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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 8. Draft Common Frame of Reference and the Duty to Warn.

### 8.1. Introduction.

For many years now the process of Europeanization of private law has been encouraged and finally financed by the institutions of the European Union. The process progresses gradually. On the way to create a European Civil Code (hereinafter referred to as the ECC), specific areas of private law are being researched and examined by various research groups, consisting of academics but also practitioners. In 2005, the Study Group on a European Civil Code and the Acquis Group together undertook a commitment to prepare the Draft Common Frame of Reference for a European private law (hereinafter referred to as the DCFR) in order to present it to the European Commission<sup>726</sup>. This research was undertaken by the scholars in order to improve the process of Europeanization by presenting the common European principles for the specific parts of private law. In its Communication on European Contract Law of 2004<sup>727</sup>, the European Commission made it clear that it expected the introduction of clear definitions, fundamental principles and model rules for a European contract law in order to enhance the quality and consistency of the existing European private law. The DCFR is an academic draft version of the (political) ‘Common Frame of Reference’ (hereinafter referred to as the CFR). The DCFR is not supposed to be political in nature. However, it might (or even should) serve as a basis for the political CFR that the European Commission is planning to draft<sup>728</sup>. Before that happens, the DCFR is easily available to anyone who would like to acquaint himself with its content and as such is supposed to serve as a source of inspiration for legislators and courts, as their ‘toolbox’<sup>729</sup>.

There is a close relation between the DCFR, the Principles of European Contract Law<sup>730</sup> (hereinafter referred to as the PECL), which provides general rules of

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<sup>726</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 1, p. 4

<sup>727</sup> COM (2004) 651 def.

<sup>728</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 6, p. 7; the non-political nature of the DCFR has been questioned e.g. by: N. Jansen, R. Zimmermann, ‘A European Civil Code in All But Name’’: Discussing the nature and purposes of the Draft Common Frame of Reference’, *Cambridge Law Journal*, No. 69(1), March 2010, p. 98-112; R. Sefton-Green, ‘The DCFR: A Technical or Political Toolbox’, in: A. Somma (ed.), *The Politics of the Draft Common Frame of Reference*, Wolters Kluwer, 2009, p. 39-50; N. Jansen, ‘The authority of an academic ‘Draft Common Frame of Reference’’, in: H-W. Micklitz, F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, Cheltenham: Edward Elgar, 2010, p. 147-172

<sup>729</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 7-8, p. 7; M. W. Hesselink, ‘The Common Frame of Reference as a Source of European Private Law’, *Tulane Law Review*, Vol. 83, No. 4, 2009, p. 971; A. Somma, ‘Towards a European Private Law? The Common Frame of Reference in the conflict between EC law and national laws’, in: H-W. Micklitz, F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, Cheltenham: Edward Elgar, 2010, p. 4

<sup>730</sup> O. Lando, H. Beale (eds.), *Principles of European Contract Law, Parts I and II, Combined and Revised*, The Hague: Kluwer Law International, 2000

contract law<sup>731</sup>, and the Principles of European Law on Service Contracts<sup>732</sup> (hereinafter referred to as the PELSC). Any of these three systems may only be applied to the contract in case both parties agreed on its applicability. The so-called Lando Commission prepared the PECL. The PECL constitutes a general frame applicable to all different types of contracts, regardless of their object or the status of the parties, and as a result is of a rather abstract nature<sup>733</sup>. However, it offers a valid point of reference for the interpretation and development of the legal systems of European Union Member States<sup>734</sup>. Since its publication the PECL, which is based on the comparative law, has obtained authority on the basis of its persuasive content. The PECL provisions apply to service contracts<sup>735</sup>. However, they do not contain all the principles binding within this sector of civil law. This void was, at least to some extent, filled in by the PELSC, which apply specifically to service contracts<sup>736</sup>. The PELSC, that takes the PECL as the underlying general contract law, constitutes a general framework of European service contract law, even if it was written upon research of a limited number of services<sup>737</sup>. Its role is to provide contractual parties and the judiciary with a point of reference. Hence, the contractual parties should be free to apply any of the principles. Furthermore, legislators may take the principles into account by adjusting national law.

The DCFR contains many rules derived from the PECL, taking into account the critical notes on some of the PECL provisions brought forward after its publication as well as other legal developments<sup>738</sup>. As far as the PELSC is concerned, its provisions have largely been taken over in the DCFR<sup>739</sup>. The DCFR does not contain all provisions of the PELSC: some provisions were dealt with on a more general level<sup>740</sup>, sometimes the DCFR deviates from the provisions of the PELSC and

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<sup>731</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, p. 127

<sup>732</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007

<sup>733</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, p. 127

<sup>734</sup> H. Eidenmüller, F. Faust, H. Ch. Grigoleit, N. Jansen, G. Wagner, R. Zimmermann, 'The Common Frame of Reference for European Private Law – Policy Choices and Codification Problems', *Oxford Journal of Legal Studies*, vol. 28, no. 4, 2008, p. 660-661; N. Jansen, 'The Authority of the Academic "Draft Common Frame of Reference"', in: H-W. Micklitz, F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, Cheltenham: Edward Elgar, 2010, p. 150-152

<sup>735</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, p. 128

<sup>736</sup> M. B. M. Loos, 'Service contracts', in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 759

<sup>737</sup> M. B. M. Loos, 'Service contracts', in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 760

<sup>738</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 40-44, p. 16-17

<sup>739</sup> The PELSC provisions have been slightly modified during the works on the Draft Common Frame of Reference and then incorporated in it as Book IV, Part C (Services), in: C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 54-56, p. 33-35

<sup>740</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 46, p. 18

sometimes it improves on these provisions<sup>741</sup>. However, most of the provisions and principles are the same in the PELSC and in the DCFR<sup>742</sup>. Below, I will focus on the provisions of the DCFR and will pay attention to the PELSC only where this may provide better insight in the interpretation of the corresponding provisions of the DCFR<sup>743</sup>.

The DCFR consists of ten books and an annex with definitions<sup>744</sup>. Each book is devoted to a part of European private law. Some books are of a more general nature (e.g. Book I contains general provisions), others deal with specific subjects (e.g. Book IV on specific contracts). The scope of the DCFR has not been limited to the European contractual principles and provisions, since e.g. Book VI deals with tort law, whereas Books VIII-X deal with various subjects pertaining to property law<sup>745</sup>.

As it has been mentioned, Book IV of the DCFR is devoted to specific contracts and the rights and obligations arising from them. Part C of this Book concerns services and Chapter 3 of this Part lays down the rules applicable specifically to construction contracts<sup>746</sup>. Article IV.C.-3:101 para. (1) of the DCFR defines construction contracts as:

“(...) contracts under which one party, the constructor, undertakes to construct a building or other immovable structure, or to materially alter an existing building or other immovable structure, following a design provided by the client.”

The definition of the construction contract in the DCFR, at first sight, seems to apply only to the traditional construction contracts where the building and designing tasks are held separate<sup>747</sup>. However, the DCFR has regard to more modern types of contracts, and therefore, it encompasses within its scope of application also such construction contracts where the builder takes upon himself obligations of the

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<sup>741</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 47, p. 18

<sup>742</sup> J. M. Barendrecht, S. van Gulijk, C. E. C. Jansen, M. B. M. Loos, ‘Principles of European Law on Service Contracts’ (PEL SC) in *bouwcontractenrechtelijk perspectief*, TBR 2008/137, p. 691

<sup>743</sup> Given the strong relation between the PELSC and the DCFR it will not come as a surprise that some of the literature mentioned in this chapter as applicable to the interpretation of the DCFR has in fact been written and published as an interpretation of the provisions of the PELSC

<sup>744</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 34, p. 13

<sup>745</sup> C. von Bar, E. Clive, H. Schulte-Nölke (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Outline Edition*, München: Sellier European Law Publishers, 2009, Intr. 25-31, p. 10-12

<sup>746</sup> Article 2:101 of the PELSC includes construction contracts within the scope of application of the PELSC using a similar definition; more on the definition of construction contracts in the PELSC and the DCFR: B. Kohl, ‘European Construction Law and the Draft Common Frame of Reference: Selected Topics’, *European Review of Private Law*, 4-2009, p. 676-677

<sup>747</sup> M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 765

designer. Article IV.C.-3:101 para. (2b) DCFR states that the provisions of the DCFR should also apply to design-build contracts<sup>748</sup>:

“It applies with appropriate adaptations to contracts under which the constructor undertakes to construct a building or other immovable structure, to materially alter an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor”.

This extension of the construction contract’s definition makes the provisions of the DCFR applicable not only to the building of a new object but also to the renovation and restoration works of existing objects, as long as the changes to the existing structure are ‘material’. This is an important part of this definition since to less important renovation works, where the changes to the building structure will not be as significant, other provisions of the DCFR would apply, namely the provisions on processing services from Chapter 4 of Book IV.C DCFR<sup>749</sup>.

Moreover, as we can see, the provisions of the DCFR on construction contracts, as contained in Chapter 3, will apply only to contracts of the builders and the sub-contractors but not to the contracts of the designers. The design contract is, however, also regulated as a specific service contract, to which the general rights and obligations, as defined in Chapters 1 and 2 of Book IV Part C, apply. Chapter 6 of Book IV Part C regulates specifically design contracts. The design contracts, pursuant to Article IV.C.-6:101 (1) of the DCFR are:

“(…) contracts under which one party, the designer, undertakes to design for another party, the client:

- (a) an immovable structure which is to be constructed by or on behalf of the client; (…)”

Therefore, the general Chapter 1 and 2 of Book IV Part C of the DCFR apply to all the contracts concluded within the construction sector, but Chapter 3 will be additionally used for the builders’ and the subcontractors’ contracts and Chapter 6 for the designers’ contracts.

## 8.2. Overview of the general provisions of the DCFR applicable to the duty to warn.

As it has been mentioned in the introduction, Book IV.C of the DCFR starts with Chapters 1 and 2, which are of a more general nature and apply to each and

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<sup>748</sup> Compare Article 2:101 (3) PEELSC. See also: J. M. Barendrecht, S. van Gulijk, C. E. C. Jansen, M. B. M. Loos, ‘Principles of European Law on Service Contracts’ (PEL SC) in *bouwcontractenrechtelijk perspectief*, TBR 2008/137, p. 698; M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 765

<sup>749</sup> The distinction between the construction and processing services as regulated in the DCFR is not always clear. See more on this in: J. M. Barendrecht, S. van Gulijk, C. E. C. Jansen, M. B. M. Loos, ‘Principles of European Law on Service Contracts’ (PEL SC) in *bouwcontractenrechtelijk perspectief*, TBR 2008/137, p. 699-700; M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 765-767

every contract on provision of services. This means that rules of these two chapters also apply to contracts of the builders, the sub-contractors and the designers. It is in Chapter 2 where the draftsmen of the DCFR decided to place the articles on the duty to warn. There are two separate articles in this chapter concerning the duty to warn: Article IV.C.-2:102 DCFR<sup>750</sup> defines the pre-contractual duties to warn while Article IV.C.-2:108 DCFR<sup>751</sup> deals with the contractual obligation of the service provider to warn.

Additionally, there are various general obligations for the service providers that have been defined in the Chapter 2, which might be of relevance when the service provider is performing his duty to warn, e.g. for defining the scope of the duty to warn. Article IV.C.-2:103 DCFR<sup>752</sup> defines the obligation to co-operate. In its paragraph 1 (e), it obliges the parties to co-ordinate their respective efforts in so far as this may reasonably be considered necessary to perform their respective obligations under the contract). Article IV.C.-2:105 DCFR<sup>753</sup> requires the service provider to perform the service with the care and skill, which a reasonable service provider would exercise under the circumstances. Article IV.C.-2:106 DCFR<sup>754</sup> indicates when a service provider is under an obligation to achieve a particular result. This is the case when the client has stated such a specific result or could reasonably have envisaged such a result at the time of the conclusion of the contract, and the service provider did not indicate otherwise. Article IV.C.-2:109 DCFR<sup>755</sup> allows both the client and the service provider to unilaterally change the service to be provided, if such a change is reasonable. This is, for instance, the case when the change is a reasonable response to a warning from the service provider<sup>756</sup>.

The general regulation of Chapter 2 of Book IV.C DCFR regarding the source and the scope of the duty to warn may be influenced by the specific regulation of Chapters 3 and 6. In this respect, one should point to Article IV.C.-3:104 para. (2) DCFR<sup>757</sup> on the conformity of the structure that is to be constructed by the builder. This provision influences the scope of the builder's or the sub-contractor's duty to warn and their liability if they breach this duty. Chapter 6 introduces a separate article on the pre-contractual duty to warn of the designer (Article IV.C.-6:102 DCFR<sup>758</sup>), defines the designer's obligation of skill and care (Article IV.C.-6:103 DCFR<sup>759</sup>), and specifies when the design is in conformity with the contract (Article IV.C.-6:104 DCFR<sup>760</sup>).

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<sup>750</sup> This provision has been taken over with slight modifications from Article 1:103 PELSC.

<sup>751</sup> This provision has been taken over with slight modifications from Article 1:110 PELSC

<sup>752</sup> Compare Article 1:104 PELSC.

<sup>753</sup> Compare Article 1:107 PELSC.

<sup>754</sup> Compare Article 1:108 PELSC.

<sup>755</sup> Compare Article 1:111 PELSC.

<sup>756</sup> More on this subject may be found in: B. Kohl, 'European Construction Law and the Draft Common Frame of Reference: Selected Topics', *European Review of Private Law*, 4-2009, p. 677-682

<sup>757</sup> Compare Article 2:104 PELSC.

<sup>758</sup> Compare Article 5:102 PELSC.

<sup>759</sup> Compare Article 5:104 PELSC.

<sup>760</sup> Compare Article 5:105 PELSC.

Finally, it is important to remember that the duty to warn has its basis in good faith and therefore also the provision on good faith and fair dealing could be applicable (Article III.-1:103 DCFR<sup>761</sup>).

It is clear, that it is not sufficient to just look at the provisions on the duty to warn encompassed in Book IV.C, Chapter 2 of the DCFR, since the specific provisions of Chapters 3 and 6, as well as provisions such as Article IV.C.-2:106 DCFR, may change the scope of the professional party's duty to warn. In the following section firstly attention will be given to the general duty to warn, then to specific provisions of the DCFR regulating the builder's and the subcontractor's duty to warn, finally to the specifics of the duty to warn of the designer. The last paragraphs will deal with the requirements of the effectiveness of the warnings that may have been expressed in the DCFR and the liability for breach of the duty to warn.

### 8.3. The general duty to warn of service providers.

#### 8.3.1. Contractual obligation of the service provider to warn.

The contractual obligation of the service provider to warn is regulated in the Article IV.C.-2:108<sup>762</sup> DCFR, which reads as follows:

“IV.C.-2:108: Contractual obligation of the service provider to warn.

(1) The service provider must warn the client if the service provider becomes aware of a risk that the service requested:

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<sup>761</sup> Compare Article 1:107 PECL and Article 1:201 PECL.

<sup>762</sup> An almost identical provision has been included in the PECL in Article 1:110, in: M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007:

“(1) *The service provider is under a duty to warn the client if the service provider becomes aware or if the service provider has reason to know that the service requested: may not achieve the result stated or envisaged by the client at the time of conclusion of the contract, or may damage other interests of the client, or may become more expensive or take more time than agreed upon in the contract, either as a result of following information or directions given by the client or collected in accordance with Article 105, or as a result of the occurrence of any other risk.*

(2) *The service provider must take reasonable measures to ensure that the client understands the content of the warning.*

(3) *The duty to warn in paragraph (1) does not apply if the client: already knows of the risks referred to in paragraph (1)(a), (b), or (c); or has reason to know of the risks.*

(4) *If an event referred to in paragraph (1) occurs and the client was not duly warned, the client need not accept a change of the service under Article 111.*

(5) *For the purpose of paragraph (1), the service provider has ‘reason to know’ if the risks would be obvious to a comparable service provider in the same situation as this service provider from all the facts and circumstances known to the service provider without investigation.*

(6) *For the purpose of paragraph (3)(b), the client has ‘reason to know’ if the risks would be obvious to a comparable client in the same situation as this client from all the facts and circumstances known to the client. The client is not treated as knowing of a risk, or having reason to know of it, merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case Article 1:305 PECL (Imputed Knowledge and Intention) applies.”*

- (a) may not achieve the result stated or envisaged by the client at the time of conclusion of the contract;
  - (b) may damage other interests of the client; or
  - (c) may become more expensive or take more time than agreed on in the contract either as a result of following information or directions given by the client or collected in preparation for performance, or as a result of the occurrence of any other risk.
- (2) The service provider must take reasonable measures to ensure that the client understands the content of the warning.
  - (3) The obligation to warn in paragraph (1) does not apply if the client:
    - (a) already knows of the risks referred to in paragraph (1); or
    - (b) could reasonably be expected to know of them.
  - (4) If a risk referred to in paragraph (1) materialises and the service provider did not perform the obligation to warn the client of it, a notice of variation by the service provider under IV. C. – 2:109 (Unilateral variation of the service contract) based on the materialisation of that risk is without effect.
  - (5) For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider without investigation.
  - (6) For the purpose of paragraph (3)(b), the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case II. – 1:105 (Imputed knowledge etc.) applies.<sup>763</sup>

The contractual obligation of the service provider to warn is drafted in a similar manner as the pre-contractual duty to warn<sup>764</sup>. The service provider is obligated to warn the client whenever he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client<sup>765</sup>, however, only in as far as that result has been defined at the moment of the conclusion of the contract. Of course, if the parties agree to change the contract during its performance or if the client unilaterally changes the contract, pursuant to the rules of the DCFR<sup>766</sup>, pursuing a different construction result, such a change might lead to the extension of the scope of the builder's duty to warn since the builder will need to warn if an event occurs that

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<sup>763</sup> In the Notes to this Article the list of countries is given which recognise the duty to warn, including the three legal systems that had been analysed in this book: C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Notes, p. 1673-1676

<sup>764</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1668; further discussed in the following paragraph.

<sup>765</sup> M. B. M. Loos, 'Service contracts', in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 770

<sup>766</sup> See Article IV.C.-2:109 DCFR, discussed also in: M. B. M. Loos, 'Service contracts', in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 771-772

would endanger achieving that new construction result<sup>767</sup>. The service provider also needs to warn the client when he becomes aware of a risk that may damage other interests of the client. Finally, the service provider needs to warn the client when he becomes aware of a risk that the service may become more expensive or take more time than agreed in the contract (if need be: as amended by a later change in the construction process).

It has explicitly been added to Article IV.C.-2:108 para. (1) DCFR that the service provider's duty to warn is not limited to warning the client about a risk that might come about as a result of following information or directions of the client, or faulty information that the service provider himself had collected, but also as a result of the occurrence of any other risk. This suggests that the service provider has also a duty to warn about a risk coming from a third party even though this has not been clearly expressed in the comments to the DCFR. However, support for this suggestion may be found in the comments to the PELSC. In the General Comments to Chapter 2 (Construction), the draftsmen of the PELSC list as one of the basic principles of liability for construction contracts that when one party, e.g. a builder, observes choices of the other party which bring about a risk to the construction, he has to warn the other party. The Comment continues:

‘This is, for instance, reflected in the constructor’s duty to warn against obvious mistakes in the design supplied by the client *or his architect*’ (emphasis added, JL)<sup>768</sup>.

Article IV.C.-2:108 para. (5) DCFR states that the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider without investigation. Contrary to the pre-contractual duty to warn, in this provision there is no specification of a service provider's duty to carefully examine the information and documents given to the service provider by the client. This makes the scope of the contractual duty to warn broader than the scope of the precontractual duty to warn. The Article states instead that the service provider needs to warn only about such defaults that he saw or should have seen without investigation<sup>769</sup>. This distinction in the wording of the provision is justified, since the service provider who has been employed is more likely to discover defaults during performance of his work, e.g. by acquiring additional information during performance of the contract or by seeing the construction from

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<sup>767</sup> See also: C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1717

<sup>768</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, General Comments to Chapter 2 (Construction), Comment C under II, p. 310

<sup>769</sup> As it has been mentioned in the previous paragraph, the service provider is not obliged to investigate and search for the defaults in the pre-contractual stage either, which will be further discussed in the following paragraph. C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment C, p. 1671. See also: M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 771

another (more practical) perspective<sup>770</sup>. Since the service provider will only have to warn about the risks that he had discovered or should have discovered this does not impose any extra costs on the service provider<sup>771</sup>. In the pre-contractual stage, a service provider has less incentive and fewer possibilities to discover any defaults aside the ones that may be obvious upon analysing the information and documents delivered by the client and therefore, his duty to be diligent are limited to that examination<sup>772</sup>. A service provider in the contractual stage has to be simply attentive, or as it has been expressed in the comments to the PELSC – ‘normally attentive’<sup>773</sup>, to anything that might raise his doubts. There is a following example given in the PELSC to illustrate the standard of the duty to warn, which could apply to a situation when the builder needs to warn the client about a mistake of the designer:

“During the construction of a house, the constructor discovers that a technique for fitting in the bathroom windows will lead to difficulties because the tiles preferred by the client have such dimensions that the result will be very awkward. The technique is fine for walls without tiles, but less appropriate for tiled walls. The constructor will have to warn the client.”<sup>774</sup>

What about the scope of the contractual obligation to warn? A service provider does not have to warn the client if the client already knows of the risks involved or could reasonably be expected to know of them pursuant to Article IV.C.-2:108 para. (3) DCFR<sup>775</sup>. There is an exception from this limitation of the scope of the contractual obligation to warn, which can be read in Article IV.C.-2:108 para. (6) DCFR: the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client. Therefore, the competence and experience of the client does not automatically release a service provider of his duty to warn<sup>776</sup>.

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<sup>770</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1669

<sup>771</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment B, p. 1669

<sup>772</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1668-1669

<sup>773</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment N, p. 317

<sup>774</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment N, p. 317

<sup>775</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1668; M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 771

<sup>776</sup> The reasoning for adopting this approach is the same as with the pre-contractual duty to warn, which will be further discussed in the following paragraph. C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment C, p. 1671

The draftsmen of the DCFR made this Article a default rule. This means that the contractual parties could decide not to apply this provision to their contract. However, since the duty to warn has its roots in the good faith principle it cannot be too quickly assumed that a client decided to renounce his protection and agreed with the service provider that the latter one will be released of his duty to warn. The principle of good faith and fair dealing has also been regulated in the DCFR in Article III.-1:103 DCFR, which may not be excluded or restricted by contract<sup>777</sup>:

- “(1) A person has a duty to act in accordance with good faith and fair dealing in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship.
- (2) The duty may not be excluded or limited by contract or other juridical act.
- (3) Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right, remedy or defence which that person would otherwise have.”

Article III.-1:103 para. (2) DCFR clearly states that the good faith rule is intended to be mandatory<sup>778</sup>. The problem with reliance directly on this Article instead of on the Article regulating the duty to warn is that Article III.-1:103 para. (3) DCFR excludes the possibility of directly claiming a remedy for non-performance of the obligation to act in accordance with good faith and fair dealing<sup>779</sup>. In case the parties have not contractually excluded application of the obligation to warn, the client will be able to demand remedies for breach by the service provider of this obligation. When only Article III.-1:103 DCFR will be applicable to the contract and not Article IV.C.-2:108 DCFR, the client might only block the service provider from relying on a right, remedy or defence that he would normally have but may not demand compensation for his damage<sup>780</sup>.

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<sup>777</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment C, p. 1672

<sup>778</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume I, Comment D, p. 677

<sup>779</sup> This approach has been criticized in the literature, e.g. by M. W. Hesselink, *CFR & Social Justice*, München: Sellier European Law Publishers, 2008, p. 50-52; O. Lando, ‘The Structure and The Legal Values of the Common Frame of Reference’, *ERCL*, Vol. 3, Issue 3, 2007, p. 252-253; G. Vettori, ‘The interpretation according to human rights, fundamental freedoms and constitutional laws (art. 1:102 DCFR)’, in: H-W. Micklitz, F. Cafaggi (eds.), *European Private Law after the Common Frame of Reference*, Cheltenham: Edward Elgar, 2010, p. 27-28

<sup>780</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume I, p. 678

### 8.3.2. Pre-contractual duties to warn.

The general duty to warn of the service provider is specified in Chapter 2 of Book IV Part C of the DCFR. Article IV.C.-2:102 DCFR<sup>781</sup> defines the precontractual duty to warn as follows:

“IV.C.-2:102: Pre-contractual duties to warn.

- (1) The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware of a risk that the service requested:
  - (a) may not achieve the result stated or envisaged by the client;
  - (b) may damage other interests of the client; or
  - (c) may become more expensive or take more time than reasonably expected by the client.
- (2) The duty to warn in paragraph (1) does not apply if the client:
  - (a) already knows of the risks referred to in paragraph (1); or
  - (b) could reasonably be expected to know of them.
- (3) If a risk referred to in paragraph (1) materialises and the service provider was in breach of the duty to warn of it, a subsequent change of the service by the service provider under IV. C. – 2:109 (Unilateral

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<sup>781</sup> An almost identical provision has been included in the PELSC in Article 1:103, in: M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007:

*‘(1) The service provider is under a pre-contractual duty to warn the client if the service provider becomes aware or if the service provider has reason to know that the service requested:*

*(a) may not achieve the result stated or envisaged by the client, or*

*(b) may damage other interests of the client, or*

*(c) may become more expensive or take more time than reasonably expected by the client.*

*(2) The duty to warn in paragraph (1) does not apply if the client:*

*(a) already knows of the risks referred to in subparagraph (1)(a), (b), or (c); or*

*(b) has reason to know of the risks.*

*(3) If an event referred to in paragraph (1) occurs and the client was not duly warned:*

*(a) the client need not accept a change of the service under Article 1:111 unless the service provider proves that the client, if the client would have been duly warned, would have entered into a contract taking into account the event; and*

*(b) the client may recover damages in accordance with Article 4:117(2) and (3) PECL (Damages).*

*(4) The client is under a pre-contractual duty to warn the service provider if the client becomes aware, or if the client has reason to know of unusual facts that are likely to cause the service to become more expensive or take more time than expected by the service provider.*

*(5) If the facts referred to under paragraph (4) occur and the service provider was not duly warned, the service provider is entitled to:*

*(a) damages for the loss the service provider sustained as a consequence of the non-performance; and*

*(b) an adjustment of the time of performance that is required for the service.*

*(6) For the purpose of paragraph (1), the service provider has ‘reason to know’ if the risks would be obvious to a comparable service provider in the same situation as this service provider from all the facts and circumstances known to the service provider, considering the information that the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out.*

*(7) For the purpose of subparagraphs (2)(b) and (4), the client has ‘reason to know’ if the risks would be obvious to a comparable client in the same situation as this client from all the facts and circumstances known to the client without investigation. The client is not treated as knowing of a risk, or having reason to know of it, merely because the client was competent, or was advised by others who were competent, in the relevant field,*

*unless such other person acted as the agent of the client, in which case Article 1:305 PECL (Imputed Knowledge and Intention) applies.’*

variation of the service contract) which is based on the materialisation of the risk is of no effect unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. This is without prejudice to any other remedies, including remedies for mistake, which the client may have.

- (4) The client is under a pre-contractual duty to warn the service provider if the client becomes aware of unusual facts which are likely to cause the service to become more expensive or time-consuming than expected by the service provider or to cause any danger to the service provider or others when performing the service.
- (5) If the facts referred to under paragraph (4) occur and the service provider was not duly warned, the service provider is entitled to:
  - (a) damages for the loss the service provider sustained as a consequence of the failure to warn; and
  - (b) an adjustment of the time allowed for performance of the service.
- (6) For the purpose of paragraph (1), the service provider is presumed to be aware of the risks mentioned if they should be obvious from all the facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out.
- (7) For the purpose of paragraph (2)(b) the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client, in which case II. – 1:105 (Imputed knowledge etc.) applies.
- (8) For the purpose of paragraph (4), the client is presumed to be aware of the facts mentioned if they should be obvious from all the facts and circumstances known to the client without investigation.”

According to this provision the service provider has a pre-contractual duty to warn when he becomes aware of a risk that the service requested may not achieve the result stated or envisaged by the client, or may damage other interests of the client, or may become more expensive or take more time than reasonably expected by the client. This suggests that at any point before the contract is concluded, when the service provider becomes aware that another party endangers the construction result stated by the client, the service provider should warn the client about it. An illustration given in the comments to the PELSC makes the scope of this precontractual duty to warn more obvious:

“A constructor is requested to consider building an office building according to a design made by an architect on behalf of the client. Whilst studying the design, the constructor discovers that the steel construction of the roof may not be strong enough when made in accordance with the design. The constructor is to warn the client of this.”<sup>782</sup>

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<sup>782</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment J, p. 314

Also, when prior to the conclusion of the contract the service provider realizes that the cost or performance time estimation made by another party is incorrect, he should warn the client about it. The draftsmen of the DCFR were of the opinion that prior to the conclusion of the contract the parties should have the duty to warn each other about typical risks that might occur after the conclusion of the contract when the service started to be performed<sup>783</sup>.

When does the service provider have to warn the client? Pursuant to Article IV.C.-2:102 (6) DCFR, the service provider is presumed to be aware of the risks mentioned if they should be obvious from all facts and circumstances known to the service provider, considering the information which the service provider must collect about the result stated or envisaged by the client and the circumstances in which the service is to be carried out. In general, the service provider has to warn only about risks that he knew or reasonably could have known before the conclusion of the contract<sup>784</sup>. The draftsmen of the DCFR aimed to stimulate the exchange of important information between the parties prior to the conclusion of the contract<sup>785</sup>. This is why a certain amount of alertness on the side of the service provider is required to discover such risks, namely he is expected to check whether the construction that the client wants to have performed is feasible under the conditions that the client had specified. The draftsmen of the DCFR are clear that on the basis of this Article a service provider is not expected to make investigations and actively search for all potential risks to the client. However, careful examination of all available information, e.g. design plans, is expected from a service provider who needs to estimate the price of the offer he wants to make to the client. It is assumed that during such examination a service provider would be able to analyse the feasibility of the construction and discover certain risks<sup>786</sup>. Whether the service provider should have been aware of the risk endangering the construction, and whether, therefore, he should have warned the client, will be estimated from a point of view of a constructor who had conducted such inquiries<sup>787</sup>.

What is the scope of this duty to warn? Article IV.C.-2:102 para. (2) DCFR specifies that the duty to warn does not apply if the client already knows of the risks or could reasonably be expected to know of them. The knowledge of the client of the

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<sup>783</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1608-1609

<sup>784</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1609

<sup>785</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Comment A, Volume II, p. 1610

<sup>786</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment C, p. 1614-1615; M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment J, p. 314

<sup>787</sup> M. B. M. Loos, 'Service contracts', in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 771

risk excludes the duty to warn of the service provider pursuant to the DCFR<sup>788</sup>. However, as Article IV.C.-2:102 para. (7) DCFR states, the client cannot reasonably be expected to know of a risk merely because the client was competent, or was advised by others who were competent, in the relevant field, unless such other person acted as the agent of the client. This means, that in general the competence of the client does not influence the scope of the duty to warn of the service provider, unless the service provider can prove that the client, as a competent party, actually knew of the risk. The idea behind this provision was to protect consumers and small business parties that are often advised for free by their friends and relatives<sup>789</sup>. This provision tries to distinguish this situation with the one in which a client hires a professional advisor to act as his agent during the pre-contractual negotiations<sup>790</sup>.

The comments to the DCFR and the PELSC do not provide an illustration of this provision that would be applicable to the construction sector. To make this provision more clear, imagine that the client lets one of his friends prepare a design for his house. With ready design plans in his hands the client then approaches a builder for price estimation. If the design contains an obvious fault, the builder will not be released of his duty to warn the client just because the design was prepared by a competent party that could be seen as an advisor of the client. However, if the client concludes an agency contract with his designer-friend and it is the designer that discusses the design plans with the builder on behalf of the client, telling the builder that he had already thoroughly discussed all the potential risks with his client, then the builder may be released of his duty to warn the client.

The draftsmen of the DCFR explained in the Comments<sup>791</sup> they preferred to regulate the pre-contractual duty to warn in the DCFR since such

“duties are firmly embedded in the development of pre-contractual duties to inform, a development that has taken place and is still taking place in the jurisdictions investigated and in European private law”.

However, in the Notes<sup>792</sup> to this Article reference is only made to general pre-contractual duties to inform and not to the pre-contractual duty to warn, specifically.

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<sup>788</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1610

<sup>789</sup> The notion of the consumer is strictly applied and there have been voices raised in the literature that not only private parties not acting in the performance of their business or profession should be covered by the protection granted by the consumer law provisions, but also small business parties. In general, the DCFR introduces a sharp distinction between the consumers and the businesses, which is seen by some as being unfair and inefficient. See e.g. M. W. Hesselink, *CFR & Social Justice*, München: Sellier European Law Publishers, 2008, p. 36-40; M. W. Hesselink, ‘The CFR and Social Justice’, in: A. Somma (ed.), *The Politics of the Draft Common Frame of Reference*, Wolters Kluwer, 2009, p. 109; O. Lando, ‘Liberal, Social and ‘Ethical’ Justice in European Contract Law’, 43 CMLR, 2006, p. 829

<sup>790</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment C, p. 1616

<sup>791</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume II, Comment C, p. 1614

<sup>792</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume II, Notes, p. 1621-1625

Moreover, the draftsmen mention only a few Member States and point out to gaps in application of pre-contractual duties to inform in these countries. A question may be asked what the basis was to choosing for the regulation of the pre-contractual duty to warn as a preferred solution, then.

#### 8.4. The builder's and the sub-contractor's duty to warn.

In Article IV.C.-3:104 (2) DCFR on conformity it has been stated:

“The structure does not conform to the contract unless it is:

- (a) fit for any particular purpose expressly or impliedly made known to the constructor at the time of the conclusion of the contract or at the time of any variation in accordance with IV.C.-2:109 pertaining to the issue in question; and
- (b) fit for the particular purpose or purposes for which a structure of the same description would ordinarily be used.”

This means that, in general, the builder and the sub-contractor will have to deliver a perfect end-result to the client, and that they will not perform their contractual obligations if there is any default in the construction that hinders the construction from being fit for purpose<sup>793</sup>. The builder or the sub-contractor might be released from the liability in case he warned the client about that risk, which has been defined in Article IV.C.-3:104 (3):

“The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client under IV.C.-2:107 is the cause of the non-conformity and the constructor performed the obligation to warn pursuant to IV.C.-2:108.”

The builder needs to deliver a product fit for purpose. However, the builder will be freed from liability if the default in the construction was beyond his control. The builder may, for example, prove that the default is caused by the decisions made by the client or other employees of the client, either contained in the contract or in subsequent directions<sup>794</sup>. However, if these mistakes made by other parties were of such a nature that the builder should or could have been aware of them, he would have had the duty to warn about them. If the builder had an option to perform his duty to warn, that means that the builder was capable of preventing the risk from materializing, which means it was within his control to deliver a product fit for purpose and he should be held liable for any defaults within the construction.

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<sup>793</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1716-1717; B. Kohl, ‘European Construction Law and the Draft Common Frame of Reference: Selected Topics’, *European Review of Private Law*, 4-2009, p. 685-687

<sup>794</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment D, p. 1720; B. Kohl, ‘European Construction Law and the Draft Common Frame of Reference: Selected Topics’, *European Review of Private Law*, 4-2009, p. 686

In general, the construction has to be fit for the purpose for which other structures of the same description would be used<sup>795</sup>. The client may be silent about the expectations he has as to the construction in so far as these expectations conform with the normal use thereof. In case the client has some specific expectations, e.g. specific purposes he wants the construction to be ready for, he needs to make these expectations known to the constructor; as of that moment the constructor will need to warn the client if that specific purpose might not be achieved due to a risk coming from a third party<sup>796</sup>. The draftsmen of the PELSC give the example of the construction of a boat (to which contract in principle the same rules apply as to the contract for construction of a house)<sup>797</sup>:

“Before the conclusion of a contract regarding the construction of a boat, the client expresses his wish to use it frequently in the stormy seas surrounding the Shetland Islands. That purpose influences the quality requirements for the entire boat. At the stage where directions regarding the interior of the boat are given, however, the client informs the constructor that he wants a cupboard for storing precious wine. In this situation, the constructor must either build a cupboard fit for this purpose in stormy circumstances or, also depending on the contract, warn the client.”<sup>798</sup>

Similarly, in the case of the construction of a house, the builder would have a duty to warn if the client informed both the builder and the designer of his wish to store precious wine in the building and the designer subsequently adjusts his design plans without sufficiently guaranteeing the safety of these wines.

The DCFR regulates specifically only the contractual duty to warn of the service provider towards his client, which means that it would regulate only the sub-contractor's duty to warn the builder, and not the client directly. The sub-contractor's duty to warn the client might fall under the tort provision of the DCFR. However, the tort provisions in the DCFR are very general as to their scope of their application. Pursuant to Article VI.-1:101 DCFR only a person who suffers “legally relevant damage” has a right to compensation from a person who caused that damage<sup>799</sup>. The definition of legally relevant damage is given in Article VI.-2:101<sup>800</sup> and requires for

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<sup>795</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1717

<sup>796</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment H, p. 347

<sup>797</sup> See Article IV.C.-3:101 paragraph (2) DCFR and Article 2:101 paragraphs (2) and (3) PELSC.

<sup>798</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment H, p. 347

<sup>799</sup> “VI. – 1:101: Basic rule

(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage.

(2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.”

<sup>800</sup> “VI. – 2:101: Meaning of legally relevant damage

(1) Loss, whether economic or non-economic, or injury is legally relevant damage if:

(a) one of the following rules of this Chapter so provides;

(b) the loss or injury results from a violation of a right otherwise conferred by the law; or

the loss to either be specified in one of the other articles of the DCFR or for the loss to be the result from a violation of a right otherwise conferred by the law or from a violation of an interest worthy of legal protection. The loss that the client might suffer as a result of not being warned directly by the sub-contractor does not fall directly under the special cases mentioned in the articles of the DCFR, although if e.g. it results in a personal injury it could qualify under Article VI.-2:201 DCFR. However, the Sections 1(b) and 1(c) of Article VI.-2:101 DCFR introduce flexibility<sup>801</sup> to this rule and might mean that the sub-contractor could be liable for not warning the client about a risk to the construction even if there is no specific duty to warn in tort placed on him by the provisions of the DCFR.

#### 8.5. The designer's duty to warn.

As it has been mentioned in the introduction a designer is one of the service providers which means that the general provisions of Chapters 1 and 2 of Book IV.C DCFR apply to him. Therefore, a designer has also a duty to warn under provisions of the already discussed Article IV.C.-2:102 DCFR and Article IV.C.-2:108 DCFR<sup>802</sup>. However, the pre-contractual duty to warn of the designer has also been separately regulated in Chapter 6 on the designer contract. And so, pursuant to Article IV.C.-6:102 DCFR:

“The designer’s pre-contractual duty to warn requires in particular the designer to warn the client in so far as the designer lacks special expertise in specific problems which require the involvement of specialists.”

According to Article IV.C.-6:102 DCFR a designer will need to warn the client in case he knows that he is not qualified to fully assess certain risks. In this case the duty to warn is combined with the duty to advise since the designer should point out to the client the necessity of employing a specialist who would be able to give a proper assessment of the risk and solve his problem<sup>803</sup>. Therefore, in case the designer in pre-contractual negotiations is not sure as to the quality and precision of the performance of one of the other contractors or, for example, an engineering design, he should warn

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*(c) the loss or injury results from a violation of an interest worthy of legal protection.*

*(2) In any case covered only by sub-paragraphs (b) or (c) of paragraph (1) loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention, as the case may be, under VI. – 1:101 (Basic rule) or VI. – 1:102 (Prevention).*

*(3) In considering whether it would be fair and reasonable for there to be a right to reparation or prevention regard is to be had to the ground of accountability, to the nature and proximity of the damage or impending damage, to the reasonable expectations of the person who suffers or would suffer the damage, and to considerations of public policy.*

*(4) In this Book:*

*(a) economic loss includes loss of income or profit, burdens incurred and a reduction in the value of property;*

*(b) non-economic loss includes pain and suffering and impairment of the quality of life.”*

<sup>801</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume IV, Comment B, C and D, p. 3141-3145

<sup>802</sup> Discussed in the previous paragraphs.

<sup>803</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1853

the client that there is a potential risk there and that the client would be better off asking for an advice from an expert in the given field. The following illustration has been given in the DCFR:

“A designer recognises that special analysis of the soil is needed and that he is not able to carry out such analysis himself. Before the contract is concluded, the designer warns the client and recommends the employment of a geodesist.”<sup>804</sup>

The designer would also need to warn the client about the need to employ a geodesist, when the client had already employed a builder to evaluate the construction grounds and the builder would not conduct all the soil examinations that the designer deems necessary.

This duty specifies the pre-contractual duty of any service provider to warn under Article IV.C.-2:102 DCFR<sup>805</sup>, which means that all sections of this Article should be applied when interpreting the scope of Article IV.C.-6:102 DCFR<sup>806</sup>. The reason behind adopting this provision was to enable the client to make an informed decision prior to the conclusion of the contract, also as to the specialists that he will have to employ<sup>807</sup>.

## 8.6. Requirements for an effective warning.

### 8.6.1. What constitutes a proper warning?

Article IV.C.-2:108 para. (2) DCFR establishes that the service provider must take reasonable measures to ensure that the client understands the content of the warning. These measures have not been specified in the DCFR, since the draftsmen of the DCFR believed that it would depend on the circumstances of the case which measures could be considered as adequate<sup>808</sup>, however, a certain amount of diligence is obviously required of a service provider. It seems that the draftsmen of the DCFR will not see the warning as effective unless the client understands it<sup>809</sup>. The added

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<sup>804</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1853

<sup>805</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment D, p. 1854

<sup>806</sup> This follows from the commentary to the PELSC: M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment E, p. 639-640

<sup>807</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment D, p. 1854

<sup>808</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1668

<sup>809</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1668; M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W.

requirement of the effectiveness of warnings in the DCFR broadens the scope of the duty to warn of the service provider, since it is not sufficient for him to just inform the client of the risks, but he also needs to take other, reasonable measures to ensure that the client understands the warning and is aware of the risk<sup>810</sup>. Therefore, it might be assumed that the warning has to be given in as plain language as possible and clearly present to the client the risk involved with the warning not having been followed. However, the draftsmen of the DCFR made no requirement as to the form of the warning, which means that the written form of a warning is not a formal condition for properly warning the client<sup>811</sup>.

Another question concerned is: does the service provider need to warn the client directly or is it sufficient for him to fulfill his duty to warn if he gives a warning to a representative of the client? Pursuant to Article IV.C.-2:108 (3b) DCFR the service provider is released of his duty to warn in case the client could reasonably be expected to know of the risk. Article IV.C.-2:108 (6) DCFR specifies then that the client could not reasonably be expected to know of a risk merely because other professional parties advised the client, unless such a party acted as the agent of the client. In such a situation the Article II.-1:105 DCFR<sup>812</sup> applies pursuant to which the knowledge of the representative of the client is imputed to be his own knowledge. This means that if the service provider gives a warning to the representative of the client, the client himself can be seen as having been warned. However, the service provider could not reasonably expect the client to know about the risk, if he had reason to believe that the warning was not further conveyed. Only in such circumstances, when the service provider would have realized that the warning was not further conveyed to the client, would the service provider have a duty to warn the client directly.

#### 8.6.2. Does a sole warning suffice?

Pursuant to Article IV.C.-3:103 DCFR:

“The constructor must take reasonable precautions in order to prevent any damage to the structure.”

This is a specific provision that applies only to the builders and the sub-contractors who have already a duty to warn the client based on the general provisions of the

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Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 771-772

<sup>810</sup> On the broader scope of the duty to warn when the warning needs to be effective: M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment E, p. 525

<sup>811</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment A, p. 1668; M. B. M. Loos, ‘Service contracts’, in: A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak & C. E. du Perron, *Towards a European Civil Code*, Fourth Revised and Expanded Edition, The Netherlands: Kluwer Law International, 2011, p. 771

<sup>812</sup> “II. – 1:105: Imputed knowledge etc.

*If a person who with a party’s assent was involved in making a contract or other juridical act or in exercising a right or performing an obligation under it:*

*(a) knew or foresaw a fact, or is treated as having knowledge or foresight of a fact; or*

*(b) acted intentionally or with any other relevant state of mind this knowledge, foresight or state of mind is imputed to the party.”*

DCFR applicable to any service provider. Moreover, it is a specification of a general obligation for a service provider to act with skill and care as expressed in Article IV.C.-2:105 DCFR. Pursuant to Article IV.C.-2:105 para. (5) DCFR:

“The obligations under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of damage as a consequence of the performance of the service.”

In a situation that the builder gave a warning to the client, but the client decided not to follow the warning he had received, there are three possibilities for the builder: to refuse further work which might bring the risk about, to once again try to convince the client to follow the warning, or to just follow through on the directions of the client assuming that the client took upon himself the risk of the faulty construction. Article IV.C.-3:103 DCFR seems to indicate that the third option will be taken away from the builder in case the risk might cause any damage to the structure of the construction. Therefore, if the default would be substantial and would endanger the structure of the construction, the builder might be expected to do something more than just to give a warning to the client about it – he needs to take ‘reasonable precautions’<sup>813</sup>. The scope of these precautions has not been defined in the DCFR and is left for practice to decide.

## 8.7. Duty to warn breached: liability and its scope.

### 8.7.1. Causality.

The service provider is obliged to achieve the specific result that was stated or envisaged by the client at the time of the conclusion of the contract, pursuant to Article IV.C.-2:106 DCFR<sup>814</sup>. This means that the service provider has to deliver a perfect end result to the client and, in general, he might be seen as having caused the loss of the client if there is any default in the construction, regardless whether he caused it directly, e.g. by providing a defective design, or whether he caused it indirectly, e.g. by not giving a warning. This suggests, as far as causality is concerned, that the builder will always be responsible for delivering to the client a faultless construction. The builder might be seen as not performing his obligations even if the default in the construction was the result of a mistake made by the client or a designer

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<sup>813</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment B, p. 1712

<sup>814</sup> ‘IV. C. – 2:106: *Obligation to achieve result*

(1) *The supplier of a service must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that in the case of a result envisaged but not stated:*

(a) *the result envisaged was one which the client could reasonably be expected to have envisaged; and*  
(b) *the client had no reason to believe that there was a substantial risk that the result would not be achieved by the service.*

(2) *In so far as ownership of anything is transferred to the client under the service contract, it must be transferred free from any right or reasonably based claim of a third party. IV. A. – 2:305 (Third party rights or claims in general) and IV. A. – 2:306 (Third party rights or claims based on industrial property or other intellectual property) apply with any appropriate adaptations.’*

since that mistake will not longer be seen as the only cause of the fact that the builder has not achieved the result<sup>815</sup>.

Article IV.C.-2:102 para. (3) DCFR makes it clear that at least certain consequences of the breach of the pre-contractual duty to warn may not be applied in case there is no causal link between that non-performance of the duty to warn and the damage: if the service provider breached his duty to warn and the risk materialized, the service provider may not demand the change of the service, e.g. by requiring additional payment for correcting the faulty construction, unless the service provider proves that the client, if duly warned, would have entered into a contract anyway. The burden of proof is on the service provider. This exception has not been added to the regulation of the contractual obligation to warn of the service provider. The draftsmen of the DCFR explain this difference by simply stating that the contractual duty to warn applies only after the contract has already been concluded<sup>816</sup>. This does not sound as a convincing explanation, since also after the contract has been concluded there might not be a causal link between the lack of warning and the materialization of a risk and the service provider could be allowed to prove that. Instead of proving that the client would have entered into a contract even if the warning had been given, the service provider could also prove that the client would not have changed his directions even if the warning had been given. In both cases there would then not seem to be a causal link between the lack of warning and the damage. However, in the comments to the contractual duty to warn in the PELSC, it has been explained that the service provider might claim compensation for extra costs or time to the extent that extra costs and delay would be present even if the service provider would have warned the client, i.e. in a situation where there would be no causal link between the lack of warning and the damage<sup>817</sup>. This suggests that despite their different wording the scope of precontractual and contractual duty to warn in this respect would be the same. It is regrettable that the draftsmen of the DCFR did not simplify the interpretation of this Article by adjusting it appropriately to cover explicitly also such situations.

#### 8.7.2. Sole liability, solidary liability or apportionment of liability?

What happens if there are two service providers that caused the damage to the client? One of them had made a mistake and created a faulty construction, the other one had failed to perform his duty to warn about that mistake. What type of liability would be applied by the DCFR?

Pursuant to Article III.-4:103 DCFR:

“(1) Whether an obligation is solidary, divided or joint depends on the terms regulating the obligation.

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<sup>815</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment D, p. 1656-1657

<sup>816</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, München: Sellier European Law Publishers, 2009, Volume II, Comment D, p. 1672-1673

<sup>817</sup> M. Barendrecht, Ch. Jansen, M. Loos, A. Pinna, R. Cascão, S. van Gulijk (eds.), *Principles of European Law. Service Contracts (PEL SC)*, München: Sellier European Law Publishers, 2007, Comment I, p. 254

- (2) If the terms do not determine the question, the liability of two or more debtors to perform the same obligation is solidary. Liability is solidary in particular where two or more persons are liable for the same damage.
- (3) The fact that the debtors are not liable on the same terms or grounds does not prevent solidarity.”

The DCFR gives precedence to the rules establishing a given obligation to determine what type of plural obligation should arise in its case<sup>818</sup>. However, if the specific provision does not make this choice, then the default rule remains, pursuant to Article III.-4:103 para. (2) DCFR, that the liability of two or more debtors is solidary. At the same time, Article III.-4:103 para. (3) DCFR, specifies that liability may be solidary even when the debtors are not liable on the same terms or grounds. This is essential for the application of this provision to the breach of the duty to warn, which may offer a different ground for liability of one party than the breach of whatever obligation was infringed by the other party who caused the original default<sup>819</sup>. For example, the builder might have breached his duty to warn the client about the mistake in the design plans, while the designer had not performed his obligation to prepare the design with due skill and care that would guarantee the client that his construction will be fit for purpose. Both the builder and the designer will be solidary liable towards the client

Article III.-4:102 DCFR defines that:

- “(1) An obligation is solidary when each debtor is bound to perform the obligation in full and the creditor may require performance from any of them until full performance has been received.”

That is the best option for the client, since he may then choose from which professional party to claim damages: the one that made a mistake in performance (the designer) or the one that did not warn him about that mistake (the builder).

### 8.7.3. Contributory negligence as a defence.

The DCFR also contains a rule on the defence of contributory negligence. If the builder or the designer breaches his duty to warn, therefore improperly performing his contractual obligations, the client may claim damages for non-performance of the obligation to warn. However, the liability of a service provider will be limited pursuant to Article III.-3:704 DCFR:

- “The debtor is not liable for loss suffered by the creditor to the extent that the creditor contributed to the non-performance or its effects.”

Article III.-3:704 DCFR will be applicable in relation to construction contracts when, e.g.: a client provided the builder with faulty or incomplete information or documents

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<sup>818</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume I, Comment A, p. 977

<sup>819</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume I, Comment D, p. 978

as to design plans, and the designer was an agent of the client, i.e. a party for whose actions the client was directly responsible. In such a case, while the builder will still be seen as a party liable for the default since he did not perform his duty to warn, it is taken into account that the client should not recover damages to the extent that the damage was caused by his own behaviour, or by behaviour of the designer for whom the client bears responsibility<sup>820</sup>.

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<sup>820</sup> C. von Bar, E. Clive (eds.), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR), Full Edition*, Oxford: Oxford University Press, 2010, Volume I, Comment A, p. 934