluded. The BGH in the case of 8 November 2007 decided that in case the court would establish that the client would not have concluded a contract upon having been warned, the breach of that duty to warn should lead to the contract being seen as not having been concluded. That means that the client would be put in the position in which he would have been if the warning had been given and had been heeded.

However, the situation presented above is exceptional because in most cases the liability of the service provider for the breach of the duty to warn, in case the contract had been concluded, would most likely be assessed as a contractual one. It has even been argued in the literature that a client would not have a right to claiming a breach of the precontractual duty to warn, if subsequently the contract had been concluded and during performance of that contract a default appeared. It has been claimed that there is sufficient contractual protection given to the client in such a situation, i.e. § 635 BGB and § 13 No. 7 VOB/B.

7.1.3. Dutch law.

In Dutch law the matter of causality in cases described in this book has been considered both in literature and in case law. As has been mentioned in the introduction, the matter of causality raises the question which party should be held liable for the damage of the client: (1) the one who originally caused the default, or

631 BGH, 08.11.2007, VII ZR 183/05, NJW 2008, 511; this a case that concerned a breach of a contractual duty to warn, however, its reasoning could be applicable also to the breach of a precontractual duty to warn.
633 “(1) Verlangt der Besteller Nacherfüllung, so kann der Unternehmer nach seiner Wahl den Mangel beseitigen oder ein neues Werk herstellen.
(2) Der Unternehmer hat die zum Zwecke der Nacherfüllung erforderlichen Aufwendungen, insbesondere Transport-, Wege-, Arbeits- und Materialkosten zu tragen.
(3) Der Unternehmer kann die Nacherfüllung unbeschadet des § 275 Abs. 2 und 3 verweigern, wenn sie nur mit unverhältnismäßigen Kosten möglich ist.
(4) Stellt der Unternehmer ein neues Werk her, so kann er vom Besteller Rückgewähr des mangelhaften Werkes nach Maßgabe der §§ 346 bis 348 verlangen.”
634 “(1) Der Auftragnehmer haftet bei schuldhaft verursachten Mängeln für Schäden aus der Verletzung des Lebens, des Körpers oder der Gesundheit.
(2) Bei vorsätzlich oder grob fahrlässig verursachten Mängeln haftet er für alle Schäden.
(3) Im Übrigen ist dem Auftraggeber der Schaden an der baulichen Anlage zu ersetzen, zu deren Herstellung, Instandhaltung oder Änderung die Leistung dient, wenn ein wesentlicher Mangel vorliegt, der die Gebrauchsfähigkeit erheblich beeinträchtigt und auf ein Verschulden des Auftragnehmers zurückzuführen ist. Einen darüber hinausgehenden Schaden hat der Auftragnehmer nur dann zu ersetzen,
   a) wenn der Mangel auf einem Verstoß gegen die anerkannten Regeln der Technik beruht,
b) wenn der Mangel in dem Fehlen einer vertraglich vereinbarten Beschaffenheit besteht oder
c) soweit der Auftragnehmer den Schaden durch Versicherung seiner gesetzlichen Haftpflicht gedeckt hat oder durch eine solche zu tarifmäßigen, nicht auf außergewöhnliche Verhältnisse abgestellten Prämien und Prämienzuschlägen bei einem im Inland zum Geschäftsbetrieb zugelassenen Versicherer hätte decken können.
(4) Abweichend von Nummer 4 gelten die gesetzlichen Verjährungsfristen, soweit sich der Auftragnehmer nach Absatz 3 durch Versicherung geschützt hat oder hätte schützen können oder soweit ein besonderer Versicherungsschutz vereinbart ist.
(5) Eine Einschränkung oder Erweiterung der Haftung kann in begründeten Sonderfällen vereinbart werden.”
(2) the party who might have prevented the default from causing damage by giving a warning about it to the client or another party representing the client. It has been made clear in Dutch law that if the default was such that the builder recognised it or should have recognised it, then the damage that originates from the faulty construction could have been prevented if the builder would have fulfilled his duty to warn. That means that the damage was caused by the non-performance of the builder’s duty to warn and there is a causal link between the damage that occurs and the builder’s non-performance of a contractual duty, which is necessary to hold the builder liable for the damage. Specifically, pursuant to Article 7:760 Paragraph 2 and 3, in case the builder fails in his duty to warn about the default that he should have noticed within the construction materials or design plans that have been provided by a third party, he bears liability for the damage resulting from his lack of warning. Therefore, the causal link between the damage to the client and the lack of warning from the professional party, who recognised or should have recognised the default, is recognised in Dutch law. That is the reason why in Dutch law the builder is generally considered to be fully liable for the client’s damage in case he did not perform his duty to warn about the default caused by another party to the construction process.

In the case of 16 November 2005, the builder was held to have breached his duty to warn about the need to provide for extra ventilation measures in the construction and the fact that if the design would not be adjusted, then the humidity from the ground would lead to the corrosion of the construction. The builder recognised that he was liable but claimed that he should not be held fully liable, pursuant to Paragraph 6 Sec. 14 of the UAV, for the damage that the client had suffered since in the process of repairing the damage the client introduced many improvements in respect to the original design plans. The builder did not feel he should be obligated to pay for these improvements. The arbitral court adjudicated, however, that in case the builder had warned the client in time, the client would most likely manage not only to adjust but also to improve the design plans within the originally agreed upon price. While estimating the scope of damages that the builder had to pay, the court thus took into account not only the damage suffered by the client as a direct result of the lack of warning, but also the fact that if the warning had been given the client would have been able to improve the construction within the estimated price. The court decided that the client had the right to these improvements. Thus, the builder was held fully liable for the client’s damage.


636 ‘7:760 BW: (...) 2. Is de ondeugdelijke uitvoering echter te wijten aan gebreken of ongeschiktheid van zaken afkomstig van de opdrachtgever, daaronder begrepen de grond waarop hij een werk laat uitvoeren, dan komen de gevolgen voor zijn rekening, voor zover de aannemer niet zijn in artikel 754 bedoelde waarschuwingsplicht heeft geschonden of anderszins met betrekking tot deze gebreken in deskundigheid of zorgvuldigheid tekort is geschoten. 3. Lid 2 is van overeenkomstige toepassing in geval van fouten of gebreken in door de opdrachtgever verstrekte plannen, tekeningen, berekeningen, bestekken of uitvoeringsvoorschriften.’

637 On attribution of liability see the next paragraph.

638 RvA 16.11.2005, nr. 27.016, BR 2007, p. 140
When the court in such situations declares only the builder liable, one might wonder whether the court considers that the causal link between the mistake of the designer and the damage has been severed. There have been many voices raised in the doctrine639 questioning the disappearance of the causal link between the professional party who caused the original default in the construction and the client’s damage. If the existence of the original default in the construction contributes to the damage, the professional party who caused the default should still be held at least partially liable for the client’s damage. Namely, the fact that the builder then breaches his duty to warn does not annul the earlier cause for the damage – the existence of the default itself. As it will be shown in the following paragraph, that does not always lead the Dutch courts to apportioning the liability to both professional parties, but can lead to the diminishing of the full liability of the builder on the basis of the defence of contributory negligence. Unfortunately, the courts and arbiters do not always consistently make use of the rules on causality and attribution of damages.

For example, in the case of 4 April 2004640, the designer made a mistake in his design plans by not providing for a sufficient insulation of walls between two apartments, which led to the significant amount of noise. The designer claimed that he should not be held liable for the resulting damage, since the chain of causality between the mistake and the damage has been broken by the builder who should have recognised the mistake and warn the client about it. In that case, the damage could have been avoided. The arbiter in this case was of a different opinion. He stated that regardless the possibility of the breach of the builder’s duty to warn in this case, the designer still made the original mistake. The builder’s breach of the duty to warn should not diminish the designer’s liability, in such circumstances. The arbiter made it clear that the designer may claim from the builder his own damage, i.e. the damages that the designer needs to pay to the client, in case the designer believes that the builder’s own mistake, i.e. the breach of the duty to warn the client, was to the detriment of the designer. However, the breach of the builder’s duty to warn could, according to the arbiter, never lead to the severing of the chain of causality.

According to Chao-Duivis who wrote a note to this case641, the reasoning of the arbiter is insufficiently nuanced. Indeed, it seems that the arbiter should know better than to use the word ‘never’ in his justification. Chao-Duivis rightly says that the arbiter should have found out whether and how the builder breached his duty to warn in this case. The breach of the builder’s duty to warn might have brought the arbiter to a conclusion that the mistake of the designer had fewer consequences for the client than he originally had thought. Only upon establishing that, the arbiter could

640 AIB 04.10.2004, nr. 1200-0311, BR 2006/102
641 Case note by M. A. B. Chao-Duivis, AIB 04.10.2004, nr. 1200-0311, BR 2006/102
have properly estimated the exact scope of the liability of the designer, since the builder’s breach of the duty to warn would have been attributed to the client642.

The burden of proof that the service provider had a duty to warn lies on the client643. Pursuant to the judgment of 13 April 2005644 the client has to point out in his claim what exactly the builder was supposed to warn him about and why. For example, the client cannot just state that the design was faulty because the construction was not in accordance with the legal requirements thereof. The court deemed that kind of statement to be insufficient to recognise a duty to warn of the builder645.

Upon having proven that the builder had a duty to warn and that he had breached this duty, the client may be released from having to prove the causal link between the breach of the duty to warn and the damage he had suffered on the basis of the so-called ‘omkeringsregel’. The ‘omkeringsregel’ establishes an exception to the evidence rule of Article 150 RV646, pursuant to which a party that makes a claim has to prove the existence of facts on which this claim is based. According to this provision, only if another legal rule or the fairness and good faith required it, the party making a claim would not need to sustain it by evidence, but it would be left for the other party to disprove it. The ‘omkeringsregel’ has been applied by the Dutch courts647 in case of the non-performance of a contractual duty that is intended to prevent or diminish certain risks, and in case such risks have materialized upon breach of that contractual duty. As a result of the ‘omkeringsregel’, the causal link between that non-performance and the damages would be assumed. The duty to warn in the construction process could be seen as intended to prevent specific risks from materializing. Therefore, if the duty to warn is breached and the client suffers certain damage as a result of the materialization of the risk that he did not receive a warning about, the causal link between the breach of the duty to warn and the damage could be assumed on the basis of the ‘omkeringsregel’648.

In case of a precontractual duty to warn a specific situation may happen, namely that the default that should have been discovered before the construction has started, would be found out during the construction works only and would then be

642 The designer might have used the defence of the contributory negligence that would be discussed in the following paragraphs.
643 If the client does not claim breach of the duty to warn, the court or arbitrator will not consider it, see e.g. RvA 5.10.2009, nr. 30.024, << http://www.raadvanarbitrage.info/default.aspx >> (lastly checked on 15 July 2011)
645 To be discussed in the following chapters.
646 ‘De partij die zich beroept op rechtsgewolgen van door haar gestelde feiten of rechten, draagt de bewijslast van die feiten of rechten, tenzij uit enige bijzondere regel of uit de eisen van redelijkheid en billijkheid een andere verdeling van de bewijslast voortvloeit.’
647 The main Dutch Supreme Court cases establishing the ‘omkeringsregel’ are not construction cases, but the rules contained in them could be applicable also to them, e.g. HR 02.03.2001, NJ 2001, 649 (Medisch Protocol Leeuwarden). It has been argued that the ‘omkeringsregel’ applies in particular in case a safety or security obligation, intended to prevent certain material risks from occurring, is breached. The duty to warn could be seen as such an obligation.
648 However, from a few judgments of the Dutch Supreme Court follows that the ‘omkeringsregel’ will not always be applied to a breach of a duty to warn, e.g.: HR 29.09.2006, RvdW 206, 909; HR 2.02.2007, NJ 2007, 93
corrected by the builder. In this case the builder often claims that he has a right to extra remuneration from the client since he prepared his original price estimation on the basis of the design, which was faulty and did not take into account that extra time and effort would be necessary to provide a construction which is fit for purpose after the correction of the design. In such a situation the client may claim, however, that in case the default was so obvious that it should have been recognised by the builder already during the precontractual phase and the builder would have warned the client about that default, the design plans would have been adjusted before the construction had started and the client would not have to bear extra costs. Therefore, the client’s defence against the claim for additional remuneration would be that the builder had breached his precontractual duty to warn and therefore was the only direct cause of the damage. This, according to the client, should be the reason why the builder should bear the costs of this extra work.

This reasoning has been accepted, for example, in the case of 8 March 2001.650 In the appeal, the appellate arbitral court had overturned the ruling of the arbitral court of first instance because the default in the construction was not so obvious, that the builder should have discovered it in the precontractual phase. However, it is likely that had the default been seen by the appellate arbitral court as so obvious that it should have been noticed even upon a marginal check of the design by the builder, needed for the builder for his price calculation, the verdict in the first instance would have been upheld and the builder would have been liable for the resulting damage, i.e. would not be paid for the extra work that he needed to perform in order to deliver a proper construction.

Opinions can be found, however, that in this situation the builder should be held liable only for part of the damage, since the default originated in the design, for which the client bears responsibility. The causality then is attributed to both parties: the one who caused the default and the one that did not warn about it. Only in case the builder was actually aware, and not also when he should have been aware, of the default before the contract was concluded, the full liability of the builder was argued for. The distinction seems to be that in case the builder actually knew about that default and did not warn the breach of his obligation should be considered as gross negligence. In such a situation the builder is more clearly the last party who could have prevented the damage from happening and therefore could be seen as causing the damage more directly.

This narrowing of the liability of the builder does not seem to be justified since the precontractual duty to warn of the builder is already narrowly defined and the builder would only have to warn of the obvious defaults in the design plans. That suggests that in case the default was obvious enough that the builder should have recognised it, even though he did not, this could still be attributed to the negligence of the builder. In such a situation, the builder should bear full liability for the damage that the client had suffered as a result of him negligently not granting the client the warning.

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One other argument that speaks against narrowing of the liability of the builder is that if a difference is made in the liability for cases when the builder knew or should have known about the default, this will lead to a burden of proof for the client that the builder had noticed the default. To prove someone’s actual knowledge of a fact is difficult and that puts the client in an unfavourable position, which means that the builder could escape liability for even careless work, e.g. when he did not examine the design plans at all before concluding the contract with the client, as the client would, by definition, then not be able to prove the actual discovery of the default.

7.2. Sole liability, solidary liability, or apportionment of liability?

As it has been mentioned in the previous paragraph, theoretically there are four possibilities of granting damages to the client in case the damage was caused by the default in the design plans about which the builder did not warn the client: (1) by declaring sole liability, in full, of the builder, (2) by declaring sole liability, in full, of the designer, (3) by attributing liability to both the designer and the builder, (4) by attributing liability, in full, to both the designer and the builder. The causal link between the original default and the damage is considered to be weaker than the causal link between the lack of warning and the damage, as a result of the chain of causality and the warning being the last step that, if taken, could have prevented the damage from appearing, which suggests that it was the direct cause of the damage. That might be the reason why in none of the countries discussed in this book the second option, the sole liability, in full, of the designer (without the client being able to hold the builder liable), in case the default originated in the design plans but the builder had a duty to warn about it, is considered.

This paragraph shows how England, Germany and the Netherlands attribute liability between the professional parties involved in the construction process who might both been seen as having contributed to the damage that the client had suffered. It is important to assess whether if the client sues all professional parties involved in the process who share responsibility for the default in the construction, one of the professional parties would be declared to be fully liable or whether the client would need to get damages in parts from different parties involved in the construction process.

7.2.1. English law.

As it has been mentioned in the previous paragraph, it is difficult to estimate the exact division of liability between the professional parties who both contributed to the client’s damage due to the lack of established authority on that matter. It is important to note, however, that, generally, it has been accepted by English courts that the sole fact that e.g. the designer breached his duty to warn about the builder’s mistake does not mean that the builder should not still be liable for the default he caused\textsuperscript{652}. The client could claim his damages in full from the builder in such a case.

\textsuperscript{652} Oldschool and another v. Gleeson (Construction) Ltd and others (1976) 4 BLR 103. With the exception of a situation mentioned in the previous paragraph when there was a reasonable opportunity to inspect and discover the default in the construction for the designer, which leads to the exclusion of the builder’s causal link to the damage.
Other case law points out that the professional party who breached its duty to warn could be held liable for the whole damage, as well, despite the fact that the default in the construction would not have arisen if not for a mistake of another professional party. This seems to suggest that in English law both parties in such a case, i.e. the one who failed to deliver faultless work and the one who failed to fulfill his duty to warn, could be held liable for the whole damage of the client. The client might pick which party he will claim damages from. However, while the client may choose which professional party to sue, the Civil Liability (Contribution) Act 1978 gives a possibility to the defendant to bring another professional party who might also be liable into an action as a third party. This leads, in practice, to the apportionment of liability between all professional parties that contributed to the damage. Furthermore, while the client might choose a professional party that he will hold liable for his damage in full, this does not exclude the possibility of the defence of contributory negligence being used by that professional party to diminish his liability. Moreover, the contractual parties may agree to limit their liability contractually by adding so-called ‘net contribution clauses’ to the contract, according to which the parties would bear liability only for their ‘fair share of the loss suffered’ which excludes the application of the solidary liability.

In the case of London Borough of Merton v. Lowe and Pickford, one of the defences that the designer brought forward was that he should not be held liable for damage caused by the sub-contractor, because unlike the builder, the sub-contractor was solvent and the damage could have been recovered from him in tort. The client nevertheless decided to institute proceedings against the designer. The court decided that both the designer and the sub-contractor were liable for the same damage and in such case, irrespectively of the fact whether the liability was contractual or tortious, the court could apportion such liability between the liable parties – pursuant to the provisions of the Civil Liability (Contribution) Act 1978. However, since the subcontractors were not a party to this case, the court diminished the designer’s liability on the basis of the contributory negligence defence, thus forcing the client to instigate a second procedure against the sub-contractors in case he wanted to recover the full damage.

655 As a side note it is interesting to note that if the client chooses to claim damages fully from the designer, it might be difficult for the designer to recover part of his loss from the builder on the basis of the builder’s breach of the duty to warn. That is because the designer’s loss is a pure economic loss in this case and English law rarely admits claims in negligence when the only damage to the claimant is an economic one. See e.g. O. Hayford, “Did you know… A “Construct Only” Contractor Can Be Liable For Design Defects?”, Mondaq, 07/07/2009, 2009 WLNR 12902774.
657 This will be further discussed in the following paragraph.
658 M. A. B. Chao-Duivis, ‘Hoofdelijkheid in het bouwcontractrecht (deel 1)’, TBR 2008/2, par. 4

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7.2.2. German law.

Under German law the courts hold the builder and the designer solidary liable in case one professional party made a mistake and the other party, who should have noticed it if he had acted with due diligence, did not warn the client about that mistake. This means that when the builder had in practice not recognised the default in the design plans, although he should have done so as a professional party and therefore subsequently should have warned the client, and when the non-fulfilment of the builder’s contractual duties was the result of his negligent performance, the court decides both the builder and the designer should be liable in full\textsuperscript{661}. The legal basis for this liability may be found in § 421 BGB\textsuperscript{662}.

This liability had been recognised in German practice as of the judgment of the BGH of 1 February 1965\textsuperscript{663}. In this case the BGH clearly stated that the designer and the builder are solidary liable towards the client when they both are responsible for the default in the construction and are obliged to remedy it pursuant to § 635 BGB\textsuperscript{664}. The BGH makes it clear that both the designer and the builder in their own way contributed to the damage, by non-performance or improper performance of their contractual obligations, and are responsible for remedying it in their own way. The client is free to choose whom he will hold liable for his damage. If one of the parties pays damages to the client, that releases the other party from its liability. They can in turn then seek recourse against each other for return of a certain percentage or the whole amount of what they had to pay to the client\textsuperscript{665}. However, in case the liability of e.g. the designer would be contractually limited, then the solidary liability of both contractual parties extends only to the amount that both professional parties are liable for to the client\textsuperscript{666}.


\textsuperscript{662} “Schulden mehrere eine Leistung in der Weise, dass jeder die ganze Leistung zu bewirken verpflichtet, der Gläubiger aber die Leistung nur einmal zu fordern berechtigt ist (Gesamtschuldner), so kann der Gläubiger die Leistung nach seinem Belieben von jedem der Schuldner ganz oder zu einem Teil fordern. Bis zur Bewirkung der ganzen Leistung bleiben sämtliche Schuldner verpflichtet.”

\textsuperscript{663} BGH, 01.02.1965, GSZ 1/64, NJW 1965, 1175

\textsuperscript{664} (1) Verlangt der Besteller Nacherfüllung, so kann der Unternehmer nach seiner Wahl den Mangel beseitigen oder ein neues Werk herstellen.
(2) Der Unternehmer hat die zum Zwecke der Nacherfüllung erforderlichen Aufwendungen, insbesondere Transport-, Wege-, Arbeits- und Materialkosten zu tragen.
(3) Der Unternehmer kann die Nacherfüllung unbeschadet des § 275 Abs. 2 und 3 verweigern, wenn sie nur mit unverhältnismäßigen Kosten möglich ist.
(4) Stellt der Unternehmer ein neues Werk her, so kann er vom Besteller Rückgewähr des mangelhaften Werkes nach Maßgabe der §§ 346 bis 348 verlangen’.


\textsuperscript{666} P. Bydlinski, in: Münchener Kommentar BGB, 2007, § 421, 50, p. 2614
In the case of 24 April 2008\textsuperscript{667} the OLG Oldenburg considered a case of solidary liability of the designer, the builder and a specialist planner. In the given case the OLG Oldenburg decided that the planner was partially responsible for the damage because he delivered construction plans that were faulty and he did not correct these defaults during the construction process. The designer had a duty to inspect the plans prepared by the planner and should have recognised the default in them and warn the client about it. The builder should have also recognised the default in the plans and warn the client about it on the basis of § 4 No. 3 VOB/B. The court had no doubts here that all three parties should be held solidary liable to the client and it was for the client to decide from which party he would like to receive damages. That does not mean, that in case the client decided to claim damages from the builder, the builder would have to pay the client for the whole damage that the client had suffered. The builder might use a defence of the contributory negligence from § 254 BGB, i.e. claim that his improper performance of contractual duties was to be attributed to the improper performance of his client’s contractual obligations\textsuperscript{668}.

7.2.3. Dutch law.

The Dutch Civil Code is clear on the subject of solidary liability, establishing it in article 6:102 BW\textsuperscript{669}. Pursuant to this article, if two or more parties are liable for the same damage, any of them is liable to pay damages in full and may then have recourse on the other party. In practice, as a principle, it is the builder who would be held fully and solely liable for the damage of the client caused by the designer’s mistake and the non-performance of the builder’s duty to warn. The reason for choosing this system of liability, instead of attributing parts of it to the other professional party who made a mistake, has not been made explicit in case law. The simple statement that since the builder did not perform his duty to warn he caused the occurrence of the default which means he should be liable for the whole damage that resulted from it seems to serve as a sufficient explanation. The lack of proper justification for choosing this liability system has been criticized in the literature\textsuperscript{670}. One of the arguments against attributing the liability to both parties might have been the fact that then it would be for the client (the victim) to prove the extent of the liability of both parties, which would be quite a task to do.

This system of liability has been partially based on Paragraph 6 Sec. 14 of the UAV, which says that the builder should warn the client in case of explicit defaults within the design. This paragraph has been interpreted in the judgments of the RvA\textsuperscript{671}.

\textsuperscript{667} OLG Oldenburg, 24.04.2008, 8 U 4/08 (full text found on <<www.ibr-online.de>> lastly checked on 04.12.2009)
\textsuperscript{668} This will be discussed further in the following paragraph.
\textsuperscript{669} ‘Rust op ieder van twee of meer personen een verplichting tot vergoeding van dezelfde schade, dan zijn zij hoofdelijk verbonden. Voor de bepaling van hetgeen zij krachtens artikel 10 in hun onderlinge verhouding jegens elkaar moeten bijdragen, wordt de schade over hen verdeeld met overeenkomstige toepassing van artikel 101, tenzij uit wet of rechtshandeling een andere verdeling voortvloeit.’
\textsuperscript{670} C. E. C. Jansen, \textit{Towards a European building contract law}, Tilburg: Tilburg University Press, 1998, p. 488-490; for an overview of literature and case law in which it has been argued for other division of liability than solidary liability see: M. A. B. Chao-Duivis, ‘Hoofdelijkheid in het bouwcontractrecht (deel 1)’, TBR 2008/2, par. 1-4; M. A. B. Chao-Duivis, ‘Hoofdelijkheid in het bouwcontractrecht (deel 2)’, TBR 2008/24, par. 5-6
as excluding the possibility to hold the builder liable only in part. Pursuant to these judgments, the builder should be held liable for the whole damage in the construction, because if not for his non-performance of the duty to warn, the damage could have been avoided wholly. The fact that the default originates in the faulty design plans is not being seen here as a factor contributing to the emergence of damage. In this system, the non-performance of the builder’s duty to warn is seen as the only cause of damage, since the designer’s mistake in delivering proper design plans does not influence in any way the builder’s performance of his duty to warn\(^{672}\). Let us take a closer look of two of the judgments in which this view has been expressed.

For example, in the case of 25 March 1991\(^{673}\), the builder was employed to perform some plastering and painting works in the basement of the client. The designer insisted that the works should be performed as soon as possible and as a result, they were not moisture proof. The court decided that although the client, upon the recommendation of the designer, commissioned the works too early in the construction process, the builder should have warned the client thereabout and not just perform his works upon the insistence of the designer. Because the builder had failed in his duty to warn, the court considered him liable in full for the damage that the client suffered.

In the case of 14 October 1993\(^{674}\) the builder did not warn the client that leaving out a specific foil while constructing the heated marble floor might lead to the cracking of that floor. The court decided that the builder had the duty to warn the client thereabout; that he failed to perform this duty and that he thus was liable for the whole damage suffered by the client.

In both these judgments the court decided on the full, sole liability of the builder, disregarding even the possibility of its diminishment as a result of application of the defence of contributory negligence. Thunnissen has criticized this in the commentary of these judgments\(^{675}\).

The point of view that the builder should be fully liable for the client’s damage is dominant in the Dutch case law.

For example, in the case of 12 January 1996\(^{676}\) the client’s garage was built smaller than it was supposed to be. The builder had performed the construction based on the design he received from the main construction contractor of the client. That design was faulty. The court recognised the main liability of the main construction contractor who prepared the faulty design. However, the court adjudicated the co-liability of the builder in that case. Upon discovering the default in the design, the builder should have warned the main construction contractor thereabout. As he had

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24.01.1996, nr. 18.499, BR 1996, p. 251; RvA 9.06.2000, nr. 21.436, BR 2001, p. 901; RvA 16.11.2005, nr. 27.016, BR 2007, p. 140. It should be mentioned, though, that this reasoning has been criticized by H.O. Thunnissen in his commentary of some of these judgments and by M. A. M. C. van den Berg, ‘Bouwcontractenrecht in beweging’ in: 40 Jaar Instituut voor Bouwrecht, ed. M. A. B. Chao-Duivis, M. A. M. C. van den Berg, B. P. M. van Ravels, Stichting Instituut voor Bouwrecht, 2009, p. 77-78


673 RvA 25.03.1991, nr. 70.014, BR 1993, p. 547 with casenote by H.O. Thunnissen

674 RvA 14.10.1993, nr. 15.272, BR 1994, p. 784 with casenote by H.O. Thunnissen

675 The possibility of having the builder’s liability diminished due to contributory negligence of the client will be discussed in the following paragraph.

not performed his duty to warn, he was found liable as well. While the main construction contractor was obliged to pay damages in full to the client, the court estimated that he could seek recourse of 50% of damages on the builder. In this case, the court held the main constructor fully liable towards the client; however, the main constructor was allowed to seek recourse for part of the damages he was obliged to pay, on another professional party that had contributed to the damage of the client.

As it has been briefly mentioned in this chapter the other way in which the liability for the client’s damage could be attributed between the parties is due to the contributory negligence. However, in this case, the builder remains fully liable, in general, and only due to the ‘own fault’ of the client the damages that he needs to pay are diminished. If the client wants to recover the whole amount of damages he needs to sue the other professional party, whose default had been attributed to the client, separately. The possibility of diminishing the liability of the builder in case the default comes from the default in the design, for which the client bears responsibility, has been widely accepted in the case law and in the doctrine\textsuperscript{677}. It will be further discussed in the next paragraph.

7.3. Contributory negligence as a defence.

The defence of the contributory negligence allows the defendant to demand that the amount of damages that he needs to pay to the client is reduced in a case where the loss suffered by the client was only partially the result of the defendant’s breach of contract, whereas, the other part depended on the behaviour of the client or of another party for whom the client bears responsibility. If this behaviour was not reasonable, negligent or even faulty, then a reduction of damages would be granted to the defendant.

Both in the case where, on the basis of the rules discussed in the previous paragraph, the courts hold a professional party liable in full, solely or solidary, and where they attribute liability to both parties that contributed to the damage of the client, the liability of the professional parties might be diminished on the basis of the contributory negligence defence. Let us see when a professional party may make use of this defence in England, Germany and in the Netherlands.

7.3.1. English law.

Since the defence of the contributory negligence has only recently started to be applied in contractual relationships, it is uncertain whether the builder might successfully use it in order to diminish his liability. The English case law on that varies. Unfortunately, there have not yet been sufficient cases within the construction sector to make it clear whether that defence could be applied in case of a breach of a contractual duty to warn. As has been already described in the introductory chapter to English law and in the chapter on the emergence and source of the duty to warn in English law, English courts recognised both contractual and tortious duties to warn. If the client cannot claim one, he would claim the other. This often gives the impression that the contributory negligence applied in a particular case was applied based on contract law when in reality the claim was dealt with under tort law.

Initially the damages could be reduced on the grounds of this defence only when the defendant was liable in tort or simultaneously in tort and contract. Such possibility was not allowed on the grounds of contract law, due to the fact that the parties to the contract have had an opportunity to regulate their obligations as they wanted to and apparently chose not to include a provision to this extent. To nevertheless grant such defence in contract law would enable the court to shift the risk, which would have changed the contract made by its parties. The same reasoning has been used by English courts to deny the existence of the contractual duty to warn in case the parties concluded a detailed contract without a provision on the duty to warn therein. However, for many years it has been widely argued that this defence should be available also to defendants liable exclusively in contract in respect of breaches of all contractual obligations unless expressly or impliedly excluded in the contract. If the contractual provisions explicitly allocated the risk otherwise, the defendant would not be able to make use of the defence of contributory negligence.

It has been said that the defence of the contributory negligence is:

“A man’s carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself.”

Section I (1) of the Law Reform (Contributory Negligence) Act 1945 gave courts the authority to reduce the plaintiff’s damages:

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680 Further discussed in the chapter on the emergence of the duty to warn in England.
“To such extent as [it] thinks just and equitable having regard to the [plaintiff’s] share in the responsibility for the damage”\textsuperscript{684}.

The court has to take into account the causation and blameworthiness when he decides, which party and in what scope is responsible for the damage. Still, the court has a discretionary power to decide how to apportion the damages – the only indication is that the apportionment should be just and equitable. However, it has to be pointed out that in practice, for a long time the law reform did not broaden the scope of the notion of contributory negligence to encompass breaches of a contractual duty to warn. For example, in the case \textit{Basildon v. Lesser}\textsuperscript{685} the House of Lords held explicitly that the Contributory Negligence Act did not apply to a claim in contract, so that the client could recover his damages in full as was provided for under common law.

When the defence of contributory negligence finally started being accepted in contract law, it was always done exceptionally and depended on the fulfilment of many conditions, like the one expressed in \textit{Raflatac v. Eade and Ors} case\textsuperscript{686}:

“Once it was established that the main contractor in this case did not owe a duty of care in effect to secure careful performance by the sub-contractor, there could be no question of a defence of contributory negligence on the part of the plaintiff’s employers. The well-known \textit{Vesta}\textsuperscript{687} case confirms that this defence is available <<…where the defendant’s liability in contract is the same as his liability in the tort of negligence independent of the existence of any contract>>”.

Application of this defence in contractual actions based on the Law Reform (Contributory Negligence) Act has been seen as difficult, although not impossible by Palmer and Davies. They compared the English authority with many Australian decisions on this matter and claimed that application of the Act to contractual claims was deemed to be unjustified and without practical value since it cannot be shown that at common law contributory negligence was ever a defence to an action for breach of contract. They argued that the interpretation of the Act, which leads to application of this defence in contract law cases, is artificial and meaningless and that English case law, which applied this interpretation in practice, is vague and contradictory\textsuperscript{688}. However, it needs to be pointed out that even though its application is questionable this defence is applied in some contract actions and accepted by English courts. This creates for the court the possibility to diminish damages of a professional party who was not the only one who contributed to the existence of the client’s damage and who otherwise would be held liable in full.

In \textit{Lindenberg v. Canning}\textsuperscript{689} the court stated:

\begin{itemize}
  \item \textsuperscript{684} S. Furst, V. Ramsey, \textit{Keating on construction contracts}, London: Sweet & Maxwell, 2006, p. 268-269
  \item \textsuperscript{685} Basildon v. Lesser, [1985] Q.B. 839, Judge Newey, Q.C.
  \item \textsuperscript{686} Raflatac Ltd v. Eade and Ors (1999) 1 BLR 261
  \item \textsuperscript{687} Forsikringsaktieselskapet Vesta v. Butcher [1989] 1 Lloyd’s Rep 331
  \item \textsuperscript{688} N. E. Palmer, P. J. Davies, ‘Contributory Negligence and breach of contract – English and Australian attitudes compared’, International and Comparative Law Quarterly, April 1980, vol. 29
  \item \textsuperscript{689} Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71
\end{itemize}
“Contributory negligence has not been clearly pleaded, but it has been the subject of submissions made to me and I think I must take it into account. In my opinion Mr Carlish [the designer – JL] when acting for Mr Lindenberg [the client - JL] failed to take care on his behalf by wrongly showing the 9” walls as non load bearing on his plan, by instructing Mr Canning [the builder - JL] orally to demolish them, and by failing to give any instructions for temporary or permanent supports. In apportioning responsibility between Mr Carlish [the designer – JL] and Mr Lindenberg’s [the client’s - JL] agent and Mr Canning [the builder - JL] I think that Mr Carlish [the designer – JL] was 75% responsible and Mr Canning [the builder - JL] 25%”.

In this case, the judge applied contributory negligence despite having found no liability in the tort of negligence, which would seem to suggest that the defence could be applicable also in cases concerning a purely contractual duty to warn 690.

7.3.2. German law.

As has been mentioned in the previous paragraph, in German law there is solidary liability of all professional parties who contributed to the damage. It is for the client to choose whom he will hold liable, but either party is liable in full. However, in case the non-performance of the builder of his obligations is caused by a default that could be attributed to the client, e.g. the designer makes a mistake in the design plans which could be attributed to the client since he is seen as having a duty to deliver default-free plans to the builder, then the builder may escape liability or have his liability diminished. That means that the client could hold the builder only partially liable on the basis of § 254 BGB 691 and potentially claim the remaining damage from the designer in other proceedings 692. The client is then considered as not having protected his own interests sufficiently 693.

691 “(1) Hat bei der Entstehung des Schadens ein Verschulden des Beschädigten mitgewirkt, so hängt die Verpflichtung zum Ersatz sowie der Umfang des zu leistenden Ersatzes von den Umständen, insbesondere davon ab, inwieweit der Schaden vorwiegend von dem einen oder dem anderen Teil verursacht worden ist.
(2) Dies gilt auch dann, wenn sich das Verschulden des Beschädigten darauf beschränkt, dass er unterlassen hat, den Schuldner auf die Gefahr eines ungewöhnlich hohen Schadens aufmerksam zu machen, die der Schuldner weder kannte noch kennen musste, oder dass er unterlassen hat, den Schaden abzuwenden oder zu mindern. Die Vorschrift des § 278 findet entsprechende Anwendung.”
Still, in certain cases the possibility to use the defence of contributory negligence has been limited or excluded in German law. This means that in certain situations the client might hold the professional party liable in full even if he bears himself part of responsibility for the default. For example, it has been decided that if the builder had in fact recognised the default in the design plans prepared by the designer and nonetheless did not warn the client thereof, acting with gross negligence, then he would be deemed to be fully liable for the resulting damage. The same would apply in case the builder had recognised the default, but had not warned the client immediately about it. Namely, in such circumstances the court did not see the default in the plans as the client’s fault. When would the professional party be found fully liable then in practice without having a possibility to use the defence of contributory negligence?

In the case of 30 March 1995 (described in one of the previous chapters) the builder was found liable for not warning the client, but he tried to defend himself by saying he should not be held fully liable for the default in the construction due to the fact that the construction plans had been negligently prepared by the designer employed by the client. This default should be, according to the builder, attributed to the client. OLG Hamm stressed, however, that the construction plans given to the builder were so obviously negligently made that it should have been obvious to the builder that they did not correspond with the technological requirements of a proper construction. It was stated that if the builder was positively aware of the faults in the construction plans and at the same time refrained from warning his client of these faults and followed these plans to the letter, he should be fully liable for the resulting damage. The court decided that if in that case the builder would be released from part of his liability due to the fact that the client was to be held responsible for the designer’s defective plans, such solution would be inconsistent with the rule of good faith. Therefore, the defence of contributory negligence might be limited by the rule of good faith.

In the case of 12 November 1999, the builder tried to defend himself claiming that it was not only his own, but also the client’s obligation to inspect the work performed by the builder’s sub-contractor and that if the client also neglected to perform such inspection, the builder’s liability should be diminished. However, OLG Düsseldorf stressed that the builder had a contractual obligation to inspect the work of his sub-contractor and to warn the client of any defects therein. He showed gross negligence by forfeiting to perform these contractual duties, as it was undisputable that the builder neglected to perform the inspection and did not issue any warning to
the client – not even an oral one. The court concluded that if the builder acted with such gross negligence it would obstruct the rule of good faith to allow him to benefit from the defence of contributory negligence (the existing doctrinal interpretation was cited 699).

In the case of 18 January 2007 OLG Brandenburg 700 reiterated the view that if it is proven that the builder had actual knowledge of the default and negligently did not warn the client about that, the builder could be held fully liable. The OLG Brandenburg decided over a case where the builder built a cellar in accordance with the designer’s instructions. The design plans turned out to be faulty, however, and the cellar was not waterproof. The liability of the builder encompassed, according to the court, also the builder’s liability for not having warned the client about the designer’s mistake. The default in the design plans should have been clearly visible to the builder. However, since it had not been proven that the builder actually knew of the default and proceeded with the construction without having warned the client of a default he knew about, his liability for not having warned the client was limited. The limitation of the builder’s liability for the breach of his duty to warn was also a result of the client not sufficiently protecting his own interests. The client should have had certain doubts in the given case, according to the court, and it was his duty to ask the builder additional questions as to the risk associated with the construction.

As the last case shows, in practice in most cases the professional party’s liability is diminished on the basis of the contributory negligence defence.

In the OLG Köln’s judgment of 22 December 1993 701 (already described in the chapter on the scope of the builder’s duty to warn) the client employed a number of builders directly to renovate his balcony. It turned out that although each of the builders diligently performed his contractual obligations, their performances were not compliant and the construction was at fault. The OLG Köln found that builders had the duty to warn the client thereof upon seeing the construction plans. In the judgment it has, however, been noticed that the BGH 702 previously stated that in case the client decided to entrust the construction to laymen without securing the preparation of construction plans by the designer, any damage that would be caused on those grounds would also be attributable to the client. As a result, the builder’s liability was diminished due to the own fault of the client in that particular case.

In a case decided by the OLG Hamm on 18 July 2002 703 the builder’s liability has also been diminished on similar grounds. In that case builders employed by the client to construct the indoor tennis centre were found liable for not warning him that the material he planned for them to use was inappropriate for that construction. However, the court diminished their liability by half on the ground that half of the fault could be attributed to the client. Namely, it was the client who made the decision to use the wrong material – without even asking for an advice of his designer. The court decided that such a material change should not have been made without having consulted first with the designer or another specialist from the field of application of this new material, which meant that the client attributed to the resulting default.

700 OLG Brandenburg, 18.01.2007, 12 U 120/06, IBR 2007, 1208
703 OLG Hamm, 18.07.2002, 21 U 82/01, BauR 2003, 1, p. 101
Also, in the previously discussed case of 16 December 2003\textsuperscript{704} OLG Düsseldorf decided to diminish the liability of the designer. The warning given by the designer in that case had not been considered as sufficient. It did not clearly indicate to the client that he should wait with making a decision to take out a certain loan for the construction and with purchasing grounds for it until the designer would finish estimating the total construction costs. However, even though the warning had been seen as insufficient since it did not convey all the risks, the client still decided to go against the risks that had been implied while he purchased the ground. Therefore, the client was seen as having taken upon himself some responsibility for that decision. This led the court to diminishing the designer’s liability.

In another similar case of 13 June 2002\textsuperscript{705} the OLG Karlsruhe has decided that the client attributed to the default in the plans and the builder’s liability should therefore be diminished. In that case the parties implemented the VOB/B-provisions to the contract concluded between them. Pursuant to them, the builder was obligated to warn the client that some water appeared in the cellar, which was being constructed. The builder as a professional company having a lot of experience with the construction of cellars should have been aware that the appearance of water made it impossible to proceed further with the construction pursuant to the plans that the builder was given at the beginning. The court this time had no doubt whatsoever that part of the fault was on the designer’s side and that the builder should not be held liable for the whole damage. Due to the fact that the designer acted as the client’s helper it was adjudicated that the damage should be partially attributed to the client; therefore, the builder’s liability was diminished\textsuperscript{706}.

In the case of 15 July 2010\textsuperscript{707} the designer employed by the client made a mistake in his design plans and the OLG Düsseldorf stated, just as in the above-mentioned cases, that in the relationship between the builder and the client it is the client who bears the final responsibility for the design, which means that the default could be attributed to him. However, the builder was also found as having breached his duty to warn in this case. The client took into account the designer’s fault and claimed only 50% of his damages from the builder. The court still decided to lower the amount of losses for which the builder should be liable to 1/3 of the client’s total loss\textsuperscript{708}. The court stated that the original reason for the client’s loss is the default of the designer and that in comparison with the designer’s mistake the builder’s fault is significantly smaller, therefore the court chose to lower the builder’s liability\textsuperscript{709}.

It is important to notice here that the builder may demand to have his liability diminished based on the defence of contributory negligence only when the default was made by another professional party whose actions could be attributed to the client. Not all professional parties employed by the client are seen as the client’s representatives for whose actions the client bears a certain responsibility. Whereas the

\textsuperscript{704} OLG Düsseldorf, 16.12.2003, 21 U 24/03, BauR 2004, 6, p. 1024
\textsuperscript{705} OLG Karlsruhe, 13.06.2002, 9 U 153/01, BauR 2003, 6, p. 917
\textsuperscript{707} OLG Düsseldorf, 15.07.2010, 5 U 25/09, IBR 2010, 675
\textsuperscript{708} The same percentage of liability was attributed to the builder not warning about the designer’s default in the case: OLG Karlsruhe, 17.03.2011, 13 U 86/10, (full text found on <<www.ibr-online.de>>), last correction: 23.06.2011 (full text found on <<www.ibr-online.de>>)
\textsuperscript{709} See also: G. Hein-Röder, ‘2/3 Planungsverschulden bei Ausschreibung ungeeigneten Baumaterials!’, last correction: 23.06.2011 (full text found on <<www.ibr-online.de>>)}
designer is usually seen as a representative of the client, this rarely is the case for other builders.

In the case of 14 March 2011\(^{710}\) the OLG Frankfurt considered a case in which the first builder incorrectly connected the house’s drainage pipes to the sewer, which led to the problems with the client’s cellar and further construction process. After the first builder had concluded his works, another builder continued with the construction process and he did not warn the client about the mistake of the first builder, even though it should have been visible to him. When the defect was discovered, the client claimed his losses from the first builder. That first builder tried to limit his liability by arguing that the client was negligent himself, i.e. the default could have been discovered earlier if the second builder had not breached his duty to warn. That breach of the duty to warn by the second builder should be attributed to the client, according to the first builder. The court decided, however, that the second builder could not be considered a representative of the client; therefore the client did not have to bear responsibility for his mistakes. In the commentary\(^{711}\) to this case it has been stressed that the same situation would apply if the client claimed his losses from the second builder for the breach of his duty to warn. In such a situation that second builder would also not be able to limit his liability by claiming contributory negligence of the client, due to the default being created by the first builder. Again, the first builder would not have been perceived as a representative of the client.

7.3.3. Dutch law.

In the paragraph on the causality it has been discussed who should be responsible for the damage that the client had suffered. In general, in Dutch law, it can be said that due to the lack of warning of the builder about the designer’s mistake it is the builder who is seen as having caused the whole damage. However, the fact that the original problem was the default in the design, for which – in the relation between client and builder – the client is responsible, may be taken into account when assessing the scope of the liability of the builder. The builder, while at first held fully liable to the client, might on the basis of the contributory negligence diminish his liability and be held only partially liable to the client. Whether the client then may hold his other contractual counterparts liable for the rest of the damage he had suffered remains a separate question here.

The applicable provision of the Dutch civil code, art. 6:101 Sec. 1 BW\(^{712}\), states that in case the damage has been caused in part by circumstances for which the injured party is accountable, the obligation to compensate should be adjusted in proportion to the measure of each party’s contribution to the emergence of the damage. However, the factual amount of compensation may be diminished or increased based on the “fairness” rule, e.g. due to the seriousness of each party’s

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\(^{710}\) OLG Frankfurt, 14.03.2011, 1 U 55/10, (full text found on <<www.ibr-online.de>>, last checked on 15.07.2011)

\(^{711}\) S. Bolz, ‘Mängelgewährleistung: Keine Haftung des Auftraggebers für Verschulden des Nachfolgeunternehmers’, last correction: 04.04.2011, (full text found on <<www.ibr-online.de>>)

\(^{712}\) ‘Wanneer de schade mede een gevolg is van een omstandigheid die aan de benadeelde kan worden toegerekend, wordt de vergoedingsplicht verminderd door de schade over de benadeelde en de vergoedingsplichtige te verdelen in evenredigheid met de mate waarin de aan ieder toe te rekenen omstandigheden tot de schade hebben bijgedragen, ten dien verstande dat een andere verdeling plaatsvindt of de vergoedingsplicht geheel vervalt of in stand blijft, indien de billijkheid dit wegens de uiteenlopende ernst van de gemaakte fouten of andere omstandigheden van het geval eist.’
default 713. Article 6:101 BW may be applied here if the damage is seen as resulting not only from the lack of warning given by the builder but also from the faulty design plans that have been delivered by the client. The client’s underlying mistake is being seen here as precluding full liability of the builder, since if the client had delivered proper design plans the builder would not have had anything to warn about and would not non-perform his duty to warn. However, the test for attributing part of responsibility for the damage to the client is a heavy one for the builder. According to the Court of Appeal Leeuwarden in the case of 9 February 2010 714 he has to prove not only that a certain action, or lack thereof, that the client might have taken, could have contributed to the increase of the loss to the client, but also that the client under given circumstances did not act as any other reasonable person would have acted. Moreover, in another case of 8 April 2009 715 the District Court Zutphen made it clear that the mere fact that the client employed another professional party as his advisor does not automatically mean that the client could be seen as responsible for the default on the basis of Article 6:101 BW. It is for the builder to prove e.g. that the advisor should have noticed the default.

Initially there was a bit of confusion in the doctrine when the court could apply the defence of the contributory negligence. For example, in the case of 25 March 1991 716, discussed in the previous paragraph, the court decided that although the client, upon the recommendation of the designer, commissioned the works too early in the construction process, the builder should have warned the client thereabout and not just perform his work upon the insistence of the designer. Therefore, due to the builder’s non-performance of his duty to warn, the court considered him fully liable for the client’s damage. In his commentary to the judgment, Thunnissen looked for a rationale behind the court’s judgment and explanation why the defence of contributory negligence had not been applied in this case. Thunnissen observed that the builder performed his tasks upon insistence and not upon instructions and directions from the designer, as defined in Paragraph 6 Sec. 2 of the UAV 717. If such instructions and directions were given to the builder, it would have put some responsibility for his work on the client in case of the default. However, the builder would still have had the duty to warn the client before starting his works. The difference lies therein, that in that case the builder would have a possibility to use the defence of the contributory negligence and have his liability diminished pursuant to the provision of Art. 6:101 BW 718. It seems that mere insistence to speed up work is not sufficient to claim ‘own fault’ of the client.

Further, in the commentary to the case of 14 October 1993 719 Thunnissen points out that the builder should only bear the full liability pursuant to Paragraph 6 Sec. 14 of the UAV if the provision of Art. 6:101 BW would not be applicable. In the given case, the design was faulty, so it could be said that the client partially

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713 So called ‘billijkheidscorrectie’ established on the basis of the second part of the Article 6:101 lid 1 BW where the possibility of a different division of liability is mentioned on the basis of fairness rules.
714 Hof Leeuwarden, 9.02.2010, 200.014.649/01, LJN: BN3873
715 Rechtbank Zutphen, 8.04.2009, 96912/HA ZA 08-1149, LJN: BJ5766
716 RvA 25.03.1991, nr. 70.014, BR 1993, p. 547 with casenote by H.O. Thunnissen
717 “De aannemer is verplicht het werk uit te voeren volgens de door de directie te verstrekken en de door haar goed te keuren tekeningen. Hij is verplicht de orders en aanwijzingen op te volgen, die hem door de directie worden gegeven.”
718 The possibility of having the builder’s liability diminished due to contributory negligence of the client will be discussed in the following paragraph.
719 RvA 14.10.1993, nr. 15.272, BR 1994, p. 784 with casenote by H.O. Thunnissen
contributed in the default and that the builder’s liability should be diminished. Only if the builder would act with gross negligence or other circumstances of the case would justify it, should he be fully liable for the damage, Thunnissen argued. This would, for instance, be the case when the builder would be a specialist in the field within which the default was made and the designer for that reason would have no supervision duties during the construction. The court did not mention any special circumstances in this judgment that would lead us to conclude that the builder should be held fully liable for the client’s damage. Still the court followed a line of reasoning based on the fact that if the duty to warn had been duly performed by the builder, the original default made by the designer could have probably been corrected and the construction would have been flawless. This allowed the arbitral court to find the builder fully liable in this case disregarding the possibility for application of the defence of contributory negligence.

In the last years the possibility for application of the defence of contributory negligence has been more commonly argued for both in case law (though not all cases concerned the construction sector) and in the Dutch literature. It has also been accepted by the Dutch Supreme Court in the case KPI/Leba, where the Supreme Court decided that while the builder should not be released from his duty to warn when the client had the necessary professional knowledge to recognise the default in construction himself, this circumstance could lead to diminishing of the builder’s liability for the non-performance of his duty to warn.

The RvA in the case of 3 March 2006 adopted a similar line of reasoning. In that case, while the court had recognised the builder’s duty to warn, it held the builder liable for 30% of the resulting damage, in accordance also with the claim of the client. The default in the construction was clearly seen as an obvious design default for which the client was responsible. However, due to the obviousness of the default, the builder was held to have had the duty to warn towards the client and for the breach thereof he was held to be liable. The full liability of the builder had been diminished in this case due to the client’s own fault. In the end, the builder was held to be liable for a certain percentage of the damage only.

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720 The possibility of having the builder’s liability diminished due to contributory negligence of the client will be discussed in the following paragraph.
722 HR 18.09.1998, NJ 1998, 818 (KPI/Leba). This case relates to the production of movable goods, but this does not seem relevant for the decision of the Hoge Raad.
723 RvA 03.03.2006, nr. 25.856, BR 2007, p. 255
In the case of 18 May 2011 the RvA found that the builder had a duty to warn the client about the possibility that connecting a so-called warm roof with a cold roof openly could lead to a risk of condensation and problems with gathering of moisture. The builder was deemed to be competent enough to have been aware of this risk. Since the builder did not give a warning to the client about this default in the design of the construction, he was seen as having breached his duty to warn the client. However, due to the presence and competence of the client’s advisor the RvA decided to limit the builder’s liability to 60% of the client’s loss based on the client’s contributory negligence. The advisor had planned this way of constructing the roof and therefore had contributed to the loss of the client. Since the client is responsible for the advisors that he employs, this advisor’s fault is attributable to the client and therefore the arbitration court may use the instrument of contributory negligence.

The same reasoning applies in a situation when the sub-contractor failed to warn the builder of a default that the builder had made. In this case the position of the builder is comparable to a position of a client who has some knowledge on the construction. For example, in the RvA-case of 7 May 2010 the sub-contractor did not warn the builder about the necessity to apply fluid-containment foil in the construction and was held liable for the breach of his duty to warn by the RvA. However, his liability was diminished by 50% due to ‘own mistake’ of the builder, who was seen as having enough competence that he should have recognised the risk himself.

7.4. Comparison.

The first part of this chapter concerned the matters of causality. The research question that was answered in this part was as to the presence of the causal link between the lack of warning by a professional party in respect of the defect of another professional party involved in the construction process.

In English law it is often difficult to estimate who exactly should be held responsible for the default in the construction, since there is no established case law on a breach of the duty to warn. It seems, however, that as long as the damage could have been caused by the breach of either contractual or tortious obligations of more than one professional party, these professional parties could be seen by the client as concurrently liable.

German law recognised the causal link between the client’s damage and the breach of the contractual obligations of both professional parties involved in the construction: the one that made the original mistake and the other one who did not warn about it. German courts clearly pointed out also that the burden of proof that there was a duty to warn lies with the client. It is the client who needs to prove that a professional party knew or should have known about the risk coming from a third party. The burden of proof that the duty to warn has been fulfilled or that there was no causal link between a lack of warning and the damage lies on a professional party who had the duty to warn.

In the Netherlands it has been made clear that the professional party who breached his duty to warn is liable for the client’s damage. However, it is less certain whether the causal link between the damage and the breach of the duty to warn means

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724 RvA 18.05.2011, nr. 32.198, <<http://www.raadvanarbitrage.info/default.aspx>> (lastly checked on 15 July 2011)

that there is no causality between the original default and the damage. In most case law, it is the professional party who breached his duty to warn that is being held liable in full for the damage. It has been still argued in the doctrine that this should not preclude the possibility of the other professional party being held liable for the mistake he had made in the construction process. The claiming of damages from the party who breached his duty to warn have been made easier since the Dutch courts started applying the so-called ‘omkeringsregel’ on the basis of which it is for the professional party to raise doubts as to the legal presumption for the time being that there is a causal link between his non-performance of the duty to warn (that may be seen as a safety obligation intended to prevent certain material risks from occurring) and the damage.

As long as the substantive rules on the duty to warn allow for its recognition in England, the liability rules are as clear as in Germany: the consumer may claim damages either from the party who breached its duty to warn about a default of another professional party or directly from that professional party who created the defective product. Dutch law offers in this respect less legal certainty to the consumer, since it is sometimes questioned whether the consumer would be able to claim his losses from the party who caused a default.

Upon having an answer who might be seen as having caused the damage to the client and from whom the client might claim damages it was considered whether the client has to claim his damages from all professional parties that together caused his loss or whether he may claim the total loss from one of these professional parties.

English law has made it easy for the client to claim full damages since not only is the client able to sue more than one person but also the defendants in the proceedings may involve other professional parties in them, who they think should bear part of the liability for the damage. The most important trait in English law as to liability for non-performance or negligent performance of a duty to warn, is that is has been recognised both in contract and in tort. This has made it easier for the client to sue all parties of the construction process, regardless of whether he had concluded contracts with them all or not. Although in theory it seems that English system recognises solidary liability of professional parties who contributed to the damage, in practice the English courts apportion the damages between the parties in the proceedings. That might be the effect of the difficulty to make a recourse claim for a professional party who reimbursed the consumer’s losses in full, since the damage to that professional party would be purely economical, and therefore difficult to claim under English tort law.

In German law, a professional party who breaches his duty to warn about a risk coming from a third party, in general, is solidary liable for losses with that party. This means that the client might choose which professional party he will hold liable. However, the client may claim damages only from the professional party he decides to sue. This professional party will need to pay damages in full and may later seek recourse on the other professional party that contributed to the damage, as well.

Dutch law provides for the full liability of the professional party who breached his duty to warn. In practice it seems that this would be a sole liability of that professional party. The idea behind this theory is that the non-performance by the client of his obligation to deliver proper design plans does not influence in any way the builder’s performance of his duty to warn. The breach of the duty to warn is seen then as a direct cause of the losses of the client. However, in the doctrine it has been argued in favour of holding all professional parties who could have contributed to the
damage liable in the court proceedings. There have been a few recent cases in which
the liability between the professional parties had been apportioned.

From all three systems analysed, Germany has the clearest rules on the
liability of the professional parties for their breach of the duty to warn. In the
Netherlands there seems to be a difference between the judgments of the regular
courts and those of the arbitral courts on whether the builder could bear the full
liability for the breach of the duty to warn. In England, the consumer enjoys less legal
certainty due to the mixed liability system that is being applied to breach of the duty
to warn, i.e. in contract and in tort law. This may lead to the consumer not being
certain as to what requirements need to be fulfilled for a success of his claim.

Finally, this chapter focused on the possibility of the professional party who
breached his obligation to warn the client to use a defence of contributory negligence,
thereby limiting the scope of his liability.

There have been doubts raised in English law whether the contributory
negligence defence could be applied to the contractual breach of the duty to warn
since it has not been applied at common law. In practice, however, despite theoretical
debates on that matter, this form of defence is sometimes being applied by English
courts to such cases. If the defence of contributory negligence would not be available
to a professional party by a contractual breach of the duty to warn, this would mean
that the client could claim his damages in full from that party. It should be noted that
making the application of the defence possible to the professional party seems to be
more in accordance with other European legal systems.

German law knows a legal construction similar to the English defence of
contributory negligence when a defendant, a professional party who failed to warn the
client, demands he should not be held liable or that he would be held liable for part of
damages only. This defence might be used when the client also contributed to the
improper construction. This applies not only when it is directly the client who is co-
responsible for the default, but also other specialists employed by the client, e.g. the
designer. However, even if the appearance of the default might be attributed to the
client or his representatives, the builder might still remain to be fully liable for the
losses of the client when he actually recognised the default, but had not warned the
client about it or not immediately. The gross negligence of the builder’s actions
prevails in this scenario over the fact that the default had been invoked by the client’s
or client’s representatives’ actions. The builder may not use the defence of
contributory negligence to diminish his liability, if it were contrary to the ‘good faith’
rule.

The provisions of the Dutch Civil Code clearly define that in case the damage
to the client has been caused partially by circumstances that he is responsible for, the
amount of damages should be proportionally adjusted. Dutch law clearly recognises
the possibility for the professional party to make use of the defence of contributory
negligence. The fact that the client was more experienced or had more knowledge as
to the area in which the default appeared might lead to diminishing the builder’s
liability (as has been mentioned in the chapter on the scope of the builder’s duty to
warn). In general, the amount of damages to be paid by the party infringing its duty to
warn would then depend on all circumstances of the case and on the ‘fairness’ rule,
just like in German law.

In general, all three legal systems provide for the possibility of diminishing of
the builder’s liability in case the client could be found co-responsible for the default,
e.g. due to the default originating in the design plans. When a duty to warn is
recognised in England, English law is least likely to accept the defence in case of a contractual breach of a duty to warn, which puts the English consumer in a better position as far as recovering the full amount of his losses is concerned. In German and Dutch law the application of this defence might be excluded in case it would infringe the ‘good faith’ rule. Despite the fact that the English consumer may benefit from the non-application of the defence of contributory negligence in certain cases, German and Dutch laws create more legal certainty for the consumer since the consumer may be sure what rules and what standards will be applied to determine whether the client was partially responsible for the default. In England it is still debated from case to case whether the defence of contributory negligence could be applied in cases of breach of a duty implied in common law.

The liability for breach of the precontractual duty to warn has been elaborated on less extensively in German law. However, it has been mentioned that the damages for breach of the precontractual duty to warn might need to restore the client to the position that he would have been into if the agreement had not been concluded as a result of the warning having been given. Still, in most cases the liability for the breach of the precontractual duty to warn would be assessed as if a contractual duty to warn had been breached, since in case the contract was concluded between the parties there would have been specific and clear contractual obligations to warn that would have been also infringed and the contractual liability is more clearly regulated in German law and more easy to rely on by the client.

As far as the breach of the precontractual duty to warn in Dutch law is concerned, the rules on approportionment of damages apply, as well. The full liability of the builder had been argued in these cases only when the builder had an actual knowledge of the default prior to conclusion of the contract. This seems to extensively limit the liability for the breach of the precontractual duty to warn, since already the scope of the duty to warn in the precontractual phase is limited to warning about obvious mistakes only.

8.1. Introduction.

For many years now the process of Europeanization of private law has been encouraged and finally financed by the institutions of the European Union. The process progresses gradually. On the way to create a European Civil Code (hereinafter referred to as the ECC), specific areas of private law are being researched and examined by various research groups, consisting of academics but also practitioners. In 2005, the Study Group on a European Civil Code and the Acquis Group together undertook a commitment to prepare the Draft Common Frame of Reference for a European private law (hereafter referred to as the DCFR) in order to present it to the European Commission. This research was undertaken by the scholars in order to improve the process of Europeanization by presenting the common European principles for the specific parts of private law. In its Communication on European Contract Law of 2004, the European Commission made it clear that it expected the introduction of clear definitions, fundamental principles and model rules for a European contract law in order to enhance the quality and consistency of the existing European private law. The DCFR is an academic draft version of the (political) ‘Common Frame of Reference’ (hereinafter referred to as the CFR). The DCFR is not supposed to be political in nature. However, it might (or even should) serve as a basis for the political CFR that the European Commission is planning to draft. Before that happens, the DCFR is easily available to anyone who would like to acquaint himself with its content and as such is supposed to serve as a source of inspiration for legislators and courts, as their ‘toolbox’.

There is a close relation between the DCFR, the Principles of European Contract Law (hereinafter referred to as the PECL), which provides general rules of

contract law, and the Principles of European Law on Service Contracts (hereinafter referred to as the PELSC). Any of these three systems may only be applied to the contract in case both parties agreed on its applicability. The so-called Lando Commission prepared the PECL. The PECL constitutes a general frame applicable to all different types of contracts, regardless of their object or the status of the parties, and as a result is of a rather abstract nature. However, it offers a valid point of reference for the interpretation and development of the legal systems of European Union Member States. Since its publication the PECL, which is based on the comparative law, has obtained authority on the basis of its persuasive content. The PECL provisions apply to service contracts. However, they do not contain all the principles binding within this sector of civil law. This void was, at least to some extent, filled in by the PELSC, which apply specifically to service contracts. The PELSC, that takes the PECL as the underlying general contract law, constitutes a general framework of European service contract law, even if it was written upon research of a limited number of services. Its role is to provide contractual parties and the judiciary with a point of reference. Hence, the contractual parties should be free to apply any of the principles. Furthermore, legislators may take the principles into account by adjusting national law.

The DCFR contains many rules derived from the PECL, taking into account the critical notes on some of the PECL provisions brought forward after its publication as well as other legal developments. As far as the PELSC is concerned, its provisions have largely been taken over in the DCFR. The DCFR does not contain all provisions of the PELSC: some provisions were dealt with on a more general level, sometimes the DCFR deviates from the provisions of the PELSC and

sometimes it improves on these provisions\textsuperscript{741}. However, most of the provisions and principles are the same in the PELSC and in the DCFR\textsuperscript{742}. Below, I will focus on the provisions of the DCFR and will pay attention to the PELSC only where this may provide better insight in the interpretation of the corresponding provisions of the DCFR\textsuperscript{743}.

The DCFR consists of ten books and an annex with definitions\textsuperscript{744}. Each book is devoted to a part of European private law. Some books are of a more general nature (e.g. Book I contains general provisions), others deal with specific subjects (e.g. Book IV on specific contracts). The scope of the DCFR has not been limited to the European contractual principles and provisions, since e.g. Book VI deals with tort law, whereas Books VIII-X deal with various subjects pertaining to property law\textsuperscript{745}.

As it has been mentioned, Book IV of the DCFR is devoted to specific contracts and the rights and obligations arising from them. Part C of this Book concerns services and Chapter 3 of this Part lays down the rules applicable specifically to construction contracts\textsuperscript{746}. Article IV.C.-3:101 para. (1) of the DCFR defines construction contracts as:

“(...) contracts under which one party, the constructor, undertakes to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client.”

The definition of the construction contract in the DCFR, at first sight, seems to apply only to the traditional construction contracts where the building and designing tasks are held separate\textsuperscript{747}. However, the DCFR has regard to more modern types of contracts, and therefore, it encompasses within its scope of application also such construction contracts where the builder takes upon himself obligations of the

\textsuperscript{743} Given the strong relation between the PELSC and the DCFR it will not come as a surprise that some of the literature mentioned in this chapter as applicable to the interpretation of the DCFR has in fact been written and published as an interpretation of the provisions of the PELSC
\textsuperscript{746} Article 2:101 of the PELSC includes construction contracts within the scope of application of the PELSC using a similar definition; more on the definition of construction contracts in the PELSC and the DCFR: B. Kohl, ‘European Construction Law and the Draft Common Frame of Reference: Selected Topics’, European Review of Private Law, 4-2009, p. 676-677
designer. Article IV.C.-3:101 para. (2b) DCFR states that the provisions of the DCFR should also apply to design-build contracts:

“It applies with appropriate adaptations to contracts under which the constructor undertakes to construct a building or other immovable structure, to materially alter an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor”.

This extension of the construction contract’s definition makes the provisions of the DCFR applicable not only to the building of a new object but also to the renovation and restoration works of existing objects, as long as the changes to the existing structure are ‘material’. This is an important part of this definition since to less important renovation works, where the changes to the building structure will not be as significant, other provisions of the DCFR would apply, namely the provisions on processing services from Chapter 4 of Book IV.C DCFR.

Moreover, as we can see, the provisions of the DCFR on construction contracts, as contained in Chapter 3, will apply only to contracts of the builders and the sub-contractors but not to the contracts of the designers. The design contract is, however, also regulated as a specific service contract, to which the general rights and obligations, as defined in Chapters 1 and 2 of Book IV Part C, apply. Chapter 6 of Book IV Part C regulates specifically design contracts. The design contracts, pursuant to Article IV.C.-6:101 (1) of the DCFR are:

“(…) contracts under which one party, the designer, undertakes to design for another party, the client:
(a) an immovable structure which is to be constructed by or on behalf of the client; (…)”

Therefore, the general Chapter 1 and 2 of Book IV Part C of the DCFR apply to all the contracts concluded within the construction sector, but Chapter 3 will be additionally used for the builders’ and the subcontractors’ contracts and Chapter 6 for the designers’ contracts.

8.2. Overview of the general provisions of the DCFR applicable to the duty to warn.

As it has been mentioned in the introduction, Book IV.C of the DCFR starts with Chapters 1 and 2, which are of a more general nature and apply to each and
every contract on provision of services. This means that rules of these two chapters also apply to contracts of the builders, the sub-contractors and the designers. It is in Chapter 2 where the draftsmen of the DCFR decided to place the articles on the duty to warn. There are two separate articles in this chapter concerning the duty to warn: Article IV.C.-2:102 DCFR defines the pre-contractual duties to warn while Article IV.C.-2:108 DCFR deals with the contractual obligation of the service provider to warn.

Additionally, there are various general obligations for the service providers that have been defined in the Chapter 2, which might be of relevance when the service provider is performing his duty to warn, e.g. for defining the scope of the duty to warn. Article IV.C.-2:103 DCFR defines the obligation to co-operate. In its paragraph 1 (e), it obliges the parties to co-ordinate their respective efforts in so far as this may reasonably be considered necessary to perform their respective obligations under the contract. Article IV.C.-2:105 DCFR requires the service provider to perform the service with the care and skill, which a reasonable service provider would exercise under the circumstances. Article IV.C.-2:106 DCFR indicates when a service provider is under an obligation to achieve a particular result. This is the case when the client has stated such a specific result or could reasonably have envisaged such a result at the time of the conclusion of the contract, and the service provider did not indicate otherwise. Article IV.C.-2:109 DCFR allows both the client and the service provider to unilaterally change the service to be provided, if such a change is reasonable. This is, for instance, the case when the change is a reasonable response to a warning from the service provider.

The general regulation of Chapter 2 of Book IV.C DCFR regarding the source and the scope of the duty to warn may be influenced by the specific regulation of Chapters 3 and 6. In this respect, one should point to Article IV.C.-3:104 para. (2) DCFR on the conformity of the structure that is to be constructed by the builder. This provision influences the scope of the builder’s or the sub-contractor’s duty to warn and their liability if they breach this duty. Chapter 6 introduces a separate article on the pre-contractual duty to warn of the designer (Article IV.C.-6:102 DCFR), defines the designer’s obligation of skill and care (Article IV.C.-6:103 DCFR), and specifies when the design is in conformity with the contract (Article IV.C.-6:104 DCFR).

750 This provision has been taken over with slight modifications from Article 1:103 PELSC.
751 This provision has been taken over with slight modifications from Article 1:110 PELSC.
752 Compare Article 1:104 PELSC.
753 Compare Article 1:107 PELSC.
754 Compare Article 1:108 PELSC.
755 Compare Article 1:111 PELSC.
756 More on this subject may be found in: B. Kohl, ‘European Construction Law and the Draft Common Frame of Reference: Selected Topics’, European Review of Private Law, 4-2009, p. 677-682
757 Compare Article 2:104 PELSC.
758 Compare Article 5:102 PELSC.
759 Compare Article 5:104 PELSC.
760 Compare Article 5:105 PELSC.
Finally, it is important to remember that the duty to warn has its basis in good faith and therefore also the provision on good faith and fair dealing could be applicable (Article III.-1:103 DCFR\textsuperscript{761}).

It is clear, that it is not sufficient to just look at the provisions on the duty to warn encompassed in Book IV.C, Chapter 2 of the DCFR, since the specific provisions of Chapters 3 and 6, as well as provisions such as Article IV.C.-2:106 DCFR, may change the scope of the professional party’s duty to warn. In the following section firstly attention will be given to the general duty to warn, then to specific provisions of the DCFR regulating the builder’s and the subcontractor’s duty to warn, finally to the specifics of the duty to warn of the designer. The last paragraphs will deal with the requirements of the effectiveness of the warnings that may have been expressed in the DCFR and the liability for breach of the duty to warn.

8.3. The general duty to warn of service providers.

8.3.1. Contractual obligation of the service provider to warn.

The contractual obligation of the service provider to warn is regulated in the Article IV.C.-2:108\textsuperscript{762} DCFR, which reads as follows:

(1) The service provider must warn the client if the service provider becomes aware of a risk that the service requested:

\textsuperscript{761} Compare Article 1:107 PELSC and Article 1:201 PECL.
\textsuperscript{762} An almost identical provision has been included in the PELSC in Article 1:110, in: M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), Principles of European Law. Service Contracts (PEL SC), München: Sellier European Law Publishers, 2007:

“(1) The service provider is under a duty to warn the client if the service provider becomes aware or if the service provider has reason to know that the service requested:
may not achieve the result stated or envisaged by the client at the time of conclusion of the contract, or
may damage other interests of the client, or
may become more expensive or take more time than agreed upon in the contract, either as a result of following information or directions given by the client or collected in accordance with Article 105, or as a result of the occurrence of any other risk.
(2) The service provider must take reasonable measures to ensure that the client understands the content of the warning.
(3) The duty to warn in paragraph (1) does not apply if the client: already knows of the risks referred to in paragraph (1)(a), (b), or (c); or has reason to know of the risks.
(4) If an event referred to in paragraph (1) occurs and the client was not duly warned, the client need not accept a change of the service under Article 111.
(5) For the purpose of paragraph (1), the service provider has ‘reason to know’ if the risks would be obvious to a comparable service provider in the same situation as this service provider from all the facts and circumstances known to the service provider without investigation.
(6) For the purpose of paragraph (3)(b), the client has ‘reason to know’ if the risks would be obvious to a comparable client in the same situation as this client from all the facts and circumstances known to the client. The client is not treated as knowing of a risk, or having reason to know of it, merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case Article 1:305 PECL (Imputed Knowledge and Intention) applies.”
(a) may not achieve the result stated or envisaged by the client at the
time of conclusion of the contract;
(b) may damage other interests of the client; or
(c) may become more expensive or take more time than agreed on in
the contract either as a result of following information or directions
given by the client or collected in preparation for performance, or as a
result of the occurrence of any other risk.

(2) The service provider must take reasonable measures to ensure that the
client understands the content of the warning.

(3) The obligation to warn in paragraph (1) does not apply if the client:
(a) already knows of the risks referred to in paragraph (1); or
(b) could reasonably be expected to know of them.

(4) If a risk referred to in paragraph (1) materialises and the service
provider did not perform the obligation to warn the client of it, a notice
of variation by the service provider under IV. C. – 2:109 (Unilateral
variation of the service contract) based on the materialisation of that
risk is without effect.

(5) For the purpose of paragraph (1), the service provider is presumed to be
aware of the risks mentioned if they should be obvious from all the
facts and circumstances known to the service provider without
investigation.

(6) For the purpose of paragraph (3)(b), the client cannot reasonably be
expected to know of a risk merely because the client was competent, or
was advised by others who were competent, in the relevant field, unless
such other person acted as the agent of the client, in which case II. –
1:105 (Imputed knowledge etc.) applies.\footnote{In the Notes to this Article the list of countries is given which recognise the duty to warn, including the three legal systems that had been analysed in this book: C. von Bar, E. Clive (eds.), \textit{Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)}, \textit{Full Edition}, München: Sellier European Law Publishers, 2009, Volume II, Notes, p. 1673-1676}{763}

The contractual obligation of the service provider to warn is drafted in a similar
warn the client whenever he becomes aware of a risk that the service requested may
that result has been defined at the moment of the conclusion of the contract. Of
course, if the parties agree to change the contract during its performance or if the
a different construction result, such a change might lead to the extension of the scope
of the builder’s duty to warn since the builder will need to warn if an event occurs that
would endanger achieving that new construction result. The service provider also needs to warn the client when he becomes aware of a risk that may damage other interests of the client. Finally, the service provider needs to warn the client when he becomes aware of a risk that the service may become more expensive or take more time than agreed in the contract (if need be: as amended by a later change in the construction process).

It has explicitly been added to Article IV.C.-2:108 para. (1) DCFR that the service provider’s duty to warn is not limited to warning the client about a risk that might come about as a result of following information or directions of the client, or faulty information that the service provider himself had collected, but also as a result of the occurrence of any other risk. This suggests that the service provider has also a duty to warn about a risk coming from a third party even though this has not been clearly expressed in the comments to the DCFR. However, support for this suggestion may be found in the comments to the PELSC. In the General Comments to Chapter 2 (Construction), the draftsmen of the PELSC list as one of the basic principles of liability for construction contracts that when one party, e.g. a builder, observes choices of the other party which bring about a risk to the construction, he has to warn the other party. The Comment continues:

‘This is, for instance, reflected in the constructor’s duty to warn against obvious mistakes in the design supplied by the client or his architect’ (emphasis added, JL).

Article IV.C.-2:108 para. (5) DCFR states that the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider without investigation. Contrary to the pre-contractual duty to warn, in this provision there is no specification of a service provider’s duty to carefully examine the information and documents given to the service provider by the client. This makes the scope of the contractual duty to warn broader than the scope of the precontractual duty to warn. The Article states instead that the service provider needs to warn only about such defaults that he saw or should have seen without investigation. This distinction in the wording of the provision is justified, since the service provider who has been employed is more likely to discover defaults during performance of his work, e.g. by acquiring additional information during performance of the contract or by seeing the construction from

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another (more practical) perspective. Since the service provider will only have to warn about the risks that he had discovered or should have discovered this does not impose any extra costs on the service provider. In the pre-contractual stage, a service provider has less incentive and fewer possibilities to discover any defaults aside the ones that may be obvious upon analysing the information and documents delivered by the client and therefore, his duty to be diligent are limited to that examination.

A service provider in the contractual stage has to be simply attentive, or as it has been expressed in the comments to the PELSC – ‘normally attentive’, to anything that might raise his doubts. There is a following example given in the PELSC to illustrate the standard of the duty to warn, which could apply to a situation when the builder needs to warn the client about a mistake of the designer:

“During the construction of a house, the constructor discovers that a technique for fitting in the bathroom windows will lead to difficulties because the tiles preferred by the client have such dimensions that the result will be very awkward. The technique is fine for walls without tiles, but less appropriate for tiled walls. The constructor will have to warn the client.”

What about the scope of the contractual obligation to warn? A service provider does not have to warn the client if the client already knows of the risks involved or could reasonably be expected to know of them pursuant to Article IV.C.-2:108 para. (3) DCFR. There is an exception from this limitation of the scope of the contractual obligation to warn, which can be read in Article IV.C.-2:108 para. (6) DCFR: the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client. Therefore, the competence and experience of the client does not automatically release a service provider of his duty to warn.

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776 The reasoning for adopting this approach is the same as with the pre-contractual duty to warn, which will be further discussed in the following paragraph. C. von Bar, E. Clive (eds.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition, München: Sellier European Law Publishers, 2009, Volume II, Comment C, p. 1671
The draftsmen of the DCFR made this Article a default rule. This means that the contractual parties could decide not to apply this provision to their contract. However, since the duty to warn has its roots in the good faith principle it cannot be too quickly assumed that a client decided to renounce his protection and agreed with the service provider that the latter one will be released of his duty to warn. The principle of good faith and fair dealing has also been regulated in the DCFR in Article III.-1:103 DCFR, which may not be excluded or restricted by contract:\footnote{C. von Bar, E. Clive (eds.), \textit{Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition}, München: Sellier European Law Publishers, 2009, Volume II, Comment C, p. 1672}

\begin{quote}
“(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.

(2) The duty may not be excluded or limited by contract or other juridical act.

(3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.”
\end{quote}

Article III.-1:103 para. (2) DCFR clearly states that the good faith rule is intended to be mandatory\footnote{C. von Bar, E. Clive (eds.), \textit{Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition}, Oxford: Oxford University Press, 2010, Volume I, Comment D, p. 677}. The problem with reliance directly on this Article instead of on the Article regulating the duty to warn is that Article III.-1:103 para. (3) DCFR excludes the possibility of directly claiming a remedy for non-performance of the obligation to act in accordance with good faith and fair dealing\footnote{This approach has been criticized in the literature, e.g. by M. W. Hesselink, \textit{CFR & Social Justice}, München: Sellier European Law Publishers, 2008, p. 50-52; O. Lando, ‘The Structure and The Legal Values of the Common Frame of Reference’, ERCL, Vol. 3, Issue 3, 2007, p. 252-253; G. Vettori, ‘The interpretation according to human rights, fundamental freedoms and constitutional laws (art. 1:102 DCFR)’, in: H-W. Micklitz, F. Cafaggi (eds.), \textit{European Private Law after the Common Frame of Reference}, Cheltenham: Edward Elgar, 2010, p. 27-28}. In case the parties have not contractually excluded application of the obligation to warn, the client will be able to demand remedies for breach by the service provider of this obligation. When only Article III.-1:103 DCFR will be applicable to the contract and not Article IV.C.-2:108 DCFR, the client might only block the service provider from relying on a right, remedy or defence that he would normally have but may not demand compensation for his damage\footnote{C. von Bar, E. Clive (eds.), \textit{Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition}, Oxford: Oxford University Press, 2010, Volume I, p. 678}. 

\addcontentsline{toc}{section}{References}
8.3.2. Pre-contractual duties to warn.

The general duty to warn of the service provider is specified in Chapter 2 of Book IV Part C of the DCFR. Article IV.C.-2:102 DCFR defines the precontractual duty to warn as follows:

(1) The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware of a risk that the service requested:
(a) may not achieve the result stated or envisaged by the client;
(b) may damage other interests of the client; or
(c) may become more expensive or take more time than reasonably expected by the client.
(2) The duty to warn in paragraph (1) does not apply if the client:
(a) already knows of the risks referred to in paragraph (1); or
(b) could reasonably be expected to know of them.
(3) If a risk referred to in paragraph (1) materialises and the service provider was in breach of the duty to warn of it, a subsequent change of the service by the service provider under IV. C. – 2:109 (Unilateral


‘(1) The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware or if the service provider has reason to know that the service requested:
(a) may not achieve the result stated or envisaged by the client, or
(b) may damage other interests of the client, or
(c) may become more expensive or take more time than reasonably expected by the client.
(2) The duty to warn in paragraph (1) does not apply if the client:
(a) already knows of the risks referred to in subparagraph (1)(a), (b), or (c); or
(b) has reason to know of the risks.
(3) If an event referred to in paragraph (1) occurs and the client was not duly warned:
(a) the client need not accept a change of the service under Article 1:111 unless the service provider proves that the client, if the client would have been duly warned, would have entered into a contract taking into account the event; and
(b) the client may recover damages in accordance with Article 4:117(2) and (3) PECL (Damages).
(4) The client is under a pre-contractual duty to warn the service provider if the client becomes aware, or if the client has reason to know of unusual facts that are likely to cause the service to become more expensive or take more time than expected by the service provider.
(5) If the facts referred to under paragraph (4) occur and the service provider was not duly warned, the service provider is entitled to:
(a) damages for the loss the service provider sustained as a consequence of the non-performance; and
(b) an adjustment of the time of performance that is required for the service.
(6) For the purpose of paragraph (1), the service provider has ‘reason to know’ if the risks would be obvious to a comparable service provider in the same situation as this service provider from all the facts and circumstances known to the service provider, considering the information that the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out.
(7) For the purpose of subparagraphs (2)(b) and (4), the client has ‘reason to know’ if the risks would be obvious to a comparable client in the same situation as this client from all the facts and circumstances known to the client without investigation. The client is not treated as knowing of a risk, or having reason to know of it, merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case Article 1:305 PECL (Imputed Knowledge and Intention) applies.’

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variation of the service contract) which is based on the materialisation of the risk is of no effect unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. This is without prejudice to any other remedies, including remedies for mistake, which the client may have.

4. The client is under a pre-contractual duty to warn the service provider if the client becomes aware of unusual facts which are likely to cause the service to become more expensive or time-consuming than expected by the service provider or to cause any danger to the service provider or others when performing the service.

5. If the facts referred to under paragraph (4) occur and the service provider was not duly warned, the service provider is entitled to:
   (a) damages for the loss the service provider sustained as a consequence of the failure to warn; and
   (b) an adjustment of the time allowed for performance of the service.

6. For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out.

7. For the purpose of paragraph (2)(b) the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case II. – 1:105 (Imputed knowledge etc.) applies.

8. For the purpose of paragraph (4), the client is presumed to be aware of the facts mentioned if they should be obvious from all the facts and circumstances known to the client without investigation.”

According to this provision the service provider has a pre-contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. This suggests that at any point before the contract is concluded, when the service provider becomes aware that another party endangers the construction result stated by the client, the service provider should warn the client about it. An illustration given in the comments to the PELSC makes the scope of this precontractual duty to warn more obvious:

“A constructor is requested to consider building an office building according to a design made by an architect on behalf of the client. Whilst studying the design, the constructor discovers that the steel construction of the roof may not be strong enough when made in accordance with the design. The constructor is to warn the client of this.”

Also, when prior to the conclusion of the contract the service provider realizes that the cost or performance time estimation made by another party is incorrect, he should warn the client about it. The draftsmen of the DCFR were of the opinion that prior to the conclusion of the contract the parties should have the duty to warn each other about typical risks that might occur after the conclusion of the contract when the service started to be performed.\textsuperscript{783}

When does the service provider have to warn the client? Pursuant to Article IV.C.-2:102 (6) DCFR, the service provider is presumed to be aware of the risks mentioned if they should be obvious from all facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out. In general, the service provider has to warn only about risks that he knew or reasonably could have known before the conclusion of the contract.\textsuperscript{784} The draftsmen of the DCFR aimed to stimulate the exchange of important information between the parties prior to the conclusion of the contract.\textsuperscript{785} This is why a certain amount of alertness on the side of the service provider is required to discover such risks, namely he is expected to check whether the construction that the client wants to have performed is feasible under the conditions that the client had specified. The draftsmen of the DCFR are clear that on the basis of this Article a service provider is not expected to make investigations and actively search for all potential risks to the client. However, careful examination of all available information, e.g. design plans, is expected from a service provider who needs to estimate the price of the offer he wants to make to the client. It is assumed that during such examination a service provider would be able to analyse the feasibility of the construction and discover certain risks.\textsuperscript{786} Whether the service provider should have been aware of the risk endangering the construction, and whether, therefore, he should have warned the client, will be estimated from a point of view of a constructor who had conducted such inquiries.\textsuperscript{787}

What is the scope of this duty to warn? Article IV.C.-2:102 para. (2) DCFR specifies that the duty to warn does not apply if the client already knows of the risks or could reasonably be expected to know of them. The knowledge of the client of the


risk excludes the duty to warn of the service provider pursuant to the DCFR\textsuperscript{788}. However, as Article IV.C.-2:102 para. (7) DCFR states, the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client. This means, that in general the competence of the client does not influence the scope of the duty to warn of the service provider, unless the service provider can prove that the client, as a competent party, actually knew of the risk. The idea behind this provision was to protect consumers and small business parties that are often advised for free by their friends and relatives\textsuperscript{789}. This provision tries to distinguish this situation with the one in which a client hires a professional advisor to act as his agent during the pre-contractual negotiations\textsuperscript{790}.

The comments to the DCFR and the PELSC do not provide an illustration of this provision that would be applicable to the construction sector. To make this provision more clear, imagine that the client lets one of his friends prepare a design for his house. With ready design plans in his hands the client then approaches a builder for price estimation. If the design contains an obvious fault, the builder will not be released of his duty to warn the client just because the design was prepared by a competent party that could be seen as an advisor of the client. However, if the client concludes an agency contract with his designer-friend and it is the designer that discusses the design plans with the builder on behalf of the client, telling the builder that he had already thoroughly discussed all the potential risks with his client, then the builder may be released of his duty to warn the client.

The draftsmen of the DCFR explained in the Comments\textsuperscript{791} they preferred to regulate the pre-contractual duty to warn in the DCFR since such

“duties are firmly embedded in the development of pre-contractual duties to inform, a development that has taken place and is still taking place in the jurisdictions investigated and in European private law”.

However, in the Notes\textsuperscript{792} to this Article reference is only made to general pre-contractual duties to inform and not to the pre-contractual duty to warn, specifically.


\textsuperscript{789} The notion of the consumer is strictly applied and there have been voices raised in the literature that not only private parties not acting in the performance of their business or profession should be covered by the protection granted by the consumer law provisions, but also small business parties. In general, the DCFR introduces a sharp distinction between the consumers and the businesses, which is seen by some as being unfair and inefficient. See e.g. M. W. Hesselink, \textit{ CFR & Social Justice}, München: Sellier European Law Publishers, 2008, p. 36-40; M. W. Hesselink, ‘The CFR and Social Justice’, in: A. Somma (ed.), \textit{The Politics of the Draft Common Frame of Reference}, Wolters Kluwer, 2009, p. 109; O. Lando, ‘Liberal, Social and ‘Ethical’ Justice in European Contract Law’, 43 CMLR, 2006, p. 829


Moreover, the draftsmen mention only a few Member States and point out to gaps in application of pre-contractual duties to inform in these countries. A question may be asked what the basis was to choosing for the regulation of the pre-contractual duty to warn as a preferred solution, then.

8.4. The builder’s and the sub-contractor’s duty to warn.

In Article IV.C.-3:104 (2) DCFR on conformity it has been stated:

“If the structure does not conform to the contract unless it is:
(a) fit for any particular purpose expressly or impliedly made known to the constructor at the time of the conclusion of the contract or at the time of any variation in accordance with IV.C.-2:109 pertaining to the issue in question; and
(b) fit for the particular purpose or purposes for which a structure of the same description would ordinarily be used.”

This means that, in general, the builder and the sub-contractor will have to deliver a perfect end-result to the client, and that they will not perform their contractual obligations if there is any default in the construction that hinders the construction from being fit for purpose. The builder or the sub-contractor might be released from the liability in case he warned the client about that risk, which has been defined in Article IV.C.-3:104 (3):

“If the client is not entitled to invoke a remedy for non-conformity if a direction provided by the client under IV.C.-2:107 is the cause of the non-conformity and the constructor performed the obligation to warn pursuant to IV.C.-2:108.”

The builder needs to deliver a product fit for purpose. However, the builder will be freed from liability if the default in the construction was beyond his control. The builder may, for example, prove that the default is caused by the decisions made by the client or other employees of the client, either contained in the contract or in subsequent directions. However, if these mistakes made by other parties where of such a nature that the builder should or could have been aware of them, he would have had the duty to warn about them. If the builder had an option to perform his duty to warn, that means that the builder was capable of preventing the risk from materializing, which means it was within his control to deliver a product fit for purpose and he should be held liable for any defaults within the construction.

In general, the construction has to be fit for the purpose for which other structures of the same description would be used. The client may be silent about the expectations he has as to the construction in so far as these expectation conform with the normal use thereof. In case the client has some specific expectations, e.g. specific purposes he wants the construction to be ready for, he needs to make these expectations known to the constructor; as of that moment the constructor will need to warn the client if that specific purpose might not be achieved due to a risk coming from a third party. The draftsmen of the PELSC give the example of the construction of a boat (to which contract in principle the same rules apply as to the contract for construction of a house):

“Before the conclusion of a contract regarding the construction of a boat, the client expresses his wish to use it frequently in the stormy seas surrounding the Shetland Islands. That purpose influences the quality requirements for the entire boat. At the stage where directions regarding the interior of the boat are given, however, the client informs the constructor that he wants a cupboard for storing precious wine. In this situation, the constructor must either build a cupboard fit for this purpose in stormy circumstances or, also depending on the contract, warn the client.”

Similarly, in the case of the construction of a house, the builder would have a duty to warn if the client informed both the builder and the designer of his wish to store precious wine in the building and the designer subsequently adjusts his design plans without sufficiently guaranteeing the safety of these wines.

The DCFR regulates specifically only the contractual duty to warn of the service provider towards his client, which means that it would regulate only the sub-contractor’s duty to warn the builder, and not the client directly. The sub-contractor’s duty to warn the client might fall under the tort provision of the DCFR. However, the tort provisions in the DCFR are very general as to their scope of their application. Pursuant to Article VI.-1:101 DCFR only a person who suffers “legally relevant damage” has a right to compensation from a person who caused that damage. The definition of legally relevant damage is given in Article VI.-2:101 and requires for

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797 See Article IV.C.-3:101 paragraph (2) DCFR and Article 2:101 paragraphs (2) and (3) PELSC.
799 “VI. – 1:101: Basic rule
(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.
(2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.”
800 “VI. – 2:101: Meaning of legally relevant damage
(1) Loss, whether economic or non-economic, or injury is legally relevant damage if:
(a) one of the following rules of this Chapter so provides;
(b) the loss or injury results from a violation of a right otherwise conferred by the law; or
the loss to either be specified in one of the other articles of the DCFR or for the loss to be the result from a violation of a right otherwise conferred by the law or from a violation of an interest worthy of legal protection. The loss that the client might suffer as a result of not being warned directly by the sub-contractor does not fall directly under the special cases mentioned in the articles of the DCFR, although if e.g. it results in a personal injury it could qualify under Article VI.-2:201 DCFR. However, the Sections 1(b) and 1(c) of Article VI.-2:101 DCFR introduce flexibility 801 to this rule and might mean that the sub-contractor could be liable for not warning the client about a risk to the construction even if there is no specific duty to warn in tort placed on him by the provisions of the DCFR.

8.5. The designer’s duty to warn.

As it has been mentioned in the introduction a designer is one of the service providers which means that the general provisions of Chapters 1 and 2 of Book IV.C DCFR apply to him. Therefore, a designer has also a duty to warn under provisions of the already discussed Article IV.C.-2:102 DCFR and Article IV.C.-2:108 DCFR802. However, the pre-contractual duty to warn of the designer has also been separately regulated in Chapter 6 on the designer contract. And so, pursuant to Article IV.C.-6:102 DCFR:

“The designer’s pre-contractual duty to warn requires in particular the designer to warn the client in so far as the designer lacks special expertise in specific problems which require the involvement of specialists.”

According to Article IV.C.-6:102 DCFR a designer will need to warn the client in case he knows that he is not qualified to fully assess certain risks. In this case the duty to warn is combined with the duty to advise since the designer should point out to the client the necessity of employing a specialist who would be able to give a proper assessment of the risk and solve his problem803. Therefore, in case the designer in pre-contractual negotiations is not sure as to the quality and precision of the performance of one of the other contractors or, for example, an engineering design, he should warn

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802 Discussed in the previous paragraphs.
the client that there is a potential risk there and that the client would be better off asking for an advice from an expert in the given field. The following illustration has been given in the DCFR:

“A designer recognises that special analysis of the soil is needed and that he is not able to carry out such analysis himself. Before the contract is concluded, the designer warns the client and recommends the employment of a geodesist.”

The designer would also need to warn the client about the need to employ a geodesist, when the client had already employed a builder to evaluate the construction grounds and the builder would not conduct all the soil examinations that the designer deems necessary.

This duty specifies the pre-contractual duty of any service provider to warn under Article IV.C.-2:102 DCFR, which means that all sections of this Article should be applied when interpreting the scope of Article IV.C.-6:102 DCFR. The reason behind adopting this provision was to enable the client to make an informed decision prior to the conclusion of the contract, also as to the specialists that he will have to employ.

8.6. Requirements for an effective warning.

8.6.1. What constitutes a proper warning?

Article IV.C.-2:108 para. (2) DCFR establishes that the service provider must take reasonable measures to ensure that the client understands the content of the warning. These measures have not been specified in the DCFR, since the draftsmen of the DCFR believed that it would depend on the circumstances of the case which measures could be considered as adequate, however, a certain amount of diligence is obviously required of a service provider. It seems that the draftsmen of the DCFR will not see the warning as effective unless the client understands it. The added
requirement of the effectiveness of warnings in the DCFR broadens the scope of the
duty to warn of the service provider, since it is not sufficient for him to just inform the
client of the risks, but he also needs to take other, reasonable measures to ensure that
the client understands the warning and is aware of the risk. Therefore, it might be
assumed that the warning has to be given in as plain language as possible and clearly
present to the client the risk involved with the warning not having been followed.
However, the draftsmen of the DCFR made no requirement as to the form of the
warning, which means that the written form of a warning is not a formal condition for
properly warning the client.

Another question concerned is: does the service provider need to warn the
client directly or is it sufficient for him to fulfill his duty to warn if he gives a warning
to a representative of the client? Pursuant to Article IV.C.-2:108 (3b) DCFR the
service provider is released of his duty to warn in case the client could reasonably be
expected to know of the risk. Article IV.C.-2:108 (6) DCFR specifies then that the
client could not reasonably be expected to know of a risk merely because other
professional parties advised the client, unless such a party acted as the agent of the
client. In such a situation the Article II.-1:105 DCFR applies pursuant to which the
knowledge of the representative of the client is imputed to be his own knowledge.
This means that if the service provider gives a warning to the representative of the
client, the client himself can be seen as having been warned. However, the service
provider could not reasonably expect the client to know about the risk, if he had
reason to believe that the warning was not further conveyed. Only in such
circumstances, when the service provider would have realized that the warning was
not further conveyed to the client, would the service provider have a duty to warn the
client directly.

8.6.2. Does a sole warning suffice?

Pursuant to Article IV.C.-3:103 DCFR:

“The constructor must take reasonable precautions in order to prevent any
damage to the structure.”

This is a specific provision that applies only to the builders and the sub-contractors
who have already a duty to warn the client based on the general provisions of the

Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, Towards a European Civil Code, Fourth Revised

810 On the broader scope of the duty to warn when the warning needs to be effective: M. Barendrecht,

811 C. von Bar, E. Clive (eds.), Principles, Definitions and Model Rules of European Private Law:
Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, Towards a European Civil Code, Fourth Revised

812 “II. – 1:105: Imputed knowledge etc.

If a person who with a party’s assent was involved in making a contract or other juridical act or in
exercising a right or performing an obligation under it:
(a) knew or foresaw a fact, or is treated as having knowledge or foresight of a fact; or
(b) acted intentionally or with any other relevant state of mind this knowledge, foresight or state of
mind is imputed to the party.”
DCFR applicable to any service provider. Moreover, it is a specification of a general obligation for a service provider to act with skill and care as expressed in Article IV.C.-2:105 DCFR. Pursuant to Article IV.C.-2:105 para. (5) DCFR:

“The obligations under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service.”

In a situation that the builder gave a warning to the client, but the client decided not to follow the warning he had received, there are three possibilities for the builder: to refuse further work which might bring the risk about, to once again try to convince the client to follow the warning, or to just follow through on the directions of the client assuming that the client took upon himself the risk of the faulty construction. Article IV.C.–3:103 DCFR seems to indicate that the third option will be taken away from the builder in case the risk might cause any damage to the structure of the construction. Therefore, if the default would be substantial and would endanger the structure of the construction, the builder might be expected to do something more than just to give a warning to the client about it – he needs to take ‘reasonable precautions’\(^{813}\). The scope of these precautions has not been defined in the DCFR and is left for practice to decide.

8.7. Duty to warn breached: liability and its scope.

8.7.1. Causality.

The service provider is obliged to achieve the specific result that was stated or envisaged by the client at the time of the conclusion of the contract, pursuant to Article IV.C.-2:106 DCFR\(^{814}\). This means that the service provider has to deliver a perfect end result to the client and, in general, he might be seen as having caused the loss of the client if there is any default in the construction, regardless whether he caused it directly, e.g. by providing a defective design, or whether he caused it indirectly, e.g. by not giving a warning. This suggests, as far as causality is concerned, that the builder will always be responsible for delivering to the client a faultless construction. The builder might be seen as not performing his obligations even if the default in the construction was the result of a mistake made by the client or a designer.

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\(^{814}\) *IV. C. – 2:106: Obligation to achieve result*

1. The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:
   (a) the result envisaged was one which the client could reasonably be expected to have envisaged; and
   (b) the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.

2. In so far as ownership of anything is transferred to the client under the service contract, it must be transferred free from any right or reasonably based claim of a third party. *IV. A. – 2:305* (Third party rights or claims in general) and *IV. A. – 2:306* (Third party rights or claims based on industrial property or other intellectual property) apply with any appropriate adaptations.
since that mistake will not longer be seen as the only cause of the fact that the builder has not achieved the result. 815

Article IV.C.-2:102 para. (3) DCFR makes it clear that at least certain consequences of the breach of the pre-contractual duty to warn may not be applied in case there is no causal link between that non-performance of the duty to warn and the damage: if the service provider breached his duty to warn and the risk materialized, the service provider may not demand the change of the service, e.g. by requiring additional payment for correcting the faulty construction, unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. The burden of proof is on the service provider. This exception has not been added to the regulation of the contractual obligation to warn of the service provider. The draftsmen of the DCFR explain this difference by simply stating that the contractual duty to warn applies only after the contract has already been concluded. 816 This does not sound as a convincing explanation, since also after the contract has been concluded there might not be a causal link between the lack of warning and the materialization of a risk and the service provider could be allowed to prove that. Instead of proving that the client would have entered into a contract even if the warning had been given, the service provider could also prove that the client would not have changed his directions even if the warning had been given. In both cases there would then not seem to be a causal link between the lack of warning and the damage. However, in the comments to the contractual duty to warn in the PELSC, it has been explained that the service provider might claim compensation for extra costs or time to the extent that extra costs and delay would be present even if the service provider would have warned the client, i.e. in a situation where there would be no causal link between the lack of warning and the damage. 817 This suggests that despite their different wording the scope of precontractual and contractual duty to warn in this respect would be the same. It is regrettable that the draftsmen of the DCFR did not simplify the interpretation of this Article by adjusting it appropriately to cover explicitly also such situations.

8.7.2. Sole liability, solidary liability or apportionment of liability?

What happens if there are two service providers that caused the damage to the client? One of them had made a mistake and created a faulty construction, the other one had failed to perform his duty to warn about that mistake. What type of liability would be applied by the DCFR?

Pursuant to Article III.-4:103 DCFR:

“(1) Whether an obligation is solidary, divided or joint depends on the terms regulating the obligation.

If the terms do not determine the question, the liability of two or more debtors to perform the same obligation is solidary. Liability is solidary in particular where two or more persons are liable for the same damage.

The fact that the debtors are not liable on the same terms or grounds does not prevent solidarity.

The DCFR gives precedence to the rules establishing a given obligation to determine what type of plural obligation should arise in its case. However, if the specific provision does not make this choice, then the default rule remains, pursuant to Article III.-4:103 para. (2) DCFR, that the liability of two or more debtors is solidary. At the same time, Article III.-4:103 para. (3) DCFR, specifies that liability may be solidary even when the debtors are not liable on the same terms or grounds. This is essential for the application of this provision to the breach of the duty to warn, which may offer a different ground for liability of one party than the breach of whatever obligation was infringed by the other party who caused the original default. For example, the builder might have breached his duty to warn the client about the mistake in the design plans, while the designer had not performed his obligation to prepare the design with due skill and care that would guarantee the client that his construction will be fit for purpose. Both the builder and the designer will be solidary liable towards the client.

Article III.-4:102 DCFR defines that:

“(1) An obligation is solidary when each debtor is bound to perform the obligation in full and the creditor may require performance from any of them until full performance has been received.”

That is the best option for the client, since he may then choose from which professional party to claim damages: the one that made a mistake in performance (the designer) or the one that did not warn him about that mistake (the builder).

8.7.3. Contributory negligence as a defence.

The DCFR also contains a rule on the defence of contributory negligence. If the builder or the designer breaches his duty to warn, therefore improperly performing his contractual obligations, the client may claim damages for non-performance of the obligation to warn. However, the liability of a service provider will be limited pursuant to Article III.-3:704 DCFR:

“The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.”

Article III.-3:704 DCFR will be applicable in relation to construction contracts when, e.g.: a client provided the builder with faulty or incomplete information or documents.

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as to design plans, and the designer was an agent of the client, i.e. a party for whose actions the client was directly responsible. In such a case, while the builder will still be seen as a party liable for the default since he did not perform his duty to warn, it is taken into account that the client should not recover damages to the extent that the damage was caused by his own behaviour, or by behaviour of the designer for whom the client bears responsibility.\footnote{C. von Bar, E. Clive (eds.), \textit{Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition}, Oxford: Oxford University Press, 2010, Volume I, Comment A, p. 934}
9. The DCFR and the three national systems compared. Concluding remarks.

This book contains an analysis of the English, German and Dutch precontractual and contractual duty of a service provider to warn about a risk that might emerge from a contract with a third party in the construction sector, in the situation where the client is either a consumer or a consumer-like party. Moreover, it presents an analysis of the regulation of the precontractual and the contractual duty to warn in the Draft Common Frame of Reference (and its predecessor, the Principles of European Contract Law on Service Contracts). This has been done in order to establish and define the existence and scope of this specific duty to warn.

The preceding chapters 2-7 give answers to the research questions. These chapters explore under what conditions a service provider has a precontractual or a contractual duty to warn about a risk that might emerge from a contract with a third party in the construction process in England, in Germany and in the Netherlands, when such duty has not been explicitly agreed upon in the service provider’s contract. Each of these chapters ends with a comparative paragraph where the findings in these three discussed legal systems may be found and where more general conclusions have been drawn.

Chapter 8 presents the regulation of the duty to warn in the DCFR. However, no comparison has been made there between the theoretical regulation of the duty to warn in the DCFR and the practical solutions adopted in England, Germany and in the Netherlands. The commentary to the DCFR shortly sketches the source and the scope of the duty to warn in these Member States, without, however, giving the whole picture. One of the aims of this book is to serve as a comparative basis for the current regulation of the duty to warn in the DCFR. It also hopes to influence the future development of a general framework in European contract law as regards duties to warn. This is why a comparison will be made in this last chapter between the regulation of the duty to warn in the DCFR and in the three analysed national legal systems: England, Germany and the Netherlands. Therefore, the first part of this last chapter presents in what way the provisions of the DCFR are supported by the law of the three legal systems that have been analysed. In the second part of this chapter the reader may find a summary of the answers to the research questions considered and other concluding remarks.

9.1. The DCFR and the three national systems compared.

9.1.1. The builder’s duty to warn.

As has been presented in the chapter on the builder’s contractual duty to warn, the three analysed legal systems do not differ significantly on the regulation of the builder’s duty to warn about the designer’s default. In all of them it is considered that the builder’s duty to warn about the defects in the design plans should not be understood too broadly, due to the fact that the client in most cases employs specialists whose task it is to evaluate the design plans and due to the fact that the builder usually does not possess the knowledge, which is needed for such an evaluation himself. Since the English courts, from the beginning of this century onwards, started accepting the duty to warn in construction cases, all systems recognise the builder’s duty to warn the client if there is a default within the design
that the builder should have been aware of. Still, English law does not provide us with an established authority as to the recognition of the builder’s duty to warn (taking into account that the case law is recent, concerns mostly the sub-contractor’s duty to warn and it is based on the Court of Appeal ruling that has never been challenged at the Supreme Court), which points to a weaker position of English clients in this respect as compared with clients in Germany and the Netherlands. In the DCFR the contractual obligation to warn of the service provider has been specifically established which is supported by the fact that it is recognised in the three legal systems that had been analysed here, even if only the Netherlands has codified this duty. Pursuant to the provision of the Article IV.C.-2:108 para. (1) DCFR the builder has to warn the client about a mistake made by the designer. This has also been explicitly pointed out in the General Comments to Chapter 2 (Construction) of the PELSC. Pursuant to Article IV.C.-2:108 para. (5) DCFR the builder would need to warn the client only about such defaults of the designer that he could have easily noticed (or had actually noticed), which, just as in the three legal systems that have been analysed, does not put on the builder any obligation to actively look for defaults. Still, the clear provision in the DCFR establishing the builder’s duty to warn provides legal certainty to the consumers who would chose to have the system of the DCFR applied to their contracts.

As far as the scope of the German and Dutch builder’s duty to warn is concerned, the case law gives us plenty of indications when the builder might be expected to be held liable if he does not warn the client about the default in the design. However, even in the Dutch system, where the duty to warn is codified, there is no possibility to give precise specifications as to the scope of the builder’s duty to warn, since certain requirements for that can be evaluated only on a case-by-case basis. This suggests that the scope of the builder’s duty to warn in England and Germany is even less transparent. However, in all three systems there is no doubt that one of the most important indications as to whether the builder should have a duty to warn, is the level of professional knowledge and expertise that could be expected of him in the area where the default had manifested itself. In the DCFR, Article IV.C.-2:108 para. (1) DCFR defines the scope of the builder’s duty to warn a bit more precisely since it establishes that the builder has a contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. Again, the clear text of this provision aims at providing legal certainty to the consumers. The DCFR sets a specific limitation to the scope of the builder’s duty to warn, namely, the builder does not have to warn the client if the client already knows of the risks involved or could reasonably be expected to know of them pursuant to Article IV.C.-2:108 para. (3) DCFR. The same rule can be found in German and Dutch law. In English law, this matter has not been clearly decided by courts up to this moment.

All three legal systems that have been analysed, recognise also the builder’s duty to warn as to the risk coming from parties in the construction process other than the designer. The scope of that duty to warn is also dependent on the knowledge and expertise of the builder acting as a careful average builder. It has explicitly been added to Article IV.C.-2:108 para. (1) DCFR that the service provider’s duty to warn is not limited to warning the client about a risk that might come about as a result of following information or directions of the client, or faulty information that the service provider himself had collected, but also as a result of the occurrence of any other risk.
This suggests that the service provider has also a duty to warn about a risk coming from a third party, even though this has not been clearly expressed in the comments to the DCFR. Since a similar provision may be found in the PELSC, it is worthwhile to mention that in the General Comments to Chapter 2 (Construction), the draftsmen of the PELSC list an example of the duty to warn as falling within the scope of this provision. This part of the provision of the DCFR lacks clarity since it does not specify that the consumer may claim damages for loss caused by breach of a duty to warn of one professional party about a risk coming from a third party. It is likely that this provision would be interpreted in such a way to encompass this obligation, as I had explained above, but the consumers would have more legal certainty if it were clearly stated in the text of the provision.

The scope of the precontractual duty to warn is not specified in all three systems in such detail as the scope of the contractual duty to warn. In Germany and the Netherlands the main conclusion coming out of the comparison of the scope of the contractual and precontractual duty to warn is that they are alike. However, despite the similarities it needs to be pointed out that the scope of the precontractual duty to warn does not stretch as far as the contractual one. It may be assumed that if the precontractual duty to warn would be accepted at all in England – so far there is no case law where such a duty has been accepted in the first place – the scope thereof would certainly not stretch further than the scope of the contractual duty to warn. The draftsmen of the DCFR were much more specific than the national legislations (or courts) and set the scope of the precontractual duty to warn close to the scope of the contractual duty to warn, which again provides more legal certainty to the consumers. This means that the builder has a pre-contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. In general, the builder has to warn only about risks that he knew or reasonably could have known before the conclusion of the contract, pursuant to Article IV.C.-2:102 para. (6) DCFR. However, a certain amount of alertness on the side of the service provider is required to discover such risks, namely he is expected to check whether the construction that the client wants to have performed is feasible under the conditions that the client had specified. Article IV.C.-2:102 para. (2) DCFR specifies that the pre-contractual duty to warn does not apply if the client already knows of the risks or could reasonably be expected to know of them. The regulation of the pre-contractual duty to warn in the DCFR is seen as a preferred solution by the draftsmen of the DCFR, since it is to reflect the development of pre-contractual duties to inform (and therefore, also duties to warn) in Member States. However, the Notes to this Article do not provide a good illustration of this reasoning, since they point out just a few Member States and list lots of uncertainties as to the recognition and scope of the pre-contractual duties to inform therein. For example, while the draftsmen discuss these pre-contractual duties to inform, we can see that, just as this research showed, there is a problem with recognition of such duties in England. German and Dutch law are seen as recognising these pre-contractual duties but with certain controversies still leaving doubts as to the specifics of the scope of such rights. All in all, in this respect, the DCFR seems not only to reflect the law as it stands in the three legal systems dealt with, but also to go beyond it and to design a desired law. This desired law provides more legal certainty and clarity to the consumers and therefore may be seen as a preferable option to the ones presented in the national systems.
9.1.2. The designer’s duty to warn.

In all three discussed systems it is clear that the designer is liable for not warning the client about defaults in the construction caused by third parties that the designer had or should have noticed. The same obligation has been placed on the designer in the provisions of the DCFR, since the general duty to warn expressed in Article IV.C.-2:108 DCFR of the service provider also applies to designers. The designer does not have to look for the mistakes the builder or any other professional party has made, but he has to notify the client about any risk that he should have seen as a reasonable and competent designer. Pursuant IV.C.-2:108 para. (5) DCFR the designer will also only have to warn the client about any obvious risks to the construction. The designer is not released from this duty just by the fact the client employs other professional parties who might also discover the risk and convey the warning to the client. The only difference between the three national law systems is as to the liability of the designer for recommending another specialist to the client. In German and English law the designer has a duty to warn if he makes such a recommendation as to the risks involved in employing that specialist. In the Netherlands the designer’s liability is less certain if that specialist does not perform his work timely, etc. Since pursuant to Article IV.C.-2:108 para. (1) DCFR the designer needs to warn the client about any risk he is aware of, that would seem to include the knowledge he might have of incompetence or financial problems of the specialist he is recommending to the client. The DCFR chose here a solution that gives more clarity and legal certainty to the consumers than the Dutch legal system.

As has been mentioned in the chapter on the designer’s duty to warn, the precontractual duty to warn of the designer is even less regulated and less discussed in case law than the builder’s precontractual duty to warn. One explanation that might be given for it is that there are not many cases where there is contract concluded with a third party (from which a risk within the scope of this book may emerge) before the contract with the designer is concluded – in most cases, the client first concludes a contract with the designer before engaging other parties. As a consequence, it is difficult to draw any conclusions as to the scope of such a duty to warn in the three analysed legal systems. The DCFR is in this respect more specific since Article IV.C.-2:102 DCFR on the pre-contractual duty to warn applies to designers as well and places a pre-contractual duty to warn on them. Moreover, there is a separate provision on the designer’s pre-contractual duty to warn in Article IV.C.-6:102 DCFR obliging the designers to warn their clients if they are not qualified to fully assess the risks involved in the construction process. The draftsmen of the DCFR saw the need to enable clients to make an informed decision prior to the conclusion of the contract as to the specialists they would want to employ. Again, the draftsmen of the DCFR by adopting such a provision granted consumers more protection than the protection they have in the three legal systems studied in this book, aiming for the creation of maximum legal certainty and clarity to consumers.

9.1.3. The sub-contractor’s duty to warn.

As far as the sub-contractor’s contractual duty to warn the builder is concerned, its scope is comparable with the scope of the builder’s duty warn the client in England, Germany, and in the Netherlands. The sub-contractor will most likely
have a duty to warn when he knew or should have known about the default in the works of a third party. However, it should be mentioned that the sub-contractor’s duty to warn is more rarely recognised (or at least claimed) in practice. The DCFR does not differentiate between the builder’s and the sub-contractor’s duty to warn. The general provision of Article IV.C.-2:108 DCFR on the contractual duty to warn of the service provider would be applicable also to the sub-contractor. This means that in accordance with Article IV.C.-2:108 para. (5) DCFR the sub-contractor would need to warn the builder only about such defaults of the third party that he (the sub-contractor) could have easily noticed (or he had actually noticed) and that the builder (who in relation to the sub-contractor is the client) does not already know of or could reasonably be expected to know of them pursuant to Article IV.C.-2:108 para. (3) DCFR, which will be less likely here. The DCFR provisions, as well as the discussed national legal systems, establish a sub-contractor’s duty to warn in similar circumstances to the builder’s duty to warn. The level of protection granted by the DCFR to consumers is only marginally higher than what is established in the three discussed legal systems, since the DCFR clearly considers the sub-contractor to comply with the same requirements for the duty to warn as the builder does. In the discussed national laws this comparison is implied in case law rather than explicitly established.

As far as the sub-contractor’s duty to warn the client is concerned, important differences may be seen between the three legal systems in the way the client as a third party in regard of the contract between the builder and the sub-contractor can claim damages for the faulty construction and for non-performance of the sub-contractor’s duty to warn. In English and Dutch law, the client can claim compensation from the sub-contractors, who noticed or should have noticed a default in the work of other professional parties working at the construction site, but only in tort, since the client does not have a contractual relationship with the sub-contractor. In German law, there is the special construction of Vertrag mit Schutzwirkung für Dritte, which, under certain conditions, allows the client to claim contractual damages from the sub-contractor even though there is no contractual relationship between them. In Dutch law when the sub-contractor warns his contractual counterpart, the builder, of a serious risk to the construction and sees that the builder does not do anything with the warning, a question may be asked whether the sub-contractor should not warn the client under such circumstances. As it will be discussed in the next paragraph, when the risks to the construction are extremely serious (e.g. personal injury) then the service provider might be expected to do something more than just warn his client. It is interesting whether the same reasoning could not require the sub-contractor to relay the warning directly to the client. However, it has not yet been decided on by the Dutch courts.

The DCFR regulates specifically only the contractual duty to warn of the service provider towards his client, which means that it would regulate only the sub-contractor’s duty to warn the builder, and not the client directly. The sub-contractor’s duty to warn the client falls under the tort provision of the DCFR. The tort provisions in the DCFR are very general as to their scope of their application. The loss that the client might suffer as a result of not being warned directly by the sub-contractor could be recovered under Article VI.2:201 para. 1(b) or 1(c) DCFR, even if there is no specific duty to warn in tort placed on the sub-contractor by the provisions of the DCFR. In this respect the DCFR seems to offer less legal certainty to the consumers, which may be the effect of the focus in the DCFR on contractual relations rather than on tort actions.

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There has not been much case law that could be analysed on the precontractual duty to warn of the sub-contractor. The only example presented in the chapter on the sub-contractor’s duty to warn concerns a case in the Netherlands. It shows us that its scope would correspond to the scope of the precontractual duty to warn of the builder, which means that only so far as the sub-contractor knew or should have known about an obvious risk from a third party from the study he conducts of, for instance, the design plans, in order to make his offer to the builder, he would have a duty to warn. As mentioned in the part about the builder’s duty to warn above, the precontractual regulation of the service provider’s duty to warn is similarly regulated to the contractual regulation in the DCFR. This means that if there is a precontractual duty to warn of the sub-contractor, then pursuant to Article IV.C.-2:102 DCFR he has a pre-contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. In general, the sub-contractor has to warn only about risks that he knew or reasonably could have known before the conclusion of the contract.

9.1.4. Requirements for an effective warning.

All three analysed systems require the warning to be given in clear and precise terms. Only German law introduces a form requirement: the warning must be given in writing. However, if the service provider could prove that he has given a clear and precise warning but not in writing, the German courts may take that into account while establishing the liability of the service provider. As a result, the court might assess that there was no liability of the service provider or that it should be diminished. The DCFR does not request a specific form for the warning in either of its articles. Article IV.C.-2:108 para. (2) DCFR does require the service provider to ensure the client understands the warning that has been given to him, thus introducing the requirement for clear and comprehensible warning. The DCFR rule in this respect is very general and will not lead to more legal certainty for the European consumers since it is difficult to assess and prove whether the warning was given in a way that led to the consumer’s understanding thereof.

It has also been recognised that the service provider could fulfil his duty to warn by warning the representative of the client, and not the client himself. However, in German and English law if the service provider had doubts as to whether the warning was taken seriously by the client’s representative and further conveyed to the client, he might need to approach the client directly. In Dutch law such an action would be requested of the service provider only in extreme circumstances, when the service provider would realize that not following the warning given by the representative of the client could have serious negative consequences to the client. Also according to Article IV.C.-2:108 para. (3b) and Article IV.C.-2:108 para. (6) DCFR the knowledge of the representative of the client would be attributed to the client himself, which means that the service provider would fulfil his duty to warn by warning the representative and not the client. However, it does not seem likely that he could assume that the client knew of the risks, if he had a reason to doubt if the representative had conveyed his warning to the client.

In all three systems it has also been mentioned that the service provider sometimes might need to take other measures than just warn the client. However,
none of the legal systems clarifies what such measures are and when the service provider should apply them. The most clear is German law, where when the risk endangering the construction threatens the health and life of people or the interests of third parties, the service provider needs to refuse to perform his services if the client does not change his instruction upon receiving the warning. Pursuant to Article IV.C.-3:103 and Article IV.C.-2:105 para. (5) DCFR the service provider needs to prevent any structural damage to the construction. If such a risk endangers it, then it might be imagined that the service provider could not stop at just giving the warning to the client but should also stop with performance of his services if they could lead to endangerment of the construction’s structure. It needs to be mentioned that the provision of the DCFR only aims at preventing the structural damage to the construction. It does not put any specific extra obligations on the service provider, beyond granting a warning, which means that the consumers may not be certain exactly what kind of duties the service provider had towards them. Additionally, if the risk does not involve structural damage but still threatens health and safety of others, German and Dutch law request of the service provider a higher standard of care, but the DCFR does not specify a more extent duty of care.

9.1.5. Liability.

In all three national law systems concurrent liability of the professional party who breached his duty to warn and the service provider who caused the risk to the construction is recognised. This leads, most commonly, to the client being able to choose from which party he wants to claim his loss. In German law these two parties are subject to rules on solidary liability. A similar situation happens in English law, even though there the client often chooses to sue both parties in one proceedings and the court will immediately apportion damages between them. In the Netherlands some authors are in favour of sole liability of the party who breached his duty to warn, while some others argue for concurrent liability and the possibility to apportion damages between all professional parties that contributed to the risk. Since the main rule of Dutch Civil Code on liability is recognition of solidary liability, it is not really clear why in this case an exception could be make of sole liability of e.g. the builder breaching his duty to warn. The arbitral court tends to hold the builder who breached his duty to warn about the designer’s mistake fully liable towards the client for his loss. It does not mean that the designer’s causal link to the client’s loss is seen as being severed. The client could still choose the designer liable for his default. Pursuant to Article IV.C.-2:106 DCFR the service provider will always be seen as having caused the loss to the client, regardless whether he did this directly – i.e. by providing a defective design – or indirectly – i.e. by not giving a warning – since the service provider is obliged to achieve the specific result that was stated by the client at the time of the conclusion of the contract. However, where the service provider would be able to prove a clear lack of causality between the lack of warning and the client’s loss, then the comments to the PELSC suggest that the client might not hold the service provider liable at all. Still, no example of such a situation had been given in the comments. In case of the precontractual duty to warn that rule has been deduced from Article IV.C.-2:102 para. (3) DCFR. Since there is no specific provision in the DCFR changing the general rules on liability in case of a breach of the duty to warn, the liability of two professional parties would be solidary pursuant to Article III.-4:103 para. (2) DCFR. Paragraph 3 of this Article specifies that solidary liability may apply even if two debtors are liable on different grounds. This again means that the
client may turn towards any debtor with his claim for damages, which gives him the most legal certainty by allowing him a free choice between professional parties he would like to claim damages from.

The service provider who breached his duty to warn might try to protect himself by claiming the defence of contributory negligence – that is by showing that other parties for whom the client held responsibility had contributed to the risk. This defence is the least likely to lead to succeed in contractual claims in English law. In Germany and in the Netherlands the service provider might not be able to use this defence only exceptionally, that is if it would infringe the ‘good faith’ rule. The DCFR recognises the defence of contributory negligence as well in Article III.-3:704 DCFR. It is disputable whether the provision on ‘good faith’ from Article III.-1:103 DCFR could limit the scope of the application of this defence, since the relation between these two articles has not been explained in the comments to the DCFR. This lowers the level of legal certainty granted to the consumers, since they may not be certain whether they will be able to claim the whole amount of damages from the professional party, based on the fact that e.g. the builder knew clearly of the defect and it was due to his gross negligence that the client was not warned about it, or whether part of the client’s losses will be attributed to them.

Finally, the liability for breach of the precontractual duty to warn has not be discussed as extensively, since most of the time when a breach of a precontractual duty to warn is recognised, the contract had already been concluded and often parties just claim the liability for breach of the contractual obligation. In this respect the regulation of the DCFR, again, does not reflect the current state of law in these three Member States, but rather illustrates the desired state thereof.

9.2. Concluding remarks.

The main purpose of this book is to illustrate the conditions under which a service provider in the construction process has a precontractual or a contractual duty to warn towards his consumer-client about a risk that might emerge from the client’s contract with a third party in England, Germany, the Netherlands and under the DCFR, when such a duty has not been explicitly included in the service provider’s contract. The findings of this research have been presented in the above chapters, each of them finishing with a summary and comparison of these conditions in the analysed legal systems. In these chapters more detailed research questions have been analysed and answered on the basis of a positive methodology, i.e. based on existing legal provisions and case law in England, Germany, the Netherlands, and on the provisions of the DCFR.

Since the outcome of this research may influence the future development of a general framework in European contract law as regards duties to warn, this last part of the book repeats the research questions that were posed at the beginning of this book, and summarizes the answers that may be found in it.

The main research question of this book asked for: an illustration of the scope of the implied duty to warn of the service providers in the construction sector in respect of a risk coming from a third party. Article IV.C.-2:108 para. (1) DCFR puts a contractual obligation on the service providers to warn their clients about a risk that might come about as a result of following information or directions of the client or faulty information that the service provider himself had gathered, but also as a result
of the occurrence of any other risk, which would include a risk coming from a third party.

What would trigger the duty to warn? The trigger for this duty to warn to arise under Article IV.C.-2:108 para. (5) DCFR is materialization of a risk that should be obvious to and could be seen by the service provider from all the facts and circumstances of the given case, i.e. without the service provider having to investigate in order to find that risk. This answers also the question whether the service provider has to specifically look for gaps, ambiguities, inconsistencies, and mistakes.

Another side of the above-mentioned question is: how attentive must the service provider be when analysing the information and instruction gathered or received, in order for him to be able to identify a problem? I see these questions as two different sides of the same coin. On one hand, we need to know how attentive the service provider has to be to answer the question what could trigger his duty to warn. On the other hand, upon knowing what triggers the duty to warn, its scope would depend on how attentive the service provider has to be while performing it. That is why I think it is worth to mention these questions side by side, instead of just asking one of them. The standard for the service provider is that he should be normally attentive to anything that might make him suspect a risk. The same test and standard applies to all service providers included in the analysis of this book: builders, designers, and sub-contractors. This provision has been drafted in a way to reflect the main rule on the builder’s and designer’s duty to warn the client in England, Germany and in the Netherlands: the builder (or designer, or sub-contractor) needs to warn the client about the defaults that he could have spotted without having to conduct thorough inspections. English courts apply the standard of a careful and competent service provider. A German builder will be held liable for mistakes that should have been obvious to him, as an average builder, ‘at a glance’. The scope of the designer’s duty to warn in Germany is discussed in detail by German courts and it seems to be less strenuous than that of the builder, since the designer is seen as having fewer chances to notice a mistake in the construction process if he has not been employed specifically to supervise it. A Dutch builder needs to conduct only a marginal check, and the standard of care put on the builder and the designer is that of a reasonably competent and reasonably careful service provider. Based on various specific circumstances of analysed cases the scope of this duty to warn of a builder, a designer and a sub-contractor may be narrowed down more by various national courts and, respectively, chapters 3, 4 and 5 present these various circumstances. The DCFR reflects in Article IV.C.-2:108 para. (5) a general rule limiting the service provider’s liability to obvious mistakes that he had not warned about and obliging him to act with ‘normal attention’.

The lack of specific definitions and boundaries of the attentiveness of the service provider makes it more difficult to answer the question whether a mere ambiguity or uncertainty already suffices to give rise to the duty to warn? Or is the duty to warn only brought about in case of an inconsistency or incorrectness? These questions refer to the previous paragraph since they intend to specify the scope of the service provider’s duty to warn. However, as we could see, the provision in the DCFR is of a rather general character. This means that it is left to the judges/arbiters to see whether a normally attentive service provider would have recognised a risk in the construction process just upon being uncertain about certain details of it or whether an actual inconsistency would have to appear before this risk became ‘visible’ to him. The fact that the service provider is not obliged to investigate and search for the
mistakes and risks suggests that a mere ambiguity might not be a sufficient ground to bind the service provider with a duty to warn.

Another research question that concerns the scope of the service provider’s liability is whether the existence and the scope of the duty to warn is influenced by the competence of the client or other professional parties employed by him. The service provider does not have to warn the client, pursuant to Article IV.C.-2:108 para. (3) and para. (6) DCFR, if the client already knows of the risk. However, the service provider cannot deduce that the client is aware of the risk from the fact that the client is assisted by another professional party or because of the client is competent himself. The competence and experience of the client, or the fact that he employs other specialists in the construction process, do not release the service provider from his duty to warn the client. The same rule can be found in German and Dutch law. In English law, this matter has not been clearly decided by courts up to this moment. Some English cases seem to suggest that the fact that the client had the possibility to get an advice from another professional party could diminish the scope of the liability of the service provider encumbered with a duty to warn and it should not be relevant that the client had not used this possibility. However, there are also opinions expressed that even if the client could have employed another professional party and get their advice, but in fact he had not done that, the scope of the duty to warn of the service provider should not be changed. It seems we need to await more case law on this matter for a clearer rule in English law. In this respect, German and Dutch case law created an additional rule: in case the other specialist employed by the client has a professional knowledge that is higher than the service provider’s professional knowledge, then the service provider should not be expected to have a duty to warn the client. This last rule narrows down the service provider’s scope of liability. It has not been taken over by the draftsmen of the DCFR. It is, of course, more consumer-friendly not to exclude in such a situation the service provider’s liability in the DCFR. However, one might wonder whether, under such circumstances, there are not enough reasons to protect the interests of the service provider, and not only those of the client. If there are two professional parties that could have warned the client about the risk to the construction process and one of them is more experienced and more likely to notice that risk, it seems, to me, abundant to let the client claim damages for breach of the duty to warn from both these parties. However, the reason for not implementing such an exclusion of liability is obvious: since both service providers should have been able to recognise the default, why should one of them be allowed to restrict his liability by claiming that he could have kept quiet when the other, more experienced and knowledgeable party did not mention the risk either, in particular when this should have been apparent to the first service provider. While, in general, it is understandable that there are certain limits to the service provider’s duty to warn and that he should not be expected to warn the client when there are more knowledgeable professional parties involved in the construction process, it seems reasonable to still expect the service provider to give a warning when he is aware of the problems and risks. Why? Well, if the service provider has any doubts as to the method of construction chosen, it does not hurt him to share these doubts with the client, whereas it may save the client serious inconvenience. Moreover, in many cases it is hard to assess up front whether the duty to warn would be binding the service provider. Providing the client with a warning might, therefore, allow the service provider to avoid potential liability for the breach of his duty to warn, in case the court would decide in a given case that other professional parties employed by the client did
not have more professional knowledge than the service provider and therefore he should not have relied on their advice.

The same research questions have been raised with respect to the scope of the pre-contractual duty to warn of the service provider. In the DCFR the provision on the service provider’s pre-contractual duty to warn is similar to the one on his contractual duty to warn. This means that again the service provider will not have a duty to investigate and actively search for any risks to the construction process. The service provider would have a duty to warn about any risk that he should have noticed as a ‘normally attentive’ service provider, taking into account all information that was available to him in the pre-contractual phase of construction. The explicit regulation of the pre-contractual duty to warn in the DCFR places consumers in a better position in comparison with the three national systems that have been analysed. England, Germany and the Netherlands often lack clear rules on what the scope of the pre-contractual duty to warn is. As it has been pointed out in the specific chapters of this book, it is especially hard to determine the scope of the designer’s pre-contractual duty to warn due to a lack of case law on the subject. The scope of the builder’s and the sub-contractor’s precontractual duty to warn does not seem to differ much from the scope of their contractual duty to warn, based on the German and Dutch law that have considered it. This means that, just as in the DCFR, in these two law systems the builder or sub-contractor does not have to search for the defect or risk to the construction. Article IV.C.-2:102 DCFR makes the murkier regulations of the pre-contractual duty to warn in the mentioned Member States more precise. Certain German cases that have been analysed seem to suggest that the liability would be created only if the defect had been even more easily noticeable than by the test for the establishment of the contractual duty to warn of the service provider. The provisions of the DCFR require the service provider to warn about risks that should be obvious from all facts and circumstances known to the service provider, considering the information, which the service provider must collect. E.g. the builder is required to carefully examine design plans in the pre-contractual phase in order to estimate the price of the offer he wants to make to the client. During such an examination the service provider should be able to assess the feasibility of the project and discover certain defects that should have been clearly noticeable at a glance. Under the provisions of the DCFR the defect, therefore, should also be more easily noticeable to the service provider in order for him to be held liable for breach of the duty to warn.

Besides providing an insight into the scope of the service provider’s duty to warn, this book demonstrates also various problems that might arise while performing the duty to warn. For example, it is discussed what the form of the warning should be like. The DCFR does not create a formal requirement for giving a warning. This means that the service provider does not need to warn the client in writing, although, of course, he then takes a risk upon himself that he will not be able to prove that the warning have been given. The provision of the DCFR seems to suggest that the service provider will need to use plain language and to clearly present the risks to the client. In the three national law systems that have been analysed it is clear that the warning conveyed by the service provider has to be clear and explicit. Only Germany has a formal requirement of writing added to the regulation of the performance of the duty to warn. However, in case this requirement is not observed in practice, German courts tend to remain flexible and still recognise that there was no breach of the duty to warn if the warning had been given clearly by use of other means than writing. The
solution of the DCFR seems to be more practical, since it may depend on the circumstances of the case whether the service provider should have warned the client in writing or not (e.g. in case the warning must reach the client as fast as possible, e.g. because of immediate danger).

Another question concerned is to whom the warning should be given. More specifically, does the service provider need to warn the client directly or is it sufficient for him to fulfill his duty to warn if he gives a warning to a representative of the client? Pursuant to Article IV.C.-2:108 para. (3b) DCFR the service provider is released from his duty to warn in case the client could reasonably be expected to know of the risk. Article IV.C.-2:108 para. (6) DCFR specifies then that the client could not reasonably be expected to know of a risk merely because other professional parties advised the client, unless such a party acted as the agent of the client. In such a situation Article II.-1:105 DCFR applies, pursuant to which the knowledge of the representative of the client is imputed to be the client's own knowledge. This means that if the service provider gives a warning to the representative of the client, the client himself can be seen as having been warned. This is also the solution that has been adopted in England, Germany and in the Netherlands. Only in circumstances when the service provider would have realized that the warning was not further conveyed to the client (or additionally, as in Dutch law, if serious negative consequences would be the result of not following the warning), would the service provider have a duty to warn the client directly. The same might be the case under provisions of the DCFR, since the service provider could not reasonably expect the client to know about the risk, if he had only warned the representative of the client and he had reason to believe that the warning was not further conveyed.

Finally, one might wonder whether the duty to warn is fulfilled by the service provider when he gives a mere warning or whether his warning needs to be effective. The only provisions in the DCFR that might apply to this question - Article IV.C.-2:105 para. (5) DCFR, further specified in Article IV.C.-3:103 DCFR – say that the service provider should take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service. This suggests that in case the risk that the service provider warns the client about will significantly endanger the construction, the service provider might need to do more than to just warn the client. This is especially relevant in cases when the client does not heed the warning that has been given and when he does not change his instructions to the service provider and does not even try to avoid the risk. However, it is not always easy for the service provider to estimate up front what kind of and how serious negative consequences will follow if the client does not act upon the warning given to him. This means that the service provider will not easily have the certainty that he has fully and satisfactorily performed his duty to warn and that he will not have to compensate any damages of the client, if such would arise. Unfortunately, the lack of clarity in the DCFR provisions does not come as a surprise since there is a gap in the regulation of this issue on national level, as well. In England, Germany, and the Netherlands the courts sometimes adjudicated that the service provider had to do ‘something more’ than just convey a warning. These other measures that the service provider should have taken are barely ever specified, which leaves a gap as to what procedure should the service provider follow in order not to be held liable for the breach of his duty to warn. Because of a lack of clear regulation the service provider might not be allowed to suspend or even terminate his works in case he instructs him to perform a faulty construction disregarding the warning that had been issued. Only in cases in which continuation of the construction process would have
endangered safety and health of others, it was clear to the courts that the service provider had a duty not to proceed with such works. As it had been mentioned, however, it might be difficult to assess in advance whether the damage that is threatening the construction process is of such significance.

The last subject matter that had been discussed in this book concerns the liability of the service provider for the breach of his duty to warn. Firstly, matters of causality were raised in order to see whether the service provider who did not warn the client about a risk coming from a third party, can be seen as having caused the damage or whether it should be attributed to that third party. Article IV.C.-2:106 DCFR places upon the service provider an obligation to achieve the specific result that was envisaged by the client at the moment of conclusion of the contract. This means, in theory, that regardless the origins of the default that made the final product faulty, the service provider who delivers it would not perform his contractual obligations. However, the non-performance of the service provider does not have to equal his liability. One possible way to escape this liability is for the service provider to warn the client about the risks involved in the construction. As far as causality for the breach of the duty to warn is concerned the service provider who breached his duty to warn will be liable to the client under the general rules on liability of Book III, Chapter 3 DCFR. However, in the comments to the PELSC on a similar provision on the contractual duty to warn the remark has been made that in case the service provider could prove the absence of causality between the lack of warning and the client’s loss, the client could not hold him liable. As far as the liability for breach of the precontractual duty to warn is concerned the same may be deduced from Article IV.C.-2:102 para. (3) DCFR. German and Dutch law leave no doubt that the breach of the duty to warn can be seen as a cause of the client’s damage and that the service provider might be held liable for that in full. English law is a bit more reluctant to recognise the duty to warn, as had been mentioned many times in this book, which means also that matters of causality are not thoroughly discussed. However, in recent years there is more and more case law on service providers being held liable for breach of their duty to warn which leads to the conclusion that also in English law the causal link is assumed when a duty to warn is breached. The national laws that have been discussed in this book do not relate the service provider’s liability to the breach of his own obligation to deliver a perfect end result, what the DCFR seems to be doing, but rather to the fact that another duty, i.e. duty to warn or duty of care, has been breached.

The second matter that has been raised is that when the default was caused not only by breach of the duty to warn but also by a third party causing the risk, then maybe both these parties could be held liable by the client. What system of liability is adopted to enable the client to fully claim his damages? In case both the service provider who breached his duty to warn and the third party who had caused the original default could be held liable, that is if the causal link between the original default and the loss suffered by the client had not been severed, then under Article III.-4:103 para. (2) DCFR the solidary liability of these two parties would occur. Article III.-4:103 para. (3) DCFR specifies that it does not matter for establishing the solidary liability that the debtors are not liable on the same terms or grounds. The system of solidary liability means that the client may require performance of any of the debtors until full performance had been received. The debtors might have then recourse obligations to each other. This is definitely the system that offers sufficient protection to the client, since he is then able to choose the debtor that he wants to
claim full damages from. English law also enables the client to sue both parties that might have caused his loss, both in contract and in tort, recognising that whoever contributed to the client’s losses should be held responsible for that. The difference between the DCFR regulation and English law is that in practice in England the client is more likely not to receive the whole sum from one debtor, since the court will apportion the damages to all the parties that have caused his loss. The DCFR-system is more alike to German law, where solidary liability is established on the basis of similar rules. The client may choose the professional party that he will claim damages from and that professional party may then seek recourse on the other service provider that had contributed to the client’s loss. Dutch law is a bit less clear, since there seem to be two different approaches adopted in practice: either the service provider who breached his duty to warn would be held solely liable or the liability of the third party who made the original mistake would be recognised as well, which will then lead to the court apportioning the damages between these two parties. As it has been mentioned, the sole liability of the service provider does not find proper justification in Dutch law. The system of the DCFR, just as the German system, seems to be more clear and client friendly. The client does not have to conduct two different court proceedings against each individual debtor to claim damages and he is less endangered by the possibility of insolvency of one of his contractors.

The next question to consider is: if the service provider that breached his duty to warn is held liable by the client instead of or alongside with the third party who had caused the risk to the client, may that service provider limit or exclude his liability by using the defence of contributory negligence? The DCFR has a rule on contributory negligence in Article III.-3:704 DCFR pursuant to which the debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to his own damage. This means that if the client is responsible for the original default made by the third party, e.g. that third party acted upon his instructions or was his representative, then the service provider may be able to limit or even exclude his liability for breach of the duty to warn about this default. German and Dutch law accept the use of the defence of contributory negligence in such a situation, as well. In both these systems this possibility might be taken away from the service provider in case it would be contrary to the principle of ‘good faith’ to limit his liability, e.g. when the service provider actually recognised the default but had waited with conveying the warning to the client, and his delay had caused the damage. The DCFR also contains a provision on the application of the principle of ‘good faith’ in Article III.-1:103 DCFR, which seems to suggest that a similar limitation of the use of this instrument might happen. How big of a role in interpretation of the provisions of the DCFR the principle of ‘good faith’ will play is yet to be seen. English law is a bit more reluctant to accept the use of the contributory negligence defence by the service provider since traditionally it was available only in tortious liability cases. However, in practice, there were a few cases in which the English courts managed to find an application for this defence also in contractual liability cases.

In the above-presented paragraphs it has been shown that the draftsmen of the DCFR, indeed, took into account the national trends and tendencies, at least as far as English, German and Dutch law are concerned. There are, of course, slight discrepancies between these regulations but most of them seem to come from the fact that the provisions of the DCFR are of a more general nature and are supposed to regulate the duty to warn in more sectors than just construction law. However, there is a separate chapter in the DCFR devoted to the construction process and another one to
design, which seems to suggest that the draftsmen of the DCFR recognised the need for more specific rules on construction process and design, respectively. This book points out a few inconsistencies and gaps between the regulation of the three analysed legal systems and the provisions of the DCFR on the duty to warn. In future works on the European Contract Law it could be reconsidered whether not to make the duty to warn more specific for all service providers, or whether not to regulate these ambiguities in specific chapters relating to construction or design. The need of and methods of introducing such changes is for the future researchers to establish.

Various chapters of this book illustrate the scope of a specific duty to warn, problems with performing it and consequences of a breach of that duty to warn. This book refers to existing literature and case law discussing and regulating various aspects of that duty to warn, and adds to that debate by presenting the most current developments as well as a comparison with the provisions of the DCFR. Such in depth comparison of the provisions of the DCFR with English, German and Dutch law as far as the regulation of the duty to warn of the service provider in the construction process is concerned is a novelty. This type of research shows us an increased tendency to attempt further harmonization of the European Contract Law. This process seems to call for the broadening of the traditional comparative research of positive legal systems of various Member States by adding a review of the rules that are supposed to be ‘European’. This book does not argue for the change of any of the legal systems analysed in it, but mainly describes the rules established in these systems and presents different (or similar) solutions that had been found in English, German, Dutch law and in the DCFR to the legal problems reviewed. Fortunately, work on further harmonization of the European Contract Law is still in progress, which means that the researchers and politicians involved in this endeavour are capable of taking into account the conclusions of research such as the one that has been presented in this book.
10. Samenvatting. (vertaling van het hoofdstuk 9.2.)

Het belangrijkste doel van dit boek is de verduidelijking van de voorwaarden waaronder een dienstverlener in het bouwproces een precontractuele of een contractuele waarschuwingsplicht tegenover zijn consument-opdrachtgever heeft voor een risico dat voortvloeit uit een overeenkomst tussen de opdrachtgever en een derde en wanneer een dergelijke waarschuwingsplicht niet expliciet in de overeenkomst van de dienstverlener is opgenomen. Deze vraag wordt onderzocht naar Engels, Duits en Nederlands recht; daarnaast wordt naar de regeling in de DCFR gekeken. De uitkomsten van dit onderzoek zijn in de bovenstaande hoofdstukken gepresenteerd en elk daarvan eindigt met een samenvatting en een vergelijking van deze voorwaarden in de onderzochte rechtsstelsels. In deze hoofdstukken zijn meer gedetailleerde onderzoeksvragen geanalyseerd en beantwoord op basis van een positiefrechtelijke methodologie, dat wil zeggen op basis van de bestaande wettelijke bepalingen en jurisprudentie in Engeland, Duitsland, Nederland en van de bepalingen van de DCFR. De centrale onderzoeksvraag van dit boek vroeg om: een illustratie van de reikwijdte van de stilzwijgende waarschuwingsplicht van dienstverleners in het bouwproces ten aanzien van een risico afkomstig van een derde. Artikel IV.C.-2:108 lid (1) DCFR legt een contractuele plicht op aan dienstverleners om hun opdrachtgevers niet alleen te waarschuwen voor risico’s die het gevolg zijn van het opvolgen van aanwijzingen van de opdrachtgever of van gebrekkige informatie die de dienstverlener zelf had verzameld, maar ook voor risico’s die het worden veroorzaakt door een derde. Wat zou leiden tot de waarschuwingsplicht? De waarschuwingsplicht op grond van Artikel IV.C.-2:108 lid (5) DCFR ontstaat wanneer zich een risico openbaart aan de dienstverlener zonder dat de dienstverlener een eigen onderzoek behoeft uit te voeren naar het bestaan van dat risico. De vraag of de dienstverlener specifiek naar lacunes, onduidelijkheden, inconsistenties en fouten moet zoeken, kan daarmee ook ontkennend worden beantwoord.

Een ander aspect van de centrale vraag is: hoe oplettend moet de dienstverlener zijn bij het analyseren van de verzamelde of ontvangende informatie en instructie, opdat hij een mogelijk probleem kan ontdekken waarover hij de opdrachtgever dient te waarschuwen? Ik zie deze vragen als twee verschillende zijden van dezelfde munt. Aan de ene kant moeten we weten hoe attent de dienstverlener moet zijn om de vraag wanneer de waarschuwingsplicht ontstaat, te kunnen beantwoorden. Aan de andere kant, wanneer vaststaat dat op de dienstverlener een waarschuwingsplicht rust, hangt de reikwijdte van die waarschuwingsplicht af van de mate van oplettendheid die van de dienstverlener tijdens de uitvoering van de dienst mag worden verwacht. Dat is waarom het volgens mij de moeite waard is om deze vragen naast elkaar te behandelen. De norm voor de dienstverlener is dat van hem een gebruikelijke mate van oplettendheid mag worden verwacht ten aanzien van alles wat bij hem de aanwezigheid van een risico doet veroordelen. Dezelfde norm is van toepassing op alle dienstverleners die in de analyse van dit boek zijn opgenomen: aannemers, ontwerpers (architecten) en onderaannemers. Deze norm weerspiegelt de
hoofdregel ten aanzien van de waarschuwingsplicht van de aannemer, de ontwerper en de onderaannemer in Engeland, Duitsland en in Nederland: de dienstverlener dient de opdrachtgever te waarschuwen over de risico’s die hij zonder een grondige inspectie uit te voeren, had moeten ontdekken. De Engelse rechtbanken passen daarbij de standaard van een zorgvuldige en deskundige dienstverlener toe. Een Duitse aannemer wordt aansprakelijk gehouden voor fouten die voor de gemiddelde aannemer ‘in een oogopslag’ kenbaar zouden zijn geweest. De reikwijdte van de waarschuwingsplicht van de ontwerper in Duitsland is uitvoerig in de rechtspraak besproken en lijkt minder ver te gaan dan die van de aannemer, omdat de ontwerper wordt gezien als een partij die minder mogelijkheden heeft om een risico in het bouwproces te ontdekken, tenzij hij specifiek wordt ingezet om het bouwproces te begeleiden in het kader van toezicht op de uitvoering van het ontwerp. Een Nederlandse aannemer behoeft slechts een beperkt onderzoek uit te voeren, en de norm waaraan zowel de aannemer en de ontwerper zich dienen te houden, is die van een redelijk bekwaam en redelijk zorgvuldige dienstverlener. De reikwijdte van de waarschuwingsplicht van de aannemer, de ontwerper en de onderaannemer kan op basis van verschillende specifieke omstandigheden door de verschillende nationale rechters worden ingeperkt. In de hoofdstukken 3, 4 en 5 wordt ingegaan op deze verschillende omstandigheden. Artikel IV.C.-2:108 lid (5) DCFR bevat een algemene regel die de aansprakelijkheid van de dienstverlener beperkt tot de voor de hand liggende gebreken waarover hij niet had gewaarschuwd en die hem tot het handelen met ‘normale aandacht’ verplicht.

Het gebrek aan specifieke definities en grenzen ten aanzien van de mate van oplettenheid die van de dienstverlener kan worden verlangd, maakt het moeilijker om de vraag te beantwoorden of de enkele onduidelijkheid of dubbelzin in de opdracht aan de dienstverlener al voldoende is om een waarschuwingsplicht aan te nemen? Of ontstaat de waarschuwingsplicht alleen indien sprake is van een inconsistentie of onjuistheid in de opdracht? Deze vragen hangen samen met het besprokene in de vorige paragraaf, omdat zij de reikwijdte van de waarschuwingsplicht van de dienstverlener specificeren. De bepaling in de DCFR heeft echter een vrij algemeen karakter. Dit betekent dat het aan de rechters/arbiters wordt overgelaten om te oordelen of een normaal attent dienstverlener een risico in het bouwproces al zou (moet) hebben onderkend als hij geconfronteerd werd met onzekerheid over de juistheid van bepaalde gegevens in het bouwproces, of dat sprake moet zijn van een duidelijke fout in het bouwproces. Het feit dat de dienstverlener niet verplicht is om actief te zoeken naar mogelijke fouten en risico’s wijst erop dat de enkele onduidelijkheid of dubbelzin mogelijk onvoldoende is om te leiden tot het ontstaan van een waarschuwingsplicht voor de dienstverlener.

Een andere onderzoeksvraag die de reikwijdte van de aansprakelijkheid van de dienstverlener betreft, is de vraag of het bestaan en de reikwijdte van de waarschuwingsplicht wordt beïnvloed door de deskundigheid van de opdrachtgever of van door hem ingeschakelde andere professionele partijen. Volgens Artikel IV.C.-2:108 lid (3) en lid (6) DCFR hoeft de dienstverlener de opdrachtgever niet te waarschuwen, indien de opdrachtgever het risico al kent. Uit het enkele feit dat de opdrachtgever door een andere professionele partij wordt bijgestaan of dat de opdrachtgever zelf deskundig is, kan de dienstverlener echter niet afleiden dat de opdrachtgever zich bewust is van het risico. De deskundigheid en ervaring van de opdrachtgever, of het feit dat hij andere specialisten ingeschakeld heeft bij het
bouwproces, ontslaan de dienstverlener niet van zijn waarschuwingsplicht jegens de opdrachtgever. Dezelfde regel kan in het Duitse en Nederlandse recht worden gevonden. In het Engels recht is deze kwestie tot op heden niet duidelijk beslist. Sommige Engels zaken duiden erop dat het feit dat de opdrachtgever een mogelijkheid had om een advies te krijgen van een andere professionele partij, kan leiden tot een vermindering van de reikwijdte van de aansprakelijkheid van de dienstverlener op wie een waarschuwingsplicht rust. Daarbij zou het niet relevant zijn of de opdrachtgever wel of geen gebruik heeft gemaakt van die mogelijkheid. In sommige uitspraken kan echter ook het tegenovergestelde worden gelezen. Voor het Engelse recht is het dus afwachten totdat de rechtspraak meer duidelijkheid over deze kwestie schept.

In het Duitse en Nederlandse rechtspraak heeft op dit punt nog een nadere verfijning van de regel plaatsgevonden: in het geval dat een door de opdrachtgever ingeschakelde specialist beschikt over bijzondere expertise waarover een andere dienstverlener niet beschikt, dan rust op deze andere dienstverlener geen waarschuwingsplicht jegens de opdrachtgever. Deze laatste regel beperkt de reikwijdte van de aansprakelijkheid van de dienstverlener, maar is niet door de opstellers van de DCFR overgenomen. De regeling in de DCFR is op dit punt daardoor consument-vriendelijker. Men kan zich echter afvragen of in dergelijke omstandigheden de belangen van de dienstverlener niet zwaarder behoren te wegen dan die van de opdrachtgever. Als er twee professionele partijen zijn die de opdrachtgever voor het bouwproces konden waarschuwen en een van hen over meer deskundigheid beschikt en daardoor beter in staat staat om het risico op te merken, dan lijkt het mij te ver te gaan om aan de opdrachtgever de mogelijkheid te bieden om schadevergoeding van beide partijen te eisen wegens schending van de waarschuwingsplicht. De reden waarom de opstellers van de DCFR niet hebben gekozen voor het overnemen van de regel uit het Duitse en Nederlandse recht ligt echter voor de hand: indien van beide dienstverleners mocht worden verwacht dat zij zich bewust zouden zijn van het risico, lijkt het niet goed te verdedigen dat één van hen de mogelijkheid krijgt om zijn aansprakelijkheid te beperken door te stellen dat hij niet heeft hoeven te waarschuwen omdat de andere, meer ervaren en deskundige partij ook niet heeft gewaarschuwd, in het bijzonder niet wanneer het voor de eerste dienstverlener duidelijk moet zijn geweest dat de meer ervaren en deskundige partij niet heeft gewaarschuwd. Ofschoon het in het algemeen wenselijk is dat er grenzen worden gesteld aan de reikwijdte van de waarschuwingsplicht van de dienstverlener en dat van hem niet mag worden verwacht dat hij de opdrachtgever waarschuwt als er meer deskundige professionele partijen bij het bouwproces betrokken zijn, lijkt het redelijk om toch van de dienstverlener te verwachten dat hij een waarschuwing geeft wanneer hij zich bewust is van de problemen en risico’s. Waarom? Welnu, het kan sowieso geen kwaad dat een dienstverlener die twijfels heeft over de gekozen bouwmethode, deze twijfels met de opdrachtgever deelt, te meer nu dit ernstige overlast voor de opdrachtgever kan voorkomen. Daar komt nog bij dat hoewel het in veel gevallen moeilijk is om vooraf te beoordelen of de dienstverlener verplicht is om te waarschuwen en in het bijzonder of de bijzondere deskundigheid van de andere dienstverlener de andere dienstverlener bevrijdt van de verplichting tot waarschuwen, de dienstverlener in ieder geval van aansprakelijkheid bevrijdt is indien hij op deugdelijke wijze de opdrachtgever gewaarschuwd heeft.

Dezelfde onderzoeksvragen zijn gesteld met betrekking tot de reikwijdte van de precontractuele waarschuwingsplicht van de dienstverlener. In de DCFR is de
bepaling over de precontractuele waarschuwingsplicht van de dienstverlener vergelijkbaar met die over zijn contractuele waarschuwingsplicht. Dit betekent weer dat op de dienstverlener geen verplichting rust om actief naar de risico’s in het bouwproces te zoeken. Op de dienstverlener rust slechts een waarschuwingsplicht ten aanzien van een risico dat hij met normale opletting zou hebben opgemerkt, met inachtneming van alle gegevens die hem op dat moment ter beschikking stonden. Vergeleken met de drie nationale systemen die zijn onderzocht biedt de expliciete regeling van de precontractuele waarschuwingsplicht in de DCFR consumenten een betere positie. In Engeland, Duitsland en Nederland ontbreken veelal heldere regels over de reikwijdte van de precontractuele waarschuwingsplicht. Zoals aangegeven in de afzonderlijke hoofdstukken van dit boek, is het vanwege een gebrek aan rechtspraak op dit punt vooral moeilijk om de reikwijdte van de precontractuele waarschuwingsplicht van de ontwerper te bepalen. Op basis van de onderzochte Duitse en Nederlandse rechtspraak lijkt de reikwijdte van de precontractuele waarschuwingsplicht van de aannemer en van de onderaannemer niet te veel afwijken van de reikwijdte van hun contractuele waarschuwingsplicht. Dit betekent dat, net als in de DCFR, in deze twee rechtssystemen de aannemer of de onderaannemer niet actief hoeft te zoeken naar risico’s voor de bouw. Artikel IV.C.-2:102 DCFR preciseert de nog wat vage regels inzake de precontractuele waarschuwingsplicht in deze lidstaten. Uit sommige Duitse uitspraken kan worden afgeleid dat van aansprakelijkheid alleen sprake kan zijn indien het gebrek of het risico nog eenvoudiger te ontdekken was dan geldt voor de contractuele waarschuwingsplicht van de dienstverlener. De bepalingen van de DCFR verlangen van de dienstverlener dat deze waarschuwt voor de risico’s die gelet op de omstandigheden bij hem bekend moeten zijn geweest, mede gelet op de informatie die de dienstverlener heeft moeten verzamelen. Zo is bijv. de aannemer verplicht om ten behoeve van het bepalen van de prijs die hij aan de opdrachtgever wil offeren, al in de precontractuele fase de ontwerpplannen zorgvuldig te onderzoeken. Tijdens een dergelijk onderzoek moet de dienstverlener in staat zijn om de haalbaarheid van het project te beoordelen en waarschuwen voor gebreken die al tijdens een dergelijk onderzoek in één oogopslag opgemerkt moeten worden. Alleen voor het niet waarschuwen voor risico’s en gebreken die al bij zo’n onderzoek aan het licht moeten komen, kan de dienstverlener aansprakelijk zijn.

Naast het bieden van inzicht in de reikwijdte van de waarschuwingsplicht van de dienstverlener, laat dit boek ook verschillende problemen zien die tijdens het uitvoeren van de waarschuwingsplicht kunnen ontstaan. Zo wordt besproken wat de vorm van de waarschuwing zou moeten zijn. De DCFR bevat geen formele eisen waaraan de te verstrekken waarschuwing moet voldoen. Dit betekent dat de waarschuwing niet schriftelijk behoeft te worden gedaan, al neemt de dienstverlener daarmee natuurlijk het risico dat hij niet in staat is om te bewijzen dat hij daadwerkelijk gewaarschuwd heeft. De bepaling van de DCFR wekt de indruk dat de dienstverlener begrijpelijke taal zal moeten gebruiken en dat hij de risico’s voor de opdrachtgever duidelijk zal moeten maken. In de drie onderzochte nationale rechtstelsels is het duidelijk dat waarschuwing helder en expliciet moet zijn. Alleen in Duitsland geldt een vormvereiste: de waarschuwing dient op schrift te zijn gesteld. De Duitse rechtspraak lijkt echter flexibel om te gaan met dit vormvereiste: wanneer de waarschuwing helder was, wordt geen schending van de waarschuwingsplicht aangenomen indien de waarschuwing niet schriftelijk is overgebracht. De oplossing van de DCFR lijkt meer praktisch te zijn, omdat het van de omstandigheden van het
geval kan afhangen of de dienstverlener de opdrachtgever schriftelijk of niet zou moeten waarschuwen (bijvoorbeeld, in het geval de waarschuwing de opdrachtgever zo snel mogelijk dient te bereiken, bijvoorbeeld in geval van onmiddellijk gevaar).

Een andere vraag is aan wie de waarschuwing moet worden gegeven. Meer specifiek: moet de dienstverlener de opdrachtgever zelf waarschuwen of voldoet hij aan zijn waarschuwingsplicht als hij de waarschuwing aan een vertegenwoordiger van de opdrachtgever verleent? Op grond van Artikel IV.C.-2:108 lid (3b) DCFR is de dienstverlener van zijn waarschuwingsplicht vrijgesteld indien van de opdrachtgever redelijkerwijs kan worden verwacht dat hij zich van het risico bewust is. Artikel IV.C.-2:108 lid (6) DCFR bepaalt dan dat voor het aannemen dat de opdrachtgever zich bewust is van het risico niet voldoende is dat andere professionele partijen de opdrachtgever adviseerden, tenzij een dergelijke partij als de vertegenwoordiger van de opdrachtgever heeft gehandeld. In dat laatste geval is Artikel II.-1:105 DCFR van toepassing, op grond waarvan de kennis van de vertegenwoordiger van de opdrachtgever aan de opdrachtgever zelf wordt toegerekend. Dit betekent dat indien de dienstverlener een waarschuwing aan de vertegenwoordiger van de opdrachtgever geeft, de opdrachtgever zelf wordt geacht gewaarschuwd te zijn. Die regel wordt ook in Engeland, Duitsland en Nederland aanvaard. Alleen in die gevallen waarin de dienstverlener zich moet hebben gerealiseerd dat de waarschuwing door de vertegenwoordiger genegeerd is en niet onder de aandacht van de opdrachtgever is gebracht (of, in het Nederlandse recht, indien het niet opvolgen van de waarschuwing ernstige negatieve gevolgen zou hebben), kan de dienstverlener gehouden zijn om de opdrachtgever persoonlijk te waarschuwen. De bepalingen van de DCFR kunnen hetzelfde resultaat met zich brengen, aangezien de dienstverlener redelijkerwijs niet van de opdrachtgever kan verwachten dat deze op de hoogte is van het risico, indien de dienstverlener slechts de vertegenwoordiger van de opdrachtgever heeft gewaarschuwd en hij moet hebben geweten dat die de waarschuwing niet onder de aandacht van de opdrachtgever heeft gebracht.

Tot slot kan men zich afvragen of de waarschuwingsplicht door de dienstverlener is nagekomen met de enkele verstrekking van de waarschuwing, of dat dit pas het geval is indien de waarschuwing effectief blijkt te zijn. De enige bepalingen in de DCFR die hier van toepassing kunnen zijn – Artikel IV.C.-2:105 lid (5) DCFR en de nadere uitwerking daarvan in Artikel IV.C.-3:103 DCFR – stellen dat de dienstverlener redelijke voorzorgsmaatregelen dient te nemen om het ontstaan van schade als gevolg van de uitvoering van de dienst te voorkomen. Dit doet vermoeden dat in het geval het risico waarover de dienstverlener de opdrachtgever waarschuwde de bouw aanzienlijk in gevaar zal brengen, de dienstverlener mogelijk iets meer zal moeten doen dan enkel de opdrachtgever te waarschuwen. Dit geldt met name in gevallen wanneer de opdrachtgever niet naar de verleende waarschuwing luistert en wanneer hij zijn instructies aan de dienstverlener niet wijzigt en niet eens het risico probeert te vermijden. Het is echter niet altijd gemakkelijk voor de dienstverlener om van te voren in te schatten wat de gevolgen zullen zijn indien de opdrachtgever niet reageert op de waarschuwing en hoe ernstig die gevolgen zullen zijn. Dit betekent dat de dienstverlener niet snel zekerheid heeft dat hij zijn waarschuwingsplicht volledig en naar tevredenheid heeft uitgevoerd en dat hij niet langer aansprakelijk is indien desalniettemin schade zou ontstaan voor de opdrachtgever. Het gebrek aan duidelijkheid in de bepalingen van de DCFR op dit punt komt niet als een verrassing, aangezien hierover ook op nationaal niveau geen duidelijkheid bestaat. In Engeland, Duitsland en Nederland hebben de gerechten soms geoordeeld dat de dienstverlener ‘iets meer’ had moeten doen dan enkel te waarschuwen. Wat de dienstverlener dan
had moeten doen, wordt nauwelijks aangegeven. Daarmee blijft onduidelijk wat de dienstverlener zou moeten doen om niet met succes aansprakelijk te kunnen worden gesteld voor de schending van zijn waarschuwingsplicht. Door een gebrek aan duidelijke regelgeving zou de dienstverlener bovendien niet worden toegestaan om zijn werken op te schorten of zelfs te beëindigen in het geval de opdrachtgever hem verzoekt dat hij een gebrekkige bouw uitvoert zonder rekening te houden met de verleende waarschuwing. Alleen in gevallen waarin de voortzetting van het bouwproces de veiligheid en gezondheid van anderen zou bedreigen, was het duidelijk aan de rechtbanken dat de dienstverlener een plicht met dergelijke werken niet door te gaan had. Zoals het was genoemd, echter, kan het moeilijk zijn om van te voren in te schatten of de schade die voor het bouwproces een bedreiging vormt zo aanzienlijk is.

Het laatste onderwerp dat is besproken in dit boek betreft de aansprakelijkheid van de dienstverlener voor het schenden van zijn waarschuwingsplicht. In de eerste plaats is aandacht besteed aan vragen over het causaal verband: *kan de dienstverlener, die niet de opdrachtgever heeft gewaarschuwd over een risico afkomstig van een derde, worden beschouwd als degene die de schade heeft veroorzaakt, of moet het ontstaan van de schade worden toegerekend aan die derde?* Artikel IV.C.-2:106 DCFR legt de dienstverlener een verplichting op om het resultaat te bereiken dat de opdrachtgever voor ogen had op het moment van het sluiten van de overeenkomst. Dit betekent, in theorie, dat ongeacht de oorzaak van het feit dat het eindproduct gebrekkig is, de dienstverlener die het eindproduct gebrekkig aflevert, zijn contractuele verplichting niet nakomt. De niet-nakoming van de dienstverlener behoeft echter niet noodzakelijkerwijs neer te komen op aansprakelijkheid: de waarschuwingsplicht biedt een mogelijkheid om te ontsnappen aan aansprakelijkheid. Bij een schending van de waarschuwingsplicht, zal de dienstverlener daarvoor jegens zijn opdrachtgever aansprakelijk zijn op basis van de algemene regels van aansprakelijkheid in Boek III, Hoofdstuk 3 DCFR. In het commentaar bij een soortgelijke bepaling inzake de contractuele waarschuwingsplicht in de PELSC wordt echter opgemerkt dat wanneer de dienstverlener kan bewijzen dat het causaal verband ontbreekt tussen het uitblijven van de waarschuwing en het ontstaan van de schade van de opdrachtgever, de opdrachtgever hem niet aansprakelijk kon houden. Voor wat betreft de aansprakelijkheid voor de schending van de precontractuele waarschuwingsplicht kan hetzelfde worden afgeleid uit Artikel IV.C.-2:102 lid (3) DCFR. Het Duitse en Nederlands recht laten er geen twijfel over bestaan dat het niet nakomen van de waarschuwingsplicht kan worden gezien als een oorzaak van de schade van de opdrachtgever en dat de dienstverlener daarvoor volledig aansprakelijk gesteld kan worden. Het Engelse recht is iets meer terughoudend in het erkennen van de waarschuwingsplicht, zoals vele malen in dit boek is opgemerkt. Dit betekent ook dat kwesties van causaal verband niet uitputtend zijn besproken. In de afgelopen jaren is er echter meer en meer jurisprudentie gekomen waarin de dienstverleners aansprakelijk worden gehouden voor het niet nakomen van hun waarschuwingsplicht, hetgeen tot de conclusie leidt dat ook naar Engels recht het causaal verband wordt aangenomen wanneer een waarschuwingsplicht is geschonden. De nationale rechtsstelsels die in dit boek zijn besproken, brengen de aansprakelijkheid van de dienstverlener niet in verband met de schending van zijn eigen verplichting om een perfect eindresultaat te leveren, hetgeen de DCFR lijkt te doen, maar eerder met het feit dat een andere plicht, namelijk een waarschuwingsplicht of zorgplicht is geschonden.
Het tweede punt dat is opgeworpen, is of wanneer het gebrek niet slechts het gevolg is van schending van de waarschuwingsplicht maar ook van een derde die het risico heeft veroorzaakt, deze partijen dan wellicht samen aansprakelijk kunnen worden gesteld door de opdrachtgever. Op welke wijze is geregeld dat de opdrachtgever in een dergelijk geval zijn schade volledig vergoed kan krijgen? Artikel III.-4:103 lid (2) DCFR gaat uit van hoofdelijke aansprakelijkheid van deze beide partijen indien het causaal verband tussen de oorspronkelijke fout en de schade van de opdrachtgever niet is verbroken door de latere schending van de waarschuwingsplicht. Artikel III.-4:103 lid (3) DCFR bepaalt dat voor het vaststellen van hoofdelijke aansprakelijkheid niet vereist is dat de schuldenaren op dezelfde wijze en op dezelfde grond aansprakelijk zijn. Het systeem van hoofdelijke aansprakelijkheid betekent dat de opdrachtgever nakoming mag verwachten van elk van de schuldenaren totdat volledige nakoming is bereikt. De schuldenaren kunnen dan onder elkaar regres halen. Dit systeem biedt zonder twijfel voldoende bescherming aan de opdrachtgever, aangezien hij hier in staat wordt gesteld de schuldenaar te kiezen van wie hij volledige schadevergoeding wil verlangen. Ook het Engelse contractenrecht en onrechtmatigedadsrecht stelt de opdrachtgever in staat om beide partijen aan te spreken. Daarmee wordt erkend dat ieder die aan de schade van de opdrachtgever heeft bijgedragen, daarvoor aansprakelijk kan worden gesteld. Het verschil tussen de regeling in de DCFR en het Engelse recht is dat het in de praktijk in Engeland aannemelijk is dat de opdrachtgever niet de volledige schade van één enkele schuldenaar vergoed krijgt, aangezien de rechter de schadevergoeding onder alle partijen die de schade hebben veroorzaakt zal verdelen. Het systeem van de DCFR lijkt meer op het Duitse recht, waar hoofdelijke aansprakelijkheid wordt vastgesteld op basis van overeenkomstige regels. De opdrachtgever kiest wellicht de professionele partij om zijn schade op te verhalen, waarna die professionele partij regres neemt op de andere dienstverlener die heeft bijgedragen aan de schade van de opdrachtgever. Het Nederlandse recht is op dit punt iets minder duidelijk omdat er in de praktijk twee verschillende benaderingen zijn: soms wordt enkel de dienstverlener die zijn waarschuwingsplicht heeft geschonden voor aansprakelijk gehouden, soms wordt ook de aansprakelijkheid van de derde die het oorspronkelijke gebrek heeft veroorzaakt erkend, hetgeen dan tot gevolg zal hebben dat de rechter de schadevergoeding over deze twee partijen verdeeld. Zoals reeds opgemerkt, de enkele aansprakelijkheid van de dienstverlener vindt geen voldoende grond in het Nederlandse recht. Het systeem van de DCFR, net als het Duitse recht, lijkt duidelijker en meer opdrachtgever-vriendelijk. De opdrachtgever hoeft niet twee verschillende rechtszaken aanhangig te maken, tegen elk van de schuldenaren, om zijn schade te verhalen, en hij loopt minder het gevaar dat één van zijn aannemers insolvent raakt.

De volgende vraag die in overweging moet worden genomen is: als de dienstverlener die zijn waarschuwingsplicht schond aansprakelijk wordt gesteld door de opdrachtgever in plaats van of tezamen met de derde die het risico voor zijn opdrachtgever had veroorzaakt, kan dan de dienstverlener zijn aansprakelijkheid beperken of uitsluiten door zich te beroepen op eigen schuld van de opdrachtgever? De DCFR bevat een regel aangaande eigen schuld in Artikel III.-3:704 DCFR, welke bepaalt dat de schuldenaar niet aansprakelijk is voor de schade geleden door de schuldeiser waaraan de schuldeiser zelf heeft bijdragen. Dit betekent dat als de opdrachtgever verantwoordelijk is voor het oorspronkelijke tekortkoming van de derde, bijvoorbeeld dat de derde zijn instructies opvolgde of zijn vertegenwoordiger was, dan kan de dienstverlener zijn aansprakelijkheid op grond van de schending van
zijn waarschuwingsplicht beperken of zelfs uitsluiten. Het Duitse en Nederlandse recht staan in een dergelijke situatie ook een beroep op eigen schuld toe. In beide systemen kan de dienstverlener alsnog deze mogelijkheid worden ontnomen wanneer het in strijd met de redelijkheid en de billijkheid zou zijn als de dienstverlener op deze grond bevrijd zou worden van (een deel van) zijn aansprakelijkheid, bijvoorbeeld wanneer de dienstverlener het gebrek weliswaar had onderkend maar had gewacht met het waarschuwen van de opdrachtgever, en deze vertraging de schade had veroorzaakt. De DCFR past ook het beginsel van de redelijkheid en billijkheid toe, op grond van Artikel III.-1:103 DCFR, hetgeen lijkt te duiden op een overeenkomstige beperking van het verweermiddel van de eigen schuld als in het Duitse en Nederlandse recht. Hoe groot de rol is die het beginsel van de redelijkheid en billijkheid speelt in de interpretatie van de bepalingen van de DCFR, valt echter nog te bezien. Het Engelse recht is iets meer terughoudend in het aanvaarden van een beroep op eigen schuld door de dienstverlener aangezien dit middel traditioneel slechts voor handen was in kwesties van onrechtmatige daad. Inmiddels is het instrument echter enkele malen door Engelse rechters toegepast in gevallen van contractuele aansprakelijkheid.

In de hierboven gepresenteerde paragrafen is aangetoond dat de opstellers van de DCFR, inderdaad rekening hebben gehouden met de nationale ontwikkelingen en stromingen althans voor zover deze het Engelse, Duitse en Nederlandse recht betreffen. Er zijn, natuurlijk, kleine verschillen tussen deze regelgevingen, maar de meesten van deze verschillen lijken te komen uit het feit dat de bepalingen van de DCFR van een meer algemene aard zijn en de waarschuwingsplicht in meer sectoren dan alleen het bouwrecht wordt verondersteld te gelden. Er is wel een apart hoofdstuk in de DCFR gewijd aan het bouwproces en een ander hoofdstuk aan het ontwerpproces, wat de indruk wekt dat de opstellers van de DCFR de behoefte aan meer specifieke regels voor het bouwproces en het ontwerpproces hebben onderkend. Dit boek wijst op een aantal inconsistenties en leemten in de regelgeving in de drie onderzochte rechtssystemen en in de bepalingen van de DCFR betreffende de waarschuwingsplicht. In toekomstige werken op het gebied van het Europese contractenrecht kan worden heroverwogen of een meer bijzondere regeling van de waarschuwingsplicht voor alle dienstverleners wenselijk is en of de geconstateerde onduidelijkheden niet in specifieke hoofdstukken betreffende de bouw of het ontwerp moeten worden geregeld. Of dit nodig is, en hoe dergelijke wijzingen zouden moeten worden ingevoerd, is aan toekomstige onderzoekers om vast te stellen.

Verschillende hoofdstukken van dit boek tonen de omvang van een specifieke waarschuwingsplicht, de problemen met het uitvoeren ervan en de gevolgen van een schending van dit waarschuwingsplicht. Dit boek verwijst naar de bestaande literatuur en rechtsspraak die de verschillende onderdelen van dit waarschuwingsplicht bespreekt en reguleert, en draagt aan dit debat bij door een beschrijving van de meest actuele ontwikkelingen in drie rechtssystemen, alsmede een vergelijking met de bepalingen van de DCFR te bieden. Een dergelijke diepgaande vergelijking van de bepalingen van de DCFR met het Engelse, Duitse en Nederlandse recht betrekking op het gebied van de waarschuwingsplicht van de dienstverlener in het bouwproces ontbrak nog. Het onderzoek toont mogelijkheden voor een verdere harmonisatie van het Europese contractenrecht. Het proces van harmonisatie vergt een uitbreiding van het traditionele rechtsvergelijking onderzoek van het positieve rechts van verschillende lidstaten door daaraan de mogelijke herziening van regels van ‘Europese’ aard toe te voegen. Dit
boek pleit niet voor de verandering van elk van de onderzochte rechtsstelsels, maar beschrijft vooral de regels die in deze stelsels zijn vastgesteld en geeft weer welke verschillende of overeenkomstige oplossingen zijn aangetroffen in het Engelse, Duitse en Nederlandse recht en in de DCFR. Het werk aan de verdere harmonisatie van het Europese contractenrecht is nog in volle gang, wat betekent dat de onderzoekers en politici die bij deze inspanningen betrokken zijn, desgewenst rekening kunnen houden met de resultaten van dit onderzoek.
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