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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 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 needed⁴³⁶. 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”⁴³⁷.

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 either⁴³⁸.

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*⁴³⁹ 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:

⁴³⁶ Equitable Debenture Assets Corporation Ltd v. William Moss Group Ltd, (1984) CILL 74; (1984) 2 Con LR 1; (1984) 1 Const LJ 131; Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd. (2007) 1 BLR 526; Pearson Education Ltd v. The Charter Partnership Ltd (2007) 1 BLR 324

⁴³⁷ Brickfield Properties v. Newton, [1971] 1 WLR 862; (1971) 115 Sol. J 307; [1971] 3 All ER 328

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 work⁴⁴⁰. The general rule remains, as specified in the case *Oldschool v. Gleeson*⁴⁴¹, 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

⁴⁴⁰ D. Chappell, J. Parris, *Parris’s Standard Form of Building Contract*, London: WileyBlackwell, 2002, p. 72-73; C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 366-373

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 Another*⁴⁴³ 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

⁴⁴³ *Investors in Industry Commercial Properties Ltd v. District Council of South Bedfordshire and Another* (1985) 32 BLR 1; (1986) 2 Const LJ 108; (1986) 5 Con LR 1; (1986) CILL 236; (1986) 1 EG 252; [1986] QB 1034; [1986] 2 WLR 937; [1986] 1 All ER 787

⁴⁴⁴ S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 437-438

⁴⁴⁵ N. G. Bunni, *Risk and insurance in construction*, London: Taylor & Francis, 2003, p. 152

was made and such a careless designer might be forced to pay damages instead of the insolvent or bankrupt third party⁴⁴⁶.

4.1.2. Precontractual duty to warn.

The scope of the designer's *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 *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 *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)⁴⁴⁷, 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 faith⁴⁴⁸. 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

⁴⁴⁶ 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

⁴⁴⁷ This has been discussed in the chapter on emergence of the duty to warn.

⁴⁴⁸ 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, *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, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kováč, 2008, p. 18-21; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 100

work by other professional parties working at the construction site⁴⁴⁹. 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 2006⁴⁵⁰, 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 2000⁴⁵¹ 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

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 duty⁴⁵². 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 engineer⁴⁵³. 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 default⁴⁵⁴.

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 literature⁴⁵⁵. 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 performed⁴⁵⁶. 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 site⁴⁵⁷. 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 him⁴⁵⁸. However, the designer's liability might be diminished even if he confuses the client as to the amount of money

⁴⁵² P.A. Kamphausen, 'Wer haftet für den sommerlichen Wärmeschutz von Büroräumen hinter Glasfassaden?', IBR 2000, 69

⁴⁵³ BGH, 30.10.1975, VII ZR 309/74, BauR 1976, 1, p. 68; S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 115-116

⁴⁵⁴ E. Baden, 'Wärmeschutz bei Sonneneinstrahlung: Darf sich der Architekt auf den Sonderfachmann verlassen?', IBR 2003, 87

⁴⁵⁵ H. Roth in: *Münchener Kommentar BGB*, 2001, § 242, 317, p. 203

⁴⁵⁶ OLG München, 27.03.1987, 14 U 481/86, NJW-RR 1988, 85; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 232; different opinion in H. Locher, W. Koeble, W. Frik, *Kommentar zur HOAI. Mit einer Einführung in das Recht der Architekten und der Ingenieure*, Düsseldorf: Werner, 2005, § 15, Rdnr. 28

⁴⁵⁷ That the client is under such an obligation seems to be rather obvious, but nevertheless the designer may be required to warn the client thereof. See for instance: OLG Köln, 03.04.1959, 9 U 20/58, MDR 1959, 660; OLG Stuttgart, 17.03.1989, 2 U 147/88, NJW 1989, 2402

⁴⁵⁸ BGH, 07.07.1964, VersR 1964, 1045; BGH, 15.12.1966, VII ZR 151/64, VersR 1967, 260, 262; S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 89-91; B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 108-110

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 designer⁴⁵⁹. 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 capabilities⁴⁶⁰.

In the case of 16 December 2003 decided by OLG Düsseldorf⁴⁶¹ 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 performance⁴⁶². 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

⁴⁵⁹ P. Löffelmann, G. Fleischmann, *Architektenrecht. Architektenvertrag und HOAI. Leistungspflichten. Honorar und Haftung. Bausummenüberschreitung.*, Düsseldorf: Werner, 2007, p. 54

⁴⁶⁰ B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 108-110; B. Franz, 'Architekt muss auf wirtschaftliche Risiken hinweisen!', *IBR* 2004, 435

⁴⁶¹ OLG Düsseldorf, 16.12.2003, 21 U 24/03, *BauR* 2004, 6, p. 1024

⁴⁶² S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 91; P. Löffelmann, G. Fleischmann, *Architektenrecht. Architektenvertrag und HOAI. Leistungspflichten. Honorar und Haftung. Bausummenüberschreitung.*, Düsseldorf: Werner, 1995, p. 36; B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 108-110, 112; H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 255

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 specialists⁴⁶³.

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 2002⁴⁶⁴ 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 himself⁴⁶⁵. 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 permit⁴⁶⁶. 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

⁴⁶³ B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 140

⁴⁶⁴ OLG Düsseldorf, 22.03.2002, 5 U 31/01, NJW-RR Zivilrecht 2002, 17, p. 1098

⁴⁶⁵ BGH BGHZ 74, 235 [239]

⁴⁶⁶ OLG München, 02.07.1990, 28 U 6783/89, NJW-RR 1992, 788; BauR 1992, 534; B. Rauch, *Architektenrecht und privates Baurecht für Architekten*, Köln: Rudolf Müller, 1995, p. 110-111

application. 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 application⁴⁶⁷. 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 delays⁴⁶⁸.

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 about⁴⁶⁹. 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 party⁴⁷⁰.

⁴⁶⁷ S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 80-81; P. Löffelmann, G. Fleischmann, *Architektenrecht. Architektenvertrag und HOAI. Leistungspflichten. Honorar und Haftung. Bausummenüberschreitung.*, Düsseldorf: Werner, 2007, p. 84-85, 114

⁴⁶⁸ BGH, 19.03.1992, III ZR 117/90, NVwZ 1992, 911; OLG Stuttgart, 28.04.1992, 10 U 182/90, BauR 1992, 539

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 to⁴⁷¹. 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 phase⁴⁷². 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 that⁴⁷³. 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

24.11.1993, 11 U 106/93, BauR 1994, 271) or the designer not having warned the client that a different construction method than the one chosen could be more beneficial for him (OLG Frankfurt, 02.08.2000, 9 U 60/99, IBR 2003, 87).

⁴⁷¹ H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 190-192

⁴⁷² S. van Gulijk in: M. A. M. C. van den Berg, A. G. Bregman, M. A. B. Chao-Duivis (eds.), *Bouwwrecht in kort bestek*, 's-Gravenhage: IBR, 2010, p. 223-230

⁴⁷³ See more on that in: S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 106-107

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 design⁴⁷⁴. 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 warning⁴⁷⁵.

In the case of 17 January 2000⁴⁷⁶, 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 skills⁴⁷⁷.

In the case of 22 June 1999⁴⁷⁸, 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 place⁴⁷⁹.

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 2009⁴⁸⁰ 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.

⁴⁷⁴ Art 5 Sec 4 and Art 49 of the SR 1997. The DNR 2005 does not contain any similar provisions.

⁴⁷⁵ M. A. M. C. van den Berg, *Samenwerkingsvormen in de bouw*, Deventer: Kluwer, 1990, nr 135-136

⁴⁷⁶ AIBk 17.01.2000, BR 2000, p. 970

⁴⁷⁷ Asser-Tjong Tjin Tai, 7-IV*, 2009, nr. 93-95; S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 46

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.

⁴⁸⁰ RvA 6.10.2009, nr. 12000510, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

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 it⁴⁸¹. The standard for recognising that default would be the standard of a designer acting with proper skill and care, pursuant to article 7:401 BW⁴⁸².

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

⁴⁸¹ AIBk 6.06.1991, BR 1993, p. 843; S. van Gulijk, *European Architect Law. Towards a New Design*, Apeldoorn/Antwerpen: Maklu-Uitgevers, 2008, p. 67-68

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

suggestions does not release the builder from his liability for their practical application⁴⁸³.

For example, in one of the above-mentioned cases – the case of 22 June 1994⁴⁸⁴ – 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 BW⁴⁸⁵.

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 courts⁴⁸⁶.

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 1986⁴⁸⁷. 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

⁴⁸³ RvA 16.06.1986, nr. 12.219, BR 1987, p. 59; RvA 19.08.1987, nr. 12.508, BR 1988, p. 217; RvA 22.06.1994, nr. 14.256 and 14.257/AIBk 22.06.1994, BR 1995, p. 603; RvA 4.03.1996, nr. 17.553, BR 1996, p. 430; other meaning in: RvA 23.11.1987, nr. 12.235, BR 1988, p. 221

⁴⁸⁴ RvA 22.06.1994, nr. 14.256 and 14.257/AIBk 22.06.1994, BR 1995, p. 603

⁴⁸⁵ See also paragraph 8.3.

⁴⁸⁶ HR 10.07.2009, RvdW 2009, 871; S. van Gulijk, *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.), *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

⁴⁸⁷ AIBk 15.01.1986, BR 1986, p. 373

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.