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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 5. The odd case of the sub-contractor's duty to warn.

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

As the sub-contractor does not have a contract with the client, he will not have a contractual or precontractual duty to warn the client, either about defaults of the builder or of the designer. For this reason, the sub-contractor's duty to warn the client is not covered in this book as a separate duty to warn. In certain cases, however, the judge or an arbitrator would assess that the sub-contractor's duty to warn was not exhausted by the sub-contractor just giving a warning to the builder and not to the client⁴⁸⁸. In such cases, mostly when it would be obvious that the builder would ignore the duty to warn at the spot, the sub-contractor could be considered to have a duty to warn to the client directly. This could then be seen as a consequence of his contractual or precontractual duty to warn the builder. In German law this duty to warn the *client* would be based on the *contractual* construction of the *Vertrag mit Schutzwirkung für Dritte*, a construction that has been established in doctrine and case law in order to remedy insufficiencies of the German tort law⁴⁸⁹. In English law the

⁴⁸⁸ 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

⁴⁸⁹ 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, 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.

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

It is also worth mentioning in this short introduction that the construction sector seems to be organized differently in these three countries. Whereas in England the client usually employs a builder and a designer and leaves them discretion as to the selection of their co-workers and sub-contractors, it seems, from the cases I examined and which will be presented in the following chapters, that in Germany, and in quite a few cases also in the Netherlands, the client employs most of the parties working at the construction site directly. The result of such differences is predictable – in England the client often encounters problems with holding a professional party *contractually* liable for breach of the duty to warn due to the fact that this professional party was employed by e.g. a general constructor and there was no contract concluded between the client and this professional party. Liability may then arise only in tort, which could mean that a different standard for liability would be applied. The English courts have prevented that problem from materialising by applying the same standards to contractual and tortious liability for breach of the duty to warn⁴⁹⁰. This means that while adjudicating a case, an English court focuses on whether to grant damages to the wronged party instead of establishing whether there was a contractual relation between the parties. As a result, the sub-contractors will often be found liable towards the clients in tort, as I will conclude based on the cases presented in the following paragraphs. In Germany, as we will see from the presented cases, this problem does not appear that often. As the client most often directly employs builders and engineers performing work at the construction site and enters into contractual relationships with all of them, there is usually no need to appeal to either tortious liability or the construction of the *Vertrag mit Schutzwirkung für Dritte* to claim damages for the breach of the duty to warn. In the Netherlands clients (in practice often represented by the designer they have already employed) are also more active in entering into contractual relationships with more than one builder and employ also additional specialists, e.g. engineers. Still, the builders also employ sub-contractors, often recommended to them by the client, when the client for some reason did not want to enter into a contractual relationship with the sub-contractor himself. In the latter case, the sub-contractors have a contractual relationship with the builder only and if they have a duty to warn, it is primarily to the builder⁴⁹¹. We will see whether this difference in the organization of the construction process implies that there is a significant difference in the scope of the sub-contractor's duty to warn the client in English, German and Dutch construction law.

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

⁴⁹⁰ Robinson v PE Jones (Contractors) Ltd, [2010], T.C.L.R. 3 (QBD (TCC)), Construction Law Journal 2010, 26 (3), p. T79-119

⁴⁹¹ To be discussed in the following chapters.

5.1. English law.

5.1.1. Contractual duty to warn the builder.

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

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

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

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

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

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

⁴⁹² *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

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

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

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

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

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

In the abovementioned case, the Court of Appeal decided that the contractual relationship between the builder and the sub-contractor contained an implied term that the sub-contractor would speak up if asked to do something dangerous, even if other entities would have been responsible for that defect⁴⁹³. That means that if it was evident for the sub-contractor that this method was risky, he should have warned the main contractor – the builder – about that risk, even if the client and the builder agreed upon a certain manner of construction. Furthermore, just like in the previously mentioned case *Lindenberg v. Canning*⁴⁹⁴, it was decided that in case the warning was given but then was ignored, the party aware of the potential danger should have taken further steps to prevent the risk from happening⁴⁹⁵. Unfortunately, the Court of the Appeal did not define these further steps, leaving this matter to be reconsidered by the lower court judge, who had decided this case in the first instance. Taking into account other judgments and theoretical possibilities the appellate court might have clarified these further steps as, for example: an obligation for the sub-contractor to stop proceeding with the construction until the instructions had been changed; or a sub-contractor’s tortious duty to warn the client in case the builder refused to listen to

⁴⁹³ T. Thompson, ‘Refusal to comply: not a good idea’, *Construction Law Journal*, 2005/21, p. 419-430; T. Bingham, ‘You’ve been warned’, *Building*, 6 April 2001, p. 48; P. Jack, ‘Getting back into shape – toning up fitness for purpose’, *Construction Law Journal*, 2011, 27 (5), p. 360-368; O. Hayford, ‘Did you know... A “Construct Only” Contractor Can Be Liable For Design Defects?’, *Mondaq*, 07/07/2009, 2009 WLNR 12902774

⁴⁹⁴ *Edward Lindenberg v. Joe Canning and Others* (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71

⁴⁹⁵ This matter will be further discussed in Chapter 6.

him⁴⁹⁶. Unfortunately, none of these measures has been pointed out by the court. One can wonder, also, whether the verdict would have been the same, if the risks involved were lower. For example, the Court of Appeal left for future consideration situations in which the defects did not endanger anyone⁴⁹⁷. Probably, in case when there was no risk of personal injury involved the duty to warn would not have been as strenuous. However, in the doctrine⁴⁹⁸ the restraint of the Court of Appeal had been evaluated as leaving room for the future recognition of the duty to warn of the builder or sub-contractor in cases in which the design defects would not only lead to a dangerous situation but even just to an economic loss for the client. Moreover, while in this case the Court of Appeal acknowledge implied duty to warn because of the actual knowledge of the sub-contractor of the defect, again the Court of Appeal seemed to leave room to recognising this duty to warn even in case of the imputed knowledge.

The process of defining the scope of the duty to warn was continued in the case *Aurum v. Avonforce*⁴⁹⁹. On the facts of this case, the client employed one company to do some designing and constructing work, which in its scope encompassed also some excavating work. The builder (who in this case was also a designer) was being advised by the structural engineers and employed specialists in underpinning (the sub-contractor). The sub-contractor was employed by the builder to perform some specialist excavating work – underpinning of one particular wall – and did that diligently. However, after the builder started some further excavating works within the area in which the underpinning was done, it failed and as result part of the walls collapsed. During the court proceedings the builder claimed that the sub-contractor had a duty to warn him of the need to provide additional supports for the underpinning in case of doing any further excavation works in that area.

The court admitted that there could be no dispute that

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

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

⁴⁹⁶ P. Jack, ‘Getting back into shape – toning up fitness for purpose’, *Construction Law Journal*, 2011, 27 (5), p. 360-368

⁴⁹⁷ T. Thompson, ‘Refusal to comply: not a good idea’, *Construction Law Journal*, 2005/21, p. 419-430; O. Hayford, ‘Did you know... A “Construct Only” Contractor Can Be Liable For Design Defects?’, *Mondaq*, 07/07/2009, 2009 WLNR 12902774

⁴⁹⁸ I. N. D. Wallace, *Hudson’s Building and Engineering Contracts: 1st Supplement*, London: Sweet and Maxwell, 2003, p. 108

⁴⁹⁹ *Aurum Investments Limited v. Avonforce Limited (in liquidation)*, [2001] 2 All ER 385; 78 Con. LR 115, (2001) 17 Const. LJ 145, [2001] Lloyd’s Rep. PN 285; (2001) 3 TCLR 21; S. Furst, V. Ramsey, *Keating on construction contracts*, London: Sweet & Maxwell, 2006, p. 251

“In the present case, Mr Brown [counsellor on behalf of Avonforce, the builder - JL] seeks to persuade me to extend to⁵⁰⁰ the duty to warn further than ever before. First, the warning that he contends should have been given did not relate to the suitability or safety of the work that Advanced [the sub-contractor - JL] was asked to carry out. Rather, it related to the suitability of work to be done by others in the future which might affect the safety of the work that it had carried out. Secondly, this is not a case where Advanced [the sub-contractor - JL] knew that the work that was to be done in the future would in fact be carried out in a dangerous manner so as to affect the safety of its own work. (...) the mere fact that the alleged duty to warn did not relate to the work that Advanced [the sub-contractor - JL] was asked to carry out is not necessarily fatal to the case (...) if Advanced [the sub-contractor - JL] had understood (...) that Avonforce [the builder – JL] intended to carry out the excavation in the way that it did, then it would have been under a duty to warn Avonforce [the builder – JL] of the dangers involved. (...) But on the facts of this case, Advanced [the sub-contractor - JL] did not know that Avonforce [the builder – JL] intended to carry out the excavation in the way that it eventually chose to carry it out. (...) I do not accept (...) that it is sufficient to establish the duty to warn that it was possible that Avonforce [the builder – JL] would carry out the excavation in the way that it did. It seems to me that it is unreasonable to impose a duty to warn in such circumstances”.

The court summed up the case

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

It has to be pointed out that although the duty to warn has not been recognised in this case, the court followed the judgment given in *Plant Construction v. Adams*⁵⁰¹. Based on the facts of that case, which was described above, it was decided in *Aurum v. Avonforce* that the sub-contractor was not required to give a warning to the builder. Namely, the defects about which the sub-contractor might have had to warn the builder about did not exist at the time the sub-contractor performed his duties and their future appearance was conditional upon the choices made by the builder and work performed by other parties. This factor was decisive for the court. Since the sub-contractor did not have actual knowledge of the defect, he could not have had an implied duty to warn. The phrasing of the judgment is crucial – it seems that in future the court would recognise the duty to warn about a risk coming out of the performance of the contract by a third party, if there was a greater likelihood of the risk materialising or if it were more evident, as ascertained *ex ante*, that the defects would appear than as was the case here⁵⁰². This seems to imply that the Court of

⁵⁰⁰ The mistake comes from an original text of the judgment.

⁵⁰¹ *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

⁵⁰² S. Jackson, ‘Good faith in construction – will it make a difference and is it worth the trouble?’, *Construction Law Journal*, 2007/23, p. 420-435;

Appeal has broadened the scope of the duty to warn, and not limited it – as some legal commentaries to this case suggest⁵⁰³.

5.1.2. Precontractual duty to warn the builder.

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

5.1.3. Duty to warn the client.

Sub-contractors usually enter into a contractual relationship only with the builder as a result might be bound by their contractual duty to warn the builder. It is clear that in such a situation there is no privity of contract between the client and the sub-contractor, as a general rule⁵⁰⁴. However, there are two ways in which the client may hold the sub-contractor liable. Firstly, there is a possibility of "name-borrowing" procedures, based on which e.g. the client may be authorized by the builder to sue the builder's sub-contractor in the builder's name⁵⁰⁵. While this might allow the client to claim damages directly from the responsible party, namely the sub-contractor, he can recover damages only in as far as the builder was harmed by the sub-contractor's actions, since the client is suing in the name of the builder. This leaves this solution to be quite complicated legally and have reduced practical value⁵⁰⁶. The other option for the client is that the sub-contractor might still be found liable in tort towards the client for not warning him directly as to the default within the works of the builder or the designer⁵⁰⁷. In England, the most common cases pertaining to the duty to warn are actually not cases instigated by clients against the builders, but cases instigated by those clients against the sub-contractors. The reason for that might be that the sub-contractors are usually only addressed when the main contractor is insolvent. In case the main contractor is solvent, the client would claim damages from him, most often by claiming that the delivered product, the building, is not fit for the purpose it was supposed to serve. In such cases, there is no need for the client to claim damages from the sub-contractor, and no need to invoke the builder's breach of the duty to warn either, since the conditions for a claim against the builder on the basis of the defective end-product to succeed are in practice much easier to fulfill. However, in case the builder is insolvent, the client may claim damages only in tort against the sub-contractor, which leaves him with having to prove that there was a breach of the duty

⁵⁰³ J. Uff, *Construction law: law and practice relating to the construction industry*, London: Sweet & Maxwell, 2005, 9th ed., p. 298-299

⁵⁰⁴ I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 2, p. 1314

⁵⁰⁵ I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 2, p. 1313

⁵⁰⁶ I. N. D. Wallace, *Hudson's Building and Engineering Contracts*, London: Sweet and Maxwell, 1995, v. 2, p. 1320, 1330-1334

⁵⁰⁷ O. Hayford, 'Did you know... A "Construct Only" Contractor Can Be Liable For Design Defects?', Mondaq, 07/07/2009, 2009 WLNR 12902774

to warn by the sub-contractor. Another reason why the sub-contractor would be sued directly by the client might be that the builder had contractually limited or excluded his liability for the work of the sub-contractor. Also then the only remedy available to the client is to hold the sub-contractor liable in tort.

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

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

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

In one of the leading Canadian⁵⁰⁹ cases regarding the duty to warn of sub-contractors, namely *District of Surrey v. Carroll-Hatch & Associates*⁵¹⁰, it was decided that the fact that the engineers who were employed by the designer did warn the designer of the potential risks associated with the construction was irrelevant, because the engineers had a duty to warn the client directly. Usually it is concluded that the designer is working for the client and that the warning given to him should be considered as a warning given directly to the client⁵¹¹. When as here, there was no direct contractual link between the engineers and the client it would have seemed to be even more the case. However, on the facts of this case the court decided otherwise – finding the tortious liability of the engineers towards the client.

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

⁵⁰⁸ *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

⁵⁰⁹ The relevance of Canadian law to the interpretation of English law has been elaborated on in the introduction to this book.

⁵¹⁰ *District of Surrey v. Carroll-Hatch & Associates*, [1979] 101 D.L.R. (3d) 218

⁵¹¹ *Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited* (1984) CILL 126; (1985) Con LR 52

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

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

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

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

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

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

As mentioned above, if the relationship between the client and the designer is in the form of an agency, then the warning by the sub-contractor of defects in the design given to the designer shall prove to be sufficient. In English case law it has been expressly stated that the builder has a duty to warn the designer if he is acting as an agent for the client⁵¹².

⁵¹² Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited (1984) CILL 126; (1985) Con LR 52

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

It has already been mentioned that the competence or actual knowledge of the client might influence the scope of the duty to warn of the builder⁵¹⁵. This applies in particular with regard to the duty of the sub-contractor towards his client, the builder.

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

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

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

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

⁵¹³ *Kensington & Chelsea and Westminster Area Health Authority v. Wettern Composites Ltd and Adams Holden & Pearson* (1985) 1 Con LR 114; (1985) 31 BLR 57; [1985] 1 All ER 346

⁵¹⁴ *District of Surrey v. Carroll-Hatch & Associates*, [1979] 101 D.L.R. (3d) 218

⁵¹⁵ See chapter on the builder's duty to warn in English law.

⁵¹⁶ *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

⁵¹⁷ *Aurum Investments Limited v. Avonforce Limited (in liquidation)*, [2001] 2 All ER 385; 78 Con. LR 115, (2001) 17 Const. LJ 145, [2001] Lloyd's Rep. PN 285; (2001) 3 TCLR 21

⁵¹⁸ *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

5.2. German law.

5.2.1. Contractual duty to warn the builder.

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

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

For example, pursuant to a judgment of the OLG Celle of 29 May 2000⁵¹⁹, when it is the sub-contractor of the client who notices the default, a warning given to the builder, with whom the sub-contractor has a contractual relationship, suffices to release him of his liability. Namely, the court stated that the sub-contractor diligently fulfilled his duty to warn the builder, when he gave the warning to the representatives of the builder, which had been present at the construction site. In that case the builder's representatives seemed to disregard the sub-contractor's warning. The court stated that if the representatives of the builder still insisted to apply the previously agreed upon method of the construction, regardless of the reason for their behaviour it should not lead to the liability of the sub-contractor.

5.2.2. Precontractual duty to warn the builder.

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

5.2.3. Duty to warn the client.

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

⁵¹⁹ OLG Celle, 29.05.2000, 7 U 40/99, BauR 2002, 1, p. 93

applied in case the damage was limited to pure economic loss⁵²⁰. That led the German courts and lawyers to look for solutions outside the standard boundaries of purely contract or purely tort remedies, with the focus directed on the more general notion of the law of obligations⁵²¹. As a result a special contractual construction, the *Vertrag mit Schutzwirkung für Dritte*, has been recognised, firstly in a case note to a judgment from the German Supreme Court⁵²² and subsequently in the case law itself, in order to overcome the shortcomings of tort law⁵²³. Based on this construction, the rights of a third party, in our case the rights of the client, may under certain conditions be protected just as if he were a contractual party. The client would not have a right to demand performance of the contract but he would have a right to demand that care is taken in case the contract is being performed, and that means also performance of the duty to warn by the sub-contractor⁵²⁴.

In the case of 28 October 2004⁵²⁵ the client hired a general contractor to renovate his gas station. The general contractor sub-contracted the concrete works on the roadway leading to the gas pumps to another company while still leaving to himself certain preparatory works on that roadway. The end result was unsatisfactory – there were lots of cracks and holes in the concrete. The sub-contractor claimed that he should not be held liable vis-à-vis the client for the default in construction, since it appeared due to faulty preparatory works performed by the general contractor. The court – OLG Karlsruhe – disagreed and held both parties liable for the damage. The court confirmed that indeed it was faulty work of the general contractor that led to the default in the roadway. However, the sub-contractor should have recognised that default and therefore, was obligated to warn the client about that. The court stated that the purpose of the duty to warn is to protect the client from damage. Therefore, any professional party employed at the construction site should check whether the works of another constructor on which that party relies and builds are suitable as a basis for his own work and whether they do not have any characteristics that could endanger the success of the whole construction. This duty to warn still applies if the sub-contractor were to give a warning about a default in the works prepared directly by the general contractor. The fact that the general contractor was a professional party did not justify the exclusion of the duty to warn towards the client, since it was ultimately the interest of the client that was at stake in the construction.

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

⁵²⁰ B. S. Markesinis, H. Unberath, *The German law of torts: a comparative treatise*, Portland: Hart Publishing, 1997, p. 58

⁵²¹ B. S. Markesinis, H. Unberath, *The German law of torts: a comparative treatise*, Portland: Hart Publishing, 1997, p. 58

⁵²² Case note Larenz, BGH, 25.04.1956, NJW 1956, 1193

⁵²³ This phenomenon is thought to have its source in § 157 BGB: “*Verträge sind so auszulegen, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*”; BGH, 02.11.1983, NJW 1984, 355; P. Gottwald in *Münchener Kommentar BGB*, 2007, § 328, 109-110, p. 2056; Ch. Grüneberg, in: *Palandt. BGB*, München: C.H. Beck, 2010, § 328, Rdnr. 14

⁵²⁴ B. S. Markesinis, H. Unberath, *The German law of torts: a comparative treatise*, Portland: Hart Publishing, 1997, p. 60; A. S. Hartkamp, Ch. Von Bar, *Towards a European Civil Code*, The Hague: Kluwer Law International, 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

⁵²⁵ OLG Karlsruhe, 28.10.2004, 17 U 19/01, IBR 2006, 135, IBR 2006, 88

5.3. Dutch law.

5.3.1. Contractual duty to warn the builder.

Generally, pursuant to the Dutch legal literature and judgments, the sub-contractor employed by the builder has certain obligations to the builder, which in turn the builder has to the client (as his direct contractor), e.g. the duty to warn. The question then is whether also the sub-contractor might have a duty to warn the builder about the risk coming from a contract with a third party, e.g. the designer or another sub-contractor. Unlike the situation in, in particular, England, there are much fewer judgments dealing with the sub-contractor's duty to warn in comparison to the builder's duty to warn. As has been mentioned in the introductory chapter, it is mostly the client holding the builder liable in court for not warning him, as the builder generally is the party responsible for the whole construction⁵²⁶. Since the client often employs all specialists directly himself, the sub-contractors relationship will not appear as often in this system, either. In general, however, it might be assumed that all the characteristics of the builder's duty to warn the client apply to the sub-contractor's duty to warn the builder, as both the builder's and the sub-contractor's duty to warn would be based on the same statutory provision of article 7:754 of the Dutch Civil Code and the same standard of care would apply⁵²⁷. This means *inter alia* that the sub-contractor only has to warn about a mistake in the design when it would have been contrary to good faith to proceed with the construction without having warned the builder⁵²⁸. Moreover, the duty to warn binds the sub-contractor only when the default should have been easily recognisable to him which means that he does not need to inspect the construction in details, looking for potential defaults, as well as he does not have a duty to re-check designer's calculations⁵²⁹.

While deciding whether the sub-contractor should have the duty to warn it is important to take into account the level of competence of the sub-contractor and the builder. However, the sole fact that the builder has the same competence as the sub-contractor or even a higher competence than the sub-contractor does not automatically mean that there was no duty to warn on the side of the sub-contractor, as is demonstrated by the case Fliesen Körkemeyer/Ottink Meteg of 8 September 2006⁵³⁰. In this case, the builder and the sub-contractor were both working in the business of delivering and laying down floors. The builder took on a job that he could not do himself, so he asked the sub-contractor to perform it for him. After the work has been performed, it turned out that the design of the floor was faulty and did not provide for proper support. The question was raised whether the sub-contractor had a duty to warn the builder as to the risk coming out of the design in case the builder was as professional as the sub-contractor itself was. The appellate court decided that the sub-

⁵²⁶ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 488-490

⁵²⁷ M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 13*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 118 (No. 722)

⁵²⁸ See e.g. RvA 16.06.2009, nr. 71.297 and 27.630, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵²⁹ See e.g. RvA 4.11.2009, nr. 71.462 and 31.037, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 30.03.2010, nr. 71.415 and 29.082, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 02.06.2010, nr. 31.000, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵³⁰ HR 8.09.2006, C05/151HR, BR 2007/52, p. 265 (Fliesen Körkemeyer GmbH/Ottink Meteg BV)

contractor had no duty to warn in this case. The factors that weighed down to this verdict were *inter alia*: the fact that the builder was as professional as the sub-contractor in the same field, that the builder accepted the contract with the client agreeing to performance pursuant to the design plans, and that in case it was expected of the sub-contractor to discover the default in the design the same should have applied to the builder. The builder appealed from this verdict and the Dutch Supreme Court upheld his appeal. The Dutch Supreme Court clearly stated that the sole fact that the builder is a professional party himself does not take away the duty to warn of the sub-contractor as to the defaults that he knew or should have known. In this judgment, it was made clear that the sole fact that both parties act as professional does not mean that the party who knows or should have known of a risk may assume that this risk is also known by the other party and consider its duty to warn redundant. One reason for that might be, that usually while accepting the job the builder goes through the design plans just globally, in order to estimate the cost of the construction and its feasibility. Only upon performing the construction, more attention is paid to the design plans. In case the default in the design plans concerned the tasks that only the sub-contractor would be performing, global reading of the plans by the builder might not have discovered that default. Therefore, it would be safer for the sub-contractor to err on the side of caution by giving one too many warning than one too few to the builder and to not assume that the builder is already aware of all the problems and difficulties. This decision is in line with the more general view in Dutch law that a builder is still held to have a duty to warn towards a client who is either a professional party himself or is being assisted by another professional⁵³¹.

In the RvA-case of 7 May 2010⁵³² the builder made a mistake by instructing the sub-contractor to use in the construction of the floors only red lead and some biocides, without mentioning the need to cover the ground with fluid-containment foil. The sub-contractor performed his tasks in accordance with the instructions of the builder. The RvA took into account the experience of the sub-contractor with such type of constructions as was used in this case and it decided that it should have been obvious to the sub-contractor that there was a default in the design plans. He needed to warn the builder about the risk of not using the fluid-containment foil. This duty to warn bound the sub-contractor despite the fact that the builder was seen as having enough specialist knowledge to foresee this risk. The fact that the builder contributed to the damage was taken into account in assessing the scope of the liability of the sub-contractor for the damage⁵³³.

The sub-contractor might be released from his duty to warn, when he does not have access to all necessary information and data about the construction or the use thereof. For example, in the case of 27 May 1991⁵³⁴ improper paving stone was used (9mm thick instead of 15mm). The court decided that the sub-contractor would have a duty to warn only if he knew what kind of loads would be transported over it, so that he actually had a chance to realize that the used material was inappropriate for that

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

⁵³² RvA 7.05.2010, nr. 28.970, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

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

⁵³⁴ RvA 27.05.1991, nr. 14.369, BR 1991, p. 637

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

In this case, the design did not provide for sufficient building materials, which means that there was a question whether the sub-contractor who was supposed to use them, needed to warn as to the unsuitability. The court decided against such a duty to warn because the sub-contractor did not and should not have known what the destination of that construction was⁵³⁵. Therefore, the sub-contractor could not have been expected to realize that the materials were not fit for the purpose aimed at by the client.

In the RvA-case of 26 October 2009⁵³⁶ the builder acknowledged that the design was lacking certain important details, e.g. the indication of specific places in which rear timber needed to be applied in the construction. The problem appeared when the rear timber was applied by the sub-contractor in certain places under the plasterboards that he put on the ceiling, to provide it with more support. The sub-contractor claimed that he had no contractual duty to apply rear timber, since he was performing the construction according to the design plans, which meant that he performed some extra work by applying the rear timber and he should receive additional remuneration for that work. The builder claimed that the sub-contractor should have known that more support for the ceiling is needed and should have warned the builder about the mistake in the design, especially since the sub-contractor applied the rear timber in certain places in the construction when it was not mentioned on the design plans. According to the builder, the fact that the design plans did not mention the application of the rear timber did not make it an extra work for the sub-contractor, since it was an obvious mistake in the design. Additionally, the builder claimed that the sub-contractor should compensate him for not applying the rear timber in certain other places in the construction that the builder deemed to be crucial. The arbitration court decided in this case that the sub-contractor had no duty to warn the builder. The RvA is aware of the process of application of plasterboards and usually it does not require more support and application of the rear timber. Therefore, the sub-contractor did not have a duty to warn the builder about the rear timber support not being mentioned on the design nor did he have a duty to apply rear timber in specific places in the construction. The sub-contractor may therefore claim additional remuneration from the builder.

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

The duty of the sub-contractor to warn has been recognised in a few cases⁵³⁷ when the competence and actual knowledge of the sub-contractor was such that he

⁵³⁵ Similar reasoning may be found in RvA 9.06.2011, nr. 31.952, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵³⁶ RvA 26.10.2009, nr. 30.018, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵³⁷ RvA 31.10.1968, nr. 5326, BR 1968, p. 608; RvA 23.12.1968, nr. 5254, BR 1969, p. 105; RvA 29.05.1969, nr. 5610, BR 1969, p. 455; RvA 12.10.1970, nr. 5733, BR 1970, p. 779; RvA 26.03.1973, nr. 6734, BR 1973, p. 565; RvA 2.05.1990, nr. 14.048, BR 1990, p. 634; RvA 9.06.2000, nr. 21.436, BR 2001, p. 901

should have been aware of the default and therefore should have warned thereof. For example, in the case of 2 May 1990⁵³⁸ the sub-contractor was employed to install specific armature. It could be expected from the professional installation specialist that he would have had the necessary knowledge and competence to know how to install and connect armatures properly. The court considered this and decided that the sub-contractor had a duty to warn the builder that the armatures in the given case were not suitable to be built in the ceiling in the way desired by the client. In this case, the duty of the sub-contractor to warn has been recognised since the sub-contractor, as a professional party, should have known that with the materials he received he could not reach the aims envisaged by the client. The sub-contractor had then a duty to warn as to the mistake in the design.

In the case of 11 December 2009⁵³⁹ after the sub-contractor started performing his works, i.e. drilling in order to place foundation piles under a house, there was lots of sludge coming to the surface when the drill was being pulled up. The sub-contractor assigned a specialist to conduct certain, not planned, acoustic measurements in order to see whether the construction was being properly performed. The measurements showed some inconsistencies, but nothing overly worrying. The sub-contractor continued the drilling and there was a lot of mud and slime coming to the surface. Additionally, the sub-contractor could notice a high usage of concrete. These all circumstances put together with the knowledge of the sub-contractor that prior to his works some initial drilling was performed with a drill of a bigger diameter should have raised his doubts as to the regularity of the construction. The sub-contractor had a duty to warn the builder about this in such circumstances.

Also in the case of 24 March 2011⁵⁴⁰ the sub-contractor as a professional in handling natural stones was seen as having a duty to warn the builder that these natural stones were not suited as a building material to be used outdoors. Since the sub-contractor did not mention the risk of the design, he was seen as being liable towards the builder for breach of his duty to warn, while the builder was in turn held liable towards the client.

5.3.2. Precontractual duty to warn.

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

For example, in the case of 15 July 2003⁵⁴¹ the design did not provide for sufficient space for wiring in the floor, describing the floor's depth in an incorrect manner. Both the builder and the sub-contractor received the design plans before concluding their contracts. The builder claimed later that the sub-contractor had a duty to warn him about such an obvious mistake in the design. The court decided, however, that the sub-contractor had no duty to warn. The court stated that before conclusion of the contract the sub-contractor only assessed the design plans from the perspective of

⁵³⁸ RvA 2.05.1990, nr. 14.048, BR 1990, p. 634

⁵³⁹ RvA 11.12.2009, nr. 30.427, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵⁴⁰ RvA 24.03.2011, nr. 30.921 and 71.681, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵⁴¹ RvA 15.07.2003, nr. 70.647, BR 2004, p. 981

estimating the price for his services and did not take into account the quality of the design. The positioning of the wiring in the floor does not influence the costs of the construction for the sub-contractor, thus it cannot be held against him that he was not attentive to this default at that moment of time. The moment it should have become clear to the sub-contractor that the design had been faulty was when the sub-contractor tried fitting in the installation in the construction and that was seen as the moment that the sub-contractor had to warn about the default in the design. That is in fact what the sub-contractor has also done in this case. The court adjudicated that the sub-contractor properly performed his duty to warn ex Paragraph 6 Section 14 UAV 1989 by warning the builder before he commenced the installation.

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

In the RvA-case of 11 December 2009⁵⁴² the damage to the construction was caused due to the sub-contractor placing foundation piles under a house that were of a smaller diameter than the holes in which he was placing them. The holes were drilled previously by another constructor in order to see whether or not there were obstacles in the ground for placing these piles. The sub-contractor was not involved in these original inspection works and the RvA decided that he did not have a pre-contractual duty to warn that there is a discrepancy in the diameter of the holes and the piles. This discrepancy usually does not cause any problems in the construction; therefore the sub-contractor did not have to be aware of potential risks thereof prior to starting his own works⁵⁴³.

5.3.3. Duty to warn the client.

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

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

⁵⁴² RvA 11.12.2009, nr. 30.427, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵⁴³ See previous paragraphs on existence of the duty to warn in this case after the performance of contractual obligations had started.

the warning is given to a representative of the client⁵⁴⁴. Moreover, in the Dutch literature⁵⁴⁵, it has been argued that even in case a professional party would know that the warning it gave would not be conveyed to the client directly, the professional party would not have a duty to warn the client directly, unless it considered a case in which the risks endangering the construction were grave.

5.4. Comparison.

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

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

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

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

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

⁵⁴⁴ Further discussed in the chapter on how the warning should be properly given: RvA 11.04.2001, nr. 20.336, not published; after: M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 120 (No. 798)

⁵⁴⁵ J. P. Hoerzeil in: M. A. Van Wijngaarden (eds.), *Vijfenzeventig jaar bouw-arbitrage, gedenkboek van de Raad van Arbitrage voor de Bouwbedrijven in Nederland, 1907-1982*, Zwolle: Tjeenk Willink, 1982, p. 155; M. A. van Wijngaarden, M. A. B. Chao-Duivis, *Serie Bouw- en Aanbestedingsrecht, deel 14*, 's-Gravenhage: Uitgeverij Paris, 2010, p. 130 (No. 802)

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

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

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

In this respect we can see important differences between these three legal systems, not so much in the scope of the duty to warn itself, since this seems to correspond with the scope of the builder's duty to warn, but in the way the client can claim damages for the faulty construction and for non-performance of the duty to warn. In English law, the client can claim compensation from other builders, who noticed or should have noticed a default in the work of other builders working at the construction site, but only in tort. This gives a possibility to consumers to claim damages from a professional party for breach of his duty to warn, even when there was no contractual relation between these parties. However, this does not necessarily benefit consumers by giving them more legal certainty, since the claim for damages in case there was a breach of a duty to warn in tort is rarely admitted by English courts and it requires the fulfilment of complicated prerequisites. In most cases it is, therefore, unclear to consumers whether their claim against such an additional party would be successful. In German law, as it has been mentioned in the chapter on the scope of the builder's duty to warn, builders will be liable for not warning the client of the negligent work of other builders working at the construction site in case they had to rely in some part on their job. That does not exclude other grounds for liability of German builders towards the client, however, e.g. in case they did not have to rely on the other builder's work but still noticed the default in his work. Furthermore, there is

the special construction of *Vertrag mit Schutzwirkung für Dritte*, which, under certain conditions, allows the client to claim contractual damages from the sub-contractor even though there is no contractual relationship between them. This special German legal construction gives more legal certainty to consumers, not only by allowing them to claim damages not only directly from their contractual parties but also from other parties involved in the construction process who contributed to the client's losses, but mostly since the rules of liability under this *quasi-tort* construction are very clear in German law. In Dutch law the builder is in general liable for performance of his sub-contractors. For reasons explained in the previous paragraph, the question whether the sub-contractors may be held liable towards the client in tort has not been addressed very often. This comparison leads us to the conclusion that in respect of the sub-contractor's duty to warn it is the German system that gives the most clarity and legal certainty to consumers in case they receive a faulty construction product. German consumers may claim their damages in such cases either from the builder, who is seen as having the responsibility for the performance of sub-contractors', or directly from the sub-contractors. This gives consumers more protection e.g. in case one of the professional parties becomes insolvent.

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