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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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Publication date
2011

[Link to publication](#)

Citation for published version (APA):

Luzak, J. A. (2011). *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 6. Requirements for an effective warning.

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

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

6.1. English law.

6.1.1. What constitutes a proper warning?

Unfortunately, the form of the warning that should be given to the client had not really been a subject of discussion in England. This does not come as a surprise, taking into account the reluctance of recognising the duty to warn in English law. If the emergence and the scope of the duty to warn is put in doubts and is still a subject of discussion that does not make discussing the form of the duty to warn fruitful. In the case *Plant Construction v. Adams*⁵⁴⁶ the court stated that:

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

⁵⁴⁶ *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

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

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

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

In English law not much attention is paid as to whom a professional party should warn about the default in order to be released from liability for improper performance of his duty to warn. This might be the result of the duty to warn being recognised both in contract and in tort law. When a builder warns the client he might fulfil his contractual duty to warn the builder but breach his tortious duty to warn towards the designer. And, for the purposes of this book more importantly, the same applies to the sub-contractor who warns the builder, but neglects to warn the client when he notices that the builder ignores the warning. Moreover, if the builder chooses to warn the designer instead of the client, he might breach his contractual duty to warn the client. However, a designer is often perceived as the representative of the client and a warning given to him should be considered as a warning given directly to the client⁵⁴⁹, which means it releases the builder from both his contractual duty to warn the client and his tortious duty to warn the designer. For example, in *Lindenberg v. Canning*⁵⁵⁰ it was stated that the builder should warn the designer, who was seen to be acting as an agent of the client, as to any ‘suspected’ design defects⁵⁵¹. Yet, in *District of Surrey v. Carroll-Hatch & Associates*⁵⁵², it was decided that the fact that the engineers who were employed by the designer did warn the designer of the potential risks associated with the construction was irrelevant, because the engineers had a duty to warn the client directly. The court deemed this to be the case, on the facts of this case – finding the tortious liability of the engineers towards the client. The court had no doubts that in this case it should have been clear to the engineers that the client might not have been informed about their warnings and recommendations. In such a case, when the professional party has evidence that the warning did not reach the client through his representative, he should pass on this warning himself.

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

⁵⁴⁷ *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

⁵⁴⁸ *Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited*, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

⁵⁴⁹ *Victoria University of Manchester v. Hugh Wilson and Lewis Womersley and Pochin (Contractors) Limited* (1984) CILL 126; (1985) Con LR 52

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

⁵⁵¹ D. Chappell, *The JCT Design and Build Contract 2005*, London: Wiley-Blackwell, 2007, p. 51

⁵⁵² *District of Surrey v. Carroll-Hatch & Associates*, [1979] 101 D.L.R. (3d) 218

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

6.1.2. Does a sole warning suffice?

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

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

This point of view has been confirmed in the newer case *Plant Construction v. Adams*⁵⁵⁴. The Court of Appeal in this case stated that the sub-contractor should have protested more "vigorously" and not just limit himself to issuing a single warning. However, the court did not further specify the exact measures that the builder could and should have taken in order to avoid future liability for breach of its duty to warn⁵⁵⁵. The case was reconsidered and the trial judge doing so stated⁵⁵⁶:

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

Therefore, it seems that the builder may not stop at bringing the defects and risks in the construction to the attention of the designer⁵⁵⁷. If the builder does not manage to change the mind of the designer as to how to proceed with the construction and if the

⁵⁵³ Edward Lindenberg v. Joe Canning and Others (1993) 9 Const LJ 43; 62 BLR 147; 29 Con LR 71

⁵⁵⁴ Plant Construction Plc v. Clive Adams Associates, JMH Construction Services Limited, [2000] BLR 137, 69 Con. LR 106, (2000) 2 TCLR 513

⁵⁵⁵ T. Thompson, 'Refusal to comply: not a good idea', Construction Law Journal, 2005/21, p. 419-430

⁵⁵⁶ According to: T. Thompson, 'Refusal to comply: not a good idea', Construction Law Journal, 2005/21, p. 429

⁵⁵⁷ O. Hayford, 'Did you know... A "Construct Only" Contractor Can Be Liable For Design Defects?', Mondaq, 07/07/2009, 2009 WLNR 12902774

defect endangers the safety and health of people, the builder might be obligated to cease performing his work⁵⁵⁸. Since suspension of the performance of work is a rather serious step, the builder might be inclined first to try to convey the warning to the client directly in case the designer does not change his instructions upon receiving the warning. That does not necessarily mean that giving a warning to the client would release the builder from its liability in case the client would also not listen to the warning and the builder continued with the faulty construction. However, it seems more likely than that the builder's liability would at least be diminished.

The situation looks different in the case of an engineer, whose duty would not ordinarily extend to supervision of the construction elements in which the defect originated, which was the situation at hand in *Kensington & Chelsea and Westminster Area Health Authority v. Wettern Composites Ltd and Adams Holden & Pearson*⁵⁵⁹. In that case, the client engaged both a designer and structural engineers to construct an extension to the hospital. During the construction process, the engineers noticed some defects in the mullions and pointed this fact out to the designer. Nothing was done, however, to remedy these defects in practice. After the construction had been finalised and the defects could be seen, the client instituted proceedings against both the designer and the engineers' company, claiming that they had acted negligently. The court stated:

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

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

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

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

However, when the case concerned a structural engineer who also had design duties, like in *Hart Investments v. Fidler and Larchpark*⁵⁶⁰, even if he did not have an express contractual duty to supervise the court implied such a term to his contract and

⁵⁵⁸ D. Chappell, *The JCT Design and Build Contract 2005*, London: Wiley-Blackwell, 2007, p. 51; P. Jack, ‘Getting back into shape – toning up fitness for purpose’, *Construction Law Journal*, 2011, 27 (5), p. 360-368

⁵⁵⁹ *Kensington & Chelsea and Westminster Area Health Authority v. Wettern Composites Ltd and Adams Holden & Pearson* (1985) 1 Con LR 114; (1985) 31 BLR 57; [1985] 1 All ER 346

⁵⁶⁰ *Hart Investments Ltd v. Terence Maurice Charles Fidler and Larchpark Ltd.* (2007) 1 BLR 526

with that the engineer's duty to warn. As it has already been mentioned, the court considered in such a case that the engineer had a duty to prevent the damage from happening when he noticed that the way the builder performed his obligations brought with it unnecessary risks. The court stated that the engineer had to

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

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

6.2. German law.

6.2.1. What constitutes a proper warning?

In older German case law the form of the issued warning was discussed. In the BGH judgment of 10 April 1975⁵⁶¹ it has been stated that pursuant to the provision of § 13 No. 3 VOB/B, the warning should be given in writing, so that the warning expressed therein would be taken seriously due to its explicit and clear nature. That means that the builder would have to clearly state what the default might be and what risks for the whole construction it could cause, so that the client could not easily ignore or dismiss that warning⁵⁶². However, the BGH decided that in certain circumstances the oral warning given to the client would be sufficient to diminish the builder's liability for damage, which arose when the client ignored such an oral warning given to him⁵⁶³. The BGH mentioned that if it is established that the oral warning has been so clear that the client had to have been aware of the risks involved in ignoring it, and if the warning had been given directly to the client, and not to his representatives, that oral warning should release the builder at least from part of his liability to the client. In case the builder gives the warning to the client's representatives and they decide to ignore it, the builder should then directly address the client.

In the case of 30 March 1995, decided by the OLG Hamm⁵⁶⁴, the client employed builders to finalize the construction pursuant to plans prepared by his designer. Upon finalization of the construction it turned out that the construction was not entirely water-resistant and the client initiated proceedings against the builders claiming damages from them. The builders defended themselves by stating that they had fulfilled their duty to warn by orally explaining the problem to the director of the construction (employed by the client) and that they followed the construction plans given to them by the client. The plans and supervision were faulty, not their work,

⁵⁶¹ BGH, 10.04.1975, VII ZR 183/74, NJW 1975, 1217

⁵⁶² T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 38; It is worth mentioning here that the provision of BGB does not prescribe a requirement of written form.

⁵⁶³ See also: C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 493

⁵⁶⁴ OLG Hamm, 30.03.1995, 17 U 205/93, BauR 1995, 6, p. 852

they claimed. OLG Hamm was of a different mind, however. It was stated that pursuant to § 13 No. 3 VOB/B the builder, who found himself in such circumstances as described above, was obliged to give a written warning to the proper addressee and only then it could be stated that he had performed his duty to warn⁵⁶⁵. This had not taken place in this case. First of all, the warning was given orally, not in writing. As mentioned above, pursuant to the German case law⁵⁶⁶ an oral warning could have been sufficient, if it was given in such a clear way, that the client would be fully aware of the danger resulting from ignoring it. In this case, the builder had simply expressed his surprise about the way the construction was supposed to proceed and had not clearly issued a warning about the risk involved therewith. Secondly, it was stated that the warning was not granted to the proper addressee – namely, the client himself. The builder just gave his warning to the director of the construction. The court relied in this case on the earlier judgment of the German Supreme Court⁵⁶⁷, where it was said that when the designer or the director of the construction, who participated in formulating the faulty plans, does not listen to the warning issued by the builder, the latter is obligated to give his warning directly to the client. As a result, the warning issued in that case was deemed to be insufficient.

Even when the warning had been given to the client and had been sufficiently clear but had not been given in a written form, the builder could end up being liable for damages to compensate the client who did not listen to the warning. Such an example of the builder's liability can be found in the case of 7 July 2000⁵⁶⁸. In that case the builder was employed to lay pipes in the bathroom of the villa belonging to the client, according to the plans that the designer prepared and using materials that were prescribed to him. After the works were completed and winter came, it turned out that the pipes had not been fully insulated and were not resistant to frost temperatures. As a result, some of the pipes froze and then broke. The OLG Hamburg decided that the builder was negligent, because he had not sufficiently thought about the possible influence the low temperatures would have on the installed pipes and as a result, had not properly warned the client that additional insulation was necessary to protect the installation. The fact that the builder had pointed out vents in the wallpapering during a meeting with the designer and the client and had mentioned that there was not sufficient protection from frost could not release the builder from his liability since pursuant to § 13 No. 3 VOB/B such statement should have been given to the client in writing. However, the builder was not held fully liable, since the court decided that at least some oral warning had been given to the client in the presence of the designer, which led the court to diminishing the liability of the builder to 1/3 of the client's damage⁵⁶⁹.

In unusual circumstances an oral warning might even release the builder from all liability for the improper form of the warning. In the case of 10 April 2003⁵⁷⁰ OLG Koblenz recognised that the duty to warn should be fulfilled in writing and that the oral warning in normal cases does not release the builder from his liability, but as previous courts it determined that the liability of the builder could be diminished if he

⁵⁶⁵ BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518

⁵⁶⁶ BGH, 10.04.1975, VII ZR 183/74, NJW 1975, 1217; OLG Düsseldorf, 30.08.1995, 22 U 11/95, NJW-RR 1996, 401, BauR 1996, 260

⁵⁶⁷ BGH, 18.01.1973, VII ZR 88/70, NJW 1973, 518

⁵⁶⁸ OLG Hamburg, 07.07.2000, 12 U 65/98, NJW-RR Zivilrecht 2001, 1534

⁵⁶⁹ To be discussed in the next Chapter.

⁵⁷⁰ OLG Koblenz, 10.04.2003, 5 U 1687/01, BauR 2003, 1728

at least could prove he gave certain oral warnings. Under the circumstances of the given case, i.e. the client was also an engineer, which meant that he was deemed competent enough to be capable of assessing the risks the builder mentioned to him, the oral warning given by the builder was seen as sufficient to even fully release him from the liability for not performing his duty to warn in writing. However, this case has been marked as clearly exceptional⁵⁷¹.

In a more recent case of 12 July 2006⁵⁷² OLG Jena stated that the liability of the builder may not be limited when the warning given is not fully informative, convincing or clear and does not show all negative consequences of not following it. An oral warning could limit or even release the builder from his liability only if it fulfilled all these conditions.

It seems, therefore, that if the oral warning would not lead to the release of the builder from liability, it would at least diminish it, even though the warning has not been issued in the required form. Both when the warning is in writing and when it is given orally, the warning only releases the builder from liability in full or diminishes that liability if the warning given to the client was complete, clear and not likely to be misinterpreted. The client should be fully informed what kind of risk he is at danger and what kinds of damage he might expect⁵⁷³. However, it needs to be mentioned, that even if the oral warning would suffice to limit or exclude liability of the builder, it is risky for him to rely on it since it would be difficult to prove that such a warning had been given⁵⁷⁴.

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

In a recent case of 16 March 2011⁵⁷⁵ the OLG Brandenburg added additional requirements. In this case the builder was installing exterior insulation on a bungalow of the client, but unfortunately, the design and materials that he was provided with were faulty. The court in this case reiterated that the builder should indeed give a clear warning to the client, pointing out all possible negative consequences of not abiding by this warning. However, the court added to these theoretical requirements⁵⁷⁶ that giving the warning to the right recipient and at the right time was as important as its comprehensiveness⁵⁷⁷.

Interestingly, in a case of 3 February 2010⁵⁷⁸ the OLG Hamburg made a comment suggesting that if the builder has a duty to warn the client about a risk, then

⁵⁷¹ M. Preussner, 'Mündliche Bedenken können beachtlich sein!', IBR 2003, 1081

⁵⁷² OLG Jena, 12.07.2006, 2 U 1122/05, IBR 2007,1077, IBR 2007, 303

⁵⁷³ H. Locher, U. Locher, *Das private Baurecht*, München: C.H. Beck, 2005, p. 102; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 34, 55

⁵⁷⁴ T. Karczewski, 'Wann schließt ein Bedenkenhinweis die Haftung des Auftragnehmers aus?', IBR 2007, 303

⁵⁷⁵ OLG Brandenburg, 16.03.2011, 13 U 126/09, (full text found on <<www.ibr-online.de>>, lastly checked on 15.07.2011)

⁵⁷⁶ The court does not discuss specifics of the duty to warn under the circumstances of the given case.

⁵⁷⁷ See also: H. Scheel, 'Keine Haftung für Mängel bei erfolgtem Bedenkenhinweis!', last correction: 18.07.2011, (full text found on <<www.ibr-online.de>>)

⁵⁷⁸ OLG Hamburg, 03.02.2010, 4 U 17/09, IBR 2010/323; see also: T. Steiger, 'Schaden durch Arbeitsraumverfüllung: Grenzen der Prüfungs- und Hinweispflicht', IBR 2010/323

its scope is limited to pointing out that risk to the client⁵⁷⁹. In the court's opinion, the builder does not need to suggest to the client how to avoid that risk or other methods of construction that he could use that would diminish or eliminate that risk. In that particular case, the client had some support systems used in the cellar to protect it from caving in during the next phases of construction, but these supports turned out to be insufficient. The court did not find the builder as having the duty to check whether the support system used by another builder upon the designer's order was sufficient, which meant he also did not have the duty to warn about this default. The court then stated that even if the builder had a duty to warn, he would only need to warn that some supports should be applied, which is what the client's other employees already had told the client. The duty to warn of the builder does not reach as far as to instruct the client in what number and how to apply these supports, since there are other professional parties responsible for that⁵⁸⁰.

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

Let us now consider whether in practice the professional party's warning has to be issued directly to the client or whether it could be issued to one of his representatives, e.g. the designer, the director of construction. The provision of the § 4 No. 3 VOB/B states clearly that the professional party should warn the client directly, but the German courts chose to interpret this provision broadly⁵⁸¹.

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

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

⁵⁸¹ C. E. C. Jansen, *Towards a European building contract law*, Tilburg: Tilburg University Press, 1998, p. 312; T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsungleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 39-40

In the OLG Düsseldorf's judgment of 20 July 1994⁵⁸² (as described in one of the previous chapters) it was stated that if the builder related his suspicions to the designer employed by the client and the designer would show his disregard thereto, the builder would then be obligated to immediately report his doubts to the client. OLG Düsseldorf did not question then the right of the builder to issue the warning to the designer as a representative of the client. However, it was stressed that in case the builder had any doubts whether the designer would notify the client of the builder's suspicions, he should make sure that the client received them.

In the case of 19 December 1996⁵⁸³ the BGH decided that the warning issued to the designer and not to the client had been insufficient and did not release the builder from his liability. In the given case, the court specified that pursuant to § 4 No. 3 VOB/B the builder needs to warn the client directly. In certain circumstances, the warning given to the designer instead of the client could be accepted as a sufficient performance of the duty to warn, but that did not apply in the given case. The court decided that the risk to the client is not diminished if a warning is given by the builder to the designer in case the risk has been caused by the actions of the designer or in case the designer upon having the warning does not acknowledge it and decides to proceed with the original design. The builder should not rely on having performed his duty to warn in such a situation.

However, when it is the sub-contractor of the client who notices the default, pursuant to a judgment of the OLG Celle of 29 May 2000⁵⁸⁴, a warning given to the representatives of the builder, with whom the sub-contractor has a contractual relationship, might suffice. Namely, the court stated that the sub-contractor diligently fulfilled his duty to warn the builder, when he gave the warning to the representatives of the builder, which had been present at the construction site. In that case the builder's representatives also seemed to disregard the sub-contractor's warning. The court stated that if the representatives of the builder still insisted to apply the previously agreed upon method of the construction, it should not lead to the liability of the sub-contractor either towards the builder (since he was deemed to have been warned with his representatives having had received the warning) or the client (since the sub-contractor's contractual duty to warn obliged him to warn only the builder). In certain circumstances, when public safety or interests of other parties are at stake, the liability of the sub-contractor towards the client might still exist⁵⁸⁵.

6.2.2. Does a sole warning suffice?

Even if the client had been fully informed and warned by the builder, this does not necessarily mean that the builder would be released from his liability if he continued with the original construction plan in case the warning would not persuade the client. In certain situations, it seems that the builder needs to do more than just warn the client. In the case of 20 July 2004⁵⁸⁶ the builder was working on securing a wall at the construction site according to the structural plans delivered to him by the

⁵⁸² OLG Düsseldorf, 20.07.1994, 22 U 15/94, NJW-RR Zivilrecht 1995, 10, p. 214

⁵⁸³ BGH, 19.12.1996, VII ZR 309/95, BauR 1997, 301; H. Kothe, 'Wem gegenüber muss der Unternehmer Bedenken anmelden?', IBR 1997, 277; H. Groß, 'Eigene Fachkunde des Bauherrn befreit nicht von der Pflicht zur Bedenkenanmeldung', IBR 2001, 177

⁵⁸⁴ OLG Celle, 29.05.2000, 7 U 40/99, BauR 2002, 1, p. 93

⁵⁸⁵ Further discussed in the following paragraph on the basis of the case OLG Brandenburg, 07.11.2007, 13 U 24/07, IBR 2008, 1112.

⁵⁸⁶ OLG Karlsruhe, 20.07.2004, 17 U 262/01, BauR 2005, 729, IBR 2004, 684, IBR 2005, 315

client. After performing some initial works the builder noticed that the structural plans delivered to him were incorrect and that the wall would, due to its instability, endanger the whole excavation and people working there. The builder warned the client about this risk and notified him that any works based on the structural plans delivered to him could not be further performed. The client contacted the builder and asked him to ‘remove the default’ and continue with the works as planned originally. The builder once again gave a full warning to the client, pointing out at all potential risks and refused to perform any further work based on the plans delivered to him, fearing for the life and safety of his employees as well as the material damage that he could cause. The client terminated the contract with the builder and claimed damages from him for breach of his contractual obligations to perform the work. The court – OLG Karlsruhe – issued a very clear judgment in this case. In general, a builder is obliged to follow the instructions and plans delivered to him by the client, even if he warned the client about certain risks involved in performing them and the client decided not to listen to his warning and ordered that the construction works continued as originally planned⁵⁸⁷. However, exceptionally the builder might refuse to perform his contractual obligations when any further execution of construction works, going against the warning that had been issued, would contradict legal or regulatory aims, especially if it would endanger life and limb. In the given case the builder was released from its liability towards the client.

In the case of 7 November 2007⁵⁸⁸ OLG Brandenburg decided that the builder cannot be released from his liability in case he warned the client, but the client decided to proceed with the original plans anyway and the builder followed his instructions, in case the interests of third parties were at stake. The builder in the given case was employed to extend a conduit system next to a public street. Part of the builder’s contractual obligations was to make sure that during his works he would secure the avenue trees from any damage. The builder sub-contracted these works and the sub-contractor warned the builder that if he would follow through in accordance with the construction plans, damage to the trees would be unavoidable. The sub-contractor was instructed to stick to the design plans as a result of which the trees were damaged. The client claimed compensation from the builder and the sub-contractor and the court held both of them liable. The court decided that the fact that the sub-contractor warned about the danger to the trees did not release him from his liability since in this case the sub-contractor had not only to follow his contractual obligation but also legal duties to implement safety precautions in order to protect the interests of third parties. It was irrelevant for the outcome of the case whether the warning had been given to the client or not. What mattered was that if the contractual obligations collided with the safety obligations the sub-contractor should have withheld himself from performing his contractual obligations in order to protect the interests of third parties (not only the client but also other inhabitants of that area).

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

⁵⁸⁷ In such a case, pursuant to §4 No. 1 VOB/B the builder does not have a right to terminate the contract with the client and refuse performance of his contractual obligations; see also: T. Großkurth, *Prüfungs- und Hinweispflichten des Auftragnehmers beim Bauvertrag und Haftungsausgleich zwischen den Baubeteiligten*, Hamburg: Verlag Dr. Kovač, 2008, p. 46-47

⁵⁸⁸ OLG Brandenburg, 07.11.2007, 13 U 24/07, IBR 2008, 1112

mind of the client as to how to follow with the construction or he should refuse to perform such dangerous works.

6.3. Dutch law.

6.3.1. What constitutes a proper warning?

In the case of 7 October 1983⁵⁸⁹ the court recognised the builder's duty to warn the client of the default within the roof construction design. The roof collapsed due to the improper drainage system of the roof, which was incorrectly designed and which did not allow for the successful outlet of the rainwater. The court explicitly said that the improper performance by the builder of the duty to warn that the design contained a default should lead to his liability for the whole damage suffered by the client. The builder claimed that he did warn the client. Based on the statements of witnesses the court decided that the warning given by the builder had the form of pointing out to the client the less correct drain pipes locations without mentioning the lower capacity of the whole drainage system of the roof. The court adjudicated that the non-explicit warning given to the client was insufficient in the given situation, however, it should be taken into account in determining the range of the builder's liability and thus, the court diminished the liability of the builder to only half of the damage suffered by the client.

A case decided by the RvA on 9 June 1992⁵⁹⁰ concerned the improper construction of the floor in a shopping mall. The client requested that natural stones be used in the construction. The designer had chosen white and blue stones to represent the logo of the company in the floor. After the construction had been performed, some cracking appeared in the floor. The client claimed damages from the builder for not warning him of the defaults in the design and of the unsuitability of the building material chosen by the client. The builder tried to defend himself by stating that he warned the client that the blue-dyed cement did not always seem to be resistant. The court adjudicated, however, that making a (general) statement that a certain type of building material did not always appear to be resistant and capable to fulfil its function could not be treated as the warning, which the builder was obligated to give to the client. Other statements issued by the builder were also considered insufficient by the court. For that reason, the court recognised the builder's full liability for the damage.

The warning, which the builder gives to the client, needs to be explicit, clear and justified⁵⁹¹. For example, in the case of 29 June 1990⁵⁹² the builder pointed out to the designer another method of construction, which he had successfully used in the past. The RvA, however, adjudicated that this was not enough to constitute a warning or even to indicate that the builder had second thoughts as to the method of construction chosen by the designer.

In the RvA-case of 27 January 2010⁵⁹³ the builder notified the client that he wanted to mill the top layer of concrete in the foundation of the construction,

⁵⁸⁹ RvA 7.10.1983, nr. 11.380, BR 1984, p. 166

⁵⁹⁰ RvA 9.06.1992, nr. 15.276, BR 1993, p. 316

⁵⁹¹ Recently repeated in: RvA 23.02.2009, nr. 29.963, TBR 2009/133

⁵⁹² RvA 29.06.1990, nr. 13.639, BR 1991, p. 154

⁵⁹³ RvA 27.01.2010, nr. 30.473, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

however, the client did not follow this suggestion because he did not want to stop the construction process for the time needed to mill the foundation. After the client suffered damages because of the lack of milling, the client claimed that the builder should have warned him about the mistake in the design that did not provide for this procedure. The suggestion of the builder was not seen as a proper warning, since it did not point out the fact that without the milling the foundation will not constitute a suitable ground for laying down tiles. The RvA stated that the builder had to make sure that the client was aware of the consequences of laying down the tiles on the floor without first milling the foundation – only then the duty to warn would have been satisfied⁵⁹⁴.

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

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

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

⁵⁹⁴ Similarly: RvA 20.01.2010, nr. 30.890, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵⁹⁵ See also: M. A. B. Chao-Duivis, ‘Aspecten van de waarschuwingsplicht van de aannemer’, BR 2007/46, p. 235; e.g. RvA 17.12.2009, nr. 29.402, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011); RvA 20.09.2010, nr. 31.537, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵⁹⁶ RvA 17.12.2009, nr. 29.402, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

⁵⁹⁷ RvA 9.06.2010, nr. 31.232, << <http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

It is not required that the warning is given in the written form⁵⁹⁸, however, it is the builder who needs to prove that he did warn the client. Taking into account his own best interests, the builder had better pass such a warning in writing. For example, in the case of 7 October 1983⁵⁹⁹ the court stated that it was clear from the construction report that there were second thoughts as to the applied dilatation method. It did not, however, mean that these doubts led the builder to issue an actual warning to the client. There was no written evidence of the warning having been given. The court had to conclude that the builder had not performed his duty to warn⁶⁰⁰.

What if the builder gives the warning to the director of the construction who then decides to ignore it without notifying the client thereabout? Is the builder then obligated to warn the client directly? Pursuant to the provision of Paragraph 6, Sec. 14 of the UAV, the warning does not need to be directed to the client. It is sufficient when the warning is given to the director of the construction, who represents the client. In Dutch literature⁶⁰¹, it has been argued that the obligation for the builder to give a warning directly to the client in person should take place only in extreme cases. For example, when the director of the construction would be obviously incompetent or when the not abiding of the warning would lead to very serious negative consequences for the client. It seems, thus, that *in these extreme cases*, the builder should have approached the client, taking into account the serious consequences that might follow, even if the designer would have assured the builder that the client was notified and had decided to follow through with the construction as it was.

This has been confirmed in case law. In the case of 11 April 2001⁶⁰², the client was not aware of the letter the builder had sent to the designer in which he warned about the defaults within the construction. The court decided that the builder could not be held accountable for that fact. It is the duty of the designer, as the director of the construction and representative of the client, to pass on the warning to the client. The builder was therefore relieved from liability.

Also in a more recent case of 19 November 2009⁶⁰³ the RvA had to decide whether the builder should be liable for performing a design according to which the concrete walls were supported by an unsatisfactory number of piles. The arbitration court found that the builder discussed the necessity and design of these walls with the designer and the designer insisted on further performance of the construction according to the design plans. The RvA saw that as sufficient evidence of the builder performing his duty to warn the client.

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

⁵⁹⁹ RvA 7.10.1983, nr. 9535, TvA 1984/1, p. 26

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

⁶⁰¹ 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)

⁶⁰² 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)

⁶⁰³ RvA 19.11.2009, nr. 30.067, <<<http://www.raadvanarbitrage.info/default.aspx>>> (lastly checked on 15 July 2011)

6.3.2. Does a sole warning suffice?

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

For example, in the case of 19 November 1981⁶⁰⁴, the RvA decided that the builder is not free to decide whether to continue with the construction process or stop it, in case he issued a warning after which the client decided to carry on with the construction nonetheless. That would mean that the builder could not terminate his work for the client in case the client does not listen to his warning and does not change his instructions. The builder is simply not given a choice to stop with the construction due to him disagreeing with the instructions of the client. However, in the case of 14 April 1999⁶⁰⁵ the RvA adjudicated to the contrary of the previous judgment. It has been decided in the given case that the builder had not only the right but also an obligation to stop the construction works and should not be liable for the damage resulting from that decision. The difference between these two cases is the risk that the builder was taking on himself by continuing with the construction upon his warning being ignored. In the first case the builder terminated performance of his work because he realised that if he followed the design plans the end result would not be fully fit for the client's purpose. He warned the client about that risk, but the client decided not to change his instructions. In the case of 14 April 1999 the risk was higher – the safety of the construction site and workers was endangered.

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

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

⁶⁰⁴ RvA 19.11.1981, nr. 8915, TvA 1982/2, p. 37

⁶⁰⁵ RvA 14.04.1999, nr. 20.285, BR 2001/61, p. 236

An example may be found in a case of 19 February 2007⁶⁰⁶, where the question was considered whether the builder should be released from his liability in case he warned the client but nevertheless created certain expectations for the client. In this case, the builder was supposed to work on the floor of the showroom that belonged to the client. The client, with the designer, specifically chose a material for the floor that was difficult to install and the builder warned the client explicitly that when using this material, there would be a risk that cracks would appear in certain areas and that the colour most likely would differ in places, with a possibility of certain stains appearing. The builder showed to the client a reference floor made of this material in which certain cracks and stains were visible and told the client that he may expect such a floor. The client informed the builder that he wished to proceed with the construction as planned. The floor that had been made for the client showed many more and more visible cracks and stains than the floor that has been shown to the client as a reference. The arbitral court adjudicated in this case that the builder should be held liable for the damage that the client suffered by receiving a floor that has been faulty. The builder indeed gave explicit warnings to the client that there might be problems with the floor, but at the same time, he also created expectations with the client promising him a floor that would look like the reference floor that has been showed to the client. The implicit promise that the builder had given to the client by showing him the reference floor took away the substance from the warnings that had been given to the client, since the client then could have expected that the floor he would receive would not be worse than the one he had seen. This behaviour of the builder made his warning ineffective and could be seen also as improper performance of his duty to warn.

6.4. Comparison.

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

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

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

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

⁶⁰⁶ RvA 19.02.2007, nr. 71.072, BR 2007, p. 698

however, since the burden of proof of the warning having been issued rests on a professional party obligated to give it, it is in his own interest to use the written form.

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

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

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

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

In English law, the warning may normally be directed to the client's representatives. However, when the professional party (the builder or the sub-contractor) has evidence that the warning did not reach the client through his representative, he should pass on this warning himself.

The starting point in all legal systems is the same: the warning may be given to the client's representative. However, it seems that when there is evidence that the representative does not convey the warning to the client and does not heed the warning himself, in England and Germany the builder would be required to warn (also) the client in person, whereas this would be true in the Netherlands only in extreme cases.

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

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

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

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

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

since it is sometimes difficult to foresee what kind of consequences a default in the construction might cause and whether they would involve e.g. harm to the health or life of others. This matter seems to be in dire need of further regulation.