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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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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 Reference¹ (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:

A builder is employed to cover the balcony’s floor of the client with a top layer of water-resistant materials. In his design the designer did not provide for any water-resistant base materials to cover the balcony’s floor. As a result, even if the builder would meticulously perform the contract as is foreseen in the design, the balcony’s floor will not be water-resistant and, consequently, subject to corrosion. The question then would be whether the client may expect the builder to warn about that risk and whether, if the builder should have warned him but failed to do so, the client may claim damages not only from the designer but also from the builder.

A builder creates a sewer system on the basis of the design provided to him. However, as in the design plans the sewer system had not been connected to proper pipes, and the builder followed closely the design plans, it is not functioning properly. The builder had noticed something might be wrong when he examined the design in order to calculate his offer, but had not expressed his doubts during the precontractual discussions that he had with the client and the designer on the planned construction. The question then would be

¹ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Outline Edition, München: Sellier European Law Publishers, 2009

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.

³ O. Lando, H. Beale (eds.), *Principles of European Contract Law, Parts I and II, Combined and Revised*, The Hague: Kluwer Law International, 2000

⁴ 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

England, in Germany, in the Netherlands, and in the DCFR, when such a duty has not been explicitly included in the service provider's contract?

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 contract⁵ 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 law⁶, 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

⁵ In such a case the duty to warn might be seen as an express contractual obligation, however,

⁶ I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 1, p. 102-104; I. N. D. Wallace, *Hudson's Building and Engineering Contracts: 1st Supplement*, London: Sweet and Maxwell, 2003, p. 14-16

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 subject⁷. 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 review⁸ of this implied term given by the English Court of Appeal⁹ 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 client¹⁰.

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:

⁷ C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998

⁸ I. N. D. Wallace, *Hudson's Building and Engineering Contracts: 1st Supplement*, London: Sweet and Maxwell, 2003, p. 108

⁹ *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

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 sub-contractor 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 precontractual 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 client¹². 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 law¹³. 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 contract¹⁴. 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

¹² E.g. *District of Surrey v. Carroll-Hatch & Associates*, [1979] 101 D.L.R. (3d) 218; *OLG Karlsruhe*, 28.10.2004, 17 U 19/01, IBR 2006, 135, IBR 2006, 88

¹³ B. S. Markesinis, H. Unberath, *The German law of torts: a comparative treatise*, Portland: Hart Publishing, 1997, p. 60; E. du Perron, 'Contract and Third Parties' in: A. S. Hartkamp, Ch. von Bar et al. (eds.), *Towards a European Civil Code*, Nijmegen: Ars Aequi Libri, 1998, p. 323; M. W. Hesselink, *De redelijkheid en billijkheid in het Europese privaatrecht*, diss. Utrecht, Deventer: Kluwer, 1999, p.275; Ch. Conrad, *Baumängel – was tun? Ansprüche, Rechte und Ihre Durchsetzung*, Berlin: Ernst & Sohn, 2003, p. 64; BGH, 02.11.1983, NJW 1984, 355; In this respect German legal system is exceptional since under the contractual construction *Vertrag mit Schutzwirkung für Dritte* certain contractual obligations might also bind the sub-contractor with respect to the client – see more on that in the paragraphs on the sub-contractor's duty to warn the client in German law.

¹⁴ See on the concurrent duty to warn of the builder (towards a professional client) : *Robinson v PE Jones (Contractors) Ltd*, [2010], T.C.L.R. 3 (QBD (TCC)), *Construction Law Journal* 2010, 26 (3), p. T79-119

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 basis¹⁵. 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 bodies¹⁶. 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

¹⁵ See e.g. P. S. Atiyah, *An Introduction to the Law of Contract*, Oxford: Clarendon Press, 1989, p. 1-3; G. Samuel, *Law of Obligations and Legal Remedies*, London: Cavendish Publishing Limited, 2001, p. 250-251, 254-255; M. A. B. Chao-Duivis, ‘Informatie en mededelingsplichten: een causaliteitsprobleem’, BR 1991/2, p. 82

¹⁶ See e.g. P. S. Atiyah, *An Introduction to the Law of Contract*, Oxford: Clarendon Press, 1989, p. 1-3; G. Samuel, *Law of Obligations and Legal Remedies*, London: Cavendish Publishing Limited, 2001, p. 250-251, 254-255; this difference is also mentioned in Introduction 51 to the DCFR: Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Outline Edition, München: Sellier European Law Publishers, 2009

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 *dwaling*. 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

¹⁷ Problems with establishing precontractual duty to warn were also discussed by: M. A. B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 81-94

¹⁸ *Collins Cobuild Advanced Learner's English Dictionary*, Glasgow: HarperCollins Publishers, 2006, p. 744

¹⁹ *Collins Cobuild Advanced Learner's English Dictionary*, Glasgow: HarperCollins Publishers, 2006, p. 22

²⁰ *Collins Cobuild Advanced Learner's English Dictionary*, Glasgow: HarperCollins Publishers, 2006, p. 1636

tell another person to watch out, is it not an advice as well since I tell someone what 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 literature²¹, 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 information²².

²¹ A. Pinna, *The obligations to inform and to advise*, Den Haag: Boom, 2003, p. 9; M. Ebers, ‘Informations- und Beratungspflichten bei Finanzdienstleistungen: Allgemeine und besondere Rechtsgrundsätze’, in: R. Schulze, M. Ebers, H. Ch. Grigoleit (eds.), *Informationspflichten und Vertragsschluss im Acquis communautaire*, Tübingen: Mohr Siebeck, 2003, p. 173; R. Sefton-Green, ‘Duties to Inform versus Party Autonomy: Reversing the Paradigm (from Free Consent to Informed Consent)? – A Comparative Account of French and English Law’, in: G. Howells, A. Janssen, R. Schulze (eds.), *Information Rights and Obligations*, Aldershot: Ashgate, 2005, p. 174; J. M. Barendrecht, E. J. A. M. van den Akker, *Informatieplichten van dienstverleners*, Deventer: W. E. J. Tjeenk Willink, 1999, p. 2; M. A. B. Chao-Duivis, ‘Informatie en mededelingsplichten: een causaliteitsprobleem’, BR 1991/2, p. 88

²² M. W. Hesselink, *CFR & Social Justice*, München: Sellier European Law Publishers, 2008, p. 36-40; M. W. Hesselink, ‘The CFR and Social Justice’, in: A. Somma (ed.), *The Politics of the Draft Common*

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

Frame of Reference, Wolters Kluwer, 2009, p. 109; O. Lando, ‘Liberal, Social and ‘Ethical’ Justice in European Contract Law’, 43 CMLR, 2006, p. 829

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

²³ D. Caruso, 'The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration', *European Law Journal*, Vol. 3, No. 1, March 1997, p. 7; Ch. Willett, 'Autonomy and Fairness: The Case of Public Statements', in: G. Howells, A. Janssen, R. Schulze (eds.), *Information Rights and Obligations*, Aldershot: Ashgate, 2005, p. 1-6; P. Gozzo, 'The Strategy and the Harmonization Process within the European Legal System: Party Autonomy and Information Requirements', in: G. Howells, A. Janssen, R. Schulze (eds.), *Information Rights and Obligations*, Aldershot: Ashgate, 2005, p. 22-30

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 solidarity²⁴. 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

²⁴ M. W. Hesselink, 'The Politics of a European Civil Code', *European Law Journal*, Vol. 10, No. 6, November 2004, p. 676-677; D. Kennedy, 'Thoughts on Coherence, Social Values and National Tradition in Private Law', in: *The Politics of a European Civil Code*, M. W. Hesselink (ed.), Amsterdam: Kluwer Law International, 2006, p. 17-24; M. W. Hesselink, 'The Horizontal Effect of Social Rights in European Contract Law', in: *Privaatrecht tussen autonomie en solidariteit*, M. W. Hesselink, C. E. du Perron, A. F. Salomons (eds.), Den Haag: Boom Juridische uitgevers, 2003, p. 128-131; R. Sefton-Green, 'Duties to Inform versus Party Autonomy: Reversing the Paradigm (from Free Consent to Informed Consent)? – A Comparative Account of French and English Law', in: G. Howells, A. Janssen, R. Schulze (eds.), *Information Rights and Obligations*, Aldershot: Ashgate, 2005, p. 171-173; Ch. Mak, *Fundamental Rights in European Contract Law. A comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn: Wolters Kluwer, 2008, chapters 4.2.-4.3., p. 200-214; B. van Zelst, *The Politics of European Sales Law. A Legal-Political Inquiry into the Drafting of the Uniform Commercial Code, the Vienna Sales Convention, the Dutch Civil Code and the European Sales Directive in the Context of the Europeanisation of Contract Law*, academisch proefschrift, 2008, chapter 2.2.8., p. 27-30

party's interests are about to be compromised, it should guard the other party from such problems²⁵. 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 contract²⁶. 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 parties²⁷.

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

²⁵ M. A. B. Chao-Duivis, 'Informatie en mededelingsplichten: een causaliteitsprobleem', BR 1991/2, p. 82

²⁶ 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, p. 248-249

²⁷ 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, p. 167, 249

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 obvious²⁸.

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 research²⁹ 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 contracts³⁰. 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 services³¹, but it encountered so much resistance that the proposal was withdrawn. Only in 2006 a general directive on provision of services in the internal market³² was enacted. However, this Services directive in principle does

²⁸ 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, p. 168, 249

²⁹ See the reference in: J. Luzak, 'Client satisfaction – incentive for service providers to warn their clients?', in: W. H. van Boom, I. Giesen, A. J. Verheij (eds.), *Gedrag en privaatrecht*, Den Haag: Boom Juridische Uitgevers, 2008, p. 83-101

³⁰ M. B. M. Loos, 'Service contracts', in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 757-758

³¹ Proposal for a Council Directive in liability for services, OJ 1991, C 12/8

³² Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L 376/36

not affect the contractual relations between the service provider and the client³³. As a result, the directive contains only a few substantive rules that may influence the contractual relation between a service provider and its client³⁴. Moreover, there are several directives on public procurement³⁵; 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)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 PELSC³⁷.

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 published³⁸ which opens the way to further works on creating the Optional Instrument³⁹. The DCFR contains many rules derived from the PECL, taking into

³³ See: the preamble (under 90) to the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006, L 376/36

³⁴ M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 757-758

³⁵ E.g. Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors; Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; for more source see: << http://ec.europa.eu/internal_market/publicprocurement/legislation_en.htm>>

³⁶ O. Lando, H. Beale (eds.), *Principles of European Contract Law, Parts I and II, Combined and Revised*, The Hague: Kluwer Law International, 2000

³⁷ 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

³⁸ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*, Full Edition, München: Sellier European Law Publishers, 2009

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 developments⁴⁰. As far as the PELSC is concerned, it has largely been taken over in the DCFR⁴¹. 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 PECL⁴²) since it deviates from some of them, and is thought to improve others⁴³. However, most of the provisions and principles are the same in the PELSC and in the DCFR⁴⁴. 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 PELSC⁴⁵ and to the DCFR⁴⁶ show important differences between the approach in England towards such duties, which is reserved, and the more advanced approach in Germany. This book

⁴⁰ C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 40-44, p. 16-17

⁴¹ The PELSC provisions have been slightly modified during the works on the Draft Common Frame of Reference and then incorporated in it as Book IV, Part C (Services), in: C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 54-56, p. 33-35

⁴² C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 46, p. 18

⁴³ C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 47, p. 18

⁴⁴ As four of the draftsmen of the PELSC remark themselves. See: J. M. Barendrecht, S. van Gulijk, C. E. C. Jansen, M. B. M. Loos, 'Principles of European Law on Service Contracts' (PEL SC) in *bouwcontractenrechtelijk perspectief*, TBR 2008/137, p. 691

⁴⁵ 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

⁴⁶ Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009

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 methodology⁴⁷. 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 countries⁴⁸. 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

⁴⁷ R. Michaels, 'The functional method of comparative law', in: M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, New York: Oxford University Press, 2006, p. 342

⁴⁸ 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)

influenced more and more by the case law of the United States of America⁴⁹. 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.a., 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 use⁵⁰. 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,

⁴⁹ C. P. Best, "Best Guide to Canadian Legal Research", 2008, <<<http://legalresearch.org/docs/uk-research.html>>> (lastly checked on 26.01.2011)

⁵⁰ R. Michaels, 'The functional method of comparative law', in: M. Reimann, R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, New York: Oxford University Press, 2006, p. 342

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.