Principles of European Law

Study Group on a European Civil Code

Service Contracts (PEL SC)

prepared by
Maurits Barendrecht
Chris Jansen
Marco Loos
Andrea Pinna
Rui Cascão
Stéphanie van Gulijk

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Foreword

The Study Group on a European Civil Code has taken upon itself the task of drafting common European principles for the most important aspects of the law of obligations and for certain parts of the law of property in moveables which are especially relevant for the functioning of the common market. It was founded in 1999 as a successor body to the Commission on European Contract Law, on whose work the Study Group is building.

The two groups pursue identical aims. However, the Study Group has a more far-reaching focus in terms of subject-matter and as an ultimate goal it aspires to a consolidated composite text of the material worked out by itself and the Commission on European Contract Law. Both groups have undertaken to ascertain and formulate European standards of 'patrimonial' law for the Member States of the European Union. The Commission on European Contract has already achieved this for the field of general contract law (*Lando and Beale* [eds.], Principles of European Contract Law, Parts I and II combined and revised, The Hague, 2000; *Lando/Clive/Prüm/Zimmermann* [eds.], Principles of European Contract Law Part III, The Hague, 2003). These Principles of European Contract Law (PECL) are being adopted with adjustments by the Study Group on a European Civil Code to take account of new developments and input from its research partners. The Study Group is itself dovetailing its principles with those of the PECL, extending their encapsulation of standards of patrimonial law in three directions: (i) by developing rules for specific types of contracts; (ii) by developing rules for extra-contractual obligations, i.e. the law of tort/delict, the law of unjustified enrichment, and the law of benevolent intervention in another's affairs (*negotiorum gestio*); and (iii) by developing rules for fundamental questions in the law on mobile assets – in particular transfer of ownership and security for credit.

Like the Commission on European Contract Law's Principles of European Contract Law, the results of the research conducted by the Study Group on a European Civil Code seek to advance the process of Europeanisation of private law. We have undertaken this endeavour on our own personal initiative and merely present the results of a pan-European research project. It is a study in comparative law in so far as we have always taken care to identify the legal position in the Member States of the European Union and to set out the results of this research in the introductions and notes. That of course does not mean that we have only been concerned with documenting the pool of shared legal values or that we simply adopted the majority position among the legal systems where common ground was missing. Rather we have consistently striven to draw up "sound and fitting" principles, that is to say, we have also recurrently developed proposals and concepts for the further development of private law in Europe.

The working methods of the Commission on European Contract Law and the Study Group on a European Civil Code are or were likewise quite similar. The Study Group, however, has had the benefit of Working (or Research) Teams – groups of younger legal scholars under the supervision of a senior member of the Group (a Team Leader) which undertook the basic comparative legal research, developed the drafts for discussion and

assembled the extensive material required for the notes. Furthermore, to each Working Team was allocated a consultative body – an Advisory Council. These bodies – deliberately kept small in the interests of efficiency – were formed from leading experts in the relevant field of law who are representative of the major European legal systems. The proposals drafted by the Working Teams and critically scrutinised and improved in a series of meetings by the respective Advisory Council were submitted for discussion on a revolving basis to the actual decision-making body of the Study Group on a European Civil Code, the Co-ordinating Group. Until June 2004 the Co-ordinating Group consisted of representatives from all the jurisdictions belonging to the EU immediately prior to its enlargement in Spring 2004 and in addition legal scholars from Estonia, Hungary, Norway, Poland, Slovenia and Switzerland. Representatives from the Czech Republic, Malta, Latvia, Lithuania and Slovakia joined us after the June meeting 2004 in Warsaw. However, due to reasons of time and capacity, it was only occasionally possible to summarise in the notes the current legal position in the new Member States of the EU. We are keen to fill the outstanding gaps (of which we are only too painfully aware) at a later point in time.

Besides its permanent members, other participants in the Co-ordinating Group with voting rights included all the Team Leaders and – when the relevant material was up for discussion – the members of the Advisory Council concerned. The results of the deliberations during the week-long sitting of the Co-ordinating Group were incorporated into the text of the Articles and the commentaries which returned to the agenda for the next meeting of the Co-ordinating Group (or the next but one depending on the work load of the Group and the Team affected). Each part of the project was the subject of debate on manifold occasions, some stretching over many years. Where a unanimous opinion could not be achieved, majority votes were taken. As far as possible the Articles drafted in English were translated into the other languages either by members of the Team or third parties commissioned for the purpose. The number of languages into which the Articles could be translated admittedly varies considerably from volume to volume. That is in part a consequence of the fact that not all Working Teams were equipped with the same measure of financial support. We also had to resign ourselves to the absence of a perfectly uniform editorial style. Our editing guidelines provided a common basis for scholarly publication, but at the margin had to accommodate preferences of individual teams. However, this should not cause the reader any problems in comprehension.

Work on these Principles had begun long before the European Commission published its Communication on European Contract Law (in 2001), its Action Plan for a more coherent European contract law (in 2003), and its follow-up Communication "European Contract Law and the revision of the *acquis*: the way forward" (in 2004). (All of these early documents concerning European contract law are still available on the Commission's website: http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm). These documents for their part were published before we formed the Network of Excellence, together with other European research groups and institutions, which will collaborate in the preparation of an Academic Common Frame of Reference with the support of funds from the European Community's Sixth Framework Programme. The texts laid before the public by the Study Group on a European Civil Code are therefore not necessarily identical with those which the Network of Excellence will propose to the European Commission. Rather they represent

for the time being texts which the Study Group considers should serve as the starting point for the comprehensive process of discussion and consultation envisaged for the coming years. Whether that process will require any changes to our texts (and, if so, which changes) is something which will have to be weighed up carefully in a spirit of academic independence after a review of the arguments. The political domain can then determine at a later date which of our proposals, if any, it wishes to take up.

In order to leave no room for misunderstanding, it is important to stress that these Principles have been prepared by impartial and independent-minded scholars whose sole interest has been a devotion to the subject-matter. None of us have been rewarded for taking part or mandated to do so. None of us would want to give the impression that we claim any political legitimation for promoting harmonisation of the law. Our legitimation is confined to curiosity and an interest in Europe. In other words, the volumes in this series are to be understood exclusively as the results of scholarly legal research within large international teams. Like every other scholarly legal work, they restate the current law and introduce possible models for its further development; no less, but also no more. We are not a homogenous group whose every member is an advocate of the idea of a European Civil Code. We are, after all, only a *Study* Group. The question whether a European Civil Code is or is not desirable is a political one to which each member can only express an individual view.

Osnabrück, July 2006 *Christian v. Bar*

Our Sponsors

The project of the Study Group on a European Civil Code represents a research endeavour in legal science of extraordinary magnitude. Without the generous financial support of many organisations its realisation would not have been possible.

Our thanks go first of all to the *Deutsche Forschungsgemeinschaft (DFG)*, which has supplied the lion's share of the financing including the salaries of the Working Teams based in Germany and the direct travel costs for the meetings of the Co-ordinating Group and the numerous Advisory Councils. The work of the Dutch Working Teams was financed by the *Nederlandse Organisatie voor Wetenschappelijk Onderzoek (NWO)*. Further personnel costs were met by the Flemish *Fonds voor Wetenschappelijk Onderzoek-Vlaanderen (FWO)*, the *Onassis-Foundation*, the Austrian *Fonds zur Förderung der wissenschaftlichen Forschung* and the *Fundação Calouste Gulbenkian*.

In addition we have consistently been able to fall back on funds made available to the respective organisers of the week long sittings of the Co-ordinating Group by the relevant university or other sources within the country concerned. It is therefore with the deepest gratitude that I must also mention the *Consiglio nazionale forense* (Rom) and the *Istituto di diritto privato* of the *Università di Roma La Sapienza*, which co-financed the meeting in Rome (June 2000). The session in Salzburg (December 2000) was supported by the Austrian *Bundesministerium für Bildung, Wissenschaft und Kultur*, the *Universität Salzburg* and the *Institut für Rechtspolitik* of the *Universität Salzburg*. The discussions in Stockholm (June 2001) were assisted by the *Department of Law, Stockholm University*, the *Supreme Court Justice Edward Cassels Foundation* and *Stiftelsen Juridisk Fakultetslitteratur (SJF)*. The meeting in Oxford (December 2001) had the support of *Shearman & Sterling*, the *Hulme Trust, Berwin Leighton Paisner* and the *Oxford University Press (OUP)*. The session in Valencia (June 2002) was made possible by the *Asociación Nacional de Registradores de la Propiedad, Mercantil y Bienes Muebles*, the *Universitat de València*, the *Ministerio Español de Ciencia y Tecnología*, the *Facultad de Derecho* of the *Universitat de València*, the *Departamento de Derecho Internacional, Departamento de Derecho Civil* and the *Departamento de Derecho Mercantil "Manuel Broseta Pont"* of the *Universitat de València*, the law firm *Cuatrecasas*, the *Generalitat Valenciana*, the *Corts Valencianes*, the *Diputación Provincial de Valencia*, the *Ayuntamiento de Valencia*, the *Colegio de Abogados de Valencia* and *Aranzadi Publishing Company*. The subsequent meeting in Oporto (December 2002) was substantially assisted by the *Universidade Católica Portuguesa – Centro Regional do Porto*. For the week long session in Helsinki (June 2003) we were able to rely on funds from *Suomen Kultuurirahasto* (Finnish Cultural Foundation), the *Niilo Helanderin Säätiö* (Niilo Helander Foundation), the *Suomalainen Lakimeisyhdistys* (Finnish Lawyers Association), the *Ministry of Justice* and the *Ministry for Foreign Affairs*, the *Nordea Bank*, *Roschier Holmberg* Attorneys Ltd., *Hannes Snellman* Attorneys Ltd., the *Department of Private Law* and the *Institute of International Commercial Law (KATTI) of Helsinki University*. The session in Leuven (December 2003) was supported by *Katholieke Universiteit Leuven, Faculteit Rechtsgeleerdheid*, and the *FWO Vlaanderen Fonds voor Wetenschappelijk Onderzoek* (Flanders Scientific Research Fund). The meeting of the Group

in Warsaw (June 2004) was substantially assisted by the *Fundacja Fundusz Wspolpracy* (The Cooperation Fund) and the *Faculty of Law and Administration of Warsaw University*. The meeting in Milan (December 2004) was supported by the *Università Bocconi* and its *Istituto di diritto comparato*, by the Milan *Camera di Commercio*, by the *Associazione Civilisti Italiani* and by the *Comune di Milano*. The meeting in Berlin (June 2005) was made possible by *PricewaterhouseCoopers Deutschland AG*, Frankfurt/Berlin; *Sievert AG & Co.*, Osnabrück, and by *Verband deutscher Hypothekenbanken e.V., Berlin*. The meeting in Tartu (December 2005) was supported by the *University of Tartu*, its *Faculty of Law*, its *Institute of Law* and its *Institute of Private Law*, by the *Estonian Supreme Court*, the *Ministry of Justice*, the *Tartu City Government*, *Iuridicum Foundation*, the Law Offices *Concordia, Lepik & Luhaäär, Luiga Mody Hääl Borenius, Ots & Co, Aivar Pilv, Aare Raig, Raidla & Partners, Sorainen, Tark & Co, Teder Glikman & Partners, Paul Varul, Alvin Rödl & Partner* and *Lextal Law Firm*. The meeting in Oslo (June 2006) was made possible by the *kongelige Justis- og Politidepartement* (The Royal Ministry of Justice), by *Sigvald Bergesen d.y.*, by *hustru Nankis Almennyttige stiftelse*, *Storebrand* and the law firms *Wiersholm and BA-HR*. We thank all of these organisations and institutions for the funds which they made available to us and for the extraordinary warmth of hospitality with which our hosts received us.

Osnabrück, July 2006 *Christian v. Bar*

Preface to this volume

The following text on the law of service contracts, hereby presented to the interested public, has been deliberated by the Co-ordinating Group of the Study Group on a European Civil Code during its week-long meetings in Rome (June 2000), Salzburg (December 2000), Stockholm (June 2001), Oxford (December 2001), Valencia (June 2002), Oporto (December 202), Helsinki (June 2003) and Leuven (December 2003). In preparation of the respective meetings, thorough deliberations with the Advisory Council of the Working Team have taken place. As the preceding pages clearly show, this text is very much the result of a collective effort. The Tilburg members of the Dutch Working Team are jointly responsible for the text as it stands, but we had an author for each Chapter who took the lead: Chris Jansen (Chapter 1 General), Maurits Barendrecht (Chapter 2 Construction), Marco Loos (Chapter 3 Processing and Chapter 4 Storage), Stéphanie van Gulijk (Chapter 5 Design), Andrea Pinna (Chapter 6 Information) and Rui Cascão (Chapter 7 Treatment).

Drafting common principles on the law of service contracts was a novel experience for everyone involved. The existing codes only deal with a limited number of services, so to some extent we had to invent a method of "codification" ourselves. Extensive discussions in the Co-ordinating Group and in the Advisory Council resulted in a procedure in which we first identified the most common types of services that tend to cause legal conflicts. This was not an easy task, because it entails an abstraction from the thousands of different types of services provided on the market, into a manageable number of categories. We identified six categories, of which some are close to legal tradition (construction, storage, and to some extent treatment) and others an answer to challenges that come from the modern practice of contract law (processing, design, information). Yet other types we identified, e.g representation, intermediation and education, we had – at least for the time being – to leave outside the scope of the Team's work due to time and financial restraints.

Then, we tried to find the answers the legal systems provide in regard to the most important issues that lead to conflicts in the six categories of service contracts. The comparative law material used in this volume has been collected by the Amsterdam, Utrecht and Tilburg members of the Dutch Working Team. The reader will note that there are some gaps in this material, in particular because the Dutch Working Team did not succeed in contracting researchers from Denmark, Scotland, Ireland and Luxemburg. Moreover, in some jurisdictions it was difficult to find general answers to some of the questions we had, highly abstract as they sometimes were. Case law tends to be very case-specific in this area and the number of general treatises we could rely on was small.

This resulted in a number of draft rules, supported by comparative material. These rules were extensively discussed in meetings of the Co-ordinating Group and in the Advisory Council and adjusted if they did not sufficiently reflect the usual approach of the issue in the European jurisdictions.

In the next stage, some general principles were derived from the principles found for the six categories. These found their way in the General Provisions, which were again discussed and improved in several stages. Then, the long process of fine-tuning text, comments and notes began.

We are confident that the principles resulting from this very interactive process generally reflect the current approach of legal problems in the area of service contracts. However, the relative lack of legal tradition in this area and the dynamic developments in the services economy is something the reader should keep in mind when using these principles. There will be flaws, and issues we missed.

Legislation, case law and doctrine have been stated as of January 2003. We are very grateful to Andrea Pinna, who was in charge of the process of getting the documents ready for publication. We are also grateful to Hildegard Penn who to our regret did not live to see this publication printed for the English language check; Valerie Verberne for the material text editing, Jeanine Leytens for the tables, Jeanette Andersson and Prof. Christina Ramberg for the Swedish translation; Prof. Jérôme Huet for the French translation, Prof. Marco Loos for the Dutch translation; Prof. Martin Schmidt-Kessel, Wiss.Mit. Friederike Schäfer and Wiss.Mit. Sandra Rohlfing for the German translation.

Before publication this text was circulated to stakeholders under the CFR net exercise as part of the European Commission's contract law programme. However, as explained in the foreword by Prof. von Bar, their comments could not be reflected in these texts.

Tilburg, August 2006 *Maurits Barendrecht*

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English
Service Contracts

Chapter 1:
General Provisions

Article 1:101: Scope of Application
(1) This Chapter applies to contracts whereby one party, the service provider, is to supply a service to the other party, the client, in exchange for remuneration.
(2) This Chapter applies to contracts for construction, processing, storage, design, information, and treatment, unless provided otherwise in Chapters 2 to 7.
(3) When, under a contract, a party is bound to supply a service and to do something else, both this Chapter and, so far as relevant, Chapters 2 to 7 apply to the parts of the contract that involve services, with appropriate modifications.
(4) Without prejudice to paragraph (3), this Chapter does not apply to contracts for transport, insurance, guarantee, or for the supply of a financial product or a financial service.
(5) This Chapter does not apply to employment contracts.
(6) This Chapter, with the exception of Article 1:102, applies with appropriate modifications to contracts whereby the service provider is to supply a service to the client otherwise than for remuneration.

Article 1:102: Price
(1) Unless agreed otherwise, a service provider who has entered into the contract in the course of a profession or business is entitled to a price.
(2) Where the contract does not fix the price or the method of determining it, the price is the market price generally charged at the time of the conclusion of the contract.

Article 1:103: 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 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.

Article 1:104: Duty to Co-operate

(1) The duty under Article 1:202 PECL (Duty to Co-operate) requires in particular:
  (a) the client to answer reasonable requests by the service provider for information in so far as this is reasonably necessary to enable the service provider to perform the contract;
  (b) the client to give directions regarding the performance of the service in so far as this is reasonably necessary to enable the service provider to perform the contract;
  (c) the client, in so far as the client is to obtain permits or licenses, to obtain these at such time as is reasonably necessary to enable the service provider to perform the contract;
  (d) the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract; and
  (e) the parties to co-ordinate their respective efforts in so far as this is reasonably necessary to perform the contract.
(2) If the client fails to perform the duties under subparagraph (1)(a) or (b), the service provider may either withhold performance under Article 9:201 PECL (Right to Withhold Performance), or base performance upon the expectations, preferences and priorities a person in the same situation as the client may reasonably be considered to have, given the information and directions that have been gathered, provided that the client is warned in accordance with Article 1:110.
(3) If the client fails to perform the duties under paragraph (1) causing the service to become more expensive or to take more time than agreed upon in the contract, 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.

Article 1:105: Circumstances in which the Service Is to Be Performed

The service provider must, in so far as this is reasonably necessary for the performance of the service, collect information about the circumstances in which the service has to be performed and ensure that performance of the service takes into account these circumstances.

Article 1:106: Duties of the Service Provider regarding Input

(1) The service provider may subcontract the performance of the service in whole or in part without the client's consent, unless personal performance is of the essence of the contract.
(2) Any subcontractor so engaged by the service provider must be of adequate competence.
(3) In so far as the service provider uses tools and materials for the performance of the service, they must be in conformity with the contract and the applicable statutory rules, and fit to achieve the particular purpose for which they are to be used.
(4) In so far as the service provider must transfer ownership to the client of an immovable structure, a movable or incorporeal thing, or a right, such transfer must be free from any right or claim of a third party.
(5) The service provider must adequately plan the performance of the service.
(6) In so far as subcontractors are nominated by the client or tools and materials are provided by the client, the responsibility of the service provider is governed by Article 1:109 and Article 1:110.

Article 1:107: General Standard of Care for Services

(1) The service provider must perform the service:
    (a) with the care and skill that a reasonable service provider would exercise under the circumstances; and
    (b) in conformity with any statutory or other binding legal rules that are applicable to the service.
(2) If the service provider professes a higher standard of care and skill the provider must exercise that care and skill.
(3) If the service provider is, or purports to be, a member of a group of professional service providers for which standards exist that have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in these standards.
(4) In determining the care and skill the client is entitled to expect, regard is to be had, among other things, to:
    (a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the client;
    (b) if damage has occurred, the costs of precautions that would have prevented this or similar damage from occurring;
    (c) whether the service is rendered by a non-professional or gratuitously;
    (d) the amount of the remuneration for the service; and
    (e) the time reasonably available for the performance of the service.
(5) The duties under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of personal injury or damage to immovable structures and movable or incorporeal things as a consequence of the performance of the service.

Article 1:108: Result Stated or Envisaged by the Client

The service provider must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that:

(a) any result envisaged but not stated was one that a reasonable client in the same circumstances as the client might have envisaged; and

(b) a reasonable client in the same circumstances would have no reason to believe that there was a substantial risk that the result would not be achieved by the service.

Article 1:109: Directions of the Client

(1) The service provider must follow all timely directions of the client regarding the performance of the service, provided that the directions:

  (a) are part of the contract itself or are specified in any document that the contract refers to; or

  (b) result from the realisation of choices left to the client by the contract in pursuance of Article 6:105 PECL (Unilateral Determination by a Party); or

  (c) result from the realisation of choices initially left open by the parties.

(2) If non-performance of one or more of the duties of the service provider under Articles 1:107 or 1:108 is the consequence of following a direction falling under paragraph (1), the service provider is not liable under those Articles, provided that the client was duly warned under Article 1:110.

(3) If the service provider perceives a direction falling under paragraph (1) to be a variation of the contract under Article 1:111, the service provider must warn the client accordingly. Unless the client then revokes the direction without undue delay, the service provider must follow the direction and the direction is deemed to be a variation of the contract.

Article 1:110: Contractual Duty of the Service Provider to Warn

(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:

  (a) may not achieve the result stated or envisaged by the client at the time of conclusion of the contract, or

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

  (c) 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 1:105, 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:

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

  (b) 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 1:111.

(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.

Article 1:111: Variation of the Service Contract

(1) Without prejudice to the client's right to cancel the contract under Article 1:115, a party must accept a change of the service that is to be provided under the contract or when read with any direction under Article 1:109, if such a change is reasonable, taking into account:
   (a) the result of the service that is to be achieved;
   (b) the interests of the client;
   (c) the interests of the service provider; and
   (d) the circumstances at the time of the change of the service.

(2) A change of the service is deemed to be reasonable if that change:
   (a) is necessary in order to enable the service provider to act in accordance with Article 1:107 or, as the case may be, Article 1:108; or
   (b) is the consequence of a direction that is given in accordance with Article 1:109(1) and the client has not revoked the direction without undue delay after having been warned in accordance with Article 1:109(3); or
   (c) is a reasonable response to a warning from the service provider under Article 1:110.

(3) For the purpose of paragraphs (1) and (2) a change of service required by a change of circumstances within the meaning of Article 6:111 PECL (Change of Circumstances) is regarded as a reasonable change of service.

(4) The price that is due as a result of the change of the service has to be reasonable and is to be determined using the same methods of calculation as were used to establish the original price for the service.

(5) In so far as the service is reduced, the loss of profit, the expenses saved and any possibility that the service provider may be able to use the released capacity for other purposes are to be taken into account in the calculation of the price that is due as a result of the change of the service.

(6) A change of the service may lead to an adjustment of the time of performance that is proportionate to the extra work required in relation to the work originally required for the performance of the service and the time span determined for performance of the service.

Article 1:112: Remedies for Breach of Duties of the Service Provider

(1) Damages recoverable by the client include the costs the client has incurred in order to establish the breach of any duty of the service provider, and or to prevent the result stated or envisaged by the client from not being achieved, provided that the client acted reasonably in incurring these costs.

(2) If the service provider has breached a duty under the contract, and if it is not yet clear whether the result stated or envisaged by the client will be achieved, the client may withhold performance of any reciprocal obligations under Article 9:201 PECL (Right to Withhold Performance).

(3) The client is entitled to terminate the contract in accordance with Article 9:304 PECL (Anticipatory Non-Performance) only if it is clear that the breach of a duty of the service provider under the contract will result in a non-performance of an obligation fundamental to the contract in accordance with Article 8:103 PECL (Fundamental Non-Performance).

Article 1:113: Failure to Notify for Non-Conformity

(1) The client is under a duty to notify the service provider if the client becomes aware, or if a comparable client in the same situation as this client from all the facts and circumstances known to the client without investigation has reason to know that the service provider will either fail to achieve the result stated or envisaged by the client or has failed to achieve that result.

(2) If the client fails to notify under paragraph (1) that the service provider will fail to achieve the result stated or envisaged by the client, causing the service to become more expensive or to take more time than agreed upon in the contract, 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.

Article 1:114: Limitation of Liability

(1) The service provider may neither limit nor exclude liability for death or personal injury caused by the performance of the service.

(2) The service provider may limit or exclude liability for damage, other than death or personal injury, caused by the performance of the service if, at the moment of conclusion of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case, unless provided otherwise in Chapters 2 to 7.

Article 1:115: Cancellation of the Service Contract

(1) The client may cancel the contract at any time.

(2) If the contract is cancelled under this Article the service provider is entitled to damages to put the service provider as nearly as possible into the position in which the service provider would have been if the contract had been duly performed. Such damages cover the loss which the service provider has suffered and the gain of which the service provider has been deprived.

(3) In determining the position into which the service provider is to be put under paragraph (2), regard is to be had, among other things, to the following rules:
   (a) if payment of a price was agreed, the service provider is entitled to that price minus the expenses that should reasonably have been saved and the benefit that could reasonably have been earned using the capacity that has become available;
   (b) if payment of a fee based on a particular rate was agreed, the service provider is entitled to payment of the fee on the basis of that rate, to the extent that the service has already been performed; and
   (c) if payment of a fee based on a 'no cure no pay' basis was agreed, the service provider is entitled to payment of both the reasonable costs incurred, to the extent that the service has already been performed, and to the gain of which the service provider has been deprived as a result of the cancellation.

Chapter 2:
Construction

Article 2:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the constructor, is 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.
(2) This Chapter applies with appropriate modifications to contracts whereby the constructor is to construct a movable or incorporeal thing, following a design provided by the client.
(3) This Chapter applies with appropriate modifications to contracts whereby the constructor is to construct a building or other immovable structure, to perform construction work on an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor.
(4) When, under a contract, a party is bound to construct and to supply another service, this Chapter applies to the parts of the contract that involve construction, with appropriate modifications.

Article 2:102: Duty to Co-operate of the Client

The duties under Article 1:202 PECL (Duty to Co-operate) and Article 1:104 (Duty to Co-operate) require in particular the client to:
(a) provide access to the site where the construction has to take place in so far as is reasonably necessary to enable the constructor to perform the contract; and
(b) in so far as they must be provided by the client, provide the components, materials and tools at such time as is reasonably necessary to enable the constructor to perform the contract.

Article 2:103: Duty of Care of the Constructor

The duties under Article 1:107 (General Standard of Care for Services) require in particular the constructor to take reasonable precautions in order to prevent any damage to the structure.

Article 2:104: Conformity

(1) The constructor must deliver a structure that is of the quantity, quality and description required by the contract.
(2) Except where the parties have agreed otherwise, 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 Article 1:111 (Variation of the Service Contract) 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.
(3) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client pursuant to Article 1:109 (Directions of the Client) is the cause of the non-conformity and the constructor did not breach the duty to warn pursuant to Article 1:110 (Contractual Duty of the Service Provider to Warn).

Article 2:105: Inspection, Supervision and Acceptance

(1) In accordance with Article 1:104(1)(d) (Duty to Co-operate), the client may inspect or supervise the input in the construction process, the process of construction and the resulting structure in a reasonable manner and at any reasonable time, but is not bound to do so.
(2) If the parties agree that the constructor has to present certain elements of the input, process or the resulting structure to the client for acceptance, the constructor may not proceed with the construction before having been allowed by the client to do so.
(3) Absence of, or inadequate, inspection, supervision or acceptance does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

Article 2:106: Handing over of the Structure

(1) If the constructor regards the structure, or any part of it that is fit for independent use, as sufficiently completed and wishes to transfer control over it to the client, the client must accept such control within a reasonable time after being notified. The client may refuse to accept the control when the structure, or the relevant part of it, does not conform to the contract and such non-conformity makes it unfit for use.
(2) Acceptance by the client of the control over the structure does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

Article 2:107: Payment of the Price

The price or a proportionate part of it is due and payable as of the time the constructor transfers the control of the structure or a part of it to the client in accordance with Article 2:106.

Article 2:108: Risks

(1) This Article applies if the structure is destroyed or damaged due to an event for which the constructor cannot be held accountable and which the constructor could not have avoided or overcome.
(2) When the situation mentioned under paragraph 1 has been caused by an event occurring before the structure or control of it has been, or should have been, transferred to the client in accordance with Article 2:106 and it is still possible to perform:
    (a) the constructor still has to perform or, as the case may be, perform again;
    (b) the client is only obliged to pay for the constructor's performance under (a);
    (c) the time of performance is extended in accordance with Article 1:111(6) (Variation of the Service Contract);
    (d) the rules of Article 8:108 PECL (Excuse Due to an Impediment) may apply to the constructor's original performance; and
    (e) the constructor is not obliged to compensate the client for losses to input provided by the client.
(3) When the situation mentioned under paragraph 1 has been caused by an event occurring before the structure or control of it has been, or should have been, transferred to the client in accordance with Article 2:106, and it is no longer possible to perform:

(a) the client does not have to pay for the service rendered;
(b) the rules of Article 8:108 PECL (Excuse Due to an Impediment) may apply to the constructor's performance; and
(c) the constructor is not obliged to compensate the client for losses to input provided by the client, but is obliged to return the structure or what remains of it to the client.

(4) When the situation mentioned under paragraph 1 has been caused by an event occurring after the structure or the control of it has been, or should have been, transferred to the client in accordance with Article 2:106:
(a) the constructor does not have to perform again; and
(b) the client remains obliged to pay the price.

Article 2:109: Specific Performance and Cure

(1) If the constructor does not deliver a structure in accordance with Article 2:104, the client is entitled to have the non-conformity cured by specific performance under Article 9:102 PECL (Non-Monetary Obligations), provided that:
(a) cure is not unlawful or impossible;
(b) cure will not cause the constructor unreasonable effort or expense; and
(c) the performance does not consist in the provision of services or work of a personal character or depends on a personal relationship.

(2) Article 9:102(d) PECL (Non-Monetary Obligations) does not apply to any case to which paragraph (1) applies.

(3) If the constructor fails to deliver a structure in accordance with Article 2:104, the constructor may cure the non-conformity, provided that this can be done:
(a) before the end of any additional period of reasonable length fixed by a notice by the client under Article 8:106(3) PECL (Notice Fixing Additional Period for Performance); and
(b) before the delay caused by the cure constitutes a fundamental non-performance under Article 8:103(b) or (c) PECL (Fundamental Non-Performance).

(4) Article 8:103(a) PECL (Fundamental Non-Performance) does not apply to any case to which paragraph (3) applies, unless it is expressly agreed that strict compliance with the time of delivery is essential to the contract.

(5) The constructor is free to determine how to meet the obligation of specific performance. In particular, the constructor is free to decide whether to repair the structure, replace it by a new structure or have the structure repaired at the constructor's expense by a third party.

(6) Until the constructor has cured the non-conformity, the client may withhold performance under Article 9:201 PECL (Right to Withhold Performance).

(7) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest) for any loss not remedied by the constructor's cure.

Article 2:110: Resort to Other Remedies

(1) The client may resort to other remedies as provided in this Article, if
(a) the constructor refuses to cure because the client is not entitled to ask for cure under Article 2:109(1); or
(b) the constructor is unable or fails to cure according to Article 2:109(3).

(2) The client may terminate the contract in accordance with Chapter 9, Section 3 PECL (Termination of the Contract) if the non-conformity is a fundamental non-performance according to Article 8:103(b) or (c) PECL (Fundamental Non-Performance).

(3) The client may reduce the price in accordance with Article 9:401 PECL (Right to Reduce Price).
(4) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest), including the costs of repair or replacement.

Article 2:111: Prescription of Remedies based on Non-Conformity

(1) In accordance with Article 14:201 PECL (General Period), the prescription period for a remedy for non-conformity of the structure is three years.
(2) In accordance with Article 14:203(1) PECL (Commencement), the period of prescription runs from the time that the control over the structure, or part of it, is handed over to the client in accordance with Article 2:106.
(3) In accordance with Article 14:301(1) PECL (Suspension in Case of Ignorance), the running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably know of, the facts giving rise to the claim including the type of damage. This does not apply to remedies other than damages.
(4) In accordance with Article 14:307 PECL (Maximum Length of Period), the period of prescription cannot be extended, by suspension of its running or postponement of its expiry, to more than ten years or, in the case of claims for personal injuries, to more than thirty years. This does not apply to suspension under Article 14:302 (Suspension in Case of Judicial and Other Proceedings).

Chapter 3:
Processing

Article 3:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the processor, is to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client.
(2) This Chapter applies in particular to contracts whereby the processor is to repair, maintain or clean an existing movable or incorporeal thing or immovable structure.
(3) When, under a contract, a party is bound to process and to supply another service, this Chapter applies to the parts of the contract that involve processing, with appropriate modifications.

Article 3:102: Duty to Co-operate of the Client

The duties under Article 1:202 PECL (Duty to Co-operate) and Article 1:104 (Duty to Co-operate) require in particular the client to:
(a) hand over the thing or to give the control of it to the processor, or to give access to the site where the service is to be performed in so far as is reasonably necessary to enable the processor to perform the contract; and
(b) in so far as they must be provided by the client, provide the components, materials and tools at such time as is reasonably necessary to enable the processor to perform the contract.

Article 3:103: Circumstances in which the Service Is to Be Performed

The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the processor to collect information about the characteristics of the thing on which the service is to be performed in so far as is reasonably necessary to perform the service.

Article 3:104: Duty of Care of the Processor

The duties under Article 1:107 (General Standard of Care for Services) require in particular the processor to take reasonable precautions in order to prevent any damage to the thing or other loss.

Article 3:105: Conformity

The processor must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that:

(a) any result envisaged but not stated was one that a reasonable client in the same circumstances as the client might have envisaged; and
(b) a reasonable client in the same circumstances would have no reason to believe that there was a substantial risk that the result would not be achieved by the service.

Article 3:106: Inspection and Supervision

(1) In accordance with Article 1:104(1)(d) (Duty to Co-operate), if the service is to be performed at a site provided by the client, the client may inspect or supervise the input, the performance of the service and the thing on which the service is performed in a reasonable manner and at any reasonable time, but is not bound to do so.
(2) Absence of, or inadequate inspection or supervision does not relieve the processor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to accept, inspect or supervise the processing of the thing.

Article 3:107: Return of the Thing

(1) If the processor regards the service as sufficiently completed and wishes to return the thing or the control of it to the client, the client must accept such return or control within a reasonable time after being notified. The client may refuse to accept the return or control when the thing is not fit for use in accordance with the particular purpose for which the client had the service performed, provided that such purpose was made known to the processor or that the processor otherwise has reason to know of it.
(2) The processor must return the thing or the control of it within a reasonable time after being so requested by the client.
(3) Acceptance by the client of the return of the structure or the control of it does not relieve the processor wholly or partially from liability for non-performance.
(4) If, given the nature of the thing and the contract, the processor has become the owner of the thing as a consequence of the performance of the contract, the processor must transfer ownership of the thing when the thing is returned.

Article 3:108: Payment of the Price

The price is due and payable as of the moment the processor transfers the thing or the control of it to the client in accordance with Article 3:107 or the client, without being entitled to do so, refuses to accept the return of the thing.

Article 3:109: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event for which the processor cannot be held accountable and which the processor could not have avoided or overcome.

(2) If, prior to the event mentioned in paragraph (1), the processor had indicated that the processor regarded the service as sufficiently completed and that the processor wished to return the thing or the control of it to the client:
   (a) the processor is not required to perform again; and
   (b) the client must pay the price.
   The price is due as of the occurrence of the event and the moment that the processor returns the remains of the thing, if any, or the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's costs.
   This provision does not apply if the client was entitled to refuse the return of the thing under Article 3:107(1).

(3) If the parties had agreed that the processor would be paid for each period that has elapsed, the client is obliged to pay the price for each period that has elapsed before the event mentioned in paragraph (1) occurred.

(4) If, after the event mentioned in paragraph (1) occurred, performance of the contract is still possible for the processor:
   (a) the processor still has to perform, as the case may be, again;
   (b) the client is only obliged to pay for the processor's performance under (a); the processor's entitlement to a price under paragraph (3) is not affected by this provision;
   (c) the client is obliged to compensate the processor for the costs the processor has to incur in order to acquire materials replacing the materials supplied by the client, unless the client upon being so requested by the processor supplies these materials himself; and
   (d) if need be, the time for performance is extended in accordance with Article 1:111(6) (Variation of the Service Contract).
   The client is, however, entitled to cancel the contract under Article 1:115 (Cancellation of the Service Contract); the consequences of such cancellation are governed by that provision.

(5) If, in the situation mentioned in paragraph (1), performance of the contract is no longer possible for the processor:
   (a) the client does not have to pay for the service rendered; the processor's entitlement to a price under paragraph (3) is not affected by this provision; and
   (b) the processor is obliged to return to the client the thing and the materials supplied by the client or what remains of them, unless the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's costs.

Article 3:110: Specific Performance and Cure

(1) If the processor has not fulfilled the duties under Article 3:105, the client may claim specific performance under Article 9:102 PECL (Non-Monetary Obligations). Article 9:102(2)(d) PECL (Non-Monetary Obligations) does not apply.

(2) The processor may cure the non-conformity, provided that this can be done:
   (a) before the end of any additional period of reasonable length fixed by a notice by the client under Article 8:106(3) PECL (Notice Fixing Additional Period for Performance); and
   (b) before the delay caused by the cure would constitute a fundamental non-performance under Article 8:103(b) or (c) PECL (Fundamental Non-Performance).
(3) Article 8:103(a) PECL (Fundamental Non-Performance) does not apply to any case covered by paragraph (2), unless it is expressly agreed that strict compliance with the time for delivery is of the essence of the contract.
(4) The processor is entitled to choose the method of specific performance or cure.
(5) Until the processor has cured the non-conformity, the client may withhold performance under Article 9:201 PECL (Right to Withhold Performance).
(6) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest) for any loss not remedied by the processor's cure.

Article 3:111: Resort to Other Remedies

(1) The client may resort to other remedies as provided in this Article, if:
   (a) the client is not entitled to specific performance under Article 9:102 PECL (Non-Monetary Obligations) and Article 3:110(1); and
   (b) the processor is unable or fails to cure according to Article 3:110(2).
(2) The client may terminate the contract in accordance with Chapter 9, Section 3 PECL (Termination of the Contract) if the non-performance is a fundamental non-performance according to Article 8:103(b) or (c) PECL (Fundamental Non-Performance).
(3) The client may reduce the price in accordance with Article 9:401 PECL (Right to Reduce Price).
(4) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest), including the costs of repair or replacement.

Article 3:112: Limitation of Liability

In contracts between two parties that both act in the course of their business, a term restricting the processor's liability for non-performance to the value of the thing, had the service been performed correctly, is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability), unless the damage was caused intentionally or by way of grossly negligent behaviour on the part of the processor or any person for whose actions the processor is responsible.

Chapter 4:
Storage

Article 4:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the storer, is to store a movable or incorporeal thing for another party, the client.
(2) When, under a contract, a party is bound to store and to supply another service, this Chapter applies with appropriate modifications to the parts of the contract that involve storage.
(3) This Chapter does not apply to the storage of:
   (a) immovable structures;

(b) movable or incorporeal things during transportation; and
(c) money, securities or rights.

Article 4:102: Pre-contractual Duty to Warn of the Client

The duty under Article 1:103(4) (Pre-contractual Duties to Warn) requires in particular the client to warn the storer of any unusual danger connected with the thing or the storage of it that the client knows of.

Article 4:103: Circumstances in which the Service Is to Be Performed

The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the storer to collect information about the characteristics of the thing to be stored insofar as is necessary for the performance of the service.

Article 4:104: Duties of the Storer regarding Input

(1) The duties under Article 1:106 (Duties of the Service Provider regarding Input) require in particular the storer, insofar as the storer provides the storage place, to provide a place fit for storing the thing in such a manner that the thing can be returned in the condition the client may expect.
(2) The storer may not subcontract the performance of the service without the client's consent.

Article 4:105: Duty of Care of the Storer

(1) The duties under Article 1:107 (General Standard of Care for Services) require in particular the storer to take reasonable precautions in order to prevent unnecessary deterioration, decay or depreciation of the thing stored.
(2) The storer may use the thing handed over for storage only if the client has agreed to such use.

Article 4:106: Return of the Thing

(1) The storer must return the thing within a reasonable time after being so requested by the client.
(2) The client must accept the return of the thing at the agreed time or, if the storer is entitled to terminate the contract for non-performance by the client, within a reasonable time after notification of the termination of the contract.
(3) Acceptance by the client of the return of the thing does not relieve the storer wholly or partially from liability for non-performance.
(4) If the client fails to accept the return of the thing at the time provided under paragraph (2), the storer has the right to sell the thing in accordance with Article 7:110(2)(b) PECL (Property Not Accepted), provided that the storer has given the client reasonable warning of the storer's intention to do so.
(5) If, during storage, the thing bears fruit, the storer must hand this fruit over when the thing is returned to the client.
(6) If, given the nature of the thing or the contract, the storer has become the owner of the thing as a consequence of the performance of the contract, the storer must return a thing of the same kind and the same quality and quantity and transfer ownership of that thing. Paragraph (1) applies accordingly.
(7) This Article applies accordingly if a third party that holds sufficient title to receiving the thing requests its return.

Article 4:107: Conformity

(1) The storer must store the thing in accordance with the contract.
(2) The storage of the thing does not conform with the contract unless the thing is returned in the same condition as it was in when handed over to the storer.
(3) If, given the nature of the thing or the contract, it cannot reasonably be expected that the thing is returned in the same condition, the storage of the thing does not conform with the contract if the thing is not returned in such condition as the client could reasonably expect it to be returned.
(4) If, given the nature of the thing or the contract, it cannot reasonably be expected that the same thing is returned, the storage of the thing does not conform with the contract if the thing that is returned is not in the same condition as the thing that was handed over for storage, or if it is not of the same kind, quality and quantity, or if ownership of the thing is not transferred in accordance with Article 4:106(6).

Article 4:108: Payment of the Price

(1) The price is due as of the moment the storer returns the thing to the client in accordance with Article 4:106 or the client, without being entitled to do so, refuses to accept the return of the thing.
(2) The storer may withhold the thing until the client pays the price. Article 9:201 PECL (Right to Withhold Performance) applies accordingly.

Article 4:109: Duty to Give Account

After ending of the storage, the storer must inform the client of:
(a) any damage that has occurred to the thing during storage; and
(b) the necessary precautions that the client must take before using or transporting the thing, unless the client has reason to be aware of these precautions.

Article 4:110: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event for which the storer cannot be held accountable and which the storer could not have avoided or overcome.
(2) If, prior to the event mentioned in paragraph (1), the storer had notified the client that the client was required to accept the return of the thing, the client must pay the price. The price is due as of the occurrence of the event and the moment that the storer returns the remains of the thing, if any, or the client indicates that the client does not want the remains of the thing. In the latter case, the storer may dispose of the remains of the thing at the client's expense.
(3) If the parties had agreed that the storer would be paid for each period of time that has elapsed, the client must pay the price for each period that has elapsed before the event mentioned in paragraph (1) occurred.
(4) If, after the event mentioned in paragraph (1) occurred, further performance of the contract is still possible for the storer, the storer is required to continue performance of the contract. The client is, however, entitled to cancel the contract under Article 1:115 (Cancellation of the Service Contract); the consequences of such cancellation are governed by that provision.
(5) If, in the situation mentioned in paragraph (1), performance of the contract is no longer possible for the storer:

(a) the client does not have to pay for the service rendered; the storer's entitlement to a price under paragraph (3) is not affected by this provision; and
(b) the storer must return to the client the remains of the thing unless the client indicates that the client does not want the remains of the thing. In the latter case, the storer may dispose of the remains of the thing at the client's costs.

Article 4:111: Remedies for Non-Conformity

In the case of non-conformity under Article 4:107, the client may resort to any of the remedies under Chapter 9 PECL (Particular Remedies for Non-Performance).

Article 4:112: Limitation of Liability

In contracts between two parties that both act in the course of their business, a term restricting the storer's liability for non-performance to the value of the thing is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability), unless the damage was caused intentionally or by way of grossly negligent behaviour on the part of the storer or any person for whose actions the storer is responsible.

Article 4:113: Liability of the Hotel-Keeper

(1) This Article does not apply if and to the extent that a separate storage contract is concluded between the hotel-keeper and any guest for any thing brought to the hotel. A separate storage contract is deemed to have been concluded if a thing is handed over for the storage to the hotel-keeper. Article 4:101(3) does not apply.
(2) A hotel-keeper is liable as a storer for any damage to or destruction or loss of a thing brought to the hotel by any guest who stays at the hotel and has sleeping accommodation there.
(3) Any thing:
    (a) which is at the hotel during the time when the guest has the use of sleeping accommodation there; or
    (b) of which the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge outside the hotel during the period for which the guest has the use of the sleeping accommodation at the hotel; or
    (c) of which the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the use of sleeping accommodation at the hotel;

    shall be deemed to be a thing brought to the hotel.
(4) The hotel-keeper is not liable insofar as the damage, destruction or loss is due to:
    (a) a guest or any person accompanying, employed by or visiting the guest; or
    (b) an impediment beyond the hotel-keeper's control under Article 8:108 PECL (Excuse Due to an Impediment); or
    (c) the nature of the thing.
(5) A term excluding or limiting the liability of the hotel-keeper is deemed not to be fair and reasonable under Article 1:114(2) (Limitation of Liability) if it excludes or limits liability in a case where the hotel-keeper, or a person for whose actions the hotel-keeper is responsible, causes the damage, destruction or loss intentionally or by way of grossly negligent conduct.
(6) Except where the damage, destruction or loss is caused intentionally or by way of grossly negligent conduct of the hotel-keeper or a person for whose actions the hotel-keeper is

responsible, the guest must inform the hotel-keeper of the damage, destruction or loss without undue delay. If the guest fails to inform the hotel-keeper without undue delay, the hotel-keeper will not be held liable.

(7) The hotel-keeper has the right to withhold any thing referred to in paragraph (2) until the guest has met any claim the hotel-keeper has against the guest with respect to accommodation, food, drink and solicited services performed for the guest in the hotel-keeper's professional capacity.

Chapter 5: Design

Article 5:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the designer, is to design for another party, the client, an immovable structure that is to be constructed by or on behalf of the client.

(2) This Chapter applies to contracts whereby the designer is to design a movable or incorporeal thing or service that is to be constructed or performed by or on behalf of the client.

(3) When, under a contract, a party is bound to design and to supply another service, this Chapter applies to the parts of the contract that involve design, with appropriate modifications.

(4) If the other service mentioned in paragraph (3) consists of carrying out the design, the rules governing the supply of the subsequent service prevail. However, Articles 5:105 and 5:108 do not apply.

Article 5:102: Pre-contractual Duty of the Designer to Warn

The duties under Article 1:103 (Pre-contractual Duties to Warn) require 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.

Article 5:103: Duty to Co-operate of the Client

In so far as the designer has warned the client under Article 1:103 (Pre-contractual Duties to Warn) and Article 5:102 that further expertise is required to enable the designer to perform the contract, the duties under Article 1:202 PECL (Duty to Co-operate) and Article 1:104 (Duty to Co-operate) require in particular the client to employ such expertise.

Article 5:104: Duty of Care of the Designer

The duties under Article 1:107 (General Standard of Care for Services) require in particular the designer to:

(a) attune the design work to the work of other designers who contracted with the client, in order to enable an efficient performance of all services involved;

(b) integrate the work of other designers, which is necessary to ensure that the design will be in accordance with Article 5:105;

(c) include any information for the interpretation of the design that is necessary for a user of the design of average competence or of a specific user made known to the designer at the conclusion of the contract to give effect to the design;

(d) enable the user of the design to give effect to the design without violation of public law rules or interference based on justified third-party rights of which the designer knows or could reasonably be expected to know; and
(e) provide a design that allows economic and technically efficient realisation.

Article 5:105: Conformity

(1) Except where the parties have agreed otherwise, the design does not conform to the contract unless it enables the user of the design to achieve a specific result by carrying out the design following the required standard of care with regard to the carrying out of the design.
(2) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client pursuant to Article 1:109 (Directions of the Client) is the cause of the non-conformity and the designer did not breach the duty to warn pursuant to Article 1:110 (Contractual Duty of the Service Provider to Warn).

Article 5:106: Handing over of the Design

In so far as the designer regards the design, or a part of it that is fit for carrying out independently from the completion of the rest of the design, as sufficiently completed and wishes to transfer the design to the client, the client must accept it within a reasonable time after being notified. The client may refuse to accept the design when it, or the relevant part of it, does not conform to the contract and such non-conformity amounts to a fundamental non-performance within the meaning of Article 8:103 PECL (Fundamental Non-Performance).

Article 5:107: Duty of the Designer to Keep Records

After performance of both parties' contractual obligations, the client may ask the designer to hand over all relevant documents at least in copy. The designer must store these documents for a reasonable time. Before the destruction of the documents, the designer must reoffer them to the client.

Article 5:108: Limitation of Liability

In contracts between two parties that both act in the course of their business, a term restricting the designer's liability for non-performance to the value of the structure, thing or service that is to be constructed or performed by or on behalf of the client following the design, is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability) unless the damage was caused intentionally or by way of grossly negligent behaviour on the part of the designer or any person for whose actions the designer is responsible.

Chapter 6:
Information

Article 6:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the information provider, is to supply information, such as factual information, evaluative information or a recommendation to another party, the client.

(2) When, under a contract, a party is bound to supply information and to supply another service, this Chapter applies to the parts of the contract that involve the supply of information, with appropriate modifications.

Article 6:102: Circumstances in which the Service Is to Be Performed

(1) The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the information provider, in so far as this is reasonably necessary for the performance of the service, to collect information about:
  (a) the particular purpose for which the client requires the information;
  (b) the client's preferences and priorities in relation to the information;
  (c) the decision the client can be expected to make on the basis of the information; and
  (d) the personal situation of the client.

(2) In case the information is intended to be passed on to a group of persons, the information to be collected must relate to the purposes, preferences, priorities and personal situations that can reasonably be expected from individuals within such a group.

(3) In so far as the information provider must obtain information from the client, the information provider must explain what the client is required to provide.

Article 6:103: Duties of the Information Provider regarding Input

Unless agreed otherwise, the information provider is required in particular to collect and use the expert knowledge to which the information provider has or should have access as a professional information provider, in so far as reasonably necessary for the performance of the service.

Article 6:104: Duty of Care of the Information Provider

(1) The duties under Article 1:107 (General Standard of Care for Services) require in particular the information provider to:
  (a) take reasonable measures to ensure that the client understands the content of the information;
  (b) act with the care and skill that a reasonable information provider would demonstrate under the circumstances when providing evaluative information; and
  (c) in any case where the client is expected to make a decision on the basis of the information, inform the client of the risks involved, in so far as such risks could reasonably influence the client's decision.

(2) When the information provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the information provider must:
  (a) base the recommendation upon a skilful analysis of the expert knowledge to be collected in relation to the purposes, priorities, preferences and personal situation of the client;
  (b) inform the client of alternatives the information provider can personally provide relating to the subsequent decision and of their advantages and risks, as compared with those of the recommended decision; and
  (c) inform the client of other alternatives the information provider cannot personally provide, unless the information provider expressly informs the client that only a limited range of alternatives is offered or this is apparent from the situation.

Article 6:105: Conformity

(1) The information provider must provide information that is of quantity, quality and description required by the contract.
(2) The factual information provided by the information provider to the client must be a correct description of the actual situation described.

Article 6:106: Duty to Give Account

In so far as reasonably necessary, having regard to the interest of the client, the information provider must give account regarding the information provided in accordance with this Chapter.

Article 6:107: Conflict of Interest

(1) When the information provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the information provider must disclose any possible conflict of interest that might influence the performance of the information provider's duties.
(2) As long as the contract has not been completely performed, the information provider may not enter into a relation with another party that may amount to a possible conflict with the interests of the client, without full disclosure to the client and the client's explicit or implicit agreement.
(3) If the parties deviate from the liability rule of paragraph (2), the information provider may invoke such a clause against the client only in so far as the information provider drew the clause to the attention of the client in a way that was reasonably appropriate in the circumstances.

Article 6:108: Influence of Ability of the Client

(1) The involvement in the supply of the service of other persons on the client's behalf or the mere competence of the client does not relieve the information provider of the duties under this Chapter.
(2) The information provider is relieved of those duties if the client already has knowledge of the information or if the client has reason to know of the information.
(3) For the purpose of paragraph (2), the client has 'reason to know' if the information would be obvious to a comparable client in the same situation as this client from all the unusual facts and circumstances known to the client without investigation.

Article 6:109: Causation

If the information provider knows or should be aware that a subsequent decision will be based on the information to be provided, the breach of duty of the information provider is presumed to have caused the damage if the client substantiates that, if the provider had provided all information required, a reasonable client in the same situation as this client would have seriously considered taking an alternative subsequent decision.

Chapter 7:
Treatment

Article 7:101: Scope of Application
(1) This Chapter applies to contracts whereby one party, the treatment provider, is to provide medical treatment to another party, the patient.
(2) This Chapter applies with appropriate modifications to contracts whereby the treatment provider is to provide any other service in order to change the physical or mental condition of a person.
(3) Where the patient is not the contracting party, the patient may require performance of the duties of the treatment provider imposed by this Chapter in accordance with Article 6:110 PECL (Stipulation in Favour of a Third Party).
(4) When, under a contract, a party is bound to provide treatment and to supply another service, this Chapter applies to the parts of the contract that involve treatment, with appropriate modifications.

Article 7:102: Circumstances in which the Service Is to Be Performed
The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the treatment provider, in so far as reasonably necessary for the performance of the service, to:
(a) interview the patient about the patient's health condition, symptoms, previous illnesses, allergies, previous or other current treatment and the patient's preferences and priorities in relation to the treatment;
(b) carry out the examinations necessary to diagnose the health condition of the patient; and
(c) consult with any other treatment providers involved in the treatment of the patient.

Article 7:103: Duties of the Treatment Provider regarding Input
The duties under Article 1:106 (Duties of the Service Provider regarding Input) require in particular the treatment provider to use instruments, medication, materials, installations and premises of at least the quality demanded by accepted and sound professional practice, that conform to applicable statutory rules, and that are fit to achieve the particular purpose for which they are to be used.

Article 7:104: Duty of Care of the Treatment Provider
(1) The duties under Article 1:107 (General Standard of Care for Services) require in particular the treatment provider to provide the patient with the care and skill that a reasonable treatment provider exercising and professing care and skill would demonstrate under the given circumstances.
(2) If the treatment provider lacks the experience or skill to treat the patient in accordance with Article 1:107 (General Standard of Care for Services), the treatment provider must refer the patient to a treatment provider that can meet the standard set in these rules.

Article 7:105: Duty to Inform of the Treatment Provider
(1) The treatment provider must, in order to give the patient a free choice regarding treatment, and in a way understandable to the patient, in particular inform the patient about:
(a) the patient's health status;

(b) the nature of the proposed treatment;
(c) the advantages of the proposed treatment;
(d) the risks of the proposed treatment;
(e) the alternatives to the proposed treatment as well as their advantages and risks as compared to those of the proposed treatment; and
(f) the consequences of abstaining from any treatment.

(2) The treatment provider must, in any case, inform the patient about any risk or alternative that may reasonably influence the patient's decision on whether to give consent to the proposed treatment or not. A risk is presumed to be capable of influencing that decision if its materialisation leads to serious detriment to a patient in that situation. Unless otherwise provided, the duty to inform is subject to the provisions of Chapter 6 (Information).

Article 7:106: Duty to Inform in case of Unnecessary or Experimental Treatment

(1) If the treatment is unnecessary in respect of the patient's health condition, all known risks must be disclosed.
(2) If the treatment is experimental, all information regarding the objectives of the experiment, the nature of the treatment, its advantages and risks and its alternatives, be it only potential, must be disclosed.

Article 7:107: Exceptions to the Duty to Inform

(1) The information that must be provided under Article 7:105 and 7:106 may be withheld from the patient:
(a) if there are objective reasons to believe that it would seriously and negatively influence the patient's health or life; or
(b) if the patient expressly states that the patient wishes not to be informed, provided that the non-disclosure of the information does not endanger the health or safety of third parties.

(2) Article 7:105 does not apply if treatment must be provided in an emergency. In such a case the treatment provider must, so far as possible, provide the information later.

Article 7:108: Duty to Obtain Consent

(1) The treatment provider may not carry out treatment unless the treatment provider has obtained prior informed consent from the patient.
(2) The patient may withdraw consent at any time.
(3) In so far as the patient is incapable of giving consent, the treatment provider must:
(a) obtain informed consent from a person or institution legally entitled to take decisions regarding the treatment on behalf of the patient; or
(b) comply with any rules or procedures enabling treatment to be lawfully given without such consent.

(4) In the situation described in paragraph (3), the treatment provider must, in so far as possible, consider the opinion of the incapable patient, and the opinion of the patient expressed before the patient became incapable.
(5) In the situation described in paragraph (3), the treatment provider may only carry out treatment that is intended to improve the health condition of the patient.
(6) In the situation described in Article 7:106(2), consent must be given in an express and specific way.
(7) This Article does not apply if the treatment must be provided in an emergency.

Article 7:109: Duty to Give Account

(1) The treatment provider must create adequate records of the treatment. Such records must include, in particular, information collected in pursuance of Article 7:102, information regarding the consent of the patient and information regarding the treatment performed.
(2) The treatment provider must give the patient, or if the patient is incapable of giving consent, the person or institution legally entitled to take decisions on behalf of the patient, access to the records.
(3) The treatment provider must answer, in so far as reasonable, questions regarding the interpretation of the records.
(4) If the treatment provider fails to comply with paragraphs (2) and (3), breach of the duty under Article 7:104 and causation are presumed.
(5) The treatment provider must keep the records, and give information about their interpretation, during a reasonable time of at least 10 years after the treatment has ended, depending on the usefulness of these records for the patient or the patient's heirs and for future treatments. Records that can reasonably be expected to be important after the reasonable time must be kept by the treatment provider after that time. If for any reason the treatment provider ceases activity, the records must be deposited or delivered to the patient for future consultation.
(6) The treatment provider may not disclose information about the patient or other persons involved in the patient's treatment to third parties unless disclosure is necessary in order to protect third parties or the public interest. The treatment provider may use the records in an anonymous way for statistical or scientific purposes.

Article 7:110: Remedies for Non-Performance

With regard to any non-performance, Chapters 8 (Non-Performance and Remedies in General) and 9 (Particular Remedies for Non-Performance) PECL apply, with the following modifications:
(a) the treatment provider may not withhold performance or terminate the contract in pursuance of Chapter 9, Sections 2 and 3 PECL (Withholding Performance, Termination of the Contract) if this seriously endangers the health condition of the patient;
(b) in so far as the treatment provider has the right to withhold performance or to terminate the contract and is planning to exercise that right, the treatment provider must refer the patient to another treatment provider;
(c) termination by the treatment provider is not allowed, unless the patient fails to comply with Article 104 (Duty to Co-operate).

Article 7:111: Central Liability of Treatment Providing Organisations

(1) If, in the process of performance of the treatment contract, activities take place in a hospital or on the premises of another treatment-providing organisation, and the hospital or that other treatment-providing organisation is not a party to the treatment contract, it must make clear to the patient that it is not the contracting party.
(2) Where the treatment provider cannot be identified, the hospital or treatment-providing organisation in which the treatment took place shall be treated as the treatment provider unless the hospital or treatment-providing organisation informs the patient, within a reasonable time, of the identity of the treatment provider.

Dutch*
Dienstverleningsovereenkomsten

Hoofdstuk 1:
Algemene Bepalingen

Artikel 1:101: Toepassingsgebied

(1) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij een partij, de dienstverlener, gehouden is een dienst te leveren aan de andere partij, de opdrachtgever, in ruil voor loon.
(2) Dit Hoofdstuk is van toepassing op aannemingsovereenkomsten, overeenkomsten tot bewerking van zaken, bewaarnemingsovereenkomsten, ontwerpovereenkomsten, informatieovereenkomsten en behandelingsovereenkomsten, tenzij anders is bepaald in de Hoofdstukken 2 tot 7.
(3) Wanneer een partij op grond van een overeenkomst verplicht is zowel een dienst als een andere prestatie te verrichten, zijn zowel dit Hoofdstuk als, voor zover relevant, de Hoofdstukken 2 tot 7 van toepassing op de gedeelten van de overeenkomst die de dienst betreffen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.
(4) Dit Hoofdstuk is niet van toepassing op vervoersovereenkomsten, verzekeringsovereenkomsten, garantieovereenkomsten, of overeenkomsten tot levering van een financieel product of een financiële dienst, onverminderd het bepaalde in lid (3).
(5) Dit Hoofdstuk is niet van toepassing op arbeidsovereenkomsten.
(6) Dit Hoofdstuk, met uitzondering van Artikel 1:102, is van toepassing op overeenkomsten waarbij een dienstverlener gehouden is een dienst te leveren aan een opdrachtgever zonder dat deze gehouden is loon te betalen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

Artikel 1:102: Loon

(1) Tenzij anders overeengekomen heeft een dienstverlener die de overeenkomst in de uitoefening van zijn beroep of bedrijf heeft gesloten, recht op loon.
(2) Wanneer de overeenkomst niet het loon voor de dienst bepaalt noch de wijze waarop dit moet worden bepaald, is het loon het loon dat gewoonlijk in rekening wordt gebracht ten tijde van de sluiting van de overeenkomst.

Artikel 1:103: Precontractuele waarschuwingsplichten

(1) Op de dienstverlener rust een precontractuele verplichting de opdrachtgever te waarschuwen indien de dienstverlener ontdekt of reden heeft te weten dat de gevraagde dienst:
    (a) niet zal leiden tot het door de opdrachtgever medegedeelde of verwachte resultaat, of
    (b) andere belangen van de opdrachtgever kan schaden, of
    (c) kostbaarder zal worden of meer tijd zal vergen dan redelijkerwijs wordt verwacht door de opdrachtgever.

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* Vertaling voorgesteld door Prof. Marco Loos, Universiteit van Amsterdam.

(2) De waarschuwingsplicht, bedoeld in lid (1), is niet van toepassing indien de opdrachtgever:
   (a) de risico's bedoeld in lid (1)(a), (b) of (c) al kent; of
   (b) reden heeft deze risico's te kennen.
(3) Wanneer een gebeurtenis als bedoeld in lid (1) plaatsvindt en de opdrachtgever niet op gepaste wijze gewaarschuwd was,
   (a) behoeft de opdrachtgever een wijzing van de dienst overeenkomstig Artikel 1:111 niet te aanvaarden, tenzij de dienstverlener bewijst dat wanneer de opdrachtgever op gepaste wijze zou zijn gewaarschuwd, hij een overeenkomst zou hebben gesloten waarin rekening zou zijn gehouden met die gebeurtenis; en
   (b) heeft de opdrachtgever recht op schadevergoeding overeenkomstig Artikel 4:117(2) en (3) PECL (Schadevergoeding).
(4) Op de opdrachtgever rust een precontractuele verplichting de dienstverlener te waarschuwen indien de opdrachtgever ongebruikelijke feiten ontdekt of reden heeft deze feiten te kennen indien deze feiten er de oorzaak van zullen zijn dat de gevraagde dienst waarschijnlijk kostbaarder wordt of deze meer tijd zal vergen dan redelijkerwijs wordt verwacht door de dienstverlener.
(5) Wanneer de feiten bedoeld in lid (4) plaatsvinden en de dienstverlener niet op gepaste wijze gewaarschuwd was, heeft de dienstverlener recht op:
   (a) schadevergoeding voor het nadeel dat de dienstverlener heeft geleden als een gevolg van de niet-nakoming van de waarschuwingsplicht; en
   (b) een aanpassing van de tijd voor nakoming zoals nodig is voor de uitvoering van de dienst.
(6) Voor de toepassing van lid (1) geldt dat de dienstverlener 'reden heeft te weten' wanneer de risico's overduidelijk zouden zijn voor een vergelijkbare dienstverlener in dezelfde situatie als deze dienstverlener, gezien alle feiten en omstandigheden die gekend worden door de dienstverlener, in aanmerking genomen de informatie die de dienstverlener moet vergaren ter zake van het door de opdrachtgever medegedeelde of verwachte resultaat en de omstandigheden waarin de dienst moet worden uitgevoerd.
(7) Voor de toepassing van de leden (2)(b) en (4) geldt dat de opdrachtgever 'reden heeft te kennen' wanneer de risico's overduidelijk zouden zijn voor een vergelijkbare opdrachtgever als deze opdrachtgever in dezelfde situatie als deze opdrachtgever, gezien alle feiten en omstandigheden die gekend worden door de opdrachtgever zonder afzonderlijk onderzoek. De opdrachtgever wordt niet geacht een risico te kennen, of reden te hebben dit te kennen, vanwege het enkele feit dat de opdrachtgever bekwaam was, of geadviseerd werd door anderen die bekwaam waren op het relevante gebied, tenzij een dergelijke persoon als vertegenwoordiger van de opdrachtgever optrad, in welk geval Artikel 1:305 PECL (Toerekening van kennis en bedoeling) van toepassing is.

Artikel 1:104: Samenwerkingsplicht

(1) De verplichting op grond van Artikel 1:202 PECL (Samenwerkingsplicht) brengt in het bijzonder met zich dat:
   (a) de opdrachtgever redelijke verzoeken van de dienstverlener om informatie te verschaffen moet beantwoorden, voor zover deze informatie redelijkerwijs noodzakelijk is om de dienstverlener in staat te stellen de overeenkomst te kunnen nakomen;
   (b) de opdrachtgever aanwijzingen betreffende de levering van de dienst geeft voor zover deze redelijkerwijs noodzakelijk zijn om de dienstverlener in staat te stellen de overeenkomst te kunnen nakomen;

(c) de opdrachtgever, voor zover deze vergunningen of licenties dient te verkrijgen, deze verkrijgt op zodanig tijdstip als redelijkerwijs noodzakelijk is om de dienstverlener in staat te stellen de overeenkomst te kunnen nakomen;
(d) de dienstverlener aan de opdrachtgever een redelijke mogelijkheid biedt om te beoordelen of de dienstverlener zijn verplichtingen onder de overeenkomst nakomt; en
(e) de partijen hun respectievelijke inspanningen coördineren, voor zover dit redelijkerwijs noodzakelijk is om de overeenkomst na te komen.

(2) Wanneer de opdrachtgever zijn verplichtingen overeenkomstig lid (1)(a) of (b) niet nakomt, mag de dienstverlener hetzij zijn prestatie opschorten overeenkomstig Artikel 9:201 PECL (Opschortingsrecht), of nakoming baseren op de verwachtingen, voorkeuren en prioriteiten die een persoon in dezelfde situatie als de opdrachtgever redelijkerwijs geacht kan worden te hebben, gezien de informatie en aanwijzingen die is vergaard, op voorwaarde dat de opdrachtgever gewaarschuwd is overeenkomstig Artikel 1:110.

(3) Wanneer de opdrachtgever zijn verplichtingen overeenkomstig lid (1) niet nakomt en de dienst daardoor kostbaarder wordt of langer duurt dan was overeengekomen, heeft de dienstverlener recht op:
(a) schadevergoeding voor het nadeel dat de dienstverlener hierdoor heeft geleden; en
(b) een aanpassing van de duur voor nakoming van zijn prestatie zoals vereist is voor de levering van de dienst.

Artikel 1:105: Omstandigheden waaronder de dienst moet worden uitgevoerd

De dienstverlener moet, voor zover dit redelijkerwijs noodzakelijk is voor de levering van de dienst, informatie vergaren omtrent de omstandigheden waaronder de dienst moet worden verricht en verzekeren dat deze omstandigheden bij de nakoming van de dienst in acht worden genomen.

Artikel 1:106: Verplichtingen van de dienstverlener aangaande hulpzaken en hulppersonen

(1) De dienstverlener kan de uitvoering van de dienst zonder toestemming van de opdrachtgever geheel of gedeeltelijk uitbesteden, tenzij levering van de dienst door de dienstverlener zelf van wezenlijk belang is voor de nakoming van de overeenkomst.

(2) Een onderdienstverlener aan wie de uitvoering van de dienst aldus wordt uitbesteed door de dienstverlener, moet voldoende bekwaam zijn.

(3) Voor zover de dienstverlener hulpzaken of materialen gebruikt voor de uitvoering van de dienst, dienen deze in overeenstemming met de overeenkomst en de toepasselijke wettelijke regels te zijn, en geschikt om te dienen voor het bijzondere doel waartoe ze zijn bestemd.

(4) Voor zover de dienstverlener aan de opdrachtgever de eigendom moet overdragen van een onroerende zaak, een roerende zaak, een onstoffelijk voorwerp of een recht, dient een dergelijke overdracht vrij te zijn van enig recht of enige vordering van een derde.

(5) De dienstverlener moet op gepaste wijze de uitvoering van de dienst plannen.

(6) Voor zover onderdienstverleners zijn aangewezen door de opdrachtgever, of hulpzaken en materialen ter beschikking zijn gesteld door de opdrachtgever, wordt de aansprakelijkheid van de dienstverlener beheerst door de Artikelen 1:109 en 1:110.

Artikel 1:107: Algemene zorgverplichting bij diensten

(1) De dienstverlener moet de dienst uitvoeren:
   (a) met de zorg en bekwaamheid die een redelijke dienstverlener zou betrachten in de gegeven omstandigheden; en
   (b) in overeenstemming met enige op de dienst van toepassing zijnde wettelijke of anderszins bindende regelgeving.

(2) Wanneer de dienstverlener pretendeert te beschikken over een hogere graad van zorg en bekwaamheid, dient hij die zorg en bekwaamheid te betrachten.

(3) Wanneer de dienstverlener lid is, of voorgeeft te zijn, van een groep van professionele dienstverleners voor welke normen bestaan die zijn vastgesteld door een bevoegde autoriteit of door die groep zelf, dan dient de dienstverlener de zorg en bekwaamheid zoals uitgedrukt in die normen te betrachten.

(4) Bij de beoordeling van de zorg en bekwaamheid die de opdrachtgever mag verwachten, wordt onder meer in aanmerking genomen:
   (a) de aard, de omvang, de frequentie en de voorzienbaarheid van de risico's betrokken bij de uitvoering van de dienst voor de opdrachtgever;
   (b) wanneer zich schade heeft voorgedaan, de kosten voor het nemen van voorzorgsmaatregelen die het ontstaan van deze of vergelijkbare schade hadden kunnen voorkomen;
   (c) of de dienst wordt geleverd om niet of door een dienstverlener die niet handelt in de uitvoering van zijn beroep of bedrijf;
   (d) de hoogte van het loon voor de dienst; en
   (e) de tijd die redelijkerwijs beschikbaar is voor de uitvoering van de dienst.

(5) De verplichtingen die voortvloeien uit dit Artikel vereisen in het bijzonder dat de dienstverlener redelijke voorzorgsmaatregelen neemt om te voorkomen dat door de uitvoering van de dienst letselschade of schade aan onroerende of roerende zaken of onstoffelijke voorwerpen ontstaat.

Artikel 1:108: Door de opdrachtgever medegedeeld of verwacht resultaat

De dienstverlener moet het door de opdrachtgever ten tijde van de contractsluiting medegedeelde of verwachte resultaat bereiken, mits:
   (a) een wel verwacht maar niet medegedeeld resultaat van zodanige aard was dat een redelijke opdrachtgever in dezelfde omstandigheden als de opdrachtgever dit resultaat mocht verwachten; en
   (b) een redelijke opdrachtgever in dezelfde omstandigheden geen reden zou hebben om te geloven dat er een aanmerkelijk risico bestond dat het resultaat niet zou worden bereikt door de dienst.

Artikel 1:109: Aanwijzingen van de opdrachtgever

(1) De dienstverlener moet alle tijdig gegeven aanwijzingen van de opdrachtgever betreffende de uitvoering van de dienst opvolgen, mits de aanwijzingen:
   (a) onderdeel van de overeenkomst zelf zijn of zijn verbijzonderd in enig document waarnaar de overeenkomst verwijst; of
   (b) voortvloeien uit de verwezenlijking van keuzes die in de overeenkomst aan de opdrachtgever zijn overgelaten in gevolge Artikel 6:105 PECL (Partijbeslissing); of
   (c) voortvloeien uit de verwezenlijking van keuzes die aanvankelijk door partijen zijn opengelaten.

(2) Indien de niet-nakoming door de dienstverlener van een of meer van de verplichtingen overeenkomstig de Artikelen 1:107 of 1:108 het gevolg is van de navolging van een aanwijzing als bedoeld in lid (1), is de dienstverlener niet aansprakelijk overeenkomstig die artikelen, mits de opdrachtgever op gepaste wijze was gewaarschuwd overeenkomstig Artikel 1:110.
(3) Indien de dienstverlener een aanwijzing als bedoeld in lid (1) opvat als een wijziging van de overeenkomst overeenkomstig Artikel 1:111, dient de dienstverlener de opdrachtgever hiervoor te waarschuwen. Tenzij de opdrachtgever de aanwijzing vervolgens onverwijld herroept, is de dienstverlener gehouden de aanwijzing op te volgen en wordt de aanwijzing beschouwd als een wijziging van de overeenkomst.

Artikel 1:110: Contractuele waarschuwingsplicht van de dienstverlener

(1) De dienstverlener is gehouden de opdrachtgever te waarschuwen indien hij ontdekt of reden heeft te weten dat de gevraagde dienst:
  (a) niet zal leiden tot het door de opdrachtgever ten tijde van de contractsluiting medegedeelde of verwachte resultaat, of
  (b) andere belangen van de opdrachtgever kan schaden, of
  (c) kostbaarder zal worden of meer tijd zal vergen dan is overeengekomen,
  hetzij als gevolg van het navolgen van door de opdrachtgever verstrekte informatie of aanwijzingen of informatie of aanwijzingen die vergaard zijn in overeenstemming met Artikel 1:105, of als gevolg van de verwezenlijking van enig ander risico.
(2) De dienstverlener dient redelijke maatregelen te nemen ten einde te verzekeren dat de opdrachtgever de inhoud van waarschuwing begrijpt.
(3) De waarschuwingsplicht bedoeld in lid (1) is niet van toepassing indien de opdrachtgever:
  (a) de risico's bedoeld in lid (1)(a), (b) of (c) al kent; of
  (b) reden heeft deze risico's te kennen.
(4) Wanneer een gebeurtenis als bedoeld in lid (1) plaatsvindt en de opdrachtgever niet op gepaste wijze gewaarschuwd was, behoeft de opdrachtgever een wijziging van de dienst overeenkomstig Artikel 1:111 niet te aanvaarden.
(5) Voor de toepassing van lid (1) geldt dat de dienstverlener 'reden heeft te weten' wanneer de risico's overduidelijk zouden zijn voor een vergelijkbare dienstverlener in dezelfde situatie als deze dienstverlener, gezien alle feiten en omstandigheden die gekend worden door de dienstverlener zonder afzonderlijk onderzoek.
(6) Voor de toepassing van lid (3)(b) geldt dat de opdrachtgever 'reden heeft te kennen' wanneer de risico's overduidelijk zouden zijn voor een vergelijkbare opdrachtgever als deze opdrachtgever in dezelfde situatie als deze opdrachtgever, gezien alle feiten en omstandigheden die gekend worden door de opdrachtgever. De opdrachtgever wordt niet geacht een risico te kennen, of reden te hebben dit te kennen, vanwege het enkele feit dat de opdrachtgever bekwaam was, of geadviseerd werd door anderen die bekwaam waren op het relevante gebied, tenzij een dergelijke persoon als vertegenwoordiger van de opdrachtgever optrad, in welk geval Artikel 1:305 PECL (Toerekening van kennis en bedoeling) van toepassing is.

Artikel 1:111: Wijziging van de overeenkomst

(1) Onverminderd het recht van de opdrachtgever om de overeenkomst overeenkomstig Artikel 1:115 op te zeggen, dient een partij een wijziging van de dienst te aanvaarden welke is voorzien in de overeenkomst of welke voortvloeit uit een aanwijzing overeenkomstig Artikel 1:109, indien een dergelijke wijziging redelijk is, in aanmerking genomen:
   (a) het te bereiken resultaat van de dienst;
   (b) de belangen van de opdrachtgever;
   (c) de belangen van de dienstverlener; en
   (d) de omstandigheden ten tijde van de wijziging van de dienst.

(2) Een wijziging van de dienst wordt geacht redelijk te zijn indien die wijziging:
   (a) noodzakelijk is ten einde de dienstverlener in staat te stellen overeenkomstig Artikel 1:107 of, voor zover van toepassing, Artikel 1:108 te handelen; of
   (b) het gevolg is van een aanwijzing die is gegeven overeenkomstig Artikel 1:109(1) en de opdrachtgever de aanwijzing niet onverwijld heeft herroepen nadat hij gewaarschuwd is overeenkomstig Artikel 1:109(3); of
   (c) een redelijke reactie is op een waarschuwing van de dienstverlener overeenkomstig Artikel 1:110.

(3) Voor de toepassing van de leden (1) en (2) geldt dat een wijziging van de dienst welke vereist wordt door een wijziging van omstandigheden als bedoeld in Artikel 6:111 PECL (Gewijzigde Omstandigheden) wordt beschouwd als een redelijke wijziging van de dienst.

(4) Het loon dat verschuldigd is als een gevolg van de wijziging van de dienst dient redelijk te zijn en moet worden bepaald met gebruikmaking van dezelfde berekeningsmethoden als welke zijn gebruikt om het oorspronkelijke loon voor de dienst vast te stellen.

(5) Voor zover de dienst in omvang wordt teruggebracht, wordt bij de bepaling van het loon dat verschuldigd is als een gevolg van de wijziging van de dienst rekening gehouden met de gederfde winst, de uitgespaarde kosten en elke mogelijkheid die de dienstverlener heeft om de vrijgekomen capaciteit te gebruiken voor andere doelen.

(6) Een wijziging van de dienst kan leiden tot een aanpassing van de duur voor de uitvoering van de dienst welke in overeenstemming is met het extra werk dat moet worden verricht in vergelijking tot het werk dat oorspronkelijk had moeten worden verricht voor de uitvoering van de dienst en de tijdsperiode bestemd voor de uitvoering van de dienst.

Artikel 1:112: Rechten bij tekortkomingen van de dienstverlener

(1) Door de opdrachtgever te vorderen schadevergoeding omvat de kosten die de opdrachtgever heeft moeten maken ten einde de niet-nakoming van een verplichting door de dienstverlener en/of om het niet bereiken van het door de opdrachtgever medegedeelde of verwachte resultaat vast te stellen, voor zover de opdrachtgever redelijk heeft gehandeld bij het maken van deze kosten.

(2) Indien de dienstverlener een uit de overeenkomst voortvloeiende verplichting niet is nagekomen, en het nog niet duidelijk is of het door de opdrachtgever medegedeelde of verwachte resultaat zal worden bereikt, kan de opdrachtgever zijn wederkerige verplichtingen opschorten overeenkomstig Artikel 9:201 PECL (Opschortingsrecht).

(3) De opdrachtgever is alleen dan gerechtigd de overeenkomst te ontbinden overeenkomstig Artikel 9:304 PECL (Tekortkoming op voorhand) indien het duidelijk is dat de niet-nakoming van een uit de overeenkomst voortvloeiende verplichting van de dienstverlener zal leiden tot de niet-nakoming van een wezenlijke verplichting uit de overeenkomst overeenkomstig Artikel 8:103 PECL (Wezenlijke Tekortkoming).

Artikel 1:113: Achterwege blijven van kennisgeving betreffende non-conformiteit

(1) De opdrachtgever is gehouden de dienstverlener ervan kennis te geven indien de opdrachtgever ontdekt, of een vergelijkbare opdrachtgever in dezelfde situatie als deze opdrachtgever reden heeft te weten, gezien alle feiten en omstandigheden die gekend worden door de opdrachtgever zonder afzonderlijk onderzoek, dat de dienstverlener hetzij er niet in zal slagen, hetzij er niet in geslaagd is het door de opdrachtgever medegedeelde of verwachte resultaat te bereiken.

(2) Indien de opdrachtgever nalaat overeenkomstig lid (1) er kennis van te geven dat de dienstverlener er niet in zal slagen het door de opdrachtgever medegedeelde of verwachte resultaat te bereiken, en als gevolg daarvan de dienst kostbaarder wordt of meer tijd zal vergen dan is overeengekomen, heeft de dienstverlener recht op:
   (a) schadevergoeding voor het nadeel dat de dienstverlener heeft geleden als een gevolg van de niet-nakoming van de kennisgevingsplicht; en
   (b) een aanpassing van de tijd voor nakoming zoals nodig is voor de uitvoering van de dienst.

Artikel 1:114: Beperking van aansprakelijkheid

(1) De dienstverlener kan zijn aansprakelijkheid voor dood of lichamelijk letsel, veroorzaakt door de uitvoering van de dienst, niet beperken of uitsluiten.

(2) De dienstverlener kan zijn aansprakelijkheid voor schade anders dan bestaande uit dood of lichamelijk letsel, veroorzaakt door de uitvoering van de dienst, beperken of uitsluiten indien, ten tijde van de contractsluiting, een beding van die strekking kan worden beschouwd als redelijk en billijk in de omstandigheden van het geval, tenzij anders is bepaald in de Hoofdstukken 2 tot 7.

Artikel 1:115: Opzegging van de overeenkomst

(1) De opdrachtgever kan de overeenkomst te allen tijde opzeggen.

(2) Indien de overeenkomst is opgezegd overeenkomstig dit Artikel, heeft de dienstverlener recht op zodanige schadevergoeding dat de dienstverlener zoveel mogelijk in de positie wordt gebracht waarin hij zou hebben verkeerd indien de overeenkomst op gepaste wijze zou zijn nagekomen. Een dergelijke schadevergoeding omvat het nadeel dat de dienstverlener heeft geleden en de gederfde voordelen welke de dienstverlener zijn ontnomen.

(3) Bij de bepaling van de positie waarin de dienstverlener dient te worden gebracht overeenkomstig lid (2) dienen onder meer de volgende regels in aanmerking te worden genomen:
   (a) indien partijen een vaste prijs overeengekomen waren, is de dienstverlener gerechtigd tot betaling van die prijs, verminderd met de kosten die redelijkerwijs hadden moeten zijn uitgespaard en het voordeel dat de dienstverlener redelijkerwijs had kunnen verdienen door gebruik te maken van de vrijgekomen capaciteit;
   (b) indien partijen betaling van loon overeengekomen waren welk gebaseerd is op een bepaald tarief, heeft de dienstverlener recht op betaling van loon op basis van dat tarief in de mate waarin de dienst al is uitgevoerd; en
   (c) indien partijen betaling van loon overeengekomen waren op basis van 'no cure no pay', heeft de dienstverlener recht op betaling van zowel de redelijke gemaakte kosten voor zover de dienst al is uitgevoerd, en het voordeel dat de dienstverlener is ontnomen als gevolg van de opzegging.

Hoofdstuk 2:
Aanneming

Artikel 2:101: Toepassingsgebied

(1) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij een partij, de aannemer, gehouden is een gebouw of andere onroerende zaak te vervaardigen, of een bestaand gebouw of bestaande andere onroerende zaak wezenlijk aan te passen overeenkomstig een door de opdrachtgever verstrekt ontwerp.

(2) Dit Hoofdstuk is van toepassing op overeenkomsten op grond waarvan een aannemer gehouden is een roerende zaak of onstoffelijk voorwerp te vervaardigen overeenkomstig een door de opdrachtgever verstrekt ontwerp, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

(3) Dit Hoofdstuk is van toepassing op overeenkomsten op grond waarvan een aannemer gehouden is een gebouw of ander onroerende zaak te vervaardigen, aannemingswerkzaamheden te verrichten aan een bestaand gebouw of bestaande andere onroerende zaak, of een roerende zaak of onstoffelijk voorwerp te vervaardigen overeenkomstig een door de dienstverlener verstrekt ontwerp, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

(4) Indien een partij op basis van een overeenkomst gehouden is een zaak te vervaardigen en een andere dienst te leveren, is dit Hoofdstuk van toepassing op de gedeelten van de overeenkomst die de vervaardiging van de zaak betreffen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

Artikel 2:102: Samenwerkingsplicht van de opdrachtgever

De verplichtingen op grond van Artikel 1:202 PECL (Samenwerkingsplicht) en Artikel 1:104 (Samenwerkingsplicht) brengen in het bijzonder met zich dat de opdrachtgever:

(a) toegang tot de plaats verschaft waar de vervaardiging plaats dient te vinden, voor zover als redelijkerwijs nodig is om de aannemer in staat te stellen de overeenkomst uit te voeren; en

(b) voor zover als deze ter beschikking gesteld moeten worden door de opdrachtgever, de onderdelen, materialen en hulpzaken ter beschikking stelt op zodanig tijdstip als redelijkerwijs noodzakelijk is om de aannemer in staat te stellen de overeenkomst na te komen.

Artikel 2:103: Zorgverplichting van de aannemer

De verplichtingen op grond van Artikel 1:107 (Algemene zorgverplichting bij diensten) verplichten in het bijzonder de aannemer om redelijke voorzorgsmaatregelen te nemen ten einde schade aan de zaak te voorkomen.

Artikel 2:104: Conformiteit

(1) De aannemer moet een zaak opleveren welke overeenstemt met de kwantiteit, kwaliteit en beschrijving als bepaald in de overeenkomst.

(2) Tenzij de partijen anders zijn overeengekomen, beantwoordt de zaak niet aan de overeenkomst, tenzij de zaak:

  (a) geschikt is voor enig uitdrukkelijk of stilzwijgend aan de aannemer ten tijde van de contractsluiting of de wijziging van de overeenkomst op grond van Artikel 1:111 (Wijziging van de overeenkomst) bekend gemaakt doel inzake het desbetreffende vraagstuk; en

(b) geschikt voor het normale doel of de normale doelen waarvoor een zaak van dezelfde beschrijving gewoonlijk zou worden gebruikt.

(3) De opdrachtgever is niet gerechtigd een recht wegens non-conformiteit in te roepen indien de oorzaak voor de non-conformiteit wordt gevormd door een aanwijzing van de opdrachtgever op grond van Artikel 1:109 (Aanwijzingen van de opdrachtgever) en de aannemer zijn waarschuwingsplicht op grond van Artikel 1:110 (Contractuele waarschuwingsplicht van de dienstverlener) niet heeft geschonden.

Artikel 2:105: Inspectie, toezicht en aanvaarding

(1) Overeenkomstig Artikel 1:104(1)(d) (Samenwerkingsplicht) is de opdrachtgever gerechtigd op een redelijke wijze en op een redelijk tijdstip de hulpzaken en hulppersonen in het aannemingsproces, het proces van de vervaardiging van de zaak en de zaak zelf te inspecteren en hierop toe te zien, zonder dat hij hiertoe gehouden is.

(2) Indien de partijen overeenkomen dat de aannemer bepaalde onderdelen van de hulpzaken en hulppersonen, het proces van de vervaardiging van de zaak of de zaak zelf aan de opdrachtgever dient te tonen ten einde diens aanvaarding hiervan te verkrijgen, mag de aannemer niet verder gaan met de vervaardiging voordat hij hiertoe toestemming heeft verkregen van de opdrachtgever.

(3) Gebreke aan, of inadequate inspectie, toezicht of aanvaarding bevrijdt de aannemer noch geheel, noch ten dele van aansprakelijkheid. Deze regel is eveneens van toepassing wanneer op de opdrachtgever een contractuele verplichting rust tot inspectie, toezicht of aanvaarding van de zaak of de vervaardiging ervan.

Artikel 2:106: Oplevering van de zaak

(1) Indien de aannemer de zaak, of een gedeelte ervan dat geschikt is voor afzonderlijk gebruik, als voldoende voltooid beschouwd en de controle erover wil overdragen aan de opdrachtgever, dan is de opdrachtgever gehouden de controle over de zaak, of dat gedeelte ervan, te aanvaarden binnen een redelijke termijn nadat de aannemer hiervan kennis heeft gegeven. De opdrachtgever kan de overname van de controle weigeren wanneer de zaak, of het relevante gedeelte ervan, niet overeenstemt met de overeenkomst en deze non-conformiteit de zaak, of het relevante gedeelte ervan, ongeschikt voor gebruik maakt.

(2) Aanvaarding van de controle over de zaak door de opdrachtgever bevrijdt de aannemer noch geheel, noch ten dele van aansprakelijkheid. Deze regel is eveneens van toepassing wanneer op de opdrachtgever een contractuele verplichting rust tot inspectie, toezicht of aanvaarding van de zaak of de vervaardiging ervan.

Artikel 2:107: Betaling van het loon

Het loon of een evenredig gedeelte ervan is opeisbaar en betaalbaar vanaf het moment waarop de aannemer de controle over de zaak, of een gedeelte ervan, aan de opdrachtgever overeenkomstig Artikel 2:106 overdraagt.

Artikel 2:108: Risico's

(1) Dit Artikel is van toepassing indien de zaak tenietgaat of beschadigd raakt door een gebeurtenis voor welke de aannemer niet aansprakelijk kan worden gehouden en welke door de aannemer niet voorkomen of ondervangen kon worden.

(2) Indien de situatie, bedoeld in lid (1), veroorzaakt is door een gebeurtenis die heeft plaatsgevonden voordat de zaak of de controle erover is of had moeten zijn overgedragen aan de opdrachtgever overeenkomstig Artikel 2:106 en het nog mogelijk is na te komen:
   (a) dient de aannemer alsnog, en voor zover nodig: opnieuw, na te komen;
   (b) behoeft de opdrachtgever alleen voor de onder (a) bedoelde nakoming door de aannemer te betalen;
   (c) wordt de tijd voor nakoming verlengd overeenkomstig Artikel 1:111(6) (Wijziging van de overeenkomst);
   (d) kunnen de regels van Artikel 8:108 PECL (Niet toerekenbare tekortkoming) van toepassing zijn op de oorspronkelijke prestatie van de aannemer; en
   (e) is de aannemer niet gehouden de opdrachtgever te compenseren voor door de opdrachtgever verstrekte en verloren gegane hulpzaken en hulpmaterialen.

(3) Indien de situatie, bedoeld in lid (1), veroorzaakt is door een gebeurtenis die heeft plaatsgevonden voordat de zaak of de controle erover is of had moeten zijn overgedragen aan de opdrachtgever overeenkomstig Artikel 2:106 en het niet meer mogelijk is na te komen:
   (a) behoeft de opdrachtgever niet voor de geleverde dienst te betalen;
   (b) kunnen de regels van Artikel 8:108 PECL (Niet toerekenbare tekortkoming) van toepassing zijn op de prestatie van de aannemer; en
   (c) is de aannemer niet gehouden de opdrachtgever te compenseren voor door de opdrachtgever verstrekte en verloren gegane hulpzaken en hulpmaterialen, maar is hij gehouden de zaak of wat hiervan over is, over te dragen aan de aannemer.

(4) Indien de situatie, bedoeld in lid (1), veroorzaakt is door een gebeurtenis die heeft plaatsgevonden nadat de zaak of de controle erover is of had moeten zijn overgedragen aan de opdrachtgever overeenkomstig Artikel 2:106:
   (a) behoeft de aannemer niet opnieuw na te komen; en
   (b) blijft de opdrachtgever gehouden het loon te betalen.

Artikel 2:109: Recht op nakoming en zuivering

(1) Indien de aannemer niet een zaak overeenkomstig Artikel 2:104 levert, is de opdrachtgever gerechtigd het wegnemen van de non-conformiteit te vorderen overeenkomstig Artikel 9:102 PECL (Verbintenis anders dan tot betaling van een geldsom), mits:
   (a) nakoming niet onwettig of onmogelijk is;
   (b) nakoming voor de aannemer niet onredelijke inspanningen of kosten zal inhouden; of
   (c) nakoming niet bestaat in de levering van werk of diensten van persoonlijke aard of afhangt van een persoonlijke verhouding.

(2) Artikel 9:102(d) PECL (Verbintenis anders dan tot betaling van een geldsom) is niet van toepassing in een geval waarin lid (1) van toepassing is.

(3) Indien de aannemer in gebreke is een zaak overeenkomstig Artikel 2:104 te leveren, is de aannemer gerechtigd het verzuim te zuiveren, mits de aannemer de non-conformiteit kan herstellen:
   (a) voor het einde van een aanvullende termijn van redelijke duur voor nakoming zoals bepaald in een kennisgeving van de opdrachtgever overeenkomstig Artikel 8:106(3) PECL (Kennisgeving van een aanvullende termijn voor nakoming); en
   (b) voordat de vertraging veroorzaakt door de zuivering van het verzuim een wezenlijke tekortkoming in de zin van Art. 8:103(b) of (c) PECL (Wezenlijke tekortkoming) heeft doen ontstaan.

(4) Artikel 8:103(a) PECL (Wezenlijke tekortkoming) is niet van toepassing in enig geval waarop lid (3) van toepassing is, tenzij uitdrukkelijk overeengekomen is dat strikte naleving van de termijn voor oplevering van de zaak voor de overeenkomst van wezenlijk belang is
(5) De aannemer is vrij om te bepalen op welke wijze hij zijn verplichting tot het wegnemen van de non-conformiteit nakomt. In het bijzonder is de aannemer vrij om te bepalen of hij de zaak herstel, vervangt door een nieuwe zaak of op zijn kosten laat herstellen door een derde.
(6) Tot het moment waarop de aannemer de non-conformiteit heeft weggenomen, is de opdrachtgever gerechtigd zijn prestatie op te schorten overeenkomstig Artikel 9:201 PECL (Opschortingsrecht).
(7) De opdrachtgever kan schadevergoeding vorderen overeenkomstig Hoofdstuk 9, Afdeling 5 PECL (Schadevergoeding en rente) voor enig nadeel dat niet wordt weggenomen door het wegnemen van de non-conformiteit door de aannemer.

Artikel 2:110: Toevlucht tot andere rechten

(1) De opdrachtgever kan zijn toevlucht nemen tot andere rechten wegens non-conformiteit als voorzien in dit Artikel indien:
  (a) de aannemer weigert de non-conformiteit weg te nemen omdat de opdrachtgever niet gerechtigd is nakoming te vorderen overeenkomstig Artikel 2:109(1); of
  (b) de aannemer niet in staat is of nalaat de non-conformiteit weg te nemen overeenkomstig Artikel 2:109(3).
(2) De opdrachtgever kan de overeenkomst ontbinden overeenkomstig Hoofdstuk 9, Afdeling 3 PECL (Ontbinding van de overeenkomst), indien de non-conformiteit een wezenlijke tekortkoming is in de zin van Artikel 8:103(b) of (c) PECL (Wezenlijke tekortkoming).
(3) De opdrachtgever kan het loon verminderen overeenkomstig Artikel 9:401 PECL (Prijsvermindering).
(4) De opdrachtgever kan schadevergoeding overeenkomstig Hoofdstuk 9, Afdeling 5 PECL (Schadevergoeding en rente) vorderen, inclusief de kosten van herstel of vervanging.

Artikel 2:111: Verjaring van rechten wegens non-conformiteit

(1) Overeenkomstig Artikel 14:201 PECL (Algemene termijn) bedraagt de verjaringstermijn voor een recht wegens non-conformiteit 3 jaar.
(2) Overeenkomstig Artikel 14:203(1) PECL (Aanvang) vangt de verjaringstermijn aan op het moment waarop controle over the zaak, of het gedeelte ervan, wordt overgedragen aan de opdrachtgever overeenkomstig Artikel 2:106.
(3) Overeenkomstig Artikel 14:301(1) PECL (Onderbreking in geval van onbekendheid) is het lopen van de verjaringstermijn onderbroken zo lang de schuldeiser de feiten welke aanleiding geven tot de vordering, inclusief de soort schade, niet kent en redelijkerwijs niet kon kennen. Dit is niet van toepassing op andere rechten wegens non-conformiteit dan schadevergoeding.
(4) Overeenkomstig Artikel 14:307 PECL (Maximum duur van de termijn) kan de verjaringstermijn niet worden verlengd door onderbreking van het lopen van de termijn of uitstel van de verstrijking van de termijn, tot een termijn van meer dan tien jaar of, in geval van een vordering wegens letselschade, tot meer dan dertig jaar. Dit is niet van toepassing op onderbreking overeenkomstig Artikel 14:302 (Onderbreking in geval van juridische of andere procedures).

Hoofdstuk 3:
Bewerking van Zaken

Artikel 3:101: Toepassingsgebied

(1) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij een partij, de bewerker, ten behoeve van een andere partij, de opdrachtgever, gehouden is een dienst te verrichten op of aan een bestaande roerende of onroerende zaak of een onstoffelijk voorwerp.
(2) Dit Hoofdstuk is in het bijzonder van toepassing op overeenkomsten waarbij de bewerker gehouden is een roerende of onroerende zaak of een onstoffelijk voorwerp te herstellen, onderhouden of reinigen.
(3) Indien een partij op basis van een overeenkomst gehouden is een zaak te bewerken en een andere dienst te leveren, is dit Hoofdstuk van toepassing op de gedeelten van de overeenkomst die de bewerking van de zaak betreffen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

Artikel 3:102: Samenwerkingsplicht van de opdrachtgever

De verplichtingen op grond van Artikel 1:202 PECL (Samenwerkingsplicht) en 1:104 (Samenwerkingsplicht) brengen in het bijzonder met zich dat de opdrachtgever:
(a) de zaak of de controle erover aan de bewerker overhandigt, of toegang tot de plaats verschaft waar de dienst moet worden uitgevoerd, voor zover dit redelijkerwijs noodzakelijk is om de bewerker in staat te stellen de overeenkomst na te komen; en
(b) voor zover als deze ter beschikking gesteld moeten worden door de opdrachtgever, de onderdelen, materialen en hulpzaken ter beschikking stelt op zodanig tijdstip als redelijkerwijs noodzakelijk is om de bewerker in staat te stellen de overeenkomst na te komen.

Artikel 3:103: Omstandigheden waaronder de dienst moet worden uitgevoerd

De verplichtingen op grond van Artikel 1:105 (Omstandigheden waaronder de dienst moet worden uitgevoerd) brengen in het bijzonder met zich dat de bewerker gehouden is informatie te vergaren betreffende de kenmerken van de zaak waarop de dienst moet worden uitgevoerd voor zover dit redelijkerwijs noodzakelijk is voor uitvoering van de dienst.

Artikel 3:104: Zorgverplichting van de bewerker

De verplichtingen op grond van Artikel 1:107 (Algemene zorgverplichting bij diensten) verplichten in het bijzonder de bewerker om redelijke voorzorgsmaatregelen te nemen ten einde schade aan de zaak of ander nadeel te voorkomen.

Artikel 3:105: Conformiteit

De bewerker moet het door de opdrachtgever ten tijde van de contractsluiting medegedeelde of verwachte resultaat bereiken, mits:
(a) een wel verwacht maar niet medegedeeld resultaat van zodanige aard was dat een redelijke opdrachtgever in dezelfde omstandigheden als de opdrachtgever dit resultaat mocht verwachten; en
(b) een redelijke opdrachtgever in dezelfde omstandigheden geen reden zou hebben om te geloven dat er een aanmerkelijk risico bestond dat het resultaat niet zou worden bereikt door de dienst.

Artikel 3:106: Inspectie en toezicht

(1) Overeenkomstig Artikel 1:104(1)(d) (Samenwerkingsplicht), indien de dienst moet worden uitgevoerd op de door de opdrachtgever ter beschikking gestelde plaats, is de opdrachtgever gerechtigd op een redelijke wijze en op een redelijk tijdstip de hulpzaken en hulppersonen, de uitvoering van de dienst en de zaak waarop de dienst wordt uitgevoerd te inspecteren en hierop toe te zien, zonder dat hij hiertoe gehouden is.

(2) Gebreke aan, of inadequate inspectie of toezicht bevrijdt de bewerker noch geheel, noch ten dele van aansprakelijkheid. Deze regel is eveneens van toepassing wanneer op de opdrachtgever een contractuele verplichting rust tot inspectie van of toezicht op de dienst.

Artikel 3:107: Teruggave van de zaak

(1) Indien de bewerker de dienst als voldoende voltooid beschouwd en de zaak of de controle erover weer wil overdragen aan de opdrachtgever, dan is de opdrachtgever gehouden de zaak of de controle erover te aanvaarden binnen een redelijke termijn nadat de bewerker hiervan kennis heeft gegeven. De opdrachtgever kan de overname van de zaak of de controle erover weigeren wanneer de zaak niet geschikt is voor het bijzondere doel waarvoor de opdrachtgever de dienst had laten uitvoeren, mits die bedoeling kenbaar was gemaakt aan de bewerker of de bewerker anderszins reden had het doel te kennen.

(2) De bewerker moet de zaak of de controle erover teruggeven binnen een redelijke termijn na daartoe verzocht te zijn door de opdrachtgever.

(3) Aanvaarding van de zaak of de controle erover door de opdrachtgever bevrijdt de bewerker noch geheel, noch ten dele van aansprakelijkheid.

(4) Indien, gezien de aard van de zaak of de overeenkomst, de bewerker de eigenaar van de zaak is geworden door de nakoming van de overeenkomst, is de bewerker gehouden de eigendom van de zaak over te dragen wanneer de zaak wordt teruggegeven.

Artikel 3:108: Betaling van het loon

Het loon is opeisbaar en betaalbaar vanaf het moment waarop de bewerker de zaak of de controle erover aan de opdrachtgever overeenkomstig Artikel 3:107 overdraagt of de opdrachtgever, zonder daartoe gerechtigd te zijn, weigert de teruggave van de zaak te aanvaarden.

Artikel 3:109: Risico's

(1) Dit Artikel is van toepassing indien de zaak tenietgaat of beschadigd raakt door een gebeurtenis voor welke de bewerker niet aansprakelijk kan worden gehouden en welke door de bewerker niet voorkomen of ondervangen kan worden.

(2) Indien, voorafgaand aan de gebeurtenis, bedoeld in lid (1), de bewerker te kennen had gegeven dat hij de dienst als voldoende voltooid beschouwde en dat de bewerker de zaak of de controle erover terug wilde geven aan de opdrachtgever:
(a) behoeft de bewerker niet opnieuw na te komen; en
(b) is de opdrachtgever gehouden het loon te betalen.
Het loon is opeisbaar vanaf het moment dat de gebeurtenis plaatsvindt en de bewerker de overblijfselen van de zaak, zo die er zijn, teruggeeft aan de opdrachtgever, of de opdrachtgever aangeeft dat hij deze niet terug wil ontvangen. In het laatste geval kan de bewerker zich van de overblijfselen ontdoen op kosten van de opdrachtgever.
Deze bepaling is niet van toepassing indien de opdrachtgever gerechtigd was de teruggave van de zaak te weigeren overeenkomstig Artikel 3:107(1).

(3) Indien de partijen overeengekomen waren dat de bewerker zou worden betaald per verstreken periode, is de opdrachtgever gehouden het loon voor iedere periode te betalen die verstreken is voordat de gebeurtenis als bedoeld in lid (1) heeft plaatsgevonden.
(4) Indien, nadat de gebeurtenis, bedoeld in lid (1), heeft plaatsgevonden, nakoming van de overeenkomst door de bewerker nog mogelijk is:
   (a) dient de bewerker alsnog, en voor zover nodig: opnieuw, na te komen;
   (b) behoeft de opdrachtgever alleen voor de onder (a) bedoelde nakoming door de bewerker te betalen; het recht van de bewerker op betaling van het loon overeenkomstig lid (3) wordt door deze bepaling niet geraakt;
   (c) is de opdrachtgever gehouden de bewerker de kosten te vergoeden die de bewerker moet maken ten einde materialen aan te schaffen welke de door de opdrachtgever verstrekte materialen vervangen, tenzij de opdrachtgever nadat hij een daartoe strekkend verzoek van de bewerker heeft ontvangen, deze materialen zelf verschaft;
   (d) wordt, voor zover nodig, de tijd voor nakoming verlengd overeenkomstig Artikel 1:111(6) (Wijziging van de overeenkomst).

   De opdrachtgever is echter gerechtigd de overeenkomst op te zeggen overeenkomst Artikel 1:115 (Opzegging van de overeenkomst); de gevolgen van een dergelijke opzegging worden bepaald door die bepaling.
(5) Indien, in de situatie bedoeld in lid (1), nakoming van de overeenkomst niet meer mogelijk is voor de bewerker:
   (a) behoeft de opdrachtgever niet voor de geleverde dienst te betalen; het recht van de bewerker op betaling van het loon overeenkomstig lid (3) wordt door deze bepaling niet geraakt; en
   (b) is de bewerker gehouden de zaak en de door de opdrachtgever verstrekte materialen, of wat hiervan overblijft, terug te geven aan de opdrachtgever, tenzij de opdrachtgever aangeeft dat hij de overblijfselen niet terug wil ontvangen. In het laatste geval kan de bewerker zich van de overblijfselen ontdoen op kosten van de opdrachtgever.

Artikel 3:110: Recht op nakoming en zuivering

(1) Indien de bewerker zijn verplichtingen op grond van Artikel 3:105 niet is nagekomen, is de opdrachtgever gerechtigd het wegnemen van de non-conformiteit te vorderen overeenkomstig Artikel 9:102 PECL (Verbintenis anders dan tot betaling van een geldsom). Artikel 9:102(d) PECL (Verbintenis anders dan tot betaling van een geldsom) is niet van toepassing.
(2) De bewerker is gerechtigd het verzuim te zuiveren door de non-conformiteit weg te nemen, mits de bewerker de non-conformiteit kan herstellen:
   (a) voor het einde van een aanvullende termijn van redelijke duur voor nakoming zoals bepaald in een kennisgeving van de opdrachtgever overeenkomstig Artikel 8:106(3) PECL (Kennisgeving van een aanvullende termijn voor nakoming); en
   (b) voordat de vertraging veroorzaakt door de zuivering van het verzuim een wezenlijke tekortkoming in de zin van Art. 8:103(b) of (c) PECL (Wezenlijke tekortkoming) heeft doen ontstaan.
(3) Artikel 8:103(a) PECL (Wezenlijke tekortkoming) is niet van toepassing in enig geval waarop lid (2) van toepassing is, tenzij uitdrukkelijk overeengekomen is dat strikte naleving van de verbintenis tot oplevering van de zaak voor de overeenkomst van wezenlijk belang is.
(4) De bewerker is vrij om te bepalen op welke wijze hij zijn verplichting tot het wegnemen van de non-conformiteit nakomt.

(5) Tot het moment waarop de bewerker de non-conformiteit heeft weggenomen, is de opdrachtgever gerechtigd zijn prestatie op te schorten overeenkomstig Artikel 9:201 PECL (Opschortingsrecht).
(6) De opdrachtgever kan schadevergoeding vorderen overeenkomstig Hoofdstuk 9, Afdeling 5 PECL (Schadevergoeding en rente) voor enig nadeel dat niet wordt weggenomen door het wegnemen van de non-conformiteit door de bewerker.

Artikel 3:111: Toevlucht tot andere rechten

(1) De opdrachtgever kan zijn toevlucht nemen tot andere rechten wegens non-conformiteit als voorzien in dit Artikel indien:
  (a) de opdrachtgever niet gerechtigd is nakoming te vorderen overeenkomstig Artikel 9:102 PECL (Specific Performance) and Artikel 3:110(1); of
  (b) de bewerker niet in staat is of nalaat de non-conformiteit weg te nemen overeenkomstig Artikel 3:110(2).
(2) De opdrachtgever kan de overeenkomst ontbinden overeenkomstig Hoofdstuk 9, Afdeling 3 PECL (Ontbinding van de overeenkomst), indien de non-conformiteit een wezenlijke tekortkoming is in de zin van Artikel 8:103(b) of (c) PECL (Wezenlijke tekortkoming).
(3) De opdrachtgever kan het loon verminderen overeenkomstig Artikel 9:401 PECL (Prijsvermindering).
(4) De opdrachtgever kan schadevergoeding overeenkomstig Hoofdstuk 9, Afdeling 5 PECL (Schadevergoeding en rente) vorderen, inclusief de kosten van herstel of vervanging.

Artikel 3:112: Beperking van aansprakelijkheid

In overeenkomsten tussen twee partijen die beide handelen in de uitoefening van hun beroep of bedrijf wordt een beding waarmee de aansprakelijkheid van de bewerker wordt beperkt tot de waarde die de zaak zou hebben gehad indien de dienst op juiste wijze zou zijn uitgevoerd, vermoed redelijk en billijk te zijn in de zin van Artikel 1:114(2) (Beperking van aansprakelijkheid), tenzij de schade opzettelijk of door bewuste roekeloosheid van de bewerker of enige persoon voor wiens gedragingen de bewerker aansprakelijk is, is veroorzaakt.

Hoofdstuk 4:
Bewaarneming

Artikel 4:101: Toepassingsgebied

(1) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij een partij, de bewaarnemer, ten behoeve van een andere partij, de opdrachtgever, gehouden is een roerende zaak of onstoffelijk voorwerp te bewaren voor de opdrachtgever.
(2) Indien een partij op basis van een overeenkomst gehouden is een zaak te bewaren en een andere dienst te leveren, is dit Hoofdstuk van toepassing op de gedeelten van de overeenkomst die de bewaring van de zaak betreffen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.
(3) Dit Hoofdstuk is niet van toepassing op bewaarneming van:
  (a) onroerende zaken;
  (b) roerende zaken of onstoffelijke voorwerpen tijdens vervoer; en
  (c) geld, zekerheden of rechten.

Artikel 4:102: Precontractuele Waarschuwingsplichten

De verplichtingen op grond van Artikel 1:103(4) (Precontractuele Waarschuwingsplichten) brengen in het bijzonder met zich dat de opdrachtgever de bewaarnemer dient te waarschuwen voor enig ongebruikelijk gevaar verbonden aan de zaak of de bewaarneming ervan waarvan de opdrachtgever weet heeft.

Artikel 4:103: Omstandigheden waaronder de dienst moet worden uitgevoerd

De verplichtingen op grond van Artikel 1:105 (Omstandigheden waaronder de dienst moet worden geleverd) brengen in het bijzonder met zich dat de bewerker gehouden is informatie te vergaren betreffende de kenmerken van de zaak die moet worden bewaard voor zover dit redelijkerwijs noodzakelijk is voor uitvoering van de dienst.

Artikel 4:104: Verplichtingen van de bewaarnemer aangaande hulpzaken en hulppersonen

(1) De verplichtingen op grond van Artikel 1:106 (Verplichtingen van de dienstverlener aangaande hulpzaken en hulppersonen) brengen in het bijzonder met zich dat voor zover de bewaarnemer de plaats voor de bewaarneming verschaft, de bewaarnemer een plaats verschaft welke geschikt is voor het bewaren van de zaak op zodanige wijze dat de zaak kan worden teruggegeven in de toestand waarin de opdrachtgever haar mag verwachten.
(2) Het is de bewaarnemer niet toegestaan de nakoming van de dienst zonder toestemming van de opdrachtgever uit te besteden.

Artikel 4:105: Zorgverplichting van de bewerker

(1) De verplichtingen op grond van Artikel 1:107 (Algemene zorgverplichting bij diensten) verplichten in het bijzonder de bewaarnemer om redelijke voorzorgsmaatregelen te nemen ten einde onnodige achteruitgang, verval of vermindering van de waarde van de in bewaring genomen zaak te voorkomen.
(2) De bewaarnemer is alleen dan bevoegd de voor bewaarneming overgedragen zaak te gebruiken indien de opdrachtgever met dergelijk gebruik heeft ingestemd.

Artikel 4:106: Teruggave van de zaak

(1) De bewaarnemer moet de zaak binnen een redelijke termijn nadat de opdrachtgever hem hierom heeft verzocht, aan de opdrachtgever teruggeven.
(2) De opdrachtgever is gehouden de zaak terug te nemen op het overeengekomen tijdstip of, indien de bewaarnemer gerechtigd is de overeenkomst te ontbinden wegens niet-nakoming door de opdrachtgever, binnen een redelijke termijn nadat hem kennis is gegeven van de ontbinding van de overeenkomst.
(3) Aanvaarding van de teruggave van de zaak door de opdrachtgever bevrijdt de bewaarnemer noch geheel, noch ten dele van aansprakelijkheid.
(4) Indien de opdrachtgever in gebreke is de teruggave van de zaak te aanvaarden op het tijdstip, bedoeld in lid (2), heeft de bewaarnemer het recht de zaak te verkopen overeenkomstig Artikel 7:110(2)(b) PECL (Verzuim zaken in ontvangst te nemen), mits de bewaarnemer de opdrachtgever een redelijke waarschuwing heeft gegeven van zijn voornemen daartoe.
(5) Indien tijdens de bewaarneming de zaak vrucht heeft gedragen, moet de bewaarnemer deze vrucht aan de opdrachtgever overdragen wanneer de zaak wordt teruggegeven aan de opdrachtgever.

(6) Indien, gezien de aard van de zaak of de overeenkomst, de bewaarnemer de eigenaar van de zaak is geworden door de nakoming van de overeenkomst, is de bewaarnemer gehouden een zaak van dezelfde soort en dezelfde kwaliteit en kwantiteit terug te geven en de eigendom van die zaak over te dragen. Lid (1) is van overeenkomstige toepassing.
(7) Dit Artikel is van overeenkomstige toepassing indien een derde die gerechtigd is om de zaak in ontvangst te nemen, verzoekt de zaak terug te geven.

Artikel 4:107: Conformiteit

(1) De bewaarnemer moet de zaak in overeenstemming met de overeenkomst bewaren.
(2) De bewaarneming van de zaak beantwoordt niet aan de overeenkomst, tenzij de zaak wordt teruggegeven in dezelfde toestand als waarin zij verkeerde toen zij werd overhandigd aan de bewaarnemer.
(3) Indien, gezien de aard van de zaak of de overeenkomst, redelijkerwijs niet kan worden verwacht dat de zaak wordt teruggeven in dezelfde toestand, beantwoordt de bewaarneming niet aan de overeenkomst indien de zaak niet wordt teruggeven in zodanige toestand als waarin de opdrachtgever haar redelijkerwijs mocht verwachten te worden teruggegeven.
(4) Indien, gezien de aard van de zaak of de overeenkomst, het redelijkerwijs niet kan worden verwacht dat dezelfde zaak wordt teruggegeven, beantwoordt de bewaarneming niet aan de overeenkomst indien de zaak die wordt teruggegeven niet in dezelfde toestand verkeert als de zaak verkeerde toen die aan de bewaarnemer werd overhandigd, of als de teruggeven zaak niet van dezelfde soort, kwaliteit en kwantiteit is, of als de eigendom van die zaak niet wordt overgedragen overeenkomstig Artikel 4:106(6).

Artikel 4:108: Betaling van het loon

(1) Het loon is opeisbaar vanaf het moment waarop de bewaarnemer de zaak teruggeeft aan de opdrachtgever overeenkomstig Artikel 4:106 of de opdrachtgever, zonder daartoe gerechtigd te zijn, weigert de teruggave van de zaak te aanvaarden.
(2) De bewaarnemer mag de teruggave van de zaak opschorten tot de opdrachtgever het loon betaalt. Artikel 9:201 PECL (Opschortingsrecht) is van overeenkomstige toepassing.

Artikel 4:109: Verantwoordingsplicht

Na beëindiging van de bewaarneming moet de bewaarnemer de opdrachtgever informeren over:
(a) iedere beschadiging van de zaak die tijdens de bewaarneming heeft plaatsgevonden; en
(b) de noodzakelijke voorzorgsmaatregelen die de opdrachtgever moet nemen alvorens hij de zaak gebruikt of vervoert, tenzij de opdrachtgever reden heeft om deze voorzorgsmaatregelen te kennen.

Artikel 4:110: Risico's

(1) Dit Artikel is van toepassing indien de zaak tenietgaat of beschadigd raakt door een gebeurtenis voor welke de bewaarnemer niet aansprakelijk kan worden gehouden en welke door de bewaarnemer niet voorkomen of ondervangen kan worden.
(2) Indien, voorafgaand aan de gebeurtenis, bedoeld in lid (1), de bewaarnemer de opdrachtgever ervan in kennis had gesteld dat de opdrachtgever gehouden was de teruggave van de zaak te aanvaarden, is de opdrachtgever gehouden het loon te betalen. Het loon is opeisbaar vanaf het moment dat de gebeurtenis plaatsvindt en de bewaarnemer de overblijf-

selen van de zaak, zo die er zijn, teruggeeft aan de opdrachtgever, of de opdrachtgever aangeeft dat hij deze niet terug wil ontvangen. In het laatste geval kan de bewaarnemer zich van de overblijfselen ontdoen op kosten van de opdrachtgever.

(3) Indien de partijen overeengekomen waren dat de bewaarnemer zou worden betaald per verstreken periode, is de opdrachtgever gehouden het loon voor iedere periode te betalen die verstreken is voordat de gebeurtenis als bedoeld in lid (1) heeft plaatsgevonden.

(4) Indien, nadat de gebeurtenis, bedoeld in lid (1), heeft plaatsgevonden, verdere nakoming van de overeenkomst door de bewaarnemer nog mogelijk is, is de bewaarnemer gehouden de nakoming van de overeenkomst voort te zetten. De opdrachtgever is echter gerechtigd de overeenkomst op te zeggen overeenkomstig Artikel 1:115 (Opzegging van de overeenkomst); de gevolgen van een dergelijke opzegging worden bepaald door die bepaling.

(5) Indien, in de situatie bedoeld in lid (1), nakoming van de overeenkomst niet meer mogelijk is voor de bewaarnemer:
   (a) behoeft de opdrachtgever niet voor de geleverde dienst te betalen; het recht van de bewaarnemer op betaling van het loon overeenkomstig lid (3) wordt door deze bepaling niet geraakt; en
   (b) is de bewaarnemer gehouden de overblijfselen van de zaak terug te geven aan de opdrachtgever teruggeeft aan de opdrachtgever, tenzij de opdrachtgever aangeeft dat hij deze niet terug wil ontvangen. In het laatste geval kan de bewaarnemer zich van de overblijfselen ontdoen op kosten van de opdrachtgever.

Artikel 4:111: Rechten bij non-conformiteit

In het geval van een non-conformiteit overeenkomstig Artikel 4:107 kan de opdrachtgever zijn toevlucht nemen tot elk van de rechten krachtens Hoofdstuk 9 PECL (Afzonderlijke rechten bij tekortkoming).

Artikel 4:112: Beperking van aansprakelijkheid

In overeenkomsten tussen twee partijen die beide handelen in de uitoefening van hun beroep of bedrijf wordt een beding waarmee de aansprakelijkheid van de bewaarnemer wordt beperkt tot de waarde van de zaak, vermoed redelijk en billijk te zijn in de zin van Artikel 1:114(2) (Beperking van aansprakelijkheid), tenzij de schade opzettelijk of door bewuste roekeloosheid van de bewaarnemer of enige persoon voor wiens gedragingen de bewaarnemer aansprakelijk is, is veroorzaakt.

Artikel 4:113: Aansprakelijkheid van de hotelhouder

(1) Dit Artikel is niet van toepassing indien en voor zover een afzonderlijke bewaarnemingsovereenkomst tot stand is gekomen tussen een hotelhouder en een gast ten aanzien van enige zaak welke naar het hotel is gebracht. Een afzonderlijke bewaarnemingsovereenkomst tussen de hotelhouder en de gast wordt geacht te zijn gesloten indien een zaak ter bewaarneming wordt overgedragen aan de hotelhouder. Artikel 4:101(3) is niet van toepassing.

(2) Een hotelhouder is aansprakelijk als een bewaarnemer voor enige schade aan of tenietgaan of verlies van een zaak welke naar het hotel is gebracht door een gast die in het hotel verblijft en daar een slaapplaats heeft.

(3) Een zaak:
   (a) die zich in het hotel bevindt gedurende de tijd waarin de gast het gebruik van een slaapplaats in het hotel heeft, of

(b) welke zich buiten het hotel bevindt en waarover de hotelhouder of een persoon voor wiens gedragingen de hotelhouder aansprakelijk is, zich ontfermt gedurende de tijd waarin de gast het gebruik van een slaapplaats heeft in het hotel; of
(c) waarover de hotelhouder of een persoon voor wiens gedragingen de hotelhouder aansprakelijk is, zich ontfermt gedurende een redelijke termijn voorafgaande aan of volgende op de tijd waarin de gast het gebruik van een slaapplaats heeft in het hotel, ongeacht of deze zaak zich in of buiten het hotel bevindt;

wordt beschouwd als een zaak die naar het hotel is gebracht.

(4) De hotelhouder is niet aansprakelijk voor zover de schade, het tenietgaan of het verlies van de zaak te wijten is aan:
(a) een gast of enige persoon die de gast begeleidt of bezoekt of in diens dienst is; of
(b) een hindernis die buiten de macht is van de hotelhouder in de zin van Artikel 8:108 PECL (Niet toerekenbare tekortkoming); of
(c) de aard van de zaak.

(5) Een beding waarmee de aansprakelijkheid van de hotelhouder wordt uitgesloten of beperkt wordt geacht onredelijk en onbillijk te zijn in de zin van Artikel 1:114(2) (Beperking van aansprakelijkheid) indien de hotelhouder, of een persoon voor wiens gedragingen de hotelhouder aansprakelijk is, opzettelijk of door bewuste roekeloosheid de schade, het tenietgaan of het verlies heeft veroorzaakt.

(6) Tenzij de schade, het tenietgaan of het verlies opzettelijk of door bewuste roekeloosheid van de hotelhouder of een persoon voor wiens gedragingen de hotelhouder aansprakelijk is, is veroorzaakt, is de gast gehouden de hotelhouder onverwijld te informeren omtrent de schade, het tenietgaan of het verlies. Indien de gast nalaat de hotelhouder onverwijld te informeren, kan de hotelhouder niet aansprakelijk worden gehouden.

(7) De hotelhouder heeft het recht om afgifte van enige zaak als bedoeld in lid (2) achter te houden totdat de gast enige vordering heeft voldaan die de hotelhouder op hem heeft ten aanzien van het verblijf, de verstrekking van eten en drinken en diensten welke de hotelhouder op verzoek van de gast in de uitoefening van zijn bedrijf heeft verricht.

Hoofdstuk 5:
Ontwerp

Artikel 5:101: Toepassingsgebied

(1) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij een partij, de ontwerper, ten behoeve van een andere partij, de opdrachtgever, gehouden is een onroerende zaak te ontwerpen welke door of ten behoeve van de opdrachtgever zal worden gebouwd.

(2) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij de ontwerper gehouden is een roerende zaak of onstoffelijk voorwerp of dienst te ontwerpen welke door of ten behoeve van de opdrachtgever zal worden gebouwd of uitgevoerd.

(3) Indien een partij op basis van een overeenkomst gehouden is te ontwerpen en een andere dienst te leveren, is dit Hoofdstuk van toepassing op de gedeelten van de overeenkomst die het ontwerpen betreffen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

(4) Indien de andere dienst, bedoeld in lid (3), bestaat uit de uitvoering van het ontwerp, hebben de regels die die dienst beheersen voorrang boven de regels van die Hoofdstuk. Evenwel zijn de Artikelen 5:105 and 5:108 niet van toepassing.

Artikel 5:102: Precontractuele Waarschuwingsplichten

De verplichtingen op grond van Artikel 1:103 (Precontractuele Waarschuwingsplichten) brengen in het bijzonder met zich dat de ontwerper de opdrachtgever dient te waarschuwen voor zover de ontwerper de bijzondere bekwaamheid ontbeert voor specifieke problemen welke de inschakeling van specialisten vereisen.

Artikel 5:103: Samenwerkingsplicht van de opdrachtgever

Voor zover de ontwerper heeft gewaarschuwd overeenkomstig Artikel 1:103 (Precontractuele Waarschuwingsplichten) en Artikel 5:102 dat verdere bekwaamheid vereist is om de ontwerper in staat te stellen de overeenkomst na te komen, brengen de verplichtingen op grond van Artikel 1:202 PECL (Samenwerkingsplicht) en Artikel 1:104 (Samenwerkingsplicht) met zich dat de opdrachtgever dergelijke bekwaamheid dient in te schakelen.

Artikel 5:104: Zorgverplichting van de ontwerper

De verplichtingen op grond van Artikel 1:107 (Algemene zorgverplichting bij diensten) verplichten in het bijzonder de ontwerper om:

(a) de werkzaamheden betreffende het ontwerpen af te stemmen op de werkzaamheden van andere ontwerpers die met de opdrachtgever een overeenkomst hebben gesloten, ten einde een efficiënte uitvoering van alle diensten mogelijk te maken;
(b) de werkzaamheden van andere ontwerpers te integreren, welke noodzakelijk is om te verzekeren dat het ontwerp in overeenstemming met Artikel 5:105 is;
(c) iedere informatie betreffende de uitleg van het ontwerp te verstrekken welke noodzakelijk is om aan het ontwerp uitvoering te geven door een gemiddeld bekwame gebruiker van het ontwerp of door een bijzondere gebruiker die voorafgaand aan de contractsluiting aan de ontwerper bekend was gemaakt;
(d) de gebruiker van het ontwerp in staat te stellen om uitvoering te geven aan het ontwerp zonder daarbij publiekrechtelijke regels te schenden en zonder inmenging op basis van gerechtvaardigde rechten van derden van welke de ontwerper kennis heeft of hij redelijkerwijs geacht kan worden kennis te hebben; en
(e) een economische en technisch efficiënte verwerkelijking van het ontwerp mogelijk te maken.

Artikel 5:105: Conformiteit

(1) Tenzij de partijen anders zijn overeengekomen, beantwoordt het ontwerp niet aan de overeenkomst, tenzij het de gebruiker in staat stelt een specifieke resultaat te bereiken door het ontwerp uit te voeren met de zorgvuldigheid die daartoe vereist is.
(2) De opdrachtgever is niet gerechtigd een recht wegens non-conformiteit in te roepen indien de non-conformiteit is veroorzaakt door een aanwijzing van de opdrachtgever op grond van Artikel 1:109 (Aanwijzingen van de opdrachtgever) en de ontwerper zijn waarschuwingsplicht op grond van Artikel 1:110 (Contractuele waarschuwingsplicht van de dienstverlener) niet heeft geschonden.

Artikel 5:106: Oplevering van het ontwerp

Indien de ontwerper het ontwerp, of een gedeelte ervan dat geschikt is om afzonderlijk van de voltooiing van de rest van het ontwerp te worden uitgevoerd, als voldoende voltooid beschouwd, en hij het ontwerp wil overdragen aan de opdrachtgever, dan is de opdrachtgever gehouden het te aanvaarden binnen een redelijke termijn na hiervan in kennis te zijn gesteld. De

opdrachtgever kan het ontwerp weigeren wanneer het, of het relevante gedeelte ervan, niet overeenstemt met de overeenkomst en deze non-conformiteit een wezenlijke tekortkoming met zich brengt in de zin van Artikel 8:103 PECL (Wezenlijke tekortkoming).

Artikel 5:107: Verplichting van de ontwerper ten aanzien van aantekeningen

Nadat beide partijen hun verplichtingen uit de overeenkomst zijn nagekomen, kan de opdrachtgever aan de ontwerper verzoeken hem alle relevante documenten ten minste in kopie te overhandigen. De ontwerper dient deze documenten gedurende een redelijke termijn te bewaren. Voordat de documenten worden vernietigd, is de ontwerper gehouden deze wederom aan de opdrachtgever aan te bieden.

Artikel 5:108: Beperking van aansprakelijkheid

In overeenkomsten tussen twee partijen die beide handelen in de uitoefening van hun beroep of bedrijf wordt een beding waarmee de aansprakelijkheid van de ontwerper wordt beperkt tot de waarde van de zaak of dienst welke door of ten behoeve van de opdrachtgever op basis van het ontwerp zal worden gebouwd of geleverd, vermoed redelijk en billijk te zijn in de zin van Artikel 1:114(2) (Beperking van aansprakelijkheid), tenzij de schade opzettelijk of door bewuste roekeloosheid van de ontwerper of enige persoon voor wiens gedragingen de ontwerper aansprakelijk is, is veroorzaakt.

Hoofdstuk 6:
Informatie

Artikel 6:101: Toepassingsgebied

(1) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij een partij, de informatieverstrekker, gehouden is aan een andere partij, de opdrachtgever, informatie te verstrekken, zoals feitelijke informatie, evualatieve informatie of een aanbeveling.
(2) Indien een partij op basis van een overeenkomst gehouden is informatie te verstrekken en een andere dienst te leveren, is dit Hoofdstuk van toepassing op de gedeelten van de overeenkomst die het verstrekken van informatie betreffen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

Artikel 6:102: Omstandigheden waaronder de dienst moet worden uitgevoerd

(1) De verplichtingen op grond van Artikel 1:105 (Omstandigheden waaronder de dienst moet worden uitgevoerd) brengen in het bijzonder met zich dat de informatieverstrekker, voor zover dit redelijkerwijs nodig is voor de uitvoering van de dienst, gehouden is informatie te vergaren betreffende:
    (a) het bijzondere doel waarvoor de opdrachtgever de informatie verlangt;
    (b) de voorkeuren en prioriteiten van de opdrachtgever ter zake van de informatie;
    (c) de beslissing waarvan kan worden verwacht dat de opdrachtgever die zal maken op basis van de informatie; en
    (d) de persoonlijke situatie van de opdrachtgever.
(2) Indien de informatie bestemd is om te worden doorgegeven aan een groep van personen, moet de te vergaren informatie betrekking hebben op de bedoelingen, voorkeuren, prioriteiten en persoonlijke situaties die redelijkerwijs kunnen worden verwacht van individuen binnen een dergelijke groep.

(3) Voor zover de informatieverstrekker informatie moet verkrijgen van de opdrachtgever, moet de informatieverstrekker uitleggen welke informatie de opdrachtgever dient te verschaffen.

Artikel 6:103: Verplichtingen van de informatieverstrekker aangaande hulpzaken en hulppersonen

Tenzij anders is overeengekomen is de informatieverstrekker, voor zover noodzakelijk voor de uitvoering van de dienst, in het bijzonder gehouden de specifieke kennis te verkrijgen en gebruiken waartoe de informatieverstrekker als een professionele informatieverstrekker toegang heeft of zou moeten hebben.

Artikel 6:104: Zorgverplichting van de informatieverstrekker

(1) De verplichtingen op grond van Artikel 1:107 (Algemene zorgverplichting bij diensten) verplichten in het bijzonder de informatieverstrekker om:
   (a) redelijke maatregelen te nemen ten einde te verzekeren dat de opdrachtgever de inhoud van de informatie begrijpt;
   (b) met de zorg en bekwaamheid te handelen die een redelijke informatieverstrekker in de gegeven omstandigheden zou betrachten bij de verstrekking van evaluatieve informatie; en
   (c) in elk geval waarin van de opdrachtgever verwacht kan worden dat deze een beslissing zal nemen op basis van de informatie, de opdrachtgever te informeren over de betrokken risico's, voor zover dergelijke risico's de beslissing van de opdrachtgever redelijkerwijs zouden kunnen beïnvloeden.

(2) Indien de informatieverstrekker uitdrukkelijk of stilzwijgend de verplichting op zich neemt om de opdrachtgever een aanbeveling te doen ten einde de opdrachtgever in staat te stellen een daaropvolgende beslissing te nemen, is de informatieverstrekker gehouden om:
   (a) zijn aanbeveling te baseren op een bekwame analyse van de te vergaren deskundige kennis in verhouding tot de doelen, prioriteiten, voorkeuren en persoonlijke situatie van de opdrachtgever;
   (b) de opdrachtgever te informeren over alternatieven en de daarmee gepaard gaande voordelen en risico's welke de informatieverstrekker persoonlijk kan leveren aangaande de daaropvolgende beslissing, in vergelijking tot de voordelen en risico's verbonden aan de aanbevolen beslissing; en
   (c) de opdrachtgever te informeren over andere alternatieven welke de informatieverstrekker niet persoonlijk kan leveren, tenzij de informatieverstrekker de opdrachtgever uitdrukkelijk mededeelt dat slechts een beperkte verscheidenheid aan alternatieven wordt aangeboden of dit duidelijk uit de situatie blijkt.

Artikel 6:105: Conformiteit

(1) De informatieverstrekker moet informatie verstrekken die beantwoordt aan de door de overeenkomst vereiste kwantiteit, kwaliteit en beschrijving.
(2) De door de informatieverstrekker aan de opdrachtgever verstrekte feitelijke informatie moet een juiste beschrijving van de daadwerkelijke situatie bevatten.

Artikel 6:106: Verplichting tot verantwoording

Voor zover, gelet op de belangen van de opdrachtgever, redelijkerwijs vereist moet de informatieverstrekker verantwoording afleggen aangaande de overeenkomstig dit Hoofdstuk verstrekte informatie.

Artikel 6:107: Belangentegenstelling

(1) Indien de informatieverstrekker uitdrukkelijk of stilzwijgend de verplichting op zich neemt om de opdrachtgever een aanbeveling te doen ten einde de opdrachtgever in staat te stellen een daaropvolgende beslissing te nemen, is de informatieverstrekking gehouden om iedere mogelijke belangentegenstelling te openbaren welke de nakoming van de verplichtingen van de informatieverstrekker zou kunnen beïnvloeden.
(2) Zo lang de overeenkomst nog niet volledig is nagekomen, mag de informatieverstrekker zich niet in een relatie met een andere partij begeven welke kan leiden tot een mogelijke tegenstelling met de belangen van de opdrachtgever zonder hierover volledige openheid met de opdrachtgever te betrachten en zonder de uitdrukkelijke of stilzwijgende toestemming van de opdrachtgever.
(3) Indien de partijen afwijken van de aansprakelijkheidsregel van lid (2) kan de informatieverstrekker zich tegenover de opdrachtgever slechts op een dergelijk beding beroepen voor zover de informatieverstrekker het beding onder de aandacht van de opdrachtgever heeft gebracht op een wijze die gezien de omstandigheden redelijk en gepast was.

Artikel 6:108: Invloed bekwaamheid van de opdrachtgever

(1) De inschakeling door de opdrachtgever van andere personen in zijn belang bij de levering van de dienst of de enkele bekwaamheid van de opdrachtgever zelf bevrijdt de informatieverstrekker niet van zijn verplichtingen op grond van dit Hoofdstuk.
(2) De informatieverstrekker is van die verplichtingen bevrijdt indien de opdrachtgever reeds kennis draagt van de informatie of reden heeft de informatie te kennen.
(3) Voor de toepassing van lid (2) heeft de opdrachtgever 'reden te kennen' indien de informatie overduidelijk zou zijn voor een vergelijkbare opdrachtgever in dezelfde situatie als deze opdrachtgever, gezien alle ongebruikelijke feiten en omstandigheden die zonder onderzoek gekend worden door de opdrachtgever.

Artikel 6:109: Causaal verband

Indien de informatieverstrekker weet of behoort te weten dat een opvolgende beslissing zal worden gebaseerd op de informatie die zal worden verstrekt, wordt een tekortkoming van de informatieverstrekker vermoed de schade te hebben veroorzaakt wanneer de opdrachtgever aannemelijk maakt dat, indien de informatieverstrekker alle vereiste informatie zou hebben verstrekt, een redelijke opdrachtgever in dezelfde situatie als deze opdrachtgever serieus zou hebben overwogen om een andere opvolgende beslissing te nemen.

Hoofdstuk 7:
Behandeling

Artikel 7:101: Toepassingsgebied

(1) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij een partij, de behandelaar, geneeskundige behandeling zal verstrekken aan een andere partij, de patiënt.
(2) Dit Hoofdstuk is van toepassing op overeenkomsten waarbij de behandelaar gehouden is een andere dienst te verrichten ten einde de fysieke of geestelijke toestand van een persoon te veranderen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

(3) Indien de patiënt niet de partij is met wie de overeenkomst is gesloten, is de patiënt gerechtigd nakoming van de krachtens dit Hoofdstuk geldende verplichtingen van de behandelaar te vorderen overeenkomstig Artikel 6:110 PECL (Beding ten gunste van een derde).
(4) Indien een partij op basis van een overeenkomst gehouden is behandeling te verstrekken en een andere dienst te leveren, is dit Hoofdstuk van toepassing op de gedeelten van de overeenkomst die behandeling betreffen, voor zover nodig aangepast aan de bijzondere aard van de overeenkomst.

Artikel 7:102: Omstandigheden waaronder de dienst moet worden uitgevoerd

De verplichtingen op grond van Artikel 1:105 (Omstandigheden waaronder de dienst moet worden uitgevoerd) brengen in het bijzonder met zich dat de behandelaar, voor zover dit redelijkerwijs noodzakelijk is voor de uitvoering van de dienst, gehouden is om:

(a) navraag bij de patiënt te doen omtrent diens gezondheidstoestand, symptomen, vroegere ziekten, allergieën, vroegere of andere huidige behandelingen, en de voorkeuren en prioriteiten van de patiënt betreffende de behandeling;
(b) de onderzoeken uit te voeren welke noodzakelijk zijn om de gezondheidstoestand van de patiënt vast te stellen; en
(c) te overleggen met andere behandelaren die betrokken zijn bij de behandeling van de patiënt.

Artikel 7:103: Verplichtingen van de behandelaar aangaande hulpzaken en hulppersonen

De verplichtingen op grond van Artikel 1:106 (Verplichtingen van de dienstverlener aangaande hulpzaken en hulppersonen) brengen in het bijzonder met zich dat de behandelaar instrumenten, medicatie, materialen, apparaten en gebouwen moet gebruiken van ten minste de kwaliteit die geëist wordt door de aanvaarde en deugdelijke professionele beroepspraktijk, welke overeenstemmen met de toepasselijke wettelijke regels en welke geschikt zijn om gebruikt te worden voor het bijzondere doel waarvoor ze worden gebruikt.

Artikel 7:104: Zorgverplichting van de behandelaar

(1) De verplichtingen op grond van Artikel 1:107 (Algemene zorgverplichting bij diensten) verplichten in het bijzonder de behandelaar om de patiënt te voorzien van de zorg en bekwaamheid welke een zorgvuldige en bekwame behandelaar verstrekt en pretendeert te verstrekken.
(2) Indien het de behandelaar ontbeert aan de ervaring of bekwaamheid om de patiënt overeenkomstig Artikel 1:107 (Algemene zorgverplichting bij diensten) te behandelen, moet hij de patiënt verwijzen naar een behandelaar die kan voldoen aan de norm uiteengezet in deze regels.

Artikel 7:105: Informatieverplichting van de behandelaar

(1) De behandelaar moet, ten einde de patiënt een vrije keuze aangaande de behandeling te verschaffen, en op een wijze die voor de patiënt begrijpelijk is, de patiënt in het bijzonder informeren omtrent:
    (a) de gezondheidsstatus van de patiënt;
    (b) de aard van de voorgestelde behandeling;
    (c) de voordelen van de voorgestelde behandeling;

(d) de risico's van de voorgestelde behandeling;
(e) de alternatieven voor de voorgestelde behandeling, alsmede hun voordelen en risico's vergeleken met die van de voorgestelde behandeling; en
(f) de gevolgen van het afzien van enige behandeling.

(2) De behandelaar moet in ieder geval informeren omtrent enig risico of alternatief dat redelijkerwijs de beslissing van de patiënt zou kunnen beïnvloeden om al dan niet toestemming tot de voorgestelde behandeling te geven. Een risico wordt vermoed in staat te zijn om die beslissing te kunnen beïnvloeden indien zijn verwezenlijking zou leiden tot serieus nadeel voor een redelijke patiënt in die situatie. Tenzij anders is bepaald, is de informatieverplichting onderworpen aan de bepalingen van Hoofdstuk 6 (Informatie).

Artikel 7:106: Informatieverplichting in het geval van onnodige of experimentele behandeling

(1) Indien de behandeling onnodig is met het oog op de gezondheidstoestand van de patiënt, moeten alle bekende risico's worden medegedeeld.
(2) Indien de behandeling experimenteel van aard is, moet alle informatie betreffende de doelen van het experiment, de aard van de behandeling, de voordelen ervan en de risico's en alternatieven, ook als die slechts latent zijn, worden medegedeeld.

Artikel 7:107: Uitzonderingen op de informatieverplichting

(1) De informatie die op grond van de Artikelen 7:105 en 7:106 moet worden verstrekt, mag de patiënt worden onthouden:
(a) indien er objectieve redenen zijn om te geloven dat verstrekking van de informatie de gezondheid of het leven van de patiënt serieus en op negatieve wijze zou beïnvloeden; of
(b) indien de patiënt uitdrukkelijk verklaart dat hij niet geïnformeerd wil worden, mits het achterwege blijven van het mededelen van de informatie niet de gezondheid of veiligheid van derden in gevaar brengt.

(2) Artikel 7:105 is niet van toepassing indien de behandeling moet worden verzorgd in een noodsituatie. In een dergelijk geval moet de behandelaar, voor zover mogelijk, de informatie later verstrekken.

Artikel 7:108: Verplichting om toestemming te verkrijgen

(1) De behandelaar mag geen behandeling uitvoeren tenzij hij vooraf geïnformeerde toestemming van de patiënt heeft verkregen.
(2) De patiënt kan zijn toestemming op ieder moment herroepen.
(3) Voor zover de patiënt niet in staat is om zijn toestemming te geven, moet de behandelaar:
(a) geïnformeerde toestemming verkrijgen van een persoon die of van een instituut dat wettelijk bevoegd is om beslissingen betreffende de behandeling ten behoeve van de patiënt te nemen; of
(b) voldoen aan de regels of procedures die behandeling juridisch mogelijk maken zonder dergelijk toestemming.

(4) In de situatie beschreven in lid (3) moet de behandelaar, voor zover mogelijk, de opvatting van de onbekwame patiënt, en de voordat hij onbekwaam werd uitgedrukte opvatting van de patiënt in aanmerking nemen.
(5) In de situatie beschreven in lid (3) mag de behandelaar alleen behandelingen uitvoeren welke bedoeld zijn om de gezondheidtoestand van de patiënt te verbeteren.

(6) In de situatie beschreven in Artikel 7:106(2) moet de toestemming op uitdrukkelijke en specifieke wijze worden gegeven.
(7) Dit Artikel is niet van toepassing indien de behandeling moet worden geleverd in een noodsituatie.

Artikel 7:109: Verplichting tot verantwoording

(1) De behandelaar moet gepaste aantekeningen ten aanzien van de behandeling maken. Deze aantekeningen moeten in het bijzonder de informatie omvatten die in navolging van Artikel 7:102 is vergaard aangaande de toestemming van de patiënt en de informatie aangaande de uitgevoerde behandeling.
(2) De behandelaar moet toegang tot de aantekeningen geven aan de patiënt, of wanneer de patiënt onbekwaam is om toestemming te geven, aan de persoon die of het instituut dat wettelijk bevoegd is om beslissingen betreffende de behandeling ten behoeve van de patiënt te nemen.
(3) De behandelaar moet, voor zover redelijk, vragen aangaande de uitleg van de aantekeningen beantwoorden.
(4) Indien de behandelaar nalaat de leden (2) en (3) na te leven, wordt de schending van de verplichting op grond van Artikel 7:104 en het causaal verband vermoed te zijn gegeven.
(5) De behandelaar moet de aantekeningen bewaren, en informatie over de uitleg ervan geven, gedurende een redelijke termijn van ten minste 10 jaar nadat de behandeling geëindigd is, afhankelijk van de bruikbaarheid van de aantekeningen voor de patiënt of diens erfgenamen en voor toekomstige behandelingen. Aantekeningen waarvan redelijkerwijs verwacht kan worden dat zij van belang zijn nadat de redelijke termijn is geëindigd moeten ook nadien door de behandelaar worden bewaard. Indien om welke reden dan ook de behandelaar zijn activiteiten staakt, moeten de aantekeningen in bewaring worden gegeven of aan de patiënt worden overhandigd ten behoeve van latere raadpleging.
(6) De behandelaar mag informatie over de patiënt of andere personen betrokken bij de behandeling van de patiënt niet openbaar maken aan derden, tenzij openbaarmaking noodzakelijk is ten einde derden of het algemeen belang te beschermen. De behandelaar mag de aantekeningen op geanonimiseerde wijze gebruiken voor statistische of wetenschappelijke doeleinden.

Artikel 7:110: Rechten bij tekortkominge

Ten aanzien van enige tekortkoming zijn de Hoofdstukken 8 (Niet-nakoming en rechten bij tekortkoming in het algemeen) en 9 PECL (Afzonderlijke rechten bij tekortkoming) van toepassing, met de volgende aanpassingen:
(a) de behandelaar is niet gerechtigd de nakoming van zijn verplichtingen op te schorten of de overeenkomst ontbinden overeenkomstig Hoofdstuk 9, Afdelingen 2 (Opschorting van nakoming) en 3 PECL (Ontbinding van de overeenkomst) indien dit de gezondheidstoestand van de patiënt op serieuze wijze in gevaar brengt;
(b) voor zover de behandelaar het recht heeft de nakoming van zijn verplichtingen op te schorten of de overeenkomst ontbinden en voornemens is dat recht uit te oefenen, moet de behandelaar de patiënt verwijzen naar een andere behandelaar;
(c) indien de behandelaar nalaat overeenkomstig Artikel 7:109(2) en (3) te handelen, worden de tekortkoming en het causaal verband vermoed aanwezig te zijn; en
(d) ontbinding door de behandelaar is niet toegestaan, tenzij de patiënt nalaat te voldoen aan Artikel 1:104 (Samenwerkingsplicht).

Artikel 7:111: Centrale aansprakelijkheid van behandeling verstrekkende organisaties

(1) Indien bij de uitvoering van de behandelingsovereenkomst activiteiten plaatsvinden in een ziekenhuis of op het grondgebied van een andere behandeling verstrekkende organisatie, en het ziekenhuis of die andere behandeling verstrekkende organisatie geen partij is bij de behandelingsovereenkomst, moet het ziekenhuis of de andere behandeling verstrekkende organisatie dit aan de patiënt duidelijk maken.

(2) Indien de behandelaar niet kan worden bepaald, wordt het ziekenhuis of de andere behandeling verstrekkende organisatie waarin de behandeling heeft plaatsgevonden gezien als de behandelaar, tenzij het ziekenhuis of de andere behandeling verstrekkende organisatie de patiënt binnen een redelijke termijn informeert omtrent de identiteit van de behandelaar.

French*
Contrats de Service

Chapitre 1:
Dispositions Generales

Article 1:101: Champ d'application

(1) Le présent Chapitre s'applique au contrat dans lequel une partie, le prestataire de service, doit rendre un service à l'autre partie, le client, en contrepartie d'une rémunération.
(2) Le présent Chapitre s'applique aux contrats de construction, de travail sur une chose, de dépôt, de conception, de fourniture d'informations et de traitement médical, sauf disposition contraire dans les Chapitres 2 à 7.
(3) Lorsque, en vertu d'un contrat, une partie est tenue de rendre un service et de fournir quelque chose d'autre, tant ce Chapitre que, dans la mesure où cela est opportun, les Chapitres 2 à 7 s'appliquent aux parties du contrat qui concernent le service, avec les adaptations appropriées.
(4) Sans préjudice des dispositions du paragraphe (3), le présent Chapitre ne s'applique pas aux contrats de transport, d'assurance, de garantie ou de fourniture d'un produit ou service financier.
(5) Le présent Chapitre ne s'applique pas au contrat de travail.
(6) Le présent Chapitre, à l'exception de l'article 1:102, s'applique avec les adaptations appropriées au contrat par lequel le prestataire de service doit rendre un service au client sans rémunération en contrepartie.

Article 1:102: Prix

(1) Sauf accord contraire, un prestataire de service qui conclut le contrat dans le cadre d'une profession ou d'une activité commerciale a le droit de percevoir le prix du service.
(2) Lorsque le contrat ne fixe pas le prix ou la méthode permettant de le fixer, le prix est celui généralement demandé sur le marché au moment de la conclusion du contrat.

Article 1:103: Devoirs précontractuels de mise en garde

(1) Le prestataire de service est tenu d'un devoir précontractuel de mettre en garde le client si le prestataire apprend ou a une raison de savoir que le service demandé:
  (a) ne peut pas apporter le résultat déclaré ou envisagé par le client, ou
  (b) peut porter atteinte aux autres intérêts du client, ou
  (c) peut devenir plus onéreux ou prendre plus de temps que ce qui était raisonnablement attendu par le client.
(2) L'obligation de mise en garde prévue au paragraphe (1) ne s'applique pas si le client:
  (a) connaît déjà les risques mentionnés dans le paragraphe (1)(a), (b) ou (c); ou
  (b) a des raisons de connaître ces risques.

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* La traduction en langue française a été preparée par Monsieur le Professeur Jérôme Huet.

(3) Si un fait mentionné dans le paragraphe (1) survient et que le client n'avait pas été dûment mis en garde :
   (a) le client n'est pas tenu d'accepter une modification du service en vertu de l'article 1:111, sauf si le prestataire de service prouve que le client, s'il avait été mis en garde, aurait tout de même conclu le contrat en connaissant ledit fait; et
   (b) le client peut obtenir des dommages et intérêts en application de l'article 4:117(2) et (3) Principes Européens de Droit des Contrats (PEDC) (Dommages et intérêts).

(4) Le client est tenu d'une obligation précontractuelle de mettre en garde le prestataire de service s'il apprend, ou s'il a des raisons de connaître, l'existence de faits inhabituels qui peuvent rendre le service plus onéreux ou faire qu'il prenne plus de temps que ce qui était prévu par le prestataire de service.

(5) Si les faits auxquels il est fait référence dans le paragraphe (4) surviennent et que le prestataire de service n'avait pas été dûment mis en garde, le prestataire de service aura droit à:
   (a) des dommages et intérêts au titre de la perte qu'il a supportée en raison de l'inexécution; et
   (b) un ajustement du délai d'exécution requis pour la fourniture du service.

(6) Dans le cadre du paragraphe (1), le prestataire de service a ›des raisons de savoir‹ si les risques sont évidents pour un prestataire de service comparable placé dans la même situation que le prestataire de service, au vu de tous les faits et circonstances connus du prestataire de service sans recherche particulière, en tenant compte des informations que le prestataire de service doit réunir à propos du résultat déclaré ou envisagé par le client et des circonstances dans lesquelles le service doit être fourni.

(7) Dans le cadre des paragraphes (2)(b) et (4), le client a ›des raisons de savoir‹ si les risques sont évidents pour un client comparable placé dans la même situation que le client, au vu de tous les faits et circonstances connus du prestataire de service sans recherche particulière. Le client n'est pas considéré comme connaissant un risque, ou comme ayant des raisons de le connaître, simplement parce qu'il était compétent, ou était conseillé par un tiers compétent, dans le domaine concerné, sauf si ce tiers a agi en qualité de mandataire du client, auquel cas l'article 1:305 PEDC (Imputation de connaissance et d'intention) s'applique.

Article 1:104: Devoir de collaboration

(1) Le devoir de collaboration prévu à l'article 1:202 PEDC (Devoir de collaboration) requiert en particulier que:
   (a) le client réponde aux demandes raisonnables d'informations du prestataire de service dans la mesure où cela est nécessaire pour permettre au prestataire de service d'exécuter le contrat;
   (b) le client donne des instructions relatives à l'exécution du service dans la mesure où cela est raisonnablement nécessaire pour permettre au prestataire de service d'exécuter le contrat;
   (c) dans la mesure où le client doit obtenir des autorisations ou des licences, qu'il les obtienne au moment où elles sont raisonnablement nécessaires pour permettre au prestataire de service d'exécuter le contrat;
   (d) le prestataire de service donne l'occasion au client de vérifier s'il exécute ses obligations conformément au contrat; et

(e) les parties unissent leurs efforts respectifs, dans la mesure raisonnablement nécessaire, pour exécuter le contrat.

(2) Si le client ne respecte pas les devoirs prévus par le paragraphe (1)(a) ou (b), le prestataire de service peut soit suspendre l'exécution en vertu de l'article 9:201 PEDC (Droit de suspendre l'exécution), soit fonder l'exécution sur les attentes, les préférences et les priorités qui peuvent être considérées être celles d'une personne placée dans la même situation que le client, compte tenu des informations et des directives qui ont été recueillies, à condition que le client soit dûment informé conformément à l'article 1:110.

(3) Si le client ne respecte pas les devoirs prévus par le paragraphe (1) et que cela a pour conséquence que le service est plus onéreux et prend plus de temps que ce qui a été convenu dans le contrat, le prestataire de service aura droit à:

(a) des dommages et intérêts au titre de la perte qu'il subit en raison de l'inexécution; et

(b) un ajustement du délai d'exécution requis pour l'exécution du service.

Article 1:105: Circonstances dans lesquelles le service doit être exécuté

Le prestataire de service doit, dans la mesure où cela est raisonnablement nécessaire à l'exécution du service, réunir des informations sur les circonstances dans lesquelles le service doit être exécuté et garantir que l'exécution du service tiendra compte de ces circonstances.

Article 1:106: Devoirs du prestataire de service concernant les moyens mis en œuvre

(1) Le prestataire de service peut sous-traiter l'exécution du service, en totalité ou en partie, sans le consentement du client, sauf si l'exécution personnelle constitue une condition substantielle du contrat.

(2) Tout sous-traitant, ainsi engagé par le prestataire de service, doit avoir les compétences requises.

(3) Dans la mesure où le prestataire de service utilise des outils et des matériaux pour l'exécution du service, ils doivent être conformes au contrat et aux dispositions légales en vigueur, et répondre à l'objet particulier pour lequel ils sont utilisés.

(4) Dans la mesure où le prestataire de service doit céder au client la propriété d'un bien immeuble, d'un bien meuble ou d'une chose incorporelle, ou d'un droit, cette cession doit être exempte de tout droit ou de toute réclamation d'un tiers.

(5) Le prestataire de service doit organiser de manière adéquate l'exécution du service.

(6) Dans la mesure où des sous-traitants sont désignés par le client, ou des outils ou des matériaux fournis par le client, la responsabilité du prestataire de service est régie par les articles 1:109 et 1:110.

Article 1:107: Diligence généralement requise dans la fourniture de service

(1) Le prestataire doit fournir le service:

(a) avec la diligence et la compétence dont un prestataire de service raisonnable ferait preuve dans les mêmes circonstances; et

(b) conformément à toutes les dispositions impératives qui sont applicables au service.

(2) Si le prestataire de service affiche un niveau de diligence et de compétence plus élevée, il doit faire preuve de cette diligence et de cette compétence.

(3) Si le prestataire de service est, ou prétend être, membre d'un groupe de prestataires de service pour lequel des normes existent qui ont été fixées par une autorité compétente ou par ce groupe lui-même, le prestataire de service doit faire preuve de la diligence et de la compétence définies dans ces normes.

(4) Pour déterminer la diligence et la compétence que le client est en droit d'attendre, doivent être pris en considération, entre autres choses:
   (a) la nature, l'importance, la fréquence et la prévisibilité des risques encourus dans l'exécution du service pour le client;
   (b) si un dommage est survenu, les coûts des précautions qui auraient permis de l'éviter ou d'éviter qu'un dommage semblable ne survienne;
   (c) si le service est rendu par un non-professionnel ou gratuitement;
   (d) le montant de la rémunération pour le service; et
   (e) le temps raisonnablement envisageable pour l'exécution du service.
(5) Les devoirs prévus par le présent article requièrent en particulier que le prestataire de service prenne des précautions raisonnables pour prévenir la survenance de préjudice corporel ou de préjudice occasionné aux biens immeubles et aux biens meubles ou aux choses incorporelles du fait de l'exécution du service.

Article 1:108: Résultat déclaré ou envisagé par le client

Le prestataire de service doit obtenir le résultat déclaré ou envisagé par le client au moment de la conclusion du contrat, sous réserve que:
(a) tout résultat envisagé mais non déclaré soit un résultat qu'un client raisonnable, placé dans les mêmes circonstances que le client, pourrait envisager; et
(b) un client raisonnable dans les mêmes circonstances n'ait aucune raison de croire qu'il existait un risque important que le résultat ne soit pas obtenu grâce au service.

Article 1:109: Instructions données par le client

(1) Le prestataire de service doit suivre toutes les instructions opportunes du client relatives à l'exécution du service, sous réserve que ces instructions:
   (a) soient contenues dans le contrat lui-même ou soient spécifiées dans un document auquel se réfère le contrat; ou
   (b) résultent des choix laissés au client par le contrat en application de l'article 6:105 PEDC (Détermination unilatérale par une partie); ou
   (c) résultent de la réalisation des choix initialement laissés ouverts par les parties.
(2) Si l'inexécution d'un ou plusieurs des devoirs du prestataire de service prévus par les articles 1:107 ou 1:108 découle du fait qu'une instruction entrant dans le champ d'application du paragraphe (1) a été suivie, le prestataire de service n'est pas responsable en vertu de ces articles, à condition que le client ait été dûment mis en garde conformément à l'article 1:110.
(3) Si le prestataire de service estime qu'une instruction entrant dans le champ d'application du paragraphe (1) constitue une modification du contrat au regard de l'article 1:111, le prestataire de service doit en informer le client. A moins que le client ne révoque alors l'instruction sans retard injustifié, le prestataire de service doit la suivre et elle est considérée constituer une modification du contrat.

Article 1:110: Obligation contractuelle du prestataire de service de mettre en garde

(1) Le prestataire de service a l'obligation de mettre en garde le client s'il apprend ou a une raison de savoir que le service demandé:
   (a) ne peut pas apporter le résultat déclaré ou envisagé par le client au moment de la conclusion du contrat, ou
   (b) peut porter atteinte aux autres intérêts du client, ou

(c) peut devenir plus onéreux ou prendre plus de temps que cela avait été convenu dans le contrat,

en raison soit des informations ou des instructions données par le client ou recueillies conformément à l'article 1:105, soit de la survenance de tout autre risque.

(2) Le prestataire de service doit prendre des mesures raisonnables pour garantir que le client comprenne le contenu de la mise en garde.

(3) L'obligation de mise en garde prévue au paragraphe (1) ne s'applique pas si le client:
(a) connaît déjà les risques mentionnés dans le paragraphe (1)(a), (b) ou (c); ou
(b) a des raisons de connaître ces risques.

(4) Si un fait mentionné dans le paragraphe (1) survient et que le client n'avait pas été dûment mis en garde, le client n'est pas tenu d'accepter une modification du service en vertu de l'article 1:111.

(5) Pour l'application du paragraphe (3)(b), le client a ›une raison de savoir‹ si les risques seraient évidents pour un prestataire de service comparable, placé dans la même situation que le prestataire de service, au vu de tous les faits et circonstances connus du prestataire de service sans recherche particulière

(6) Pour l'application du paragraphe (3)(b), le client a ›des raisons de connaître‹ les risques s'ils seraient évidents pour un client comparable, placé dans la même situation que le client, au vu de tous les faits et circonstances connus du prestataire de service sans recherche particulière. Le client n'est pas présumé connaître risque, ou avoir des raisons de le connaître, simplement parce qu'il est compétent, ou est conseillé par un tiers compétent, dans le domaine concerné, sauf si ce tiers a agi en qualité de mandataire du client, auquel cas l'article 1: 305 PEDC (Imputation de connaissance et d'intention) s'applique.

Article 1:111: Modification du service

(1) Sans préjudice du droit du client de résilier le contrat en vertu de l'article 1:115, une partie doit accepter une modification du service à rendre en vertu du contrat en raison d'une instruction donnée conformément à l'article 1:109, si cette modification est raisonnable, compte tenu:
(a) du résultat du service qui doit être obtenu;
(b) des intérêts du client;
(c) des intérêts du prestataire de service; et
(d) des circonstances existant au moment de la modification du service.

(2) Une modification du service est considérée comme raisonnable, si cette modification:
(a) est nécessaire pour permettre au prestataire de service d'agir conformément à l'article 1:107 ou, selon le cas, à l'article 1:108, ou
(b) est la conséquence d'une instruction qui est donnée conformément à l'article 1:109(1) et que le client ne l'a pas révoquée sans retard injustifié après avoir été informé en application de l'article 1:109(3); ou
(c) est une réponse raisonnable à une mise en garde de la part du prestataire de service en vertu de l'article 1:110.

(3) Pour l'application des paragraphes (1) et (2), une modification de service requise par un changement de circonstances au sens de l'article 6:111 PEDC (Changement de circonstances) est considérée comme une modification raisonnable du service.

(4) Le prix qui est dû en raison de la modification du service doit être raisonnable et doit être fixé en utilisant les mêmes méthodes de calcul que celles qui ont été utilisées pour établir le prix initial du service.

(5) Si le service est réduit, la perte de revenus, les dépenses économisées et toute possibilité que le prestataire de service puisse utiliser la capacité de travail libérée à d'autres fins doivent être prises en considération dans le calcul du prix qui est dû en raison de la modification du service.
(6) Une modification du service peut conduire à un ajustement du délai d'exécution proportionnel au travail supplémentaire requis par rapport au travail et à la durée estimés nécessaires à l'origine pour l'exécution du service.

Article 1:112: Recours en cas d'inexécution de ses obligations par le prestataire de service

(1) Les dommages et intérêts dus au client comprennent les frais que le client a assumés pour établir la violation d'une obligation du prestataire de service, et pour permettre que le résultat déclaré ou envisagé par lui soit atteint, sous réserve qu'il ait agi raisonnablement en engageant ces frais.
(2) Si le prestataire de service a violé une obligation contractuelle, qu'on ne sait pas encore si le résultat déclaré ou envisagé par le client sera atteint, ce dernier peut suspendre l'exécution des obligations réciproques en vertu de l'article 9:201 PEDC (Droit de suspendre l'exécution).
(3) Le client n'a le droit de résilier le contrat en application de l'article 9:304 PEDC (Inexécution par anticipation) que s'il est clair que la violation d'une obligation contractuelle du prestataire de service aboutira à une inexécution d'une obligation essentielle du contrat au regard de l'article 8:103 PEDC (Inexécution essentielle).

Article 1:113: Absence de notification de non-conformité

(1) Le client a l'obligation d'informer le prestataire de service s'il apprend, ou si un client comparable, placé dans la même situation que lui, au vu de tous les faits et de toutes les circonstances connues de lui sans recherche particulière, a des raisons de savoir que le prestataire de service soit n'atteindra pas le résultat déclaré ou envisagé par lui, soit n'a pas obtenu ce résultat.
(2) Si le client ne met pas en garde en application du paragraphe (1) que le prestataire de service n'atteindra pas le résultat déclaré ou envisagé par le client, et que de ce fait le service deviendra plus onéreux ou prendra plus de temps que convenu contractuellement, le prestataire de service aura droit à:
  (a) des dommages et intérêts au titre de la perte supportée par lui en raison de l'inexécution; et
  (b) un ajustement du délai d'exécution requis pour l'exécution du service.

Article 1:114: Limitation de responsabilité

(1) Le prestataire de service ne peut ni limiter ni exclure sa responsabilité en cas de décès ou de préjudice corporel causé par l'exécution du service.
(2) Le prestataire de service peut limiter ou exclure sa responsabilité au titre d'un préjudice, autre que le décès ou le préjudice corporel, occasionné par l'exécution du service si, au moment de la conclusion du contrat, une disposition à cet effet peut être considérée équitable et raisonnable dans les circonstances de l'espèce, sauf dispositions contraires prévues dans les Chapitres 2 à 7.

Article 1:115: Résiliation du contrat de service

(1) Le client peut résilier le contrat à tout moment.
(2) Si le contrat est résilié en vertu du présent article, le prestataire de service a droit à des dommages et intérêts destinés à le placer dans la situation la plus proche possible de celle dans laquelle il se serait trouvé si le contrat avait été dûment exécuté. Ces dommages et intérêts couvrent la perte subie par le prestataire de service et les gains dont il a été privé.
(3) Pour déterminer la situation dans laquelle le prestataire de service doit être placé en vertu du paragraphe (2), doivent être prises en considération, entre autres choses, les règles suivantes:
   (a) si le paiement d'un prix était convenu, le prestataire de service a droit à ce prix, diminué des dépenses qui devraient raisonnablement être économisées et de l'avantage qui devrait raisonnablement être tiré de la capacité de travail rendue disponible;
   (b) si le paiement d'un prix fixé à un tarif particulier était convenu, le prestataire de service a droit au paiement du prix calculé sur la base de ce tarif, au prorata du service déjà exécuté; et
   (c) si le paiement d'un prix fondé sur le principe ›pas de rémunération sans travail fait‹ était convenu, le prestataire de service a droit au paiement à la fois des coûts raisonnablement engagés, au prorata du service déjà exécuté, et des gains dont il a été privé en raison de la résiliation.

Chapitre 2:
Construction

Article 2:101: Champ d'application

(1) Le présent Chapitre s'applique au contrat dans lequel une partie, le constructeur, doit réaliser un édifice ou tout autre ouvrage immobilier, ou modifier de manière importante un ouvrage existant ou tout autre bien immobilier, selon des plans fournis par le client
(2) Le présent Chapitre s'applique avec des adaptations appropriées au contrat dans lequel le constructeur doit réaliser un bien meuble ou une chose incorporelle, selon des plans fournis par le client.
(3) Le présent Chapitre s'applique avec les adaptations appropriées aux contrats en vertu desquels le constructeur doit réaliser un édifice ou tout autre ouvrage immobilier, réaliser des travaux de construction sur un ouvrage existant ou tout autre bien immeuble, ou réaliser un bien meuble ou une chose incorporelle, selon des plans fournis par le constructeur.
(4) Lorsqu'une partie, en vertu d'un contrat, est tenue à la fois de réaliser une construction et de rendre un autre service, le présent Chapitre s'applique aux aspects du contrat qui concernent la construction, avec des adaptations appropriées.

Article 2:102: Devoir de collaboration du client

(1) Les devoirs prévus par l'article 1:202 PEDC (Devoir de collaboration) et 1:104 (Devoir de collaboration) imposent en particulier au client:
   (a) qu'il donne accès au site sur lequel s'effectue la construction dans la mesure où cela est raisonnablement nécessaire pour permettre au constructeur d'exécuter le contrat; et
   (b) que, dans la mesure où ils doivent être fournis par le client, ce dernier fournisse les composants, les matériaux et les outils au moment où ils sont raisonnablement nécessaires pour permettre au constructeur d'exécuter le contrat.

Article 2:103: Diligence requise du constructeur

Les devoirs prévus par l'article 1:107 (Diligence généralement requise dans la fourniture de service) requièrent en particulier du constructeur qu'il prenne des précautions raisonnables en vue d'éviter tout dommage causé à l'ouvrage.

Article 2:104: Conformité

(1) Le constructeur doit délivrer un ouvrage dont la quantité, la qualité et la description sont celles définies par le contrat.

(2) Sauf accord contraire des parties, l'ouvrage n'est pas conforme au contrat:

(a) s'il n'est pas adapté au but particulier indiqué expressément ou tacitement au constructeur au moment de la conclusion du contrat ou au moment d'une modification en vertu de l'article 1:111 (Modification du contrat de service); ou

(b) s'il n'est pas adapté au but ou aux buts dans lesquels un ouvrage correspondant à la même description est normalement utilisé.

(3) Le client n'a pas le droit de prétendre à un dédommagement pour non-conformité si une instruction qu'il a donnée en application de l'article 1:109 (Instructions données par le client) est la cause de la non-conformité et que le constructeur n'a pas manqué à son obligation de mise en garde découlant de l'article 1:110 (Obligation contractuelle du prestataire de service de mettre en garde).

Article 2:105: Inspection, supervision et acceptation

(1) Conformément à l'article 1:104(1)(d) (Devoir de collaborer), le client peut inspecter et superviser les moyens mis en œuvre dans le processus de construction et l'ouvrage en résultant, d'une manière raisonnable et à tout moment raisonnable, encore qu'il ne soit pas tenu de le faire.

(2) Si les parties conviennent que le constructeur doit présenter certains éléments des moyens mis en œuvre, du processus de construction ou de l'ouvrage en résultant au client aux fins d'acceptation, le constructeur peut ne pas poursuivre la construction avant d'y avoir été autorisé par le client.

(3) L'absence d'acceptation, d'inspection ou de supervision ou une acceptation, une inspection ou une supervision inadéquate, n'exonère ni totalement ni partiellement le constructeur de sa responsabilité. Cette règle s'applique également lorsque le client est tenu contractuellement d'accepter, d'inspecter et de superviser l'ouvrage ou sa construction.

Article 2:106: Mise à disposition de l'ouvrage

(1) Si le constructeur estime que l'ouvrage, ou toute partie de celui-ci destinée à un usage distinct, est dans un état d'achèvement suffisant et souhaite en transférer le contrôle au client, ce dernier doit accepter ce contrôle dans un délai raisonnable après en avoir été informé. Le client peut refuser d'accepter le contrôle lorsque l'ouvrage, ou la partie concernée de celui-ci qui est destinée à un usage distinct, n'est pas conforme au contrat et que cette non-conformité le rend impropre à son usage.

(2) L'acceptation par le client du contrôle de l'ouvrage n'exonère ni totalement, ni partiellement, le constructeur de sa responsabilité. Cette règle s'applique également lorsque le client est tenu contractuellement d'accepter, d'inspecter ou de superviser l'ouvrage ou la construction de celui-ci.

Article 2:107: Paiement du prix

Le prix ou une partie de celui-ci est dû et exigible au moment où le constructeur transfère le contrôle de l'ouvrage, ou d'une partie de celui-ci au client conformément à l'article 2:106.

Article 2:108: Risques

(1) Le présent article s'applique si l'ouvrage est détruit ou endommagé en raison d'un événement dont le constructeur ne peut être tenu pour responsable et qu'il ne pouvait éviter ou surmonter.

(2) Si la situation mentionnée au paragraphe (1) a été occasionnée par un fait survenant avant que l'ouvrage ou son contrôle aient été, ou aient dû être, transféré au client conformément à l'article 2:106 et s'il est toujours possible de poursuivre l'exécution:
   (a) le constructeur doit alors, si possible, exécuter à nouveau;
   (b) le client est seulement obligé de payer l'exécution réalisée par le constructeur en vertu de (a);
   (c) le délai de réalisation est prorogé conformément à l'article 1:111(6) (Modification du contrat de service);
   (d) les règles posées par l'article 8:108 PEDC (Exonération résultant d'un empêchement) peuvent s'appliquer à l'exécution initiale du constructeur; et
   (e) le constructeur n'est pas obligé d'indemniser le client au titre des pertes de moyens fournis par le client.

(3) Si la situation mentionnée au paragraphe 1 a été occasionnée par un fait survenu avant que l'ouvrage ou son contrôle aient été, ou aient dû être, transférés au client conformément à l'article 2:106, et si l'exécution n'est plus possible:
   (a) le client n'a pas à payer pour le service rendu;
   (b) les règles de l'article 8:108 PEDC (Exonération résultant d'un empêchement) peuvent s'appliquer à l'exécution; et
   (c) le constructeur n'est pas obligé d'indemniser le client au titre des pertes relatives aux moyens fournis par ce dernier, mais est tenu de lui restituer l'ouvrage ou ce qu'il en reste.

(4) Lorsque la situation mentionnée au paragraphe 1 a été occasionnée par un fait survenu après que l'ouvrage ou son contrôle ont été, ou auraient dû être, transférés au client en application de l'article 2:106:
   (a) le constructeur n'a pas à exécuter à nouveau; et
   (b) le client reste tenu de payer le prix.

Article 2:109: Exécution en nature et mise en conformité

(1) Si le constructeur ne livre pas un ouvrage conforme au regard de l'article 2:104, le client a le droit de voir la non-conformité corrigée en demandant une exécution en nature en vertu de l'article 9:102 PEDC (Obligations autres que de somme d'argent), sous réserve que:
   (a) l'exécution ne soit pas illégale ou impossible;
   (b) l'exécution ne nécessite pas de la part du constructeur des efforts ou des dépenses déraisonnables; et
   (c) l'exécution ne consiste pas en la fourniture de service ou la réalisation d'un ouvrage présentant un caractère personnel ou dépendant de relations personnelles.

(2) L'article 9:102(d) PEDC (Obligations autres que de somme d'argent) ne s'applique pas lorsqu'on est dans les cas visés au paragraphe (1).

(3) Si le constructeur ne délivre un ouvrage conforme aux termes de l'article 2:104, il est en droit d'assurer la mise en conformité, si cela est possible;
   (a) avant la fin d'un délai supplémentaire d'une durée raisonnable fixé par un avis notifié par le client en application de l'article 8:106(3) PEDC (Notification d'un délai supplémentaire pour l'exécution); et
   (b) avant que le retard occasionné par la correction ne constitue une inexécution essentielle au sens de l'article 8:103 (b) ou (c) PEDC (Inexécution essentielle).

(4) L'article 8:103(a) PEDC (Inexécution essentielle) ne s'applique à aucun cas visé au paragraphe (3), à moins qu'il ne soit expressément convenu que le strict respect du délai de livraison constitue une condition substantielle du contrat.

(5) Le constructeur est libre de choisir comment respecter l'obligation d'exécution en nature. En particulier, il est libre de décider s'il doit réparer l'ouvrage, le remplacer par un nouvel ouvrage ou faire réparer l'ouvrage à ses frais par un tiers.

(6) Jusqu'à ce que le constructeur ait corrigé la non-conformité, le client peut suspendre l'exécution en vertu de l'article 9:201 PEDC (Droit de suspendre l'exécution).

(7) Le client peut réclamer des dommages et intérêts en vertu du chapitre 9, section 5 PEDC (Dommages et intérêts) au titre d'un préjudice non réparé par le constructeur.

Article 2:110: Exercice d'autres recours

(1) Le client peut exercer d'autres recours, si
   (a) le constructeur refuse d'assurer la mise en conformité, étant dans un cas où elle ne peut pas être exigée par le client en vertu de l'article 2:109(1); ou
   (b) le constructeur n'est pas en état d'effectuer ou n'effectue pas la mise en conformité telle qu'elle est prévue à l'article 2:109(3).

(2) Le client peut résilier le contrat conformément au chapitre 9, section 3 PEDC (Résolution du contrat), si la non-conformité constitue une inexécution essentielle en vertu de l'article 8:103(b) ou (c) PEDC (Inexécution essentielle).

(3) Le client peut réduire le prix conformément à l'article 9:401 PEDC (Droit de réduire le prix).

(4) Le client peut réclamer des dommages et intérêts en vertu du chapitre 9, section 5 PEDC (Dommages et intérêts), notamment pour les coûts de réparation ou de remplacement.

Article 2:111: Prescription des recours en matière de non-conformité

(1) Conformément à l'article 14:201 PEDC (Délai de droit commun), le délai de prescription d'un recours pour non-conformité d'un ouvrage est de trois ans.

(2) Conformément à l'article 14:203(1) PEDC (point de départ), la prescription commence à courir à compter du moment où le contrôle de l'ouvrage, ou d'une partie de celui-ci, est transféré au client en application de l'article 2:106.

(3) Conformément à l'article 14:301(1) PEDC (Suspension en cas d'ignorance), le délai de prescription est suspendu aussi longtemps que le créancier ignore, et ne pouvait pas raisonnablement connaître, les faits générateurs de la créance, y compris, dans le cas d'une créance de dommages et intérêts, le type de dommage subi. Cette suspension ne joue pas pour les recours autres que les demandes en dommages et intérêts.

(4) Conformément à l'article 14:307 PEDC (Durée maximum du délai), le délai de prescription ne peut, par l'effet de la suspension ou de la prorogation de son expiration, excéder dix ans ou, lorsqu'il s'agit de créances de réparation de dommages à la personne, trente ans. Cette règle ne s'applique pas à la suspension prévue par l'article 14:302 (Suspension en cas de procédure judiciaire ou extrajudiciaire).

Chapitre 3:
Travail sur une Chose

Article 3:101: Champ d'application
(1) Le présent Chapitre s'applique au contrat dans lequel une partie, l'entrepreneur, doit exécuter un travail sur un bien meuble ou une chose incorporelle ou sur un bien immobilier pour une autre partie, le client.
(2) Le présent Chapitre s'applique en particulier au contrat dans lequel l'entrepreneur doit réparer, entretenir ou nettoyer un bien meuble ou une chose incorporelle ou un bien immobilier.
(3) Si, en vertu du contrat, une partie est tenue d'effectuer un travail sur une chose et de rendre un autre service, le présent Chapitre s'applique aux aspects du contrat qui concernent le travail sur la chose, avec les adaptations appropriées.

Article 3:102: Devoir de collaboration du client
Les devoirs prévus par l'article 1:202 PEDC (Devoir de collaboration) et l'article 1:104 (Devoir de collaboration) requièrent en particulier du client:
(a) qu'il remette la chose ou en transfère le contrôle à l'entrepreneur, ou qu'il donne accès au site sur lequel le travail doit être réalisé dans la mesure raisonnablement nécessaire pour permettre à l'entrepreneur d'exécuter le contrat; et
(b) dans la mesure où cela lui incombe, qu'il fournisse les composants, les matériaux et les outils au moment raisonnablement nécessaire pour permettre à l'entrepreneur d'exécuter le contrat.

Article 3:103: Circonstances dans lesquelles le service doit être exécuté
Les devoirs prévus par l'article 1:105 (Circonstances dans lesquelles le service doit être exécuté) exigent en particulier de l'entrepreneur qu'il recueille des informations relatives aux caractéristiques de la chose sur laquelle le travail doit être exécuté dans la mesure raisonnablement nécessaire pour l'exécuter.

Article 3:104: Diligence requise de l'entrepreneur
Les devoirs prévus par l'article 1:107 (Diligence généralement requise dans la fourniture de service) requièrent en particulier de l'entrepreneur qu'il prenne des précautions raisonnables pour prévenir tout dommage sur la chose ou tout autre préjudice.

Article 3:105: Conformité
L'entrepreneur doit parvenir au résultat spécifique déclaré ou envisagé par le client au moment de la conclusion du contrat, sous réserve que:
(a) tout résultat envisagé mais non déclaré soit un résultat qu'un client raisonnable, placé dans les mêmes circonstances que le client, pourrait envisager: et
(b) un client raisonnable, placé dans les mêmes circonstances, n'ait aucune raison de croire qu'il existait un risque important que le résultat ne soit pas obtenu grâce au travail sur la chose.

Article 3:106: Inspection et supervision

(1) Conformément à l'article 1:104(1)(d) (Devoir de collaborer), si le travail doit être effectué sur un site fourni par le client, ce dernier peut inspecter et superviser les moyens mis en œuvre, l'exécution du travail et la chose sur laquelle il est exécuté d'une manière raisonnable et à tout moment raisonnable, mais n'est pas tenu de le faire.

(2) L'absence d'acceptation, d'inspection ou de supervision ou une acceptation, une inspection ou une supervision inadéquate, n'exonère ni totalement ni partiellement l'entrepreneur de sa responsabilité. La présente règle s'applique également lorsque le client est tenu contractuellement d'accepter, d'inspecter et de superviser le travail sur la chose.

Article 3:107: Restitution de la chose

(1) Si le l'entrepreneur estime que le travail est dans un état d'achèvement suffisant et souhaite restituer la chose ou en rendre le contrôle au client, ce dernier doit accepter cette restitution ou ce contrôle dans un délai raisonnable après en avoir été informé. Le client peut refuser d'accepter la restitution ou le contrôle lorsque la chose n'est pas susceptible d'être utilisée conformément au but pour lequel il a fait exécuter le travail, sous réserve que ce but ait été connu de l'entrepreneur ou que ce dernier ait eu autrement des raisons de le connaître.

(2) L'entrepreneur doit restituer la chose ou son contrôle dans un délai raisonnable après que le client en a fait la demande.

(3) L'acceptation par le client de la restitution de la chose ou de son contrôle ne constitue pas une renonciation aux droits prévus en matière d'inexécution.

(4) Si, en raison de la nature de la chose et du travail convenu, l'entrepreneur est devenu le propriétaire de la chose du fait de l'exécution du contrat, il doit transférer la propriété de la chose lorsque celle-ci est restituée.

Article 3:108: Paiement du prix

Le prix est dû et exigible au moment où l'entrepreneur restitue la chose ou son contrôle au client conformément à l'article 3:107 ou au moment où le client, sans avoir le droit de le faire, refuse d'accepter le retour de la chose.

Article 3:109: Risques

(1) Le présent article s'applique si la chose est détruite ou endommagée en raison d'un fait dont l'entrepreneur ne peut être tenu pour responsable et qu'il ne pouvait éviter ou surmonter.

(2) Si, avant le fait mentionné au paragraphe (1), l'entrepreneur avait indiqué qu'il considérait que le service était suffisamment achevé et qu'il souhaitait restituer la chose ou son contrôle au client:

(a) l'entrepreneur n'a pas à exécuter à nouveau; et

(b) le client doit payer le prix.

Le prix est dû à compter de la survenance du fait et du moment où l'entrepreneur restitue ce qui reste de la chose, s'il en reste, à moins que le client n'indique qu'il n'en veut pas. Dans ce dernier cas, l'entrepreneur peut disposer des restes aux frais du client. La présente disposition ne s'applique pas si le client avait le droit de refuser la restitution de la chose en vertu de l'article 3:107(1).

(3) Si les parties étaient convenues que l'entrepreneur serait payé par périodes successives, le client est obligé de payer le prix pour chaque période passée avant la survenance du fait mentionné au paragraphe (1).

(4) Si, après la survenance du fait mentionné au paragraphe (1), l'exécution du contrat est toujours possible pour l'entrepreneur:
   (a) l'entrepreneur reste tenu d'exécuter, le cas échéant, à nouveau;
   (b) le client est seulement obligé de payer pour l'exécution effectuée par l'entrepreneur en vertu de (a); le droit de l'entrepreneur de percevoir le prix en vertu du paragraphe (3) n'est pas affecté par cette disposition;
   (c) le client est obligé de rembourser à l'entrepreneur les coûts que ce dernier a engagés pour acquérir les matériaux en remplacement de ceux fournis par le client, à moins que le client à la demande de l'entrepreneur ne fournisse ces matériaux lui-même; et
   (d) si besoin est, le délai d'exécution est prorogé conformément à l'article 1:111(6) (Modification du contrat service).
(5) Si, dans la situation mentionnée au paragraphe (1), l'exécution du contrat n'est plus possible pour l'entrepreneur:
   (a) le client n'a pas à payer pour le service rendu; le droit de l'entrepreneur à percevoir le prix en vertu du paragraphe (3) n'est pas affecté par la présente disposition; et
   (b) l'entrepreneur est obligé de restituer au client la chose et les matériaux fournis par lui ou ce qu'il en reste.

Article 3:110: Exécution en nature et mise en conformité

(1) Si l'entrepreneur n'a pas respecté les devoirs prévus à l'article 3:105, le client peut réclamer une exécution en nature en application de l'article 9:102 PEDC (Obligations autres que de somme d'argent), le (d) dudit article ne s'appliquant pas.
(2) L'entrepreneur peut porter remède à la non-conformité, à condition que cela puisse se faire:
   (a) avant l'expiration du délai supplémentaire d'une durée raisonnable fixée par un avis notifié par le client en vertu de l'article 8:106(3) PEDC (Notification d'un délai supplémentaire pour l'exécution); et
   (b) avant que le retard occasionné par la correction ne constitue une inexécution essentielle en vertu de l'article 8:103(b) ou (c) PEDC (Inexécution essentielle).
(3) L'article 8:103(a) PEDC (Inexécution essentielle) ne s'applique pas aux cas prévus par le paragraphe (2), sauf s'il est expressément convenu que le strict respect de la délivrance constitue une condition substantielle du contrat.
(4) L'entrepreneur a le droit de choisir la méthode d'exécution en nature ou de mise en conformité.
(5) Jusqu'à ce que l'entrepreneur ait corrigé la non-conformité, le client peut suspendre l'exécution en vertu de l'article 9:201 PECL (Droit de suspendre l'exécution).
(6) Le client peut réclamer des dommages et intérêts en vertu du chapitre 9, section 5 PEDC (Dommages et intérêts) pour tout préjudice non réparé par la mise en conformité.

Article 3:111: Exercice d'autres recours

(1) Le client peut exercer d'autres recours prévus dans le présent article, au cas où
   (a) il n'a pas le droit de demander une exécution en nature en vertu de l'article 9:102 PEDC (Obligations autres que de sommes d'argent) et de l'article 3:110(1); et
   (b) l'entrepreneur n'est pas capable d'effectuer ou n'effectue pas la mise en conformité conformément à l'article 3:110(2).
(2) Le client peut résilier le contrat conformément au chapitre 9, section 3 PEDC (Résolution du contrat), si la non-conformité constitue une inexécution essentielle en vertu de l'article 8:103(b) ou (c) PEDC (Inexécution essentielle).

(3) Le client peut réduire le prix conformément à l'article 9:401 PEDC (Droit de réduire le prix).
(4) Le client peut réclamer des dommages et intérêts en vertu du chapitre 9, section 5 PEDC (Dommages et intérêts) comprenant les coûts de réparation ou de remplacement.

Article 3:112: Limitation de responsabilité

Dans les contrats passés entre professionnels, une clause restreignant la responsabilité de l'entrepreneur pour une inexécution affectant la valeur de la chose, quand bien même le travail aurait été réalisé correctement, est présumée être équitable et raisonnable au sens de l'article 1:114(2) (Limitation de responsabilité), sauf si le dommage a été occasionné intentionnellement ou du fait d'une négligence grave de la part de l'entrepreneur ou d'une personne dont les actes engagent la responsabilité de ce dernier.

Chapitre 4:
Depôt

Article 4:101: Champ d'application

(1) Le présent Chapitre s'applique au contrat dans lequel une partie, le dépositaire, doit assurer la garde d'un bien meuble ou d'une chose incorporelle pour une autre partie, le client, ou déposant.
(2) Lorsqu'en vertu d'un contrat, une partie est tenue à la fois de garder une chose et de rendre un autre service, le présent Chapitre s'applique avec les adaptations appropriées aux aspects du contrat qui concernent le dépôt.
(3) Le présent Chapitre ne s'applique pas à la garde:
(a) d'un bien immeuble;
(b) des biens meubles ou des choses incorporelles pendant leur transport; et
(c) d'argent, de titres ou de droits.

Article 4:102: Devoir précontractuel du client de mettre en garde

Le devoir prévu par l'article 1:103(4) (Devoirs précontractuels de mettre en garde) requiert en particulier du client qu'il mette en garde le dépositaire de tout danger inhabituel lié à la chose, ou à sa conservation, et dont il a connaissance.

Article 4:103: Circonstances dans lesquelles le service doit être exécuté

Les devoirs prévus par l'article 1:105 (Circonstances dans lesquelles le service doit être exécuté) exigent en particulier du dépositaire qu'il recueille des informations sur les caractéristiques de la chose à conserver dans la mesure où cela est nécessaire pour l'exécution du service.

Article 4:104: Devoirs du dépositaire concernant les moyens mis en œuvre

(1) Les devoirs prévus par l'article 1:106 (Devoirs du prestataire de service concernant les moyens mis en œuvre) exigent en particulier que le dépositaire, dans la mesure où il fournit les locaux, s'assure qu'ils soient adaptés au dépôt de la chose, de manière à ce que celle-ci puisse être restituée dans l'état que le client peut attendre.
(2) Le dépositaire ne peut sous-traiter l'exécution du service sans le consentement du déposant.

Article 4:105: Diligence requise du dépositaire

(1) Les devoirs prévus par l'article 1:107 (Diligence généralement requise dans la fourniture de service) exigent en particulier du dépositaire qu'il prenne des précautions raisonnables pour prévenir une détérioration, une altération ou une dépréciation de la chose gardée.
(2) Le dépositaire peut utiliser la chose remise aux fins de garde que si le client a accepté cet usage.

Article 4:106: Restitution de la chose

(1) Le dépositaire doit restituer la chose dans un délai raisonnable après la demande du client.
(2) Le client doit accepter la restitution de la chose au moment convenu ou, si le dépositaire résilie le contrat pour inexécution par le client, dans un délai raisonnable après la notification de la résiliation du contrat.
(3) La simple acceptation du client de la restitution de la chose ne constitue pas une renonciation aux droits liés à l'inexécution.
(4) Si le client n'accepte pas la restitution de la chose au moment prévu au paragraphe (2), le dépositaire a le droit de vendre la chose conformément à l'article 7:110(2)(b) PEDC (Refus de recevoir un bien), sous réserve que ce dernier ait donné au client une mise en garde raisonnable de son intention de le faire.
(5) Si, durant le dépôt, la chose génère des fruits, le dépositaire doit remettre ces fruits lors de la restitution de la chose au client.
(6) Si, en raison de la nature de la chose ou du contrat, le dépositaire devient le propriétaire de la chose du fait de l'exécution du contrat, il doit restituer une chose de la même nature, de la même qualité et en quantité identique et transférer la propriété de cette chose, dans les conditions prévues au paragraphe (1).
(7) Le présent article s'applique de la même manière si un tiers qui a le droit de recevoir la chose demande qu'elle lui soit remise.

Article 4:107: Conformité

(1) Le dépositaire doit conserver la chose conformément au contrat.
(2) La conservation de la chose n'est conforme au contrat que si la chose est restituée dans le même état que celui dans lequel elle était lorsqu'elle a été remise au dépositaire.
(3) Si, compte tenu de la nature de la chose ou du contrat, il ne peut être raisonnablement attendu que la chose soit restituée dans le même état, la conservation de celle-ci n'est pas conforme au contrat si elle n'est pas restituée dans l'état où le client est en droit de l'attendre.
(4) Si, en raison de la nature de la chose ou du contrat, il ne peut être raisonnablement attendu que la même chose soit restituée, la conservation de la chose n'est pas conforme au contrat si la chose qui est restituée n'est pas dans le même état que la chose remise en vue de sa conservation, ou si elle n'est pas de la même catégorie, de la même qualité ou en même quantité, ou si la propriété de la chose n'est pas restituée conformément à l'article 4:106.

Article 4:108: Paiement du prix

(1) Le prix est dû et exigible au moment où le dépositaire restitue la chose au client conformément à l'article 4:106 ou au moment où le client, sans y être fondé, refuse d'accepter la restitution de la chose.
(2) Le dépositaire peut suspendre la restitution de la chose jusqu'à ce que le client paie le prix. L'article 9:201 PEDC (Droit de suspendre l'exécution) s'applique en ce cas.

Article 4:109: Devoir de rendre compte

A la fin du dépôt, le dépositaire doit informer le client :

(a) de tout dommage subi par la chose durant la garde; et

(b) des précautions nécessaires que le client doit prendre avant d'utiliser ou de transporter la chose, à moins que ce dernier ait des raisons de connaître ces précautions.

Article 4:110: Risques

(1) Le présent article s'applique si la chose est détruite ou endommagée en raison d'un fait dont le dépositaire ne peut être tenu pour responsable et qu'il ne pouvait éviter ou surmonter.

(2) Si, avant le fait mentionné au paragraphe (1), le client s'était vu dûment notifier par le dépositaire qu'il devait accepter la restitution de la chose, il serait redevable du prix. Le prix est dû lors de la survenance du fait et au moment où le dépositaire restitue ce qui reste de la chose, le cas échéant, ou au moment où le client indique qu'il ne veut pas ce qui reste de la chose. Dans le dernier cas, le dépositaire peut disposer des restes de la chose aux frais du client.

(3) Si les parties étaient convenues que le dépositaire paierait par périodes successives, le client doit payer le prix pour chaque période passée avant la survenance du fait mentionné au paragraphe (1).

(4) Si, après la survenance du fait mentionné au paragraphe (1), l'exécution ultérieure du contrat est toujours possible pour le dépositaire, ce dernier doit poursuivre l'exécution du contrat. Le client est, cependant, en droit de résilier le contrat en vertu de l'article 1:115 (résiliation du contrat de service); les conséquences de cette résiliation sont régies par cette disposition.

(5) Si, dans la situation mentionnée au paragraphe (1), l'exécution du contrat n'est plus possible pour le dépositaire:

(a) le client n'est pas tenu de payer le service rendu, le droit du dépositaire en vertu du paragraphe (3) n'étant pas affecté par cette disposition; et

(b) le dépositaire doit retourner au client ce qui reste de la chose à moins que le client n'indique qu'il n'en veut pas. Dans le dernier cas, le dépositaire peut disposer des restes de la chose aux frais du client.

Article 4:111: Recours en cas d'inexécution

Dans les cas d'inexécution prévus par l'article 4:107, le client peut exercer chacun des recours prévus au chapitre 9 PEDC (Divers recours en cas d'inexécution).

Article 4:112: Limitation de responsabilité

Dans les contrats passés entre professionnels, une clause restreignant la responsabilité du dépositaire pour une inexécution affectant la valeur de la chose est présumée être équitable et raisonnable au sens de l'article 1:114(2) (Limitation de responsabilité), à moins que le dommage n'ait été causé intentionnellement ou en raison d'une négligence grave de la part du dépositaire ou d'une personne dont les actes engagent la responsabilité ce dernier.

Article 4:113: Responsabilité de l'hôtelier

(1) Le présent article ne s'applique pas au cas où un contrat de dépôt distinct du contrat d'hôtellerie est conclu entre un hôtelier et un client concernant une chose apportée dans l'hôtel. Un contrat de dépôt distinct est réputé avoir été conclu si une chose est remise à l'hôtelier en vue de sa conservation. L'article 4:101(3)(c) ne s'applique pas en ce cas.

(2) Un hôtelier est responsable en qualité de dépositaire de tout dommage, détérioration ou perte causée à une chose apportée dans l'hôtel par un client qui y séjourne et y dispose d'une chambre.
(3) Toute chose:
  (a) qui se trouve dans l'hôtel durant le temps pendant lequel le client y a l'usage d'une chambre, ou
  (b) que l'hôtelier ou une personne dont l'hôtelier est responsable prend en charge en dehors de l'hôtel pendant le temps où le client occupe une chambre dans l'hôtel, ou
  (c) que l'hôtelier ou une personne dont l'hôtelier est responsable prend en charge, que ce soit dans l'hôtel ou en dehors de celui-ci, pendant un délai raisonnable avant ou après le moment où le client occupe une chambre dans l'hôtel,

  est considérée être une chose apportée dans l'hôtel.
(4) L'hôtelier n'est pas responsable si le dommage, la destruction ou la perte sont dus:
  (a) à un client ou à des personnes qui l'accompagnent, qui sont les employés de ce dernier ou qui lui rendent visite; ou
  (b) à un événement échappant au contrôle de l'hôtelier au sens de l'article 8:108 PEDC (Exonération résultant d'un empêchement); ou
  (c) à la nature de la chose.
(5) Une disposition excluant ou limitant la responsabilité de l'hôtelier est considérée comme inéquitable si elle exclut ou limite la responsabilité dans le cas où lui-même, ou une personne dont il répond, cause le dommage, la destruction ou la perte intentionnellement ou par sa négligence grave.
(6) En dehors des cas où le dommage, la destruction ou la perte sont causés intentionnellement ou par une négligence grave de l'hôtelier ou d'une personne dont il répond, le client doit informer l'hôtelier du dommage sans retard injustifié. Si le client n'informe pas l'hôtelier sans retard injustifié, l'hôtelier ne peut être responsable.
(7) L'hôtelier a le droit de retenir une chose mentionnée au paragraphe (2) jusqu'à ce que le client ait acquitté tout ce dont il est redevable envers lui au titre de la chambre, de la nourriture, des boissons et des services commandés fournis au client par l'hôtelier dans le cadre de son activité professionnelle.

Chapitre 5:
Conception

Article 5:101: Champ d'application

(1) Le présent Chapitre s'applique au contrat dans lequel une partie, le bureau d'études, doit concevoir pour une autre partie, le client, un ouvrage immobilier qui doit être construit par ou pour le compte du client.
(2) Le présent Chapitre s'applique également au contrat dans lequel le bureau d'études doit concevoir un bien mobilier ou une chose incorporelle ou un service qui doit être fourni ou exécuté par ou pour le compte du client.
(3) Quand, en vertu d'un contrat, une partie est tenue à la fois d'effectuer un travail de conception et de rendre un autre service, le présent Chapitre s'applique aux aspects du contrat qui concernent le travail de conception, avec les adaptations appropriées.

(5) Si l'autre service mentionné au paragraphe (3) consiste à mettre en application la conception, les règles régissant la fourniture du service subséquent s'appliquent à l'exception des articles 5:105 et 5:108.

Article 5:102: Devoir précontractuel du bureau d'études de mettre en garde

Les devoirs prévus à l'article 1:103 (Devoirs précontractuels de mise en garde) requièrent en particulier du bureau d'études qu'il mette en garde le client s'il n'a pas la compétence requise pour traiter des problèmes qui nécessitent l'intervention d'un spécialiste.

Article 5:103: Devoir de collaborer du client

Dans la mesure où le bureau d'études a mis en garde le client en application de l'article 1:103 (Devoirs précontractuels de mise en garde) et de l'article 5:102 qu'une expertise complémentaire est requise pour exécuter le contrat, les devoirs prévus à l'article 1:202 PEDC (Devoir de collaborer) et à l'article 1:104 (Devoir de collaborer) exigent en particulier que le client fasse appel à cette expertise.

Article 5:104: Diligence requise du bureau d'études

Les devoirs prévus par l'article 1:107 (Diligence généralement requise dans la fourniture de service) imposent en particulier au bureau d'études :

(a) d'harmoniser, le cas échéant, le travail de conception avec le travail des autres prestataires de service qui ont contracté avec le client, de manière à permettre l'exécution efficace de tous les services en cause;
(b) d'intégrer, le cas échéant, le travail d'autres prestataires de service pour permettre que la conception soit conforme à l'article 5:105;
(c) d'inclure toutes les informations pour l'interprétation du travail de conception qui sont nécessaires à un utilisateur de compétence moyenne ou un utilisateur spécifique que le client a fait connaître au bureau d'études lors de la conclusion du contrat;
(d) permettre à l'utilisateur de la conception de la réaliser sans violer les règles d'ordre public ou porter atteinte aux droits des tiers dont le bureau d'études avait connaissance ou dont on pouvait raisonnablement attendre qu'il les ait connus; et
(e) de fournir un travail de conception qui permette une exploitation économiquement et techniquement efficace.

Article 5:105: Conformité

(1) Sauf clause contraire, le travail de conception n'est pas conforme au contrat s'il ne permet pas à l'utilisateur d'atteindre un résultat spécifique en l'exploitant avec le niveau de diligence requis pour sa réalisation.
(2) Le client n'a pas le droit d'exercer un recours pour non-conformité si une instruction donnée par le client en application de l'article 1:109 (Instructions données par le client) est la cause de la non-conformité et que le bureau d'études n'a pas manqué au devoir de mise en garde prévu par l'article 1:110 (Devoir du prestataire de service de mettre en garde).

Article 5:106: Remise du travail de conception

Dans la mesure où le bureau d'études estime que le travail de conception, ou une partie de celui-ci qui est susceptible d'une réalisation indépendante, est suffisamment aboutie et souhaite le transférer au client, ce dernier doit l'accepter dans un délai raisonnable après en avoir été

informé. Le client peut refuser d'accepter de le recevoir, s'il n'est pas conforme au contrat et que cette non-conformité constitue une inexécution essentielle au sens de l'article 8:103 PEDC (Inexécution essentielle).

Article 5:107: Devoir du bureau d'études de conserver des documents

Après l'exécution du contrat, le client peut demander au bureau d'études de lui remettre tous les documents utilisés pour cette exécution, au moins en copie. Le bureau d'études doit conserver ces documents pendant un délai raisonnable. Avant la destruction des documents, le bureau d'études doit les proposer au client.

Article 5:108: Limitation de responsabilité

Dans les contrats passés entre professionnels, une clause restreignant la responsabilité du bureau d'études pour une inexécution affectant la valeur de l'ouvrage ou de la chose construite ou du service exécuté par ou pour le compte du client dans le cadre du travail de conception, est présumée équitable et raisonnable au sens de l'article 1:114(2) (Limitation de responsabilité), sauf si le dommage a été causé intentionnellement ou en raison d'une négligence grave de la part du bureau d'études ou d'une personne dont les actes engagent la responsabilité ce dernier.

Chapitre 6:
Information

Article 6:101: Champ d'application

(1) Le présent Chapitre s'applique au contrat dans lequel une partie, le prestataire, doit fournir des informations, telles que des données factuelles, des évaluations ou une recommandation à une autre partie, le client.
(2) Lorsque, en vertu d'un contrat, une partie est tenue à la fois de fournir des informations et de rendre un autre service, le présent Chapitre s'applique aux aspects du contrat qui concernent la fourniture d'informations, avec les adaptations appropriées.

Article 6:102: Circonstances dans lesquelles le service doit être exécuté

(1) Les devoirs prévus à l'article 1:105 (Circonstances dans lesquelles le service doit être exécuté) imposent en particulier au fournisseur d'informations, dans la mesure où cela est raisonnablement nécessaire à l'exécution du service, de recueillir des informations en fonction:
    (a) d'un but particulier pour lequel le client a besoin des informations;
    (b) des préférences et des priorités du client relatives aux informations;
    (c) de la décision qui peut être attendue du client sur le fondement des informations ; et
    (d) de la situation personnelle du client.
(2) Si les informations doivent être transmises à un groupe de personnes, les informations à collecter doivent concerner les buts, les préférences, les priorités et les situations personnelles qui peuvent raisonnablement être envisagées de la part de personnes de ce groupe.
(3) Dans la mesure où le fournisseur d'informations doit obtenir des informations du client, le fournisseur d'informations doit expliquer ce que le client doit fournir.

Article 6:103: Devoir du fournisseur d'informations concernant les moyens mis en œuvre

Sauf clause contraire, le fournisseur d'informations doit en particulier recueillir et utiliser les avis d'experts auxquels le fournisseur d'informations a ou devrait avoir accès en qualité de fournisseur d'informations professionnel, dans la mesure raisonnablement nécessaire à l'exécution du service.

Article 6:104: Diligence requise du fournisseur d'informations

(1) Les devoirs en vertu de l'article 1:107 (Diligence généralement requise dans la fourniture de service) imposent en particulier au fournisseur d'informations:
   (a) de prendre des mesures raisonnables pour garantir que le client comprenne le contenu des informations;
   (b) d'agir avec la diligence et la compétence dont un fournisseur d'informations raisonnable devrait faire preuve dans les mêmes circonstances en fournissant des évaluations; et
   (c) dans tous les cas où il est attendu du client qu'il prenne une décision sur le fondement des informations fournies, d'informer le client des risques existants, dans la mesure où ces risques sont susceptibles d'influencer la décision du client.

(2) Lorsque le fournisseur d'informations s'engage expressément ou tacitement à fournir au client une recommandation pour permettre à ce dernier de prendre ensuite une décision, le fournisseur d'informations doit:
   (a) fonder la recommandation sur une analyse compétente des avis d'experts recueillis en ce qui concerne les buts, les priorités, les préférences et la situation personnelle du client;
   (b) informer le client des alternatives qu'il peut personnellement proposer concernant la décision à prendre, ainsi que de leurs avantages et des risques qu'elles comportent, comparés à ceux de la décision recommandée; et
   (c) informer le client des autres alternatives que le fournisseur d'informations ne peut pas personnellement proposer, à moins que le fournisseur d'informations n'informe expressément le client qu'une gamme limitée d'alternatives est offerte ou que cela ressorte de la situation.

Article 6:105: Conformité

(1) Le fournisseur d'informations doit fournir des informations conformes à la quantité, la qualité et la description définies dans le contrat.

(2) Les données factuelles apportées par le fournisseur d'informations au client doivent constituer une description adéquate de la situation réelle décrite.

Article 6:106: Devoir de rendre compte

Dans la mesure où cela est raisonnablement nécessaire, en tenant compte de l'intérêt du client, le fournisseur d'informations doit donner un compte-rendu relatif aux informations apportées en application du présent Chapitre.

Article 6:107: Conflit d'intérêts

(1) Lorsque le fournisseur d'informations s'engage expressément ou tacitement à fournir à un client une recommandation pour permettre à ce dernier de prendre ensuite une décision, le fournisseur d'informations doit révéler tout éventuel conflit d'intérêt susceptible d'influencer l'exécution de ses obligations.

(2) Tant que l'exécution du contrat n'est pas terminée, le fournisseur d'informations ne peut pas instituer une relation avec une autre partie susceptible d'entrer en conflit avec les intérêts du client, sans en informer parfaitement le client et sans l'accord exprès ou tacite du client.
(3) Si les parties écartent la règle de responsabilité du paragraphe (2), le fournisseur d'informations ne peut opposer cette clause au client que s'il a attiré l'attention de ce dernier sur la clause d'une manière adaptée aux circonstances.

Article 6:108: Influence des capacités du client

(1) La participation d'autres personnes au nom du client à la fourniture du service, ou la simple compétence du client, n'exonère pas le fournisseur d'informations des devoirs prévus dans le présent Chapitre.
(2) Le fournisseur d'informations est libéré de ces devoirs si le client a déjà connaissance des informations ou si le client a des raisons de connaître les informations.
(3) Dans le cadre du paragraphe (2), le client a ›des raisons de savoir‹ si les informations sont évidentes pour un client comparable, placé dans la même situation que celle du client et compte tenu de tous les faits et circonstances inhabituels connus du client sans recherche particulière.

Article 6:109 Lien de causalité

Si le fournisseur d'informations sait, ou devrait savoir, qu'une décision sera prise sur le fondement des informations qui doivent être fournies, le manquement aux devoirs du fournisseur d'informations sera présumé être la cause du préjudice si le client démontre qu'au cas où le fournisseur d'informations aurait apporté toutes les informations requises, un client raisonnable aurait sérieusement envisagé de prendre une autre décision.

Chapitre 7:
Traitement Médical

Article 7:101: Champ d'application

(1) Le présent Chapitre s'applique au contrat dans lequel une partie, le praticien, applique un traitement médical à une autre partie, le patient.
(2) Le présent Chapitre s'applique, avec les adaptations appropriées, au contrat dans lequel le praticien fournit tout autre service destiné à changer la condition physique ou mentale d'une personne.
(3) Lorsque le patient n'est pas la partie contractante, il peut demander l'exécution des devoirs du praticien imposés par le présent Chapitre conformément à l'article 6:110 PEDC (Stipulation pour autrui).
(4) Lorsqu'en vertu d'un contrat, une partie est tenue de fournir à la fois un traitement médical et de rendre un autre service, le présent Chapitre s'applique aux aspects du contrat qui concernent le traitement médical, avec les adaptations appropriées.

Article 7:102: Circonstances dans lesquelles le service doit être exécuté

Les devoirs prévus par l'article 1:105 (Circonstances dans lesquelles le service doit être exécuté) imposent en particulier au praticien, dans la mesure raisonnablement nécessaire pour l'exécution du service:

(a) d'interroger le patient sur sa santé, ses symptômes, ses maladies antérieures, ses allergies, ses traitements antérieurs et en cours et ses préférences et priorités en matière de traitement médical;
(b) de procéder aux examens nécessaires à l'établissement d'un diagnostic sur l'état de santé du patient; et
(c) de consulter tout autre praticien impliqué dans le traitement du patient.

Article 7:103: Devoirs du praticien concernant les moyens mis en œuvre

Les devoirs prévus à l'article 1:106 (Devoirs du prestataire de service concernant les moyens mis en œuvre) imposent en particulier au praticien d'utiliser des instruments, des médicaments, du matériel, des installations et des locaux répondant au moins aux normes de qualité exigées par une pratique professionnelle acceptée et sérieuse, conformes aux dispositions légales en vigueur et destinées à servir le but particulier pour lequel ils doivent être utilisés.

Article 7:104: Diligence requise du praticien

(1) Les devoirs prévus par l'article 1:107 (Diligence généralement requise dans la fourniture de service) imposent en particulier au praticien d'apporter au patient la diligence et la compétence dont un praticien raisonnable ferait preuve dans les mêmes circonstances.
(2) Si le praticien manque d'expérience et de compétence pour traiter le patient conformément à l'article 1:107 (Diligence généralement requise pour la fourniture de service), il doit déférer le patient à un praticien qui peut répondre au niveau de diligence requis par les présentes règles.

Article 7:105: Devoir d'information du praticien

(1) Le praticien doit, pour offrir au patient un choix libre concernant le traitement, et d'une manière compréhensible pour le patient, en particulier l'informer:
  (a) de son état de santé;
  (b) de la nature du traitement proposé;
  (c) des avantages du traitement proposé;
  (d) des risques du traitement proposé;
  (e) des alternatives au traitement proposé ainsi que de leurs risques comparés à ceux du traitement proposé; et
  (f) des conséquences qu'entraînerait le fait de s'abstenir de tout traitement.
(2) Le praticien doit, en toute hypothèse, informer le patient des risques ou des alternatives qui pourraient raisonnablement influencer sa décision d'accepter le traitement proposé. Un risque est présumé susceptible d'influencer cette décision si sa matérialisation peut occasionner un préjudice grave à un patient placé dans cette situation. Sauf disposition contraire, le devoir d'informer est soumis aux dispositions du Chapitre 6 (Informations).

Article 7:106: Devoir d'informer en cas de traitement non nécessaire ou expérimental

(1) Si le traitement n'est pas nécessaire compte tenu de l'état de santé du patient, tous les risques connus doivent lui être expliqués.
(2) Si le traitement est expérimental, toutes les informations relatives aux objectifs de l'expérience, à la nature du traitement, à ses avantages et ses risques, et aux alternatives, même si elles ne sont que potentielles, doivent lui être données.

Article 7:107: Exceptions au devoir d'informer

(1) Les informations qui doivent être fournies en vertu des articles 7:105 et 7:106 peuvent être dissimulées au patient:
   (a) s'il existe des raisons objectives de croire qu'elles auraient des conséquences graves et négatives sur la santé ou la vie du patient; ou
   (b) si le patient a expressément indiqué qu'il ne souhaitait pas être informé, à condition que la dissimulation des informations ne mette pas en danger la santé ou la sécurité de tiers.

(2) L'article 7:105 ne s'applique pas si le traitement doit être prescrit en urgence. Dans ce cas, le praticien doit, dans la mesure du possible, donner les informations ultérieurement.

Article 7:108: Devoir d'obtenir le consentement

(1) Le praticien ne peut administrer un traitement médical sans avoir obtenu le consentement éclairé du patient.

(2) Le patient peut revenir sur son consentement à tout moment.

(3) Dans la mesure où le patient est incapable d'exprimer son consentement, le praticien doit:
   (a) obtenir le consentement éclairé d'une personne ou d'une institution légalement habilitée à prendre des décisions concernant le traitement au nom du patient; ou
   (b) respecter toutes les règles et toutes les procédures permettant d'administrer le traitement légalement sans ce consentement.

(4) Dans la situation décrite au paragraphe (3), le praticien doit, dans la mesure du possible, prendre en considération l'opinion du patient incapable, et l'opinion du patient exprimée avant qu'il soit devenu incapable.

(5) Dans la situation décrite au paragraphe (3), le praticien peut seulement administrer un traitement destiné à améliorer l'état de santé du patient.

(6) Dans la situation décrite à l'article 7:106(2), le consentement doit être donné d'une manière expresse et spécifique.

(7) Le présent article ne s'applique pas si le traitement médical doit être administré en urgence.

Article 7:109: Devoir de rendre compte

(1) Le praticien doit conserver de manière adéquate les données relatives au traitement. Ces données doivent comprendre, en particulier, les informations recueillies en application de l'article 7:102, ainsi que celles relatives au consentement du patient et au traitement administré.

(2) Le praticien doit donner au patient, ou si le patient est incapable d'exprimer son consentement, à la personne ou l'institution habilitée à prendre des décisions au nom du patient, accès à ces données.

(3) Le praticien doit répondre, dans une mesure raisonnable, aux questions relatives à l'interprétation de ces données.

(4) Si le praticien ne respecte pas les paragraphes (2) et (3), la violation du devoir prévu par l'article 7:104 et le lien de causalité seront présumés.

(5) Le praticien doit conserver les données et fournir des informations à propos de leur interprétation, pendant une période d'au moins dix ans après la fin du traitement, en fonction de l'utilité de ces enregistrements pour le patient ou ses héritiers et pour les traitements à venir. Les enregistrements dont il peut être raisonnablement prévu qu'ils restent importants après l'expiration d'un délai raisonnable doivent être conservés par le praticien au-delà de l'expi-

ration de ce délai. Si pour une raison quelconque, le praticien cesse son activité, les données doivent être placées en dépôt ou fournies au patient en vue de leur consultation ultérieure.

(6) Le praticien ne peut pas divulguer d'informations relatives au patient ou d'autres personnes impliquées dans le traitement du patient à des tiers, sauf si cette divulgation est nécessaire à la protection de tiers ou à l'intérêt public. Le praticien peut utiliser les enregistrements de manière anonyme à des fins statistiques ou scientifiques.

Article 7:110: Recours pour inexécution

Pour toute inexécution, les chapitres 8 et 9 PEDC s'appliquent, avec les adaptations suivantes :

(a) le praticien ne peut refuser l'exécution du contrat ou le résilier en application du chapitre 9, sections 2 et 3 PEDC (Exception d'inexécution, Résolution du contrat) si cela met gravement en danger l'état de santé du patient;

(b) dans la mesure où le praticien a le droit de suspendre l'exécution ou de résilier le contrat et entend exercer ce droit, il doit déférer le patient à un autre praticien; et

(c) la résiliation n'est pas permise, sauf si le patient ne respecte pas les dispositions de l'article 1:104 (Devoir de collaborer).

Article 7:111: Responsabilité des établissements de traitement médical

(1) Si, au cours de la mise en œuvre du contrat de traitement médical, des actes ont lieu dans un hôpital ou dans les locaux d'un autre établissement de traitement médical, et que l'hôpital ou l'établissement n'est pas partie au contrat de traitement médical, il doit indiquer clairement au patient qu'il n'est pas une partie contractante.

(2) Lorsque le praticien ne peut pas être identifié, l'hôpital ou l'établissement de traitement médical dans lequel est administré le traitement sera considéré comme étant le praticien, sauf si l'hôpital ou l'établissement informe le patient, dans un délai raisonnable, de l'identité du praticien.

German*
Verträge über Dienstleistungen

Kapitel 1:
Allgemeine Bestimmungen

Artikel 1:101: Anwendungsbereich

(1) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich eine Partei, der Dienstleister, verpflichtet, der anderen Partei, dem Kunden, gegen Vergütung eine Dienstleistung zu erbringen.
(2) Dieses Kapitel ist auf Herstellungs-, Bearbeitungs-, Verwahrungs- und Behandlungsverträge sowie auf Verträge über Entwürfe und Informationen anwendbar, soweit nicht die Kapitel 2 bis 7 etwas anderes bestimmen.
(3) Ist eine Partei vertraglich zugleich zur Erbringung einer Dienstleistung und zu einer anderen Leistung verpflichtet, so findet auf denjenigen Vertragsteil, der die Dienstleistung betrifft, sowohl dieses Kapitel als auch, soweit sie einschlägig sind, die Kapitel 2 bis 7 entsprechende Anwendung.
(4) Unbeschadet des Absatzes (3) ist dieses Kapitel nicht auf Verträge über Transportleistungen, Versicherungen, Garantien, Finanzprodukte und Finanzdienstleistungen anwendbar.
(5) Dieses Kapitel ist nicht auf Arbeitsverträge anwendbar.
(6) Mit Ausnahme des Artikels 1:102 findet dieses Kapitel entsprechende Anwendung auf Verträge, durch welche sich der Dienstleister zur Erbringung einer Dienstleistung nicht gegen Vergütung verpflichtet.

Artikel 1:102: Vergütung

(1) Soweit nichts anderes vereinbart ist, kann ein Dienstleister, der den Vertrag im Rahmen seiner beruflichen oder gewerblichen Tätigkeit abgeschlossen hat, eine Vergütung verlangen.
(2) Legt der Vertrag weder die Höhe der Vergütung noch die Art und Weise ihrer Bestimmung fest, entspricht die Vergütung der bei Vertragsschluß am Markt üblichen Vergütung.

Artikel 1:103: Vorvertragliche Hinweispflichten

(1) Erlangt der Dienstleister davon Kenntnis oder hat er Grund zu der Annahme, daß die geschuldete Dienstleistung möglicherweise
    (a) das vom Kunden mitgeteilte oder angestrebte Ziel nicht erreichen wird oder
    (b) andere Interessen des Kunden beeinträchtigen wird oder
    (c) teurer wird oder mehr Zeit erfordert, als der Kunde vernünftigerweise erwartet,
    trifft ihn eine vorvertragliche Pflicht, den Kunden darauf hinzuweisen.
(2) Die Hinweispflicht nach Absatz (1) greift nicht ein, wenn der Kunde
    (a) die in Absatz (1)(a), (b) oder (c) bezeichneten Risiken bereits kennt oder
    (b) Grund zur Annahme eines solchen Risikos hat.

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* Übersetzung vorgeschlagen von Prof. Dr. Martin Schmidt-Kessel, Wiss. Mit. Friederike Schäfer, Wiss. Mit. Sandra Rohlfing.

(3) Wenn eines der in Absatz (1) bezeichneten Ereignisse eintritt und der Kunde nicht ordnungsgemäß darauf hingewiesen worden ist,
   (a) braucht der Kunde keine Veränderung der Dienstleistung nach Artikel 1:111 hinzunehmen, es sei denn, der Dienstleister beweist, daß der Kunde, wäre er ordnungsgemäß darauf hingewiesen worden, einen Vertrag unter Berücksichtigung des Ereignisses geschlossen hätte, und
   (b) kann der Kunde Schadenersatz nach Artikel 4:117(2) und (3) PECL (Schadenersatz) verlangen.

(4) Den Kunden trifft eine vorvertragliche Pflicht, den Dienstleister auf ungewöhnliche Umstände hinzuweisen, welche die Dienstleistung wahrscheinlich verteuern oder mehr Zeit für deren Erbringung erforderlich machen, als vom Dienstleister erwartet, wenn der Kunde davon Kenntnis erlangt oder Grund zur Annahme solcher Umstände hat.

(5) Wenn die in Absatz (4) bezeichneten Umstände eintreten und der Dienstleister nicht ordnungsgemäß gewarnt worden ist, kann er
   (a) Ersatz des Schadens, den er als Folge der Nichterfüllung erlitten hat, und
   (b) Anpassung der für die Erbringung der Dienstleistung notwendigen Zeit verlangen.

(6) Im Sinne von Absatz (1) hat der Dienstleister „Grund zur Annahme", wenn die Risiken für einen vergleichbaren Dienstleister in derselben Situation angesichts der ihm bekannten Tatsachen und Umstände offensichtlich wären unter Berücksichtigung der Informationen, die sich der Dienstleister über das vom Kunden mitgeteilte oder angestrebte Ziel und über die Umstände, unter denen die Dienstleistung zu erbringen ist, verschaffen muß.

(7) Im Sinne der Absätze (2)(b) und (4) hat der Kunde „Grund zur Annahme", wenn die Risiken für einen vergleichbaren Kunden in derselben Situation angesichts der Tatsachen und Umstände, die ihm ohne Untersuchung bekannt sind, offensichtlich wären. Der Kunde wird nicht lediglich deshalb so behandelt, als ob er Kenntnis eines Risikos oder Grund zu dessen Annahme hat, weil er sachkundig oder durch sachkundige Dritte beraten ist, es sei denn ein solcher Dritter hat als Vertreter des Kunden gehandelt; in diesem Fall findet Artikel 1:305 PECL (Zurechnung von Kenntnis und Vorsatz) Anwendung.

Artikel 1:104: Pflicht zur Zusammenarbeit

(1) Die Pflicht nach Artikel 1:202 PECL (Pflicht zur Zusammenarbeit) umfaßt insbesondere
   (a) die Pflicht des Kunden, angemessene und vernünftige Auskunftsverlangen des Dienstleisters zu erfüllen, soweit die Auskunft vernünftigerweise notwendig ist, um dem Dienstleister die Vertragserfüllung zu ermöglichen,
   (b) die Pflicht des Kunden dem Dienstleister Weisungen für die Erbringung der Dienstleistung zu geben, soweit dies vernünftigerweise notwendig ist, um dem Dienstleister die Vertragserfüllung zu ermöglichen,
   (c) soweit es dem Kunden obliegt, Genehmigungen oder Zulassungen zu beschaffen, seine Pflicht, dies so frühzeitig zu tun, wie es vernünftigerweise notwendig ist, um dem Dienstleister die Vertragserfüllung zu ermöglichen,
   (d) die Pflicht des Dienstleisters, dem Kunden eine angemessene Gelegenheit für die Überprüfung zu geben, ob der Dienstleister seine Pflichten aus dem Vertrag erfüllt und
   (e) die Pflicht der Parteien, ihre jeweiligen Bemühungen insoweit zu koordinieren, als es vernünftigerweise notwendig ist, um den Vertrag durchzuführen.

(2) Wenn der Kunde seine Pflichten nach Absatz (1)(a) oder (b) nicht erfüllt, kann der Dienstleister entweder seine Leistung nach Artikel 9:201 PECL (Zurückbehaltungsrecht) zurückbehalten oder seine Leistung an denjenigen Erwartungen, Präferenzen und Prioritäten

ausrichten, welche angesichts der gegebenen Auskünfte und Anweisungen von einer Person in derselben Situation wie der Kunde vernünftigerweise erwartet werden können, vorausgesetzt, daß der Kunde einen Hinweis nach Artikel 1:110 erhalten hat.

(3) Wenn der Kunde seine Pflichten nach Absatz (1) nicht erfüllt und dadurch verursacht, daß die Dienstleistung teurer wird oder mehr Zeit erfordert als vertraglich vereinbart, kann der Dienstleister
   (a) Ersatz des Schadens, den er als Folge der Nichterfüllung erlitten hat, und
   (b) Anpassung der für die Dienstleistung notwendigen Leistungszeit
   verlangen.

Artikel 1:105: Umstände, unter denen die Dienstleistung zu erbringen ist

Der Dienstleister muß sich, soweit es für die Erbringung der Dienstleistung vernünftigerweise notwendig ist, Informationen über die Umstände verschaffen, unter denen die Dienstleistung zu erbringen ist, und sicherstellen, daß diese bei der Erbringung der Dienstleistung berücksichtigt werden.

Artikel 1:106: Pflichten des Dienstleisters hinsichtlich Hilfspersonen und Hilfsmittel

(1) Der Dienstleister kann ohne die Zustimmung des Kunden die Erbringung der Dienstleistung ganz oder teilweise an einen Dritten vergeben, es sei denn, daß die persönliche Erbringung für den Vertrag entscheidend ist.

(2) Der Dritte muß angemessen qualifiziert sein.

(3) Soweit der Dienstleister für Erbringung der Dienstleistung Werkzeuge und Materialien einsetzt, müssen diese vertragsgemäß sein, den anwendbaren gesetzlichen Bestimmungen entsprechen und für den Zweck geeignet sein, für den sie eingesetzt werden sollen.

(4) Soweit der Dienstleister das Eigentum an einer unbeweglichen oder beweglichen Sache oder einem unkörperlichen Gegenstand oder ein Recht übertragen muß, muß diese Übertragung frei von Rechten oder Ansprüchen Dritter erfolgen.

(5) Der Dienstleister muß die Erbringung seiner Dienstleistung in angemessener Weise planen.

(6) Soweit der Kunde einen Dritten benannt oder Werkzeuge und Materialien zur Verfügung gestellt hat, bestimmt sich die Verantwortlichkeit des Dienstleisters nach Artikel 1:109 und Artikel 1:110.

Artikel 1:107: Allgemeiner Sorgfaltsstandard für Dienstleistungen

(1) Der Dienstleister hat die Dienstleistung
   (a) mit derjenigen Sorgfalt, die ein vernünftiger Dienstleister in derselben Situation üben würde, und
   (b) in Übereinstimmung mit den anwendbaren gesetzlichen Bestimmungen oder anderweit bindenden Rechtsregeln
   zu erbringen.

(2) Bekennt sich der Dienstleister zu einem höheren Sorgfaltsstandard, so muß er diesen einhalten.

(3) Ist der Dienstleister Mitglied einer beruflichen Vereinigung von Dienstleistern oder behauptet er dies und bestehen für diese Vereinigung Standards, die von einer zuständigen Stelle oder der Vereinigung selbst aufgestellt wurden, so muß der Dienstleister diese Standards einhalten.

(4) Bei der Bestimmung der Sorgfalt, die der Kunde erwarten darf, sind unter anderem zu berücksichtigen

(a) die Natur, der Umfang, die Häufigkeit sowie die Vorhersehbarkeit der Risiken, die mit der Erbringung der Dienstleistung für den Kunden verbunden sind,
(b) die Kosten für Vorkehrungen, die einen eingetretenen oder ähnlichen Schaden verhindert hätten,
(c) ob die Dienstleistung außerhalb eines Berufs oder Gewerbes oder unentgeltlich erbracht wird,
(d) die Höhe der Vergütung und
(e) die vernünftigerweise für die Erbringung der Dienstleistung zur Verfügung stehende Zeit.

(5) Die sich nach diesem Artikel ergebenden Pflichten umfassen insbesondere die Pflicht des Dienstleisters vernünftige und angemessene Vorkehrungen zu treffen, um Personenschäden sowie Schäden an einer unbeweglichen oder beweglichen Sache oder einem unkörperlichen Gegenstand zu vermeiden, welche als Folge der Dienstleistung eintreten können.

Artikel 1:108: Das vom Kunden mitgeteilte oder angestrebte Ziel

Ein vom Kunden bei Vertragsschluß mitgeteiltes oder angestrebtes Ziel muß der Dienstleister erreichen, wenn

(a) das angestrebte aber nicht mitgeteilte Ziel von solcher Art ist, daß es ein vernünftiger Kunde unter denselben Umständen angestrebt hätte und
(b) ein vernünftiger Kunde unter denselben Umständen keinen Grund zu der Annahme einer ernsten Gefahr hätte, daß dieses Ziel nicht erreicht werden würde.

Artikel 1:109: Weisungen des Kunden

(1) Der Dienstleister muß allen rechtzeitigen Weisungen des Kunden bezüglich der Erbringung der Dienstleistung Folge leisten, vorausgesetzt, daß die Weisungen:
(a) Teil des Vertrags selbst oder eines von diesem in Bezug genommenen Dokuments sind,
(b) sich aus Entscheidungen des Kunden ergeben, die ihm im Sinne von Artikel 6:105 PECL (Einseitige Bestimmung durch eine Partei) vertraglich eingeräumt sind oder
(c) sich aus Entscheidungen ergeben, welche die Parteien bei Vertragsschluß zunächst offen gelassen haben.

(2) Erfüllt der Dienstleister eine oder mehrere Pflichten nach den Artikeln 1:107 oder 1:108 nicht, weil er eine Weisung nach Absatz (1) befolgt, ist er von der Haftung nach diesen Artikeln befreit, wenn der Kunde einen ordnungsgemäßen Hinweis nach Artikel 1:110 erhalten hat.

(3) Faßt der Dienstleister eine Weisung nach Absatz (1) als Vertragsänderung im Sinne von Artikel 1:111 auf, muß er dem Kunden einen entsprechenden Hinweis geben. Nimmt der Kunde die Weisung daraufhin nicht ohne vermeidbare Verzögerung zurück, muß der Dienstleister der Weisung Folge leisten, und diese wird als Vertragsänderung angesehen.

Artikel 1:110: Vertragliche Hinweispflicht des Dienstleisters

(1) Erlangt der Dienstleister davon Kenntnis oder hat er Grund zu der Annahme, daß die geschuldete Dienstleistung entweder als Folge der Beachtung von Informationen oder Weisungen des Kunden oder solchen Informationen, die sich der Dienstleister nach Artikel 1:105 selbst verschafft hat, oder als Folge des Auftretens eines sonstigen Risikos möglicherweise
(a) das bei Vertragsschluß vom Kunden mitgeteilte oder angestrebte Ziel nicht erreichen wird oder

(b) andere Interessen des Kunden beeinträchtigen wird oder
(c) teurer wird oder mehr Zeit erfordert, als vertraglich vereinbart,
trifft ihn eine Pflicht, den Kunden darauf hinzuweisen.

(2) Der Dienstleister muß angemessene Maßnahmen ergreifen, um sicherzustellen, daß der Kunden den Inhalt des Hinweises versteht.

(3) Die Warnpflicht nach Absatz (1) greift nicht ein, wenn der Kunde
(a) die in Absatz (1)(a), (b) oder (c) bezeichneten Risiken bereits kennt oder
(b) Grund zur Annahme eines solchen Risikos hat.

(4) Wenn eines der in Absatz (1) bezeichneten Ereignisse eintritt und der Kunde keinen ordnungsgemäßen Hinweis erhalten hat, braucht er keine Veränderung der Dienstleistung nach Artikel 1:111 hinzunehmen.

(5) Im Sinne von Absatz (1) hat der Dienstleister „Grund zur Annahme", wenn die Risiken für einen vergleichbaren Dienstleister in derselben Situation angesichts der Tatsachen und Umstände, die ihm ohne Untersuchung bekannt sind, offensichtlich wären.

(6) Im Sinne des Absatzes (3)(b) hat der Kunde „Grund zur Annahme", wenn die Risiken für einen vergleichbaren Kunden in derselben Situation angesichts der ihm bekannten Tatsachen und Umstände offensichtlich wären. Der Kunde wird nicht lediglich deshalb so behandelt, als ob er Kenntnis eines Risikos oder Grund zu dessen Annahme hat, weil er sachkundig oder durch sachkundige Dritte beraten ist, es sei denn, ein solcher Dritter hat als Vertreter des Kunden gehandelt; in diesem Fall findet Artikel 1:305 PECL (Zurechnung von Kenntnis und Vorsatz) Anwendung.

Artikel 1:111: Vertragsänderung

(1) Unbeschadet des Kündigungsrechts des Kunden nach Artikel 1:115 muß eine Partei einer Veränderung der Dienstleistung, wie sie vertraglich oder aufgrund einer Weisung nach Artikel 1:109 geschuldet ist, zustimmen, wenn eine solche Veränderung angemessen und vernünftig ist angesichts
(a) des mit der Dienstleistung zu erreichenden Ziels,
(b) der Interessen des Kunden,
(c) der Interessen des Dienstleisters und
(d) der Umstände zur Zeit der Veränderung der Dienstleistung.

(2) Eine Veränderung der Dienstleistung ist angemessen,
(a) wenn sie notwendig ist, um dem Dienstleister zu ermöglichen, in Einklang mit Artikel 1:107 oder Artikel 1:108 zu verfahren,
(b) wenn sie die Folge einer Weisung nach Artikel 1:109(1) ist und der Kunde diese Weisung auf einen Hinweis nach Artikel 1:109(3) hin nicht ohne vermeidbare Verzögerung zurückgenommen hat oder
(c) wenn sie eine angemessene und vernünftige Reaktion auf einen Hinweis des Dienstleisters nach Artikel 1:110 ist.

(3) Im Sinne der Absätze (1) und (2) wird eine Veränderung der Dienstleistung als angemessen angesehen, wenn sie durch veränderte Umstände nach Artikel 6:111 PECL (Veränderte Umstände) erforderlich wird.

(4) Die Vergütung, die aufgrund der Veränderung der Dienstleistung geschuldet wird, muß angemessen sein; sie ist auf dieselbe Weise zu bestimmen wie die ursprüngliche Vergütung.

(5) Soweit der Dienstleister weniger zu leisten hat, sind bei der Ermittlung der veränderten Vergütung der entgangene Gewinn, die ersparten Kosten und die Möglichkeiten eines anderweitigen Einsatzes der freigewordenen Kapazitäten zu berücksichtigen.

(6) Eine Veränderung der Dienstleistung kann zu einer Anpassung der Leistungszeit in dem Verhältnis führen, in welchem die zusätzlich erforderliche Arbeitsleistung zu der ursprünglich erforderlichen Arbeitsleistung und der dafür vorgesehenen Zeitspanne steht.

Artikel 1:112: Rechtsbehelfe bei Pflichtverletzung des Dienstleisters

(1) Der Schadensersatz für den Kunden schließt die Kosten ein, die der Kunde zur Feststellung der Pflichtverletzung des Dienstleisters und dafür aufgewandt hat, das mitgeteilte oder angestrebte Ziel gleichwohl zu erreichen, vorausgesetzt, daß der Kunde dabei vernünftig und angemessen gehandelt hat.
(2) Hat der Dienstleister eine vertragliche Pflicht verletzt und ist noch offen, ob das vom Kunden mitgeteilte oder angestrebte Ziel erreicht wird, kann der Kunde die Erfüllung jeder ihm obliegenden Pflichten nach Artikel 9:201 PECL (Zurückbehaltungsrecht) zurückbehalten.
(3) Der Kunde kann den Vertrag nach Artikel 9:304 PECL (Antizipierte Nichterfüllung) nur aufheben, wenn offensichtlich ist, daß die Pflichtverletzung des Dienstleisters zu einer für den Vertrag wesentlichen Nichterfüllung nach Art. 8:103 PECL (Wesentliche Nichterfüllung) führen wird.

Artikel 1:113: Unterlassen der Anzeige der Vertragswidrigkeit

(1) Erlangt der Kunde davon Kenntnis oder hätte ein vergleichbarer Kunde in derselben Situation angesichts aller Tatsachen und Umstände, die ihm ohne Untersuchung bekannt sind, Grund zu der Annahme, daß der Dienstleister das vom Kunden mitgeteilte oder angestrebte Ziel nicht erreichen wird oder nicht erreicht hat, muß der Kunde dem Dienstleister dies anzeigen.
(2) Unterläßt der Kunde eine Anzeige nach Absatz (1), daß der Dienstleister das vom Kunden mitgeteilte oder angestrebte Ziel nicht erreichen wird, und wird deshalb die Dienstleistung teurer oder erfordert sie mehr Zeit, als vertraglich vereinbart, kann der Dienstleister
(a) Ersatz des Schadens, den er als Folge der Nichterfüllung erlitten hat, und
(b) Anpassung der für die Dienstleistung notwendigen Leistungszeit
verlangen.

Artikel 1:114: Haftungsbegrenzung

(1) Der Dienstleister kann seine Haftung für Tod oder Verletzung einer Person, die durch die Dienstleistung verursacht werden, weder ausschließen noch begrenzen.
(2) Der Dienstleister kann seine Haftung für andere Schäden als Tod oder Verletzung einer Person ausschließen oder begrenzen, wenn eine solche Klausel bei Vertragsschluß nach den Umständen des Falles als fair, angemessen und vernünftig angesehen werden kann; dies gilt nicht, soweit in den Kapiteln 2 bis 7 etwas anderes bestimmt wird.

Artikel 1:115: Kündigung des Vertrags

(1) Der Kunde kann den Vertrag jederzeit kündigen.
(2) Wird der Vertrag nach diesem Artikel gekündigt, kann der Dienstleister Schadenersatz verlangen, der ihn soweit wie möglich in die Lage versetzt, in der er sich befunden hätte, wenn der Vertrag ordnungsgemäß erfüllt worden wäre. Dieser Schadenersatz umfaßt den Verlust, den der Dienstleister erlitten hat, und den Gewinn, der ihm entgangen ist.

(3) Bei der Ermittlung der Lage, in die der Dienstleister nach Absatz (2) zu versetzen ist, sind unter anderem die folgenden Regeln zu beachten:
   (a) War eine feste Vergütung vereinbart, kann der Dienstleister diese Vergütung verlangen abzüglich der vernünftigerweise zu ersparenden Kosten und solcher Einkünfte, die vernünftigerweise durch einen anderweitigen Einsatz der freigewordenen Kapazitäten hätten erzielt werden können.
   (b) War eine Vergütung auf der Grundlage eines bestimmten Vergütungssatzes vereinbart, kann der Dienstleister Vergütung auf der Grundlage dieses Satzes verlangen, soweit er die Dienstleistung bereits erbracht hat.
   (c) War ein Erfolgshonorar vereinbart, kann der Dienstleister, soweit die Dienstleistung bereits erbracht ist, Ersatz sowohl derjenigen angemessenen Kosten, die er dafür aufgewandt hat, verlangen als auch des Gewinns, der ihm infolge der Kündigung entgangen ist.

Kapitel 2:
Herstellung

Artikel 2:101: Anwendungsbereich

(1) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich eine Partei, der Hersteller, dazu verpflichtet, ein Bauwerk oder eine andere unbewegliche Sache zu errichten, oder ein vorhandenes Bauwerk oder eine vorhandene andere unbewegliche Sache wesentlich zu ändern, und dabei den Plänen folgt, die der Kunde zur Verfügung stellt.
(2) Dieses Kapitel findet entsprechende Anwendung auf Verträge, durch welche sich der Hersteller verpflichtet, eine bewegliche Sache oder einen nichtkörperlichen Gegenstand nach den vom Kunden zur Verfügung gestellten Plänen herzustellen.
(3) Dieses Kapitel findet entsprechende Anwendung auf Verträge, durch welche sich der Hersteller verpflichtet, ein Bauwerk oder eine andere unbewegliche Sache zu errichten, Bauarbeiten an einem vorhandenen Bauwerk oder an einer anderen unbeweglichen Sache vorzunehmen oder eine bewegliche Sache oder einen nichtkörperlichen Gegenstand herzustellen, und dabei den Plänen folgt, die er selbst zur Verfügung stellt.
(4) Ist eine Partei durch einen Vertrag zugleich zur Herstellung und zur Erbringung einer anderen Dienstleistung verpflichtet, findet auf denjenigen Teil des Vertrags, der die Herstellung betrifft, dieses Kapitel entsprechende Anwendung.

Artikel 2:102: Pflicht des Kunden zur Zusammenarbeit

Die Pflichten nach den Artikeln 1:102 PECL und 1:104 (Pflicht zur Zusammenarbeit) umfassen insbesondere die Pflicht des Kunden

(a) Zugang zu der Stelle, wo die Herstellung stattfinden muß, zu gewähren, soweit dies vernünftigerweise notwendig ist, um dem Hersteller die Vertragserfüllung zu ermöglichen; und
(b) soweit es ihm obliegt, Komponenten, Materialien und Werkzeuge zur Verfügung zu stellen, dies so frühzeitig zu tun, wie es vernünftigerweise notwendig ist, um dem Hersteller die Vertragserfüllung zu ermöglichen.

Artikel 2:103: Sorgfaltspflicht des Herstellers

Die Pflichten nach Artikel 1:107 (Allgemeiner Sorgfaltsstandard für Dienstleistungen) umfassen insbesondere die Pflicht des Herstellers, angemessene Vorkehrungen zu treffen, um jeglichen Schaden an dem Werk zu vermeiden.

Artikel 2:104: Vertragsgemäßheit

(1) Der Hersteller muß ein Werk liefern, das in Menge, Qualität und Art den Anforderungen des Vertrages entspricht.

(2) Haben die Parteien nichts anderes vereinbart, so entspricht das Werk dem Vertrag nur,
   (a) wenn es sich für einen bestimmten Zweck eignet, der dem Hersteller bei Vertragsabschluß oder zum Zeitpunkt einer Vertragsänderung gemäß Artikel 1:111 (Vertragsänderung) in Bezug auf den fraglichen Sachverhalt ausdrücklich oder auf andere Weise zur Kenntnis gebracht wurde; und
   (b) wenn es sich für die Zwecke eignet, für die Werke der gleichen Art gewöhnlich gebraucht werden.

(3) Dem Kunden steht kein Rechtsbehelf wegen Vertragswidrigkeit zu, wenn die Vertragswidrigkeit auf einer Weisung des Kunden gemäß Artikel 1:109 (Weisungen des Kunden) beruht und der Hersteller seine Hinweispflicht gemäß Artikel 1:110 (Vertragliche Hinweispflicht des Dienstleisters) nicht verletzt hat.

Artikel 2:105: Inspizierung, Überwachung und Abnahme

(1) Nach Artikel 1:104 (1)(d) (Pflicht zur Zusammenarbeit) kann der Kunde die bei der Herstellung eingesetzten Mittel, den Ablauf der Herstellung und das entstandene Werk in einer vernünftigen und angemessenen Weise und zu jeder angemessenen Zeit inspizieren oder überwachen. Er ist nicht dazu verpflichtet.

(2) Haben die Parteien vereinbart, daß der Hersteller bestimmte Teile der zur Herstellung eingesetzten Mittel, des Ablaufs der Herstellung oder des entstandenen Werks zur Abnahme präsentieren muß, darf der Hersteller nicht mit der Herstellung fortfahren, ehe der Kunde es genehmigt.

(3) Fehlende oder unzureichende Abnahme, Inspizierung oder Überwachung befreit den Hersteller weder ganz noch teilweise von der Haftung. Dies gilt auch, falls der Kunde vertraglich verpflichtet ist, das Werk oder dessen Herstellung abzunehmen, zu inspizieren oder zu überwachen.

Artikel 2:106: Übergabe des Werks

(1) Erachtet der Hersteller das Werk oder einen unabhängig nutzbaren Teil davon als hinreichend fertig gestellt und wünscht er, die Kontrolle darüber dem Kunden zu übertragen, muß der Kunde diese Kontrolle innerhalb einer angemessenen Frist nach der Benachrichtigung annehmen.

(2) Die Annahme der Kontrolle über das Werk durch den Kunden befreit den Hersteller weder ganz noch teilweise von der Haftung. Dies gilt auch, falls der Kunde vertraglich verpflichtet ist, das Werk oder dessen Herstellung abzunehmen, zu inspizieren oder zu überwachen.

Artikel 2:107: Zahlung der Vergütung

Die Vergütung oder ein entsprechender Teil davon ist fällig und zahlbar, wenn der Hersteller nach Artikel 2:106 die Kontrolle über das Werk oder einen Teil davon auf den Kunden überträgt.

Artikel 2:108: Gefahrtragung

(1) Dieser Artikel ist anwendbar, wenn das Werk aufgrund eines Ereignisses zerstört oder beschädigt wird, für das der Hersteller nicht verantwortlich ist und das er weder vermeiden noch überwinden konnte.

(2) Wurde die in Absatz 1 bezeichnete Situation durch ein Ereignis verursacht, das eintritt, bevor das Werk nach Artikel 2:106 übergeben oder die Kontrolle darüber übertragen wurde oder hätte übertragen werden sollen, und ist die Leistungserbringung noch möglich,
   (a) ist der Hersteller noch oder gegebenenfalls erneut zur Leistung, verpflichtet.
   (b) ist der Kunde nur zur Vergütung der Leistung des Herstellers nach (a) verpflichtet.
   (c) wird die Leistungszeit nach Artikel 1:111(6) (Vertragsänderung) verlängert.
   (d) können die Regelungen des Artikel 8:108 PECL (Entschuldigung aufgrund eines Hinderungsgrundes) auf die ursprüngliche Leistung des Herstellers anwendbar sein.
   (e) ist der Hersteller nicht verpflichtet, den Kunden für Verluste von diesem eingesetzter Mittel zu entschädigen.

(3) Wurde die in Absatz 1 bezeichnete Situation durch ein Ereignis verursacht, das eintritt, bevor das Werk nach Artikel 2:106 übergeben oder die Kontrolle darüber übertragen wurde oder hätte übertragen werden sollen, und ist die Leistungserbringung nicht mehr möglich,
   (a) ist der Kunde nicht zur Vergütung der erbrachten Dienstleistung verpflichtet.
   (b) können die Regelungen des Artikel 8:108 PECL (Entschuldigung aufgrund eines Hinderungsgrundes) auf die Leistung des Herstellers anwendbar sein.
   (c) ist der Hersteller nicht verpflichtet, den Kunden für Verluste von diesem eingesetzter Mittel zu entschädigen. Er ist verpflichtet, dem Kunden das Werk oder dessen Überreste zurückzugeben.

(4) Wurde die in Absatz 1 bezeichnete Situation durch ein Ereignis verursacht, das eintritt, nachdem das Werk nach Artikel 2:106 übergeben oder die Kontrolle darüber übertragen wurde oder hätte übertragen werden sollen,
   (a) ist der Hersteller nicht zur erneuten Leistungserbringung verpflichtet.
   (b) bleibt der Kunde zur Zahlung der Vergütung verpflichtet.

Artikel 2:109: Erfüllung und Nacherfüllung

(1) Liefert der Hersteller das Werk nicht in Übereinstimmung mit Artikel 2:104, kann der Kunde in Anwendung von Artikel 9:102 PECL (Nicht auf Geld gerichtete Verpflichtungen) Nacherfüllung verlangen, vorausgesetzt
   (a) die Erfüllung ist nicht rechtswidrig oder unmöglich;
   (b) die Erfüllung würde dem Hersteller keine unangemessenen Anstrengungen oder Kosten verursachen; und
   (c) die Erfüllung besteht nicht in der Erbringung von Dienst- oder Werkleistungen persönlichen Charakters oder hängt von einer persönlichen Beziehung ab.

(2) Artikel 9:102(d) PECL (Nicht auf Geld gerichtete Verpflichtungen) ist nicht anwendbar auf Fälle, in denen Absatz 1 anwendbar ist.

(3) Liefert der Hersteller das Werk nicht in Übereinstimmung mit Artikel 2:104, kann der Hersteller die Vertragswidrigkeit beheben, falls dies möglich ist,
   (a) vor Ablauf einer angemessenen Nachfrist, die der Kunde durch eine Erklärung nach Artikel 8:106(3) PECL (Nachfrist für die Erfüllung) setzt; und
   (b) bevor die durch die Nacherfüllung verursachte Verspätung eine wesentliche Vertragsverletzung nach Artikel 8:103(b) oder (c) (Wesentliche Nichterfüllung) darstellen würde.

(4) Artikel 8:103(a) PECL (Wesentliche Nichterfüllung) ist nicht anwendbar auf Fälle, in denen Absatz (3) anwendbar ist, es sei denn, es wurde ausdrücklich vereinbart, daß genaue Einhaltung der Leistungszeit für den Vertrag entscheidend ist.
(5) Der Hersteller kann bestimmen, wie er seiner Verpflichtung zur Erfüllung nachkommt. Insbesondere kann der Hersteller entscheiden, ob er das Werk nachbessert, durch ein neues Werk ersetzt oder das Werk auf seine Kosten durch einen Dritten nachbessern läßt.
(6) Der Kunde kann seine Leistung nach Artikel 9:201 PECL (Zurückbehaltungsrecht) zurückbehalten, bis der Hersteller die Vertragswidrigkeit behoben hat.
(7) Der Kunde kann nach Kapitel 9, Abschnitt 5 PECL (Schadenersatz und Zinsen) Ersatz des Schadens verlangen, der nicht durch die Nacherfüllung des Herstellers behoben wurde.

Artikel 2:110: Andere Rechtsbehelfe

(1) Der Kunde kann nach diesem Artikel auf andere Rechtsbehelfe zurückgreifen,
  (a) wenn der Hersteller die Nacherfüllung verweigert, weil der Kunde nach Artikel 2:109(1) kein Recht auf Nacherfüllung hat; oder
  (b) wenn der Hersteller nicht in der Lage ist nachzuerfüllen oder nicht gemäß Artikel 2:109(3) nacherfüllt.
(2) Der Kunde kann den Vertrag nach Kapitel 9, Abschnitt 3 PECL (Aufhebung des Vertrages) aufheben, wenn die Vertragswidrigkeit eine wesentliche Nichterfüllung nach Artikel 8:103(b) oder (c) PECL (Wesentliche Nichterfüllung) darstellt.
(3) Der Kunde kann die Vergütung nach Artikel 9:401 PECL (Recht auf Minderung des Preises) mindern.
(4) Der Kunde kann nach Kapitel 9, Abschnitt 5 PECL (Schadenersatz und Zinsen) Schadenersatz einschließlich der Kosten für Reparatur oder Ersatz des Werkes verlangen.

Artikel 2:111: Verjährung von Rechtsbehelfen wegen Vertragswidrigkeit

(1) Die Verjährungsfrist nach Artikel 14:201 PECL (Allgemeine Verjährungsfrist) beträgt für Ansprüche wegen Vertragswidrigkeit des Werkes drei Jahre.
(2) Die Verjährungsfrist beginnt nach Artikel 14:203(1) PECL (Verjährungsbeginn) mit der Übertragung der Kontrolle über das Werk oder einen Teil davon auf den Kunden gemäß Artikel 2:106.
(3) Der Beginn der Verjährungsfrist ist nach Artikel 14:301(1) PECL (Hemmung bei Unkenntnis) so lange aufgeschoben, wie der Schuldner die Tatsachen, auf denen der Anspruch beruht die Art des Schadens, weder kennt noch vernünftigerweise kennen konnte. Dies gilt nicht für andere als Schadenersatzansprüche.
(4) Nach Artikel 14:307 PECL (Höchstdauer der Verjährungsfrist) kann die Verjährungsfrist durch die Hemmung ihres Beginns oder ihres Ablaufs nicht auf mehr als zehn Jahre verlängert werden, im Fall von Ansprüchen wegen Verletzung der Person auf dreißig Jahre. Dies gilt nicht für einen Aufschub nach Artikel 14:302 (Hemmung bei gerichtlichen und anderen Verfahren).

Kapitel 3:
Bearbeitung

Artikel 3:101: Anwendungsbereich

(1) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich eine Partei, der Bearbeiter, dazu verpflichtet, eine Dienstleistung an einer vorhandenen beweglichen Sache oder einem vorhandenen unkörperlichen Gegenstand oder einem unbeweglichen Werk für einen anderen, den Kunden, vorzunehmen.
(2) Dieses Kapitel ist insbesondere auf Verträge anwendbar, durch welche sich der Bearbeiter dazu verpflichtet, eine vorhandene bewegliche Sache, einen vorhandenen unkörperlichen Gegenstand oder ein unbewegliches Werk zu reparieren, zu unterhalten oder zu reinigen.
(3) Ist eine Partei durch einen Vertrag zugleich zur Bearbeitung und zur Erbringung einer anderen Dienstleistung verpflichtet, findet auf denjenigen Teil des Vertrags, der die Bearbeitung betrifft, dieses Kapitel entsprechende Anwendung.

Artikel 3:102: Pflicht des Kunden zur Zusammenarbeit

Die Pflichten nach den Artikeln 1:201 PECL und 1:104 (Pflicht zur Zusammenarbeit) umfassen insbesondere die Pflicht des Kunden

(a) die Sache dem Bearbeiter zu übergeben oder diesem die Kontrolle darüber zu übertragen oder ihm Zugang zu der Stelle zu gewähren, wo die Dienstleistung erbracht werden soll, soweit dies vernünftigerweise notwendig ist, um dem Bearbeiter die Vertragserfüllung zu ermöglichen; und
(b) soweit es ihm obliegt, Komponenten, Materialien und Werkzeuge zur Verfügung zu stellen, dies so frühzeitig zu tun, wie es vernünftigerweise notwendig ist, um dem Bearbeiter die Vertragserfüllung zu ermöglichen.

Artikel 3:103: Umstände, unter denen die Dienstleistung zu erbringen ist

Die Pflichten nach Artikel 1:105 (Umstände, unter denen die Dienstleistung zu erbringen ist) umfassen insbesondere die Pflicht des Bearbeiters, sich Informationen über die Eigenschaften des Gegenstandes, an dem die Dienstleistung auszuführen ist, zu verschaffen, soweit dies vernünftigerweise notwendig ist, um die Dienstleistung zu erbringen.

Artikel 3:104: Sorgfaltspflicht des Bearbeiters

Die Pflichten nach Artikel 1:107 (Allgemeiner Sorgfaltsstandard für Dienstleistungen) umfassen insbesondere die Pflicht des Bearbeiters, vernünftige und angemessene Vorkehrungen zu treffen, um jeglichen Schaden an dem Gegenstand oder andere Nachteile zu vermeiden.

Artikel 3:105: Vertragsgemäßheit

Der Bearbeiter muß ein vom Kunden bei Vertragsschluß mitgeteilte oder angestrebte Ziel erreichen, wenn

(a) das angestrebte aber nicht mitgeteilte Ziel von solcher Art ist, daß es ein vernünftiger Kunde unter denselben Umständen angestrebt hätte und
(b) ein vernünftiger Kunde unter denselben Umständen keinen Grund zu der Annahme einer ernsten Gefahr hätte, daß dieses Ziel nicht erreicht werden wird.

Artikel 3:106: Inspizierung und Überwachung

(1) Nach Artikel 1:104(1)(d) (Pflicht zur Zusammenarbeit) kann der Kunde die eingesetzten Mittel, die Ausführung der Dienstleistung und den Gegenstand, an dem die Dienstleistung ausgeführt wird, in einer vernünftigen und angemessenen Weise und zu jeder angemessenen Zeit inspizieren oder überwachen, wenn die Dienstleistung an einem vom Kunden zur Verfügung gestellten Platz ausgeführt wird; der Kunde ist nicht dazu verpflichtet.

(2) Fehlende oder unzureichende Inspizierung oder Überwachung befreit den Bearbeiter weder ganz noch teilweise von der Haftung. Dies gilt auch, falls der Kunde vertraglich verpflichtet ist, die Bearbeitung des Gegenstandes abzunehmen, zu inspizieren oder zu überwachen.

Artikel 3:107: Rückgabe des Gegenstandes

(1) Erachtet der Bearbeiter die Dienstleistung als hinreichend abgeschlossen und wünscht er, den Gegenstand oder die Kontrolle darüber auf den Kunden zurück zu übertragen, muß der Kunde die Rückgabe oder Übertragung der Kontrolle innerhalb einer angemessenen Frist annehmen, nachdem er benachrichtigt wurde. Der Kunde kann die Annahme der Rückgabe oder der Übertragung der Kontrolle zurückweisen, falls der Gegenstand sich nicht für einen bestimmten Zweck eignet, den der Kunde mit der Dienstleistung anstrebt, vorausgesetzt, der bestimmte Zweck wurde dem Bearbeiter zur Kenntnis gebracht oder dieser hatte sonst Grund, den Zweck zu kennen.

(2) Der Bearbeiter muß innerhalb einer angemessenen Frist nach Aufforderung durch den Kunden den Gegenstand zurückgeben oder die Kontrolle darüber übertragen.

(3) Die Annahme der Rückgabe des Gegenstandes oder der Übertragung der Kontrolle darüber durch den Kunden stellt keinen Verzicht auf Rechte wegen Nichterfüllung dar.

(4) Hat der Bearbeiter aufgrund der Natur des Gegenstandes und der Dienstleistung durch die Erbringung der Dienstleistung Eigentum an dem Gegenstand erlangt, muß er das Eigentum bei der Rückgabe zurück übertragen.

Artikel 3:108: Zahlung der Vergütung

Die Vergütung ist fällig und zahlbar, wenn der Bearbeiter nach Artikel 3:107 den Gegenstand dem Kunden zurückgibt oder ihm die Kontrolle darüber überträgt, oder wenn der Kunde die Annahme der Rückgabe verweigert, ohne dazu berechtigt zu sein.

Artikel 3:109: Gefahrtragung

(1) Dieser Artikel ist anwendbar, wenn der Gegenstand aufgrund eines Ereignisses zerstört oder beschädigt wird, für das der Bearbeiter nicht verantwortlich ist und das er weder vermeiden noch überwinden konnte.

(2) Hat der Bearbeiter vor dem Eintritt des in Absatz 1 bezeichneten Ereignisses angezeigt, daß er die Dienstleistung als hinreichend abgeschlossen erachtet, und daß er den Gegenstand zurückzugeben oder die Kontrolle darüber zu übertragen wünscht, muß

(a) der Bearbeiter die Leistung nicht erneut erbringen; und

(b) der Kunde die Vergütung zahlen.

Die Vergütung ist fällig, sobald das Ereignis eingetreten ist und der Bearbeiter vorhandene Überreste des Gegenstandes zurückgibt oder der Kunde anzeigt, daß er die Überreste nicht möchte. In letztem Fall kann der Bearbeiter die Überreste auf Kosten des Kunden entsorgen. Dieser Artikel ist nicht auf Fälle anwendbar, in denen der Kunde nach Artikel 3:107(1) berechtigt war, die Rückgabe zurückzuweisen.

(3) Haben die Parteien vereinbart, daß der Bearbeiter für jeweils abgelaufene Zeitabschnitte bezahlt wird, muß der Kunde die Vergütung für diejenigen Zeitabschnitte zahlen, die vor Eintritt des in Absatz 1 bezeichneten Ereignisses abgelaufen sind.
(4) Ist die Leistungserbringung nach Eintritt des in Absatz 1 bezeichneten Ereignisses für den Bearbeiter noch möglich:
   (a) ist der Bearbeiter noch oder gegebenenfalls erneut zur Leistung verpflichtet;
   (b) ist der Kunde nur zur Vergütung der Leistung des Bearbeiters nach (a) verpflichtet; das Recht des Bearbeiters auf Vergütung nach Absatz 3 bleibt unberührt;
   (c) hat der Kunde dem Bearbeiter diejenigen Kosten zu ersetzen, die dieser aufwendet, um Ersatz für vom Kunden zur Verfügung gestellte Materialien zu beschaffen, es sei denn, der Kunde stellt diese Materialien selbst zur Verfügung, nachdem er dazu vom Bearbeiter aufgefordert wurde; und
   (d) falls nötig wird die Leistungszeit nach Artikel 1:111(6) (Vertragsänderung) verlängert.

   Der Kunde kann den Vertrag jedoch nach Artikel 1:115 (Kündigung des Vertrags) kündigen; die Folgen einer solchen Kündigung richten sich nach jenem Artikel.
(5) Ist die Leistungserbringung nach Eintritt des in Absatz 1 bezeichneten Ereignisses für den Bearbeiter nicht mehr möglich, ist:
   (a) der Kunde nicht zur Vergütung der erbrachten Dienstleistung verpflichtet; das Recht des Bearbeiters auf Vergütung nach Absatz 3 bleibt unberührt; und
   (b) der Bearbeiter verpflichtet, dem Kunden den Gegenstand und vom Kunden zur Verfügung gestellte Materialien oder deren Überreste zurückzugeben.

Artikel 3:110: Erfüllung und Nacherfüllung

(1) Erfüllt der Bearbeiter seine Pflichten nach Artikel 3:105 (Vertragsgemäßheit) nicht, kann der Kunde Erfüllung nach Artikel 9:102 PECL (Nicht auf Geld gerichtete Verpflichtungen) verlangen. Artikel 9:102(2)(d) PECL (Nicht auf Geld gerichtete Verpflichtungen) ist nicht anwendbar.
(2) Der Bearbeiter kann die Vertragswidrigkeit beheben, falls dies
   (a) vor Ablauf einer angemessenen Nachfrist, die der Kunde durch eine Benachrichtigung nach Artikel 8:106(3) PECL (Nachfrist für die Erfüllung) setzt; und
   (b) bevor die durch die Nacherfüllung verursachte Verspätung eine wesentliche Vertragsverletzung nach Artikel 8:103(b) oder (c) (Wesentliche Nichterfüllung) darstellen würde,

   möglich ist.
(3) Artikel 8:103(a) PECL (Wesentliche Nichterfüllung) ist nicht anwendbar auf Fälle, in denen Absatz 2 anwendbar ist, es sei denn, es wurde ausdrücklich vereinbart, daß genaue Einhaltung der Leistungszeit für den Vertrag entscheidend ist.
(4) Der Bearbeiter kann zwischen erneuter Vornahme und Nachbesserung wählen.
(5) Der Kunde kann seine Leistung nach Artikel 9:201 PECL (Zurückbehaltungsrecht) zurückbehalten, bis der Bearbeiter die Vertragswidrigkeit behoben hat.
(6) Der Kunde kann nach Kapitel 9, Abschnitt 5 PECL (Schadenersatz und Zinsen) Ersatz des Schadens verlangen, der nicht durch die Nacherfüllung des Bearbeiters behoben wurde.

Artikel 3:111: Andere Rechtsbehelfe

(1) Der Kunde kann nach diesem Artikel auf andere Rechtsbehelfe zurückgreifen,
   (a) wenn der Kunde nicht nach Artikel 9:102 PECL (Nicht auf Geld gerichtete Verpflichtungen) und Artikel 3:110(1) Erfüllung von nicht auf Geld gerichteten Verpflichtungen verlangen kann; und

(b) der Bearbeiter nicht in der Lage ist nachzuerfüllen oder nicht gemäß Artikel 3:110(2) nacherfüllt.

(2) Der Kunde kann den Vertrag nach Kapitel 9, Abschnitt 3 PECL (Aufhebung des Vertrages) aufheben, wenn die Nichterfüllung eine wesentliche Nichterfüllung nach Artikel 8:103(b) oder (c) PECL (Wesentliche Nichterfüllung) darstellt.

(3) Der Kunde kann die Vergütung nach Artikel 9:401 PECL (Recht auf Minderung des Preises) mindern.

(4) Der Kunde kann nach Kapitel 9, Abschnitt 5 PECL (Schadenersatz und Zinsen) Schadenersatz einschließlich der Kosten für Reparatur oder Ersatz des Gegenstandes verlangen.

Artikel 3:112: Haftungsbegrenzung

In Verträgen zwischen Parteien, die beide im Rahmen ihrer beruflichen oder gewerblichen Tätigkeit handeln, wird eine Bestimmung, die die Haftung des Bearbeiters auf den Wert des Gegenstands, den dieser bei ordnungsgemäßer Erfüllung gehabt hätte, begrenzt, als fair, angemessen und vernünftig im Sinne des Artikel 1:114(2) (Haftungsbegrenzung) angesehen, es sei denn, der Bearbeiter oder eine Person, für deren Verhalten er verantwortlich ist, hat den Schaden vorsätzlich oder grob fahrlässig verursacht.

Kapitel 4:
Verwahrung

Artikel 4:101: Anwendungsbereich

(1) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich eine Partei, der Verwahrer, dazu verpflichtet, für die andere Partei einen beweglichen oder unkörperlichen Gegenstand zu verwahren.

(2) Ist eine Partei durch einen Vertrag zugleich zur Verwahrung und zur Erbringung einer anderen Dienstleistung verpflichtet, findet auf denjenigen Teil des Vertrags, der die Verwahrung betrifft, dieses Kapitel entsprechende Anwendung.

(3) Dieses Kapitel ist nicht anwendbar auf die Verwahrung von
(a) unbeweglichen Gegenständen;
(b) beweglichen oder unkörperlichen Gegenständen während des Transports; und
(c) Geld, Sicherheiten oder Rechten.

Artikel 4:102: Vorvertragliche Hinweispflichten des Kunden

Die Pflichten nach Artikel 1:103(4) (Vorvertragliche Hinweispflichten) umfassen insbesondere die Pflicht des Kunden, den Verwahrer auf jede ungewöhnliche Gefahr, die dem Gegenstand oder dessen Verwahrung anhaftet, und von der er Kenntnis hat, hinzuweisen.

Artikel 4:103: Umstände, unter denen die Dienstleistung zu erbringen ist

Die Pflichten nach Artikel 1:105 (Umstände, unter denen die Dienstleistung zu erbringen ist) umfassen insbesondere die Pflicht des Verwahrers, sich Informationen über die Eigenschaften des Gegenstandes, der verwahrt werden soll, zu verschaffen, soweit dies vernünftigerweise notwendig ist, um die Dienstleistung zu erbringen.

Artikel 4:104: Pflichten des Verwahrers hinsichtlich Hilfspersonen und Hilfsmitteln

(1) Die Pflichten nach Artikel 1:106 (Pflichten des Dienstleisters hinsichtlich Hilfspersonen und Hilfsmittel) umfassen insbesondere die Pflicht des Verwahrers, sofern er den Raum für die Aufbewahrung zur Verfügung stellt, einen dafür geeigneten Raum zur Verfügung zu stellen, so daß der Gegenstand in solch einem Zustand zurückgegeben werden kann, wie es der Kunde erwarten darf.
(2) Der Verwahrer darf die Erbringung der Dienstleistung nicht ohne die Zustimmung des Kunden an einen Dritten vergeben.

Artikel 4:105: Sorgfaltspflicht des Verwahrers

(1) Die Pflichten nach Artikel 1:107 (Allgemeiner Sorgfaltsstandard für Dienstleistungen) umfassen insbesondere die Pflicht des Verwahrers, angemessene Vorkehrungen zu treffen, um unnötige Zerstörung, Verschlechterung oder Entwertung des verwahrten Gegenstandes zu vermeiden.
(2) Der Verwahrer darf den zur Verwahrung übergebenen Gegenstand nur mit Zustimmung des Kunden nutzen.

Artikel 4:106: Rückgabe des Gegenstandes

(1) Der Verwahrer muß den Gegenstand innerhalb einer angemessenen Frist nach Aufforderung durch den Kunden zurückgeben.
(2) Der Kunde muß die Rückgabe des Gegenstandes zur vereinbarten Zeit annehmen oder innerhalb einer angemessenen Frist nach der Erklärung der Vertragsaufhebung durch den Verwahrer, falls dieser zur Vertragsaufhebung wegen Nichterfüllung des Kunden berechtigt ist.
(3) Die bloße Annahme der Rückgabe des Gegenstands durch den Kunden stellt keinen Verzicht auf Rechte wegen Nichterfüllung dar.
(4) Nimmt der Kunde die Rückgabe des Gegenstands nicht gemäß Absatz 2 an, hat der Verwahrer das Recht, den Gegenstand nach Artikel 7:110 (2)(b) PECL (Nichtannahme von Sachen) zu verkaufen, vorausgesetzt, er hat dem Kunden seine Absicht in angemessener Weise mitgeteilt.
(5) Trägt der Gegenstand während der Verwahrung Früchte, muß der Verwahrer diese Früchte übergeben, wenn der Gegenstand dem Kunden zurückgegeben wird.
(6) Hat der Verwahrer aufgrund der Natur des Gegenstandes und des Vertrages durch die Erfüllung des Vertrags Eigentum an dem Gegenstand erlangt, muß er einen Gegenstand derselben Art, Qualität und Menge zurückgeben und das Eigentum daran übertragen. Absatz 1 gilt entsprechend.
(7) Dieser Artikel ist entsprechend anwendbar, wenn ein Dritter, der zum Empfang des Gegenstandes hinreichend berechtigt ist, die Rückgabe verlangt.

Artikel 4:107: Vertragsgemäßheit

(1) Der Verwahrer muß den Gegenstand den Anforderungen des Vertrags entsprechend verwahren.
(2) Die Verwahrung entspricht den Anforderungen des Vertrags nur, wenn der Gegenstand in demselben Zustand, in dem er sich bei Übergabe an den Verwahrer befand, zurückgegeben wird.
(3) Kann aufgrund der Natur des Gegenstandes und des Vertrages vernünftigerweise nicht erwartet werden, daß der Gegenstand in demselben Zustand zurückgegeben wird, ent-

spricht die Verwahrung den Anforderungen des Vertrags nur, wenn der Gegenstand dem Kunden in einem solchen Zustand zurückgegeben wird, wie er es vernünftigerweise erwarten konnte.

(4) Kann aufgrund der Natur des Gegenstandes und des Vertrages vernünftigerweise nicht erwartet werden, daß derselbe Gegenstand zurückgegeben wird, entspricht die Verwahrung den Anforderungen des Vertrags nur, wenn ein Gegenstand zurückgegeben wird, der sich in demselben Zustand befindet, wie der zur Verwahrung übergebene Gegenstand und es sich um einen Gegenstand derselben Art, Qualität und Menge handelt und das Eigentum daran gemäß Artikel 4:106(6) (Rückgabe des Gegenstandes) übertragen wird.

Artikel 4:108: Zahlung der Vergütung

(1) Die Vergütung ist fällig und zahlbar, wenn der Verwahrer den Gegenstand dem Kunden gemäß Artikel 4:106 (Rückgabe des Gegenstandes) zurückgibt, oder wenn der Kunde die Annahme der Rückgabe verweigert, ohne dazu berechtigt zu sein.

(2) Der Verwahrer kann die Rückgabe des Gegenstands solange verweigern, bis der Kunde die Vergütung zahlt. Artikel 9:201 PECL (Zurückbehaltungsrecht) ist entsprechend anwendbar.

Artikel 4:109: Rechenschaftspflicht

Nach der Beendigung der Verwahrung muß der Verwahrer den Kunden informieren über

(a) jegliche Beschädigungen des Gegenstands während der Verwahrung; und

(b) notwendige Vorkehrungen, die der Kunde vor Ingebrauchnahme oder Transport des Gegenstandes treffen muß, es sei denn, der Kunde hat Grund, diese Vorkehrungen zu kennen.

Artikel 4:110: Gefahrtragung

(1) Dieser Artikel ist anwendbar, wenn der Gegenstand aufgrund eines Ereignisses zerstört oder beschädigt wird, für das der Verwahrer nicht verantwortlich ist und das er weder vermeiden noch überwinden konnte.

(2) Hat der Verwahrer vor dem Eintritt des in Absatz 1 bezeichneten Ereignisses dem Kunden berechtigterweise mitgeteilt, daß dieser die Rückgabe des Gegenstandes annehmen soll, muß der Kunde die Vergütung zahlen. Die Vergütung ist fällig, sobald das Ereignis eingetreten ist und der Verwahrer vorhandene Überreste des Gegenstandes zurückgibt oder der Kunde anzeigt, daß er die Überreste nicht möchte. In letztem Fall kann der Verwahrer die Überreste des Gegenstandes auf Kosten des Kunden entsorgen.

(3) Haben die Parteien vereinbart, daß der Verwahrer für jeweils abgelaufene Zeitabschnitte bezahlt wird, muß der Kunde die Vergütung für diejenigen Zeitabschnitte bezahlen, die vor Eintritt des in Absatz 1 bezeichneten Ereignisses abgelaufen sind.

(4) Ist die weitere Leistungserbringung nach dem in Absatz 1 bezeichneten Ereignis für den Verwahrer noch möglich, muß er die Leistung weiterhin erbringen. Der Kunde kann den Vertrag jedoch gemäß Artikel 1:115 (Kündigung des Vertrags) kündigen; die Folgen einer solchen Kündigung richten sich nach jenem Artikel.

(5) Ist die Leistungserbringung nach Eintritt des in Absatz 1 bezeichneten Ereignisses für den Verwahrer nicht mehr möglich, ist:

  (a) der Kunde nicht zur Vergütung der erbrachten Dienstleistung verpflichtet; das Recht des Verwahrers auf Vergütung nach Absatz 3 bleibt unberührt; und

  (b) der Verwahrer verpflichtet, dem Kunden die Überreste des Gegenstandes zurückzugeben, es sei denn, der Kunde zeigt an, daß er sie nicht möchte. In letztem Fall kann der Verwahrer die Überreste des Gegenstandes auf Kosten des Kunden entsorgen.

Artikel 4:111: Rechtsbehelfe wegen Vertragswidrigkeit

Der Kunde kann im Fall einer Vertragswidrigkeit nach Artikel 4:107 auf die Rechtsbehelfe nach Kapitel 9 PECL (Einzelne Rechtsbehelfe bei Nichterfüllung) zurückgreifen.

Artikel 4:112: Haftungsbegrenzung

In Verträgen zwischen Parteien, die beide im Rahmen ihrer beruflichen oder gewerblichen Tätigkeit handeln, wird eine Bestimmung, die die Haftung des Verwahrers auf den Wert des Gegenstandes beschränkt, als fair, angemessen und vernünftig im Sinne von Artikel 1:114(2) (Haftungsbegrenzung) angesehen, es sei denn, der Verwahrer oder eine Person, für deren Verhalten er verantwortlich ist, hat den Schaden vorsätzlich oder grob fahrlässig verursacht.

Artikel 4:113: Haftung des Hoteliers

(1) Dieser Artikel ist nicht anwendbar, soweit ein gesonderter Verwahrungsvertrag zwischen Hotelier und Gast über einen in das Hotel gebrachten Gegenstand geschlossen wird. Der Abschluss eines gesonderten Verwahrungsvertrages ist anzunehmen, wenn ein Gegenstand dem Hotelier zur Verwahrung übergeben wird. Artikel 4:101(3)(c) ist nicht anwendbar.

(2) Der Hotelier haftet wie ein Verwahrer für jede Beschädigung, Zerstörung oder für Verlust eines Gegenstandes, den ein Übernachtungsgast des Hotels in das Hotel gebracht hat.

(3) Als ein in das Hotel gebrachter Gegenstand wird jeder Gegenstand erachtet,
   (a) der sich im Hotel befindet, während der Gast dort eine Schlafgelegenheit hat; oder
   (b) den der Hotelier oder eine Person, für die er verantwortlich ist, außerhalb des Hotels in seine Obhut nimmt, während der Gast im Hotel eine Schlafgelegenheit hat; oder
   (c) den der Hotelier oder eine Person, für die er verantwortlich ist, innerhalb oder außerhalb des Hotels in seine Obhut nimmt, während einer angemessenen und vernünftigen Zeit vor oder nachdem der Gast im Hotel eine Schlafgelegenheit hat.

(4) Der Hotelier haftet nicht, soweit der Schaden oder der Verlust verursacht wurde
   (a) durch einen Gast oder eine Person, die den Gast begleitet, besucht oder bei ihm beschäftigt ist; oder
   (b) durch einen außerhalb des Einflußbereichs des Hoteliers liegenden Hinderungsgrund nach Artikel 8:108 PECL (Entschuldigung aufgrund eines Hinderungsgrundes); oder
   (c) aufgrund der Natur des Gegenstandes.

(5) Eine Bestimmung, die die Haftung des Hoteliers ausschließt oder begrenzt, gilt nicht als fair und angemessen im Sinne von Artikel 1:114(2) (Haftungsbegrenzung), falls sie die Haftung für Fälle ausschließt oder begrenzt, in denen der Schaden oder der Verlust durch ein vorsätzliches oder grob fahrlässiges Verhalten des Hoteliers oder einer Person, für die er verantwortlich ist, verursacht wird.

(6) Wurde der Schaden oder der Verlust nicht durch ein vorsätzliches oder grob fahrlässiges Verhalten des Hoteliers oder einer Person, für die er verantwortlich ist, verursacht, muß der Gast den Hotelier ohne vermeidbare Verzögerung über den Schaden informieren. Informiert der Gast den Hotelier nicht ohne vermeidbare Verzögerung, haftet dieser nicht.

(7) Der Hotelier kann die in Absatz 2 bezeichneten Gegenstände solange zurückbehalten, bis der Kunde jeder Forderung des Hoteliers nachkommt, die dieser gegen ihn wegen Unterbringung, Speisen, Getränken und anderen Dienstleistungen für den Kunden im Rahmen der Tätigkeit als Hotelier hat.

Kapitel 5:
Entwürfe

Artikel 5:101: Anwendungsbereich
(1) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich eine Partei, der Entwerfende, dazu verpflichtet, für eine andere, den Kunden, eine unbewegliche Sache zu entwerfen, die für oder durch den Kunden hergestellt werden soll.
(2) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich der Entwerfende dazu verpflichtet, einen beweglichen oder unkörperlichen Gegenstand oder eine Dienstleistung zu entwerfen, die durch oder für den Kunden hergestellt oder erbracht werden soll.
(3) Wenn eine Partei durch einen Vertrag zugleich zur Erstellung eines Entwurfs und zur Erbringung einer anderen Dienstleistung verpflichtet ist, findet auf denjenigen Teil des Vertrags, der Entwürfe betrifft, dieses Kapitel entsprechende Anwendung.
(4) Besteht die andere Dienstleistung nach Absatz 3 in der Ausführung des Entwurfs, haben die Regeln, die die nachfolgende Dienstleistung regeln, dessen Regeln Vorrang. Die Artikel 5:105 und 5:108 finden in diesem Falle keine Anwendung.

Artikel 5:102: Vorvertragliche Hinweispflicht
Die Pflichten nach Artikel 1:103 (Vorvertragliche Hinweispflichten) umfassen insbesondere die Pflicht des Entwerfenden, den Kunden gegebenenfalls darauf hinzuweisen, daß ihm besondere Fähigkeiten zur Bewältigung spezifischer Schwierigkeiten fehlen, für welche die Einbeziehung eines Spezialisten erforderlich ist.

Artikel 5:103: Pflicht des Kunden zur Zusammenarbeit
Hat der Entwerfende den Kunden nach Artikel 1:103 (Vorvertragliche Hinweispflichten) und Artikel 5:102 darauf hingewiesen, daß die Einbeziehung eines Spezialisten erforderlich ist, damit der Entwerfende seine Leistung erbringen kann, so umfassen die Pflichten nach Artikel 1:202 PECL (Pflicht zur Zusammenarbeit) und Artikel 1:104 (Pflicht zur Zusammenarbeit) insbesondere, daß der Kunde einen solchen Spezialisten verpflichtet.

Artikel 5:104: Sorgfaltspflicht des Entwerfenden
Die Pflichten nach Artikel 1:107 (Allgemeiner Sorgfaltsstandard für Dienstleistungen) umfassen insbesondere die Pflicht des Entwerfenden,
(a) den Entwurf auf die Leistungen anderer Dienstleister abzustimmen, die mit dem Kunden vertraglich verbunden sind, um so eine wirkungsvolle Erbringung sämtlicher Dienstleistungen zu ermöglichen,
(b) diejenigen Arbeiten anderer Dienstleister einzubeziehen, die erforderlich sind, um die Übereinstimmung des Entwurfs mit Artikel 5:105 sicherzustellen,
(c) sämtliche Erläuterungen in den Entwurf einzustellen, die erforderlich sind, um einem durchschnittlichen Nutzer oder einem besonderen Nutzer, der dem Entwerfenden bei Vertragsschluß mitgeteilt worden ist, die Umsetzung des Entwurfs zu ermöglichen,
(d) dem Nutzer die Umsetzung des Entwurfs ohne die Verletzung solcher Regeln des öffentlichen Rechts oder von Rechten Dritter zu ermöglichen, die der Entwerfende kennt oder deren Kenntnis von ihm vernünftigerweise erwartet werden kann und
(e) einen Entwurf zu erstellen, der wirtschaftlich und technisch wirkungsvoll umgesetzt werden kann.

Artikel 5:105: Vertragsgemäßheit

(1) Soweit die Parteien nichts anderes vereinbart haben, entspricht der Entwurf den vertraglichen Anforderungen nicht, wenn er den Nutzer trotz Einhaltung der gebotenen Sorgfalt nicht in die Lage versetzt, das angestrebte Ziel durch Umsetzung des Entwurfs zu erreichen.
(2) Der Kunde kann keinen Rechtsbehelf wegen Vertragswidrigkeit geltend machen, wenn diese auf einer Weisung des Kunden gemäß Artikel 1:109 (Weisungen des Kunden) beruht und der Entwerfende seine Hinweispflicht nach Artikel 1:110 (Vertragliche Hinweispflicht des Dienstleisters) nicht verletzt hat.

Artikel 5:106: Übergabe des Entwurfs

Erachtet der Entwerfende den Entwurf oder einen Teil, der unabhängig von der Fertigstellung des Entwurfs im übrigen umsetzbar ist, als ausreichend fertiggestellt und wünscht er, den Entwurf dem Kunden zu übergeben, muß der Kunde ihn innerhalb einer angemessenen Frist, nachdem er benachrichtigt wurde, annehmen. Der Kunde kann die Annahme des Entwurfs verweigern, wenn dieser oder ein erheblicher Teil davon nicht vertragsgemäß ist und diese Vertragswidrigkeit eine wesentliche Nichterfüllung im Sinne von Artikel 8:103 PECL (Wesentliche Nichterfüllung) darstellt.

Artikel 5:107: Aufbewahrungspflicht des Entwerfenden

Nach der Erfüllung der beiderseitigen vertraglichen Verpflichtungen kann der Kunde vom Entwerfenden die Übergabe aller relevanten Dokumente zumindest in Kopie verlangen. Der Entwerfende muß diese Dokumente eine vernünftige und angemessene Zeit lang aufbewahren. Vor einer Vernichtung der Dokumente muß sie der Entwerfende dem Kunden erneut anbieten.

Artikel 5:108: Haftungsbegrenzung

In Verträgen zwischen Parteien, die im Rahmen ihrer beruflichen oder gewerblichen Tätigkeit handeln, wird vermutet, daß eine Klausel, welche die Haftung des Entwerfenden für Nichterfüllung auf den Wert der unbeweglichen Sache, des Gegenstands oder der Dienstleistung beschränkt, fair, angemessen und vernünftig im Sinne von Artikel 1:114(2) (Haftungsbeschränkung) ist, es sei denn, der Bearbeiter oder eine Person, für deren Verhalten er verantwortlich ist, hat den Schaden vorsätzlich oder grob fahrlässig verursacht.

Kapitel 6:
Informationen

Artikel 6:101: Anwendungsbereich

(1) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich eine Partei, der Informationsdienstleister, dazu verpflichtet, dem Kunden Informationen, wie Informationen über Tatsachen, Bewertungen oder Empfehlungen, zu verschaffen.
(2) Wenn eine Partei durch einen Vertrag zugleich zur Verschaffung von Informationen und zur Erbringung einer anderen Dienstleistung verpflichtet ist, findet auf denjenigen Teil des Vertrags, der Informationen betrifft, dieses Kapitel entsprechende Anwendung.

Artikel 6:102: Umstände, unter denen die Dienstleistung zu erbringen ist

(1) Die Pflichten nach Artikel 1:105 (Umstände, unter denen die Dienstleistung zu erbringen ist) umfassen insbesondere die Pflicht des Informationsdienstleisters, soweit dies vernünftigerweise für die Erbringung der Dienstleistung erforderlich ist, sich Informationen über
   (a) den besonderen Zweck, zu welchem der Kunde die Informationen benötigt,
   (b) die Präferenzen und Prioritäten des Kunden hinsichtlich der Informationen,
   (c) die Entscheidung, welche der Kunde voraussichtlich auf der Basis der Informationen treffen wird, und
   (d) die persönliche Lage des Kunden

   zu verschaffen.

(2) Sind die Informationen zur Weitergabe an eine Gruppe von Personen bestimmt, muß sie Bezug zu den Zwecken, Präferenzen, Prioritäten und persönlichen Lagen haben, die vernünftigerweise von den Angehörigen einer solchen Gruppe erwartet werden können.

(3) Bedarf der Informationsdienstleister der Information durch den Kunden, muß er diesem darlegen, welche Information zu geben ist.

Artikel 6:103: Pflichten des Informationsdienstleisters hinsichtlich Hilfspersonen und Hilfsmittel

Sofern nichts anderes vereinbart ist, muß der Informationsdienstleister, soweit dies vernünftigerweise für die Erbringung der Dienstleistung erforderlich ist, sich Expertenwissen, zu welchem er Zugang hat oder als beruflicher oder gewerblicher Informationsdienstleister haben müßte, verschaffen und dieses auch einsetzen.

Artikel 6:104: Sorgfaltspflicht des Informationsdienstleisters

(1) Die Pflichten nach Artikel 1:107 (Allgemeiner Sorgfaltsstandard für Dienstleistungen) umfassen insbesondere die Pflicht des Informationsdienstleisters,
   (a) durch vernünftige und angemessene Maßnahmen sicherzustellen, daß der Kunde den Inhalt der Informationen versteht,
   (b) mit derjenigen Sorgfalt zu handeln, die ein vernünftiger Informationsdienstleister in derselben Situation bei der Verschaffung von Informationen über Bewertungen üben würde, und
   (c) in jedem Falle, in welchem der Kunde voraussichtlich eine Entscheidung auf der Basis der Information treffen wird, den Kunden auf die enthaltenen Risiken hinzuweisen, soweit diese vernünftigerweise Einfluß auf dessen Entscheidung haben könnten.

(2) Verpflichtet sich der Informationsdienstleister ausdrücklich oder stillschweigend zur Abgabe einer Empfehlung, welche dem Kunden eine anschließende Entscheidung ermöglichen soll, so muß der Informationsdienstleister
   (a) seine Empfehlung auf eine fachkundige Analyse des Expertenwissens stützen, das er sich im Hinblick auf die Zwecke, Präferenzen, Prioritäten und die persönliche Lage des Klienten verschaffen muß,
   (b) den Kunden hinsichtlich der zu treffenden Entscheidung auf Alternativen, die der Informationsdienstleister selbst anbieten kann, sowie auf deren Vorteile und Risiken im Vergleich zur empfohlenen Entscheidung hinweisen und
   (c) den Kunden auf solche Alternativen hinweisen, die er selbst nicht anbieten kann, es sei denn, daß der Informationsdienstleister den Kunden darüber informiert, daß nur eine beschränkte Zahl an Alternativen angeboten wird, oder daß dies in der betreffenden Situation offensichtlich ist.

Artikel 6:105: Vertragsgemäßheit

(1) Der Informationsdienstleister muß dem Kunden hinsichtlich Umfang, Qualität und Beschreibung die Informationen so verschaffen, wie sie vertraglich vorgesehen sind.
(2) Verschafft der Informationsdienstleister Informationen über Tatsachen, müssen diese eine zutreffende Beschreibung der gegenwärtigen Situation sein.

Artikel 6:106: Rechenschaftspflicht

Soweit dies vernünftigerweise erforderlich ist, muß der Informationsdienstleister im Hinblick auf das Interesse des Kunden Rechenschaft über die nach diesem Kapitel verschafften Informationen ablegen.

Artikel 6:107: Interessenkonflikt

(1) Verpflichtet sich der Informationsdienstleister ausdrücklich oder stillschweigend zur Abgabe einer Empfehlung, welche dem Kunden eine anschließende Entscheidung ermöglichen soll, so muß der Informationsdienstleister jeden möglichen Interessenkonflikt offenlegen, welcher die Erfüllung seiner Pflichten beeinflussen könnte.
(2) Solange der Vertrag nicht vollständig erfüllt ist, darf der Informationsdienstleister keine Geschäftsbeziehung mit einem Dritten eingehen, die zu einem Konflikt mit den Interessen des Kunden führen kann, ohne daß er dem Kunden dies vollständig offengelegt und dieser ausdrücklich oder stillschweigend zugestimmt hat.
(3) Weichen die Parteien von der Regel nach Absatz (2) ab, kann sich der Informationsdienstleister auf eine solche Klausel nur insoweit berufen, als er den Kunden in einer den Umständen vernünftigerweise angemessenen Art auf die Klausel hingewiesen hat.

Artikel 6:108: Bedeutung der Leistungsfähigkeit des Kunden

(1) Die Einschaltung anderer Personen auf Seiten des Kunden oder allein dessen eigene Fähigkeiten befreien den Informationsdienstleister nicht von seinen Pflichten nach diesem Kapitel.
(2) Der Informationsdienstleister ist von der Erfüllung dieser Pflichten befreit, wenn der Kunde bereits über die Informationen verfügt oder Grund hätte, über sie zu verfügen.
(3) Im Sinne von Absatz (2) hätte der Kunde „Grund, über sie zu verfügen", wenn die Informationen für einen vergleichbaren Kunden in derselben Situation angesichts aller ungewöhnlichen Tatsachen und Umstände, die dem Kunden auch ohne Nachforschung bekannt sind, offensichtlich wären.

Artikel 6:109: Ursachenzusammenhang

Weiß der Informationsdienstleister, daß die zu verschaffende Information die Basis einer anschließenden Entscheidung sein wird, oder müßte er dies wissen, wird vermutet, daß eine Pflichtverletzung des Informationsdienstleisters einen entstandenen Schaden verursacht hat, wenn der Kunde zeigt, daß ein vernünftiger Kunde in derselben Situation eine abweichende Entscheidung ernsthaft erwogen hätte, hätte der Informationsdienstleister alle geforderten Informationen verschafft.

Kapitel 7:
Behandlung

Artikel 7:101: Anwendungsbereich

(1) Dieses Kapitel ist auf Verträge anwendbar, durch welche sich eine Partei, der Behandelnde, verpflichtet, für eine andere Partei, den Patienten, eine medizinische Behandlung durchzuführen.
(2) Dieses Kapitel findet entsprechende Anwendung auf Verträge, durch die sich der Behandelnde verpflichtet, eine andere Dienstleistung zu erbringen, um die physische oder mentale Verfassung einer Person zu verändern.
(3) Ist der Patient nicht Vertragspartei, kann er die Erfüllung der Pflichten, welche dieses Kapitel dem Behandelnden auferlegt, in Einklang mit Artikel 6:110 PECL (Vertrag zugunsten Dritter) verlangen.
(4) Wenn eine Partei durch einen Vertrag zugleich zur Behandlung und zur Erbringung einer anderen Dienstleistung verpflichtet ist, findet auf denjenigen Teil des Vertrags, der die Behandlung betrifft, dieses Kapitel entsprechende Anwendung.

Artikel 7:102: Umstände, unter denen die Dienstleistung zu erbringen ist

Soweit dies vernünftigerweise für die Erbringung der Dienstleistung erforderlich ist, umfassen die Pflichten nach Artikel 1:105 (Umstände, unter denen die Dienstleistung zu erbringen ist) insbesondere die Pflicht des Behandelnden,
(a) den Patienten über seine gesundheitliche Verfassung, Symptome, frühere Krankheiten, Allergien, frühere und laufende Behandlungen sowie nach den Präferenzen und Prioritäten in bezug auf die Behandlung zu befragen,
(b) die zur Feststellung der gesundheitlichen Verfassung des Patienten erforderlichen Untersuchungen durchzuführen und
(c) sämtliche sonstigen in die Behandlung des Patienten eingebundenen Behandelnden zu Rate zu ziehen.

Artikel 7:103: Pflichten des Behandelnden hinsichtlich Hilfspersonen und Hilfsmittel

Die Pflichten nach Artikel 1:106 (Pflichten des Behandelnden hinsichtlich Hilfspersonen und Hilfsmittel) umfassen insbesondere die Pflicht des Behandelnden, Instrumente, Medikamente, Materialien, Anlagen und Gebäude von zumindest solcher Qualität zu verwenden, wie es von der allgemein akzeptierten und guten beruflichen Praxis gefordert wird, wie sie den anwendbaren gesetzlichen Regeln entsprechen und wie sie geeignet sind, den Zweck zu erreichen, für den sie eingesetzt werden.

Artikel 7:104: Sorgfaltspflicht des Behandelnden

(1) Die Pflichten nach Artikel 1:107 (Allgemeiner Sorgfaltsstandard für Dienstleistungen) umfassen insbesondere die Pflicht des Behandelnden, den Patienten mit derjenigen Sorgfalt zu behandeln, die ein vernünftiger Behandelnder unter den gegebenen Umständen üben würde.
(2) Fehlt dem Behandelnden die nötige Erfahrung oder Fähigkeit, den Patienten unter Beachtung von Artikel 1:107 (Allgemeiner Sorgfaltsstandard für Dienstleistungen) zu behandeln, muß er den Patienten an einen Behandelnden verweisen, der zur Erfüllung der in dieser Bestimmung festgesetzten Standards in der Lage ist.

Artikel 7:105: Pflicht des Behandelnden zur Information

(1) Um eine freie Entscheidung des Patienten über die Behandlung zu ermöglichen, muß der Behandelnde den Patienten in einer für diesen verständlichen Form insbesondere über
   (a) den Gesundheitszustand des Patienten,
   (b) die Art der vorgeschlagenen Behandlung,
   (c) die Vorteile der vorgeschlagenen Behandlung,
   (d) die Risiken der vorgeschlagenen Behandlung,
   (e) die Alternativen zur vorgeschlagenen Behandlung einschließlich ihrer Vorteile und Risiken gegenüber der vorgeschlagenen Behandlung und
   (f) die Folgen eines Verzichts auf die Behandlung

   informieren.

(2) Der Behandelnde muß in jedem Fall über sämtliche Risiken und Alternativen informieren, welche die Entscheidung über das Einverständnis mit der vorgeschlagenen Behandlung vernünftigerweise beeinflussen könnten. Es wird vermutet, daß ein Risiko die Entscheidung beeinflussen könnte, wenn seine Verwirklichung angesichts der Lage zu einem erheblichen Schaden für den Patienten führen würde. Soweit nichts anderes bestimmt ist, unterliegt die Informationspflicht den Regeln von Kapitel 6 (Information).

Artikel 7:106: Informationspflicht bei überflüssiger oder experimenteller Behandlung

(1) Ist eine Behandlung angesichts des Gesundheitszustands des Patienten überflüssig, müssen ihm sämtliche bekannten Risiken offengelegt werden.

(2) Ist die Behandlung experimenteller Natur, müssen sämtliche Informationen hinsichtlich des Ziels des Experiments, der Art der Behandlung, ihrer auch nur möglicherweise bestehenden Vorteile, Risiken und Alternativen offengelegt werden.

Artikel 7:107: Ausnahmen von der Informationspflicht

(1) Die nach den Artikeln 7:105 und 7:106 gebotene Information kann dem Patienten vorenthalten werden,
   (a) wenn objektive Gründe die Annahme rechtfertigen, daß dies die Gesundheit oder das Leben des Patienten nachteilig beeinflussen könnte oder
   (b) wenn der Patient ausdrücklich erklärt, nicht informiert werden zu wollen, vorausgesetzt, daß das Verschweigen die Gesundheit oder die Sicherheit Dritter nicht gefährdet.

(2) Artikel 7:105 findet keine Anwendung, wenn die Behandlung bei einem Notfall erbracht wird. In einem solchen Fall muß der Behandelnde die Information später geben, soweit dies möglich ist.

Artikel 7:108: Pflicht zur Einholung des Einverständnisses

(1) Der Behandelnde darf die Behandlung nicht durchführen, wenn er nicht zuvor die informierte Einwilligung des Patienten erhalten hat.
(2) Der Patient kann die Einwilligung jederzeit widerrufen.
(3) Soweit der Patient nicht in der Lage ist, seine Einwilligung zu geben, muß der Behandelnde
  (a) sich die informierte Einwilligung einer Person oder Einrichtung verschaffen, die zur Entscheidung über die Behandlung anstelle des Patienten befugt ist, oder
  (b) sämtliche Regeln oder Verfahren einhalten, welche eine Behandlung ohne eine solche Einwilligung gestatten.
(4) In der in Absatz (3) bezeichneten Situation muß der Behandelnde soweit als möglich die Meinung des nicht einwilligungsfähigen Patienten und dessen Meinung vor Verlust der Einwilligungsfähigkeit berücksichtigen.
(5) In der Situation nach Absatz (3) darf der Behandelnde ausschließlich eine solche Behandlung vorzunehmen, die den Gesundheitszustand des Patienten verbessern soll.
(6) In der Situation nach Artikel 7:106(2) muß die Einwilligung ausdrücklich und in besonderer Weise erklärt werden.
(7) Dieser Artikel findet keine Anwendung auf eine Behandlung, die in einem Notfall erforderlich wird.

Artikel 7:109: Berichtspflicht

(1) Der Behandelnde muß angemessene Aufzeichnungen über die Behandlung anlegen. Diese Aufzeichnungen müssen insbesondere die in Erfüllung von Artikel 7:102 erlangten Informationen, Informationen über das Einverständnis und Informationen über die ausgeführte Behandlung enthalten.
(2) Der Behandelnde muß dem Patienten oder, wenn der Patient nicht in der Lage ist, seine Einwilligung zu geben, derjenigen Person oder Einrichtung, die zur Entscheidung über die Behandlung anstelle des Patienten befugt ist, Zugang zu den Aufzeichnungen gewähren.
(3) Der Behandelnde muß, soweit dies angemessen und vernünftig ist, Fragen zum Verständnis der Aufzeichnungen beantworten.
(4) Kommt der Behandelnde den Pflichten nach Absätzen (2) oder (3) nicht nach, werden eine Verletzung der Pflicht nach Artikel 7:104 sowie die Ursächlichkeit vermutet.
(5) Der Behandelnde muß über einen angemessenen und vernünftigen Zeitraum von mindestens zehn Jahren nach Abschluß der Behandlung die Aufzeichnungen aufbewahren und Fragen zu ihrem Verständnis beantworten; die Angemessenheit und Vernünftigkeit des Zeitraums richtet sich nach der Nützlichkeit des Aufzeichnungen für den Patienten, seine Erben oder künftige Behandlungen. Aufzeichnungen, von denen vernünftigerweise zu erwarten ist, daß sie auch nach dem angemessenen und vernünftigen Zeitraum Bedeutung erlangen werden, müssen vom Behandelnden auch über diesen Zeitraum hinaus aufbewahrt werden. Gibt der Behandelnde, gleich aus welchem Grunde, seine Tätigkeit auf, muß er die Aufzeichnungen zum Zwecke der späteren Konsultation hinterlegen oder dem Patienten aushändigen.
(6) Der Behandelnde darf Informationen über den Patienten oder andere in die Behandlung des Patienten eingebundene Personen nicht an Dritte weitergeben, wenn die Weitergabe nicht zum Schutz Dritter oder öffentlicher Interessen erforderlich ist. Der Behandelnde kann die Aufzeichnungen in anonymisierter weise für statistische oder wissenschaftliche Zwecke nutzen.

Artikel 7:110: Rechtsbehelfe bei Nichterfüllung

Die Kapitel 8 und 9 PECL finden im Falle einer Nichterfüllung mit folgenden Abweichungen Anwendung:

(a) Der Behandelnde kann seine Leistung nicht nach Kapitel 9 Abschnitte 2 und 3 PECL (Zurückbehalten der Leistung, Aufhebung des Vertrages) zurückbehalten oder den Vertrag beenden, wenn dies die gesundheitliche Verfassung des Patienten ernstlich gefährdet.

(b) Soweit der Behandelnde zum Zurückbehalten oder zur Aufhebung des Vertrags berechtigt ist und dieses Recht auszuüben beabsichtigt, muß der Behandelnde den Patienten an einen anderen Behandelnden verweisen.

(c) Der Behandelnde kann den Vertrag nicht beenden, es sei denn das der Patient seine Verpflichtungen nach Artikel 104 (Pflicht zur Zusammenarbeit) nicht einhaltet.

Artikel 7:111: Haftung behandelnder Organisationen

(1) Finden bei der Ausführung eines Behandlungsvertrags Tätigkeiten in einem Krankenhaus oder auf dem Grundstück einer anderen, Behandlungen anbietenden Organisation statt und sind das Krankenhaus oder die Behandlungen anbietende Organisation nicht Vertragspartei, muß dieses dem Patienten deutlich machen, daß es keine Vertragspartei ist.

(2) Kann der Behandelnde nicht identifiziert werden, gelten das Krankenhaus oder die Behandlungen anbietende Organisation als Behandelnder, es sei denn das Krankenhaus oder die Behandlungen anbietende Organisation teilen dem Patienten die Identität des Behandelnden innerhalb vernünftiger und angemessener Zeit mit.

Swedish*
Avtal om Tjänster[1]

Kapitel 1:
Allmänna Bestämmelser

Artikel 1:101: Tillämpningsområde

(1) Detta kapitel är tillämpligt på avtal där den ena parten (tjänsteleverantören) skall utföra en tjänst till den andra parten (beställaren) mot ersättning.
(2) Detta kapitel är tillämpligt på avtal avseende arbete på fast och lös egendom, förädling, förvaring, design, information och behandling av personer, om inte annat följer av kapitel 2 till 7.
(3) I de fall ena parten enligt avtal skall utföra en tjänst och dessutom utföra någonting annat skall detta kapitel och, i den mån det är relevant, kapitel 2 till 7 tillämpas på de delar av avtalet som omfattar tjänster med lämpliga justeringar.
(4) Utöver vad som följer av (3) är detta kapitel inte tillämpligt på avtal avseende transport, försäkring, garanti, tillhandahållande av finansiella produkter eller finansiella tjänster.
(5) Detta kapitel är inte tillämpligt på anställningsavtal.
(6) Med undantag av Artikel 1:102 skall detta kapitel, med lämpliga justeringar, tillämpas på avtal varigenom tjänsteleverantören skall utföra en tjänst åt beställaren utan ersättning.

Artikel 1:102: Pris

(1) Om inte annat avtalats har tjänsteleverantör som ingått avtal i sin yrkesmässiga verksamhet rätt till ersättning.
(2) I den mån priset eller en beräkningsmetod för att fastställa priset inte följer av avtalet skall beställaren betala gängse marknadspris vid tiden för avtalsslutet.

Artikel 1:103: Prekontraktuell skyldighet att avråda

(1) Tjänsteleverantören är skyldig att före avtalets ingående avråda beställaren om tjänsteleverantören blir medveten om eller har anledning att känna till att den begärda tjänsten:
  (a) eventuellt inte kommer att leda till det av beställaren angivna eller förväntade resultatet, eller
  (b) eventuellt kan skada beställarens övriga intressen, eller
  (c) eventuellt kan bli dyrare eller ta mer tid än vad beställaren skäligen räknade med.
(2) Skyldigheten att avråda enligt (1) gäller inte om beställaren:
  (a) redan känner till de i (1)(a), (b), eller (c) uppräknade riskerna; eller
  (b) har anledning att känna till riskerna.

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* The translation in Swedish has been prepared by Mrs. Jeanette Anders and Prof. Christina Ramberg.

1 References to the PECL are of the English original language version, since no translation in Swedish exists.

(3) Om en omständighet som omnämns i (1) inträffar och beställaren inte blivit tillbörligen varnad:
   (a) behöver beställaren inte acceptera en ändring av avtalet enligt Artikel 1:111 om inte tjänsteleverantören visar att beställaren skulle ha slutit avtalet även om han blivit tillbörligen varnad; och
   (b) har beställaren rätt till skadestånd enligt Artikel 4:117 (2) och (3) PECL (Damages).

(4) Beställaren är skyldig att före avtalets ingående upplysa tjänsteleverantören om osedvanliga omständigheter som beställaren får kännedom om eller har anledning att känna till och som sannolikt kan leda till att tjänsten blir dyrare eller tar mer tid i anspråk än vad tjänsteleverantören förväntat sig.

(5) Om de omständigheter som omnämns i (4) inträffar och beställaren inte tillbörligen varnade tjänsteleverantören har tjänsteleverantören rätt till:
   (a) skadestånd för den förlust som tjänsteleverantören lidit som en följd av den uteblivna varningen; och
   (b) justering av den tid för fullgörelse som krävs för tjänsten.

(6) Tjänsteleverantören skall enligt (1) anses ha "anledning att känna till" riskerna om de skulle vara uppenbara för en jämförlig tjänsteleverantör i samma situation som den aktuella tjänsteleverantören mot bakgrund av alla de omständigheter som tjänsteleverantören kände till utan att göra en undersökning med beaktande av sådan information som tjänsteleverantören måste ta del av rörande det resultat som beställaren angivit eller förväntat sig samt rörande de omständigheter under vilka tjänsten skall utföras.

(7) Beställaren skall enligt (2) (b) och (4) anses ha "anledning att känna till" riskerna om de skulle vara uppenbara för en jämförlig beställare i samma situation som den aktuella beställaren mot bakgrund av alla de omständigheter som beställaren kände till utan att göra en undersökning. Beställaren skall inte anses ha kännedom om en risk, eller ha anledning att känna till den, endast på grund av att beställaren hade kompetens att bedöma den aktuella frågan, eller fick råd från annan person som hade sådan kompetens, om inte den andra personen agerade som fullmäktig för beställaren, varvid Artikel 1:305 PECL (Imputed Knowledge and Intention) är tillämplig.

Artikel 1:104: Samarbetsskyldighet

(1) Den samarbetsskyldighet som följer av Artikel 1:202 PECL (Duty to Co-operate) innebär i synnerhet att:
   (a) beställaren skall lämna svar på tjänsteleverantörens rimliga frågor i den utsträckning som skäligen krävs för att tjänsteleverantören skall kunna prestera enligt avtalet;
   (b) beställaren skall ge anvisningar avseende utförande av tjänsten i den utsträckning som skäligen krävs för att tjänsteleverantören skall kunna prestera enligt avtalet;
   (c) beställaren skall, i de fall det åligger beställaren att erhålla tillstånd och licenser, erhålla dessa vid den tidpunkt som skäligen krävs för att tjänsteleverantören skall kunna prestera enligt avtalet;
   (d) tjänsteleverantören skall ge beställaren skälig möjlighet att bedöma om tjänsteleverantören presterar i enlighet med avtalet; och
   (e) parterna skall samordna sina respektive insatser i den utsträckning som skäligen krävs för avtalets genomförande.

(2) Om beställaren inte fullgör sina skyldigheter enligt (1) (a) eller (b) har tjänsteleverantören rätt att hålla inne sin prestation enligt PECL Artikel 9:201 (Right to Withhold Performance) eller basera prestationen på de förväntningar, preferenser och prioriteringar som en person i samma situation som beställaren skäligen kan anses ha mot bakgrund av den information och de anvisningar som inhämtats under förutsättning att beställaren varnats enligt Artikel 1:110.
(3) Om beställaren inte fullgör sina skyldigheter enligt (1) och tjänsten på grund av detta fördyras eller försenas har tjänsteleverantören rätt till:
  (a) skadestånd för den skada som tjänsteleverantören lider på grund av kontraktsbrottet; och
  (b) justering av den tid som krävs för tjänsten.

Artikel 1:105: Omständigheter under vilka tjänsten skall utföras

Tjänsteleverantören skall, i den utsträckning som skäligen krävs för utförande av tjänsten, inhämta information om under vilka omständigheter tjänsten skall utföras och säkerställa att sådana omständigheter tas i beaktande vid utförande av tjänsten.

Artikel 1:106: Tjänsteleverantörens skyldigheter avseende tjänstens utförande

(1) Tjänsteleverantören får anlita underleverantör för att helt eller delvis utföra tjänsten utan beställarens tillstånd, om det inte är av avgörande betydelse i avtalet att tjänsteleverantören utför tjänsten personligen.
(2) Varje underleverantör som anlitas av tjänsteleverantören skall ha erforderlig kompetens.
(3) I den utsträckning tjänsteleverantören använder verktyg och material vid utförande av tjänsten skall dessa vara i enlighet med avtal och lag samt lämpa sig för det särskilda ändamål som de är avsedda för.
(4) I den utsträckning som tjänsteleverantören är skyldig att överlåta äganderätten till beställaren avseende fast egendom, lös egendom eller annan rättighet skall sådan överlåtelse inte vara behäftad med rättsliga fel eller andra anspråk från tredje man.
(5) Tjänsteleverantören skall på erforderligt sätt planera tjänstens utförande.
(6) I den utsträckning underleverantörer har anvisats av beställaren eller om verktyg och material har tillhandahållits av beställaren, följer tjänsteleverantörens ansvar av Artikel 1:109 och Artikel 1:110.

Artikel 1:107: Allmän omsorgsskyldighet vid tjänster

(1) Tjänsteleverantören skall utföra tjänsten:
  (a) med den omsorg och skicklighet som en omdömesgill tjänsteleverantör skulle utöva mot bakgrund av omständigheterna; och
  (b) i enlighet med lag eller annan på tjänsten tillämplig reglering.
(2) Om tjänsteleverantören utger sig för att ha en högre grad av omsorg och skicklighet skall han tillämpa sådan omsorg och skicklighet.
(3) Om tjänsteleverantören är, eller utger sig för att vara, medlem i en branschorganisation för vilken ett regelverk har skapats av en berörd myndighet eller av branschorganisationen, skall tjänsteleverantören tillämpa den grad av omsorg och skicklighet som regelverket föreskriver.
(4) Vid fastställande av den omsorg och skicklighet beställaren har rätt att förvänta sig skall hänsyn tas till bland annat:
  (a) naturen, omfattningen, frekvensen och förutsebarheten relaterad till de risker som tjänstens utförande innebär för beställaren;

(b) om skador har uppkommit, kostnaderna för förebyggande åtgärder som skulle ha förhindrat sådan eller liknande skada;
(c) om tjänsten utförts av en icke-fackman eller kostnadsfritt;
(d) storleken på ersättningen till tjänsteleverantören; och
(e) den tid som skäligen står till förfogande för utförande av tjänsten

(5) De åligganden som följer av denna bestämmelse innebär i synnerhet att tjänsteleverantören skall vidta skäliga förebyggande åtgärder i syfte att förhindra att skada på person eller skada på fast eller lös egendom uppstår till följd av utförande av tjänsten.

Artikel 1:108: Beställarens angivna eller förväntade resultat

Tjänsteleverantören skall uppnå det av beställaren specifikt angivna eller förväntade resultatet vid tidpunkten för avtalets ingående under förutsättning att:

(a) ett förväntat men inte angivet resultat är ett resultat som en omdömesgill beställare under samma omständigheter som beställaren hade kunnat förväntat sig; och
(b) en omdömesgill beställare under samma omständigheter inte skulle ha skäl att anta att det förelåg en betydande risk att resultatet inte skulle uppnås genom tjänsten.

Artikel 1:109: Beställarens anvisningar

(1) Tjänsteleverantören skall följa alla beställarens i tid givna anvisningar avseende utförande av tjänsten under förutsättning att anvisningarna:
(a) är del av avtalet eller angivna i ett dokument som avtalet hänvisar till; eller
(b) är en följd av val mellan olika möjligheter som beställaren kan göra enligt avtalet i enlighet med Artikel 6:105 PECL (Unilateral Determination by a Party); eller
(c) är ett resultat av val mellan olika möjligheter som ursprungligen lämnats öppna av parterna.

(2) Om tjänsteleverantören åsidosatt en eller flera av sina skyldigheter enligt Artikel 1:107 eller 1:108 beroende på att tjänsteleverantören följt en anvisning enligt (1), bär tjänsteleverantören inget ansvar enligt dessa Artiklar under förutsättning att beställaren blivit vederbörligen varnad enligt Artikel 1:110.

(3) Om tjänsteleverantören anser att en anvisning enligt (1) innebär en ändring av avtalet enligt Artikel 1:111 skall tjänsteleverantören varna beställaren härom. Om beställaren därefter inte återkallar anvisningen utan oskäligt dröjsmål skall tjänsteleverantören följa anvisningen och den skall anses utgöra en ändring av avtalet.

Artikel 1:110: Tjänsteleverantörens kontraktuella varningsskyldighet

(1) Tjänsteleverantören är skyldig att varna beställaren om tjänsteleverantören blir medveten om eller har anledning att känna till att den beställda tjänsten:
(a) eventuellt inte kommer att medföra det av beställaren vid avtalets ingående angivna eller förväntade resultatet, eller
(b) eventuellt kan skada beställarens övriga intressen, eller
(c) eventuellt kan bli dyrare eller ta mer tid i anspråk än vad som avtalats antingen på grund av information eller anvisningar från beställaren eller som inhämtats enligt Artikel 1:105 eller på grund av förekomsten av någon annan risk.

(2) Tjänsteleverantören skall vidta skäliga åtgärder för att säkerställa att kunden förstår varningens innebörd.

(3) Skyldigheten att varna enligt (1) gäller inte om beställaren:
  (a) redan har vetskap om de risker som anges i (1) (a), (b), eller (c); eller
  (b) har anledning att känna till riskerna.
(4) Om en händelse som anges i (1) inträffar och beställaren inte blivit vederbörligen varnad, behöver beställaren inte acceptera en ändring av tjänsten enligt Artikel 1:111.
(5) Vid tillämpning av (1) skall tjänsteleverantören anses ha "anledning att känna till" riskerna om de skulle vara uppenbara för en jämförlig tjänsteleverantör i samma situation som den aktuella tjänsteleverantören mot bakgrund av alla omständigheter som tjänsteleverantören kände till utan att göra en undersökning.
(6) Vid tillämpning av (3) (b) skall beställaren anses ha "anledning att känna till" riskerna om de skulle vara uppenbara för en jämförlig beställare i samma situation som den aktuella beställaren mot bakgrund av alla omständigheter som beställaren kände till utan undersökning. Beställaren skall inte anses känna till en risk, eller ha anledning att känna till den, endast på grund av att beställaren hade kompetens att bedöma den aktuella frågan, eller fick råd från annan person som hade sådan kompetens, om inte den andra personen agerade som fullmäktig för beställaren, varvid Artikel 1:305 PECL (Imputed Knowledge and Intention) är tillämplig.

Artikel 1:111: Ändring i tjänsteavtalet

(1) Utan att det skall påverka beställarens rätt att avbeställa avtalet enligt Artikel 1:115, måste en part godta en ändring av den tjänst som skall utföras enlig avtalet i enlighet med en anvisning enligt Artikel 1:109, om en sådan ändring är skälig med beaktande av
  (a) det resultat av tjänsten som skall uppnås;
  (b) beställarens intressen;
  (c) tjänsteleverantörens intressen; och
  (d) omständigheterna vid tidpunkten för ändringen av tjänsten.
(2) En ändring av tjänsten skall anses vara skälig om ändringen
  (a) är nödvändig för att möjliggöra för tjänsteleverantören att agera i enlighet med Artikel 1:107 eller Artikel 1:108; eller
  (b) är en följd av en anvisning som givits i enlighet med Artikel 1:109(1) och beställaren inte har återkallat anvisningen utan oskäligt dröjsmål efter att ha blivit varnad enligt Artikel 1:109(3); eller
  (c) är en skälig åtgärd med anledning av en varning från tjänsteleverantören enligt Artikel 1:110.
(3) Vid tillämpning av (1) och (2) skall en ändring av tjänsten som krävs på grund av ändrade förhållanden enligt Artikel 6:111 PECL (Change of Circumstances) anses utgöra en skälig ändring av tjänsten.
(4) Priset som skall betalas på grund av ändringen av tjänsten skall vara skäligt och skall bestämmas enligt samma beräkningsmetoder som användes vid fastställande av tjänstens ursprungspris.
(5) I de fall tjänstens omfattning minskar skall minskad vinst, sparade utgifter och de möjligheter tjänsteleverantören har att använda frigjord kapacitet för andra ändamål tas i beaktande vid beräkningen av det pris som skall betalas på grund av ändringen av tjänsten.
(6) En ändring av tjänsten kan leda till en justering av tidpunkten för prestationen som står i proportion till det merarbete som krävs i förhållande till det arbete som ursprungligen krävdes för utförande av tjänsten och den tidsrymd som beräknats för utförande av tjänsten.

Artikel 1:112: Påföljder vid leverantörens kontraktsbrott

(1) Det skadestånd som beställaren har rätt till inkluderar kostnader som beställaren ådragit sig för att fastställa tjänsteleverantörens kontraktsbrott och/eller för att förhindra att det av beställaren angivna eller förväntade resultatet inte uppnås, under förutsättning att beställaren agerat omdömesgillt när han ådrog sig kostnaderna.

(2) Om tjänsteleverantören inte fullgjort sina skyldigheter enligt avtalet och om det ännu inte står klart om det av beställaren angivna eller förväntade resultatet kommer att uppnås, har beställaren rätt hålla inne sin prestation enligt Artikel 9:201 PECL (Right to Withhold Performance).

(3) Beställaren har rätt att säga upp avtalet enligt Artikel 9:304 PECL (Anticipatory Non-Performance) endast om det står klart att tjänsteleverantörens kontraktsbrott kommer att leda till ett väsentligt kontraktsbrott enligt Artikel 8:103 PECL (Fundamental Non-Performance).

Artikel 1:113: Reklamation

(1) Beställaren är skyldig att underrätta tjänsteleverantören om beställaren får kännedom om, eller om en jämförlig beställare i samma situation som den aktuella beställaren mot bakgrund av alla omständigheter som beställaren känner till utan att göra en undersökning har anledning att känna till, att tjänsteleverantören antingen kommer att misslyckas med att uppnå det av beställaren angivna eller förväntade resultatet eller har misslyckats med att uppnå detta resultat.

(2) Om beställaren underlåter att reklamera enligt (1) om att tjänsteleverantören inte kommer att uppnå det av beställaren angivna eller förväntade resultatet och detta leder till en fördyring eller att tjänsten tar mer tid i anspråk än vad som följer av avtalet har tjänsteleverantören rätt till:

   (a) skadestånd för den skada tjänsteleverantören lider på grund av att reklamation inte skett enligt (1); och

   (b) justering av tid för utförande av tjänsten.

Artikel 1:114: Ansvarsbegränsning

(1) Tjänsteleverantören får inte begränsa sitt ansvar helt eller delvis för dödsfall eller personskada som orsakats av tjänstens utförande.

(2) Tjänsteleverantören får begränsa sitt ansvar helt eller delvis för annan skada än dödsfall och personskada som orsakats av tjänstens utförande om det vid tidpunkten för avtalets ingående ett sådant villkor kan anses skäligt med beaktande av omständigheterna i det enskilda fallet, under förutsättning att inget annat följer av kapitel 2 till 7.

Artikel 1:115: Uppsägning av tjänsteavtalet

(1) Beställaren har rätt att säga upp avtalet när som helst.

(2) Om avtalet sägs upp enligt denna Artikel har tjänsteleverantören rätt till skadestånd i sådan omfattning att denne försätts i en position som är så likvärdig som möjligt med den position som tjänsteleverantören skulle ha befunnit sig i om prestationen fullgjorts enligt avtalet. Sådant skadestånd omfattar skada som tjänsteleverantören lidit och utebliven vinst.

(3) Vid fastställande av den position som tjänsteleverantören skall försättas i enligt (2) skall bland annat följande beaktas:

   (a) om pris avtalats är tjänsteleverantören berättigad till detta pris med avdrag för utgifter som skäligen borde sparats in och vinst som skäligen kunnat tjänas in genom utnyttjande av tillgänglig kapacitet;

(b) om pris baserat på en särskild taxa avtalats, är tjänsteleverantören berättigad till betalning enligt taxan i den utsträckning tjänsten redan fullgjorts; och
(c) om pris avtalats enligt principen "inget resultat, ingen ersättning", har tjänsteleverantören rätt till ersättning för både de kostnader denne ådragit sig, i den utsträckning tjänsten redan fullgjorts, och för utebliven vinst på grund av uppsägningen.

Kapitel 2:
Arbete på fast och lös Egendom

Artikel 2:101: Tillämpningsområde

(1) Detta kapitel är tillämpligt på avtal där den ena parten (entreprenören) skall uppföra en byggnad eller annan fast egendom eller i väsentlig grad förändra en befintlig byggnad eller annan fast egendom i enlighet med en ritning som tillhandahållits av beställaren.
(2) Detta kapitel är, med lämpliga justeringar, tillämpligt på avtal där entreprenören skall uppföra lös egendom i enlighet med en ritning som tillhandahållits av beställaren.
(3) Detta kapitel är, med lämpliga justeringar, tillämpligt på avtal där entreprenören skall uppföra en byggnad eller annan fast egendom, utföra byggnadsarbete på en befintlig byggnad eller annan fast egendom eller uppföra lös egendom i enlighet med en ritning som tillhandahållits av entreprenören.
(4) I de fall ena parten enligt avtal skall utföra arbete på fast eller lös egendom och dessutom utföra en annan typ av tjänst skall detta kapitel tillämpas på de delar av avtalet som omfattar arbete på fast och lös egendom med lämpliga justeringar.

Artikel 2:102: Beställarens samarbetsskyldighet

Den samarbetsskyldighet som följer av Artikel 1:202 PECL (Duty to Co-operate) och 1:104 (Samarbetsskyldighet) innebär bland annat att beställaren skall:
(c) bereda tillträde till platsen där byggnadsarbetet skall utföras i den omfattning som det är skäligen nödvändigt för att möjliggöra för entreprenören att prestera enligt avtalet; och
(d) tillhandahålla komponenterna, materialen och verktygen, i den omfattning dessa måste tillhandahållas av beställaren, vid sådan tidpunkt som är skäligen nödvändig för att möjliggöra för entreprenören att prestera enligt avtalet.

Artikel 2:103: Entreprenörens omsorgsskyldighet

Den omsorgsskyldighet som följer av Artikel 1:107 (Allmän omsorgsskyldighet vid tjänster) innebär bland annat att entreprenören skall vidta skäliga förebyggande åtgärder i syfte att förhindra skada på arbetet.

Artikel 2:104: Överensstämmelse med avtalet

(1) Entreprenören skall leverera arbete som stämmer överens med vad som följer av avtalet med avseende på mängd, kvalitet och beskrivning.
(2) Förutom när parterna avtalat annat skall arbetet anses felaktigt om det inte är;
(a) ägnat för det särskilda ändamål som uttryckligen eller underförstått meddelats entreprenören vid avtalets ingående eller vid tiden för en ändring i enlighet med Artikel 1:111 (Ändring i tjänsteavtalet) och som hänför sig till den aktuella frågan; och
(b) ägnat för det eller de ändamål för vilka arbete av samma slag i allmänhet används.

(3) Beställaren äger inte rätt att åberopa en påföljd för fel om en anvisning som givits av beställaren enligt Artikel 1:109 (Beställarens anvisningar) är orsaken till felet och entreprenören fullgjort den varningsskyldighet som följer av Artikel 1:110 (Tjänsteleverantörens kontraktuella varningsskyldighet).

Artikel 2:105: Inspektion, tillsyn och godkännande

(1) I enlighet med Artikel 1:104 (1) (d) (Samarbetsskyldighet) får beställaren inspektera eller utöva tillsyn över de åtgärder som vidtas i samband med arbetet, uppförandeprocessen och resultatet i en skälig omfattning och vid varje skälig tidpunkt, men har ingen skyldighet att göra detta.
(2) Om parterna kommer överens om att entreprenören skall presentera vissa åtgärder, processer eller resultat för beställarens godkännande får entreprenören inte fortsätta med arbetet innan entreprenören erhållit beställarens tillåtelse.
(3) Avsaknad av eller bristfälligt godkännande, inspektion eller tillsyn fråntar inte entreprenören helt eller delvis från ansvar. Denna bestämmelse är också tillämplig när beställaren har en skyldighet enligt avtal att godkänna, inspektera eller utöva tillsyn över arbetet.

Artikel 2:106: Överlämnande av arbetet

(1) Om entreprenören anser att arbetet eller någon del av det som lämpar sig för fristående användning är tillräckligt färdigställt och önskar överföra kontrollen över det till beställaren är beställaren skyldig att godta sådant överlämnande inom en skälig tid efter att ha blivit meddelad om detta. Beställaren äger rätt att vägra godta kontrollövertagande när arbetet, eller en relevant del av det, inte överensstämmer med avtalet och sådant fel gör det olämpligt för användning.
(2) Beställarens godkännande att överta kontrollen över arbetet fråntar inte entreprenören helt eller delvis från ansvar. Denna bestämmelse är också tillämplig när beställaren har en skyldighet enligt avtal att godkänna, inspektera eller utöva tillsyn över arbetet.

Artikel 2:107: Betalning

Priset eller en proportionell del av det skall betalas vid den tidpunkt entreprenören överlämnar kontrollen över arbetet eller en del av det till beställaren i enlighet med Artikel 2:106.

Artikel 2:108: Risker

(1) Denna Artikel är tillämplig om arbetet förstörs eller skadas på grund av en händelse för vilken entreprenören inte kan hållas ansvarig och som entreprenören inte heller kunde ha undvikit eller övervunnit.
(2) När en i (1) omnämnd situation har orsakats av en händelse som inträffat före det att arbetet eller kontrollen över det har eller skulle ha överförts till beställaren i enlighet med Artikel 2:106 och fullgörelse fortfarande är möjlig:
   (a) är entreprenören alltjämt skyldig att prestera, och om så är fallet igen;
   (b) är beställaren skyldig att betala för entreprenörens prestation under (a);
   (c) flyttas tidpunkten för fullgörelse fram i enlighet med Artikel 1:111 (6) (Ändring i tjänsteavtalet);
   (d) kan bestämmelserna i Artikel 8:108 PECL (Excuse Due to an Impediment) vara tillämpliga på entreprenörens ursprungliga fullgörelse; och
   (e) är entreprenören inte skyldig att kompensera beställaren för skada på åtgärder och material som tillhandahållits av beställaren.

(3) När en i (1) omnämnd situation har orsakats av en händelse som inträffat före det att arbetet eller kontrollen över det har eller skulle ha överförts till beställaren i enlighet med Artikel 2:106 och fullgörelse inte längre är möjlig:
  (a) är beställaren inte skyldig att betala för det utförda arbetet;
  (b) kan bestämmelserna i Artikel 8:108 PECL (Excuse Due to an Impediment) vara tillämpliga på entreprenörens fullgörelse; och
  (e) är entreprenören inte skyldig att ersätta beställaren för skada på åtgärder och material som tillhandahållits av beställaren men är skyldig återlämna arbetet eller vad som återstår av det till beställaren.

(4) När den i (1) omnämnda situationen har orsakats av en händelse som inträffat efter det att arbetet eller kontrollen över det har eller skulle ha överförts till beställaren i enlighet med Artikel 2:106:
  (a) är entreprenören inte skyldig att prestera igen; och
  (b) är beställaren alltjämt skyldig att betala priset.

Artikel 2:109: Fullgörelse och avhjälpande

(1) Om entreprenören inte levererar arbete i enlighet med Arikel 2:104, är beställaren berättigad till avhjälpande av felet genom fullgörelse enligt Artikel 9:102PECL (Non-monetary Obligations) under förutsättning att:
  (a) prestationen inte är olaglig eller omöjlig;
  (b) prestationen inte skulle förorsaka entreprenören oskälig ansträngning eller kostnad; och
  (c) prestationen inte består av tillhandahållande av tjänster eller arbete av personlig karaktär eller är beroende av en personlig relation.

(2) Artikel 9:102 (d) PECL (Non-monteary Obligations) är inte tillämplig i fall då (1) är tillämplig.

(3) Om entreprenören misslyckas med att leverera arbete i enlighet med Artikel 2:104 får entreprenören avhjälpa felet under förutsättning att detta kan göras;
  (a) före en tilläggsperiod av skälig längd som fastställts genom ett meddelande av beställaren enligt Artikel 8:106 (3) PECL (Notice Fixing Additional Period for Performance) förflutit; och
  (b) före det dröjsmål som avhjälpandet orsakar utgör väsentligt kontraktsbrott enligt Artikel 8:103 (b) eller (c) PECL (Fundamental Non-Performance).

(4) Artikel 8:103 (a) PECL (Fundamental Non-Performance) är inte tillämplig i de fall då (3) är tillämplig om det inte uttryckligen avtalats att strikt iakttagande av leveranstidpunkten är av avgörande betydelse för avtalet.

(5) Entreprenören äger rätt att bestämma på vilket sätt denne skall uppfylla skyldigheten att avhjälpa fel. Bland annat äger entreprenören rätt att besluta om reparation, omleverans, eller att tredje utför reparation på entreprenörens bekostnad.

(6) Till dess entreprenören har avhjälpt felet äger beställaren rätt att hålla inte prestation enligt Artikel 9:201 PECL (Right to Withhold Performance).

(7) Beställaren får kräva skadestånd enligt kapitel 9, avsnitt 5 PECL (Damages and Interest) för skada som entreprenören inte kunnat avhjälpa.

Artikel 2:110: Övriga påföljder

(1) Beställaren får åberopa andra påföljder som återfinns i denna Artikel om
  (a) entreprenören vägrar avhjälpande på grund av att beställaren inte är berättigad att begära avhjälpande enligt Artikel 2:109 (1); eller

(b) entreprenören är oförmögen till eller misslyckas med avhjälpande enligt Artikel 2:109 (3).

(2) Beställaren äger rätt att säga upp avtalet enligt kapitel 9 avsnitt 3 PECL (Termination of the Contract) om felet utgör väsentligt kontraktsbrott enligt Artikel 8:103 (b) eller (c) PECL (Fundamental Non-Performance).

(3) Beställaren har rätt till prisavdrag i enlighet med Artikel 9:401 PECL (Right to Reduce Price).

(4) Beställaren äger rätt att kräva skadestånd enligt kapitel 9 avsnitt 5 PECL (Damages and Interest) inklusive kostnader för reparation och omleverans.

Artikel 2:111: Preskription

(1) I enlighet med Artikel 14:201 PECL (General Period) är preskriptionstiden för påföljd vid fel i arbetet 3 år.

(2) I enlighet med Artikel 14:203 (1) PECL (Commencement) börjar preskriptionstiden löpa från det att kontrollen över arbetet eller del av det överlämnas till beställaren i enlighet med Artikel 2:106.

(3) I enlighet med Artikel 14:301 (1) PECL (Suspension in Case of Ignorance) skjuts preskriptionstiden upp så länge som borgenären inte känner till och inte heller skäligen kan känna till de omständigheter som ger upphov till kravet inklusive, då det gäller rätten till skadestånd, typen av skadestånd. Detta gäller inte annan påföljd än skadestånd.

(4) I enlighet med Artikel 14:307 PECL (Maximum Length of Period) kan preskriptionstiden inte förlängas, genom uppskjutande av löptid eller framflyttande av dess upphörande, till mer än tio år eller i fall av personskada till mer än trettio år. Detta gäller inte uppskjutande enligt Artikel 14:302 (Suspension in Case of Judicial and Other Proceedings).

Kapitel 3:
Förädling

Artikel 3:101: Tillämpningsområde

(1) Detta kapitel är tillämpligt på avtal där den ena parten (förädlaren) skall utföra en tjänst till den andra parten (beställaren) på befintlig lös egendom eller på fast egendom.

(2) Detta kapitel är bland annat tillämpligt på avtal där förädlaren skall reparera, underhålla eller rengöra befintlig lös egendom eller fast egendom.

(3) I de fall ena parten enligt avtal skall utföra förädlingsarbete och dessutom utföra en annan tjänst skall detta kapitel tillämpas på de delar av avtalet som omfattar förädling med lämpliga justeringar.

Artikel 3:102: Beställarens samarbetsskyldighet

Den samarbetsskyldighet som följer av Artikel 1:202 PECL (Duty to Co-operate) och 1:104 (Samarbetsskyldighet) innebär bland annat att beställaren skall:

(a) överlämna föremålet eller kontrollen över det till förädlaren, eller att bereda tillträde till platsen där tjänsten skall utföras i den utsträckning detta är skäligen nödvändigt för att möjliggöra för förädlaren att prestera enligt avtalet; och

(b) tillhandahålla komponenterna, materialen och verktygen, i den omfattning dessa måste tillhandahållas av beställaren, vid sådan tidpunkt som är skäligen nödvändig för att möjliggöra för förädlaren att prestera enligt avtalet.

Artikel 3:103: Omständigheter under vilka tjänsten skall utföras

De skyldigheter som följer av Artikel 1:105 (Omständigheter under vilka tjänsten skall utföras) innebär bland annat att förädlaren skall samla information om de karaktäristiska egenskaper som föremålet på vilket tjänsten skall utföras har, i den utsträckning som är skäligen nödvändig för att utföra tjänsten.

Artikel 3:104: Förädlarens omsorgsskyldighet

Den omsorgsskyldighet som följer av Artikel 1:107 (Allmän omsorgsskyldighet vid tjänster) innebär bland annat att förädlaren skall vidta skäliga förebyggande åtgärder i syfte att förhindra skada på föremålet eller annan skada.

Artikel 3:105: Överensstämmelse med avtalet

Förädlaren skall uppnå det av beställaren specifikt angivna eller förväntade resultatet vid tidpunkten för avtalets ingående under förutsättning att:

(c) ett förväntat men inte angivet resultat är ett resultat som en omdömesgill beställare under samma omständigheter som beställaren hade kunnat förväntat sig; och

(d) en omdömesgill beställare under samma omständigheter inte skulle ha skäl att anta att det förelåg en betydande risk att resultatet inte skulle uppnås genom tjänsten.

Artikel 3:106: Inspektion och tillsyn

(4) Om tjänsten skall utföras vid en plats utsedd av beställaren får beställaren, i enlighet med Artikel 1:104 (1) (d) (Samarbetsskyldighet), inspektera eller utöva tillsyn över förädlarens åtgärder, utförandet av tjänsten och föremålet på vilket tjänsten skall utföras i en skälig omfattning och vid varje skälig tidpunkt, men har ingen skyldighet att göra detta.

(5) Avsaknad av eller bristfällig inspektion eller tillsyn fråntar inte förädlaren helt eller delvis från ansvar. Denna bestämmelse är också tillämplig när beställaren har en skyldighet enligt avtal att godkänna, inspektera eller utöva tillsyn över förädlingen av föremålet.

Artikel 3:107: Återlämnande av föremålet

(1) Om förädlaren anser att tjänsten är tillräckligt fullgjord och önskar återlämna föremålet eller kontrollen över det till beställaren är beställaren skyldig godta sådant återlämnande eller sådant kontrollövertagande inom skälig tid efter att ha erhållit meddelande om detta. Beställaren kan vägra att godta återlämnande eller kontrollövertagande när föremålet inte lämpar sig för användning i enlighet med tjänstens särskilda syfte under förutsättning att sådant syfte meddelats förädlaren eller förädlaren annars har skäl att känna till det.

(2) Förädlaren är skyldig återlämna föremålet eller kontrollen över det inom skälig tid efter det att beställaren begärt detta.

(3) Medgivande från beställaren om återlämnande av föremålet eller kontrollen över det innebär inte avstående från någon rättighet relaterad till kontraktsbrott.

(4) Om förädlaren mot bakgrund av föremålets eller tjänstens beskaffenhet blivit ägare till föremålet till följd av avtalets genomförande är förädlaren skyldig att överföra äganderätten till föremålet när föremålet återlämnas.

Artikel 3:108: Betalning

Priset skall betalas vid den tidpunkt då förädlaren överlämnar föremålet eller kontrollen över det till beställaren i enlighet med Artikel 3:107 eller beställaren utan att vara berättigad till det vägrar att godta återlämnande av föremålet.

Artikel 3:109: Risker

(1) Denna Artikel är tillämplig om föremålet förstörs eller skadas på grund av en händelse för vilken förädlaren inte kan hållas ansvarig och som förädlaren inte heller kunde ha undvikit eller övervunnit.

(2) Om förädlaren före den i (1) omnämnda händelsen tillkännagivit att förädlaren betraktade tjänsten som tillräckligt fullgjord och att förädlaren önskade återlämna föremålet eller kontrollen av det till beställaren:
   (a) är förädlaren inte skyldig att prestera igen; och
   (b) beställaren är skyldig att betala priset.
   Priset skall betalas vid händelsens inträffande och från den tidpunkt som förädlaren återlämnar vad som eventuellt återstår av föremålet eller beställaren tillkännager att beställaren inte vill ha återstoden. I det senare fallet får förädlaren avyttra återstoden på beställarens bekostnad.
   Denna bestämmelse är inte tillämplig om beställaren var berättigad att vägra återlämnande av föremålet enligt Artikel 3:107 (1).

(3) Om parterna kommit överens om att förädlaren skulle erhålla betalning för varje tidsperiod som förflutit är bestä'llaren skyldig att betala för varje tidsperiod som förflutit före den händelse som omnämns i (1) inträffat.

(4) Om fullgörelse av avtalet fortfarande är möjlig för förädlaren efter det att en i (1) omnämnd händelse inträffat:
   (c) är förädlaren alltjämt skyldig att prestera, och om så är fallet igen;
   (d) är beställaren endast skyldig att betala för förädlarens prestation under (a); förädlarens rätt till betalning enligt (3) påverkas inte av denna bestämmelse;
   (e) är beställaren skyldig att kompensera förädlaren för de kostnader som förädlaren ådrar sig för att införskaffa material som ersätter det material som tillhandahållits av beställaren om inte beställaren på förädlarens begäran tillhandahåller sådant ersättningsmaterial; och
   (f) flyttas tidpunkten för fullgörelse fram i enlighet med Artikel 1:111 (6) (Ändring i tjänsteavtalet), om det är nödvändigt.
   Beställaren äger dock rätt att säga upp avtalet enligt Artikel 1:115 (Uppsägning av tjänsteavtalet); konsekvenserna av en sådan uppsägning regleras av den bestämmelsen.

(5) Om fullgörelse av avtalet inte längre är möjlig för förädlaren i den situation som omnämns i (1):
   (a) behöver beställaren inte betala för den utförda tjänsten; förädlarens rätt till betalning enligt (3) påverkas inte av denna bestämmelse; och
   (b) är förädlaren skyldig att återlämna föremålet och materialen som tillhandahållits av beställaren eller vad som återstår av dem till beställaren.

Artikel 3:110: Fullgörelse och avhjälpande

(1) Om förädlaren inte har fullgjort sina skyldigheter enligt Artikel 3:105 får beställaren kräva fullgörelse enligt Artikel 9:102 PECL (Non-monteary Obligations). Artikel 9:102 (2) (d) PECL (Non-monetary Obligations) är inte tillämplig.

(2) Förädlaren får avhjälpa felet under förutsättning att detta kan ske;
   (a) före en tilläggsperiod av skälig längd som fastställts genom ett meddelande av beställaren enligt Artikel 8:106 (3) PECL (Notice Fixing Additional Period for Performance) förflutit; och

(b) före det dröjsmål som avhjälpandet orsakar utgör väsentligt kontraktsbrott enligt Artikel 8:103 (b) eller (c) PECL (Fundamental Non-Performance).

(3) Artikel 8:103 (a) PECL (Fundamental Non-Performance) är inte tillämplig i de fall som regleras av (2) om inte det uttryckligen avtalats att strikt iakttagande av leveranstidpunkten är av avgörande betydelse för avtalet.

(4) Förädlaren äger rätt att välja metod för fullgörelse och avhjälpande.

(5) Till dess förädlaren har avhjälpt felet äger beställaren rätt att hålla inte prestation enligt Artikel 9:201 PECL (Right to Withhold Performance).

(6) Beställaren får kräva skadestånd enligt kapitel 9, avsnitt 5 PECL (Damages and Interest) för skada som förädlaren inte kunnat avhjälpa.

Artikel 3:111: Övriga påföljder

(1) Beställaren får åberopa andra påföljder enligt denna Artikel om:

(c) beställaren inte är berättigad till fullgörelse enligt Artikel 9:102 PECL (Specific Performance) och Artikel 3:110 (1); och

(d) förädlaren är oförmögen eller misslyckas med avhjälpande enligt Artikel 3:110 (2).

(8) Beställaren äger rätt säga upp avtalet enligt kapitel 9 avsnitt 3 PECL (Termination of the Contract) om kontraktsbrottet utgör väsentligt kontraktsbrott enligt Artikel 8:103 (b) eller (c) PECL (Fundamental Non-Performance).

(9) Beställaren har rätt till prisavdrag i enlighet med Artikel 9:401 PECL (Right to Reduce Price).

(10) Beställaren äger rätt att kräva skadestånd enligt kapitel 9 avsnitt 5 PECL (Damages and Interest) inklusive kostnader för reparation och täckningstransaktioner.

Artikel 3:112: Ansvarsbegränsning

I avtal mellan två parter som agerar i sin yrkesmässiga verksamhet skall ett avtalsvillkor som begränsar förädlarens ansvar för kontraktsbrott till värdet av föremålet om tjänsten blivit riktigt utförd presumeras vara skäligt i enlighet med Artikel 1:114 (2) (Ansvarsbegränsning) om inte förädlaren eller någon person för vars handlingar förädlaren ansvarar orsakat skadan uppsåtligen eller av grov vårdslöshet.

Kapitel 4:
Förvaring

Artikel 4:101: Tillämpningsområde

(1) Detta kapitel är tillämpligt på avtal där den ena parten (förvararen) skall förvara lös egendom åt den andra parten (beställaren).

(2) I de fall ena parten enligt avtal skall förvara lös egendom och dessutom utföra en annan tjänst skall detta kapitel tillämpas på de delar av avtalet som omfattar förvaring med lämpliga justeringar.

(3) Detta kapitel är inte tillämpligt på förvaring av:

(a) fast egendom

(b) lös egendom under transport; och

(c) pengar, värdepapper eller rättigheter.

Artikel 4:102: Beställarens prekontraktuella skyldighet att varna

De skyldigheter som följer av Artikel 1:103 (4) (Prekontraktuell skyldighet att avråda) innebär bland annat att beställaren skall varna förvararen om ovanliga risker som är förenade med föremålet eller förvaringen av det och som beställaren känner till.

Artikel 4:103: Omständigheter under vilka tjänsten skall utföras

De skyldigheter som följer av Artikel 1:105 (Omständigheter under vilka tjänsten skall utföras) innebär bland annat att förvararen skall samla information om de karaktäristiska egenskaper som föremålet som skall förvaras har i den utsträckning som är nödvändig för utförande av tjänsten.

Artikel 4:104: Förvararens skyldigheter avseende tjänstens utförande

(1) De skyldigheter som följer av Artikel 1:106 (Tjänsteleverantörens skyldigheter avseende tjänstens utförande) innebär bland annat att förvararen, i den utsträckning som förvararen tillhandahåller förvaringsplats, skall tillhandahålla en plats lämplig för förvaring av föremålet på ett sådant sätt att föremålet kan återlämnas i det skick som beställaren kan förvänta sig.
(2) Förvararen får inte anlita underleverantör för utförande av tjänsten utan beställarens medgivande.

Artikel 4:105: Förvararens omsorgsskyldighet

(1) Den omsorgsskyldighet som följer av Artikel 1:107 (Allmän omsorgsskyldighet vid tjänster) innebär bland annat att förvararen skall vidta skäliga förebyggande åtgärder i syfte att förhindra att det förvarade föremålet i onödan försämras, förstörs eller minskar i värde.
(2) Förvararen får använda det för förvaring överlämnade föremålet endast om beställaren har medgivit sådant användande.

Artikel 4:106: Återlämnande av föremålet

(5) Förvararen är skyldig återlämna föremålet inom en skälig tid efter det att beställaren begärt detta.
(6) Beställaren är skyldig godta återlämnande av föremålet vid den avtalade tidpunkten eller, om förvararen äger rätt att säga upp avtalet vid beställarens kontraktsbrott, inom en skälig tid efter meddelande om uppsägning av avtalet.
(7) Enbart medgivande från beställaren om återlämnande av föremålet innebär inte avstående från någon rättighet med anledning av kontraktsbrott.
(8) Om beställaren misslyckas med att godta återlämnande av föremålet vid den tidpunkt som följer av (2) äger förvararen rätt att sälja föremålet i enlighet med Artikel 7:110 (2) (b) PECL (Property Not Accepted) under förutsättning att förvararen har givit beställaren skälig förvarning om förvararens avsikt att göra detta.
(9) Om föremålet ger avkastning under förvaringen är förvararen skyldig att överlämna avkastningen till beställaren när föremålet återlämnas.
(10) Om förvararen mot bakgrund av föremålets beskaffenhet blivit ägare till föremålet till följd av avtalets genomförande är förvararen skyldig återlämna ett föremål av samma slag och av samma kvalitet och mängd samt överföra äganderätten till sådant föremål.
(11) Denna Artikel är också tillämplig om tredje man som innehar tillräcklig äganderätt för att erhålla föremålet begär dess återlämnande.

Artikel 4:107: Överensstämmelse med avtalet

(1) Förvararen måste förvara föremålet i enlighet med avtalet.
(2) Förvaringen av föremålet är att anse som felaktig om föremålet inte återlämnas i samma skick som det var i när det överlämnades till förvararen.
(3) Om det med hänsyn till föremålets eller avtalets beskaffenhet inte skäligen kan förväntas att föremålet återlämnas i samma skick, skall förvaringen anses felaktig om föremålet inte återlämnas i sådant skick som beställaren skäligen kan förvänta sig.
(4) Om det med hänsyn till föremålets eller avtalets beskaffenhet inte skäligen kan förväntas att samma föremål återlämnas, skall förvaringen av föremålet anses felaktig om föremålet som återlämnas inte är i samma skick som det föremål som överlämnades för förvaring eller om det inte är av samma slag, kvalitet eller mängd, eller om äganderätten till föremålet inte överförs i enlighet med Artikel 4:106.

Artikel 4:108: Betalning

(1) Priset skall betalas vid den tidpunkt då förvararen överlämnar föremålet till beställaren i enlighet med Artikel 4:106 eller då beställaren utan att vara berättigad till det vägrar att godta återlämnande av föremålet.
(2) Förvararen äger rätt att hålla inne föremålet till dess beställaren betalar priset. Artikel 9:201 PECL (Withholding Performance) är således tillämplig.

Artikel 4:109: Redovisningsskyldighet

Efter avslutad förvaring är förvararen skyldig att informera beställaren om:
(a) skada som har inträffad på föremålet under förvaring; och
(b) de nödvändiga förebyggande åtgärder som beställaren måste vidta före användning och transport av föremålet om inte beställaren har anledning att känna till dessa förebyggande åtgärder.

Artikel 4:110: Risker

(1) Denna Artikel är tillämplig om föremålet förstörs eller skadas på grund av en händelse för vilken förvararen inte kan hållas ansvarig och som förvararen inte heller kunde ha undvikit eller övervunnit.
(2) Beställaren är skyldig att betala priset om förvararen, före den händelse som omnämns i (1), på rätt sätt meddelat beställaren att beställaren var skyldig att godkänna återlämnande av föremålet. Priset skall betalas vid händelsens inträffande och från den tidpunkt som förvararen återlämnar vad som eventuellt återstår av föremålet eller beställaren tillkännager att beställaren inte vill ha återstoden. I det senare fallet får förvararen göra sig av med återstoden på beställarens bekostnad.
(3) Om parterna kommit överens om att förvararen skulle erhålla betalning periodvis är beställaren skyldig att betala för varje tidsperiod som förflutit före den händelse som omnämns i (1) inträffat.
(4) Förvararen är skyldig att fortsätta prestera enligt avtalet om ytterligare fullgörelse av avtalet fortfarande är möjlig för förvararen efter det att en i (1) omnämnd händelse inträffat. Beställaren äger dock rätt att säga upp avtalet enligt Artikel 1:115 (Uppsägning av tjänsteavtalet); konsekvenserna av en sådan uppsägning regleras i den bestämmelsen.
(5) Om fullgörelse av avtalet inte längre är möjlig för förvararen i den situation som omnämns i (1):

(a) behöver beställaren inte betala för den utförda tjänsten; förvararens rätt till betalning enligt (3) påverkas inte av denna bestämmelse; och
(b) förvararen är skyldig återlämna återstoden av föremålet om inte beställaren tillkännager att beställaren inte vill ha tillbaka den. I det senare fallet får förvararen göra sig av med återstoden av föremålet på beställarens bekostnad.

Artikel 4:111: Påföljder vid kontraktsbrott

Vid fall av kontraktsbrott enligt Artikel 4:107 får beställaren åberopa påföljderna i kapitel 9 PECL (Particular Remedies for Non-performance).

Artikel 4:112: Ansvarsbegränsning

I avtal mellan två parter som agerar i sin yrkesmässiga verksamhet skall ett avtalsvillkor som begränsar förvararens ansvar för kontraktsbrott till värdet av föremålet presumeras vara rättvist och skäligt i enlighet med Artikel 1:114 (2) (Ansvarsbegränsning) om inte förvararen eller någon person för vars handlingar förvararen ansvarar orsakat skadan uppsåtligen eller av grov vårdslöshet.

Artikel 4:113: Hotellinnehavares ansvar

(1) Denna Artikel är inte tillämplig om och i den utsträckning som ett separat förvaringsavtal ingåtts mellan hotellinnehavaren och någon gäst avseende ett föremål som tagits med till hotellet. Ett separat förvaringsavtal skall anses ha ingåtts om ett föremål överlämnats till hotellinnehavaren för förvaring. Artikel 4:101 (3) (c) är inte tillämplig.
(2) En hotellinnehavare är ansvarig som förvarare för skada på eller förstörelse eller förlust av ett föremål som tagits med till hotellet av någon gäst som bor på hotellet och övernattar där.
(3) Varje föremål:
  (a) som finns på hotellet under den tid som gästen övernattar där; eller
  (b) som hotellinnehavaren eller en person för vilken hotellinnehavaren ansvarar tar hand om utanför hotellet under den period som gästen övernattar på hotellet; eller
  (c) som hotellinnehavaren eller en person för vilken hotellinnehavaren ansvarar tar hand om antingen på hotellet eller utanför det under en skälig period som föregår eller följer den tid när gästen övernattar på hotellet;
  skall anses vara ett föremål som tagits med till hotellet.
(4) Hotellinnehavaren är inte ansvarig så länge som skadan, förstörelsen eller förlusten beror på:
  (a) en gäst eller någon person som medföljer, är anställd av, eller besöker gästen; eller
  (b) ett hinder utanför hotellinnehavarens kontroll enligt Artikel 8:108 PECL (Excuse due to an Impediment); eller
  (c) föremålets beskaffenhet.
(5) Ett avtalsvillkor som helt eller delvis begränsar hotellinnehavarens ansvar skall anses oskäligt om det helt eller delvis begränsar ansvar i ett fall där hotellinnehavaren eller någon person för vars handlingar hotellinnehavaren ansvarar orsakar skadan, förstörelsen eller förlusten uppsåtligen eller av grov vårdslöshet.
(6) Förutom i de fall när skadan, förstörelsen eller förlusten orsakats uppsåtligen eller av grov vårdslöshet av hotellinnehavaren eller någon person för vars handlingar hotellinnehavaren ansvarar är gästen skyldig att informera hotellinnehavaren om skadan utan oskäligt dröjsmål. Om gästen inte informerar hotellinnehavaren utan oskäligt dröjsmål kan hotellinnehavaren inte hållas ansvarig.

(7) Hotellinnehavaren äger rätt att hålla inne föremålet som omnämns i (2) till dess att beställaren har uppfyllt de krav som hotellinnehavaren har på beställaren med avseende på logi, mat, dryck och begärda tjänster utförda för beställaren i hotellinnehavarens yrkesmässiga kapacitet.

Kapitel 5:
Design

Artikel 5:101: Tillämpningsområde

(1) Detta kapitel är tillämpligt på avtal där den ena parten (formgivaren) skall designa fast egendom till den andra parten (beställaren) som skall uppföras av beställaren eller på beställarens vägnar.
(2) Detta kapitel är tillämpligt på avtal där formgivaren skall designa lös egendom eller en tjänst som skall uppföras av beställaren eller utföras av eller på beställarens vägnar.
(3) I de fall ena parten enligt avtal skall utföra design och dessutom utföra en annan tjänst skall detta kapitel tillämpas på de delar av avtalet som omfattar design med lämpliga justeringar.
(4) Om den tjänst som enligt (3) skall utföras utöver design består av genomförande av designen skall de bestämmelser som reglerar tillhandahållandet av den efterföljande tjänsten äga företräde. Artiklarna 5:105 och 5:108 är dock inte tillämpliga.

Artikel 5:102: Formgivarens prekontraktuella skyldighet att varna

De skyldigheter som följer av Artikel 1:103 (Prekontraktuell skyldighet att avråda) innebär bland annat att formgivaren är skyldig att varna beställaren i den utsträckning som formgivaren saknar särskild kompetens för specifika problem som kräver inblandning av specialister.

Artikel 5:103: Beställarens samarbetsskyldighet

I den utsträckning formgivaren har varnat beställaren om att ytterligare expertis är nödvändig för att möjliggöra för formgivaren att prestera enligt avtalet enligt Artikel 1:103 (Prekontraktuell skyldighet att avråda) och Artikel 5:102 innebär den samarbetsskyldighet som följer av Artikel 1:202 PECL (Duty to Co-operate) och 1:104 (Samarbetsskyldighet) bland annat att beställaren skall anlita sådan expertis.

Artikel 5:104: Formgivarens omsorgsskyldighet

Den omsorgsskyldighet som följer av Artikel 1:107 (Allmän omsorgsskyldighet vid tjänster) innebär bland annat att formgivaren skall:
(a) anpassa designarbetet till andra kontrakterade tjänsteleverantörers arbete i syfte att möjliggöra ett effektivt genomförande av alla inblandade tjänster;
(b) integrera andra tjänsteleverantörers arbete som är nödvändigt för att säkerställa att designen utförs i enlighet med Artikel 5:105;
(c) inkludera all information som är nödvändig vid tolkningen av designen för en användare av designen med genomsnittlig kompetens eller för en särskild användare som är känd för formgivaren vid slutande av avtalet för att kunna förverkliga designen;
(d) möjliggöra för användare av designen att genomföra designen utan att överträda förvaltningsrättsliga föreskrifter eller inkräkta på tredje mans rättigheter vilka formgivaren känner till eller skäligen kan förväntas känna till; och
(e) leverera en design som tillåter ett ekonomiskt och tekniskt effektivt genomförande.

Artikel 5:105: Överensstämmelse med avtalet

(1) Förutom när parterna avtalat annat, skall designen anses felaktig om den inte möjliggör för användaren av designen att uppnå en viss funktion genom att använda designen med sådan omsorg som förutsatts med avseende på användningen av designen.

(2) Beställaren äger inte rätt att åberopa en påföljd för fel om en anvisning som givits av beställaren enligt Artikel 1:109 (Beställarens anvisningar) är orsaken till felet och formgivaren fullgjort den varningsskyldighet som följer av Artikel 1:110 (Tjänsteleverantörens kontraktuella varningsskyldighet).

Artikel 5:106: Överlämnande av designen

I den utsträckning formgivaren anser att designen, eller någon del av den som lämpar sig för att genomföras fristående från slutförande av den resterande designen, är tillräckligt färdigställd och önskar överföra designen till beställaren är beställaren skyldig att godta sådant överlämnande inom en skälig tid efter att ha blivit meddelad om detta. Beställaren äger rätt att vägra godta designen när den, eller en relevant del av den, inte överensstämmer med avtalet och sådan felaktighet utgör ett väsentligt kontraktsbrott i enlighet med Artikel 8:103 PECL (Fundamental Non-performance).

Artikel 5:107: Formgivarens skyldighet att förvara dokumentation

Efter genomförande av parternas kontraktuella skyldigheter får beställaren begära att formgivaren överlämnar all relevant dokumentation, åtminstone i kopia. Formgivaren är skyldig att förvara sådan dokumentation under en skälig tidsperiod. Innan formgivaren förstör dokumentationen är formgivaren skyldig att erbjuda beställaren dem.

Artikel 5:108: Ansvarsbegränsning

I avtal mellan två parter som agerar i sin yrkesmässiga verksamhet skall ett avtalsvillkor som begränsar formgivarens ansvar för kontraktsbrott till värdet av egendomen, föremålet eller tjänsten som skall uppföras eller utföras av beställaren eller på beställarens vägnar i enlighet med designen, presumeras vara skäligt i enlighet med Artikel 1:114 (2) (Ansvarsbegränsning) om inte formgivaren eller någon person för vars handlingar formgivaren ansvarar orsakat skadan uppsåtligen eller av grov vårdslöshet.

Kapitel 6:
Information

Artikel 6:101: Tillämpningsområde

(1) Detta kapitel är tillämpligt på avtal där den ena parten (informationslämnaren) skall tillhandahålla information, såsom faktisk information, information av bedömningskaraktär eller en rekommendation till den andra parten (beställaren).

(2) I de fall ena parten enligt avtal skall tillhandahålla information och dessutom utföra någonting annat skall detta kapitel tillämpas på de delar av avtalet som omfattar tillhandahållande av information med lämpliga justeringar.

Artikel 6:102: Omständigheter under vilka tjänsten skall utföras

(1) De skyldigheter som följer av Artikel 1:105 (Omständigheter under vilka tjänsten skall utföras) innebär i synnerhet att informationslämnaren, i den utsträckning som är skäligen nödvändig för att utföra tjänsten, skall samla information om;
   (a) det särskilda syfte för vilket beställaren behöver informationen;
   (b) beställarens preferenser och prioriteringar i relation till informationen;
   (c) beslutet som beställaren kan förväntas fatta på grundval av informationen; och
   (d) beställarens privata situation.

(2) I de fall informationen är avsedd att föras vidare till en grupp av personer skall den information som skall inhämtas relatera till de syften, preferenser, prioriteringar och privata situationer som skäligen kan förväntas att individer inom en sådan grupp har.

(3) I den utsträckning informationslämnaren måste inhämta information från beställaren är informationslämnaren skyldig förklara vad beställaren är ombedd att tillhandahålla.

Artikel 6:103: Informationslämnarens skyldigheter avseende tjänstens utförande

Om inte annat avtalats har informationslämnaren en särskild skyldighet att samla och använda den expertkunskap som informationslämnaren har eller borde ha tillgång till som yrkesmässig informationslämnare i den utsträckning som är skäligen nödvändig för tjänstens utförande.

Artikel 6:104: Informationslämnarens omsorgsskyldighet

(1) Den omsorgsskyldighet som följer av Artikel 1:107 (Allmän omsorgsskyldighet vid tjänster) innebär i synnerhet att informationslämnaren skall:
   (a) vidta skäliga åtgärder för att säkerställa att beställaren förstår informationens innehåll;
   (b) agera med den omsorg och skicklighet som en omdömesgill informationslämnare skulle utöva under omständigheterna vid tillhandahållande av information av bedömningskaraktär; och
   (c) i varje fall när en beställare kan förväntas fatta ett beslut baserat på informationen, informera beställaren om de risker som finns i den utsträckning sådana risker skäligen kan påverka beställarens beslut.

(2) När informationslämnaren uttryckligen eller underförstått åtar sig att förse beställaren med en rekommendation för att möjliggöra för beställaren att fatta ett påföljande beslut är informationslämnaren skyldig
   (a) basera rekommendationen på en professionell analys av den expertkunskap som skall inhämtas i förhållande till syftena, prioriteringarna, preferenserna och beställarens privata situation;
   (b) informera beställaren om alternativ som informationslämnaren personligen kan tillhandahålla och som relaterar till det påföljande beslutet och om dess fördelar och risker i jämförelse med de som följer av det rekommenderade beslutet; och
   (c) informera beställaren om andra alternativ som informationslämnaren inte personligen kan tillhandahålla, om inte informationslämnaren uttryckligen informerar beställaren om att endast ett begränsat urval av alternativ erbjuds eller detta tydligt framgår av situationen.

Artikel 6:105: Överensstämmelse med avtalet

(1) Informationslämnaren skall tillhandahålla information som till mängd, kvalitet och slag överensstämmer med avtalet.
(2) Den faktiska information som tillhandahållits beställaren av informationslämnaren skall vara en korrekt beskrivning av den faktiska situation som beskrivits.

Artikel 6:106: Redovisningsskyldighet

I den utsträckning det är skäligen nödvändigt med hänsyn till beställarens intresse är informationslämnaren skyldig redogöra för den information som tillhandahålls i enlighet med detta kapitel.

Artikel 6:107: Intressekonflikt

(1) När informationslämnaren uttryckligen eller underförstått åtar sig att förse beställaren med en rekommendation för att möjliggöra för beställaren att fatta ett påföljande beslut är informationslämnaren skyldig att redogöra för varje möjlig intressekonflikt som kan påverka prestationen av informationslämnarens skyldigheter.
(2) Så länge som avtalet inte fullgjorts i sin helhet får informationslämnaren inte ingå en relation med en annan part som kan innebära en möjlig konflikt med beställarens intresse utan att lämna en fullständig redogörelse till beställaren och inte utan beställarens uttryckliga eller underförstådda medgivande.
(3) Om parterna avviker från skyldigheten i (2) får informationslämnaren åberopa en sådan bestämmelse mot beställaren endast i den utsträckning informationslämnaren uppmärksammat beställaren på bestämmelsen på ett sätt som var skäligen lämpligt under omständigheterna.

Artikel 6:108: Beställarens inverkan

(1) Medverkan i utförandet av tjänsten av andra personer på beställarens vägnar eller enbart beställarens kompetens fråntar inte informationslämnaren från ansvar enligt detta kapitel.
(2) Informationslämnaren ansvarar inte enligt detta kapitel om beställaren redan hade kunskap om informationen eller om beställaren hade skäl att känna till informationen.
(3) Vid tillämpning av (2) skall beställaren anses ha ”anledning känna till” informationen om den skulle vara uppenbar för en jämförlig beställare i samma situation som den aktuella beställaren mot bakgrund av alla ovanliga fakta och omständigheter som beställaren kände till utan undersökning.

Artikel 6:109: Orsakssamband

Om informationslämnaren känner till eller borde vara medveten om att ett påföljande beslut kommer att baseras på den information som skall tillhandahållas skall informationslämnarens kontraktsbrott presumeras ha orsakat skadan om beställaren visar att om informationslämnaren hade tillhandahållit all erforderlig information så skulle en omdömesgill beställare i samma situation som den aktuella beställaren allvarligt ha övervägt att fatta ett alternativt påföljande beslut.

Kapitel 7:
Behandling av Personer

Artikel 7:101: Tillämpningsområde

(1) Detta kapitel är tillämpligt på avtal där den ena parten (vårdgivaren) skall tillhandahålla medicinsk behandling till den andra parten (patienten).
(2) Detta kapitel, med lämpliga justeringar, är tillämpligt på avtal avseende någon annan tjänst som vårdgivaren skall tillhandahålla i syfte att förändra en persons fysiska eller psykiska hälsa.
(3) I de fall patienten inte är avtalspart kan patienten kräva att vårdgivaren utför sina skyldigheter enligt detta kapitel i enlighet med Artikel 6:110 PECL (Stipulation in Favour of a Third Party).
(4) I de fall ena parten enligt avtal skall tillhandahålla behandling och dessutom utföra någonting annat skall detta kapitel tillämpas på de delar av avtalet som omfattar behandling med lämpliga justeringar.

Artikel 7:102: Omständigheter under vilka tjänsten skall utföras

De skyldigheter som följer av Artikel 1:105 (Omständigheter under vilka tjänsten skall utföras) innebär i synnerhet att vårdgivaren, i den utsträckning som är skäligen nödvändig för att utföra tjänsten, skall:
(a) intervjua patienten om patientens hälsotillstånd, symptom, tidigare sjukdomar, allergier, tidigare eller annan aktuell behandling och patientens preferenser och prioriteringar i relation till behandlingen;
(b) genomföra de undersökningar som är nödvändiga för att diagnostisera patientens hälsotillstånd; och
(c) samråda med annan vårdgivare som är inblandad i patientens behandling.

Artikel 7:103: Vårdgivarens skyldigheter avseende tjänstens utförande

De skyldigheter som följer av Artikel 1:106 (Tjänsteleverantörens skyldigheter avseende tjänstens utförande) innebär i synnerhet att vårdgivaren skall använda instrument, mediciner, material, installationer och lokaler av åtminstone den kvalitet som krävs av en accepterad och omdömesgill praktik, och som är i enlighet med tillämplig reglering samt lämpar sig för det särskilda syfte för vilket de används.

Artikel 7:104: Vårdgivarens omsorgsskyldighet

(1) Den omsorgsskyldighet som följer av Artikel 1:107 (Allmän omsorgsskyldighet vid tjänster) innebär i synnerhet att vårdgivaren skall tillhandahålla patienten den omsorg och skicklighet som en omdömesgill vårdgivare som visar och gör anspråk på omsorg och skicklighet skulle visa under de aktuella omständigheterna.
(2) Om vårdgivaren saknar den erfarenhet eller skicklighet som krävs för att behandla patienten i enlighet med Artikel 1:107 (Allmän omsorgsskyldighet vid tjänster) skall vårdgivaren hänvisa patienten till en vårdgivare som kan uppfylla kraven i dessa bestämmelser.

Artikel 7:105: Vårdgivarens informationsskyldighet

(1) Vårdgivaren skall för att ge patienten ett fritt val avseende behandling och på ett sätt som kan förstås av patienten i synnerhet informera om:
   (a) patientens hälsotillstånd
   (b) den föreslagna behandlingens beskaffenhet
   (c) fördelarna med den föreslagna behandlingen
   (d) riskerna med den föreslagna behandlingen
   (e) alternativa behandlingar så väl som fördelar och risker med dessa i jämförelse med fördelar och risker med den föreslagna behandlingen; och
   (f) konsekvenserna av att avstå från behandling.

(2) Vårdgivaren skall i varje fall informera om eventuella risker eller alternativ som skäligen skulle kunna påverka beslutet om att ge sitt medgivande till den föreslagna behandlingen. En risk presumeras kunna påverka sådant beslut om dess förverkligande skulle leda till allvarlig skada på en patient i den situationen. Om inte annat framgår är bestämmelserna i kapitel 6 (Information) tillämpliga avseende informationsskyldigheten.

Artikel 7:106: Informationsskyldighet vid onödig eller experimentell behandling

(1) Om behandlingen är onödig med hänsyn till patientens hälsotillstånd skall alla kända risker redovisas.

(2) Om behandlingen är experimentell skall all information med hänsyn till målen med experimentet, behandlingens beskaffenhet, dess fördelar och risker och dess alternativ, om än enbart potentiella, redovisas.

Artikel 7:107: Undantag från informationsskyldigheten

(1) Den information som skall tillhandahållas enligt Artikel 7:105 och 7:106 får undanhållas patienten:
   (a) om det finns objektiva skäl att anta att den på ett allvarligt och negativt sätt skulle påverka patientens hälsa eller liv; eller
   (b) om patienten uttryckligen anger att patienten önskar att inte bli informerad under förutsättning att undanhållandet av informationen inte riskerar hälsa och säkerhet hos tredje man.

(2) Artikel 7:105 är inte tillämplig om behandling måste utföras i ett nödläge. I sådant fall är vårdgivaren skyldig att, så långt det är möjligt, tillhandahålla informationen vid senare tillfälle.

Artikel 7:108: Skyldighet införskaffa samtycke

(1) Vårdgivaren får inte utföra behandling om inte vårdgivaren i förväg införskaffat informerat samtycke från patienten.

(2) Patienten äger rätt att dra tillbaka sitt samtycke när som helst.

(3) I den utsträckning patienten är oförmögen att lämna samtycke skall vårdgivaren:
   (a) inhämta informerat samtycke från en person eller institution som är juridiskt berättigad att fatta beslut avseende behandlingen å patientens vägnar; eller
   (b) iaktta alla regler eller tillvägagångssätt för att möjliggöra att behandlingen utförs på ett lagligt sätt utan sådant samtycke.

(4) I den situation som beskrivs i (3) skall vårdgivaren så långt det är möjligt ta hänsyn till den oförmögne patientens uppfattning och den uppfattning som patienten uttryckt innan patienten blev oförmögen.

(5) I den situation som beskrivs i (3) får vårdgivaren endast utföra behandling som är ämnad att förbättra patientens hälsotillstånd.
(6) I den situation som beskrivs i Artikel 7:106 (2) måste samtycke lämnas på ett uttryckligt och specifikt sätt.
(7) Denna Artikel är inte tillämplig om behandlingen måste utföras i ett nödläge.

Artikel 7:109: Redovisningsskyldighet

(1) Vårdgivaren är skyldig skapa fullgoda journaler över behandlingen. Sådana journaler skall i synnerhet innehålla information som samlats in i enlighet med Artikel 7:102, information avseende samtycke från patienten och information avseende utförd behandling.
(2) Vårdgivaren är skyldig att ge patienten, eller om patienten är oförmögen att lämna sitt samtycke, personen eller institutionen som är juridiskt berättigad att fatta beslut å patientens vägnar, tillgång till journalen.
(3) Vårdgivaren är skyldig besvara frågor avseende tolkningen av journalen i den utsträckning det är skäligt.
(4) Om vårdgivaren inte fullgör sina skyldigheter i (2) och (3) skall kontraktsbrott under Artikel 7:104 och orsakssamband presumeras.
(5) Vårdgivaren är skyldig föra journaler och lämna information om tolkningen av dem under en skälig tidsperiod om åtminstone 10 år efter behandlingens avslutande beroende på användbarheten av dessa journaler för patienten eller patientens arvingar och för framtida behandlingar. Journaler som skäligen kan förväntas vara viktiga även efter den skäliga tidsperioden skall förvaras av vårdgivaren efter den tiden. Om vårdgivaren av någon anledning upphör med verksamheten skall journalerna deponeras eller levereras till patienten för framtida konsultation.
(6) Vårdgivaren får inte lämna ut information om patienten eller andra personer som är inblandade i patientens behandling till tredje man om inte sådant utlämnande är nödvändigt för att skydda tredje man eller ett allmänt intresse. Vårdgivaren får använda journalerna på ett anonymt sätt för statistiska eller vetenskapliga syften.

Artikel 7:110: Påföljder vid kontraktsbrott

Vid kontraktsbrott är kapitel 8 och 9 PECL tillämpliga med följande inskränkningar:
(a) vårdgivaren får inte hålla inne prestation eller säga upp avtalet i enlighet med kapitel 9 avsnitt 2 och 3 PECL (Withholding Performance, Termination of the Contract) om detta allvarligt äventyrar patientens hälsotillstånd;
(b) i den utsträckning vårdgivaren äger rätt att hålla inne prestation eller säga upp avtalet och planerar utöva den rätten är vårdgivaren skyldig hänvisa patienten till en annan vårdgivare; och
(c) uppsägning är inte tillåten förutom då patienten brustit i sin skyldighet enligt Artikel 1:104 (Samarbetsskyldighet).

Artikel 7:111: Vårdgivarorganisationers centrala ansvar

(1) Om det under utförandeprocessen av behandlingsavtalet pågår aktiviteter på ett sjukhus eller i någon annan vårdgivarorganisations lokaler och sjukhuset eller den andra vårdgivarorganisationen inte är part i behandlingsavtalet så måste man klargöra för patienten att man inte är avtalspart.
(2) I de fall att vårdgivaren inte kan identifieras skall sjukhuset eller vårdgivarorganisationen inom vilken behandlingen ägde rum betraktas som vårdgivare om inte sjukhuset eller vårdgivarorganisationen informerar patienten inom skälig tid om vårdgivarens identitet.

Principles of European Law on Service Contracts

General Introduction

I. General

This Part of the Principles deals with contracts where one party undertakes to supply a service to the other party. The provisions are particularly applicable to construction contracts, processing contracts, storage contracts, design contracts, information contracts, and treatment contracts. The provisions of this Part are further applicable with appropriate modifications to contracts where a party undertakes to supply either a combination of services or a combination of a service and any other contractual performance.

This Part is not applicable to employment contracts, nor is it meant to be applied to transport contracts, insurance contracts, guarantee contracts, or contracts which involve the supply of a financial product or a financial service, unless such contracts are part of a larger contract involving the supply of a service dealt with in this Part.

II. Economic Importance

The economic importance of service contracts within the European Union is enormous. The European Commission recently estimated that services account for some 50 per cent of EU GDP and for some 60 per cent of employment in the Union, though an exact figure is hard to determine given that many services are provided by manufacturers of goods. According to the European Commission, many services appear in official statistics as manufacturing activity, meaning that the role of services in the economy is often significantly underestimated (see the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, launched by the European Commission on 5 March 2004).

III. Relation to General Contract Law (PECL)

Within the Principles, the Principles of European Contract Law provide general rules of contract law. Those rules apply, in principle, to all types of contracts, independent of their object (e.g. sales, insurance, medical treatment, construction, and joint venture) or the status of the parties (consumer, merchant, small business, multinational). As a result, these rules are necessarily rather general and abstract. Although abstract rules certainly have an important function – they warrant normative integrity – practice also needs more specific rules. Therefore, in addition to the general contract law contained in the PECL the Principles also contain sets of principles specifically relating to sales contracts, service contracts, and long-term commercial contracts.

As to service contracts, there are several examples of issues which require specific rules in order to give service providers, their clients, as well as (legal) advisers guidance and to provide them with a reasonable degree of legal certainty.

An important issue relates to the exchange of information between the parties, not only as an inherent part of the supply of the service itself, but also prior to the conclusion of the contract. At that stage, even if the object of the contract is a rather standardised service, it still has to be established what the specific expectations of the client are, how the service provider is to meet these expectations given the services he has to offer, what the specific circumstances are in which the service has to be carried out, what particular risks may be encountered whilst performing the service and, last but not least, what the price of the service required will be given all these peculiarities. Risks may also be general risks attached to standard services.

This issue of pre-contractual exchange of information is in fact an example of a more general feature inherent to service contracts. Unlike many other types of contracts, service contracts are greatly dependent on the mutual co-operation between a service provider and a client. Such co-operation does not only involve the client's unilateral assistance to the service provider to enable the latter to perform his part of the contract; modern service contract law also requires an ongoing process of bilateral exchange of support and information between the service provider and the client, aiming at the realisation of the parties' individual and common goals.

In the context of a service contract, a particular characteristic of the said process concerns the client's influence on the process and its result through instructions. A second and related feature concerns the service provider trying to safeguard the client by warning him against the risks that may occur due to the latter's influence. By the same token, the service provider will usually enable the client to assess the development of the service on a regular basis. Eventually, this process of mutual support and information may lead the parties to signalling difficulties – including disputes – at an early stage. This may enable them to take steps timely, to prevent problems from occurring or to control their consequences as much as possible, for instance, by agreeing on a variation of the service or by cancelling the service altogether.

Another issue inherent to service contracts which requires specific rules involves the liability of the service provider. Lawyers tend to regard this issue as the most important one in the context of a service contract. The issue centres on the difficult question of the basis on which the liability of the service provider should be established. This may either be his failure to provide the service with the care and skill required, or the fact that the service did not achieve the result that was expected by the client. Related to this issue, is the amount of damages to be paid by the service provider after his liability has been established by a court. In the past, the European Community has considered the need for specific rules in this area. However, the Proposal for a Directive on the liability of the suppliers of services (COM(90) 482, OJ C 12/8 of 18 January 1991) encountered much resistance and was eventually mothballed.

IV. Mainly Default Rules: Some Mandatory Protection

This Part of the Principles mainly contains default rules, with some exceptions explained at the end of each Comment to the individual Articles.

V. Structure of this Part: General and Specific Rules

As was stated in section (I), this Part of the Principles deals with construction, processing, storage, design, information and treatment contracts. Clearly, these are all very different contracts, involving services that differ substantially from one another *in concreto*. However, in section (III) it was explained that there are several issues that are typical for a service process *in abstracto* and that require specific rules for service contracts, in addition to the Principles of European Contract Law. These issues are typical for all services referred to above, and the proposition is that they are also inherent in other services.

This characteristic explains the present structure of this Part of the Principles. It contains a first Chapter with general provisions (Chapter 1: General Provisions) dealing with the issues that are typical for any type of service. The first Chapter does not only apply to the specific services that are being dealt with in Chapters 2 to 7 (Chapter 2: Construction, Chapter 3: Processing, Chapter 4: Storage, Chapter 5: Design, Chapter 6: Information, and Chapter 7: Treatment), but it is also applicable to any other service contract that does not fall within the scope of application of Chapters 2 to 7, provided of course that the contract is not explicitly excluded from the scope of application of Chapter 1. In addition to the provisions of Chapter 1, Chapters 2 to 7 contain specific rules that only apply to the specific service contracts dealt with in these Chapters. These additional and specific rules may either elaborate upon a general provision from Chapter 1, given the particularities of the specific service, or deal with an issue that is not dealt with in Chapter 1 because the issue is typical for the service concerned only.

Given the above explanation of the structure of this Part of the Principles, it may be clear that it is not sufficient to read, for example, Chapter 4 only if one wishes to learn about the duties of a storer under a storage contract. Chapter 4, like any of the Chapters 2 to 7, will always have to be read in connection with the provisions of Chapter 1. The same goes for the Comments to Chapters 2 to 7; they are to be read in connection with the Comments to Chapter 1.

VI. External Relationship not Dealt with

This Part of the Principles exclusively deals with the internal relationship between the service provider and his client. Therefore, the external relationships with third parties are not dealt with here. They could be subject to the rules of Chapter 3 PECL (Authority of Agents) with regard to the authority of a service provider to bind his client in relation to a contract with a third party. The answer to the question whether a third party may have a recourse against the service provider for loss suffered as a result of the

supply of the service is to be found in the Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab.Dam.).

VII. Member States Investigated

Not every legal system of the Member States of the European Union is represented in the comparative legal study underlying these Principles. For lack of manpower, the law of the Member States that have joined the European Union on 1 May 2004 could not be taken into account, with the exception of Poland, from which country a national reporter could be recruited. Moreover, as no reporters from Belgium, Denmark, Ireland, Luxemburg, and Scotland have been found, these legal systems are not represented either.

Chapter 1:
General Provisions

General Comments

A. General Idea

The supply of a service can be described as the process by which one person, the service provider, performs work undertaken according to the specific needs and instructions of another person, the client. The work undertaken in any event requires the supply of labour and may also involve the input of materials and components. Hence, a service process may result in the production of an immovable structure or of a movable or incorporeal thing.

The building of a new, immovable structure and the creation of a new, movable thing are the most important examples of services that start from scratch and that lead to a material result. Other examples are the drawing of a design of a structure or thing to be built or the drafting of a report containing factual or evaluative information. These too involve a service resulting in material output (a design, a report). However, unlike the newly built structure or thing, their economic value is not expressed in the material value of the paper on which the design or report is made, but in the immaterial ideas and information embedded in or underlying the design and the report. A service may also be centred on a movable thing that already exists; examples are repair work on a car and the storage of a movable thing. Finally, one may think of purely immaterial services which neither result in tangible output nor centre on an existing immovable structure or movable thing because they involve the treatment of persons.

The major problem the rules on service contracts have to deal with is the problem of which of the parties is responsible for a disappointing output of the service process. Materials or components may be of insufficient quality. Likewise, the manner in which they were processed may lead to problems of quality, delay, and extra cost. If the service merely involves the supply of labour, such problems may occur due to the inadequacy of that labour. Eventually, all these problems result from inadequate decisions. The service provider may have taken decisions as regards the selection of materials and components, their processing, or the manner in which labour has to be carried out. These decisions may, however, also originate from the instructions that were supplied by or on behalf of the client, either at the very beginning of the service process or in the course of that process. If the latter is the case, a contributory cause of the problem may be the fact that the service provider did not notice the inadequacy of the client's instructions. By the same token, despite having observed the service process on a regular basis, the client may have overlooked the inadequacy of decisions taken by the service provider.

It may be clear from these problems and their underlying causes that both the service provider and the client have a common interest in co-operating in the service process. The practice of service contracts shows that such co-operation does not merely consist in the client unilaterally providing the service provider with assistance in order to enable him to perform the service. What is needed in order to realise the parties' individual and common goals is a continuous process of bilateral exchange of support and information between the service provider and his client. This encourages parties to pay attention, and thus they may notice possible problems at an early stage, which allows them to take precautions in time. Through precautions, they may either prevent problems from occurring or control the consequences of potential problems as much as possible. This is why the rules on service contracts should not only deal with simply attributing to one of the parties the responsibility for an unsatisfactory service; the rules should also stimulate both the service provider and the client to contribute to a process of exchange of support and information.

B. Scope of Application

This Chapter contains general provisions dealing with issues that are typical for any type of service. It has a twofold scope of application.

First, it applies to the specific services that are dealt with in Chapters 2 to 7 of this Part (Chapter 2: Construction, Chapter 3: Processing, Chapter 4: Storage, Chapter 5: Design, Chapter 6: Information, and Chapter 7: Treatment).This chapter also applies, be it with appropriate modifications, to a combination of two or more of such specific services or to the performance of a service as part of another contract outside the scope of this Part (see Article 1:101). The specific services dealt with in Chapters 2 to 7 cover all the types of services that follow from the analysis presented above under Comment A. The relationship between Chapter 1 and the other Chapters on specific service contracts implies that it is not sufficient to read, for example, Chapter 7 only if one wishes to learn more about the duties of a treatment provider under a treatment contract. Chapter 7, like any of the other Chapters, will always have to be read in connection with the provisions of the present Chapter and, more generally, with the Principles of European Contract Law. The same goes for the Comments to Chapters 2 to 7, which are connected with the Comments to Chapter 1. A detailed structure of the interrelationship between individual Articles of this Chapter on the one hand and Articles of Chapters 2 to 7 on the other is set out below in Comment H.

Secondly, this Chapter applies to any other service contract that does not fall within the scope of application of Chapters 2 to 7 and that is either performed independently or as part of another contract outside the scope of this Part of the Principles (see Article 1:101).

This Chapter is not applicable to employment contracts. Furthermore, it is not to be applied to transport contracts, insurance contracts, guarantee contracts, or contracts which involve the supply of a financial product or a financial service unless such contracts are part of a larger contract involving the supply of a service.

C. Basic Principles

The rules of this Chapter reflect the following basic principles underlying any type of service contract:

I. Before the contract is concluded, the service provider and the client have to exchange essential information. This is not only to prevent the occurrence of a dissatisfying outcome of the service process later on, but also to enable the parties to conclude a contract that serves their common and individual goals best and, more in particular, to enable the client to compare the offer of the service provider to alternatives as well as to assess the risks involved. This process of pre-contractual information exchange is dealt with in Article 1:103.

II. Like in any contract, the parties to a service contract have a duty to co-operate. In the context of a service contract, this duty requires that the parties must be stimulated to engage in a continuous process of mutual exchange of support and information in the course of the service process in order to achieve their goals (Article 1:104). An important part of this process is the service provider's duty to give the client the opportunity to monitor the service process from the very start (Article 1:104(1)(d)). Structuring this process of communication by formal rules is left to the parties, who can use standard contracts for this purpose.

III. In order to prevent a dissatisfying outcome of the service process, other duties are imposed upon the service provider in addition to the duties stated in the Articles referred to above. Hence, he is to gather information on the specific circumstances in which the service is to be performed (Article 1:105), select materials and use other input of sufficient quality (Article 1:106), process them with sufficient skill and care (Article 1:107), follow the client's directions (Article 1:109), and warn the client in the event such directions contain obvious inadequacies (Article 1:110).

IV. The decision on who is responsible for a disappointing output of the service process is based, as a rule, on the principle that each party is responsible for its own choices and decisions taken in the course of the service process. The service provider, for instance, is responsible if the result of the service is unsatisfactory due to inadequate materials selected by him (Article 1:106), whereas the client in principle bears the consequences of inadequate directions supplied to the service provider (Article 1:109(2)).

V. This principle is further elaborated upon by the principle that in the event of a party observing choices or decisions of the other party, which may prevent an outcome of the service process that is in conformity with the contract, that party has to warn the other party. This is, for instance, reflected in the aforementioned duty of the service provider to warn (Article 1:110). By the same token, the client will have to notify the service provider if he finds out that the service will fail to achieve or has failed to achieve the result envisaged by the client (Article 1:113).

VI. The mere fact that the service process results in an unsatisfactory outcome does not always imply that the service provider is liable unless he can prove that it is the client's own act that caused the non-performance (Article 8:101(3) PECL) or that the non-performance is excused under Article 8:108 PECL (Excuse Due to an Impediment). Such a prima facie liability of the service provider, in the event of an unsatisfactory result of the service, is only acceptable if a reasonable client in the same circumstances as the client concerned would have no reason to believe that there was a substantial risk that the result envisaged would not be achieved by the service (Article 1:108). This approach is deemed to be adequate – as a principle – for some services, like construction, processing, storage, design, and the supply of factual information see Article 2:104, 3:105, 4:107, 5:105, and 6:105 (Conformity). A client will, however, not always have reason to believe that there is no substantial risk that the result aimed at will not be achieved, for instance if the service consists of the supply of evaluative information or medical treatment. Depending on the circumstances of the case, an obligation of the service provider to achieve the specific result envisaged by the client could be accepted for such services, but is not accepted as a principle.

VII. Limitation of the service provider's liability is dealt with in Article 1:114. The general idea is that neither limitation nor exclusion of liability is allowed for death or personal injury caused by the performance of the service. However, the service provider is generally allowed to limit or exclude his liability for damage other than death or personal injury if, at the time of conclusion of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case. This principle is subject to deviations stated in Chapters 2 to 7.

VIII. After the conclusion of a service contract, various reasons may lead one or both of the parties to the conclusion that the service to be supplied is to be changed. Variation of the service contract is an issue which is dealt with in Article 1:111. Its underlying principle is that the client should be granted some protection, because of his dependence on the service provider, in the form of a proportionality rule regarding the price owed for the variation. The client may consider cancellation of the contract instead of demanding a variation. Cancellation of the service contract is dealt with in Article 1:115. Its underlying principle is that the client must pay the service provider for the latter's investments (materials, labour) for the purpose of the service concerned, to the extent that they cannot be earned back in another way.

IX. The system of remedies is the same as that of the PECL, with clarifications in Article 1:112.

The above principles are explained in the Comments to the various Articles of this Chapter and further elaborated upon in the Comments to Chapters 2 to 7. A detailed structure of the interrelationship between the Comments to individual Articles of this Chapter on the one hand and the Comments to the Articles of Chapters 2 to 7, is set out below in Comment H.

D. Terminology

The term 'supplier', which is commonly used in ENGLISH contract law, is avoided here. The reason is that ENGLISH law uses that term to indicate both suppliers of services as well as suppliers of goods. Instead, the term 'service provider' is preferred to 'service supplier'. Nevertheless, the phrase 'the supply of a service' is used throughout this Part of the Principles. The rather neutral term 'client' is preferred to the term 'employer', the reason being that the latter term is also used in the context of and associated with labour law.

In Comment A above, it was shown that, apart from Chapter 6 (Information) and Chapter 7 (Treatment), the object of a service can either be a 'structure', a 'movable thing', or an 'incorporeal thing'. These terms are used throughout this Part of the Principles.

The term 'structure' means any corporeal immovable, including land and things fixed to, or growing in, land. This term is particularly relevant to services falling within the scope of Chapter 2 (Construction), Chapter 3 (Processing), and Chapter 5 (Design). These services may have as their object the construction, processing, or design of a new structure. Construction or processing services may also be performed on existing structures, whereas a design service may likewise involve the design of the material alteration of such an existing structure.

The term 'movable thing' means any corporeal movable, including specific items and goods in bulk. This term is relevant to all services falling within the scope of Chapter 2 (Construction), Chapter 3 (Processing), Chapter 4 (Storage), and Chapter 5 (Design). Hence, movable things can either be constructed, processed, stored, or designed.

'Structure' and 'movable thing' are similar in the sense that they are both 'corporeal'. They differ from each other in the sense that the former is immovable and the latter is movable. Some services, however, centre on an object that can be qualified neither as a 'structure' nor as a 'movable thing', given that the object is not considered to be corporeal. Good examples of this are the design, construction, processing, and even storage of software, websites, and information placed on a computer server. For these objects of services and the like, the term 'incorporeal thing' is used in the said Chapters.

E. Sources

General provisions that are applicable to any type of service contract covered by Article 1:101 of this Chapter hardly exist in the Codes of the countries of the European Union. If they do exist at all, they have a very general and abstract character, which makes it uncertain how they are to be particularised for a specific service contract. In some Codes, such particularisation has its place elsewhere, but then the interrelationship between these specific rules and the general rules is not always made clear.

Particularisation of the general provisions in the context of a specific service may also have been undertaken by the courts. Analysing all the relevant court decisions may lead to a better understanding of the interrelationship between general and specific rules on service contracts. Such an understanding may then allow both legislators and courts to improve the consistency of the rules dealing with services contracts and their application. The same would go for an analysis of all the standard forms of specific service contracts that are developed by practise, disillusioned by what the Codes have to offer them. Unfortunately, however, the analysis of case law and standard forms of service contracts for that purpose hardly seems to take place in the European Union. What usually happens is that court decisions dealing with a particular type of service are isolated and studied in order to get a better understanding of the application of the rules from the perspective of their relevance for that particular service. The same goes for the analysis of a standard form of contract drawn up for a specific type of service.

Therefore, the rules in this Chapter were not designed on the basis of similar general rules in codes, case law, or standard conditions in the countries of the European Union. In order to explain on what basis they were designed, a brief comment needs to be given on the manner in which this Part of the Principles was developed. Chapters 2 to 7 were drafted first. These drafts were based on an analysis of the Codes, the case law, and the standard forms of contracts of the various countries of the European Union. Next, an attempt was made to identify the rules that relate to issues that were dealt with in all Chapters (see Comment C above). This process led to the prima facie opinion that these rules might be taken from these Chapters in a general Chapter dealing with general provisions on service contracts. Hence, the rules of this Chapter have indirectly been designed on the basis of a comparative legal analysis of the Codes, court decisions, and the standard forms of contracts of the countries of the European Union that all deal with the specific types of services covered in Chapters 2 to 7.

As is explained in the General Introduction, not every legal system of the Member States of the European Union could be studied. For lack of manpower, the law of the Member States that have joined the European Union on 1 May 2004 could not be taken into account, with the exception of POLAND, from which country a national reporter could be recruited. Moreover, as no reporters from DENMARK, IRELAND, LUXEMBURG, and SCOTLAND have been found, these legal systems are not represented in the comparative legal study underlying this Chapter either. BELGIAN, FINNISH, GREEK, POLISH, SPANISH and SWEDISH law are represented only to a certain extent in this Chapter.

In the comparative and national notes for each Article it is indicated whether or not (and to what extent) comparative legal information was collected for a particular topic. Firstly, the *comparative* notes generally show the reader for which Member States information has been collected and for which this was not possible. Additionally, if no (reliable) information was collected for a particular Member State, the relevant *national* note will read: "No information". If a national note only refers to statute law, to any other statutory instrument, or to a provision taken from a national standard form of contract, it means that the information in the note is not based on a further analysis of relevant case law or legal doctrine. If, however, references to case law and/or legal

doctrine have been inserted in a national note, it means that the information is based on a more thorough analysis of the topic in the relevant Member State. In the national notes, the Member States that have joined the European Union on 1 May 2004 are not listed, with the exception of Poland, for reasons set out above.

Relation to Other Parts of the Principles

F. Relation to the Principles of European Contract Law

Service contracts contain normal contractual obligations and are therefore governed by the Principles of European Contract Law. In the Comments to each Article of this Chapter, the relation with the PECL is explained. Generally, the Articles are applications of the rules in the PECL, but particularised to the specific area of services. The rules presented in this Chapter do not explicitly deviate from the PECL.

G. Relation to the Principles of European Sales Law and the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts

This Part of the Principles deals with a specific type of contract, namely the contracts concerning the supply of services. Other Parts of the Principles deal with other specific contracts, such as sales contracts and long-term commercial contracts. A specific contract will generally have to be qualified as either a sales contract, a service contract, or a long-term commercial contract in order to determine the applicable Part of the Principles. Occasionally, however, a contract may impose several obligations upon a party, each of which will be subject to the rules of a different Part. These issues are further explained and illustrated in Comments *F* and *G* to Article 1:101 below.

H. Relation to Chapters 2 to 7 of this Part of the Principles

As has been stated above under Comments *B* and *E*, there is a strong relationship between the present Chapter and the specific Chapters 2 to 7. That relationship is represented by the fact that the provisions in this Chapter also apply to the services that are dealt with in the specific Chapters. Hence, if one is interested to learn more about the duties of a service provider under one of the other Chapters, the provisions of the relevant Chapter will have to be read in close connection with the general provisions in this Chapter. The connection between individual Articles of this Chapter on the one hand and Articles of Chapters 2 to 7 on the other will be explained in more detail below. In the context of this explanation, the connection between the Comments to the Articles of the present Chapter and the Comments to the Articles of Chapters 2 to 7 will be clarified. There are in fact four possible situations.

The first possibility is that an Article of Chapter 1 is not particularised by an Article in a specific Chapter. An example is Article 1:115, which deals with the client's right to cancel the service contract at any time. That Article has no particularisation in, for

instance, Chapter 5 (Design). A client may nevertheless cancel a design contract taking into account the provisions of Article 1:115. The reader of the General Comments to Chapter 5 is reminded of the relevance of Article 1:115 for design contracts under the heading 'Relation to Other Parts of the Principles'. More precisely, he will find a brief explanation of that relevance in Comment P, illustrated by an example. The reader is then referred to the Comments to Article 1:115 of the present Chapter, which deal with the client's right to cancel the contract in more detail. The following list shows the numbers of the Articles of Chapter 1 (in parentheses) that are *not* particularised by an Article in the specific Chapter mentioned: Chapter 2 (1:102, 1:103, 1:105, 1:106, 1:109, 1:110, 1:111, 1:112, 1:113, 1:114, 1:115); Chapter 3 (1:102, 1:103, 1:106, 1:109, 1:110, 1:111, 1:112, 1:113, 1:115); Chapter 4 (1:102, 1:104, 1:109, 1:110, 1:111, 1:112, 1:113, 1:115); Chapter 5 (1:102, 1:105, 1:106, 1:109, 1:110, 1:111, 1:112, 1:113, 1:115); Chapter 6 (1:102, 1:103, 1:104, 1:109, 1:110, 1:111, 1:112, 1:113, 1:114, 1:115); Chapter 7 (1:102, 1:103, 1:104, 1:108, 1:109, 1:110, 1:111, 1:112, 1:113, 1:114, 1:115).

The second possibility is that an Article in a specific Chapter does have a counterpart in Chapter 1. A good example is the connection between Article 1:105 and Article 6:102 (Circumstances in which the Service Is to Be Performed) in the Chapter that applies to information contracts. Article 1:105 deals with the duty of the service provider to collect information about the circumstances in which the service has to be performed as well as his duty to see to it that performance of the service is attuned to these conditions and circumstances. Article 6:102 states what the performance of this general duty under Chapter 1 requires *in concreto* for the information provider under an information contract. Article 6:102 is linked to Article 1:105, in the sense that Article 6:102 is – in its entirety – a particularisation of the more general provision of Article 1:105. The connection between the two Articles is clarified in Comment *E* to Article 6:102 under the heading 'Relation to PECL and Other Parts of the Principles'. There it is explained in short what the particularisation of the general rule of Article 1:105 consists in, and why it was thought necessary to have such a particularisation in Chapter 6. The following list shows both the numbers of the Articles of Chapter 1 that are particularised *in their entirety* by an Article in the specific Chapter mentioned and the number of the relevant specific Article (in parentheses): Chapter 2 (1:101/2:101, 1:108/2:104); Chapter 3 (1:101/3:101, 1:105/3:103, 1:108/3:105); Chapter 4 (1:101/4:101, 1:105/4:103, 1:108/4:107); Chapter 5 (1:101/5:101, 1:108/5:105); Chapter 6 (1:101/6:101, 1:105/6:102, 1:108/6:105); Chapter 7 (1:101/7:101, 1:105/7:102).

The third possibility, occurring rather frequently is the one in which an Article of one of the specific Chapters is not a particularisation of an *entire* Article of Chapter 1, but elaborates upon only one paragraph or more of that Article. A good example is Article 7:103 (Duties of the Treatment Provider regarding Input), which applies to treatment contracts. This Article is connected with Article 1:106, for it deals with the duties of the treatment provider regarding input. It is noted that Article 7:103 only particularises paragraph (3) of Article 1:106. Article 1:106, however, contains more duties which are imposed upon the treatment provider. In this case, the relevance for treatment contracts of these 'silent' paragraphs of Article 1:106 is pointed out to the reader in Comment *E* to Article 7:103 under the heading 'Relation to PECL and Other Parts of the Principles'. There, the reader will find a brief explanation of the relevance of the 'silent' paragraphs,

again illustrated by an example. The reader is then referred to the Comments to Article 1:106 of the present Chapter, which deal with the duties imposed upon the service provider by these 'silent' paragraphs in more detail. The following list shows the numbers of the Articles of the specific Chapters that are a particularisation of a single paragraph or subparagraph of an Article of Chapter 1 (in parentheses). The list mentions the relevant number of the Article and paragraph of Chapter 1 for each of these particularisations: Chapter 2 (2:102/1:104(1), 2:103/1:107(1), 2:105/1:104(1)(d)); Chapter 3 (3:102/1:104(1), 3:104/1:107(1), 3:106/1:104(1)(d), 3:112/1:114(2)); Chapter 4 (4:102/1:103(4), 4:104(1)/1:106(3), 4:104(2)/1:106(1), 4:105/1:107(1), 4:112/1:114(2)); Chapter 5 (5:102/1:103(1), 5:103/1:104(1), 5:104/1:107(1), 5:108/1:114(2)); Chapter 6 (6:103/1:106(3), 6:104/1:107(1)); Chapter 7 (7:103/1:106(3), 7:104/1:107(1)).

A fourth possibility is that an Article in one of the specific Chapters has no counterpart whatsoever in Chapter 1. An example is Article 7:111 (Central Liability of Treatment Providing Organisations), which deals with an issue that is only typical for a service that is provided under a treatment contract. The Article does not elaborate upon any of the Articles of Chapter 1. Moreover, the specific provision is solely commented upon in Chapter 7 – in the Comments to Article 7:111 – and not in the Comments to the present Chapter. The following list shows (in parentheses) the numbers of the Articles of the specific Chapters that have no counterparts in Chapter 1: Chapter 2 (2:105, 2:106, 2:107, 2:108, 2:109, 2:110, 2:111); Chapter 3 (3:106, 3:107, 3:108, 3:109, 3:110, 3:111); Chapter 4 (4:106, 4:108, 4:109, 4:110, 4:111, 4:113); Chapter 5 (5:106, 5:107); Chapter 6 (6:106, 6:107, 6:108, 6:109); Chapter 7 (7:105, 7:106, 7:107, 7:108, 7:109, 7:110, 7:111).

I. Character of the Rules

The rules in this Chapter are all default rules, with the exception of Article 1:114(1) and subject to Comment I to Article 1:101, Comment H to Article 1:110 and Comment G to Article 1:113. Parties cannot qualify a contract in such a manner as to escape or establish applicability of the rules of the present Chapter and/or Chapters 2 to 7; see Comment I to Article 1:101.

Article 1:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the service provider, is to supply a service to the other party, the client, in exchange for remuneration.
(2) This Chapter applies to contracts for construction, processing, storage, design, information, and treatment, unless provided otherwise in Chapters 2 to 7.
(3) When, under a contract, a party is bound to supply a service and to do something else, both this Chapter and, so far as relevant, Chapters 2 to 7 apply to the parts of the contract that involve services, with appropriate modifications.

(4) Without prejudice to paragraph (3), this Chapter does not apply to contracts for transport, insurance, guarantee, or for the supply of a financial product or a financial service.
(5) This Chapter does not apply to employment contracts.
(6) This Chapter, with the exception of Article 1:102, applies with appropriate modifications to contracts whereby the service provider is to supply a service to the client otherwise than for remuneration.

Comments

A. General Idea

This Article deals with the scope of application of the rules of the present Chapter. The main rule of application can be found in paragraph (1), implying that any contract imposing an obligation upon a party to supply a service is subject to the rules of the present Chapter. An obligation to supply a service is imposed in the event that a service provider performs work undertaken according to the specific needs and instructions of another party, the client. The work undertaken requires in any event the supply of labour and may also involve the input of materials and components. The outcome of a service can be a tangible immovable structure, a movable thing, or an incorporeal thing.

> *Illustration 1*
> Services falling within the scope of application of this Chapter are for instance, provided by architects, banks, barristers, building and civil engineering contractors, carpenters, consultants, doctors, dry cleaners, fashion designers, gardeners, garages, interior decorators, information technology providers, lawyers, plumbers, estate agents, solicitors, storers, trainers, et cetera.

According to paragraph (1), and for the purpose of the present Chapter's applicability, the obligation to supply a service is to be performed in exchange for remuneration. According to paragraph (6) however, the Chapter may still be applicable if a service is supplied gratuitously. If such is the case, Article 1:102 does not apply, whereas the other Articles of this Chapter are to be applied with appropriate modifications, having regard for the gratuitous character of the service supplied.

Paragraph (2) states that the rules of the present Chapter apply in connection with rules to be found in Chapters 2 to 7 of this Part if an obligation to supply a specific service covered by these Chapters is imposed upon the service provider. Such a specific service may either be the construction of a building or other structure (Chapter 2), the processing of an immovable structure or of a movable or an incorporeal thing (Chapter 3), the storage of a thing (Chapter 4), the creation of a design of an immovable structure or of a movable or an incorporeal thing (Chapter 5), the supply of factual or evaluative information (Chapter 6), or the treatment of a person (Chapter 7). The rules of the present general Chapter are applicable to such contracts, but some of them are particularised or modified in the specific Chapters.

General Comment G to the present Chapter indicates that a contract may impose both an obligation to supply a service and an obligation that is not typical for a service contract. The latter obligation may in fact be dealt with in another Part of the Principles, for instance in the Principles of European Sales Law or the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts. If that is the case, according to paragraph (3) of the present Article, both the provisions of the present Chapter and the provisions of the relevant specific services Chapter will only apply to the performance of the service part under the 'mixed' contract. They are to be applied with appropriate modifications, having regard for the mixed character of the contract.

> *Illustration 2*
> A personal computer shop sells a laptop to a client in combination with a three-year service contract for regular maintenance of the laptop.

In this example, the present Chapter applies – in connection with Chapter 3 on processing contracts – to the part of the contract that relates to the maintenance of the laptop, and the Principles of European Sales Law will apply to the sale of the laptop. The relation between the present Part of the Principles and the Principles of European Sales Law and the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts is further explained in Comments F and G below.

Paragraph (4) excludes the applicability of the present Chapter in the event that a contract merely imposes an obligation to transport, to provide insurance, to provide guarantee, or to supply either a financial product or a financial service. However, this Chapter will be applicable if the contract not only imposes such an obligation but also imposes – in addition to or in connection with that obligation – a further obligation to supply a service either covered by the present Chapter or by any of the specific services in Chapters 2 to 7.

> *Illustration 3*
> A client wishes to invest her savings in financial products. She requests her bank to inform her about the type of investment that would be both safe and financially profitable. Based on the bank's recommendations, the client subsequently requests the bank to invest her savings in a particular financial product.

This is an example of a contract which not only imposes an obligation to supply a financial service, but also imposes an obligation to give advice about such services. Therefore, the contract is subject to the rules of the present Chapter in connection with the rules of Chapter 6. Following the rule of paragraph (3), the rules of Chapter 6 are only applicable to the part of the contract dealing with the supply of evaluative information (recommending a certain investment).

Paragraph (5) is to make clear that the present Chapter – whether or not in connection with rules to be found in Chapters 2 to 7 – can never be applied to employment contracts. This rule is also to be observed in the event that an employment contract imposes mixed obligations on an employee, including an obligation to supply a service covered by the present Chapter or by any of the specific services in Chapters 2 to 7.

B. Interests at Stake and Policy Considerations

An issue that might be raised is whether or not particular types of contract should be covered by the rules of this Part. One might think of contracts for the supply of financial services and financial products, transportation contracts, and employment contracts. Such contracts are of great importance to practice, but they either have their own particularities (employment contracts) or are presently subject to initiatives at EU level (financial services, transportation) and are thus not included in this Part.

Another issue that might be raised in the context of this Article is how to deal with contracts that are in fact a mixture of the supply of a service and of any other contractual performance outside the scope of the rules of the present Part. A good example of such a contract can be found in *Illustration 2* above and in some of the illustrations discussed in Comments F and G below. *Illustration 2*, for instance, concerns a contract that has the features of both a sales contract and of a contract for the supply of a service. One could opt for a system that forces the user to make an exclusive choice as regards either one or the other qualification of the contract. If that system were to be followed in the case of *Illustration 2*, the contract would fall either within the scope of the present Principles of European Law on Service Contracts or within the scope of the Principles of European Sales Law. An alternative approach would be to have each of the two differing but related performances under the contract – for instance, the sale of a movable thing and the supply of a service with regard to that thing – be covered by their own Principles, thus opting for a system of distributive qualification.

An argument to opt for the former system is that, once the contract has been qualified, it is relatively clear how to apply the rules, the application of which follows from the qualification. However, the qualification issue itself cannot always be dealt with easily, given the fact that it will not always be clear which of the two contractual performances constitutes the preponderate part of the contract. And even if it were possible to do so, one could argue that it is hard to see why the rules dealing with that preponderate part would have to be applicable to the other part of the contract as well. The latter system does not raise these objections, but has its own problem in the sense that application of differing rules to the same contract may lead to incompatible results.

C. Comparative Overview

In all legal systems, storage services are dealt with separately from other services. As regards these other services, for the purpose of legal qualification, a distinction between services involving the supply of an immovable structure, a movable thing or the modification thereof on the one hand, and mere intellectual services on the other is made in ITALY *(contratto d'opera* or *appalto; contratto d'opera intellectuale)*, PORTUGAL *(empreitada; mandato)*, SPAIN *(contratos de obra; contratos de servicio)* and THE NETHERLANDS *(aanneming van werk; opdracht* and *geneeskundige behandelingsovereenkomst*, the latter being a species of *opdracht)*. This distinction is not made in AUSTRIA, GERMANY and GREECE where material and intellectual services generally fall under the scope of the same provisions dealing with contracts for work (*Werkvertrag*, σύμβαση έργου)

with the exception of treatment services in GERMANY and, although debated, in AUSTRIA and GREECE (*Dienstvertrag;* σύμβαση εργασίας). These exceptions are not made in FRANCE and BELGIUM where all services other than storage are dealt with by the same provisions on contracts for work *(contrat d'entreprise* or *louage d'ouvrage)*. Likewise, in ENGLAND, all services are qualified in the same manner *(contract for the supply of a service)*. No specific contract law provisions on services exist in FINLAND and SWEDEN, with the exception however of services supplied to consumers.

D. Preferred Option

Although it is clear from the explanation in Comment A that the scope of application is rather broad, it leaves aside – for the time being – services for which initiatives are being developed at EC level, such as financial services and transportation. Likewise, it does not cover employment contracts. As was explained in General Comment E above, the present Chapter contains general rules for service contracts that were in fact taken from previous drafts of Chapters 2 to 7 dealing with specific services. If a specific Chapter on employment contracts had been part of this 'generalisation process', it would have been very difficult to arrive at these general rules. The reason for excluding employment contracts is that such contracts are usually separated from service contracts and governed by mandatory rules reflecting national preferences as to the protection of employees. Inserting a specific Chapter on employment contracts in this Part would raise difficulties from a national labour law perspective.

As regards the issue of mixed contracts, the rule of paragraph (3) states that the present Principles are only to be applied to the part of the contract that involves the supply of a service. This implies that the system of distributive qualification has been opted for. However, in order to avoid the problem that is inherent in this system, mentioned in Comment B above, the Principles are to be applied with appropriate modifications. This gives the user of the system the flexibility to take into account the purpose of the rule that is to be applied, having regard for the nature of the mixed contract as a whole. The system of exclusive qualification does not seem to provide such a flexibility and fine-tuning.

E. Relation to PECL and Other Parts of the Principles

This Part of the Principles deals with a specific type of contract, namely contracts for the supply of services. The Principles of European Contract Law apply to such contracts and are either particularised or modified by the Principles in the present Part, having regard for the particular context of the supply of a service.

F. Relation to the Principles of European Sales Law

The relation between the present Part of the Principles and the Principles of European Sales Law has already been touched upon in Comments B and D as regards so-called

'mixed contracts'. In general, a mixture between the sale of a movable thing and the supply of a service related to that thing may occur in the following two typical situations. The first situation is where the supplier is to supply a material service by using movable things that are to be supplied by him under the same contract. This is, for instance, what happens in the following example.

Illustration 4
A building constructor enters into a contract with a subcontractor for the supply and installation of an elevator in a residential building.

In this situation, the purpose of the subcontract is to supply a movable thing and to install that thing in a structure by performing a service. Another typical situation is where the sale of a movable thing is followed by the supply of an after-sales service. An example of this situation has been shown above in *Illustration 2*, concerning the mixture of a sales contract involving a laptop and a maintenance contract. In these two situations, as explained in Comment B, the provisions of the present Chapter as well as the provisions of the relevant specific services Chapter will apply with appropriate modifications to the performance of the installation service and the after- sales service under the respective mixed contracts, whereas the Principles of European Sales Law will apply as a general rule to the sale of the elevator and the laptop.

It is noted, however, that this general rule is subject to an important exception. This exception becomes relevant when the part of the mixed contract involving the 'sale' of the movable thing – the supply of either the elevator or the laptop – can in fact not be qualified as a sale in itself. If the thing – for instance the elevator – is to be produced and supplied following the specific directions of the client, the supply of that thing is to be regarded in itself as the supply of a service on the basis of Article 2:101(2) (Scope of Application) of the Chapter on Construction. In the case of *Illustration 4*, this would mean that the whole contract – the supply *and* the installation of the elevator – is to be qualified as a service contract. To be more precise, it would no longer be a mixed contract; it would have to be qualified as a construction contract on the basis of Article 2:101(1) (Scope of Application).

In contrast, if the client merely orders a standard thing off the shelf, the details of which the supplier has already set out on paper (for instance in a standard product brochure), without the client having supplied any specific directions whatsoever in advance (apart, perhaps, from deciding on some standard options that are available, having regard for the product brochure), the supply of the thing does not fall within the ambit of the present Principles but is subject to the Principles of European Sales Law. This may therefore be the case in the example given in *Illustration 4* if the standard elevator is not to be produced and supplied on the basis of the client's specific directions. A similar example is given in the following illustration:

Illustration 5
A recreation park contacts a company specialised in supplying and installing objects for playgrounds. The park is looking for a particular type of swing and finds what it needs in the standard collection offered by the company.

In a case like this one, there would indeed be a mixed contract, but it is noted that there would be no real difference with the situation where the overall contract would be qualified as a service contract, given that the service provider's duties as regards the quality of the materials to be supplied do not differ from the duties of a seller, having regard for Article 1:106(3). Moreover, in many examples concerning the construction of movable things or immovable structures, the client will also specify in advance the quality and quantity of the materials needed for the purpose of constructing by giving specific directions. In such cases, as was explained above, the overall contract can be qualified as a construction contract either under Article 2:101(1) or 2:101(2) (Scope of Application).

The consequence of the analysis of the example given in *Illustration 2* is that the supply of the laptop will usually be subject to the Principles of European Sales Law, given that laptops are usually sold off the shelf as a standard product. The after-sales laptop maintenance service is then subject to the rules of the present Part of the Principles, with appropriate modifications.

There is also a second important exception to the general rule that was mentioned at the beginning of this Comment. This exception becomes relevant when the part of the mixed contract involving the 'service' to be supplied in relation to the movable thing sold under the same contract can in fact not be qualified as a service in itself. A good example of this is given in the following illustration:

> *Illustration 6*
> A customer buys a washing machine in a shop. The parties agree that the seller will deliver the machine at the client's house, that he will place the machine where the client wants it to be placed, and that he will put the plug and the hose in the socket and hosepipe already available, upon which the machine will be operational.

This illustration shows that the manner in which a movable thing is to be installed in or on another existing movable thing or immovable structure will be relevant to determine whether the contract is a mixed contract or not. The sale and installation of a washing machine can only be qualified as a mixed contract if the part of the contract involving the installation of the machine can be regarded in itself as the supply of a service. However, if the installation is a rather standardised procedure – as is the case in the illustration given – involving only little labour and requiring no specific directions of the client in advance, that part of the contract cannot be qualified as a service. Hence, the contract cannot be qualified as a mixed contract and will be subject to the Principles of European Sales Law.

The installation of a movable thing in or on another existing movable thing or immovable structure is no longer to be regarded as a standardised procedure if it involves a labour-intensive adaptation of both the movable thing or the existing structure and the thing that is to be installed in or on that thing or structure. In that case, the client will probably also have given specific directions as to the installation, which is another indication of the installation being qualified as a service contract. Such an indication

can also be derived from the fact that the client's counterpart is reluctant to enter into a contract for the supply and installation of a movable thing in or on an existing structure or thing because he did not collect in advance information about the circumstances in which this has to be done. An example of this is given in the following illustration:

> *Illustration 7*
> A customer buys a standard kitchen in a shop that displays kitchen models in a showroom. The parties agree that the shop owner will install the kitchen in the customer's house. The model chosen by the customer is to be adjusted on the basis of spatial and technical details provided by the latter. An employee of the shop visits the customer's house to check these details, upon which further adjustments are made. Before the kitchen is actually installed, an employee of the shop performs the necessary adjustments of existing gas and water pipes as well as electrical wiring.

This illustration describes a mixed contract. The part involving the sale of the kitchen is subject to the Principles of European Sales Law. The fact that the model chosen by the client is adjusted later on the basis of details provided by the client does not alter this conclusion. In this respect, the sale of the kitchen resembles the sale of the laptop as sketched out in *Illustration 2*. The client chooses a standard model from a selection of models displayed in a shop. Adjustments are subsequently made on the basis of the client's choice from a collection of standards options made available by the shop owner. The installation of the kitchen in the client's house cannot be compared with the installation of the washing machine as presented in *Illustration 6*. The installation of the kitchen requires specific information about the area of the house where the kitchen is to be placed. Moreover, it requires that the area is technically adapted so as to make proper installation possible. In this respect, the installation of the kitchen rather resembles the installation of the elevator as described in *Illustration 4* above. Hence, the part of the contract involving the installation of the kitchen is subject to the principles of the present Part of the Principles on the basis of Article 2:101(1) (Scope of Application) of the Chapter on Construction.

G. Relation to the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts

The relation between this Part of the Principles and the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts is as follows. First of all, service contracts are sometimes long-term contracts.

> *Illustration 8*
> The owner of a car has a contract for an indefinite period of time with the owner of a number of garages on the basis of which the latter is obliged to store the car.

The general rule is that long-term service contracts are not governed by the Principles of European Law on Commercial Agency, Franchising and Distribution Contracts (PELCAFDC). This rule follows from Article 1:101 PELCAFDC (Scope) and is explained in Comment *H* to that Article. It is admitted that the aforesaid Comment

states: 'It may be appropriate to apply the rules contained in this Chapter, or at least some of them (e.g. the rules on co-operation and on unilateral ending), by way of analogy, to some other long-term contracts'. It is submitted that there will generally be no need to do so for long-term service contracts, given that the present Part already contains rules on these issues for service contracts in general.

However, application of the rules by way of analogy might be appropriate in the event that the parties entered into a long-term framework contract. In such a contract, parties may have stipulated the conditions under which they enter into future service contracts. If such is the case, the PELCAFDC may be applicable by way of analogy to the long-term framework contract.

Also, a service falling within the scope of application of any of the Chapters of the present Part may be performed as an integral part of the performance of a long-term contract.

> *Illustration 9*
> A motel franchisor enters into a franchise contract with a franchisee. The franchisor grants the franchisee the right to run a motel by using the trademark, the know-how, and the business method of the franchisor. The motel has to be designed and built according the style in which all motels are run by other franchisees of the franchisor. The parties agree that the design department of the franchisor will design the new motel as part of the overall contract.

In this example, the contract stipulates obligations to supply a design service besides the obligations related to the franchise part of the contract. Both the provisions of the present Chapter and the provisions of the Chapter on design contracts will apply with appropriate modifications to the performance of the design service under the mixed contract.

H. Relation to Other Chapters of the Principles of European Law on Service Contracts

According to paragraph (2) of this Article, the rules of the present Chapter are applicable to the specific service contracts dealt with in Chapters 2 to 7. These rules are to be applied in connection with the specific rules in Chapters 2 to 7. The specific rules are either particularisations of the general rules of the present Chapter or additional rules, having regard for the particularities of the specific service involved.

I. Character of the Rule

This Article contains rules dealing with definition and scope. It is mandatory in the sense that the parties cannot, in their contract, qualify a contract imposing an obligation to supply a service as another type of contract, if the contract or part thereof contains the essential elements of a service contract.

J. Remedies

As this Article merely indicates the scope of applicability of the Principles of European Law on Service Contracts, it does not impose duties on either of the parties. Therefore, this Article does not provide a party with a remedy under Chapter 9 PECL.

Comparative Notes

1. *Legal qualification of (PELSC) services in (specific) contract law*
A separate set of contract law rules applicable not only to services involving the supply or modification of an immovable structure or movable thing but also to mere intellectual services – and apart from the obvious general contract law provisions – is only to be found in ENGLAND (Supply of Goods and Services Act 1982). The situation is only slightly different in FRANCE and BELGIUM where all services are generally subject to the rules on *louage d'ouvrage* (CC art. 1779 and 1787 ff), with the exception however of storage services and mandate. In the latter case, the service is subject to the provisions of CC art. 1915 ff *(dépot)*. The legal systems of FRANCE and BELGIUM are similar to the systems of AUSTRIA, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL and SPAIN, to the extent that storage services are dealt with separately from other services: AUSTRIA and GERMANY (*Verwahrungsvertrag; Lagergeschäft*, see AUSTRIAN CC arts. 957 ff and CommC arts. 415 ff; GERMAN CC arts. 688 ff and CommC arts. 467 ff); GREECE (παρακαταθήκη, see CC art. 822 ff); ITALY (*deposito*, see CC art. 1766 ff); THE NETHERLANDS (*bewaarneming*, see CC art. 7:600 ff); POLAND (CC art. 835 ff and 853 ff), PORTUGAL (*depósito*, see CC arts. 1185 ff and CommC arts. 403 ff) and SPAIN (*déposito*; CC art. 1758 ff). But as regards the qualification of services other than storage, the systems of AUSTRIA, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL and SPAIN – unlike the systems of FRANCE and BELGIUM – distinguish in variable ways material services from intellectual services. In AUSTRIA and GERMANY, for instance, most material and intellectual services (apart from storage services) are subject to the provisions on *Werkvertrag* (AUSTRIAN CC arts. 1165 ff; GERMAN CC arts. 631 ff). It is debated in AUSTRIA, however, whether this qualification fits treatment services better than the qualification of *(freier) Dienstvertrag*. This issue not debated in GERMANY where treatment services are indeed qualified as *Dienstvertrag*, a qualification which can also cover information services. The situation in AUSTRIA appears to be similar to that in GREECE where all services (again, with the exception of storage) are subject to the rules on contracts for work (σύμβαση έργου, see CC art. 681 ff), but where some seem to prefer the rules on labour contracts (σύμβαση εργασίας, see CC art. 648 ff) to apply to treatment contracts. A different point of view is taken in THE NETHERLANDS, PORTUGAL, SPAIN and ITALY where mere intellectual services and material services (other than storage services) are qualified differently. In THE NETHERLANDS the general provisions on *opdracht* (CC arts. 7:400 ff) are applicable to intellectual services, with additional provisions to be found in CC department 7.7.5 on treatment services. Contrary, services involving the supply or modification of an immovable structure or movable thing are covered by the provisions of CC art. 7:750 ff *(aanneming van werk)*. In PORTUGAL the latter services fall within the scope of the contract of

empreitada (CC art. 1207 ff) whereas an intellectual service is considered to fall under the scope of the contract of *mandato* (CC art. 1157 ff). Likewise, in SPAIN CC art. 1544 distinguishes material *contratos de obra* from mere intellectual *contratos de servicio*. A similar distinction is also made in ITALY, where material services *(contratto d'opera* or *appalto)* are discerned from intellectual services *(contratto d'opera intellectuale)*, although general provisions on material services (CC arts. 2222 ff and 1655 ff) may also be relevant for intellectual services (CC arts. 2229 ff)) In FINLAND and SWEDEN, specific legislation exists, governing consumer service contracts (FINLAND, see Chapter 8 of the Consumer Protection Act on Certain consumer service contracts; SWEDEN, see Consumer Services Act). If the contract is not a consumer contract, sales law applies in SWEDEN by way of analogy when this is considered appropriate. Comparative legal references with respect to the legal qualification of (PELSC) services in specific contract law are also to be found in the comparative and national notes to PELSC arts. 1:101, 2:101, 3:101, 4:101, 5:101, 6:101 and 7:101.
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Legal qualification of PELSC services in (specific) contract law*
AUSTRIA The AUSTRIAN CC starts from a clear-cut division between contracts for employment *(Dienstvertrag)* and contracts for work *(Werkvertrag)* under the general heading 'service contracts' *(Von Verträgen über Dienstleistungen)*. CC art. 1151 sets forth a short definition of both notions. Material and intellectual services are usually qualified as *Werkvertrag* (CC arts. 1165 ff) which is considered to cover a wide range of activities: manufacture, treatment, amending, restitution, or improvement of a corporeal thing, but also creation of non-corporeal works (writing of a play, data processing program), see Rummel [*-Krejci*], ABGB Kommentar, arts. 1165, 1166, no. 9. All services nominated in PELSC can be qualified as *Werkvertrag*, with the exception of storage and treatment contracts. The prevailing opinion understands treatment contracts *(Behandlungsvertrag)* as a so-called free employment contract *(freier Dienstvertrag)*. Others classify it as a mere contract for work *(Werkvertrag)*. Storage contracts are dealt with separately in CC arts. 957 ff *(Verwahrungsvertrag)* and in CommC arts. 415 ff *(Lagergeschäft)*.
BELGIUM Similar to FRENCH law, BELGIAN law distinguishes the concept of *louage d'ouvrage* or *contrat d'entreprise (aanneming van werk)*. This contract type is dealt with by CC arts. 1710, 1779 and 1787 ff. Both material and immaterial services are covered by this concept (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 23 ff and no. 40). All services nominated in PELSC can be qualified as *louage d'ouvrage* with the exception of storage services. The latter services are dealt with separately in CC arts. 1915 ff *(dépot* or *bewaargevingsovereenkomst)*.
ENGLAND ENGLISH law distinguishes the concept of *contract for the supply of a service* (Supply of Goods and Services Act 1982, art. 12(1)). This contract type covers both material and immaterial services, given that a contract is a *contract for the supply of a service* whether or not goods are also transferred or bailed (Supply of Goods and Services Act 1982 art. 12(3)). All services nominated in PELSC can be qualified as *contract for the supply of a service*. Although storage contracts are considered to be a separate category of contracts *(contract of bailment)*, they are also subject to the general requirements of arts. 13-17 Supply of Goods and Services Act 1982; cf. art. 12(3).

FINLAND Service contracts are recognised as such in FINNISH contract law. The Consumer Protection Act (38/1978) is applicable "to the offering, selling and other marketing of consumer goods and services by businesses to consumers. (…)" (chap. 1, art. 1(1)) chap. 1, art. 3 (16/1994) defines consumer goods and services as "goods, services and other merchandise and benefits that are offered to natural persons or which such persons acquire, to an essential extent, for their private households." The Consumer Protection Act is applicable to the services nominated in the PELSC. As regards services that are supplied in business to business transactions, the Contract Act (228/1929) applies.

FRANCE The *contrat d'entreprise*, formally known as *louage d'ouvrage*, is a specific contract covering all kind of services. The concept of *louage d'ouvrage* is very wide in the sense that it covers any contract by which one party agrees to perform work for another party on an independent basis. *Louage d'ouvrage* does not only include services having as their object immovable structures and movable things, given that the FRENCH *Cour de cassation* has ruled that intellectual services are not excluded from it (Cass.civ. III, 28 February 1984, Bull.civ. III, no. 51). This means that the general provisions on *louage d'ouvrage* (CC arts. 1710, 1779 and 1787 ff) also apply to design, information, and treatment services. In addition to these provisions, services may also be subject to the provisions on *mandat* (CC arts. 1984 ff) to the extent that the performance of these services involves matters of legal representation of the client. As regards construction services related to immovable structures, it is noted that the specific provisions of CC arts. 1792-1793 are applicable in addition to the aforesaid general provisions on *louage d'ouvrage*. Storage services, finally, are dealt with separately in CC arts. 1915 ff *(dépot)*.

GERMANY The concept of *Werkvertrag*, which is dealt with in CC arts. 631 ff, is considered to cover all kind of services. The rules on *Werkvertrag* apply to services related to structures and movable things, but also apply to mere immaterial services (cf. CC art. 631 (1)) although information services can also be qualified as *Dienstvertrag* (CC arts. 611 ff) in the event that the actual service of advising or providing information is the key element of the contract (cf. Pinna, The Obligations to Inform and to Advise. A Contribution to the Development of European Contract Law, p. 3). Treatment services *(Arztvertrag)* are qualified as *Dienstvertrag* (cf. BGHZ 63, 306; NJW 1975, 305). The concept of *Werkvertrag* or *Dienstvertrag* does not encompass storage services since these services are dealt with separately in CC arts. 688 ff *(Verwahrungsvertrag)* and in CommC arts. 467 ff *(Lagergeschäft)*.

GREECE The overall classification covering all kind of services is probably the contract for work (σύμβαση έργου) dealt with in CC art. 681 ff CC art. 681 explains that the service could be of material or mere intellectual character. The concept of σύμβαση έργου does not cover, however, storage or treatment services. A storage contract (παρακαταθήκη) is a separate nominate contract dealt with by CC art. 822 ff. Provisions that may be applicable to treatment contracts are those with regard to labour contracts in CC art. 648 ff (σύμβαση εργασίας) and the contract for work (σύμβαση έργου) referred to above. It is maintained that the provisions on labour contracts provide the most adequate legislative framework to cover the usual agreement between patient and doctor, though there are instances in which the contract of work provisions are deemed to be more appropriate (cf. Ismini Androulidaki-Dimitriadi, at 106 ff).

ITALY The general qualification in the ITALIAN CC, covering all kinds of services, is *lavaro autonomo* which consists of two relevant subcategories: *contratto d'opera* (CC arts. 2222-2228) and *contratto d'opera intellectuale* (arts. 2229-2238). The provisions on *contratto d'opera* are considered to state general provisions relevant for all services, including the services dealt with in PELSC. In addition to these general rules, further rules are provided for mere intellectual services in the provisions on *contratto d'opera intellectuale*. These services include the following services covered by PELSC: design, information and treatment. This means that construction and processing services are covered by the rules on *contratto d'opera*, although they could also be covered by the rather similar rules on *appalto* (CC art. 1655 ff). The difference is that *appalto* is particularly meant for the supply of construction and processing services by medium or big enterprises (Cass. 75/2429; 65/820; 60/1602), whereas *contratto d'opera* involves construction and processing services provided by small enterprises or individual persons (Cass. 75/2912). However, both sets of provisions can be applied by way of analogy to construction and processing services contracts concluded by both large and medium entreprises as well as small enterprises and individuals (cf: Rubino, Iudica, Dell'appalto, 3rd ed., Comm. SB, 28). *Contratto d'opera* does not cover storage services. The latter services are dealt with separately in CC art. 1766 ff *(deposito)*.

THE NETHERLANDS An all-encompassing qualification covering all kind of services does not exist. This is illustrated by the fact that the services nominated in PELSC are all dealt with by different titles of Book 7 (Specific Contracts) of the DUTCH CC. Title 7.7 *(opdracht)* is traditionally identified with 'genuine' services, given that its predecessor in the old DUTCH CC (see CC art. 7A:1637) was referred to as 'service contracts' *(overeenkomst tot het verrichten van enkele diensten)*. The general provisions on *opdracht* (CC art. 7:400 ff) are applicable to services that are performed independently, with the exception of services that result in (the modification of) an immovable structure or a movable thing. Storage and transportation are likewise excluded (CC art. 7:400 (1)). Hence *opdracht* would encompass the following services dealt with by PELSC: design, information and treatment services. These specific services are not dealt with in any of the additional departments of title 7.7 *(opdracht)*, with the exception of treatment services, which are covered by the provisions of CC art. 7:746 ff *(overeenkomst inzake geneeskundige behandeling)*. Construction and processing services are not considered to be examples of *opdracht*. Although these services are also performed independently, their purpose is to result into (the modification of) an immovable structure or movable thing. They are therefore covered by the provisions of CC art. 7:750 ff *(aanneming van werk)*. The same goes for storage services which are considered to be subject to the provisions of CC art. 7:600 ff *(bewaarneming)*. According to CC art. 7:424(1) the provisions of department 7.7.2 dealing with mandate *(lastgeving)* can be applicable to services in addition to the aforesaid provisions to the extent that the performance of these services involves matters of legal representation of the client.

POLAND A general qualification that would cover all kinds of services under PELSC does not exist in the POLISH CC. Services as classified in PELSC are regulated in Book III (Obligations) of the POLISH CC, in the titles, which deal with the specific nominated contracts. Contract as a result of which the person accepting the order assumes an obligation to make a specified work (to achieve the agreed result) falls under the scope of the provisions of contract of specific work *(umowa o dzieło)* (CC Book III, Title

XV, arts. 627 ff). The specified work may consist of making new objects as well as repairing, preserving, etc. of objects that already exist. The specified work may have a material character, like a contract for making shoes, or a contract with a cleaner for dry cleaning (judgements of the Supreme Courts of 6. 10. 1953. C. 1141/53, OSN 1955, nr 1, poz. 4 and of 20. 5. 1986 III CRN 82/86, OSNCP 1987, z. 8, poz. 125) or non-material character, for example making a photography or making technical designs. Construction contracts are treated as a separate category within the overall category of contract of specified work (building contract – CC Book III, Title XVI arts. 647 ff) since 1990; before that date construction contract was classified as a contract of specific work (Bieniek, Komentarz, tom II, p. 132). The construction contract however does not cover all the activities related to the process of construction, and for example contract for geological examination of a plot or for making a geodetic measurement are classified as contracts of work (Bieniek, Komentarz, tom II, p. 132). Provisions of title XVI apply respectively also to the contracts for repair of a building or a construction (CC art. 658). Storage services (as regulated by PELSC) are covered by a regulation relating to two different categories of contracts: safe-keeping *(przechowanie)* (CC Title XXVIII arts. 835 ff) and contract of storage *(umowa składu)* (CC title XXX, arts. 853 ff). To the contracts of performance of services not regulated by other provisions, provisions on mandate *(zlecenie)* apply respectively (CC arts. 750 ff).

PORTUGAL The contract type encompassing all kinds of services is called *prestação de serviços* (CC art. 1154). The qualification applies to any contract where someone promises to independently accomplish a work, either through intellectual efforts or by mere physical labour. CC art. 1155 identifies three types of *prestação de serviços*. Storage services fall within the scope of the type that is called *depósito* and are dealt with in CC (arts. 1185 ff) and in CommC (arts. 403 ff). The services indicated in PELSC as construction and processing, i.e. services related to immovable structures or movable things, fall within the scope of another type of *prestação de serviços*, namely the contract of *empreitada*. This contract is dealt with by CC arts. 1207 ff. It follows from case law that the provisions on *empreitada* do not apply to (intellectual) services which purpose is not to result in the accomplishment or modification of an immovable structure or movable thing: STJ 2 February 1988, BolMinJus 374, p. 449; STJ 17 June 1998, CJ 1998 II, p. 116; STJ 29 September 1998, CJ 1998 III, p. 34. In the case of STJ 17 June 1998, BolMinJus 478, p. 351, for instance, a design service was excluded from the scope of application of the provisions on *empreitada*. It is submitted that the same goes for contracts identified in PELSC as information contracts (see Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 385), and treatment contracts (Dias Pereira, O consentimento para intervencões médicas prestado em formulários: uma proposta para o seu controlo jurídico. Boletim da Faculdade de Direito, 2000, p. 435; Figueiredo Dias, Sinde Monteiro, Responsabilidade médica na europa ocidental. Consideracões de lege ferenda. Scientia Ivridica, 1984, p. 107). These services are therefore considered to be innominate contracts, for which CC art. 1156 states that the rules of the third type of *prestação de serviços* apply, namely the contract of *mandato* which is dealt with in CC arts. 1157 ff (cf. Pinna, The Obligations to Inform and to Advise, no. 10).

SPAIN An all-embracing qualification does not exist for service contracts. CC art. 1544 distinguishes *contratos de obra* from *contratos de servicio*. The former type of contract is dealt with in CC arts. 1588-1600, whereas the latter type is covered by the

provisions of CC arts. 1583-1587. In practice the *Ley de la Edificación* provides an important and detailed *lex specialis* in addition to the rules in the SPANISH CC on *contratos de obra*. Generally speaking, the rules on *contratos de obra* include the supply of services if the object of the service is to achieve a particular result, for instance (the modification of) an immovable structure or a movable thing. This is why construction and processing services dealt with in PELSC will generally be qualified as *contratos de obra*. The rules on *contratos de servicio* exclusively refer to the supply of a service by servants and employees (cf. M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 78, Comentario artículo 1544 del Código Civil en Código Civil, comentarios y jurisprudencia, ed. Cólex, p. 711). Case law and legal doctrine, however, have adapted these rules to the specific needs of modern time. Again, generally speaking, these rules include contracts where the main object of the contract is the supply of the service itself (and not the achievement of a particular result through that service). Treatment services are hence to be qualified as *contratos de servicio*. It is unclear, however, whether information and design services of the type now covered by PELSC are to be qualified as *contratos de servicio* as well. With respect to information services, if the purpose of the contract is to achieve a particular result, such as a legal opinion, the service has been qualified as *contratos de obra* (STS 4 February 1950, Aranzadi Jur. 17 (1950) 191.). Typical attorney services, on the other hand, have been qualified as *contratos de servicio* (STS 6 February 1935, Aranzadi Jur. 4 (1935) 462). The same goes for design services, which are sometimes qualified as *contratos de obra* (for example STS 24 September 1984) and are sometimes seen as *contratos de servicio* (for example STS 29 June 1984). To the extent that the supply of the service involves matters of legal representation of the client, the provisions of CC 1709 ff regarding mandate *(mandato)* are considered to be applicable as well. Storage services, finally, are dealt with separately in CC arts. 1758 ff *(depósito)*.

SWEDEN Apart from general contract law rules, SWEDISH law does not distinguish a particular set of contract law rules specifically relevant for the supply of services. It is thought that the Sales Act *(KöpL)* can be used by way of analogy, when appropriate. Rules for consumer services can be found, however, in the Consumer Services Act *(KTjL)*. The Act is applicable when a supplier carries out work for, or supplies services to, a consumer. Moreover, there is also the Act on Finacial Advice to Consumers *(Lag (2003:862) om finansiell rådgivning till konsumenter)*. Treatment services are dealt with separately in the Act on exercise of a profession within the area of health service and medical care *(Lag 1998:531 om yrkesverksamhet på hälso- och sjukvårdens område)*.

Article 1:102: Price

(1) Unless agreed otherwise, a service provider who has entered into the contract in the course of a profession or business is entitled to a price.

(2) Where the contract does not fix the price or the method of determining it, the price is the market price generally charged at the time of the conclusion of the contract.

Comments

A. General Idea

Paragraph (1) of this Article imposes a duty on the client to pay the service provider a price for the service the latter agrees to perform. Depending on the type of service, there are various methods of determining the price to be paid under a service contract. For some services it is customary to agree on the payment of a fixed price.

> *Illustration 1*
> A building constructor is commissioned by the local authorities to build an extension wing to the town hall. The parties agree that the work will be carried out for the total sum of € 800,000.

As to other services, it will be more probable that the service provider will be paid on the basis of an agreed tariff, such as an hourly rate.

> *Illustration 2*
> The owner of a house asks a painter to paint all ceilings, walls and doors of the house. The parties agree that the painter will be paid € 12.50 per hour of work done.

> *Illustration 3*
> A meat trader agrees with a storer that the latter will store a shipment of Argentinean beef for the price of € 35.00 per ton per week.

Sometimes payment on a 'no cure no pay' basis is also a method of determining the price to be paid under the present Article.

> *Illustration 4*
> A solicitor agrees with the victim of a work accident that she will try to obtain financial compensation from the victim's employer for all loss suffered as a result of the accident. The parties agree that the solicitor will be paid per cent of the compensation obtained and that she will not be paid for the legal services rendered if no compensation is obtained.

Paragraph (2) deals with the situation where the parties did not state a price in the contract. The reason for this may be that – as is the case with some services – it is not possible to determine the price prior to the conclusion of the contract. The fact that the parties failed to determine a price does not leave the condition of the proper conclusion of the service contract unfulfilled. The service provider will simply be entitled to payment of the usual market price that is to be determined on the basis of the state of the market at the time of conclusion of the contract. This will result either in a fixed price or in a price to be determined on the basis of a generally charged tariff.

Illustration 5
A doctor agrees to perform a vasectomy on a patient. The parties did not discuss the financial aspects of the operation.

In this example, the doctor may charge the patient for the operation, but he will have to observe the generally applicable tariffs.

Illustration 6
An architect agrees to design a new office for a law firm. When the design is completed, the architect finds a builder who is prepared to carry out the work for € 1,500,000.

In this example, the architect may charge the law firm for his design services, even if the parties did not explicitly agree on payment in advance. Assuming that it is general practice that an architect is paid 10 per cent of the price to be paid for the construction of the building designed by him, he will be able to recover € 15,000 for his service.

B. Interests at Stake and Policy Considerations

It is obvious that the client must remunerate to the service provider in exchange for the supply of the service. This duty will not be an issue even if the parties did not explicitly agree on the question whether and to what extent remuneration is to be given. Remuneration has to be reasonable.

However, there is an issue that may arise in this respect. It involves the question how to establish the method of determining what a reasonable remuneration is. One may argue that the answer to this question depends on the usual prices, tariffs, or fees that are charged by this particular service provider for this particular type of service. This may, however, be to the detriment of the client if it turns out that this particular service provider is a rather expensive one. Moreover, one may question whether this approach would induce the service provider to inform the client prior to the conclusion of the contract about the prices, tariffs or fees that will be charged. One could also deal with the issue by focussing on the prices, tariffs, or fees generally charged in a market for this type of service by the group of service providers to which this particular service provider belongs. This would probably give an incentive to the service provider to explain in advance the method he will use to determine the remuneration that is to be given to him in exchange for the supply of the service, especially if his price is above the average price charged by his competitors. Although this is advantageous to the client, it may be unfavourable to the service provider's commercial position.

C. Comparative Overview

Service providers are generally entitled to payment of a price for services rendered, even if the parties to the service contract did not agree on the subject matter in express wording: AUSTRIA, ENGLAND, FRANCE ITALY, THE NETHERLANDS, PORTUGAL,

SPAIN. Occasionally, entitlement to payment of a price is subject to the requirement that the service is generally considered to be done only for remuneration: GERMANY, GREECE, or subject to the requirement that the service provider acts in the exercise of a business: THE NETHERLANDS, PORTUGAL. Express wording or implied intention of the parties as regards the service provider's entitlement to a price is sometimes needed with respect to storage services rendered in non-commercial relations: AUSTRIA, FRANCE, ITALY, SPAIN. Sometimes separate rules exist for commercial storage services: AUSTRIA, GERMANY, PORTUGAL, SPAIN.

If the service provider is entitled to payment of a price and if the parties did neither agree on the amount of that price nor on the manner of its determination, the price is calculated either with the help of the criterion of 'a reasonable price': AUSTRIA, ENGLAND, THE NETHERLANDS, or with reference to what is 'customary' (particularly as regards commercial storage services): AUSTRIA, GERMANY, ITALY, PORTUGAL, SPAIN, or with reference to both criteria: GREECE, THE NETHERLANDS. Sometimes it is relevant what is usually charged by the service provider for similar services: THE NETHERLANDS, PORTUGAL. When determining what is a 'reasonable' or 'customary' price, tariffs and fees established by special regulations or by competent authorities or authorised associations are sometimes considered to be an important factor as well: AUSTRIA, GERMANY, GREECE, ITALY, PORTUGAL. If the matter cannot be solved with the aforesaid criteria, it is sometimes left to the courts to determine the price: FRANCE, ITALY, PORTUGAL.

D. Preferred Option

Paragraph (2) states that if the contract does not fix the price or the method of determining it, the price to be paid to the service provider is the market price generally charged at the time of the conclusion of the contract. Although this approach may not always be favourable to the commercial position of the service provider, the analysis presented under Comment *B* clearly shows that it will induce him to give information to the client, prior to the conclusion of the contract, about the prices, tariffs, and fees he will charge for the service. Hence, the client's decision to enter into the contract will be an informed decision. This is to be preferred to the situation where the client is surprised by an unexpectedly excessive invoice once the service process is either on its way or already completed, in which case the parties will probably come into a conflict with one another.

E. Relation to PECL and Other Parts of the Principles

Paragraph (2) of the present Article relates to Article 6:104 PECL (Determination of Price). The latter Article states that parties are to be treated as having agreed on a 'reasonable price' if the contract does not fix the price or the method of determining it. The comments to this Article, however, show that a 'reasonable price' not necessarily is the market price: it may also be the price charged by this particular person. The rule of paragraph (2) of the present Article is to be regarded as a particularisation of Article

6:104 PECL. The rule is needed to give an incentive to the provider of the service to show the client, prior to the conclusion of the contract, what price he will charge or how the price will be calculated.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2), the rules under the present Article are applicable to the specific service contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles in Chapters 2 to 7 that modify or deviate from the rules in the present Article. The implication of the present Article for service contracts dealt with in the specific Chapters is explained and illustrated in the General Comments to the said Chapters, particularly in Comment I (Chapter 2: Construction), Comment H (Chapter 3: Processing), Comment I (Chapter 4: Storage), Comment H (Chapter 5: Design), Comment H (Chapter 6: Information), and Comment I (Chapter 7: Treatment).

Also, there is a relation between the present Article and Articles 2:107, 3:108, and 4:108 (Payment of the Price). The latter Articles provide rules for the time when generally the price is to be paid in the context of construction contracts, processing contracts, and storage contracts.

G. Burden of Proof

If the parties did not determine a price, they may hold differing opinions as to what is considered to be 'the market price generally charged at the time of the conclusion of the contract'. As a last resort, this is something to be decided by the court. Hence, the burden of proof as to the question whether the price is in accordance with the market price, will be on the claimant of that price: the service provider.

H. Character of the Rule

This Article contains default rules.

I. Remedies

The service provider may resort to any of the remedies under Chapter 9 PECL if the client fails to perform his obligation to pay the contract price under paragraph (1) of the present Article. Paragraph (2) of this Article does not impose duties on either of the parties, the non-performance of which may cause a party to resort to a remedy under Chapter 9 PECL.

Comparative Notes

1. *The service provider is entitled to payment of a price*
Service providers are generally entitled to payment of a price for services rendered, even if the parties to the service contract did not agree on the subject matter in express wording: AUSTRIA (*Werkvertrag*, CC art. 1152), ENGLAND (*contract for the supply of a service*, Supply of Goods and Services Act 1982, art. 15(1)), FRANCE (*louage d'ouvrage*, CC art. 1710), ITALY (*appalto*, CC art. 1655), THE NETHERLANDS (*aanneming van werk*, CC art. 7:750(1); *overeenkomst inzake geneeskundige behandeling*, CC art. 7:764), PORTUGAL (*prestação de serviços*, CC art. 1154), SPAIN (*contratos de obra*, CC art. 1544). Occasionally, entitlement to payment of a price is subject to the requirement that the service is generally considered to be done only for remuneration: GERMANY (*Werkvertrag* CC art. 632(1); *Verwahrungsvertrag* CC art. 689), GREECE (σύμβαση έργου, CC art. 682(1)), or subject to the requirement that the service provider acts in the exercise of a business: THE NETHERLANDS (*opdracht*, CC art. 7:405(1); *bewaarneming*, CC art. 601(1)), PORTUGAL (*mandato*, CC art. 1158; *depósito*, CC art. 1186). Express wording or implied intention of the parties as regards the service provider's entitlement to a price is sometimes needed with respect to storage services rendered in non-commercial relations: AUSTRIA (CC art. 969), FRANCE (CC art. 1917), ITALY (CC art. 1767), SPAIN (CC art. 1760). Sometimes separate rules exist for commercial storage services, stating that the service provider is entitled to payment of a price in principle: AUSTRIA (CommC art. 420), GERMANY (CommC art. 467 para. 2, PORTUGAL (CommC art. 404), SPAIN (CommC art. 304).
No information from BELGIUM, DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

2. *Determination of price according to service contract law*
If the service provider is entitled to payment of a price and if the parties did neither agree on the amount of that price nor on the manner of its determination, the price is calculated either with the help of the criterion of 'a reasonable price': AUSTRIA (*Werkvertrag*, CC art. 1152), ENGLAND (*contract for the supply of a service*, Supply of Goods and Services Act 1982, art. 15(1)), THE NETHERLANDS (*aanneming van werk*, CC art. 7:752(1)), or with reference to what is 'customary' AUSTRIA (commercial *Verwahrungsvertrag*, CommC art. 420), GERMANY (*Werkvertrag* CC art. 632; commercial *Verwahrungsvertrag* CommC art. 467(2)), ITALY (*appalto*, CC art. 1657), PORTUGAL (commercial *depósito*, CommC art. 404(1)), SPAIN (commercial *depósito*, CommC art. 304), or with reference to both criteria: GREECE (σύμβαση έργου, CC art. 682(1), THE NETHERLANDS (*opdracht* or *overeenkomst inzake geneeskundige behandeling*, CC art. 7:405(2); *bewaarneming* CC art. 7:601(2)). Sometimes it is relevant what is customary at the place of the service provider: AUSTRIA (*Verwahrungsvertrag*, CC art. 969), or at the place where the service is to be performed: GERMANY (*Werkvertrag*, BGH, BB 1969, 1413), or what is usually charged by the service provider for similar services: THE NETHERLANDS (*aanneming van werk*, CC art. 7:752(1)), PORTUGAL (*empreitada*, CC art. 883 by force of CC art. 1211). When determining what is a 'reasonable' or 'customary' price, tariffs and fees established by special regulations or by competent authorities or authorised associations are sometimes considered to be an

important factor as well: AUSTRIA, GERMANY, GREECE, ITALY, PORTUGAL. If the matter cannot be solved with the aforesaid criteria, it is sometimes left to the courts to determine the price: FRANCE (Cass.civ. III, 12 December 1972, Bull.civ. III, no. 674; Cass.civ. I, 4 October 1989, Bull.civ. I, no. 301), ITALY (*appalto*, CC art. 1657), PORTUGAL (*empreitada, depósito*).
No information from BELGIUM, DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

National Notes

1. *The service provider is entitled to payment of a price*
AUSTRIA According to CC art. 1152, the service provider is entitled to payment of a price in the event that the parties to a *Werkvertrag* did not expressly or impliedly agree on such payment. As for storage services subject to the AUSTRIAN CC, CC art. 969 states that a price may be demanded for the service only when so provided expressly or tacitly. In case of commercial storage services the storer is entitled to payment of a price on the basis of CommC art. 420.
England In case the service can be qualified as a *contract for the supply of a service* and if the parties did not agree on payment of a price, the client's duty to pay a price follows from Supply of Goods and Services Act 1982, art. 15(1).
FRANCE If the parties did not agree on payment of a price for a service qualified as *louage d'ouvrage*, the contract is nevertheless valid and a price must be paid (CC art. 1710; Cass.civ. I, 24 November 1993, Bull.civ. I, no. 339, RD imm. 1994, 248; Cass.civ. III, 20 February 1996, Bull.civ. III, no. 9). As to services qualified as *dépot*, the aforesaid case law is considered to be applicable as well, notwithstanding the fact that CC art. 1917 states that such services are presumed to be rendered gratuitously in principle.
GERMANY If the parties to a service contract qualified as *Werkvertrag* did not explicitly or indirectly agree on the price of the service, CC art. 632(1) provides that they are deemed to have agreed that a price is to be paid if the work that is to be done is considered be done only for remuneration. As to storage services *(Verwahrungsvertrag)*, CC art. 689 is to the same effect. In case of commercial storage services the storer is entitled to payment of a price on the basis of CommC art. 467(2).
GREECE If the parties to a contract for work (σύμβαση έργου) did not agree on payment of a price, a price may nevertheless be due on the basis of CC art. 682(1). This Article states that payment shall be deemed tacitly agreed if, under usual circumstances, the service is performed solely for remuneration.
ITALY A price is due for services qualified as *appalto*, even in the event that parties did not agree on the subject matter (CC art. 1655). Pursuant to CC art. 1767 a storage service is presumed to be gratuitous, except for those cases in which from the professional quality of the storer or other circumstances, one may assume a different intention of the parties.
THE NETHERLANDS If a service can be qualified as *aanneming van werk*, following CC art. 7:750(1), the client must pay a price. This is even so when the parties did not explicitly agree upon a price. The same goes for services qualified as *overeenkomst inzake geneeskundige behandeling* (CC art. 7:764). No price is due, however, for services qualified either as *opdracht* (cf. TM, p. 987) or as *bewaarneming* (cf. TM, Parl. Gesch. InvW 7, p. 394), unless the service provider acts in the exercise of his business (see for

opdracht CC art. 7:405(1) and for *bewaarneming* CC art. 601(1)).

POLAND Definitions of the contract of specific work (CC art. 627), the building contract (CC art. 647) and the storage contract (CC art. 853) indicate that these contracts are concluded against remuneration. Rules on the contract of specific work provide rather detailed regulation concerning the price (CC arts. 628 – 632). The price can be fixed directly, or the parties may only indicate in the contract the basis for its calculation (CC art. 628 para. 1). If the contract is qualified as a mandate (CC art. 735) or as a safe-keeping, the service provider is entitled to the remuneration unless it follows from the contract or from the circumstances that he undertook to perform the contract without remuneration (CC art. 836).

PORTUGAL According to CC art. 1154, if the contract can be qualified as *prestação de serviços*, the service provider is entitled to payment of a price. CC art. 1155 identifies three types of *prestação de serviços*, two of which are subject to an additional rule as regards the service provider's entitlement to a price: in the event of services qualified either as *mandato* (CC art. 1158) or as *depósito* (CC art. 1186) the contract is presumed gratuitous, unless the service provider carries out the service as a profession in which case the contract is presumed onerous. In the event of commercial storage services, it is presumed that a price must be paid (CommC art. 404).

SPAIN According to CC art. 1544, a price must be paid for services qualified as *contratos de obra*. As to services qualified as *depósito*, the contract has a gratuitous character, unless agreed otherwise (CC art. 1760). On the contrary, CommC art. 304 states that in the event of a commercial storage service a price is due unless agreed otherwise.

2. *Determination of price according to service contract law*

AUSTRIA The price to be paid to the service provider under a *Werkvertrag* must be a reasonable price according to CC art. 1152. Guidelines and regulations concerning fees do exist (see Rummel [*-Krejci*], ABGB Kommentar, arts. 1165, 1166, no. 108). The latter are not binding but serve as an indication as to the concept of reasonableness referred to in CC art. 1152. As for storage services falling within the scope of the AUSTRIAN CC, the price must be calculated 'nach dem Stande des Aufbewahrers' (CC art. 969) whereas a customary price to be paid for commercial storage services (CommC art. 420).

ENGLAND The price to be paid by the client under a *contract for the supply of a service* must be reasonable both under common law (*Greenmast Shipping v. Jean Lion (The Saronikis)* [1986] 2 Lloyd's Rep. 277) and according to Supply of Goods and Services Act 1982, art. 15(1). In case of storage services provided outside the scope of a contract, the service provider is entitled to expenses reasonably incurred in the keeping of the goods, *China Pacific SA v. Food Corporation of India* [1982] AC 939 (HL). In *The Saronikis* case the typical market price was emphasised as an important element to be taken into account when calculating the reasonable price for the service.

FRANCE As to service contracts falling within the scope of *louage d'ouvrage:* if the parties have not determined the criterion on the basis of which the price is to be determined, it is left to the courts to determine the price, although the service provider must prove that the amount of the invoice is justified by the work performed (Cass.civ. III, 12 December 1972, Bull.civ. III, no. 674; Cass.civ. I, 4 October 1989, Bull.civ. I, no. 301). As to services qualified as *dépot*, the aforesaid case law is considered to be applicable as well.

GERMANY If the service provider under a *Werkvertrag* is entitled to payment of a price, despite the fact that parties did not agree on a price, the price has to be determined by taking into account official scales of charges and fees primarily. If there are no official tariffs available, the usual price has to be paid. This is the price, which one pays at the time of conclusion of the contract for similar services at the place where the service is to be accomplished, according to the general views of the parties involved (BGH, BB 1969, 1413). In case of storage services falling under the scope of the GERMAN CC, the price is to be determined by observing the official rate or – in case of non-existence – the customary rate (cf. Münchner [*-Hueffer*], Kommentar BGB, art. 689 no. 5). Only if a customary price cannot be determined, the general provisions of CC arts. 315 and 316 apply and the storer may determine the price. For commercial storage services the remuneration in accordance with local custom is to be paid on the basis of CommC art. 467(2) together with CommC art. 354. The commercial storer may also ask for reimbursement of his expenses (CommC art. 474).
GREECE As to the calculation of the price due under a contract for work (σύμβαση έργου) on the basis of CC art. 682(1), it must include payment for the work done and the expenses incurred. Payment for the work done corresponds to the customary payment (ειθισμένη αμοιβή) for similar work. This might be determined with reference either to a set of standards of payment (διατίμηση) or to a reasonable price (εύλογη αμοιβή). In addition the principles of CC arts. 371-373 and CC art. 379 apply. They state that if the determination of a performance has been entrusted to one of the contracting parties or to a third party, it is in case of doubt considered that the determination must be made by reference to equitable criteria.
ITALY If the parties to a contract qualified as *appalto* did not agree on payment of a price, the price to be paid is to be calculated on the basis of existing tariffs or customs. Tariffs to refer to are prices determined by special regulations or by competent authorities or authorised associations. Where such tariffs or customs are missing, the manner of determination of the price is left to the courts (CC art. 1657).
THE NETHERLANDS If the service provider is entitled to payment of a price and if the price has not been determined, the following rule applies in case the service can be qualified either as *opdracht* or *overeenkomst inzake geneeskundige behandeling* (CC art. 7:405(2)) or as *bewaarneming* CC art. 7:601(2): the price must be calculated by the service provider according to custom; if such a customary calculated price does not exist, a reasonable price is due. As to services qualified as *aanneming van werk,* CC art. 7:752(1) is drafted in a slightly different way but amounts to the same effect. The main rule of the Article is that a 'reasonable' price is due if the parties did not determine the price in advance. In calculating such price, the prices the service provider usually charges at the time of conclusion of the contract, as well as the expectations he has raised with regard to the price, are to be taken into account. Costs incurred by the provider for the execution of services qualified either as *opdracht* or *overeenkomst inzake geneeskundige behandeling* (CC art. 7:406(1)) or as *bewaarneming* (CC art. 7:601(3)) are to be compensated if these costs are not included in the price.
POLAND If the parties did not agree on the price, the manner of determination of the price depends on the type of the service contract, and refers either to the normal remuneration or to the work done. In the case of the contract of specific work, if the parties did not fix the price nor indicated the basis for its calculation, it shall be deemed, in case of doubt, that they meant the ordinary remuneration for a work of that

kind. If the remuneration cannot be determined in that way either, the remuneration due shall correspond to the justified input of labour and other outlays by the person accepting the order (CC art. 628 para. 1). In the case of the mandate contract, if there is no mandatory tariff and if the amount of remuneration has not been agreed upon, the remuneration due shall correspond to the work done (CC art. 735 para. 2). If a contract is qualified as a safe-keeping contract, and the amount of the remuneration for the safe-keeping is not specified in the contract or in the tariff, the keeper is entitled to the remuneration usually accepted in the given relationships unless it follows from the contract or from the circumstances that he undertook to keep the thing safe without remuneration (CC art. 836).

PORTUGAL If the service is qualified as *empreitada* (a specific type of *prestação de serviços*, see CC art. 1155) and if the price has not been fixed at the time of conclusion of the contract, the provision on price determination under the law of sales applies (CC art. 883 by force of CC art. 1211): if the price is not fixed by an administrative authority, the price shall be the market price usually asked by the service provider. If it is not possible to determine the price according to this criterion, the courts will decide according to equity (CA Lisboa, 25 June 1984, CJ 1984 III, 166. Cf. Romano Martinez, Direito das Obrigações, no. 365). As regards another type of *prestação de serviços*, namely *depósito:* if no price has been agreed, professional tariffs apply. If there are no such tariffs, the courts will adjudicate the price based on equity. If no price was agreed for commercial storage services, CommC art. 404(1) provides that the price is to be set on the basis of local mercantile uses (Cf. Pires de Lima/Antunes Vaarela, Código Civil anotado, p. 757).

SPAIN The price that is due for services qualified as *contratos de obra* does not necessarily have to be calculated at the moment of conclusion of the contract but can be determined by the parties (or by a third party) at a later stage on the basis of the material and the labour used (see STS 31 May 1983; F. Martinez Mas, La recepción en el contrato de obra, Madrid, 1998, p. 45). According to CommC art. 304 the price for commercial storage services is determined in accordance with the usages of the place where the storage contract was concluded.

Article 1:103: 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 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.

Comments

A. General Idea

The primary purpose of this Article is to impose a duty to warn on the parties prior to the conclusion of the service contract. This duty relates to typical risks that may occur after the conclusion of the contract once the services process has started. Occurrence of these risks would go to the very heart of the contract. The service provider is to warn the client about the risks that are identified in paragraph (1), and the client is to warn the service provider about the risks mentioned in paragraph (4).

> *Illustration 1*
> A supplier of computer networks is requested by the management of a hospital to install a tailor-made network on the basis of a design made on behalf of the hospital. If the supplier were to follow the design exactly, the computer network would not serve the intended purposes.

This is an example of a risk against which the service provider may have to warn, subject to the test of paragraph (6), which is explained below.

Illustration 2
A civil engineering constructor offers to excavate a piece of land and to remove the excavated soil to a nearby depot by truck. The constructor offers to perform the service for a fixed price within a fixed period of time. The offer is based on the constructor's assumption that the subsoil of the land is sufficiently condensed to support the constructor's large and heavy excavators without additional measures. This assumption is made known to the client. Geo-technical data on neighbouring land seem to confirm the constructor's point of view, but the client has specific knowledge of the fact that the subsoil of his land contains large pockets of soft and unstable clay. Extra measures are required to support the excavators, which will slow down the service and will make the service more costly.

This is an example of a risk for which the client may have to warn, subject to the test of paragraph (7), which is explained below.

These mutual duties to warn have in common that the parties only have to warn each other if the risks are obvious to the party the duty applies to, or if they are actually discovered by that party. This principle is reflected in paragraph (1) in conjunction with paragraph (6) as regards the service provider's duty to warn and in paragraph (4) in conjunction with paragraph (7) as regards the client's duty to warn.

An additional requirement that needs to be fulfilled under paragraph (4) in order to impose on the client a duty to warn, relates to the 'unusual' character of the risk that occurs. This additional requirement is to prevent the client from being under a duty to warn if the risk mentioned in paragraph (4) is considered to be obvious to the service provider as well. This can be illustrated by using a modification of *Illustration 2* above:

Illustration 3
A civil engineering constructor offers to excavate a piece of land and to remove the excavated soil to a nearby depot by truck. The constructor offers to perform the service for a fixed price within a fixed period of time. The offer is based on the constructor's assumption that the trucks will be able to approach and leave the land via a shortcut through a residential area. The client knows that the local authorities will not allow heavy trucks to drive through that area, which will slow down the service and will make the service more costly.

This approach is in line with the rule under subparagraph (1)(c) of the present Article, which imposes a duty to warn on the service provider if it is obvious to him that a risk of this type may occur. The mirror image of this approach can be found in paragraph (2) which negates the service provider's duty to warn in the event that a risk is either known or obvious to the client himself. A good example can be found in the following illustration:

Illustration 4
A hairdresser is asked by a customer to dye her hair. The hairdresser proposes to perform the service by using 'Inecto' hair dye. The hairdresser does not inform the customer that some customers in the past suffered from an allergic reaction to the

use of 'Inecto' hair dye. The customer in question did experience such an allergic reaction some years ago, when another hairdresser treated her with 'Inecto'. However, the customer does not mention that earlier experience to the hairdresser.

The additional purpose of this Article – closely linked to its primary purpose – is to stimulate the parties to exchange important information prior to the conclusion of the contract. This information particularly relates to the wishes and needs of the client for which he requires the service as well as to important circumstances in which the service is to be performed. A good example of this is given in the following illustration:

Illustration 5
A specialised constructor is asked to supply and install four elevators in an office building under construction at a fixed price. In order to be able to make the offer, the constructor needs to study the plans of the building, showing the specifications as regards the elevators. He will also need to know at what time during the building process he will be supposed to install the elevators and what other constructors will be present on the building site at that time in order to take into account possible interferences with his own job.

This information needs to become available to the extent that it enables the service provider to offer a tailor-made service to the client and to explain the most important characteristics of the service offered. This is the point where the connection with the service provider's pre-contractual duty to warn becomes relevant, for the extent of *that* duty depends on risks that are obvious or are discovered by him given the information the service provider should have collected in order to make an informed offer to the client as regards the service that can be supplied. A modification of *Illustration 1* may explain this.

Illustration 6
A supplier of computer networks is requested by the management of a hospital to make an offer for installing a tailor-made network on the basis of a design made on behalf of the hospital. The supplier studies the design for the purpose of preparing his offer. Only if this investigation brings to light that the hospital will not be able to use the computer network for the intended purposes, due to a failure in the design, the supplier must warn against that risk.

The risks to be discovered also relate to risks inherent in the service that are independent of what the client's needs and the circumstances surrounding the future performance of the service are.

Illustration 7
A doctor is asked to perform a vasectomy on a patient. The doctor will have to warn the patient that he will not be infertile immediately after the operation. The doctor will have to do so, whether or not the patient has told the doctor that the operation is to be performed for the purpose of becoming infertile and irrespective of the question whether the patient has a steady relationship with a female partner.

Once the client has been offered the service and has been warned against the risks mentioned in paragraph (1), he will be able to make an informed decision as regards the conclusion of the service contract. Moreover, having received the offer he will be able to perform his pre-contractual duty to warn under paragraph (4). This is in fact what the client should do in the example given in *Illustration 2* above. In that example, the client must share his specific knowledge with the civil engineering contractor prior to the conclusion of the contract.

A service is usually offered to a particular client and tailor-made to satisfy the needs of that client.

> *Illustration 8*
> A company specialised in the development of industrial software is asked to design a computer program that will enable the client, a medical laboratory, to compare medical test results.

Conversely, it is also possible that standard services are offered to the public in general.

> *Illustration 9*
> A garage offers to remove and change standard exhaust pipes at the fixed price of € 50.

The situation in Illustration 9 will probably not lead to an extensive exchange of information between the service provider and a potential client, something which will most likely happen in the situation in Illustration 8. Nevertheless, if a rather standard service is offered to a group of clients, the duties under the present Article remain imposed upon the service provider. He will have to perform these duties, bearing in mind the average purposes, conditions, circumstances, characteristics, and risks that are relevant to the average client being a member of this group.

Non-performance of a pre-contractual duty to warn under paragraph (1) or (4) will sometimes lead to the aggrieved party avoiding the contract under Article 4:103 PECL (Fundamental Mistake as to Facts or Law). If the client does not exercise that right, damages may be recovered under subparagraph (3)(b) in conjunction with Article 4:117 PECL (Damages). The rules of subparagraphs (3)(a) and (5) are additions to the rules of Chapter 4 PECL. They deal with the frequently occurring situation that non-disclosure of information prior to the conclusion of the service contract, causes the service to become more expensive and to take more time once the parties have been informed the information is revealed after the conclusion of the contract.

Subparagraph (3)(a) protects the client from being confronted with a claim for compensation for extra costs and extension of time in the event the service provider failed to warn under paragraph (1). It has a contractual counterpart in Article 1:110(4). It differs from the latter provision, however, to the extent that the service provider may try to prove that the client would have entered into the contract even if he had been warned about the risk prior to the conclusion of the contract. If the service provider succeeds in delivering that proof, the client must accept a change of the service under

Article 1:111 – subject to the client's right to cancel the contract under Article 1:115 – taking into account the consequences of the risk that has come to light. If the change leads to the incurrence of extra costs and delay, the service provider may claim compensation for these extra costs as well as extension of time under the rules of Article 1:111(4), (5), and (6).

Paragraph (5) allows the service provider to claim damages and extension of time if the client failed to warn under paragraph (4).

B. Interests at Stake and Policy Considerations

Imposing pre-contractual duties to warn on parties to a service contract raises several issues that need to be considered.

The first issue is, of course, whether pre-contractual duties to warn are to be imposed upon the parties to a service contract at all. One may argue that a duty should not be imposed upon a party unless that duty was freely assumed, either impliedly or expressly, at the time of conclusion of the contract. Another argument not to accept such duties would be that they would put too much of a burden on the parties' negotiations prior to the conclusion of the service contract. The argument could be reversed following arguments that are also used in support of imposing a *contractual* duty to warn on the service provider under Article 1:110(1) (see particularly Comments B and D to that Article). Here, the arguments would all boil down to the assumption that both the client and the service provider will in any event be involved in a process of information exchange whenever they negotiate the conclusion of a service contract. The purpose of such information exchange is obvious. The client will explain what his needs are, considering the service asked for, whereupon the service provider will give details about the most important characteristics of the service he can provide. It will further enable him to make an offer to the client, which will allow the latter to make an informed decision as regards the conclusion of the service contract. Having regard for the information received from the other party, both parties may find out that the other party makes an erroneous assumption as to the benefits that can be derived from the contract upon conclusion. One may argue that warning one another in such situations will hardly impose extra costs on both the service provider and the client. It may even be beneficial to the party issuing the warning in view of the fact that a warning may prevent future disputes, which might arise once the aggrieved party finds out that he contracted under the wrong assumption. The standard economic reasoning for a pre-contractual duty to inform is that the costs of collecting information, its supply to the other party, as well as its digestion by that other party are less than the costs of wrong decisions (the chance of a wrong decision times the damage caused by that decision, which is the difference between what a party expected to get and what it actually obtained).

Depending on whether a pre-contractual duty should be imposed upon the parties, the second issue to be dealt with involves the question what should trigger the duty to warn, having regard for the information that is exchanged during the negotiations. One may

be inclined to draw a parallel with the approach taken in Comment D to Article 1:110, dealing with the service provider's *contractual* duty to warn. There, the analysis of arguments led to the solution that the duty is to be triggered by inconsistencies in the information or directions supplied by the client if it is expected that following the information or directions may lead to a risk that would go to the very heart of the contract from the client's perspective. That approach may be taken here too, both as regards the service provider's and the client's pre-contractual duty to warn. On the other hand, one may question whether the parallel can indeed be drawn, for the duty under Article 1:110 is to be considered not only in the framework of a contract already negotiated and concluded, but also in the perspective of a service that is either in process or already completed. It is then obvious that triggering the contractual duty to warn is related to fundamental risks that may compromise the desired outcome of the service process. It could be argued that this is not what a pre-contractual duty to warn should be about and that, instead, triggering such duties should be related to the desired outcome of the process of negotiating the contract.

Assuming that pre-contractual duties to warn are to be imposed upon the parties to a service contract and that it is possible to establish in which situation they are to be imposed, a third issue has to be resolved. This issue involves the question how alert the parties should be during the pre-contractual information exchange in order to be able to signal assumptions on the part of the other party that may give rise to a pre-contractual duty to warn. Here, the same questions and arguments that are raised for the *contractual* duty to warn may be put forward (see Comment B to Article 1:110). Do the parties need to focus on wrong assumptions of the other party? Do they have to search for such assumptions? If that were to be accepted, the process of information exchange would become very costly. These costs might even be incurred in vain, if the negotiations do not result in a contract. And even if they do result in a contract, they will have made the service more costly in any event. On the other hand, an extended pre-contractual duty to investigate one another's assumptions would prevent parties from entering into a contract that later on turns out to be less profitable than expected prior to the conclusion of the contract.

A fourth issue involves the question whether a pre-contractual duty to warn is to be imposed upon a party if the other party is more competent than the average party or if it already knows of the problem to which the warning should refer. This question is particularly relevant in the context of services, where clients are frequently assisted by someone else who has – or is deemed to have – the capacity of a professional and competent adviser. The issue is also raised with respect to the *contractual* duty to warn of the service provider (see Comment B to Article 1:110). One argument would be that imposing a pre-contractual duty to warn would not only be unnecessary but also become very costly. On the other hand, it implies that one has to make a choice between an unnecessary warning and the occurrence of disappointment that is not discovered in time.

The previous issues give rise to a fifth and final issue. Parties will only be able to analyse information and warn thereupon if such information has actually been exchanged during contract negotiations. The question that needs to be answered is, therefore,

whether a pre-contractual duty to exchange information is to be imposed upon the parties, and what the content of that information should be. This question is closely related to the first issue raised above, questioning the need to adopt mutual pre-contractual duties to warn. There it has been argued that pre-contractual exchange of some information is a *conditio sine qua non* if parties contemplate the conclusion of a service contract. This will particularly be the case if the service required is not standard. The information will relate to both the client's needs and to the solutions the service provider can offer to fulfil these needs. It is doubted whether parties will be able to contract with one another without such information. By the same token, it is doubted whether they would need more information in order to consider one another's assumptions, which may eventually result in a warning causing additional information exchange.

C. Comparative Overview

In addition to the general contract law provisions on mistake of fact or law, pre-contractual duties to inform of service providers have further been developed by the courts in some of the countries investigated, with the exception of ENGLAND, particularly in FRANCE, GERMANY, THE NETHERLANDS and SPAIN. The exact basis of such duties is not always firmly established. This does not appear to be regarded as a major problem in legal doctrine, given that various legal concepts seem appropriate for providing such a basis, notably the concept of good faith and *culpa in contrahendo*. Some of the countries investigated have specific statutory provisions providing a basis for explicit pre-contractual duties to inform in the framework of services: FINLAND, FRANCE and THE NETHERLANDS. The pre-contractual duty of the service provider involves the supply of information on both characteristics and risks of the service offered, if and to the extent that it is foreseeable for the provider that such information may influence the client's decision to enter into the contract. Pre-contractual duties to inform are still developing in many European jurisdictions. This development has influenced European law, given that several (draft) EU Directives impose pre-contractual duties to inform on suppliers of goods and services, particular in the context of consumer contracts.

D. Preferred Option

The present Article imposes pre-contractual duties to warn upon both parties to a service contract. It is better to have such an Article and to limit carefully the extent of the duties it imposes than to have no provision at all. Furthermore, the 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. It is noted that this development has left its mark in Article 4:103(1)(b) and (2) PECL (Fundamental Mistake as to Facts or Law). It has been considered necessary to deal with these duties in an Article in the present Part of the Principles, in addition to the general provisions of Article 4:103 PECL. In service contracts practice, pre-contractual information exchange is of crucial importance. Clear rules are needed, which are adapted to the particular context of the interrelationship between the information exchange prior

to the contract and the performance of the service subsequent, to conclusion of that contract.

As to the question what kind of problems should trigger the parties' pre-contractual duty to warn, the Article follows the contractual counterpart of the duty of the service provider under Article 1:110(1). This is based on the assumption that fundamental risks which – if they occur upon conclusion of the contract – would compromise the desired outcome of the service process, are risks a party would want to know of prior to the conclusion of the contract. If that party were not to know of such risks at that time and if the risks occurred later on, the party would most likely argue that it would not have entered the contract or would have done so only on fundamentally different terms. An example of such a risk is given in *Illustration 1* above.

As to the questions how alert the parties should be during the pre-contractual information exchange and whether they should be on the lookout for wrong assumptions, the Article takes the approach also chosen for the service provider's *contractual* duty to warn under Article 1:110(1). The approach is captured by the concept of 'reason to know' which is acknowledged in US law (see: Restatement (2nd) Contracts § 19, comment b). It is explained in Comment *D* to Article 1:110 below. In the context of the parties' pre-contractual duty to warn under the present Article, the approach has the following implications. As to the service provider's duty under paragraph (1), it implies that he will have to examine the client's information carefully, which includes the more general information about the client's needs, because it is the basis of his tailor-made offer. In doing so, he will have to think of risks that are inherent in the service and that are independent of either what the client's needs are or the circumstances in which the service is to be provided. Wrong assumptions of the client, which will not escape the service provider's attention when he studies the information as thoroughly as is necessary to prepare his offer, have to be mentioned to the client. Any active inspection aimed at discovering wrong assumptions is therefore not required.

> *Illustration 10*
> An engineer is requested by a factory to make an offer for adapting a production machine following specific functional, technical, and production requirements provided by the factory. The engineer studies the requirements for the purpose of preparing his offer. Only if this investigation at the same time brings to light that, due to an inconsistency in the functional and technical requirements, the adapted production machine will not be able to meet the production requirements, the engineer must warn the factory against that risk.

As to the client's pre-contractual duty under paragraph (4), the approach based on the concept of 'reason to know' implies that he will have to analyse the service provider's information contained in the latter's offer carefully, given that he will enter into contractual obligations once he accepts the offer. Wrong assumptions of the service provider, which will not escape the client's attention when he studies the offer as thoroughly as is necessary to make an informed decision as to the acceptance of the offer, have to be mentioned to the service provider. Again, any active inspection aimed at discovering wrong assumptions of the service provider is therefore not required.

Illustration 11
A management training agency is requested by a company to make a fixed-price offer for a three-day training of the company's financial staff. The company wants an 'all-in' service, meaning that the fixed price offered not only covers training fees and additional training costs, but also catering and accommodation costs. Having received the offer of the agency, it becomes clear to the company notices that the agency has made a computation mistake to its own detriment.

In this example, the client has become aware that if he does not tell the service provider about the computation mistake, the supply of the service will become more costly for the latter. The client therefore must warn the agency.

The concept of 'reason to know' is also the basis of the solution in the Article to deal with the fourth issue raised under Comment B above. The concept is not only relevant in the context of establishing the pre-contractual duties to warn under paragraphs (1) and (4), but also for the purpose of establishing whether a party's competence or knowledge is such as to negate the other party's duty to warn. First, as regards the client's duty to warn paragraph (4) states that the duty only concerns an 'unusual' risk. The word 'unusual' is used in order to negate the client's pre-contractual duty to warn in the event of foreseeable facts and circumstances, which the service provider should take into account– as stated in paragraph (1) in conjunction with paragraph (6) – when he studies the client's information as thoroughly as is necessary to prepare his tailor-made offer. A good example of such a foreseeable fact can be found in the following illustration:

Illustration 12
A meat trader agrees with a storer that the latter will store a shipment of beef. The trader does not inform the storer that meat will perish if it is not stored in frozen condition.

By the same token, paragraph (7) gives an additional clarification to the question whether and, if so, to what extent the client's competence amounts to 'reason to know', and whether and, if so, to what extent the competence of any other person assisting the client at the pre-contractual stage of the service contract, amounts to 'knowledge' or 'reason to know'. The principle underlying the rule is that merely the client's competence is insufficient to support the prima facie conclusion that the client has reason to know of a risk at the pre-contractual stage. The same goes when someone else advises the client: The competence of that other person does not automatically lead to the conclusion that the client thus knows or has reason to know of the risk at the pre-contractual stage. This is particularly to protect the interests of Small and Medium-sized Enterprises (SMEs) and consumers that are advised – often for free – by their relatives or friends. The situation becomes different, however, if a client specifically hires a professional adviser for the specific purpose of acting as his agent during the pre-contractual stage of the service contract. Any knowledge or competence of such an agent will be imputed to the client under paragraph (7) in conjunction with Article 1:305 PECL (Imputed Knowledge and Intention) and may amount to knowledge or reason to know of the client, which will then negate the service provider's pre-contractual duty to warn under paragraph (2).

Finally, it is implied in paragraph (6) of the present Article that the parties are under a duty to exchange information prior to the conclusion of the contract. As explained above (see Comments A and B), this involves information the exchange of which is already inherent in service contract practice, and one may argue that it is superfluous to deal with this in the Article. However, explicit wording is needed in order to be able to establish the service provider's duty to warn – using the concept of 'reason to know' – within the boundaries of information he should have collected for the purpose of making an informed offer to the client as regards the service to be supplied.

E. Relation to PECL and Other Parts of the Principles

This Article deals with the duties to warn and to inform, which are imposed upon parties who consider entering into a service contract. The information that is exchanged, whether or not in the context of the issuing of a warning, may reasonably influence on both sides the decisions to enter into the contract. The duties are therefore related to the pre-contractual duty to inform that is implied in Article 4:103(1)(b) and (2) PECL (Fundamental Mistake as to Facts or Law).

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2), the rules under the present Article are applicable to the specific service contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles in Chapters 2 to 7 that modify or deviate from the rules in the present Article.

The need for a particularisation of the Article has only been recognised in Article 4:102 (Pre-contractual Duties to Warn) and Article 5:102 (Pre-contractual Duty of the Designer to Warn) concerning storage and design contracts. Article 4:102 is a specification of paragraph (4) of the present Article and Article 5:102 specifies paragraph (1). The reasons for these particularisations as well as their purport are further clarified in Comment E. to Article 4:102 and Comment E. to Article 5:102. These Comments also address the relevance of the other paragraphs of Article 1:103 for storage and design contracts.

The significance of the present Article for Chapters 2, 3, 6, and 7 is explained and illustrated in the General Comments to these Chapters, particularly in Comment J (Chapter 2: Construction), Comment I (Chapter 3: Processing), Comment I (Chapter 6: Information), and Comment J (Chapter 7: Treatment). In addition to what is stated in these Comments, the following general observations can be made with regard to the purport of the present Article for the specific service contracts dealt with in Chapters 2 to 7 of this Part.

The pre-contractual exchange of information between a service provider and his client, as required under the present Article, will not always be relevant to the same extent to all types of services. Differences can be noted which are caused by the characteristics

related to each type of service. An important aspect that has to be taken into account is that the client cannot always objectively expect to obtain certainty in advance as regards both the quality and the cost of the result that will be achieved through the service to be performed. The question whether or not it is possible to provide such certainty in advance depends on the ability to both identify and control *in concreto* all the factors that are capable of influencing the result of the service and its cost. *In abstracto* these factors are: (1) the particular needs of the client, (2) the service provider's solution that fits these needs, and (3) the surrounding circumstances in which that solution is to be applied in order to meet the client's needs (see also Comment A to Article 1:108). Pre-contractual exchange of information regarding these aspects *only* becomes relevant if one or more of these aspects are neither identified nor controlled sufficiently prior to the conclusion of the contract and – in the unfortunate event they present themselves after the conclusion of the contract – if they cause a substantial increase in the costs or a decrease in quality of the outcome of the service. The most prominent example of this is probably to be found in the field of construction contracts, given the particularities of a construction process, which will be discussed below after the following illustration:

> *Illustration 13*
> A regional authority requests a civil engineering constructor to make an offer for the construction of a flyover on the basis of a design prepared by the authority's planning department. The flyover is to be constructed in the vicinity of a motorway junction.

First, and this is also shown in the illustration, in construction one can see a strong interrelationship between the abstract factors referred to earlier. The solution to be applied by the constructor very much depends on the client's specific needs, given the particular surrounding circumstances in which the new building or other immovable structure has to be realised. This further explains why there is no such thing as a standardised construction service. Secondly, in theory it is possible to identify and control the result of the construction process in advance, provided the client's needs and the surrounding circumstances in which the building is to be built are thoroughly mapped and checked in advance, usually by means of a design that is supplied by or on behalf of the client to the constructor. Thirdly, given the ability of the parties to control the output of this technical process, they are also able to calculate and check in advance the total costs that will be incurred. This explains why it is very common in construction contracts to agree on a fixed price for the construction service. Fourthly, parties clearly have an interest in identifying and controlling both the quality and the costs of the result of the construction process as much as possible in advance: if they refrained from doing so as regards one or more of the aspects referred to above, they run the risk of facing considerable problems after the contract has been agreed upon. For instance, they might find out that the real costs of the building exceed the price agreed upon. Also, the quality of the outcome or the timely performance of the construction project are likely to be endangered as a result of the constructor's solution being insufficiently attuned to the client's needs given the surrounding circumstances in which the building is to be realised.

Taken together, the above particularities are the reasons why it is common in construction to map out in detail – in advance – the client's needs and the technical solution to meet these needs, attuned to the surrounding circumstances in which that solution is to be applied by the constructor. The particularities further explain why there is a clear distinction between the pre-contractual stage on the one hand and the contract stage on the other. Finally, the particularities show why pre-contractual exchange of information as required under the present Article is regarded to be most relevant. In order to be able to offer both a tailor-made solution and a fixed price for the construction of the building required by the client, the constructor needs to know in advance what the specific needs of the client and the particular surrounding circumstances are in which the construction service is to be performed.

A parallel can be drawn between the construction of a new building or other immovable structure and the situation in which a service is centred on an existing movable or incorporeal thing, which is the case in the event of a processing service under Chapter 3 or a storage service under Chapter 4. However, as will be explained below, that parallel exists only to a certain extent. The parallel will be drawn for processing contracts, but the analysis is also applicable to storage contracts. Where appropriate, a parallel with other particular service contracts will be drawn.

As regards the processing of an existing movable or incorporeal thing, there is an interrelationship between the needs of the client, the processor's solution that fits these needs, and the surrounding circumstances in which that solution is to be applied by the processor in order to meet the client's needs. The following illustration is a good example of this:

Illustration 14
A craft upholsteres agrees with a client to upholster the seats of six antique armchairs belonging to the client by using a special type of fabric selected by the client.

There is, however, a crucial difference with construction, in the sense that – apart from the particularities of the thing that is to be processed – there are hardly any influential surrounding circumstances in which the processing service is to be carried out. The costs and the results of the service entirely depend upon the particularities of the thing, given the client's needs. Particularly if both that thing and the client's needs are rather standard, the absence of surrounding circumstances likely to influence the outcome of the service process will make it likely that the client's needs can be satisfied by supplying a standardised processing service, as is shown in the following examples:

Illustration 15
A car owner requests a garage to replace the exhaust pipe of his car.

Illustration 16
A dry cleaner agrees to dry clean a raincoat for a client.

In such cases, the duties under the present Article will likewise be limited to an exchange of standard information. Given that the processor, in many of these situations, is probably also able to offer a fixed price immediately after the client expressed his needs and that he is sometimes even able to do so without performing a superficial inspection of the thing to be processed, the pre-contractual exchange of information will be very similar to the one preceding the conclusion of a sales contract. It is noted that this type of processing contracts – and the scenario that is described for the conclusion of such contracts – also resembles contracts involving the supply of factual information under Chapter 6, an example of which is given in the following illustration:

> *Illustration 17*
> A pension fund agrees with the online data services department of the stock exchange that it will have continuous access to electronic information as regards the actual value of shares traded at the stock exchange.

The situation will become different, however, if the processing service is no longer standard, given the particularities of the client's needs and the thing that is to be processed. Pre-contractual exchange of information will then become more relevant and will probably be a condition for the processor's ability to offer a fixed price. This will, for instance, be the case in the following example:

> *Illustration 18*
> An engineer is requested by a factory to make an offer for changing a production machine following specific functional, technical, and production requirements provided by the factory.

This type of processing contracts – and the scenario that is described for the conclusion of such contracts – also resembles design contracts under Chapter 5, as is illustrated in the example given in *Illustration 8* above.

There is also another gradual difference between the construction of a new building or other immovable structure and the processing of an existing movable or incorporeal thing (this is, for instance, also where the parallel between processing contracts and storage contracts ends), for it will not always be possible to identify and control in advance the aspects that will influence the result of a processing service – either standard or tailor-made – due to which pre-contractual exchange of information regarding these aspects will become less useful. This will particularly be the case if pre-contractual exchange of information is not essential for calculating a fixed price that is to be paid for the processing service. In this situation, however, there will still be a clear distinction between the pre-contractual and the contractual stage of the processing service.

> *Illustration 19*
> The owner of a seventeenth century painting, which has been exposed to smoke and other damaging conditions for centuries, agrees with a specialist restorer to try to bring back the original colours of the painting without damaging it.

This type of processing contracts – and the scenario that is shown for the conclusion of such contracts – resembles contracts involving the supply of evaluative information under Chapter 6.

Illustration 20
A company involved in a difficult legal dispute requests a law professor to investigate the documents related to the dispute and to assess the company's chances of winning the dispute in court.

The distinction will become blurred if the factors that influence both the results *and* the costs of the processing service can no longer be identified and controlled in advance and the pre-contractual exchange of information will – again – become less useful for that purpose. Given that the processor in such a situation will probably not offer the performance of the service at a fixed price, the parties will hardly notice the passing of the pre-contractual stage of such a service.

Illustration 21
During an archaeological excavation, the shattered remains of a large collection of Roman pottery are discovered. The State contracts a specialised company to try to restore the collection.

This type of processing contracts – and the scenario that is sketched out for the conclusion of such contracts – resembles contracts involving the treatment of persons under Chapter 7.

Illustration 22
A patient has suffered from an ongoing headache for several weeks and eventually decides to contact a doctor.

G. Burden of Proof

The Article imposes a duty to warn both on the service provider and on the client. The aggrieved party must prove whether a duty to warn is applicable and, if so, whether it has been breached. The burden of proof whether or not a duty to warn is applicable is relieved to some extent by the acceptance of an objective test as to the knowledge expected in the other party. In addition, the service provider will have to establish that the knowledge test of subparagraph (2)(a) is to be applied to the client's detriment, in the event that the client invokes the service provider's duty to warn under paragraph (1).

H. Character of the Rule

This Article contains a default rule. It imposes pre-contractual duties upon the client and the service provider. In the event of non-performance of these duties, such non-performance will most likely become manifest after the conclusion of the service con-

tract. If the parties wish to modify or exclude the legal consequences of that non-performance, they will have to state as such in the contract itself.

I. Remedies

Mere failure of the service provider to collect information under paragraph (1) does not give the client the right to resort to a remedy, independent of the failure of the service provider to warn. It is the latter failure – as well as the actual occurrence of one or more of the risks referred to in paragraph (1) – that may bring the client to resort to a remedy.

If the service provider's pre-contractual failure to warn causes the service not to achieve the result stated or envisaged by the client (subparagraph (1)(a)), the latter will probably seek resort to a remedy under Chapter 9 PECL on the basis of the service provider's non-performance of his main obligation under Article 1:108 (see also Comment I to Article 1:108). As was explained in Comment A to Article 1:108, however, the obligation of that Article is not imposed upon the service provider in every service contract. Another option may be to try to claim damages on the basis of Article 9:501 PECL (Right to Damages), arguing that the service provider failed to perform his *contractual* duty to warn under Article 1:110(1) (see also Comment I to Article 1:110). That second route would also be an option for the client in the event that the risk mentioned in subparagraph (1)(b) occurs. A third option for the client – in the event that either the risk under subparagraph (1)(a) or under subparagraph (1)(b) is the result of the failure to warn – would be to try to avoid the contract on the basis of Article 4:103 PECL (Fundamental Mistake as to Facts or Law). This option will sometimes be hypothetical, given that it may not always be practical or even be unprofitable to stop a service process and invoke Article 4:115 PECL (Effects of Avoidance).

On the other hand, if the client does not exercise his right to avoid the contract, damages may still be recovered under Article 1:103(3)(b) in conjunction with Article 4:117 PECL (Damages). If the risk mentioned in subparagraph (1)(c) occurs, the client does not need to resort to a remedy but can simply block the service provider's claim on the basis of subparagraph (3)(a). However, the service provider may try to prove that the client would have entered into the contract even if he had been warned about the risk prior to the conclusion of the contract. If the service provider succeeds in delivering that proof, the client must accept a change of the service under Article 1:111 – subject to the client's right to cancel the contract under Article 1:115 – taking into account the consequences of the risk that has come to light. If the change leads to the incurrence of extra costs and delay, the service provider may claim compensation for these extra costs as well as for the extension of time under the rules of Article 1:111(4), (5), and (6).

In the event that the client fails to perform his duty to warn under paragraph (4), the service provider may either not achieve the result the client has in mind or damage other interests of the client in performing the service. In this scenario, the client might try to resort to a remedy under Chapter 9 PECL on the basis that, for instance, the service provider did not perform his obligation under Article 1:108. Here it is clear, however, that the client's failure to warn has the same effects as his defective co-

operation under Article 1:104(1) (see Comment H to Article 1:104) in the sense that Article 8:101(3) PECL will prevent him from invoking the service provider's non-performance. It is noted, however, that, after the conclusion of the contract, the service provider may come under a duty to warn under Article 1:110(1) which concerns the same risk the client failed to warn about prior to the conclusion of the contract. In that case, the non-performance will give rise to remedies as explained in Comment I to Article 1:110, in the event that they jointly caused the result envisaged by the client not to have been achieved.

If the client does not warn the service provider under paragraph (4), the latter may try to avoid the contract under Article 4:103 PECL (Fundamental Mistake as to Facts or Law). This will, however, probably be as hypothetical as the client's option to avoid the contract in the case of the service provider's failure to warn under paragraph (1), for the risk that occurs due to the client's failure to warn is that the service has become more expensive and time consuming.

The service provider will probably want to carry on with the service and earn the fruits of the contract as long as he gets compensated for the loss that occurred. If he does not avoid the contract, it is unlikely that he will seek compensation under Article 4:117 PECL (Damages) if payment of a fee based on an hourly rate was agreed upon at the time of conclusion of the contract, for in that case he will suffer no loss. However, if payment of either a fixed price or a fee based on a 'no cure no pay' basis was agreed upon, Article 4:117 PECL will become relevant. However, given that the situation described is in fact similar to what may occur if the client fails to perform a *contractual* duty to co-operate under Article 1:104(1), the service provider may also seek resort under paragraph (5) of the present Article. This means that he can claim both compensation for the loss occurred and extension of time to perform the contract.

Comparative Notes

1. *Pre-contractual duties to warn in (services) contract law*
   Pre-contractual duties to inform have firmly developed in many European jurisdictions and are still developing. This development has influenced European law, given that several (draft) EU Directives impose pre-contractual duties to inform on suppliers of goods and services, particular in the context of consumer contracts. See for instance Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 L 372/31; Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 1987 L 42/48; Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990 L 158/59; Directive 94/47/EC of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, OJ 1994 L 280/83; Directive 97/7/EC of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ 1997 L 144/19; Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the

Internal Market, OJ 2000 L 178/1. The development of pre-contractual duties to inform has further left its mark in PECL art. 4:103(1)(b) and (2) (*Fundamental Mistake as to Facts or Law*). As regards the comparative legal basis of these latter provisions, see the comparative and national notes to PECL art. 4:103(1)(b) and (2): O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. In addition to general contract law provisions on mistake of fact or law, pre-contractual duties to inform of service providers have further been developed by the courts in some of the countries investigated, with the exception of ENGLAND, particularly in FRANCE, GERMANY, THE NETHERLANDS and SPAIN. The exact basis of such duties is not always firmly established. This does not appear to be regarded as a major problem in legal doctrine, given that various legal concepts seem appropriate for providing such a basis, notably the concept of good faith and *culpa in contrahendo*. Some of the countries investigated have specific statutory provisions providing a basis for explicit pre-contractual duties to inform in the framework of services: FINLAND (chap. 8 and chap. 9, art. 13(1) and art. 13(3) (16/1994) of the Consumer Protection Act), FRANCE (ConsC arts. L. 111-1 and L. 114-1) and THE NETHERLANDS (*aanneming van werk:* CC art. 7:754 and CC art. 7:753(2); *overeenkomst inzake geneeskundige behandeling:* CC art. 7:748). The pre-contractual duty of the service provider involves the supply of information on both characteristics and risks of the service offered, if and to the extent that it is foreseeable for the provider that such information may influence the client's decision to enter into the contract. Comparative legal references with respect to the specific duty of the service provider under a design contract (to warn the client in so far as the designer lacks special competence for specific problems which require the involvement of specialists) are to be found in the comparative and national notes to PELSC art. 5:102. Comparative legal references with respect to the specific duty of the client under a storage contract (to warn the storer of any unusual danger attached to the thing or the storage of it that the client knows of) are to be found in the comparative and national notes to PELSC art. 4:102.
No information from AUSTRIA, BELGIUM, DENMARK, GREECE, ITALY, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SWEDEN.

National Notes

1. *Pre-contractual duties to warn in (services) contract law*
ENGLAND Provided that a party is induced to enter into a service contract by a pre-contractual 'statement' of another party, the former party can claim damages under various headings: in the tort of deceit, if the statement was made fraudulently; in the tort of negligence, if the claimant can establish the conditions for the existence of a duty of care under *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd* [1964] AC 465, or under the provisions of the Misrepresentation Act 1967 (cf. Chitty on Contracts, 1-072). The latter Act also entitles the aggrieved party to rescind the service contract. ENGLISH law is reluctant, however, to accept pre-contractual liability outside the scope of 'statements'. The general rule is that mere non-disclosure of information does not constitute misrepresentation, for there is, in general, no duty on a party to a contract to disclose material facts that would be likely to affect the other party's decision to conclude the contract (cf. Chitty on Contracts, no. 6-013). Exceptions to this rule are limited and involve (1) contracts *uberrima fidei*, or situations (2) where

there is a fiduciary relationship between the parties, (3) where failure to disclose distorts a positive representation, or (4) where a person is considered guilty of misrepresentation by conduct (cf. Chitty on Contracts, nos. 6-013 ff, 6-079 ff, and 6-135 ff). Further development of pre-contractual duties to inform are said to be hampered by the fact that ENGLISH law has not committed itself to overriding general principles of good faith and *culpa in contrahendo* (cf. Chitty on Contracts, 1-019 and 1-076).

FINLAND As regards services provided to consumers, chap. 8, art. 2 (16/1994) of the Consumer Protection Act provides that contract terms derogating from the provisions of that chapter to the detriment of the consumer shall be void unless otherwise provided. Chap. 9, art. 2 (16/1994) of the Consumer Protection Act, applicable to construction services provided to consumers, is to the same effect. Given these basic rules, it then follows from chap. 8, art. 13(1) that a service is considered to be defective if it does not conform to the information that the service provider has given on the service or on other circumstances relating to the quality or use of the service before the conclusion of the service, and which can be deemed to have had an effect on the decision-making of the client. The rule of chap. 8, art. 13(1) is extended in art. 13(3) to non-disclosure of information on circumstances the service provider should have been aware of and which the client could justifiably have been expected to be notified of. Chap. 9, art. 14(1) and art. 14(3) on construction services are to the same effect.

FRANCE Pre-contractual duties to inform in FRENCH law are widely applied (Fabre-Magnan, De l'obligation d'information dans les contrats, nos. 285 ff.) and can first of all be derived from CC art. 1110 *(erreur)* and from CC art. 1116 *(dol)*, both allowing a misinformed party to nullify the service contract upon fulfilment of certain requirements. Additional pre-contractual duties to inform, however, have been accepted by the courts outside the scope of the aforesaid general provisions since long (cf. Ghestin, Traité de droit civil. La formation du contrat, no. 623; Larroumet, Droit civil. Les obligations. Le contrat, no. 376), with not much contemplation on the exact basis of such duties (cf. Larroumet, Droit civil. Les obligations. Le contrat, no. 376; Girot, A comparative study of the protection of the user against defective performance in information technology, p. 262). Further pre-contractual duties to inform may follow, for some suppliers of services, from specific statutory provisions (Ghestin, Traité de droit civil. La formation du contrat, nos. 608, 612 and 619) and for all suppliers from ConsC arts. L. 111-1 and L. 114-1. Pre-contractual duties to inform, as developed by the courts, have been categorised and developed into a system by legal doctrine (see for instance Ghestin, Traité de droit civil. La formation du contrat, no. 594; Fabre-Magnan, De l'obligation d'information dans les contrats, essai d'une théorie, no. 281-284), but the distinctions drawn do not always seem to be observed by the courts. It is undisputed, however, that both the courts and legal doctrine acknowledge a duty of the service provider to supply information at the pre-contractual stage. Such information relates to the characteristics and the risks of the service offered, provided that it is foreseeable for the service provider that this may influence the client's decision to enter into the contract (cf. Ghestin, Traité de droit civil. La formation du contrat, no. 643). Case law is abundant on the obligation to warn the client. For exemple a travel agency is bound to inform the traveller about the requirement of visas, vaccinations and insurance policies (Cass.civ. III, 3 November 1983, JCP 1984.II.20147). An architect must inform the client that the land he plans to buy is unsuitable for construction (Cass.civ. III, 25 March 1981, Bull.civ. III, no. 73).

GERMANY The development of pre-contractual duties to inform in GERMAN law shows several possibilities to underpin such duties in the framework of services. The basic rule under general contract law is to be found in CC art. 119 allowing a party to nullify the service contract on the basis of mistake of fact or law *(Anfechtbarkeit wegen Irrtums)*. In practice, however, the courts will more frequently be asked to consider claims for damages in the context of *culpa in contrahendo (Verschulden bei Vertragsverhandlungen)*. Such claims will be allowed, provided that it can be established that the required standard of care was not observed, having regard to the rule of CC art. 276 (cf. Palandt [*-Heinrichs*], Bürgerliches gesetzbuch, Beck'sche Kurz-kommentare, art. 276, nos. 65-103). Pre-contractual duties to inform in the framework of services contracts may also follow from specific statutory provisions (Barendrecht/Van den Akker, Van dwaling tot zelfstandig leerstuk: informatieplichten van artsen, advocaten, notarissen, banken, aannemers, verzekeraars en anderen, no. 21). Although the courts occasionally attempt to approach the subject matter of pre-contractual duties to inform in a manner consistent for all types of services (see for instance BGH VersR 1996, 471), it is hard to discover an all-embracing system in this respect. Nevertheless, several authors agree, on the basis of an analysis of case law and legal doctrine, that the duty requires a service provider to supply information on both characteristics and risks of the service offered, if and to the extent that it is foreseeable for the provider that this may influence the decision of the client to enter into the contract. On the other hand, this does not seem to require the service provider to investigate in detail all the needs and circumstances of every possible client (cf. Abegglen, Die Aufklärungspflichten in Diensleistungsbeziehungen, insbesondere im Bankgeschäft. Entwurf eines Systems zu ihrer Konkretisierung, p. 172; Borgmann/Haug, Systematische Darstellung der Rechtsgrundlagen für die anwaltliche Berufstätigkeit, pp. 89, 90 and 95; Ganter, Die Rechtsprechung des Bundesgerichtshofs zu den Belehrung, p. 703; Haug, Die Amtshaftung des Notars. Handbuch der Berufungspflichten unter besonderer Berücksichtigung der gesamten Haftpflicht-Rechtsprechung des Bundesgerichtshofes, no. 470).

THE NETHERLANDS The main rule under general contract law is that mistake of fact or law will only enable the party concerned to nullify the service contract (*dwaling* and *bedrog*; CC art. 6:228 and CC art. 3:44(1) in conjunction with (3)). Although an additional claim for damages will sometimes be possible as well (cf. HR 2 February 1993, NJ 1995, 94), DUTCH case law and legal doctrine have explored several other legal concepts which could support pre-contractual duties to inform of a party to a service contract, thus enabling the other party to seek remedies other than avoidance of the contract. Although dogmatic difficulties are acknowledged in this respect, pre-contractual duties to inform are widely accepted in the framework of services (see for an overview: Barendrecht/Van den Akker, Informatieplichten van dienstverleners. Van dwaling tot zelfstandig leerstuk: informatieplichten van artsen, advocaten, notarissen, banken, aannemers, verzekeraars en anderen, nos. 90-109; Girot, A comparative study of the protection of the user against defective performance in information technology, p. 233 ff). For some services, the duty also follows from specific statutory provisions. As regards services qualified as *aanneming van werk*, the duty of the service provider can be based upon CC art. 7:754 and on CC art. 7:753(2), whereas CC art. 7:748 provides a basis for services qualified as *overeenkomst inzake geneeskundige behandeling*. See also CC art. 7:501 *(reisovereenkomst)*. Analysis of case law and legal doctrine shows that the service provider's pre-contractual duty involves the supply of

information on both characteristics and risks of the service offered, if and to the extent that it is foreseeable for the provider that such information may influence the client's decision to enter into the contract (cf. Barendrecht/Van den Akker, Informatieplichten van dienstverleners. Van dwaling tot zelfstandig leerstuk: informatieplichten van artsen, advocaten, notarissen, banken, aannemers, verzekeraars en anderen, nos. 114-269). It is doubted whether this would require the service provider to investigate in detail all needs and circumstances of every possible client (cf. Barendrecht/Van den Akker, Informatieplichten van dienstverleners. Van dwaling tot zelfstandig leerstuk: informatieplichten van artsen, advocaten, notarissen, banken, aannemers, verzekeraars en anderen, nos. 122-126).

POLAND The POLISH CC does not contain rules pertaining to the pre-contractual duty to warn; the duty is established after the conclusion of the contract. It is questionable, whether a court would uphold the existence of a pre-contractual duty to warn, drawn from the duty of a loyal contracting. The POLISH CC provides a possibility of avoidance of the legal effects of one's declaration of intent (CC art. 84 para. 1). It is possible in the case of party's error as to the contents of an act in law. In case of contracts (declaration of intent made to another person) the avoidance of the legal effects is admissible only if the error was caused by that person, even if he was not at fault, or if he was aware of the error or could have easily noticed it. This restriction does not apply to the gratuitous acts in law. The error may be referred to only if it is essential, which means that it justifies the supposition that if the person making the declaration of intent did not act under the influence of the error and had judged the case reasonably he would not have made such a declaration of intent (CC art. 84 para. 2).

SPAIN Pre-contractual duties to inform of the service provider are not dealt with as such in the SPANISH CC. According to the general principle of good faith (CC art. 1258), however, a party negotiating a contract has to fulfil certain pre-contractual duties towards its counterpart, including the duty to inform (cf. Echebarría 1995, p. 243). It appears to be debated whether the failure of a party to disclose information at the pre-contractual stage is to be considered in the context of either pre-contractual duties, or as a matter of the validity of the contract or as a question of extra-contractual liability (cf. Echebarría, p. 211). Pre-contractual non-disclosure of information may cause misrepresentation on the other party which affects the validity of the contract. The remedy for the aggrieved party may be the annulment of the contract with the right to restitution and damages (CC art. 1300).

Article 1:104: Duty to Co-operate

(1) The duty under Article 1:202 PECL (Duty to Co-operate) requires in particular:
- (a) the client to answer reasonable requests by the service provider for information in so far as this is reasonably necessary to enable the service provider to perform the contract;
- (b) the client to give directions regarding the performance of the service in so far as this is reasonably necessary to enable the service provider to perform the contract;

(c) the client, in so far as the client is to obtain permits or licenses, to obtain these at such time as is reasonably necessary to enable the service provider to perform the contract;
(d) the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract; and
(e) the parties to co-ordinate their respective efforts in so far as this is reasonably necessary to perform the contract.

(2) If the client fails to perform the duties under subparagraph (1)(a) or (b), the service provider may either withhold performance under Article 9:201 PECL (Right to Withhold Performance), or base performance upon the expectations, preferences and priorities a person in the same situation as the client may reasonably be considered to have, given the information and directions that have been gathered, provided that the client is warned in accordance with Article 1:110.

(3) If the client fails to perform the duties under paragraph (1) causing the service to become more expensive or to take more time than agreed upon in the contract, 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.

Comments

A. General Idea

Once the service contract is concluded, the parties are under a general duty to co-operate in order to give full effect to the contract according to Article 1:202 PECL (Duty to Co-operate). Paragraph (1) of the present Article specifies the most important specific duties to co-operate that are to be imposed upon the parties to a service contract.

As for the client, the duties under subparagraph 1(a) and (b) require the supply of information and directions. These may involve information and directions that were promised to the service provider at the time of conclusion of the contract. Depending on the type of service that was agreed upon, such information and directions specify the client's expectations as regards the result to be achieved through the service. An example of this is given in the following illustration.

> *Illustration 1*
> A trader of vegetables agreed with a storer that 10 tons of vegetables are to be stored at a fixed price per ton per week. After the conclusion of the contract, the client must supply additional specifications to the storer as regards the type of vegetables and the manner of handling and preserving them.

The information and directions may also hold further details as to the circumstances in which the service is to be carried out.

Illustration 2
A management consultant agreed to investigate the logistics department of a large food production factory and to advice on a possible reorganisation of the department. Once the contract is concluded, the consultant needs to receive additional information from the factory as regards the age, education, job descriptions, and career development of the employees working in the department. She also needs to be informed about internal and external work processes.

The supply of information or directions may subsequently be required if the service provider encounters difficulties in the course of the service that may prevent him from achieving the result envisaged by the client and cannot be solved by the service provider himself.

Another particularisation of the general duty to co-operate of the client in the context of service contracts can be found in subparagraph (1)(c). It involves the responsibility to obtain permits or licenses that are needed to allow the service to be performed lawfully. The duty is imposed on the client if explicit wording to that effect is used in the contract. A duty to that effect can also be implied if the service provider himself cannot obtain the permit or license required.

Clearly, the service provider has his own responsibility in performing the duties incumbent on him. Therefore, the duties of the client under subparagraphs 1(a), (b), and (c) are subject to a necessity test, the conditions of which will only be fulfilled if the service provider has done everything he is bound to do under the contract. A good example of a case where this test is deemed to be fulfilled, is provided in the following illustration:

Illustration 3
A company specialised in removing graffiti from concrete walls is hired by a bank to clean the walls of the bank's head office. The contract states that the bank will take care of all licences and permits required. After two days of cleaning, the cleaning company is instructed by local authorities to stop working because no permit has been granted. The cleaning company awaits instructions from the bank on how to proceed with the service.

As for the service provider, the duty under subparagraph 1(d) requires him to allow the client to monitor the service process as it proceeds. This will give the client the opportunity of timely performing his duty to notify under Article 1:113 if he becomes aware that the service provider will fail to achieve the result envisaged by the client. It will also enable him to give directions under Article 1:109. The following illustration is an example of a case where a client exercises his authority under subparagraph 1(d):

Illustration 4
An aged couple contracted with an architect to design the reconstruction of their mansion, which will enable them in the future to live and sleep downstairs. The architect is to present his ideas and plans to the couple on a regular basis during the design process.

Subparagraph (1)(e) imposes a duty upon both parties. It may well be that the client has to perform his specific duties to co-operate throughout the service process, which then amounts to an iterative process of intertwined performances of both parties. Obviously, such a process will only lead to the result envisaged by the client if he and the service provider co-ordinate the performances of their respective duties. Again, however, such a duty to co-ordinate is subject to the application of the necessity test referred to above.

> *Illustration 5*
> The owner of a house wants to sell his house and contracted with an estate agent to find a buyer for that purpose. In order to be able to perform the service, the parties will have to make practical arrangements together in order to enable the estate agent to assess the value of the property and to allow potential buyers to visit the house for inspection at a time that is convenient to all parties involved.

Failure to perform any of the duties under paragraph (1) will allow the aggrieved party to resort to remedies under Chapter 9 PECL, subject to Article 8:101 and 8:108 PECL. This is further explained in Comment H below. In addition to the service provider's remedies, paragraphs (2) and (3) of the present Article contain further rules he may resort to in the event of the client's non-performance of a duty to co-operate incumbent on him.

If the client does not supply the information or directions required under subparagraph (1)(a) or (b), the proposition is that the service provider will not be able to achieve the result envisaged by *this* client. However, depending on the type of service contracted for, it may still be possible to achieve the result that would generally be envisaged by a client in the same position as this particular client. If this is the case, the service provider may try to earn the fruits of the contract by achieving this result provided that he notifies the client of his intention to do so. An example of this is given in the following illustration:

> *Illustration 6*
> A road constructor is carrying out the reconstruction of a road on the basis of a design provided by the regional planning authorities. The design requires that the subsoil of the road's foundation consist of a layer of sand of at least one metre. The information supplied to the constructor by the authorities warrants the presence of such a layer. After the road works have started, the presence of a vast amount of soft clay is discovered. The authorities fail to give the necessary directions to the constructor as to how to proceed. The constructor notifies the authorities that he will excavate the clay and replace it with sand.

This rule of paragraph (2) does not prejudice the service provider's right to resort to any of the remedies set out in Chapter 9 PECL.

If the client resumes co-operation after a period of passivity – whether or not in response to a warning given by the service provider – or if the service provider pursues the performance of the contract under paragraph (2), it is likely that the service will have become more costly for the latter and that he needs more time to achieve the

result required. This will not cause problems if payment of a fee based on an hourly rate was agreed upon at the time of conclusion of the contract. However, in the event that payment of either a fixed price or a fee based on a 'no cure no pay' basis was agreed upon, the service provider would incur a loss due to the client's failure to co-operate.

Illustration 7
A factory agrees with a specialised engineer that the latter will adjust a machine owned by the factory at a fixed price. The job will take about two weeks. The parties also agree upon the date upon which the service will have to start. When the engineer wants to start his work on the agreed date, factory employees tell him that he will not have access to the machine yet, 'but that access will be granted soon'. The engineer has to keep himself available for the service, but loses time and money.

In this example, the service provider may claim compensation for the loss suffered as a result of the client's non-performance of his duty to co-operate under paragraph (3) of the present Article. Such a claim may include an extension of time to perform the contract.

B. Interests at Stake and Policy Considerations

A codification of the duty to co-operate as regards service contracts raises several issues that have to be taken into account.

First of all, one might question the need to have specific duties to co-operate in the present Part. Although the duty to co-operate appears to be particularly relevant to service contracts, it might be argued that Article 1:202 PECL provides a general rule that suffices. On the other hand, one might argue that Article 1:202 PECL is too general and that commercial practice needs more specific duties in the context of a service contract.

A second issue to be dealt with concerns the extent to which particularly the client is to co-operate under a service contract. One might question whether the general criterion under Article 1:202 PECL ('to give full effect to the contract') is wide enough in the context of service contracts. The Principles of European Law on Commercial Agency, Franchising and Distribution Contract note that the obligation to co-operate under long-term (commercial) contracts is distinctly more intense than it is in most other contracts, because each party depends heavily on the other party's co-operation to achieve its objectives. Given that this is also characteristic of many service contracts, it would be an argument in favour of stating an intense duty to co-operate actively and loyally in order to achieve the objectives in view of which the contract was concluded. On the other hand, one might question whether a client should enable the service provider to earn the fruits of the contract even if the latter is perfectly able to do so without the client's support.

A third issue involves the need to state a rule that can now be found in subparagraph (1)(d) of the Article, imposing a duty on the service provider to enable the client to follow and check the service process. One might argue that such a duty is not required, given that – as in any contract – it is the service provider's sole responsibility to achieve the result required. On the other hand, notwithstanding the client's possibility to resort to a remedy in the event that the service does not lead to that result, it would be in his interest to be able to check the service on a regular basis whilst it is still carried out. First of all, it would enable him to establish the extent to which further co-operation is to be supplied. Moreover, he might timely anticipate a possible breach of the service provider's duty under Article 1:108 – provided that duty can be imposed on the latter – for instance by giving the service provider a direction under Article 1:109. By the same token, such a prevention of failure to achieve the result required, or to timely limit its consequences, would also be in the interest of the service provider.

A fourth and final issue relates to the remedial effect of the non-performance of the client's duty to co-operate in the context of a service contract. One might question whether the rules stated in paragraphs (2) and (3) are needed, given that the service provider may resort to any of the remedies under Chapter 9 PECL. On the other hand, it might be doubted whether it is practical to invoke any of these remedies in the event of non-performance of a duty to co-operate under a service contract. Resort to a remedy would indeed serve the interests of a seller under a sales contract if a buyer were to refuse to take delivery of the good sold. However, if a service provider is hindered in performing the service agreed upon, he is probably in the middle of performing a service contract which costs him extra money and time and from which he cannot walk away. Moreover, he will probably not want to walk away from it in practice, given that his interests are perhaps served better by a rule that would allow him to continue the service, to request compensation for costs and delay incurred as a result of the client's failure, and to earn the fruits of the contract without having to go to court. On the other hand, the client has an interest in not being tied to the service provider any longer if he does not want to be.

C. Comparative Overview

The duty to co-operate incumbent on parties to a service contract follows from the general duty to co-operate which is acknowledged in general contract law of all countries. Frequently occurring examples of the client's duty to co-operate under a service contract are to be found in AUSTRIA, BELGIUM, GERMANY, ENGLAND, FRANCE, THE NETHERLANDS, PORTUGAL, SPAIN and consist of the supply of information and directions, necessary for the service provider to perform the service; co-operating with the service provider for the purpose of obtaining licenses and permits; and co-ordinating the work of the service provider with activities of co-contractors. The duty of the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract is particularly recognized in AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, ITALY, THE NETHERLANDS, PORTUGAL.

D. Preferred Option

It is thought to be practical to deal explicitly with the most important and typical duties to co-operate under a service contract both in paragraph (1) of the present Article and in related Articles of Chapters 2 to 7 (see also Comment F below) of this Part. This enables commercial practice to determine how the abstractly defined duty to co-operate under Article 1:202 PECL is to be constructed in the context of a service contract. Moreover, the client's specific duties to co-operate under a service contract are at the very heart of this Part, together with the service provider's main obligation under Article 1:107 and/or Article 1:108. The importance of their interrelationship is reflected in many of the Articles of the present Chapter.

As regards the ambit of the client's duty to co-operate, there is common ground for adopting the principle of necessity in subparagraphs (1)(a), (b), and (c). That principle is recognised throughout the legal systems investigated. The word 'reasonably' has been added just to make sure that the duty does not extend to the supply of co-operation, which – although necessary – is no longer reasonable. It is, therefore, not meant to stretch the principle of necessity, but to make it subject to a normal test of reasonableness. The following illustration gives an example of a case in which this test will be applied to the detriment of the service provider:

> *Illustration 8*
> A fashion designer is carrying out a design contract for an international fashion company. The designer is dependent on regular instructions from an employee of the company as to how to proceed. The fashion designer rings the employee in the middle of the night to receive further necessary instructions. These phone calls are unanswered.

The service provider's duty to enable the client to follow and check the performance of the service whilst it is carried out is stated in subparagraph (1)(d) for various reasons, some of which have been mentioned above. What is essential to many service contracts is that the service is performed on the basis of the client's specific needs and wishes and that the client has an interest in determining whether his particular wishes are being fulfilled. He will not always be able to check this once the service has achieved a particular result. And even if he were able to do so, it would be a waste of money and time for both parties if the result achieved deviates from the result contracted for. If the latter can be prevented by allowing the client to check the service process regularly – which is already common for some service contracts – both parties will benefit. In the same way, the duty would enable the client both to exercise his rights under Articles 1:109, 1:111, and 1:115 and to perform his obligations under subparagraphs (1)(a), (b), (c), and (e) of the present Article, and under Article 1:113.

The rules stated in paragraphs (2) and (3) are needed in addition to the traditional remedies to which the service provider can resort under Chapter 9 PECL. The practical relevance of these remedies is limited to the context of the client's failure to co-operate. The service provider's interests are better protected by those rules. They will not bring him in the unprofitable position of having to walk away from the contract and seek

resort to court. The rules will allow him to continue the service and to earn the fruits of the contract. The interests of the client are sufficiently protected in the sense that he can always invoke his right to cancel the contract under Article 1:115. That Article is in fact a codification of the client's right to cease co-operation.

E. Relation to PECL and Other Parts of the Principles

Paragraph (1) of the present Article specifies the duties that are generally recognised particularisations of the general duty to co-operate under Article 1:202 PECL (Duty to Co-operate) incumbent on the parties to a service contract.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2), the rules under the present Article are applicable to the specific service contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles in Chapters 2 to 7 that modify or deviate from the rules in the present Article.

However, in addition to the client's duties under subparagraphs (1)(a), (b), (c), and (e) of the present Article, further duties to co-operate are imposed upon the client in Article 2:102 for construction contracts, in Article 3:102 for processing contracts, and in Article 5:103 for design contracts (Duty to Co-operate of the Client). As for construction and processing contracts, these extra duties involve giving access to the site and to the timely provision by the client, if agreed, of components, materials, and tools. Under a design contract, the extra duty of the client concerns the employment of special experts. The reasons for stating these extra provisions in Chapters 2 to 5 as well as their purport are further clarified in Comment A to Article 2:102, Comment D to Article 3:102, and Comment E to Article 5:103. These Comments also address the relevance of the other paragraphs of Article 1:104 – subparagraphs (1)(d), (2), and (3) – for construction, processing, and design contracts.

The duty of the service provider under subparagraph (1)(d) is detailed further in Article 2:105 (Inspection, Supervision and Acceptance) and Article 3:106 (Inspection and Supervision) in the particular contexts of construction contracts and processing contracts. These specific rules are explained and illustrated in Comment E to Article 2:105 and Comment E to Article 3:106.

There are no particularisations of Article 1:104 in Chapters 4, 6, and 7. The significance of Article 1:104 for storage, information, and treatment contracts is therefore explained and illustrated in the General Comments to these Chapters, particularly in Comment J (Chapter 4: Storage), Comment J (Chapter 6: Information), and Comment K (Chapter 7: Treatment).

G. Character of the Rule

This Article contains default rules.

H. Remedies

If a party fails to perform any of the duties in paragraph (1), the aggrieved party may resort to the remedies under Chapter 9 PECL. In this respect, no particularities are to be mentioned as regards the service provider's failure to perform a duty under subparagraph (1)(d) or (e). However, some observations can be made as regards the client's failure to co-operate under the present Article.

If the client does not supply any co-operation *at all*, one would face the traditional situation of *mora creditoris* (compare Article 8:101(3) PECL (Remedies Available)). In that situation, the service provider is unable to perform his main obligation under Article 1:108 – provided, of course, that this obligation can be imposed upon him – and/or Article 1:107, and for that reason he may raise the defence of Article 8:101(3) PECL (Remedies Available) against any claims put forward by the client. This is, for instance, what the dentist may do in the following example:

> *Illustration 9*
> Although a patient has agreed with a dentist to undergo treatment on a particular afternoon, he physically refuses to be treated once he is lying in the dentist's chair.

In addition, in such examples – when the client's failure to co-operate is not excused under 8:108 PECL (Excuse Due to an Impediment) – all remedies under Chapter 9 PECL are in principle open to the service provider. However, in the context of a service contract there may be occasions where a claim for a specific performance of the client's duty to co-operate will be excluded under Article 9:102(2) PECL (Non-Monetary Obligations). As regards the remedy of termination under Article 9:301 PECL (Right to Terminate the Contract), one could argue that non-performance of a duty to co-operate is fundamental under Article 8:103(b) PECL (Fundamental Non-Performance).

If the client fails to perform his duty to co-operate in the first instance, but resumes co-operation later on, much of what has been said above on remedies will still be applicable. In practice, however, the service provider will probably not want to resort to a remedy under Chapter 9 PECL; instead, he will try to claim extra payment and extension of time under Article 1:104(3) as explained under Comment A.

It is also possible that the client performs his duty to co-operate in a *defective* manner. He may, for instance, supply incorrect or inconsistent information, which leads the service provider in the wrong direction and may have several consequences: (1) the result envisaged by the client at the time of conclusion of the contract may not be achieved; (2) other interests of the client may be damaged, or (3) the service may become more expensive and/or may take more time than agreed upon in the contract.

Illustration 10
A supplier of computer networks is requested by the management of a hospital to install a tailor-made network on the basis of a design made on behalf of the hospital. The design, however, is defective. If the supplier were to follow the design exactly, the computer network would not serve the intended purposes.

This example is to be resolved as follows. If the service provider was under a (pre-contractual) duty to warn the client and failed to perform that duty, Article 1:103 or 1:110 applies. In that case, the remedies that can be invoked by the parties, given non-performance on both parts, are as set out in Comment I to Article 1:103 above and Comment I to Article 1:110 below. However, if the service provider was not under a duty to warn, the problem is to be dealt with as follows.

In situations (1) and (2), the client is not in the position to resort to any of the remedies under Chapter 9 PECL as a result of the rule under Article 8:101(3) PECL (Remedies Available). This solution is similar to the one described for the situation in which the client does not perform his duty to co-operate *at all*. In situation (3), the client's defective co-operation gives the service provider the right to resort to any of the remedies set out in Chapter 9 PECL, provided the non-performance of the client's duty is not excused under Article 8:108 (Excuse Due to an Impediment). But again, it would probably be much more practical if the service provider claimed extra payment and extension of time under Article 1:104(3).

Comparative Notes

1. *The client's specific duties to co-operate under a service contract*
The specific duties to co-operate incumbent on a client under a service contract follow from the general duty to co-operate (PECL art. 1:202) which is acknowledged in general contract law in many countries. See for the comparative and national notes to PECL art. 1:202: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. Frequently occurring examples of the client's duty to co-operate under a service contract are to be found in AUSTRIA and GERMANY *(Werkvertrag)*, BELGIUM and FRANCE *(louage d'ouvrage)*, ENGLAND *(contract for the supply of a service)*, THE NETHERLANDS *(aanneming van werk)*, PORTUGAL *(prestação de serviços*, particularly *empreitada)*, SPAIN *(contratos de obra)* and consist of: the supply of information and directions, necessary for the service provider to perform the service; co-operating with the service provider for the purpose of obtaining licenses and permits; and co-ordinating the work of the service provider with activities of co-contractors. Comparative legal references with respect to the specific duties of the client under a construction or processing contract (to provide access to the construction site; to hand over the thing to be processed; to provide components, materials and tools to the constructor or processor) and the specific duty of the client under a design contract (to employ other service providers with further expertise required to enable the designer to perform the design service) are to be found in the comparative and national notes to PELSC arts. 2:102, 3:102 and 5:103.

No information from DENMARK, GREECE, FINLAND, IRELAND, ITALY, LUXEMBURG, SCOTLAND, SPAIN, SWEDEN.

2. *The service provider's duty to co-operate*
The duty of the service provider to give the client a reasonable opportunity to determine whether the service provider is performing the obligations under the contract follows from the general duty to co-operate (PECL art. 1:202) which is acknowledged in general contract law in many countries. See for the comparative notes to PECL art. 1:202: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. The aforesaid specific duty of the service provider is particularly recognized in AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, ITALY, THE NETHERLANDS, PORTUGAL. Comparative legal references with respect to the aforesaid specific duty of the service provider under a construction or processing contract are to be found in the comparative and national notes to PELSC arts. 2:105 and 3:106.
No information from DENMARK, GREECE, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SPAIN, SWEDEN.

National Notes

1. *The client's specific duties to co-operate under a service contract*
AUSTRIA The duty to co-operate of a client to a service contract qualified as *Werkvertrag* is to be found in CC art. 1168. This duty encompasses a duty to supply information to the service provider to the extent that this is necessary for the performance of the service in accordance with the client's expectations (see for construction services: ÖNORM A 2060 2.6). Co-ordination of the work of various co-contractors is considered to be part of this duty as well (see for construction services: ÖNORM B 2110 5.14).
BELGIUM Similar to FRENCH law, service contracts qualified as *louage d'ouvrage* in BELGIAN law impose a duty upon the client to supply the service provider with the information that is necessary for the latter to perform the service (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 989 and 998; Jansen, Towards a European building contract law, pp. 133-136 and pp. 147-156 with references to standard forms of contracts). This duty includes the duty to give directions to the service provider to the extent that this is necessary for the performance of the service (cf. Jansen, Towards a European building contract law, p. 168), as well as a duty to co-ordinate the activities of the various service providers with whom the client has entered into a contract (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, no. 1002 ff; Jansen, Towards a European building contract law, pp. 184-185). In the context of construction services, these latter duties also follow from statutory law, see art. 4 *Loi sur la protection du titre et de la profession d'architecte*. Construction services usually also impose a duty upon the client to obtain permits and licenses (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, no. 986; Jansen, Towards a European building contract law, p. 174).
ENGLAND The client under a *contract for the supply of a service* has a duty to inform the service provider to the extent that this is necessary to enable the latter to perform the service: *Roberts v. Bury Commissioners* (1870) LR 5 C.P. 310; *J & J Fee Ltd. v. The*

Express Lift Co Ltd. (1993) ConLR 147 (cf. Jansen, Towards a European building contract law, pp. 133-136 and pp. 147-156 with references to standard forms of contracts). A duty to give further directions only exists to the extent that such directions are necessary. The duty is limited by the principle that stresses the service provider's independent position: he must carry out the service, within the framework of the client's expectations, as he thinks fit: *Clayton v. Woodman & Sons Ltd.* [1962] 1 WLR 585 (CA) (cf. Jansen, Towards a European building contract law, p. 169). The client's duty to co-ordinate the work of the service provider with the activities of other parties is recognised for construction services, but is absorbed by the duty of the client to give undisturbed access to the site (cf. Jansen, Towards a European building contract law, pp. 185-186; see also PELSC art. 2:102). The duty to obtain permits and licenses required for the service is also recognised in the particular context of construction services: *Porter v. Tottenham UDC* [1915] 1 KB 776 (cf. Jansen, Towards a European building contract law, p. 174).

FRANCE Service contracts qualified as *louage d'ouvrage* impose a duty upon the client to supply the service provider with the information that is necessary for the latter to perform the service: CA Paris 22 June 1983, *SA Olivetti/I.G.I.R.S.* and CA Paris 30 June 1983, *Passeport/Soc. Kienzle Informatique*, D. 1985, IR 43, note Huet; CA Colmar 15 May 1992, RD imm. 15(2) 1993, p. 228; Cass.civ. III, 7 May 1996, *SCI Saint-Lary Soulan vacances/Cie Mutuelle du Mans et autres*, RD imm. 18(4) 1996, p. 579, note P. Malinvaud and B. Boubli (cf. Jansen, Towards a European building contract law, pp. 133-136 and pp. 147-156, with references to standard forms of contracts). This duty includes a duty to give directions to the service provider (cf. Jansen, Towards a European building contract law, p. 168) and to co-ordinate the performance of the service provider with activities of co-contractors: Cass.civ. III, 6 November 1984, *Soc. C.F.E.M.*, RD imm. 7(2) 1984, p. 156 (cf. Jansen, Towards a European building contract law, p. 184). A duty to obtain permits and licenses is also incumbent on the client, particularly in the context of construction services: Cass.civ. III, 5 November 1980, *Chazelet*, JCP 1981.IV.32 (cf. Jansen, Towards a European building contract law, p. 174).

GERMANY The general duty to co-operate of any client, which can be derived from CC art. 293, has been particularised for services qualified as *Werkvertrag* in CC arts. 640 and 642. In the context of such services, the client must provide the service provider with the information the latter needs in order to perform the service in accordance with the client's expectations: BGH 29 November 1971, NJW 1972, p. 447 (cf. Jansen, Towards a European building contract law, pp. 133-136 and pp. 147-156, with references to standard forms of contracts). This duty includes a further duty to give directions, and to co-ordinate the activities of other contracting parties of the client with the activities of the service provider (Jansen, Towards a European building contract law, pp. 168 and 185). The client to a contract qualified as *Werkvertrag* will generally have to obtain the permits and licenses required for the service (OLG München 14 February 1978, BauR 1980, p. 275; cf. Jansen, Towards a European building contract law, p. 174).

THE NETHERLANDS If the service can be qualified as *aanneming van werk*, the client has a duty to inform the service provider about the client's expectations as regards the service, and the requirements that must be observed by the service provider. The duty is incumbent on the client to the extent that the supply of information is necessary to

enable the service provider to perform the contract (cf. Jansen, Towards a European building contract law, pp. 133-136 and pp. 147-156, with references to standard forms of contracts). A duty to co-ordinate the activities of other contracting parties of the client in connection with the service provider's performance of the service, is usually derived from this duty to inform (Jansen, Towards a European building contract law, p. 185). Generally speaking, the client has no additional duty to assist the service provider with directions, unless such duty has explicitly been agreed between the parties or can be derived from good faith, having regard to the circumstances of the case (HR 4 December 1970, *Bouchette/Van Limburg,* NJ 1971, 204, note G.J. Scholten). This decision is not opposed to recognising a duty of the client to give directions that are necessary for the service provider's performance of the contract (Jansen, Towards a European building contract law, p. 168). The client to a contract qualified as *aanneming van werk* will generally have to obtain the permits and licenses required for the service (Asser-Thunnissen, Bijzondere overeenkomsten. Overeenkomst van opdracht, arbeidsovereenkomst, aanneming van werk, no. 559), but if the contract leaves a considerable amount of freedom to the service provider (freedom as to how to carry out the functional specifications of the client), the duty may become incumbent on the service provider (Jansen, Towards a European building contract law, p. 174).

POLAND The duty to co-operate in any type of contract follows from the general rule of CC art. 354 para. 2, according to which the creditor is obliged to co-operate in the discharge of the obligation in accordance with its contents and in a manner complying with its socioeconomic purpose and the principles of community life, and if there are customs established in that respect, also in a manner complying with those customs. The client should take into account the justified interest of the other party and restrain himself form doing anything, which could complicate, stop or frustrate the performance of the contract (Bieniek, Komentarz do kodeksu cywilnego, tom I, p. 21). This, so-called, negative duty is always imposed on the client. A positive duty exists only if it follows from the nature of the obligation or the contract itself. In other cases the service provider cannot demand co-operation from the client, even if it would be justified by the service provider's interest or social reasons (Brzozowski in: Rajski, System Prawa Prywatnego, Tom 7, p. 340). The rules on the contract of specific work contain direct references to the duty to co-operate, which rests on the client. If the co-operation on the part of the client is required for the making of the work and such co-operation is lacking, the service provider may set the client an appropriate time limit with the sanction that after an ineffective lapse of that time limit he will be entitled to renounce the contract (CC art. 640).

PORTUGAL The client's specific duties to co-operate under a contract qualified as *prestação de serviços* (particularly *empreitada*) follow from the general principles of good faith: CC arts. 762 and 813. These duties include the supply of plans and instructions which comprise the information the service provider needs to perform the service. They further entail co-operation necessary to obtain permits and licenses (cf. Romano Martinez, Direito das Obrigações, no. 344).

SPAIN As is the case with any type of contract, the specific duties to co-operate of the client under *contratos de obra* and *contratos de servicio* follow from general principles of good faith (CC art. 1258). With respect to construction services, the typical co-operation duties of the client are stated in art. 9(2) of the *Ley 38/1999 de 15 de Noviembre or*

Ley de Ordenación de la Edificación and consist of the supply of all documents and information necessary to allow the execution of the construction service and to get all necessary licenses and administrative permits.

2. *The service provider's duty to co-operate*

AUSTRIA The service provider has a duty under *Werkvertrag* to allow the client to check the performance of the service whilst it proceeds: Rummel [*-Krejci*], ABGB Kommentar, art. 1170, no. 5. See also ÖNORM A 2060 2.11 in the context of construction services. As to treatment services *(Behandlungsvertrag)*, art. 5a Z 1 *KAG* constitutes the right of the patient to view records corresponding to the obligation set forth in art. 10 *KAG*.

BELGIUM As regards services qualified as *louage d'ouvrage*, the service provider must allow the client to check the performance of the service. This has particularly been established in the context of construction services (cf. Jansen, Towards a European building contract law, pp. 192-199).

ENGLAND The duty of the service provider to allow the client to determine, in the course of the service process, whether or not the provider performs the service in conformity with the contract, has particularly been established in the context of construction services (cf. Jansen, Towards a European building contract law, pp. 192-199, with references to standard forms of contracts).

FRANCE Similar to BELGIAN law, a service provider must allow a client under a contract qualified as *louage d'ouvrage* to check the service process. Particularly in the context of construction services, the duty is generally accepted (cf. Jansen, Towards a European building contract law, pp. 192-199, with references to standard forms of contracts).

GERMANY If the parties have entered into a *Werkvertrag*, a duty is imposed upon the service provider to allow the client to check the performance of the service whilst it proceeds (cf. Jansen, Towards a European building contract law, pp. 192-199, with references to standard forms of contracts).

ITALY It follows from the rule under CC art. 1662 that the provider of a service qualified as *appalto* must allow the client to examine the service process (Cass. 18 January 1980, no. 434, in Rep.Foro it., V° *Appalto*, c. 1:115, no. 13; Cass. 10 May 1965, no. 891, in Riv.giur.edil., 1965, I, p. 945, with comment by E. Favara, Limiti del controllo del committente sull'opera dell'appaltatore. Art. 21 of the Medical Deontological Code imposes a duty upon the provider of treatment services to put all medical reports at the disposal of the client.

THE NETHERLANDS A duty to allow the client to check the service process is imposed upon service providers both in contracts qualified as *aanneming van werk* (cf. Jansen, Towards a European building contract law, pp. 193-199, with references to standard forms of contracts), as well as in contracts qualified as *opdracht* (CC art. 7:403(1)). In case of treatment services qualified as *overeenkomst inzake geneeskundige behandeling*, CC art. 7:456 gives the client the right to view medical records and to obtain a copy of the documents included in the records, unless the privacy of a third party is at stake.

POLAND The service provider's duty to co-operate follows from the general rule of CC art. 354 para. 1, according to which the creditor is obliged to co-operate in the discharge of the obligation in accordance with its contents and in a manner complying

with its socioeconomic purpose and the principles of community life, and if there are customs established in that respect, also in a manner complying with those customs. The service provider should take into account the justified interest of the other party and restrain himself from doing anything, which could complicate, stop or frustrate the performance of the contract (Bieniek, Komentarz do kodeksu cywilnego, tom I, p. 21). In the contract of specific work, the service provider is obliged to respect the client's right to control the performance of the contract (Brzozowski in Rajski, System Prawa Prywatnego, Tom 7, p. 337). In the case of mandate the service provider is obliged to inform about the activities undertaken in order to perform the contract, just in case the client would like to give some additional instructions as to the performance of the contract (Ogiegło in Rajski, System Prawa Prywatnego, tom 7, p. 447).
PORTUGAL The service provider's duty to allow the client to determine in the course of the process, whether the service is in accordance with the contract qualified as *prestação de serviços* (particularly *empreitada*), follows from CC art 1209 para. 1: CA Porto, 15 June 1973, BolMinJus 229, 235.

Article 1:105: Circumstances in which the Service Is to Be Performed

The service provider must, in so far as this is reasonably necessary for the performance of the service, collect information about the circumstances in which the service has to be performed and ensure that performance of the service takes into account these circumstances.

Comments

A. General Idea

Although a service provider may offer standardised services to the public in general, a service is often offered to a particular client and tailor-made to the needs of that client. In both cases, and depending on the type of service, the following three factors are thought to be jointly capable of influencing the outcome of the service process: (1) the (particular) needs of the client, (2) the services provider's (tailor-made) solution that fits these needs, and (3) the circumstances in which that solution is to be applied in order to achieve the result the client has in mind. The main purpose of the present Article is to impose a duty on the service provider to take into account the latter circumstances whilst performing the service as illustrated in the following example:

Illustration 1
An oil production plant hired a specialised constructor to repair pipes that were damaged due to regular pressure. Before starting the actual repair work, the constructor will not only have to establish the way in which other parts of the installation influence the functioning of the pipes, but also have to find out how the functioning of the pipes affects the functioning of other parts of the installation.

The additional purpose of this Article – which is closely related to its primary purpose – is to impose a duty on the service provider to collect information concerning important circumstances in which the service is to be performed. This information must become available to the extent that it enables the service provider to perform his primary duty under the present Article as described above. This ancillary and *contractual* duty to collect information is similar to its *pre-contractual* counterpart under Article 1:103(1). As explained in Comment A to the latter Article, however, the main purpose of the information that is to be collected *prior to* the conclusion of the contract is to enable the service provider to make an informed offer to the client as regards the service that he can supply. Under the present Article, the main purpose of the ancillary duty to collect information is to attune the required service to the surrounding circumstances in order to achieve the result the client has in mind. This is further illustrated in the following example:

> *Illustration 2*
> A management consultant agreed to investigate the logistics department of a large food production factory and to advice on a possible reorganisation of the department. Once the contract is concluded, the consultant is to gather information as regards the ages, education, job descriptions and career developments of the employees working at the department. She further is to gather information about the internal and external work processes that take place at the logistics department.

The ancillary duties to collect information – either under Article 1:103(1) or under the present Article – have the same secondary purpose, in the sense that they may activate the service provider's duty to warn under Article 1:103(1) and Article 1:110(1).

B. Interests at Stake and Policy Considerations

The main issue that is to be addressed here is whether an express duty is needed that is self-evidently imposed upon a service provider and that would perhaps also be covered by the service provider's general duty of care under Article 1:107. This question particularly arises when we take into account that it is not easy to see what remedies the client might resort to in the event that the service provider fails to perform the duty under the present Article. Such non-performance will probably only become relevant if it causes the service provider not to achieve the result stated or envisaged by the client, in which case the latter may rather invoke a remedy on the basis of the non-performance of the service provider's obligation stated in Article 1:108. On the other hand, one has to take into account that the latter obligation will not always be imposed on every service provider in every case (see Comments A and D to Article 1:108). This means that the duty under the present Article, in connection with the duty under Article 1:107, may still be needed for the purpose of resorting to remedies if the result the client wants to obtain through the service has not been achieved.

Such a duty would also stimulate the service provider to devote his attention to an important condition for achieving the result envisaged by the client: the surrounding

circumstances in which the service is to be carried out. If necessary, the parties can discuss difficulties arising from these circumstances before the actual service process begins. This may prevent the need for adjustments, which will often be much more costly.

One may further argue that achieving the result – whether application of the test of Article 1:108 amounts to an obligation of the service provider to do so or not – will be stimulated by the client's ability to confront the service provider in good time with his failure to attune the service to the specific circumstances of the case. This proposition is to be regarded in the light of the client's options to check the service process in various ways. First of all, he may do so exercising his right under Article 1:104(1)(d). Checking and following the service process – and noticing that the service is not adequately attuned to the surrounding circumstances – may further take place if the parties communicate with one another as a consequence of the performance of ancillary duties under the contract; examples are requests by the service provider for information and directions under Article 1:104(1)(a) and (b), the co-ordination of activities under Article 1:104(1)(e), the issuing of a warning by the service provider under Article 1:110, as well as communication in the context of a variation under Article 1:111. If, as a result of any such communication, the client finds out that the service provider fails to perform the duty stated in the present Article, he may anticipate the failure to achieve the result he wishes to obtain from the service by taking appropriate action. Such action may consist of a notification under Article 1:113, a direction under Article 1:109, or a demand for adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance).

C. Comparative Overview

The rule of the present Article can be seen as a particularisation of Article 1:107 (General Standard of Care for Services). As is explained in Comment C to that Article, it is established law in the countries investigated that any service provider owes the client a duty to perform the service with reasonable care and skill. This duty usually follows from general contract law provisions dealing with good faith although (additional) specific provisions dealing with the duty of reasonable care and skill of the service provider can be found in specific contract law of many countries as well.

D. Preferred Option

The ability of a service provider to achieve a particular result through the service depends on several factors, one of which is his ability to attune the service to the particular surrounding circumstances. One should bear in mind that if the desired result is not achieved – for instance because the service provider failed to adjust the service to these circumstances – the client will not always be able to invoke non-performance of the obligation under Article 1:108. The reason is that this obligation is not always imposed on every service provider in every case (see Comments A and D to Article 1:108). If it is not, the client will have to invoke the non-performance of another duty

in order to seek a remedy. This may be the duty imposed upon the service provider under the present Article. Such a duty arises, for instance, in the example given in the following illustration:

> *Illustration 3*
> A geo-technical surveyor is requested to investigate the subsoil conditions of a particular piece of land and to advice on the necessity of extra foundation works, for the purpose of a building that is to be erected on that piece of land. The surveyor fails to take into account the geo-technical influence of a nearby tidal river and gives to his client the wrong advice.

Furthermore, an explicit duty as provided for in the present Article may stimulate the service provider to achieve the result envisaged by the client, particularly if the latter can anticipate the failure to achieve such a result by invoking the failure to attune the service to the surrounding circumstances in the course of the service process under Article 1:113.

E. Relation to PECL and Other Parts of the Principles

The duty imposed upon the service provider in this Article may be seen as an implied term under Article 6:102 PECL (Implied Terms) stemming from the nature of a service contract.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2), the rules under the present Article are applicable to the specific service contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles in Chapters 2 to 7 that modify or deviate from the rules in the present Article. The duty imposed upon the service provider in this Article, however, has been particularised in Articles 3:103, 4:103, 6:102, and 7:102 (Circumstances in which the Service Is to Be Performed) for processing contracts, storage contracts, information contracts, and treatment contracts. The reasons for these particularisations as well as their purport are further clarified in Comment A to Article 3:103, Comment E to Article 4:103, Comment E to Article 6:102, and Comment E to Article 7:102.

The significance of the present Article for Chapters 2 and 5 is explained and illustrated in the General Comments to these Chapters, particularly in Comment K (Chapter 2: Construction) and Comment I (Chapter 5: Design).

G. Character of the Rule

This Article contains default rules.

H. Remedies

Interpretation of the contract, with the help of the rules of Article 1:108, may lead to the conclusion that the service provider is to achieve a result stated or envisaged by the client. The former may fail to achieve that result due to non-performance of the duty stated in the present Article. If that is the case, it is in the client's interest that he invokes non-performance of the service provider's obligation of Article 1:108 under Article 8:101(1) PECL (Remedies Available). As is explained in Comment G to Article 1:108, the burden of proof imposed on the client will then be limited, and the service provider will have to prove that the non-performance is excused under Article 8:108 PECL (Excuse Due to an Impediment). In this scenario, it is not likely that the client will invoke non-performance of the duty under the present Article, as his burden of proof will be extensive. Moreover, a claim that would in effect seek double compensation for the same damages would in any event be barred on the basis of the principle underlying Article 9:502 PECL (General Measure of Damages).

As is explained in Comments A and D to Article 1:108, the obligation to achieve a particular result will, however, not be imposed upon every service provider in every situation. If it is not imposed, the client may be led to invoke non-performance of the duty stated in the present Article. There are two situations where this may be relevant.

The first situation is when the service has been carried out and did not lead to the result envisaged by the client. This situation would occur, for instance, in the example given in *Illustration 3* above if the client acted upon the wrong advice of the geo-technical surveyor. Here, the client would have to submit either that the surveyor did not collect information about the geo-technical circumstances vital for his investigation, or that he did not see to it that the investigation was attuned to these circumstances. In such cases, the service provider will be allowed to raise the defences of Article 8:101(3) PECL (Remedies Available) and Article 8:108 PECL (Excuse Due to an Impediment). The client may resort to any of the remedies under Chapter 9 PECL if the service provider's defences are raised in vain.

The second situation in which the client may invoke non-performance of the duty under the present Article is when the service is still in progress. This situation is illustrated in the following example, a variant of Illustration 3.

> *Illustration 4*
> A geo-technical surveyor is requested to investigate the subsoil conditions of a particular piece of land and to advice on the necessity of extra foundation works, for the purpose of a building that is to be erected on that piece of land. Whilst the surveyor is carrying out his investigation, it is discovered that he does not to take into account the geo-technical influence of a nearby tidal river.

Here, the client may exercise his right under Article 1:104(1)(d) and find out either that the service provider did not collect information about the circumstances in which the service has to be performed or that he did not see to it that performance of the service was attuned to these circumstances. If this is the case, the client will most likely

notify the service provider under Article 1:113(1) and submit that the latter will fail to achieve the result the client has in mind. In addition, the client may demand adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance), a course of action which may eventually even lead to termination of the contract under Article 8:105(2) PECL.

Comparative Notes

1. *The duty of the service provider to take into account the circumstances in which the service has to be performed*
   The duty of the service provider to perform the service following the requirements specified by the contract follows from PECL art. 6:102 (Implied Terms) and PECL art. 6:108 (Quality of Performance). PELSC art. 1:105 states an additional rule which may be seen as implied terms under PECL art. 6:102, stemming from the nature of a service contract. Furthermore, the rule is related to PECL art. 6:108, which requires performance of 'at least average quality' if the contract does not specify the quality. See for the comparative and national notes to PECL art. 6:102 and 6:108: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. Finally, the rule of PELSC art. 1:105 can be seen as a particularisation of PELSC art. 1:107 and the reader is referred to the comparative and national notes pertaining to that provision. Comparative legal references with respect to the specific duties of the service provider, particularising the duty of PELSC art. 1:105 for processing and storage services (to collect information about the characteristics of the thing on which the service is to be performed or which is to be stored), for information services (to collect information about: the particular purpose for which the client requires the information; the client's preferences and priorities in relation to the information; the decision the client can be expected to make on the basis of the information; the personal situation of the client) and for treatment services (to interview the patient about his health condition, symptoms, previous illnesses, allergies, previous or other current treatment and the patient's preferences and priorities in relation to the treatment; to carry out the examinations necessary to diagnose the health condition of the patient; to consult with any other treatment providers that are involved in the treatment of the patient) are to be found in the comparative and national notes to PELSC arts. 3:103, 4:103, 6:102 and 7:102.

Article 1:106: Duties of the Service Provider regarding Input

(1) The service provider may subcontract the performance of the service in whole or in part without the client's consent, unless personal performance is of the essence of the contract.
(2) Any subcontractor so engaged by the service provider must be of adequate competence.
(3) In so far as the service provider uses tools and materials for the performance of the service, they must be in conformity with the contract and the applicable statutory rules, and fit to achieve the particular purpose for which they are to be used.

(4) In so far as the service provider must transfer ownership to the client of an immovable structure, a movable or incorporeal thing, or a right, such transfer must be free from any right or claim of a third party.
(5) The service provider must adequately plan the performance of the service.
(6) In so far as subcontractors are nominated by the client or tools and materials are provided by the client, the responsibility of the service provider is governed by Article 1:109 and Article 1:110.

Comments

A. General Idea

The supply of a service can be described as a process by which the service provider performs work undertaken according to the particular wishes and needs of the client, in order to achieve a particular result. The work undertaken requires in any event the supply of labour and could also involve the input of tools, materials, and components. This Article imposes duties upon the service provider with respect to the service process itself, particularly as regards the selection of tools, materials, and components to be supplied under the service contract. It further states rules in the event that subcontractors are involved in carrying out the service. Paragraph (2) and (5) of the Article are to be read in connection with Article 1:107. The duties under these paragraphs are to be performed with the care and skill required under that Article. Paragraph (3), however imposes strict duties upon the service provider, which cannot be performed by merely acting with care and skill.

Paragraph (1) allows as a principle the service provider to subcontract his obligations under the service contract, either in part or in whole. He may do so without the client's consent, subject to the restriction that personal performance is of the essence of the contract. Whether or not personal performance is of the essence depends on the circumstances of the case and is left to the court to determine. In the following illustration an example is given of a case where personal performance is of the essence:

> *Illustration 1*
> A fashion company enters into a contract with a famous fashion photographer. The company instructs the photographer to make photographs of the latest fashion line of the company for the purpose of illustrating their catalogue. The photographer decides to shoot the indoor pictures himself but to subcontract the outdoor shooting to another professional photographer.

The duty that is imposed on the service provider in paragraph (2) implies that he is to select subcontractors who generally should be capable of performing the service or part thereof subcontracted. The fact that the service provider subcontracted part of the service does not relieve him from his obligations under the contract, subject to the rule of paragraph (6), as follows from Article 8:107 PECL (Performance Entrusted to Another).

Paragraph (3) imposes duties upon the service provider regarding the quality of the tools, materials, and other components to be used in the course of the service. These duties amount to a strict obligation to select tools, materials, and other components of such quality as is needed to ensure that the result the client wishes to obtain through the service will actually be achieved. The duty that is imposed upon the service provider under paragraph (5) amounts to the same effect.

The service is to be performed on the basis of the wishes and needs specified by the client. The client may want the service or part thereof to be performed by specific subcontractors, in which case he will nominate them to the service provider.

> *Illustration 2*
> The Ministry of the Interior awards a contract for the investigation of corruption practices in civil service to a specialised consulting agency. The Ministry insists that part of the investigation – the analysis of the credibility of existing internal reports dealing with the subject matter – is to be carried out by a specialised research institute.

The client may further wish that the service be carried out with the help of tools, materials, and other components to be supplied by him.

> *Illustration 3*
> A house owner agrees with a painter that the latter will paint all the doors of the house with special paint bought by the owner of the house himself.

If the service is carried out by nominated subcontractors or with the help of tools, materials, and components supplied by the client, it may happen that the result the client envisages to obtain through the service will not be achieved. In that case, the service provider's liability is to be established under paragraph (6) in conjunction with Article 1:109(2), given that both the nomination of a subcontractor as well as the actual supply of tools, materials, or other components by the client are thought to be equal to the issuing of a direction by the client under Article 1:109(1). Article 1:109(2) also provides rules for the situation where the client directs the service provider to use inadequate tools, materials, or other components – i.e. selected, though not actually supplied by the client himself – whether or not to be obtained by the service provider from a nominated subcontractor.

Finally, paragraph (4) of the present Article contains a rule for the situation where the supply of the service might touch upon questions of transfer of ownership. These questions will particularly arise in the event of services whose purpose it is to produce tangible structures or things, or the alteration of such structures and things, by means of adding other tangible things to them. However, questions could also come up in the context of intellectual property rights in the event of a service that involves the supply of an incorporeal thing, like the one in the following example:

Illustration 4
A client enters into a contract with a computer shop. The purpose of the contract is to change the mainframe of the client's personal computer and to install on that computer the latest version of a well-known anti-virus software program.

In such cases, interpretation of the contract will lead to the conclusion that the parties have impliedly agreed upon transfer of ownership of the structure or thing produced as a result of the service. The same goes for the supply of materials, components, and all other things – corporeal or incorporeal – as inherent to the service. The rule of paragraph (4) states that such a transfer must be free from third party rights, including intellectual property rights. The present Part on Service Contracts does not deal with the time of transfer of ownership. The rules governing the actual transfer of ownership of movable things can be found in the Part of the Principles that deals with transfer of moveable goods and in national rules on the transfer of immovable property.

B. Interests at Stake and Policy Considerations

The main issue that is to be dealt with here is the same as the one that was addressed in Comment *B* to Article 1:105. Again the question arises whether explicit rules are needed stating duties that are self-evidently imposed upon a service provider and that might also be derived from his main obligation under the contract. In addition, one may even argue that it is difficult to see what remedies the client may resort to in the event that the service provider fails to perform these duties. Such a failure will probably coincide with a failure of the service provider to achieve the result envisaged by the client, in which case the latter would rather invoke a remedy on the basis of the non-performance of the service provider's obligation stated in Article 1:108. On the other hand, that obligation will not always be imposed on every service provider in every case (see Comments A and D to Article 1:108). This would imply that the duties under the present Article are still needed in order to enable the client to resort to a remedy.

It could further be argued that it is useful to regulate the quality of the input into the service process because it gives the service provider incentives to prevent the result envisaged by the client from not being achieved. It would stimulate the service provider to select competent subcontractors and to use adequate tools, materials, and components. It would give him an extra reason to organise and plan the service process adequately.

Rules dealing with the quality of the service provider's input into the service process would also make it easier for the client to take precautionary actions. It is typical for a service process that the client has the ability to check and follow the service process whilst it proceeds. The present Chapter contains various provisions that support this ability. The client may, for instance, use his right under Article 1:104(1)(d). He may further receive valuable information as a consequence of the interaction that takes place between him and the service provider, given the performance of ancillary duties under the contract. He may receive requests for information and directions from the service provider under Article 1:104(1)(a) and (b). Interaction may also take place in the framework of the co-ordination of activities under Article 1:104(1)(e), the issuing

of a warning by the service provider under Article 1:110, as well as in the context of a variation under Article 1:111. Taken together, such an interaction may lead to the client's discovery that the service provider failed to select competent subcontractors, or that he failed to select adequate tools, materials, or components. This may even disclose the risk that the result envisaged by the client will not be achieved. Rules imposing a duty upon the service provider as regards the quality of the input into the service process would then enable the client to anticipate the breach of the latter's main obligation by taking precautionary actions. He might notify the service provider under Article 1:113 or give a direction under Article 1:109. He might also demand adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance). This would be advantageous for both parties as disputes about quality will be solved as early as possible in the process and not at the final stage, when it probably will be much more costly to accomplish changes.

C. Comparative Overview

The service provider is allowed to subcontract parts of the service without further conditions in AUSTRIA and GERMANY (in case of a *Werkvertrag*) and in PORTUGAL (in case the service is qualified as *empreitada*). The right to subcontract can, on the other hand, also be dependent on the intentions of the contracting parties and to other circumstances of the case, particularly the degree of *intuitu personae* of the service: AUSTRIA and GERMANY (in case of a *Dienstvertrag*), BELGIUM, ENGLAND, THE NETHERLANDS, SPAIN. This principle also exists in FRANCE, but is less relevant for services contract law as a result of statutory provisions which impose a duty upon service providers in general to ask the client's permission before entering into a subcontract. The latter approach is also followed in ITALY in case of services qualified as *appalto* and in many standard forms of contracts used in construction services practice. In all the aforesaid countries, including SWEDEN, it is established law that the service provider remains responsible towards the client for the part of the service entrusted to the subcontractor, as if that part were performed by the service provider himself.

As regards the duties of the service provider with respect to the quality of tools and materials used in the course of the service, many of the aforesaid countries acknowledge the rule that the provider must in principle use tools and materials of good quality and fit for their intended purpose. The responsibility of the service provider for these tools or materials may however be limited in AUSTRIA, BELGIUM, ENGLAND, GERMANY and THE NETHERLANDS, in the event that inadequate quality requirements were specified by the client.

D. Preferred Option

The ability of a service provider to achieve the result envisaged by the client depends on several factors, one of which is his ability to select competent subcontractors and to use tools, materials, and components that are of good quality and fit for their purpose. If, subsequently, the desired result is not achieved because the service provider failed to

select such subcontractors, tools, materials, or components, the client will not always be able to resort to a remedy on the basis of the allegation that the service provider failed to perform the obligation under Article 1:108. The reason is that the said obligation is not imposed on every service provider in every case (see Comments A and D to Article 1:108). If it is not, the client will have to invoke non-performance of another duty in order to be able to resort to a remedy. This may be one of the duties imposed on the service provider in the present Article.

Illustration 5
The owner of a seventeenth century painting, which has been exposed to smoke and other damaging conditions for centuries, agrees with a specialist restorer to try to bring back the original colours of the painting without damaging it. The restorer uses a steel brush that is too stiff to do the job and subsequently damages the painting.

In this example, the client will not be able to claim on the basis of Article 3:105 (Conformity) – the applicable particularisation of Article 1:108 – given that the obligation under that Article cannot be imposed upon the specialist cleaner. However, the client will be able to claim on the basis of paragraph (3) of the present Article.

Furthermore, by making the aforesaid duties explicit – as is done in the present Article – the service provider is stimulated to achieve the result envisaged by the client. This will particularly be the case if the latter can anticipate the failure to achieve such a result – which is inherent in his ability to check and follow the service process whilst it proceeds – by invoking the failure to select either competent subcontractors or adequate tools, materials, and components.

Particular problems may arise when the client has instructed the service provider to use particular tools, materials, and components – whether or not to be obtained from a nominated subcontractor – that turn out to be inadequate. The following illustration gives a good example of this:

Illustration 6
A storer has agreed with a client to store liquid nitrogen. The storer is instructed to use a particular machine for keeping the nitrogen at the right temperature. This machine, however, turns out to be defective, due to which the nitrogen can no longer be used for certain industrial purposes.

This issue is dealt with in Article 1:109 and 1:110 (see particularly Comments A and D to Article 1:109).

E. Relation to PECL and Other Parts of the Principles

The service provider will always be under an obligation to perform the service following the requirements specified in the contract. That obligation follows from Article 6:102 (Implied Terms) and Article 6:108 PECL (Quality of Performance) and is not repeated

here. The additional rules in paragraphs (2), (3), and (4) of this Article may be seen as implied terms under Article 6:102 PECL stemming from the nature of a service contract. Furthermore, they are related to Article 6:108 PECL, which requires 'performance of at least average quality' if the contract does not specify the quality.

Paragraph (1) particularises the rule in Article 7:106 PECL (Performance by a Third Person), which makes performance by a third party possible unless the contract requires personal performance. When a third party is involved in the performance of the contract, the party that entrusts the performance to this third party is still responsible for the performance under Article 8:107 PECL (Performance Entrusted to Another). The rules of the present Article do not change this; they add a duty to the service provider's duties, viz., select adequately the subcontractors involved in the performance of the service.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2), the rules under the present Article are applicable to the specific service contracts that are dealt with in Chapters 2 to 7 of this Part unless provided otherwise in these Chapters. There are no Articles in Chapters 2 to 7 that modify or deviate from the rules in the present Article, apart from Article 4:104(2) (Duties of the Storer regarding Input), which prohibits subcontracting without the client's consent. The duties imposed upon the service provider in this Article have been particularised in Article 4:104(1) (Duties of the Storer regarding Input), Article 6:103 (Duties of the Information Provider regarding Input) for information contracts, and in Article 7:103 (Duties of the Treatment Provider regarding Input) for treatment contracts.

The aforesaid Articles are all specifications of paragraph (3) of the present Article. The reasons for these particularisations as well as their purport are further clarified in Comment E to Article 4:104, Comment E to Article 6:103, and Comment E to Article 7:103. These Comments also address the relevance of the other paragraphs of Article 1:106 for storage contracts, information contracts, and treatment contracts.

The significance of the present Article for Chapters 2, 3, and 5 is explained and illustrated in the General Comments to these Chapters, particularly in Comment L (Chapter 2: Construction), Comment J (Chapter 3: Processing), and Comment J (Chapter 5: Design).

G. Character of the Rule

This Article contains default rules.

H. Remedies

The issue of remedies will be discussed below, following the distinction that can be made between paragraphs (1), (2), (3), and (5) on the one hand and paragraph (6) on the other. The first set of paragraphs contains duties of the service provider as to the selection of subcontractors, tools, materials, and components by himself. Paragraph (6) deals with the selection of subcontractors and the actual supply of tools, materials, and components by the client.

As regards the former set of duties, while Article 1:108 imposes a duty on the service provider to achieve a particular result, he may fail to achieve that result due to non-performance of one or more of the duties stated in the paragraphs mentioned. If this is the case, it is in the client's interest to invoke non-performance of the service provider's obligation stated in Article 1:108 under Article 8:101(1) PECL (Remedies Available). As is explained in Comment G to Article 1:108, the burden of proof imposed upon the client will then be limited, and the service provider will have to prove that the non-performance is excused under Article 8:108 PECL (Excuse Due to an Impediment). In this scenario, it is not likely that the client will invoke non-performance of a duty under paragraphs (1), (2), (3), or (5) of the present Article as he will then have a heavier burden of proof. An example of a case will the client will most likely claim on the basis of Article 1:108 in conjunction with Article 3:105 is given in Illustration 7

> *Illustration 7*
> A garage manager agreed with a car owner to replace the exhaust pipe of the latter's car. The materials used by the mechanic to connect and attach the exhaust pipe to the car are not strong enough. As a result, the pipe comes down after a few days.

Moreover, a claim that would in effect seek double compensation for the same damages would in any event be barred on the basis of the principle underlying Article 9:502 PECL (General Measure of Damages).

As is explained in Comments A and D to Article 1:108, the obligation stated in that Article will, however, not be imposed upon every service provider in every situation. If it is not imposed, the client may be led to invoke non-performance of a duty of the service provider under paragraphs (1), (2), (3) or (5) of the present Article. There are two situations where this may be relevant.

The first situation is when the service has been carried out and did not lead to the result envisaged by the client. This is in fact what happened in the example given in *Illustration 5*. In that example, the client would have to submit that the specialist restorer failed to perform the duty imposed upon him in paragraph (3). He will be allowed to raise the defences of Article 8:101(3) PECL (Remedies Available) and Article 8:108 PECL (Excuse Due to an Impediment). The owner of the painting may resort to any of the remedies under Chapter 9 PECL if the service provider's defences are raised in vain.

The second situation in which the client may invoke the non-performance of a duty under paragraphs (1), (2), (3), or (5) of the present Article is when the service is still in progress. If the client exercises his right under Article 1:104(1)(d), he may find out that the service provider fails to perform any of the duties provided for in the paragraphs mentioned. In that case, the client will most likely notify the service provider under Article 1:113(1), submitting that the latter will fail to achieve the result required:

> *Illustration 8*
> The insurer of the victim of a car accident negotiated in vain with the insurer of the driver of the car who caused the accident. The claimant insurer hires a law firm to bring the case to court in order to obtain maximum compensation. The law firm enters into a contract with a bureau that pretends to be specialised in calculating car accident damages. The bureau makes calculation mistakes on the basis of which the claimant insurer is advised by the law firm to bring a claim to court which does not cover all the losses she will suffer in the future. The client discovers this before the claim is brought to court.

The client may demand adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance), a course of action which may eventually even result in termination of the contract under Article 8:105(2) PECL.

The analysis above, as well as its outcome, may be different in the event that the client nominated incompetent subcontractors or supplied inadequate tools, materials, or components. These factors may cause the outcome of the service process not to be in accordance with the result the client had in mind or give reason to suspect in the course of the process that the result envisaged will not be achieved:

> *Illustration 9*
> A interior designer who has been contracted for the interior design of a school is instructed by his client to subcontract part of his job to a company that purports to be specialised in acoustics. In fact, this company has no expertise whatsoever in this field.

> *Illustration 10*
> A garage manager agreed with a car owner to install a second-hand spoiler on the car. The car owner bought the spoiler in a dump shop and hands it over to the garage for installation. The spoiler is defective.

The client's claim on basis of non-performance either under Article 1:108 or of any of the duties of the service provider stated in paragraphs (1), (2), (3), or (5) of the present Article will in these and similar cases have to be considered in the light of the client's poor nomination or supply. Such an act is to be treated in the same manner as any other act or failure of the client dealt with in other Articles of this Chapter – Article 1:103(4), 1:104(1)(a), (b), (c), or (e), and 1:109(1) – to the extent that such act or failure would amount to a situation of defective co-operation. This explains why paragraph (6) of the present Article is linked to Article 1:109 and 1:110.

If the service provider was under a duty to warn the client about the incompetence of the nominated subcontractors or the inadequacy of the tools, materials, or components supplied by the client, and failed to perform that duty, Article 1:110 will apply. In that case, the remedies that can be invoked by the parties, given their mutual failures, are as set out in Comment I to Article 1:110 below. But if the service provider was not under a duty to warn, the client cannot resort to any of the remedies under Chapter 9 PECL as a result of the rule under Article 8:101(3) PECL. This particularly goes for the situation where the client supplies inadequate tools, materials, or components. As regards the situation of nomination by the client it is noted, however, that mere nomination of less competent workforce will not necessarily have to cause 'non-performance of one or more of the duties of the service provider under Article 1:107 or 1:108' as stated in Article 1:109(2). Such non-performance cannot only be prevented by the service provider through the issuing of a warning under Article 1:110 as explained above, but also by adequately performing his duty to manage these nominated subcontractors.

Comparative Notes

1. *Performance of the service through subcontractors*
   The service provider is unconditionally allowed to subcontract parts of his contractual performance in AUSTRIA *(Werkvertrag)*, GERMANY *(Werkvertrag)*, and in PORTUGAL *(prestação de serviços: empreitada)*. The right to subcontract can, on the other hand, also be dependent on the intentions of the parties to the contract and to other circumstances of the case, particularly the degree of *intuitu personae* of the service: AUSTRIA (CC art. 1153; *Dienstvertrag*), GERMANY (CC art. 613; *Dienstvertrag*), BELGIUM *(louage d'ouvrage)*, ENGLAND *(contract for the supply of a service)*, ITALY (CC art. 1180), THE NETHERLANDS (CC art. 6:30(1) and CC art. 7:751; *aanneming van werk* as well as CC arts. 6:30(1) and 7:404; *opdracht*), SPAIN (art. 17(6) of the *Ley 38/1999 de 15 de Noviembre or Ley de Ordenación de la Edificación*). This principle also exists in FRANCE on the basis of CC art. 1237, but is less relevant for services contract law as a result of art. 3 of the *Loi du 31 Décembre 1975* on subcontracting, which imposes a duty upon service providers in general to ask the client's permission before entering into a subcontract. The latter approach is also followed in ITALY for services qualified as *appalto* (CC art. 1656) and in many standard forms of contracts used in construction services practice. Comparative legal references with respect to the specific duty of the service provider under a storage contract (not to subcontract the performance of the storage service without the client's consent) are to be found in the comparative and national notes to PELSC art. 4:104(2). In all the aforesaid countries it is established law that the service provider remains responsible towards the client for the part of the service entrusted to the subcontractor, as if that part were performed by the service provider himself.
   No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, SCOTLAND.

2. *Quality of tools and materials used in the course of the service*
   The duty of the service provider to perform the service following the requirements specified by the contract follows from PECL art. 6:102 *(Implied Terms)* and PECL

art. 6:108 *(Quality of Performance)*. PELSC art. 1:107 states additional rules which may be seen as implied terms under PECL art. 6:102, stemming from the nature of a service contract. Furthermore, they are related to PECL art. 6:108, which requires performance of 'at least average quality' if the contract does not specify the quality. See for the comparative and national notes to PECL arts. 6:102 and 6:108: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. The following countries acknowledge, however, the rule that the supplier of a service must in principle use tools and materials of good quality and fit for their intended purpose: BELGIUM, ENGLAND, FINLAND, FRANCE, GERMANY, ITALY and THE NETHERLANDS. The responsibility of the service provider for tools or materials may however be limited in AUSTRIA, BELGIUM, ENGLAND, GERMANY and in THE NETHERLANDS, in the event that inadequate quality requirements were specified by the client. Comparative legal references with respect to the specific duty of the service provider under a storage contract (to provide a place fit for storing the thing in such a manner that the thing may be returned in the condition the client may expect), under a treatment contract (to use instruments, medication, materials, installations and premises of at least the quality demanded by accepted and sound professional practice, that conform to applicable statutory rules, and that are fit to achieve the particular purpose for which they are to be used) and under an information contract (to collect and use the expert knowledge to which the service provider has or should have access as a professional information provider, in so far as reasonably necessary for the performance of the service) are to be found in the comparative and national notes to PELSC arts. 4:104(1), 6:103 and 7:103.

No information from DENMARK, GREECE, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Performance of the service through subcontractors*

AUSTRIA If the service is to be qualified as *Dienstvertrag*, the service provider cannot subcontract the service unless the intentions of the parties to the contract and the circumstances of the case demonstrate otherwise (CC art. 1153). Under a *Werkvertrag*, on the other hand, the service provider is not excluded from entrusting parts of the performance of the service to subcontractors. The rule of CC art. 1165 merely states that the service provider must carry out the work personally or to have it carried out under his personal responsibility. The general rule of CC art. 1313a is relevant in this respect as well in the sense that it establishes the contractual responsibility of the service provider for the performance of his staff as if this were his own performance. In the particular context of construction services, the client has a right to reject a subcontractor for good reasons under ÖNORM A 2060 2. 10. 1.3.

BELGIUM If the parties concluded a contract of *louage d'ouvrage*, the service provider may subcontract the service to the extent that the intentions of the parties are not opposed to this. The concrete intentions of the parties are dependent on the circumstances of the case, in particular the degree of *intuitu personae*, the nature of the part of the service entrusted to the subcontractor and the abilities of the latter (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, 1215 ff). The service

provider remains responsible for the part of the service carried out by the subcontractor (CC art. 1797).

ENGLAND Whether or not a service contract can be carried out through the employment of a subcontractor depends on the proper inference to be drawn from the contract itself, the subject matter of it, and other material surrounding circumstances: *Davies v. Collins* [1945] 1 AllER 247. Dependent on the circumstances of the case, the obligation may be too personal to allow performance by a subcontractor. If subcontracting is permitted, the service provider nevertheless remains responsible towards the client for the performance of the subcontractor: *Stewart v. Reavell's Garage* [1952] 2 QB 545 (cf. Chitty on Contracts, nos. 20-079 ff). In the context of construction services, standard forms of contract may have limited the service provider's freedom to subcontract (cf. Jansen, Towards a European building contract law, pp. 215-216).

FRANCE The question, whether or not the service provider may subcontract performance of the service, is answered with the general rule of CC art. 1237: the debtor may not subcontract without the creditor's consent if the latter has an interest in personal performance by the debtor. Hence the concrete intentions of the parties, particularly the degree of *intuitu personae*, are considered relevant. See however art. 3 of the *Loi du 31 Décembre 1975* on subcontracting, which imposes a duty upon service providers in general to ask the client's permission before entering into a subcontract. The service provider remains responsible towards the client for the part of the performance that is entrusted to the subcontractor on the basis of CC art. 1797 and art. 1 of the *Loi du 31 Décembre 1975* on subcontracting, as well as Cass.civ. III, 13 March 1991, Bull.civ. III, no. 91.

GERMANY If the service is to be qualified as *Dienstvertrag*, the service provider must perform the service personally (CC art. 613). A similar rule does not exist for services qualified as *Werkvertrag*. In the context of construction services, however, standard forms of contracts impose a duty upon the service provider to ask the client's permission for subcontracting (cf. Jansen, Aanneming van werk: Het gemeenrechtelijk dienstencontract, pp. 215-216). The general rule is that the service provider remains responsible for the part of the service entrusted to subcontractors (CC art. 278; BGHZ, 13, 111).

ITALY The rule that follows from general law of obligations (CC art. 1180) is that the debtor may not subcontract without the creditor's consent if the latter has an interest in personal performance by the debtor. In case the contract can be qualified as *appalto*, the service provider is only allowed to subcontract the service if this is permitted by the client (CC art. 1656). It can be implied from the rule stated in CC art. 1670 that the service provider remains responsible towards the client for the part of the service carried out by the subcontractor.

THE NETHERLANDS The general principle on the right of a contracting party to entrust part of his performance to a subcontractor can be derived from CC art. 6:30(1): subcontracting is possible in principle, unless this would conflict with the express or implied intentions of the parties to the main contract, having regard to their mutual interests. The creditor, for instance, may have an interest in personal performance by the debtor (Parl. Gesch. 6, TM, p. 158). The second general principle, stated in CC art. 6:76, is that the debtor remains responsible for the part of the performance entrusted to the subcontractor. CC art. 7:751 upholds these general principles for services qualified as *aanneming van werk*, whereas CC art. 7:404 does the same with respect to

services qualified as *opdracht*. As regards services that can be qualified as *bewaarneming*, see for the second principle also CC art. 7:603(3). This latter provision, however, contains a more lenient provision (than CC art. 6:76) for those cases where the storage was supplied gratuitously and the storer was more or less forced to hand over the good for sub storage for reasons that cannot be attributed to the storer. See for standard forms of contracts narrowing down the first principle in the context of construction services: Jansen, Towards a European building contract law, p. 215.

POLAND The general rule of the POLISH CC (CC art. 356 para. 1) is that the creditor may demand a personal performance only if that follows from the contents of the act in law, from statutory law, or from the nature of the performance. Rules relating to services contract contain a few references to the personal performance of the contract. In the case of the contract of specific work, whose performance depends on the personal qualifications of the service provider the contract is dissolved as a result of that person's death or inability to work (CC art. 645 para. 1). Position of subcontractors in the building contracts is regulated in CC art. 647^1. In such a contract the parties shall define the scope of work to be performed personally by the contractor and through subcontractors (CC art 647^1 para. 1). The contractor may conclude a contract with subcontractors only with the consent of the client. If the client, within 14 days from the moment when the contract with the subcontractors together with the part of documentation relating to the performance of the work indicated in the contract or in the project has been presented to him, did not object to it in writing, it is assumed that he consented the conclusion of the contract (CC art. 647^1 para. 2). Furthermore, if the subcontractor wishes to conclude a contract with further subcontractors, consent of the client and the contractor are required (CC art. 647^1 para. 3). The person who concludes a contract with the subcontractor as well as the client and the contractor are jointly and severally liable for payment of the remuneration for the building works done by the subcontractor (CC art. 647 para. 5). In the case of the mandate contract, the service provider may entrust a third party with the performance of the mandate only if that follows from the contract or the custom or if he is forced by circumstances to do so. In such case he is obliged to immediately inform the mandator about the name and the place of residence of his substitute and after having done so he is liable only for lack of due diligence in the choice of the substitute (CC art. 737 para. 1). The substitute is also liable for the performance of the mandate to the mandator. If the mandatory has assumed liability for the acts of his substitute as for his own acts, their liability is joint and several (CC art. 738 para. 2). In the case of safe-keeping contract the keeper cannot deposit the thing for safe-keeping with another person unless he is forced by the circumstances to do so. In such case he is obliged to immediately notify the depositor where and with whom the things have been deposited, and if he complies with that requirement he is liable only for a lack of due diligence in choosing the substitute (CC art. 840 para. 1). The substitute is liable also to the depositor. If the keeper is liable for the acts of the substitute as for his own acts, their liability shall be joint and several (CC art. 840 para. 2).

PORTUGAL If the service can be qualified as *empreitada* (one of the types of the contract of *prestação de serviços*), the service provider is allowed to use subcontractors. He remains responsible nevertheless for the conformity of the part of the service entrusted to the subcontractor: STJ 15 January 1992, BolMinJus, 413.

SPAIN With respect to construction services, art. 11(2)(e) in connection with art. 17(6) of the *Ley 38/1999 de 15 de Noviembre or Ley de Ordenación de la Edificación* states that the service provider can only subcontract parts of the service within the limits imposed by agreement, and that he remains responsible for the conformity of these parts as if they were performed by himself personally.
SWEDEN In the context of construction services, AB 04, art. 5:12, does not restrict the possibility of the service provider to entrust parts of the service to subcontractors. The provision states, however, that the service provider remains responsible for these parts. As regards processing services, a similar solution is achieved on the basis of art. 4 of the Consumer Services Act (KTjL), stating that the service provider shall perform the service in a professional manner (see also Olsen, Konsumentskyddets former, p. 95).

2. *Quality of tools and materials used in the course of the service*
AUSTRIA The provisions of the AUSTRIAN CC on *Werkvertrag* do not contain specific provisions on the duty of the service provider with respect to the quality of tools and materials to be used for the service. A provision referring to the quality of materials is CommC art. 360, which is to be applied in case of doubt and which imposes a duty upon the service provider to supply materials of average kind and quality. The provision is only applicable in commercial contracts in principle, but the prevailing opinion applies this provision analogously to non-commercial contracts as well (cf. K / W, Grundriss I, 217). The responsibility of the service provider for the quality of tools and materials used in the course of the service process can be limited in the event that inadequate specifications were imposed by the client (CC art. 1168a).
BELGIUM The service provider under a contract qualified as *louage d'ouvrage* has a duty to use tools (cf. Goossens 2003, nos. 969 ff) and materials of good quality and fit for their intended purpose, although the latter duty does not seem to be as strict as in FRENCH law: Cass. 6 October 1961, *S.P.T.L. Algemene Bouwonderneming Léon van Eeghem/Haesaert*, RW 1961-62, col 783 at 798-799, and RCJB, 1963, note A. Lagasse, p. 5 (cf. Jansen, Towards a European building contract law, pp. 248, 251 and p. 347). If the client has specified inadequately the quality of tools and materials to be used, this may limit the responsibility of the service provider (cf. Jansen, Aanneming van werk: Het gemeenrechtelijk dienstencontract, pp. 422-427).
ENGLAND The service provider under a *contract for the supply of a service* warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them unless the circumstances of the contract are such as to exclude any such warranty. Such circumstances could involve the specification by the client of inadequate quality requirements to be observed by the service provider: *G.H. Myers & Co. v. Brent Cross Services Co.* [1934] 1 KB 46 at 55; *Samuels v. Davis* [1943] 1 KB 526; *Ingham v. Emes* [1955] 2 QB 366 at 374; *Young & Marten Ltd. v. McManus Childs* [1969] 1 AC 454 (HL); *Gloucestershire County Council v. Richardson* [1969] 1 AC 480 (HL). See also art. 4(2)(A) and art. 4(5) Supply of Goods and Services Act 1982 (cf. Jansen, Towards a European building contract law, pp. 247-250 and pp. 422-427).
FINLAND According to chap. 8, art. 12(3) (16/1994) of the Consumer Protection Act (38/1978) the service provider must supply material conform to ordinary good quality, unless agreed otherwise.

FRANCE If the parties concluded a contract qualified as *louage d'ouvrage*, the service provider is under a duty to select materials of good quality and suitable for the purpose for they will be used: Cass.civ. III, 19 November 1986, RD imm. 1987, 457 (cf. Jansen, Towards a European building contract law, pp. 248 and 250). It is doubted, however, whether inadequate quality requirements imposed upon the service provider by the client will disculpate the service provider: Cass.civ. III, 7 March 1990, Bull. III, no 69; RD imm. 1990, 375 (cf. Jansen, Towards a European building contract law, pp. 427-434).
GERMANY Tools and materials used in the performance of a *Werkvertrag* must be of good quality and fit for their intended purpose (cf. Jansen, Towards a European building contract law, pp. 248-251). But the responsibility of the service provider as regards the quality of the service may be limited in the event that inadequate quality requirements were specified by the client (CC art. 645(1) and BGH 14 March 1996, BauR 1996, p. 702; cf. Jansen, Towards a European building contract law, pp. 422-427).
ITALY If the supply of a service can be qualified as *appalto*, the service provider generally warrants the quality of the materials used: D. Rubino, Dell'appalto, p. 51 ff.
THE NETHERLANDS The duty of the service provider to use tools and materials of good quality and fit for their particular purpose follows from general contract law (CC art. 6:77; HR 5 January 1968, NJ 1969, 174; HR 13 December 1968, NJ 1969, 174). As regards services qualified as *aanneming van werk* the duty is particularised in CC art. 7:760(1). If the client imposes inadequate requirements upon the service provider as to the quality of tools and materials to be used, this may affect the client's ability to seek resort to a remedy (CC art. 6:77; CC art. 7:760(2) and (3)) (cf. Jansen, Towards a European building contract law, pp. 422-427).
POLAND The provisions of the POLISH CC do not contain specific rules relating to the quality of tools and materials to be used in the course of the service. The duty to use tools and materials of an adequate quality may be derived from a general rule that governs performance of obligations (CC art. 355), which demands diligence generally required in the relationships of the given kind. The due diligence of the debtor within the scope of the economic activity is assessed with the consideration of the professional nature of that activity (higher standard of care) (CC art. 355 para. 2).
PORTUGAL According to CC art. 1210(2), if the service can be qualified as *empreitada* (one of the types of the contract of *prestação de serviços*) and if the contract does not specify the quality of the materials to be supplied under the contract, the service provider must supply materials of at least average quality.
SPAIN In the event that construction services are supplied, art. 17(6) of the *Ley 38/1999 de 15 de Noviembre or Ley de Ordenación de la Edificación* imposes responsibility upon the service provider for damage caused to the building work as a result of inadequate materials used in the course of the service.
SWEDEN As regards construction services, AB 04, art. 1:9, states as the main rule that the service provider shall at his own expense provide all material necessary for the performance of the service. AB 04, art. 2:1, imposes a duty upon the service provider to perform the work in a professional manner and it is thought that this duty includes a duty not to use defective material. A similar duty for the supplier of a processing service can be found in art. 4 Consumer Services Act (KTjL), stating that the service provider shall perform the service in a professional manner (cf. Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 94).

Article 1:107: General Standard of Care for Services

(1) The service provider must perform the service:
  (a) with the care and skill that a reasonable service provider would exercise under the circumstances; and
  (b) in conformity with any statutory or other binding legal rules that are applicable to the service.
(2) If the service provider professes a higher standard of care and skill the provider must exercise that care and skill.
(3) If the service provider is, or purports to be, a member of a group of professional service providers for which standards exist that have been set by a relevant authority or by that group itself, the service provider must exercise the care and skill expressed in these standards.
(4) In determining the care and skill the client is entitled to expect, regard is to be had, among other things, to:
  (a) the nature, the magnitude, the frequency and the foreseeability of the risks involved in the performance of the service for the client;
  (b) if damage has occurred, the costs of precautions that would have prevented this or similar damage from occurring;
  (c) whether the service is rendered by a non-professional or gratuitously;
  (d) the amount of the remuneration for the service; and
  (e) the time reasonably available for the performance of the service.
(5) The duties under this Article require in particular the service provider to take reasonable precautions in order to prevent the occurrence of personal injury or damage to immovable structures and movable or incorporeal things as a consequence of the performance of the service.

Comments

A. General Idea

Supplying a service is in fact equivalent to a process during which a service provider takes all kinds of decisions for the purpose of achieving a specific result, stated or envisaged by a client. These decisions involve the carrying out of labour which is – with the exception of pure intellectual services – usually carried out by the application of materials and components by means of tools. The service provider's strict duties as regards the *selection* of these tools, materials, and components, are all dealt with in Article 1:106. That Article further states rules as regards the selection of subcontractors. The present Article imposes duties upon the service provider with respect to the carrying out of the service process itself. These duties relate to the decisions the service provider must take as regards the *application* of the tools, materials, and components, in the course of the labour process.

The central duties imposed upon the service provider by paragraph (1) presuppose that, whenever carrying out a service, the service provider will first of all have to observe the

requirements to be found in the contract itself. An example of such a requirement is given in the following illustration:

Illustration 1
An architect is commissioned by an accountancy firm to design the firm's new head office. An express provision of the contract stipulates that the design must take into account that the office will have to give workspace to 300 staff members.

In addition, there may be statutory requirements or other binding provisions that have to be followed as well, according to paragraph (1)(b).

Illustration 2
A company specialised in removing asbestos isolation material, agrees with the owner of an old factory to clean that factory from asbestos. The company will have to observe all legal provisions related to health and safety at work whilst carrying out the said contract.

Paragraph (1)(a) imposes a duty upon the service provider to carry out the service with the care and skill generally to be observed in the circumstances of the case. In doing so, the intention of the service provider must be to achieve the result that is stated or envisaged by the client. Whether an *obligation* to achieve that result is to be imposed upon the service provider, depends on the interpretation of the contract following the rules of Article 1:108. Article 1:107 merely imposes an obligation upon the service provider to make every reasonable effort for the achievement of the particular result.

Illustration 3
A doctor agrees to treat a patient suffering from severe pneumonia. The intention of the doctor is to cure the patient and he will have to do his best to achieve that result. But he cannot guarantee that the treatment will indeed cure the patient.

The standard of care reasonably to be demonstrated by the service provider depends on the circumstances of the case. The Article, however, further specifies the required standard of care for some important and frequently occurring situations. Paragraph (2) deals with the situation in which the service provider acknowledges that he is capable of performing the service whilst observing a higher standard of care and skill than the standard generally required. If that is the case, the higher standard is the one to be observed, as is shown in the following illustration:

Illustration 4
A certain law firm specialises in giving legal advice on proposed mergers and takeovers. It is the firm's only field of business. The firm has a high reputation among other law firms and must live up to that reputation.

By the same token, if the service provider is a member of a group of professional service providers, that has set its own disciplinary standards to be observed, paragraph (3) requires that these standards will also have to be observed by the service provider

concerned. Such standards will usually have been set by a relevant authority – usually a national authority – which can either be a public authority or a private entity.

Illustration 5
A contract is concluded between a client and a shop that specialises in body piercing. The shop will have to observe the disciplinary standards set out by the National Association of Body Decoration.

Finally, the criteria provided for in paragraph (4) are to be taken into account in determining the standard of care and skill to be demonstrated by the service provider. They are not to be regarded as the only criteria that have to be looked at, but they are thought to be the most relevant ones.

The duties, which this Article imposes upon the service provider all relate to the particular result, that is to be achieved through the service process. That result can be thought of as the accomplishment of the client's explicit and implicit wishes and needs. It is implied in these wishes and needs that the service process will – apart from the achievement of the said result – not lead to personal injury and damage to immovable structures and to movable or incorporeal things.

Illustration 6
A storer agrees with a fireworks trader to store fireworks. The security policy of the storer is not very strict due to which employees smoking cigarettes are able to walk along the open doors of the containers in which the fireworks are kept. As a result of the subsequent explosion, several residents living nearby the storer are killed and several adjacent buildings and cars are seriously damaged.

For the purpose of solving cases like the one in the aforesaid illustration, paragraph (5) extends the duty to take reasonable care and skill under the present Article to precautionary measures to be taken by the service provider, in order to prevent the occurrence of the said injury and damage as a consequence of the service.

B. Interests at Stake and Policy Considerations

It is *not* an issue whether a duty is to be imposed upon the service provider to carry out the service with the care and skill, generally to be observed in the circumstances of the case. By the same token, it is undisputed that it must at least be the intention of the service provider to achieve a result stated or envisaged by the client. The crucial issue is whether the service provider has a further obligation to actually achieve that result through the service. That issue is considered in Comment B to Article 1:108.

A related issue is, whether the service provider must still carry out the service with the required care and skill, in the event that the obligation to achieve a particular result is imposed upon him under Article 1:108. One might argue that failure to carry out the service with due care and skill will then probably coincide with a failure to achieve that result, in which case the client will invoke a remedy on the basis of the non-perform-

ance of the duty stated in Article 1:108. There would then be no need for a separate duty to carry out the service with care and skill, given that it would be superfluous to allow the client to resort to a remedy ensuing from the non-performance of the that duty, if the client could also claim for a remedy on the basis of Article 1:108.

The latter issue is in fact similar to the one that was addressed in Comment B to both Article 1:105 and 1:106. Hence one could argue here too that it is useful to impose the duty of care and skill on the service provider in any event, because that gives the service provider incentives to prevent the result from not being achieved. Imposing the duty, even in the case where the service provider has a duty to achieve a particular result under Article 1:108, would also make it easier for the client to take precautionary actions. The client is in the position to do so, given that he can check and follow the service process whilst it proceeds, and discover problems at an early stage. The present Chapter gives the client ample opportunities to do so. He could make use of his power under Article 1:104(1)(d). He could further be warned as a result of continuous contact, which may exist between him and the service provider in the framework of the performance of ancillary duties under the contract. He could receive requests for information and directions from the service provider under Article 1:104(1)(a) and (b). Interaction could further take place as a result of the co-ordination of activities under Article 1:104(1)(e), the issuing of a warning by the service provider under Article 1:110, as well as in the context of a variation under Article 1:111. All these interactions might lead him to discover that the service provider does not carry out the service with the required care and skill, and that this might eventually prevent the result from being achieved. Imposing the duty of care and skill, even if the service provider is under a duty to achieve a particular result, would then enable the client to anticipate the breach of that duty. The client could give a direction or a notification under Article 1:109 or 1:113. He could also demand for adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance). Both parties will profit from these precautionary actions, in the sense that disputes will come to the table (and are able to be solved) at an early stage. If they would be raised after the achievement of a disappointing result, it may be much more costly to correct that result.

C. Comparative Overview

It is established law in the countries investigated that any service provider owes the client a duty to perform the service with reasonable care and skill. This duty usually follows from general contract law provisions dealing with good faith: AUSTRIA, BELGIUM, FRANCE, GERMANY, GREECE, ITALY, POLAND, PORTUGAL, SPAIN, although (additional) specific provisions on services contract law can be found as well in: AUSTRIA, ENGLAND, FINLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, SWEDEN. Generally speaking, the standard of care to be observed by the service provider depends on the skills of a reasonably competent representative belonging to his profession and is further determined by the generally accepted (technical) standards and customs of that profession.

D. Preferred Option

The present Article imposes a duty upon the service provider to carry out the service with care and skill, generally to be observed in the circumstances of the case. This is the fundamental duty that is imposed upon a service provider in all legal cultures, unless there is reason to impose the stricter obligation upon him to actually achieve the result stated or envisaged by the client. The present Article is therefore needed, in the event that the latter obligation cannot be imposed upon the service provider as a result of the application of the rules provided for in Article 1:108.

Even if the service provider has to perform the stricter obligation of Article 1:108, he will still be under a duty to carry out the service with the required care and skill for reasons explained in Comment B. Furthermore, this approach leads to consistency with the approach that is the basis for the rules of Articles 1:105 and 1:106.

E. Relation to PECL and Other Parts of the Principles

The service provider will always be under an obligation to perform the service following the requirements specified by the contract. That obligation follows from Article 6:102 (Implied Terms) and Article 6:108 PECL (Quality of Performance) and is not repeated here. The additional rules in this Article may be seen as implied terms under Article 6:102 PECL stemming from the nature of a service contract. Furthermore, they are related to Article 6:108 PECL, which speaks of performance of at least average quality, if the contract does not specify the quality.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules under the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7 that modify or deviate from the rules under the present Article.

The duty to carry out the service with due care and skill imposed upon the service provider by this Article, however, has been particularised in Article 2:103 (Duty of Care of the Constructor), in Article 3:104 (Duty of Care of the Processor), in Article 4:105 (Duty of Care of the Storer), in Article 5:104 (Duty of Care of the Designer), in Article 6:104 (Duty of Care of the Information Provider), and in Article 7:104 (Duty of Care of the Treatment Provider). The reasons for these particularisations as well as their purport are further clarified in Comment A to Article 2:103, Comment E to Article 3:104, Comment E to Article 4:105, Comment E to Article 5:104, Comment E to Article 6:104, and Comment E to Article 7:104.

G. Burden of Proof

The Article imposes an obligation upon the service provider to make every reasonable effort to achieve a particular result through the service. In the event that the result is not achieved – and provided that an obligation to achieve a particular result cannot be imposed upon the service provider under Article 1:108 – the client must prove that the latter failed to exercise the service with due care and skill.

H. Character of the Rule

This Article contains default rules.

I. Remedies

It is possible that the service provider is not only under a duty to carry out the service with due care and skill, but that Article 1:108 imposes a further obligation upon him to achieve the result stated or envisaged by the client. If that is the case, and if he fails to achieve that result, it is in the client's interest that he invokes the non-performance of that latter obligation under Article 8:101(1) PECL (Remedies Available). As is explained in Comment G to Article 1:108, the burden of proof imposed upon the client will then be limited, and the service provider will have to prove that the non-performance is excused under Article 8:108 PECL (Excuse Due to an Impediment).

> *Illustration 7*
> A garage has agreed with a car owner to replace the exhaust pipe of the car. The employee of the garage uses adequate materials to connect the exhaust pipe to the car. However the employee whilst connecting the pipe makes a mistake. As a result of this, the pipe comes down from the car after the owner has driven the car for a couple of days.

In this scenario, it is not likely that the client will invoke the non-performance of a duty under the present Article, given that his position – from the perspective of burden of proof – is better if the claim would be based on non-performance of the obligation under Article 1:108. Moreover, a claim that would in effect seek double compensation of the same damages would in any event be barred on the basis of the principle underlying Article 9:502 PECL (General Measure of Damages).

As is explained in Comments A and D to Article 1:108, the obligation to achieve a particular result will, however, not be imposed upon every service provider in every situation. If it is not imposed, this might cause the client to invoke the non-performance of a duty of the service provider under paragraphs (1) to (4) of the present Article. There are two situations where this might be relevant.

The first situation is when the service has been carried out and did not lead to the result envisaged by the client and where the service provider was not under an obligation to

achieve that result. An example of such a situation is to be found in the following illustration:

> *Illustration 8*
> The owner of a 17th century painting, which was exposed to smoke and other damaging conditions for centuries, agrees with a specialist cleaner to try to bring back the original colours of the painting. The cleaner does not manage to do so.

The client will then submit that the service provider did not make every reasonable effort to achieve that result. The service provider will be allowed to raise the defences of Article 8:101(3) PECL (Remedies Available) and Article 8:108 PECL (Excuse Due to an Impediment), and may also prevent liability by proving that he did exercise the service with due care and skill. If the service provider was prevented from achieving the envisaged result, for instance due to the client's possible failure to warn under Article 1:103(4), or due to his failure to co-operate under Article 1:104(1)(a), (b), (c), or (e), or as a result of following a direction of the client under Article 1:109(1), this will not constitute an excuse for him under Article 8:108 PECL. It will however allow him to bar the client's claim on the basis of the rule under Article 8:101(3) (see also Comment H to Article 1:103, Comment H to Article 1:104, and Comment H to Article 1:109). On the other hand, if the service provider was under a duty to warn the client that the result might not be achieved due to the client's incorrect or inconsistent information or directions, and if he failed to perform that duty, the client's information or directions are no longer to be regarded as the only cause of the result not being achieved. The service provider will then neither be able to bar the client's claim on the basis of Article 8:101(3) PECL, nor to give proof that the non-performance of his duty to carry out the service with reasonable care and skill is due to an impediment beyond his control. Hence the client may then in principle resort to any of the remedies set out in Chapter 9 PECL.

The second situation, in which the client might invoke the non-performance of a duty under the present Article, is when the service process is still in progress. If the client exercises his right under Article 1:104(1)(d) and finds out that the service provider does not carry out the service with the required care and skill, the client will most likely notify the service provider under Article 1:113(1), by submitting that the latter will fail to achieve the result. The following modification of *Illustration 1* above shows an example of a case where the client discovers the non-performance of the service provider:

> *Illustration 9*
> An architect is commissioned by an accountancy firm to design the firm's new head office. Part of the architect's job is to obtain planning permission from the local authorities. Due to severe protests from adjacent property owners, the prospects of obtaining permission are not very positive. The accountancy firm becomes aware of the fact that the architect does not invest much effort in trying to meet the neighbourhood's objections.

In addition, the client may demand adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance), a course of action which might eventually even end in termination of the contract under Article 8:105(2) PECL.

The client may resort to any of the remedies of Chapter 9 in the event that the service provider failed to perform his duty stated in paragraph (5) of the present Article. The most likely remedy will be damages.

Comparative Notes

1. *The duty of care of the service provider in (specific) contract law*
The duty of the service provider to perform the service following the requirements specified by the contract follows from PECL art. 6:102 *(Implied Terms)* and PECL art. 6:108 *(Quality of Performance)*. PELSC art. 1:107 states additional rules which may be seen as implied terms under PECL art. 6:102, stemming from the nature of a service contract. Furthermore, they are related to PECL art. 6:108, which requires performance of 'at least average quality' if the contract does not specify the quality. See for the comparative and national notes to PECL art. 6:102 and 6:108: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. It is established law in the countries investigated that any service provider owes the client a duty to perform the service with reasonable care and skill. This duty usually follows from general contract law provisions dealing with good faith: AUSTRIA (CC arts. 1297, 1299), BELGIUM (CC art. 1135), FRANCE (CC arts. 1135 and 1137), GERMANY (CC art. 242), GREECE (CC art. 330), ITALY (CC art. 1176(2)), POLAND (CC art. 355(1)), PORTUGAL (CC art. 762(20)), SPAIN (CC art. 1104), although specific provisions in services contract law can be found as well: AUSTRIA (CC art. 964; *Verwahrungsvertrag*), ENGLAND (Supply of Goods and Services Act 1982, art. 13), FINLAND (chap. 8, art. 12(2) (16/1994) of the Consumer Protection Act (38/1978)), FRANCE (CC art. 1927; *dépot*), GERMANY (CC art. 690; *Verwahrungsvertrag* and CommC art. 475; *Lagergeschäft*), GREECE (art. 8 Consumer Protection Law 2251/199. See also CC art. 686; σύμβαση έργου and CC art. 823; παρακαταθήκη), ITALY (CC art. 2236; *contratto d'opera intellectuale*), THE NETHERLANDS (CC art. 401; *opdracht* and CC art. 7:453; *overeenkomst inzake geneeskundige behandeling* and CC art. 6:27 and CC art. 7:602; *bewaarneming*), PORTUGAL (CC art. 1208; *empreitada*), SWEDEN (art. 4 Consumer Services Act (KTjL)). Generally speaking, the standard of care to be observed by the service provider depends on the skills of a reasonably competent representative belonging to his profession and is further determined by the generally accepted (technical) standards and customs of that profession. Comparative legal references with respect to the specific duties of care of the service provider, particularizing the duties referred to in PELSC art. 1:107(1)-(4) for storage, design, information and treatment services, are to be found in the comparative and national notes to PELSC arts. 4:105(1), 5:104, 6:104 and 7:104. Comparative legal references with respect to the specific duty of care of the service provider, particularizing the duty referred to in PELSC art. 1:107(5) for construction and processing services are to be found in the comparative and national notes to PELSC arts. 2:103 and 3:104.
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *The duty of care of the service provider in (specific) contract law*

AUSTRIA There are no specific provisions to be found in the AUSTRIAN CC on *Werkvertrag* and *Dienstvertrag* dealing with the standard of care to be observed by the service provider whilst performing the service. Each service provider, however, has to observe a standard of care on the basis of the general provisions of CC art. 1297 and CC art. 1299. The exact standard of care to be observed depends on the circumstances of the case and will be determined following the usual degree of care and attention that is necessary for the performance of the service in question (cf. OGH, SZ 34/153=JBl 1962, 322; OGH, JBl 1982, 245=EvBl 1981/159). A specific provision exists for storage services: CC art. 964 *(Verwahrungsvertrag)* imposes a duty upon the service provider to act with reasonable care.

BELGIUM In case of a service qualified as *louage d'ouvrage*, the service provider has a duty to take safety precautions in order to prevent material damage and safety risks which may occur as a direct consequence of the performance of the service. This duty is said to follow from CC art. 1135 (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 917, 955 and 961).

ENGLAND If a service is qualified as a *contract for the supply of a service*, there is an implied term that the service provider will carry out the service with reasonable care and skill, cf. art. 13 Supply of Goods and Services Act 1982; Chitty on Contracts, 13-031. Although storage services are considered to be a separate category of contracts *(contract of bailment)*, they too are subject to the general requirements of art. 13 Supply of Goods and Services Act 1982 (cf. art. 12(3)). The degree of care and skill required of the service provider is that which is to be expected of a member of his profession of ordinary skill and competence, cf. *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582. Cf. for *contract of bailment: Morris v. CW Martin & Sons Ltd.* [1966] 1 QB 716 (CA). The duty of the service provider under a *contract for the supply of a service* is to comply with applicable regulations governing safety standards and practices, cf. *Wilson v. Best Travel Ltd.* [1993] 1 AllER 353.

FINLAND According to chap. 8, art. 12(2) (16/1994) of the Consumer Protection Act (38/1978) the service provider must perform the contract with professional care and skill, taking into account the interests of the client, and in accordance with the requirements set out by law, decree or official decision.

FRANCE If the service can be qualified as *louage d'ouvrage*, it has to be determined whether the service provider merely has a duty to act with reasonable care and skill *(obligation de moyens)* or whether he has to accomplish a particular result *(obligation de résultat)*. Generally speaking, the former duty is usually imposed in case of mere intellectual services, whereas the latter duty relates to services involving the supply of an immovable structure or movable thing (cf. Malaurie, Aynès, Gautier, Contrats spéciaux, no. 742). Despite the fact that some service providers are under a higher duty to accomplish a particular result, it nevertheless follows from CC art. 1135 that *any* service provider must observe the *règles de l'art:* the standards and customs relevant to his profession, even if the contract is silent about them. Moreover, it follows from CC art. 1137 that any party performing a contract must observe the standard of care of the *bon père de famille*. In case of a service provider, comparison is made with a reasonably cared and skilled service provider. If the service can be qualified as *dépot*, the care

required from the service provider is that of the 'bon père de famille' as well (cf. CC art. 1927 and Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173).

GERMANY There are no specific provisions to be found in the GERMAN CC on *Werkvertrag* and *Dienstvertrag*, dealing with the standard of care to be observed by the service provider whilst performing the service. Each service provider, however, must perform his service in accordance with the standard of care that can be expected from him *(die im Verkehr erforderliche Sorgfalt)* and which is to be determined primarily according to the generally accepted standards and customs of his profession *(allgemein anerkannten Regeln der Technik)*. This general duty of any service provider follows from the general provision of CC art. 242. Specific provisions are applicable, however, in the context of storage services. If the service provider supplies a gratuitous storage service, he must act with such care as if he himself were the owner of the thing (cf. CC art. 690, *Verwahrungsvertrag*). In case of a commercial storage service, the service provider has a duty to act with reasonable care (cf. CommC art. 475, *Lagergeschäft*).

GREECE The general duty of care owed by any service provider when carrying out the service follows from CC art. 330 and from Consumer Protection Law 2251/1994 art. 8. The standard of care owed by the particular service provider in question depends on the skills of a reasonably competent representative of that profession, which are further determined by the generally accepted standards and customs of that profession. If the service can be qualified as a contract for work (σύμβαση έργου) the service provider has a duty of care on the basis of CC art. 686. In the event of storage services (παρακαταθήκη), CC art. 823 requires the service provider to exercise the same care as he bestows on his own affairs, unless the service is for remuneration in which case the aforesaid general rule of CC art. 330 applies.

ITALY According to the general provision of CC art. 1176(2), a service provider must perform his contract with the diligence and knowledge, required by his profession (confirmed for services qualified as *appalto* in V. Mangini, Il contratto di appalto, p. 134; F. Marinelli, La responsabilità del committente per danni cagionati a terzi dall'appaltatore nel corso dell'esecuzione dell'opera, in Giust.civ., 1982, ii, p. 116). It follows from CC art. 2236 that a more lenient duty is imposed upon the supplier of a service qualified as *contratto d'opera intellectuale* when the performance of the service is of particular difficulty.

THE NETHERLANDS If the service can be qualified as *opdracht*, the service provider must act as a reasonably skilled and a reasonably acting service provider would act: cf. CC art. 7:401 and HR 9 June 2000, NJ 2000, 460. This duty is also imposed upon the service provider whose service can be qualified as *overeenkomst inzake geneeskundige behandeling*; cf. CC art. 7:453 and HR 9 November 1990, NJ 1991, 26 (Speeckaert/Gradener). As regards services qualified as *bewaarneming*, the same duty is imposed upon the service provider; cf. CC art. 7:602 and CC art. 6:27. The duty is not stated in the DUTCH CC for services qualified as *aanneming van werk*, but follows nevertheless from HR 26 April 1991, NJ 1991, 455 (Benjaddi/Neve).

POLAND It follows from the general provision CC art. 355(1) that any service provider must act with the diligence generally required in a service contract. CC art. 355(2) adds to this that the professional capacity of the service provider is to be taken into account, leading to a higher standard of care (M. Sośniak, Należyta staranność).

PORTUGAL Any service provider has a duty to perform the service in accordance with the state of the art *(leges artis)* and with (technical) standards generally accepted in his field of profession. This duty follows from the general provision of CC art. 762(2); cf. CC art. 1208 for services qualified as *empreitada*. It includes the specific duty to take safety precautions whilst performing the service; cf. Romano Martinez, Direito das Obrigações, no. 350.
SPAIN The duty of care to be observed by any service provider follows from the general provision of CC art. 1104. The provider of the service must act with the care and skill that a reasonable service provider would demonstrate under the given circumstances in accordance with the *lex artis* of his profession.
SWEDEN In the event of the supply of a service to a consumer, art. 4 Consumer Services Act (KTjL) states that the provider shall perform the service in a professional manner, to safeguard the consumer's interests with due care and to consult the consumer to the extent that this is necessary and feasible. The same standard applies to non-consumer contracts, but the parties are free to agree upon the quality and standards they like, cf. Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 95.

Article 1:108: Result Stated or Envisaged by the Client

The service provider must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that:
(a) any result envisaged but not stated was one that a reasonable client in the same circumstances as the client *might have envisaged; and*
(b) a reasonable client in the same circumstances would have no reason to believe that there was a substantial risk that the result would not be achieved by the service.

Comments

A. General Idea

Whenever a client enters into a service contract, it is very likely that he wants to obtain a particular result through the service asked for. The ability of a service provider to achieve that result, however, depends on whether it is objectively possible to both identify and control *in concreto* the factors that are capable of influencing the outcome of the service process. *In abstracto* these factors are: (1) the (particular) needs of the client, (2) the (tailor-made) solution that fits these needs, and (3) the circumstances in which that solution is to be applied by the service provider in order to achieve the particular result.

It is generally recognised that, dependent on the type of service, a service provider will not always objectively be able to identify and control the said factors and the interrelationship that exists between them, in order to achieve the particular result. This can be illustrated by the following examples:

Illustration 1
A patient suffering from a severe form of cancer enters into a contract with a specialised doctor in order to be cured through medical treatment.

Illustration 2
A law firm is engaged by a victim of alleged medical malpractice for the purpose of obtaining financial damages from the doctor through legal action.

Whether a service provider has promised to achieve a particular result – for example to cure the patient from cancer, or to obtain damages in a lawsuit on his client's behalf – is a matter of interpretation of the contract. The same goes for the question what that particular result to be achieved consists of. The purpose of Article 1:108 is to establish what the correct interpretation is. Interpretation of the contract may lead to the conclusion that the service provider must achieve a particular result.

The rule under Article 1:108 is that the service provider is under an obligation to achieve the particular result in the following two situations: (1) before conclusion of the contract, the client expressly requires the service provider to achieve the result he desires, and the service provider does not dispute that he will be able to achieve that particular result, and (2) at the time the contract was concluded, the parties did not expressly discuss the matter, but a reasonable service provider would expect the client to expect him to achieve the particular result.

If the client states the particular result, it will already be clear to the service provider what it is that the client expects him to do. If the result is not stated, the particular result *envisaged* by the client must be determined. In that case the result to be achieved is the result that is in the mind of the objective, average reasonable client. Clearly, an average competent service provider must know what is in the mind of such a client.

Illustration 3
A motorcycle is brought to a garage for the purpose of changing tires. In the event that the type of tires to be supplied is not specified, the average reasonable client may expect new tires of the same type as the old ones. The client may not expect the motorcycle to be fit for 'off the road' journeys, if it is objectively clear from the type of motorcycle and from the type of tires to be changed that such journeys were not possible prior to changing the tires.

If it is clear what the particular result is that is to be achieved, application of Article 1:108 still depends on 'whether a reasonable client in the same circumstances would have no reason to believe that there was a substantial risk that the result would not be achieved by the service'. Obviously, the parties to the contract may have differing views. An average and reasonable client may very well believe that the service will lead to the envisaged result without any risk, whereas the average competent service provider in the same situation may not always have that belief as is illustrated in the following example:

Illustration 4
A supplier of computer networks is asked by a hospital to install a tailor-made network, following a design prepared on behalf of the hospital. The hospital sincerely believes that the design is perfect, but it is not. If the supplier would exactly follow the design, the hospital will not be able to use the computer network for the purposes it has in mind. The supplier does not trust the design handed over by the client.

If the parties have differing views on whether the result can be achieved without any risk, Article 1:108 nevertheless applies and the obligation to achieve the particular result is imposed upon the service provider. If the average competent service provider cannot reasonably believe that the achievement of the result will not be troubled by the occurrence of some risk, he must warn the client about that risk having regard to the duties that are imposed upon him under Articles 1:103 and 1:110. And if so warned, a reasonable client can no longer live in the belief that there is no substantial risk that the result will not be achieved by the service.

A reasonable client may expect a constructor, a designer, a storer, as well as a supplier of factual information to achieve the particular result through the performance of the service requested. That is the reason why the obligation to achieve such a result is imposed upon these service providers in principle in Article 2:104, 4:107, 5:105, and 6:105 (Conformity). The obligation is not imposed as a principle on a processor (Chapter 3: Processing), a supplier of evaluative information (Chapter 6: Information), or a provider of medical treatment (Chapter 7: Treatment). Dependent on the circumstances of the case, however, interpretation of the contract on the basis of the rules of Article 1:108 could lead to the conclusion that these service providers too are under an obligation to achieve the particular result envisaged by the client. This is clearly the case in the example given in the following illustration:

Illustration 5
A garage is asked by a car owner to remove and change the standard exhaust pipe of a standard car.

It is also the case with the following example, which is a modification of *Illustration 2* presented above:

Illustration 6
A law firm is engaged by a victim of alleged medical malpractice for the purpose of obtaining financial damages from the doctor through legal action. The court of first instance rejects the claim and the client decides to address the court of appeal. The law firm however fails to file the appeal case in due time, due to which the client loses his case definitely.

Finally, whenever a contract is interpreted in the sense that the service provider must achieve a particular result, other Articles imposing duties upon him – either under the present Chapter, or under the relevant specific Chapter of this Part – remain in force. This is further clarified in Comment B to Article 1:107. The same goes in the event that

the application of the rules of Article 1:108 leads to the conclusion that the service provider is *not* under an obligation to achieve a particular result. The service provider will then solely have to carry out the service with the care and skill to be observed by him under Article 1:107. Other Articles imposing duties upon him – for instance Articles 1:105 and 1:106, as well as any particularisation of Article 1:107 to be found in the relevant specific Chapter of the present Part – will apply as well.

B. Interests at Stake and Policy Considerations

The difficult question, on what basis the liability of the service provider should be established, is probably the most important issue in the context of services contracts. There are two different approaches that are generally recognised in order to deal with the issue.

The first approach is to establish the service provider's liability on the basis of his failure to exercise the service with the required care and skill. In this approach, the idea is that the obligation imposed upon the service provider is an obligation of means, implying that he must strive for the achievement of the result envisaged by the client. In the event that such result is not achieved, the client must prove that the service provider failed to exercise the service with due care and skill. Conversely, the service provider is allowed not only to raise the defences similar to the ones that are to be found in Article 8:101(3) PECL (Remedies Available), and Article 8:108 PECL (Excuse Due to an Impediment), but also to prevent liability by proving that he did exercise the service with due care and skill.

The second approach is to establish the liability of the service provider on the basis of the mere fact that he did not achieve the result stated or envisaged by the client at the time of conclusion of the contract. In this approach, the idea is that the obligation imposed upon the service provider is an obligation of result, implying that he cannot perform his obligation merely by attempting to achieve the required result. In the event that the result is not achieved, the client has to establish that fact. The service provider will subsequently have to prove that the non-performance of his obligation is excused either under Article 8:101(3) or under Article 8:108 PECL. He cannot prevent liability by proving that he did exercise the service with due care and skill.

It is difficult to make a choice between the two approaches if one were to develop a liability regime for *all* types of services contracts. The client's interests are obviously protected best if one would opt for the second approach. But the difficulty is that, although one would be inclined to impose an obligation of result on most service providers, one would find it harsh to impose such obligation on *some* of them, given their inability to fully control the outcome of the service process, even if they would make every effort to achieve the result envisaged by the client. Imposing an obligation of result on such service providers would not only be a danger to their interests, but it would also make their services much more expensive for the client, given that the service provider will have to buy insurance for the coverage of the risks he cannot control, but that are brought within the boundaries of his obligation of result. Where

such insurance coverage cannot be obtained or be obtained only at very high costs, this might cause service providers to withdraw from the market, leading to the disappearance of such services altogether.

C. Comparative Overview

The two approaches sketched out in Comment B above are acknowledged in all jurisdictions that have been analysed. Within each jurisdiction, and depending on the type of service involved, either the first or the second approach is taken. No jurisdiction appears to have opted for either the first or the second approach for all service contracts.

If the service contract does not stipulate in express wording whether or not the provider has to achieve a particular result through the service, the legal qualification of the service type itself is not sufficient to answer that question in: BELGIUM, ENGLAND, FINLAND, FRANCE and THE NETHERLANDS. In these countries, a duty to achieve a particular result may be implied from the circumstances of the case, for instance if the client relies on the skill and judgment of the service provider; if the client refrains from giving detailed instructions thus leaving it to the provider as to how to carry out the service; if the service has as its object an immovable structure or movable thing and provided that the service does not involve particular difficulty or particular hazard; or if the achievement of a particular result is something that the client may reasonable expect. In other countries, however, these circumstances are considered irrelevant for the answer to the question whether the service provider has a duty to achieve a particular result and the answer primarily depends on the legal qualification of the service: AUSTRIA, FRANCE (to the extent that the service involves construction or modification of immovable structures), GERMANY, GREECE and PORTUGAL.

D. Preferred Option

The solution which is chosen in this Article reflects the idea, that the ex ante-probability that the result envisaged by the client can be achieved, should be decisive for the obligation to be imposed upon the service provider. This means that neither the first nor the second approach sketched out under Comment B has been adopted for all services contracts. It is preferred to have a more flexible solution, which makes it possible to take into account the particularities of each type of service. Hence, if there is an ex ante-probability that the service can achieve the required result, an obligation to do so is to be imposed upon the service provider under the present Article (save a contractual provision to the contrary). If there is no such probability, the obligation is not to be imposed upon him. His liability will then have to be established on the basis of the rules under the other Articles of this Chapter, in particular under Article 1:107.

In order to establish in each particular case whether it is probable in advance that the result envisaged by the client can indeed be achieved, one has to determine whether the service provider ought to be able to identify and control the following three important factors – as well as the interrelationship that exists between them – in order to achieve

that result: (1) the (particular) needs of the client, (2) the services provider's (tailor-made) solution that fits these needs, and (3) the circumstances in which the service is to be performed. As for some services dealt with in this Part of the Principles, the service provider is deemed to have the said ability. An obligation to achieve the particular result is imposed upon these service providers as a principle, as is explained in Comment *A* and *F*.

E. Relation to PECL and Other Parts of the Principles

The service provider will always be under an obligation to perform a service that is of quality, quantity, and description required by the contract. That obligation follows from Article 6:102 (Implied Terms) and Article 6:108 PECL (Quality of Performance) and is not repeated here. However, in order to accommodate practice in determining what the concrete obligation of the service provider should be as regards the result to be achieved through the service, the Article makes explicit what could otherwise perhaps also be derived from the abstract rules under Articles 6:102 and 6:108 PECL.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules of the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7 that modify or deviate from the rules under the present Article.

The obligation under the present Article is imposed as a principle, however, upon a constructor, a designer, a storer, as well as a supplier of factual information. This is why the Article is particularised in Article 2:104 (Conformity), and in Article 4:107, 5:105, and 6:105 (Conformity). Further reasons for stating and refining the obligation for these specific services in the said Articles, as well as the purport of the particularised rules embedded in them, are clarified in Comment E to Article 2:104, Comment E to Article 4:107, Comment E to Article 5:105, and Comment E to Article 6:105. The present Article is not particularised for processing contracts but is repeated in Article 3:105 for reasons explained in Comment E to that Article.

There are neither particularisations of Article 1:108 to be found in Chapter 6 as regards the supply of evaluative information, nor in Chapter 7 for treatment services. The significance of the Article in the context of the supply of evaluative information is explained and illustrated in Comment E to Article 6:105. As for treatment contracts this is done in the General Comments to Chapter 7, particularly in Comment N.

G. Burden of Proof

The client must prove that a reasonable client would have no reason to believe that there was a substantial risk that the result would not be achieved by the service and that

therefore the obligation under the present Article is to be imposed upon the service provider. In addition, the client must prove that the result envisaged by him at the time of conclusion of the contract has not been achieved.

H. Character of the Rule

This Article contains default rules.

I. Remedies

If the service provider is under an obligation to achieve the result stated or envisaged by the client and fails to achieve that result, the client may resort to any of the remedies set out in Chapter 9 PECL on the basis of Article 8:101(1) PECL (Remedies Available), provided that the non-performance is not excused under Article 8:108 PECL (Excuse Due to an Impediment). The result to be achieved by the service provider can be influenced in various ways by the client, given the involvement of the latter prior to and in the course of the service process. This gives rise to the following observations.

Firstly, it is possible that the service provider is prevented from achieving the result due to the client's failure to warn under Article 1:103(4), or due to his failure to co-operate under Article 1:104(1)(a), (b), (c) or (e), or as a result of following a direction of the client under Article 1:109(1). Given the system of PECL, such an event will not constitute an excuse for the service provider under Article 8:108 PECL, but it will allow him to bar the client's claim on the basis of the rule under Article 8:101(3) (see also Comment H to Article 1:103, Comment H to Article 1:104, and Comment H to Article 1:109). However, if the service provider was under a duty to warn the client that the result might not be achieved due to the client's incorrect or inconsistent information or directions, and if he failed to perform that duty, the issue becomes different. In that case the client's information or directions are no longer to be regarded as the only cause of the fact that the service provider has not achieved the result. The service provider will then neither be able to bar the client's claim on the basis of Article 8:101(3) PECL nor to give proof that his non-performance is due to an impediment beyond his control. The principle underlying this rule is also the basis of the rules to be found in Article 1:103(3)(a), 1:109(2), and 1:110(4) (see also Comment H to Article 1:103, Comment H to Article 1:109, and Comment H to Article 1:110). Hence the client may then in principle resort to any of the remedies set out in Chapter 9 PECL, subject to the provisions of Article 1:112 below.

Secondly, it is possible that the service provider failed to achieve the required result and that the client failed to notify the service provider under Article 1:113(1). In that case Article 8:101(3) PECL will not bar the client's claim for non-performance of the obligation under the present Article, because his failure to notify did not cause the service provider's non-performance. Presuming that the service provider can neither find an excuse under Article 8:108 PECL, the client may then too resort to any of the remedies

under Chapter 9 PECL, subject to restrictions as to particular remedies explained in Comment H to Article 1:113 and subject to the provisions of Article 1:112 below.

Comparative Notes

1. *The duty of the service provider to achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract*
   The duty of the service provider to perform the service following the requirements specified by the contract follows from PECL art. 6:102 (Implied Terms) and PECL art. 6:108 (Quality of Performance). The latter Article requires performance of 'at least average quality' if the contract does not specify the quality. See for the comparative and national notes to PECL art. 6:102 and 6:108: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. In case the service contract does not stipulate in express wording whether or not the provider has to achieve a particular result through the service, the legal qualification of the service type itself is not sufficient to answer that question in: BELGIUM, ENGLAND, FINLAND, FRANCE and THE NETHERLANDS. In these countries, a duty to achieve a particular result may be implied from the circumstances of the case, for instance if the client relies on the skill and judgment of the service provider (ENGLAND; *contract for the supply of a service*); if the client refrains from giving detailed instructions thus leaving it to the provider as to how to carry out the service (BELGIUM; *louage d'ouvrage*, THE NETHERLANDS; *aanneming van werk*, ENGLAND; *contract for the supply of a service*); if the service has as its object an immovable structure or movable thing and provided that the service does not involve particular difficulty or particular hazard (FRANCE, *louage d'ouvrage*); or if the achievement of a particular result is something that the client may reasonable expect (FINLAND). In other countries, however, these circumstances are considered irrelevant for the answer to the question whether the service provider has a duty to achieve a particular result and the answer primarily depends on the legal qualification of the service: AUSTRIA (*Werkvertrag*; CC art. 1167), FRANCE (*louage d'ouvrage*, to the extent that the service involves construction of immovable structures; cf. CC art. 1792), GERMANY (*Werkvertrag*; CC art. 633), GREECE (σύμβαση έργου; CC arts. 688 and 689), PORTUGAL (*empreitada*; CC art. 1208). Comparative legal references with respect to the particularization of PELSC art. 1:108 for construction, processing, design, storage and information services are to be found in the comparative and national notes to PELSC arts. 2:104, 3:105, 4:107, 5:105 and 6:105.
   No information from DENMARK, IRELAND, ITALY, LUXEMBURG, POLAND, SCOTLAND, SPAIN, SWEDEN.

National Notes

1. *The duty of the service provider to achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract*
   AUSTRIA It follows from the general rule in the AUSTRIAN CC on *Gewährleistung* that whenever a party expressly or impliedly agrees to achieve a particular result, failure to achieve that result constitutes non-performance of the contract (CC arts.

922 ff). This general rule in particularised in CC art. 1167 for services qualified as *Werkvertrag*. As regards services qualified as *Verwahrungsvertrag*, cf. CC art. 961. The service provider cannot disculpate himself by arguing he has lived up to his duty to perform the service with reasonable care and skill (cf. Koziol/Welser, Grundriss des bürgerlichen Rechts, Band II, Schuldrecht Allgemeiner Teil, Schuldrecht Besonderer Teil, Erbrecht, 12th ed, p. 247). If the service provider is not sure whether or not he will be able to achieve the result, he must inform the client thereof at the time of conclusion of the contract and make clear his intention that he will only have to answer for non-performance of his lesser duty of reasonable care and skill (cf. Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166, no. 56).

BELGIUM In the event that the service is qualified as *louage d'ouvrage* the service provider only has a duty to achieve a particular result *(obligation de résultat)* if the client is considered to rely on the skill and judgment of the service provider. The client is not considered to rely on the service provider if the former imposes detailed instructions on the latter as to how to carry out the service (cf. Cass. 26 February 1976, Entr. Et dr. 1985, p. 263, note M.A. Flamme and Ph. Flamme. See also Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, no. 40 and Jansen, Towards a European building contract law, pp. 265-266).

ENGLAND If a service is qualified as a *contract for the supply of a service*, there is no rule in art. 13 ff of the Supply of Goods and Services Act 1982 imposing a duty upon the service provider to achieve a particular result through the service. But the Act does not prejudice any rule of law which imposes on the supplier a duty stricter than the one that is imposed by arts. 13-14 above (cf. Supply of Goods and Services Act 1982, art. 16(3)). There is ample case law showing that where the client relies on the skill and judgment of service provider, there is likely to be an implied term that the latter is to achieve a particular result through the service: *Duncan v. Blundell* (1820) 3 Stark. 6; *Hall v. Burke* (1886) 3 TLR 165; *Jones v. Just* (1886) LR III QB 197; *Lawrence v. Cassel* [1930] 2 KB 83; *Samuels v. Davis* [1943] 1 KB 526; *Hancock v. B.W. Brazier (Anerly) Ltd.* [1966] 1 WLR 1317; *Greaves (Contractors) Ltd. v. Baynham Meikle* & *Partners* (1975) 4 BLR 56 (cf. Chitty on Contracts, 13-031). Generally speaking, a client is considered to rely on the skill and judgment of the service provider if he leaves it to him as to how to achieve the required result. There will be less reliance if the client imposes detailed instructions upon the service provider as to how to perform the service (cf. Jansen, Towards a European building contract law, pp. 261-264).

FINLAND According to chap. 8, art. 12(2) (16/1994), 2nd sentence, Consumer Protection Act, the service must conform to what the consumer generally has reason to expect in the case of such a service. If the service does not conform to the consumer's reasonable expectations, it is deemed to be defective (cf. chap. 8, art. 12(4) (16/1994), Consumer Protection Act).

FRANCE If the service can be qualified as *louage d'ouvrage*, it has to be determined whether the service provider merely has a duty to act with reasonable care and skill *(obligation de moyens)* or whether he has to accomplish a particular result *(obligation de résultat)*. Generally speaking, the former duty is usually imposed in case of mere intellectual services, whereas the latter duty relates to services involving the supply of an immovable structure or movable thing, provided that the latter service promised does not involve particular difficulty or particular hazard (cf. Malaurie, Aynès, Gautier, Contrats spéciaux, no. 742; J. Huet, Principaux contrats spéciaux, nos. 32259 ff and the

abundant case law quoted). A duty to achieve a particular result is imposed upon the service provider, however, irrespective of the involvement of any particular difficulty or particular hazard in the event of construction services (cf. CC art. 1792).
GERMANY According to CC art. 633 the service provider under a *Werkvertrag* has to achieve a result that is fit for the specific purpose made known to the processor at conclusion of the contract, as well as fit for the normal purpose of such a service. To that extent, the service must have the qualities which are common for services of the same kind and which the client, from the nature of the service, may expect (cf. CC art. 633(2); BGH 26 November 1959, 31 BGHZ, 224; BGH, NJW 1998, 3707). The duty to achieve a specific result is not imposed upon the service provider in case the service is to be qualified as *Dienstvertrag* (cf. BGH 4 June 1970, 54 BGHZ, 106).
GREECE If the service can be qualified as contract for work (σύμβαση έργου) the service provider is under a duty to achieve a particular result through the service (cf. CC arts. 688 and 689).
THE NETHERLANDS In case of a service qualified as *aanneming van werk* the position of DUTCH law is rather similar to ENGLISH and BELGIAN law. This means that the service provider has a duty to achieve a particular result unless the client has imposed precise instructions on the service provider as to how to perform the service (Asser-Thunnissen, Bijzondere overeenkomsten. Overeenkomst van opdracht, arbeidsovereenkomst, aanneming van werk, no. 514; Van den Berg, Samenwerkingsvormen in de bouw, nos. 69-70; Jansen, Towards a European building contract law, pp. 267-270). As regards services qualified as *bewaarneming* the service provider has a duty to achieve a particular result (Rutgers, Bewaarneming, Monografie Nieuw BW B-73, no. 5; Paquay, De aansprakelijkheid van de bewaarnemer, RM Themis, p. 494; cf. art. 7:605 para. 4).
POLAND The service provider is obliged to achieve the specific result always, if the contract is classified as an obligation of result (for example contract of specific work). In such case achieving a specific result is one of the conditions of fulfilling the contract.
PORTUGAL The service provider has a duty to achieve a particular result through the service if the service can be qualified as *empreitada* only (cf. CC art. 1208). The service provider cannot disculpate himself by arguing he has lived up to his duty to perform the service with reasonable care and skill (cf. CC art. 798 and 799; CA Lisboa, 27 November 1981, CJ 1981, V, 164).

Article 1:109: Directions of the Client

(1) The service provider must follow all timely directions of the client regarding the performance of the service, provided that the directions:
  (a) are part of the contract itself or are specified in any document that the contract refers to; or
  (b) result from the realisation of choices left to the client by the contract in pursuance of Article 6:105 PECL (Unilateral Determination by a Party); or
  (c) result from the realisation of choices initially left open by the parties.

(2) If non-performance of one or more of the duties of the service provider under Articles 1:107 or 1:108 is the consequence of following a direction falling under paragraph (1), the service provider is not liable under those Articles, provided that the client was duly warned under Article 1:110.
(3) If the service provider perceives a direction falling under paragraph (1) to be a variation of the contract under Article 1:111, the service provider must warn the client accordingly. Unless the client then revokes the direction without undue delay, the service provider must follow the direction and the direction is deemed to be a variation of the contract.

Comments

A. General Idea

The client will generally translate his wishes and needs into directions that are to be observed by the service provider when carrying out the service. These directions could first of all involve the nomination of subcontractors, and the selection of specified tools, materials, and components. They could further relate to the manner in which the service process is to be performed, including the application of the said tools, materials, and components through labour. Finally, they might contain functional requirements, specifying the outcome that will eventually have to result from the service process.

> *Illustration 1*
> A building constructor agrees to build a new office for an investment bank. The constructor receives instructions from his client to cover the walls of the meeting room of the bank's board of directors with 18 mm wooden panels (meranti), to be obtained from supplier X and to be fixed by means of contact glue of type Y by subcontractor Z.

Such directions will usually be laid down in the contract itself, or in the documents and drawings the contract refers to. Paragraph (1)(a) imposes an obligation on the service provider to follow these directions. It is also possible that the contract allows the client to issue such a binding direction at a later stage under paragraph (1)(b), by making a choice left to him by the contract, or under paragraph (1)(c), following a choice that may be made by either party at a later stage (c).

Paragraph (1) further requires directions to be given reasonably and timely. Whether a direction is given reasonably and timely depends on the circumstances of the case and is to be determined by the courts. The steps that have already been taken by the service provider for the purpose of performing his obligations under the contract will have to be taken into account.

If the service is carried out following the client's directions, it may happen that the result the client intends to acquire through the service will eventually not be achieved. In that case the service provider's liability is to be established under paragraph (2) of the present Article, which follows the same principle underlying various other provisions of this Chapter dealing with similar forms of defective co-operation of the client (see

Article 1:103(4), 1:104(1)(a), (b), (c), or (e), and 1:106(6) as well as the Comments to these Articles that address the issue of remedies). That principle accepts the liability of the client for defective co-operation in principle, subject to the exception of the service provider's failure to warn under Article 1:110. An example of a case where a service provider failed to warn in this respect, is to be found in the following illustration:

> *Illustration 2*
> A supplier of computer networks is asked by a hospital to install a tailor-made network, following a design prepared on behalf of the hospital. The network as designed is fit for the purpose the hospital has in mind, namely to allow a maximum of 150 staff members to use the network at the same time. Whilst the installation service is carried out, the hospital instructs the supplier to make 250 workplaces throughout the hospital available for entering the network, without instructing the supplier to enlarge the access capacity of the network. When the network is completed, it shuts down 15 times a day due to an overload of simultaneous access attempts.

Some directions are refinements of choices already made in agreement between the parties.

> *Illustration 3*
> A garage agrees to paint the car of a customer yellow for a fixed price. Once the contract is concluded and the service is to be performed, the customer chooses from a range of colours the exact type of yellow.

If the client wishes to leave the framework of such choices, he is allowed to do so. But in that case, the rules of Article 1:111 on variation of the contract will apply, according to paragraph (3). This can be explained on the basis of a modification of Illustration 3

> *Illustration 4*
> A garage agrees to paint the car of a customer yellow for a fixed price. When the car is being painted, the customer instructs the garage to paint a black horizontal banner on both sides of the car.

Given that there is often an imprecise borderline between a direction that is issued within the boundaries of the existing contractual framework on the one hand, and a direction, which is outside that framework on the other, the service provider has to warn the client if he feels this borderline is crossed.

B. Interests at Stake and Policy Considerations

A first issue that is to be dealt with here is, whether a client ought to be allowed to give directions whilst the service process is already on its way. One might argue, on the one hand, that it is indeed essential for the client to be able to do so. First of all, in some situations, it will be impossible or impracticable to foresee every detail of both the service process and the result that is to be achieved through that process at the con-

clusion of the contract. Often it is much easier to take decisions about such details when the process is already on its way and the contours of the result are visibly present. Secondly, if it becomes clear that achievement of the result becomes a problem due to unexpected developments, which cannot be controlled by the service provider, the client will most likely want to be able to decide how the latter is to proceed with the service. Hence the client can contribute – by way of giving directions – to the achievement of a successful result of the service process.

But the downside of this is that directions may run contrary to the expectations of the service provider. He will have organised his work in accordance with the directions laid down in the contract itself and with his reasonable interpretation of what is needed to accomplish the agreed outcome through the service. Directions may conflict with measures taken by the service provider, or even with the way parts of the result of the service have already been achieved by him.

Another issue that is to be dealt with here involves the responsibility for the unfortunate consequences resulting from carrying out a direction. If the service provider observes a direction, which is incorrect or inconsistent with previous directions having regard to the result envisaged by the client, it is likely that he will not achieve that result. This means that directions might conflict with the obligations of the service provider under other Articles of this Chapter, and especially with the obligation under Article 1:108 that is imposed on some service providers, depending on the interpretation of the contract. One might argue as a general principle, that the client should presumably be responsible for the consequences of his directions to the service provider. In following these directions, the latter does nothing but perform his agreed obligations. But on the other hand, the service provider is in a much better position to assess the consequences of the directions given by the client. He is the one who carries out the service, and he will usually have much more technical and other professional knowledge than the client. Channelling some of the responsibility to the service provider would therefore seem to be reasonable as well.

C. Comparative Overview

The service provider has a duty to follow directions imposed upon him by the client in the course of the service process, whether or not the parties have agreed on the subject matter in express wording: AUSTRIA, BELGIUM, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL and SPAIN. Express wording in the contract on the duty of the service provider is needed in ENGLAND, given the prevailing principle that the service provider has the responsibility to perform the service as he thinks fit. This latter principle is considered to be important on the Continent as well, but there seems less restraint to assume that the client should be able to give directions in the course of the service process necessary for the appropriate performance of the contract, even if the contract is silent about this.

If the client supplies inadequate materials or directions to the service provider, as a result of which the latter does not perform the service in accordance with the express or

implied terms of the contract, the service provider may disculpate himself in principle in AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND and PORTUGAL. The latter principle may be altered on the basis of the violation of the service provider of his duty to warn, as will be shown in Comment C to Article 1:110.

D. Preferred Option

The present Article allows the client to give directions to the service provider in the course of the service process. The arguments set out in Comment B support this choice.

If a direction would lead to a change of the service, the service provider will have to notify the client thereof, in order to trigger the operation of the rules under Article 1:111, which might allow him additional payment.

If, upon following an incorrect or inconsistent direction, the service provider does not achieve the result envisaged by the client, the latter will invoke the non-performance of the service provider's obligation either under Article 1:108 or under Article 1:107. In any event, the service provider is then allowed to establish that his non-performance was caused by the incorrectness or inconsistency of the client's direction. He will not be allowed to invoke the client's responsibility if the incorrectness or inconsistency of the direction was obvious to him or actually discovered by him under the test of Article 1:110(1). The choice that is made here is consistent with other rules in this Chapter dealing with any other act or failure of the client, that could cause the non-performance of the service provider's main obligation under the contract: Article 1:103(4), 1:104(1)(a), (b), (c), or (e), and 1:106(6), subject to the latter's duty to warn under Article 1:110.

It is to be noted, however, that mere selection by the client – through a direction – of generally adequate tools, materials, and components – whether or not to be obtained from a nominated subcontractor – which turn out to be unfit for their purpose in the particular case concerned due to an incidental production failure, is not to be regarded as a direction which caused 'non-performance of one or more of the duties of the service provider under Article 1:107 or 1:108' in the sense of paragraph (2). This can be explained by giving an illustration that is a further modification of *Illustrations 3* and *4:*

> *Illustration 5*
> A garage agrees to paint the car of a customer yellow for a fixed price. The customer specifies the type and colour of the car paint to be supplied by the garage. This type of paint is generally suitable for painting cars. However, due to an incidental production failure, the garage buys a can of paint, which doesn't do the job properly.

The main reason why the client's specification cannot be considered to have caused the 'non-performance' follows from the general idea that decisions of the client in these typical situations do not restrict the freedom of the service provider to select *adequate*

tools, materials, or components. Moreover, the service provider will be able to invoke remedies from his supplier. An exception to the aforesaid principle could arise in the event that the input – unfit due to an incidental production failure – is to be obtained from a nominated subcontractor who then limits his liability towards the service provider to a further extent than the limitation the latter can resort to under the contract with the client. The exception will particularly be needed if the service contract does not allow the service provider to object to the nomination.

E. Relation to PECL and Other Parts of the Principles

This Article first of all deals with rules that are related to the rules of Chapter 5 PECL on interpretation of the contract. Furthermore, paragraph (1)(c) is an application of Article 6:105 PECL (Unilateral Determination by a Party). The directions of the client are thus unilateral determinations of contractual terms that should not be grossly unreasonable.

Paragraph (1)(c) deals with those areas where the parties have not clearly expressed their intentions. They confirm the general principle laid down in Article 5:101(2) PECL (General Rules of Interpretation), that the intention of one party of which the other party could not have been unaware but to which the other party did not object will bind that other party. This principle is, however, not only applied to intentions present at the time of conclusion of the contract, but also to intentions expressed later on by the client. These later intentions are only relevant though, when they relate to choices that are not yet fixed by the contract.

The rule slightly deviates from the normal contractual gap-filling rules of Chapter 5 PECL, in the sense that they give more weight to the intention of the client. As the primarily interested party, the client should have the right to express his wishes, as long as these wishes do not harm the interests of the service provider. This is taken into account by the rule of paragraph (2). In addition, the client is still bound by the outer limits of interpretation set by the rules of Article 5:102 PECL (Relevant Circumstances) and especially by the principle of good faith and fair dealing of Article 1:201 PECL (Good Faith and Fair Dealing). The constraints to which the clients' choices are bound are therefore more narrowing than what would result from the test of gross unreasonableness that applies to contractually agreed discretion for the client.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules under the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7, that either modify or deviate from the rules under the present Article, or that give a particularisation of these rules. The significance of the present Article for Chapters 2 to 7 is therefore explained and illustrated in the General Comments to the said Chapters, particularly in Comment M (Chapter 2: Construction), Comment K (Chap-

ter 3: Processing), Comment K (Chapter 4: Storage), Comment K (Chapter 5: Design), Comment K (Chapter 6: Information), and Comment O (Chapter 7: Treatment).

G. Character of the Rule

This Article contains default rules.

H. Remedies

The issue of remedies will be discussed below, following the distinction that can be made between the service provider's non-observance of adequate directions on the one hand, and the service provider's failure to achieve the result envisaged by the client, due to the observance of incorrect or inconsistent directions on the other.

Depending on the interpretation of the contract using the rules of Article 1:108, a duty can be imposed upon the service provider to achieve a result stated or envisaged by the client. It is possible that the service provider fails to achieve that result due to the non-observance of a direction given to him under paragraph (1) of the present Article. If that is the case, it is in the client's interest that he invokes the non-performance of the service provider's obligation of Article 1:108 under Article 8:101(1) PECL (Remedies Available). As is explained in Comment G to Article 1:108, the burden of proof imposed upon the client will then be limited, and the service provider will have to prove that the non-performance is not excused under Article 8:108 PECL (Excuse Due to an Impediment). In that scenario, it is not likely that the client will invoke the non-performance of a direction under paragraph (1) of the present Article. A claim that would in effect seek double compensation of the same damages would in any event be barred on the basis of the principle underlying Article 9:502 PECL (General Measure of Damages).

As is explained in Comment A and D to Article 1:108, the obligation of that Article will, however, not be imposed upon every service provider in every situation. If it not imposed, this might cause the client to invoke the failure by the service provider to carry out a direction under paragraph (1) of the present Article. There are two situations where this might be relevant.

The first situation is when the service has been carried out and did not lead to the result envisaged by the client. The client would then have to submit that the service provider failed to perform a duty under paragraph (1). The service provider will be allowed to raise the defences of Article 8:101(3) PECL (Remedies Available) and Article 8:108 PECL (Excuse Due to an Impediment). The client may resort to any of the remedies under Chapter 9 PECL, if the service provider's defences are raised in vain.

The second situation in which the client might invoke the non-performance of the service provider's duty under paragraph (1) of the present Article is when the service process is still in progress. If the client exercises his right under Article 1:104(1)(d), he

might find out that the service provider fails to observe a direction that has been given under paragraph (1). In that case the client will most likely notify the service provider under Article 1:113(1), by submitting that the latter will fail to achieve the required result. In addition, the client may demand adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance), a course of action which might eventually even end in termination of the contract under Article 8:105(2) PECL.

The analysis above, as well as its outcome, might become different in the event that the client gives an incorrect or inconsistent direction to the client. If the service provider carries out that direction, it could subsequently become the cause of the outcome of the service process not to be in accordance with the result envisaged by the client. The client's claim on the basis of the non-performance of the service provider's main obligation under the contract, either stated in Article 1:107 or 1:108, dependent on the interpretation of the contract, will then have to be considered in the light of the client's incorrect or inconsistent direction. Such direction is dealt with in the same manner as any other act or failure of the client for which rules are provided in other Articles of this Chapter – Article 1:103(4), 1:104(1)(a), (b), (c), or (e), and 1:106(6) – to the extent that they would amount to a situation of defective co-operation. This explains why paragraph (2) of the present Article is linked to Article 1:110. If the service provider was under a duty to warn the client about the incorrect or inconsistent direction, and if he failed to perform that duty, Article 1:110 will apply. In that case, the remedies that can be invoked by the parties, given their mutual failures, are as set out in Comment *I* to Article 1:110 below. But if the service provider was not under a duty to warn, the client cannot resort to any of the remedies under Chapter 9 PECL as a result of the rule under Article 8:101(3) PECL.

Comparative Notes

1. *The duty of the service provider to follow the client's directions*
   The service provider has a duty to follow directions imposed upon him by the client in the course of the service process, whether or not the parties have agreed on the subject matter in express wording: AUSTRIA (*Werkvertrag*; CC art. 1168a), BELGIUM *(louage d'ouvrage)*, FRANCE *(louage d'ouvrage)*, GERMANY (*Werkvertrag*; CC art. 242), GREECE (σύμβαση έργου; CC art. 685), ITALY (*appalto*; CC art. 1661), THE NETHERLANDS (*aanneming van werk*; CC art. 7:754 and CC art. 7:760(3), *opdracht*; CC art. 7:402(1)), POLAND (CC art. 641(2) concerning contracts for work), PORTUGAL (*empreitada*, CC art. 1208), SPAIN (in the context of construction services: art. 11 of the *Ley 38/1999 de 15 de Noviembre or Ley de Ordenación de la Edificación*). Express wording in the contract on the duty of the service provider is needed in ENGLAND, given the prevailing principle that the service provider has the responsibility to perform the service as he thinks fit (*Clayton v. Woodman & Sons Ltd.* [1962] 1 WLR 585 (CA)). This latter principle is considered to be important on the Continent as well, but there seems less restraint to assume that the client should be able to give directions in the course of the service process necessary for the appropriate performance of the contract, even if the contract is silent about this.

No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

2. *Disculpation of the service provider in the event of inadequate directions of the client*
If the client supplies inadequate materials or directions to the service provider, as a result of which the latter does not perform the service in accordance with the express or implied terms of the contract, the service provider may disculpate himself in principle in AUSTRIA (*Werkvertrag*, CC art. 1168a), BELGIUM, ENGLAND, FRANCE, GERMANY (*Werkvertrag*, CC art. 645), GREECE (σύμβαση έργου, CC art. 691), ITALY, THE NETHERLANDS (*aanneming van werk*; CC art. 7:760(2) and (3)), POLAND (CC art. 641(2) concerning contracts for work), PORTUGAL. As will appear below (cf. comparative and national notes to PELSC art. 1:110) the latter principle may be altered on the basis of the violation of the service provider of his duty to warn.
No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SPAIN, SWEDEN.

National Notes

1. *The duty of the service provider to follow the client's directions*
AUSTRIA The duty of the service provider to perform the service in accordance with instructions issued by the client follows indirectly from CC art. 1168a in the event of services qualified as *Werkvertrag*.
BELGIUM If a service is supplied under a contract qualified as *louage d'ouvrage*, there is a duty on the supplier to follow directions of the client (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, no. 797 ff). This duty only relates to instructions that are issued in time and within the framework of the contract, taking into account the characteristics of the service that is to be supplied, and having regard to the reasonable expectations of the service provider and the interests of both parties to the contract (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 801-802).
ENGLAND As regards services that qualify as *contract for the supply of a service*, the prevailing principle seems to be that the service provider is free to perform the contract as he thinks fit. But the parties can use express wording in the contract in order to impose a duty upon the provider of the service to follow the client's directions (*Clayton v. Woodman & Sons Ltd.* [1962] 1 WLR 585 (CA); cf. Jansen, Towards a European building contract law, pp. 159-167, with regard to service contracts having as their object the construction or processing of immovable structures and movable things and with ample examples of express wording in standard forms of construction contracts).
FRANCE Although the service provider is considered to have an independent responsibility as to how to carry out the service, the client is nevertheless allowed to give directions in case of *louage d'ouvrage* (cf. Mazeaud, De Juglart, Leçons de droit civil, no. 1332; Jansen, Towards a European building contract law, p. 158).
GERMANY The duty of the service provider to follow the client's directions is undisputed in GERMAN law with respect to services qualified as *Werkvertrag* (cf. BGH 25 January 1996, NJW 1996, 1346; Jansen, Towards a European building contract law, p. 159). The duty is considered to be implied in the contract on the basis of the general

provision of CC art. 242 whenever this is necessary to ensure the appropriate performance of the service. The latter remains, however, the responsibility of the service provider. The service provider does not have to follow directions of the client if they are given after the conclusion of the service contract qualified as *Verwahrungsvertrag*. He may decide himself, within the framework of the express and implied contractual duties, how to store the thing (cf., in: Münchner [*-Hueffer*], Kommentar BGB, art. 692 no. 2).

GREECE It follows from CC art. 685 that the service provider owes a duty towards the client to carry out the service in accordance with the client's directions in the event of services qualified as contract for work (σύμβαση έργου).

ITALY if the service is qualified as *appalto,* the duty of the service provider to perform the service in accordance with the client's directions follows from CC art. 1661.

THE NETHERLANDS The duty of the service provider to observe directions of the client in the event the service is qualified as *aanneming van werk* follows indirectly from CC art. 7:754 and CC art. 7:760(3)) and is generally accepted in DUTCH law (cf. Jansen, Towards a European building contract law, p. 159). The duty also exists in case the service is to be qualified as *opdracht* (cf. CC art. 7:402(1).). In the latter case the client must give directions in time and within the boundaries of the framework of the contract. The characteristics of the particular *opdracht* of the service provider may limit his duty as well (Parl. Gesch. TM, InvW 7, p. 324), particularly if a direction would be in conflict with his professional ethics, professional codes of conduct and the independent position he may have to take towards the client (Asser-Kortmann, Bijzondere overeenkomsten. Overeenkomst van opdracht, arbeidsovereenkomst, aanneming van werk, no. 61).

POLAND In this case the most relevant contract under POLISH law is the contract of specific work. According to the letter of the law, the way in which the contract is performed is in principle left up to the service provider, however, the client has a right to control the way of the performance – its correctness and accordance with the contract (CC art. 636 para. 1). As a rule the service provider is not bound by the client's instructions (Brzozowski in Rajski, System Prawa Prywatnego, tom 7, p. 336-337). In the practice however, the scope of client's possibilities to interfere is normally wider. Sometimes the possibility to give instructions is seen as an entitlement of the client (Brzozowski in Rajski, System Prawa Prywatnego, tom 7, p. 340).

PORTUGAL The duty of the service provider to follow the client's directions in case of services qualified as *empreitada* is considered to stem from CC art. 1208 (cf. CA Coimbra, 1 June 1993, BolMinJus 428, 689).

SPAIN With respect to construction services, the duty of the service provider to follow directions given to him by (or on behalf of) the client follows from art. 11 of the *Ley 38/1999 de 15 de Noviembre or Ley de Ordenación de la Edificación.*

2. *Disculpation of the service provider in the event of inadequate directions of the client*

AUSTRIA According to CC art. 1168a, the service provider is not liable in principle for the consequences of inadequate materials or instructions supplied by the client (cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1168a, no. 30).

BELGIUM If the supply of the service qualified as *louage d'ouvrage* is delayed as a result of the client's instructions, the service provider is not liable in principle (cf. Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, no. 801). The same

goes for the case where the client supplies inadequate materials (cf. Jansen, Towards a European building contract law, p. 423) or inadequate directions (Cass. 8 November 1974, Entr. et dr. 1976, p. 237, note P. Libert; cf. Jansen, Towards a European building contract law, p. 466).

ENGLAND If the client supplies inadequate materials or directions to the service provider, the latter will not be liable for non-performance of the *contract for the supply of a service* in principle (cf. Jansen, Towards a European building contract law, pp. 423 and 466, particularly with respect to services having as their object the construction or processing of immovable structures and movable things. See for instance *Lynch v. Thorne* [1956] 1 AllER 744. Nomination of subcontractors by the client may in particular circumstances indicate that the service provider can disculpate himself in case of non-performance of the contract: *Gloucestershire County v. Richardson* [1969] 1 AC 454 (cf. Jansen, Towards a European building contract law, pp. 453-458).

FRANCE The supply by the client of inadequate materials to the provider of a service qualified as *louage d'ouvrage* has been considered as a ground for disculpation in favour of the service provider (cf. Cass.civ. III, 17 July 1972, JCP 1973.II.17392), although it seems to follow from a later decision that the service provider must warrant the quality of the materials supplied by the client: cf. Cass.civ. III, 7 March 1990, Bull.civ. III, no. 69 and RD imm. 12(3) 1990, p. 375. Contrary to that decision is a later decision from the first chamber: Cass.civ. I, 20 June 1995, RD imm. 17(4) 1995, p. 751 (cf. Jansen, Towards a European building contract law, pp. 432-434). As regards the consequences of inadequate directions issues by the client the service provider may try to disculpate himself in principle, on the basis that the client's inadequate direction amounts to actual interference by a competent client. (Jansen, Towards a European building contract law, pp. 473 ff).

GERMANY The service provider will not be liable in principle for non-performance of a service qualified as *Werkvertrag* in the event that non-performance is the consequence of the client's supply of inadequate materials or directions (cf. CC art. 645; BGH 29 November 1971, NJW 1972, 447; Jansen, Towards a European building contract law, p. 423 and pp. 464-466). The mere nomination by the client of subcontractors, to be employed by the service provider, is in itself not sufficent to disculpate the service provider from liability for non-perofrmance of the service contract (cf. BGH 14 March 1996, BauR 1996, p. 702; Jansen, Towards a European building contract law, p. 451).

GREECE Similar to GERMAN law, the service provider is not liable under a contract for work (σύμβαση έργου) in principle, if non-performance of the contract is either the result of carrying out the service in accordance with the client's inadequate directions or the consequence of the application of inadequate materials that were supplied by the client (cf. CC art. 691).

ITALY In case the service is qualified as *appalto* and if the service provider is bound to follow inadequate instructions of the client, the service provider will not be liable for the consequences in principle (cf. Cass. 28 May 1958, no. 1781, in MF, 1958, c. 361).

THE NETHERLANDS In case of a service qualified as *aanneming van werk* a non-performance of the contract as a consequence of inadequate materials supplied by the client will not lead to liability of the service provider in principle, following the rule of CC art. 7:760(2). This rule also applies in case the non-performance is the conse-

quence of the client's inadequate instructions (cf. CC art. 7:760(3); Jansen, Towards a European building contract law, pp. 423 and 466-467).

POLAND Polish law clearly regulates this situation with regards to the contract of specific work. First, the service provider has a duty to immediately notify the client if the material delivered by the client is not suitable for the proper making of the work, or if there are any other circumstances, which may prevent its proper making (CC art. 634). Further, if the work is destroyed or damaged due to the defects of the material delivered by the client or as a result of the work having been made in accordance with the client's instructions, the service provider may demand the agreed remuneration or its appropriate part for the work made, if he has warned the client of the danger of destruction of, or damage to, the work (CC art. 641 para. 2). A similar regulation is included in the rules on the building contract. CC art. 651 requires the service provider to immediately notify the client that the documentation, the building site, the machines and facilities supplied by the investor are not suitable for the correct performance of the building work or if there are other circumstances which ma prevent the correct performance of the work. CC art. 655 specifies that if object made undergoes destruction or damage as a result of the defects of the materials, machines or facilities supplied by the client or as a result of the work being done in accordance with the client's instructions, the service provider may demand the remuneration agreed upon or its appropriate part, if he warned the client of the danger of destruction of, or damage to, the object, or if, in spite of observing due diligence, he could not have found the defects of the materials, machines or facilities supplied by the client.

PORTUGAL If the service is qualified as *empreitada*, the service provider is liable for non-performance of his duty to achieve the particular result through the service. However, inadequate input provided by client, such as directions, tools and materials, may give rise to contributory negligence resulting in the exclusion or mitigation of the service provider's liability (cf. CA Porto, 21 January 1977, CJ, 1977, I, 73; Romano Martinez, Direito das Obrigações, no. 443; Sá Gomes, Breves notas sobre o cumprimento defeituoso na empreitada in AB VNO AD OMNES-75 anos da Coimbra Editora, 1998, 614). The service provider remains liable for the performance of subcontractors nominated by the client when these subcontractors are acting under the supervision of the service provider (cf. STJ 15 January 1992, BolMinJus, 413; Sá Gomes, Breves notas, 1998, 615).

Article 1:110: Contractual Duty of the Service Provider to Warn

(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:
  (a) may not achieve the result stated or envisaged by the client at the time of conclusion of the contract, or
  (b) may damage other interests of the client, or
  (c) 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 1:105, 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:
(a) already knows of the risks referred to in paragraph (1)(a), (b), or (c); or
(b) 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 1:111.
(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.

Comments

A. General Idea

This Article imposes a contractual duty to warn on the service provider that is very similar to his pre-contractual duty under Article 1:103(1). The duty is extended in paragraph (2) with a duty to take reasonable measures to ensure that the client understands the content of the warning. A warning is writing is generally not required. Which measures are adequate, depends on the circumstances of the case and is left to the courts.

Again, the duty to warn relates to typical risks that might occur in the course of the service and which would go to the very heart of the contract. The risks are identified in paragraph (1). The service provider will only have to warn if the said risks are obvious, or if they are actually discovered by him. However, he will not be under a duty to warn if the risks are either obvious or actually discovered by the client. That principle is reflected in paragraph (3) in conjunction with (6).

The duty under the present Article differs from the one stated in Article 1:103(1). As explained in Comment A to that Article, the extent of the pre-contractual duty to warn is dependent on risks that are obvious or actually discovered by the service provider, given the information the service provider ought to have collected in order to make an informed offer to the client as regards the service that can be supplied. The information that is to be collected by the service provider particularly relates to the wishes and needs of the client for which he requires the service, as well as to important circumstances in which the service is to be performed. It may very well be the case that such information – *prior to* the conclusion of the contract – will not give rise to a duty to warn under Article 1:103(1). The reason for that may be that the aforesaid risks are neither obvious nor discovered in the process of preparing an offer for the required service. But they may

subsequently become obvious or even actually discovered *after* the conclusion of the contract, for two reasons.

One reason could be that the service provider will now have to look at the information, supplied before the conclusion of the contract, from a different perspective. That perspective is no longer the preparation of an offer, but the actual carrying out of the service in order to achieve the result envisaged by the client. Risks that were previously undetected, could now become obvious, particularly if the service provider collects additional information under Article 1:105 as part of his performance of the service. Another reason could be that the client has supplied additional information, directions, permits or licenses after the conclusion of the contract, under Articles 1:104(1)(a), (b), (c), or (e), or 1:109(1). If the service provider will analyse these additional data in the context of the information previously supplied, the aforesaid risks might become obvious or actually discovered.

Having regard to the purpose of the analysis of the information and directions sketched out above, the service provider is not bound to actually check whether observing the information or directions might give rise to one or more of the risks referred to in paragraph (1). But he should be normally attentive given the purpose of the analysis. That principle is reflected in paragraph (5).

If the service provider does not perform his duties under paragraphs (1) and (2) leading to the occurrence of one of the risks mentioned in paragraph (1)(a) or (b), the client may resort to the remedies under Chapter 9 PECL. This is further explained in Comment H below. In addition to the client's right to resort to these remedies, paragraph (4) of the present Article contains a further rule protecting the client, in the event that the failure to warn results in the risk mentioned in paragraph (1)(c). That rule is particularly relevant if payment of either a fixed price or a fee based on a no cure no pay-basis was agreed upon at the time of conclusion of the contract. It prevents the service provider from claiming compensation of the extra cost incurred, as well as an extension of time, under Article 1:111(4), (5) and (6). The rule is similar to its pre-contractual counterpart in Article 1:103(3)(a).

B. Interests at Stake and Policy Considerations

Imposing a contractual duty to warn on a service provider raises the following issues that have to be dealt with.

The main issue is of course whether a duty to warn is to be imposed upon a service provider at all. One could argue that the service provider should be relieved from his obligations once he has acted in conformity with the client's wishes and specifications stated at the time of conclusion of the contract, and with other directions supplied by the client under Article 1:109(1). The argument would be that the service provider should respect the wishes of the client and live up to his freely assumed contractual obligations. On the other hand, it could be argued that the service provider is in a much better position than the client to discover mistakes in the client's directions. Before

carrying out the service, he will normally have to analyse the client's wishes in order to determine what exactly has to be done. The same will go for directions issued later on. In doing so, he might discover all sorts of gaps, ambiguities, inconsistencies, and mistakes that might cause problems if they were followed without clarification or correction in advance. One might say that warning the client in such situations will hardly impose extra costs on the service provider. It may even be beneficial to him, given that it would prevent future disputes.

This leads to a second issue that is to be dealt with. The question is what should trigger the duty to warn, having regard to the content of the information and directions either supplied by the client or collected under Article 1:105. Is a mere gap, an ambiguity or a similar form of uncertainty already sufficient to give rise to the duty? Or should the duty first be brought about in case of an inconsistency or incorrectness? An argument for accepting a duty to warn in the first situation is that the ambiguity or uncertainty brings about the need for a choice, and that it will not be much of an effort for the service provider to consult the client before he takes the decision. On the other hand, it would be highly impractical for the service provider to have to consult the client for every choice he should make in the course of the service process. This would also be inconsistent with the system of Article 1:109, which gives both the service provider and the client (if he acts in good time) the possibility to make such choices. So that would be an argument not to accept a duty to warn in case of a mere gap as to the content of the information or directions.

A third issue to be dealt with, involves the question how attentive the service provider should be in analysing the information and instructions, in order to be able to signal a problem that gives rise to a duty to warn. Does he specifically have to focus on gaps, ambiguities, inconsistencies, and mistakes? Does he actually have to search for them? An argument against that proposition would be that a duty to inform is more costly when the service provider is expected to actively search for possible problems in the aforesaid information and directions. On the other hand, in many cases the client would be better of with such an extended duty to investigate of the service provider and hence to take advantage of the latter's expertise. But the service provider will not know where gaps or mistakes may be hidden and such a more extensive duty will therefore be an important burden for him.

Another issue that could be mentioned is that a duty to warn may not make sense if the client already knows of the problem to which the warning should refer. The same might be argued if the service provider may believe that the client already is aware of the problem, for instance because the client is more competent than the average client, or is assisted by someone else who has – or is deemed to have – the capacity of a professional and competent adviser. Imposing a duty to warn on the service provider would then not only be unnecessary but would also become very costly for the client. But it also implies that one has to make a choice between an unnecessary warning and the occurrence of a risk that is not discovered in time. In this respect it is noted that, in general, the costs of a warning will be rather insignificant in comparison with the costs of coping with the risk that occurs.

C. Comparative Overview

Case law and textbooks dealing with contracts for the supply of services generally acknowledge the importance of this ancillary duty next to the service provider's main obligations under Article 1:108 and/or Article 1:107. Its relevance is particularly recognised if the client asked for a tailor-made service, which is to be supplied following his wishes and needs – especially when they are abundant, detailed, and technical – and more particularly if the result envisaged by the client greatly depends on the control of the interrelationship between the said wishes and needs, the service provider's (tailor-made) solution that fits these needs, and the circumstances in which that solution is to be applied in order to achieve the result required. This explains why the duty to warn is considered to be particularly relevant in construction contracts and design contracts. Its relevance is further recognised in the framework of contracts for the processing or storage of a thing, information contracts, or treatment contracts, to the extent that the aforesaid characteristics are present. By the same token, it becomes less relevant in contracts concerning a rather standardised processing, storage, information, or treatment service.

The duty to warn of the service provider follows from his general duty to carry out the service with reasonable care and skill in all countries investigated. In some countries, however, the duty can additionally be found in specific provisions: AUSTRIA, GREECE, ITALY, THE NETHERLANDS, POLAND and SPAIN. In all countries investigated, the duty to warn the client is owed whenever the inadequacy of materials or directions supplied by the client should be obvious to the service provider, given the expertise that may be expected from him. Expertise of the client is not relevant for the purpose of establishing the duty to warn in concrete cases: AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, THE NETHERLANDS.

If the service provider fails to perform his duty to warn, he is liable towards the client for the consequences of that failure. The supply of inadequate materials or directions may, however, give rise to contributory negligence of the client in AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, PORTUGAL and THE NETHERLANDS, in which case the expertise of the client can be a relevant factor: FRANCE and THE NETHERLANDS.

D. Preferred Option

The present Article imposes a duty to warn on the provider of a service. The arguments to do so are abundant and convincing, and they have been addressed in Comment B above. In addition to these arguments, it is noted that the duty has a firm basis in the jurisdictions that have been investigated (see Comment C above).

As to the question what kind of problems should trigger the service provider's duty to warn, the Article chooses for a combination of the final two approaches sketched out under Comment C above. This implies that the duty is triggered by inconsistencies in the information or directions supplied by the client, if it is expected that following the information or directions might lead to a risk that would go to the very heart of the contract from the client's perspective.

The system chosen in most countries is that the service provider only has to warn for inconsistencies actually discovered or for other obvious inconsistencies. This system is attractive because it imposes no extra costs on the service provider. A diligent service provider will have to examine the client's information and directions carefully, because they are the very basis for his service. Inconsistencies that will not escape his attention when he studies the information and directions as thorough as is necessary to carry them out have to be mentioned to the client. Any active inspection aimed at discovering inconsistencies is therefore not required.

This approach is well captured by the concept of 'Reason to Know' that is acknowledged in American law (see: Restatement (2nd) Contracts § 19, comment b) where it is clarified as follows: 'A person has reason to know a fact, if the person has information from which a reasonable person would infer that the fact does or will exist based on all the circumstances, including the overall context and ordinary expectations. 'Reason to know' must be distinguished from knowledge. Knowledge means an actual conscious belief in or awareness of a fact. Reason to know need not entail a conscious belief in or awareness of the existence of the fact or its probable existence in the future. Reason to know is also to be distinguished from 'should know.' 'Should know' imports a duty to ascertain facts; the term 'reason to know' does not entail or assume an obligation to investigate, but is determined solely by the information available to the party.' Under American law, the amount of knowledge expected from the service provider depends on the situation. The person is charged with commercial knowledge of any factors in a particular transaction that in common understanding or ordinary practice are to be expected, including reasonable expectations from usage of trade and course of dealing and widespread business practice. If a person has specialised knowledge or superior intelligence, reason to know is determined in light of whether a reasonable person with that knowledge or intelligence would draw the inference that the fact does or will exist. For these reasons, the formula of the present Article has been adopted from the American Restatement in this Article. For the purpose of internal consistency, the formula has further been adopted in Articles 1:103 and 1:113.

The formula is not only relevant in the context of establishing the duty to warn of the service provider as such, under paragraph (1), but also for the purpose of establishing whether the client's competence or knowledge is such as to negate the duty to warn under paragraph (3) in conjunction with (6). The latter provision gives an additional clarification on the question whether, and to what extent the competence of the client amounts to 'reason to know', and whether and to what extent any person assisting the client in the framework of the service, amounts to 'knowledge' or 'reason to know' of the client. The principle underlying the rule is that mere competence of the client is insufficient to support the *prima facie* conclusion that the client has reason to know of a risk. The same goes for the situation where someone else advises the client. Mere competence of that other person does not automatically lead to the conclusion that the client thus knows or has reason to know of the risk. This is particularly to protect the interests of SME's and consumers that are – often for free – advised by family or friends. The situation becomes different, however, if a client specifically hires a professional adviser for the specific purpose of acting as his agent under the service contract. Any knowledge or competence of such agent will be imputed to the client under

paragraph (6) in conjunction with Article 1:305 PECL (Imputed Knowledge and Intention) and could amount to knowledge or reason to know of the client, which would then negate the duty to warn of the service provider under paragraph (3).

E. Relation to PECL and Other Parts of the Principles

The duty to warn under a contract for the supply of a service has no clear counterpart in PECL. There is a relation however with Article 1:201(1) (Good Faith and Fair Dealing) in conjunction with Article 6:102(c) (Implied Terms), given that the contractual duty to warn is in many legal cultures based on the principle of good faith.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules under the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7 that modify or deviate from the rules under the present Article. The implication of the present Article for services contracts dealt with in the specific Chapters is explained and illustrated in the General Comments to the said Chapters, particularly in Comment N (Chapter 2: Construction), Comment L (Chapter 3: Processing), Comment L (Chapter 4: Storage), Comment L (Chapter 5: Design), Comment L (Chapter 6: Information), and Comment P (Chapter 7: Treatment).

G. Burden of Proof

The client must prove whether a duty to warn is to be imposed upon the service provider. This burden of proof is relieved to some extent by the acceptance of an objective test as to the knowledge expected from the service provider. Likewise, the service provider will have to establish that the 'knowledge' test of paragraph (3)(a) and/or the 'reason to know' test of paragraph (3)(b) in conjunction with paragraph (6) is to be applied to the client's detriment.

H. Character of the Rule

This Article contains default rules in principle. However, given the character of the duty to warn and its basis in good faith, one should not interpret a service contract too easily in the sense that the client has renounced the protection granted under the duty to warn. Article 1:201(2) PECL (Good Faith and Fair Dealing) and Article 4:110 PECL (Unfair Terms not Individually Negotiated) may be relevant here as well.

I. Remedies

The remedies will be explained in the following, dependent on the risk that occurs as a result of the service provider's failure to warn under the present Article.

In the event that the duty is not performed and the risk of paragraph (1)(a) occurs – the service does not achieve a particular result – there are in fact two obligations the service provider failed to perform: (1) his main obligation either under Article 1:107 and/or, if applicable, under Article 1:108, and (2) his ancillary duty under Article 1:110(1)(a). Starting from the non-performance of the service provider's main obligation, Article 8:101(1) PECL (Remedies Available), allows the client to resort any of the remedies under Chapter 9 PECL. It was shown in Comment H to Article 1:104 above that the client's supply of incorrect or inconsistent information or directions will normally prevent him from invoking any remedy on the basis of Article 8:101(3) PECL. Under the present Article, the risk has again occurred following the supply of incorrect or inconsistent information or directions by the client. However, in the present situation the client's act is not the only cause of the unfortunate end-result. A secondary cause is the service provider's failure to warn which justifies the conclusion that Article 8:108(3) PECL does not apply. Non-performance of the service provider's main obligation is neither excused under Article 8:108 PECL (Excuse Due to an Impediment). Given that the service provider (also) failed to perform his duty to warn, he cannot be allowed to argue that the non-performance of his main obligation is due to an impediment beyond his control. This outcome is consistent with the outcome of the legal reasoning that sets off under Article 8:101 PECL from the non-performance of the service provider's ancillary duty to warn. The only reason why the client would probably want to claim a remedy for the service provider's failure to warn is to obtain damages. Such claim will be barred, however, in the event that the client also tries to claim damages on the basis of the non-performance of the service provider's main obligation under Article 1:107 and/or – if applicable – under Article 1:108. The reason for this bar is that any claim seeking double compensation of the same damages is inconsistent with the principle underlying Article 9:502 PECL (General Measure of Damages).

In the event that the service provider does not perform his duty to warn and the risk of paragraph (1)(b) occurs – other interests of the client are damaged – a claim for non-performance of the service provider's main obligation under Article 1:107 and/or 1:108 would not provide relief to the client. He will have to claim under Article 8:101 PECL on the basis that the service provider failed to perform his obligation to warn. It is inherent to such failure that non-performance of the duty cannot be excused under Article 8:108 PECL (Excuse Due to an Impediment).

Hence the client may resort to any of the remedies available under Chapter 9 PECL in the event that the risk of paragraph (1)(a) occurs. If the risk mentioned in paragraph (1)(b) occurs, a claim for specific performance of the service provider's failure to warn will practically not be relevant and probably be excluded under Article 9:102(2) PECL (Non-monetary Obligations). As regards the remedy of termination under Article 9:301 PECL (Right to Terminate the Contract), one could argue that non-performance of a duty to warn is indeed fundamental under Article 8:103(b) PECL (Fundamental Non-

Performance). The main remedy will however be damages under Article 9:501 PECL (Right to Damages). In that case the client's supply of incorrect or inconsistent information or directions could be regarded as a 'contribution to the non-performance or its effects' under Article 9:504 PECL (Loss Attributable to Aggrieved Party).

Finally, if the service provider fails to warn due to which the risk referred to in paragraph (1)(c) occurs – the service becomes more expensive or may take more time to perform than agreed upon in the contract – the client will not be the one to resort to a remedy. In practice it will be the service provider who will try to seek compensation for the loss that occurs, particularly if he agreed to carry out the service against a fixed price or on a no cure no pay basis. This is the type of situation for which the rule of paragraph (4) is stated, although the rule is also relevant when the service provider failed to warn for the possible occurrence of any other risk mentioned in paragraph (1). The rule of paragraph (4) prevents the service provider from seeking compensation under Article 1:111. It is similar to its pre-contractual counterpart under Article 1:103(3)(a). The difference is, however, that when the service provider fails to warn under Article 1:103(1), he may claim compensation of extra cost and extension of time under Article 1:111 if he proves the client would have entered into the contract, even if the latter would have known of the risk the service provider failed to warn of at the pre-contractual stage. A similar rule has not been adopted in paragraph (4) of the present Article, given that it is stated for the situation where the contract has already been concluded and where the service provider's duty to warn has come into being only after the conclusion of the contract. It is noted, however, that a service provider who fails to perform his contractual duty to warn, may try to claim compensation of cost and extension of time under Article 1:111, to the extent that cost and delay would have occurred anyhow, even if the service provider would have performed his duty under paragraphs (1) and (2). The reason is that such cost and delay have no causal relation with his failure to warn.

The rule therefore is that paragraph (4) stops the service provider from claiming compensation of cost and extension of time under Article 1:111, if extra cost and delay are indeed the consequence of his failure to warn under paragraphs (1) and (2). But there is always the alternative possibility that the service provider tries to claim under Article 1:104(3), invoking the client's non-performance of a duty under Article 1:104(1)(a), (b), (c) or (e). For it has already been explained that a case involving the contractual duty to warn of a service provider may at the same time be a case where the client, for instance, supplied incorrect or inconsistent information or directions. As is explained in Comment H to Article 1:104, this latter case is eventually a case of defective co-operation of the client, which would give the service provider the right to resort to any of the remedies set out in Chapter 9 PECL. But it is obvious that, whether or not this right can be exercised successfully, now has to be judged in the light of the service provider's failure to warn. In that particular situation the client, faced with a claim based on defective co-operation, will not be able to bar that claim with the help of Article 8:101(3) (Remedies Available) by stating that the service provider failed to warn him. The reason is that the service provider's failure to warn was not a cause to the client's non-performance of his duty to co-operate. By the same token, the client will not be able to treat the service provider's failure to warn as an excuse for his own failure to co-operate under Article 8:108 PECL (Excuse Due to an Impediment). The result of this would be that the service provider could resort to any of

the remedies under Chapter 9 PECL, subject to the restrictions explained in Comment H to Article 1:104. Given that he seeks compensation of the extra cost incurred due to the client's incorrect or inconsistent information or directions, he will probably try to claim damages under Article 9:501 PECL (Right to Damages). That claim would then have to be considered under the rule of Article 9:504 PECL (Loss Attributable to Aggrieved Party), given that the service provider's failure to warn contributed to the effects of the client's non-performance of his duty to co-operate. In order to get to a solution that is consistent with the application of the rule under paragraph (4) of the present Article, it would be logic to apply the rule of Article 9:504 PECL to the detriment of the service provider.

Comparative Notes

1. *The contractual duty to warn of the service provider in (specific) contract law*
   The duty to warn of the service provider follows from his general duty to carry out the service with reasonable care and skill in all countries investigated. This means that the duty can be seen as a particularisation of PELSC art. 1:107 and the reader is first of all referred to the comparative and national notes pertaining to that provision. In some countries, however, the duty can additionally be found in specific provisions: AUSTRIA (CC art. 1168a; *Werkvertrag*), GREECE (CC arts. 685, 691 and 699; σύμβαση έργου), ITALY (CC art. 1663; *appalto*), THE NETHERLANDS (CC arts. 7:752(2), 7:753(3), 7:754 and 7:755; *aanneming van werk*), POLAND (CC arts. 634, 641(2) and 651), SPAIN (CC art. 1590; *contratos de obra*). Both the general duty to carry out the service with reasonable care and skill and the duty to warn follow from the general duty to act in accordance with good faith and fair dealing stated in PECL art. 1:201(1) (Good Faith and Fair Dealing) in conjunction with PECL art. 6:102(c) (Implied Terms), which is acknowledged in general contract law in many countries (see the comparative and national notes to PECL art. 1:201(1) PECL in: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. In all countries investigated, the duty to warn the client is owed whenever the inadequacy of materials or directions supplied by the client should be obvious to the service provider, given the expertise that may be expected from him. Expertise of the client is not relevant for the purpose of establishing the duty to warn in concrete cases: AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, THE NETHERLANDS.
   No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

2. *Consequences in case of breach of the duty to warn*
   If the service provider fails to perform his duty to warn, he is liable towards the client for the consequences of that failure. The supply of inadequate materials or directions may, however, give rise to contributory negligence of the client in AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, PORTUGAL and THE NETHERLANDS, in which case the expertise of the client can be a relevant factor: FRANCE, THE NETHERLANDS.
   No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

National Notes

1. *The contractual duty to warn of the service provider in (specific) contract law*

AUSTRIA In case of a service qualified as *Werkvertrag*, the service provider has a duty to warn the client following CC art. 1168a. It is stated in this Article that the duty is owed in case of obvious defects in the material furnished by the client, or because of obviously incorrect directions issued by the client. The criterion of 'obvious' has to be assessed in the light of CC art. 1299 (cf. Klang [*-Adler-Höller*], V, art. 1168a, nos. 407ff.; JBl 1966, 562, JBl 1987, 44, 622). The service provider will only have to analyse the client's input to the extent that this is justified by economic considerations, given that the criterion points to an easy-to-establish inadequacy for experts (Iro, 507; Illustration JBl 1973, 151). The duty to warn does not cease to exist if the client himself is to be seen as an expert (Rummel [*-Krejci*], ABGB Kommentar, art. 1168a, no. 32).

BELGIUM If the service is to be qualified as *louage d'ouvrage*, the services provider owes a duty towards the client to warn if the latter supplies inadequate materials or directions. This duty emanates from the duty to perform the service with reasonable care and skill (cf. Jansen, Towards a European building contract law, pp. 290-291; Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 872 ff). The duty only exists in case the inadequate input from the client should have been obvious to a reasonable competent service provider (cf. Trib.Anvers, 12 February 1970, RW 1969-1970, col 1393; Jansen, Towards a European building contract law, pp. 299-301).

ENGLAND The duty to warn of the provider of services under a *contract for the supply of a service* stems from the implied duty of any service provider to carry out the service with reasonable care and skill (cf. *Duncan v. Blundell* (1820) 3 Stark. 7; *Pearce v. Tucker* (1862) 3 F & F 137; *Brunswick Construction Ltee v. Nowlan and Others* (1974) 21 BLR 27; *Lindenberg v. Joe Canning and Others* (1992) 9 Const LJ 43; *Worlock v. SAWS and Rushmoor Borough Council* (1982) 22 BLR 66 (CA); Jansen, Towards a European building contract law, pp. 288-289). The duty is imposed in case it must have been obvious to a reasonable competent service provider that the service could not be carried out properly, as a result of the inadequate input supplied by the client (cf. *Lindenberg v. Joe Canning and Others* (1992) 9 Const LJ 43), although additional expertise of the service provider is considered to be relevant as well (cf. Jansen, Towards a European building contract law, pp. 300-301). No evidence was found in the relevant cases that the client's expertise is a factor to be taken into account when determining whether or not a duty to warn exists.

FRANCE If the service can be qualified as *louage d'ouvrage*, the services provider must warn the client if the latter supplies inadequate materials or directions. This duty stems from the duty of the service provider to perform the service with reasonable care and skill (cf. Cass.civ. III, 5 June 1968, D. 1970, p. 453, note Jestaz; Malaurie, Aynes, Gautier, Contrats spéciaux, nos. 750 ff; Jansen, Towards a European building contract law, pp. 290-291). The duty is owed whenever inadequate input from the client should have been obvious to a reasonable competent service provider (cf. Jansen, Towards a European building contract law, pp. 300-301), irrespective of the client's expertise (cf. Jansen, Towards a European building contract law, p. 302).

GERMANY The service provider owes a duty to warn the client for the supply of inadequate materials and directions in case the service can be qualified as *Werkvertrag*. The duty is said to follow from the general duty of the service provider to carry out the

service with reasonable care and skill (Jansen, Towards a European building contract law, pp. 291-292). The service provider will have to warn whenever inadequate input from the client should have been obvious to a reasonable competent service provider (cf. Jansen, Towards a European building contract law, pp. 300-301). The client's expertise is not relevant in this respect (cf. BGH 10 July 1975, BauR 1975, p. 420; Jansen, Towards a European building contract law, p. 302).

GREECE It follows from CC arts. 685, 691 and 699 that the service provider owes a duty to the client under a contract for work (σύμβαση έργου) to warn if the client supplies inadequate materials or instructions, and provided that the inadequacy is objectively detectable. The fact that the client himself, or any professional assisting the client, should or could have noticed the inadequacy, does not release the service provider from his duty to warn.

ITALY It follows from CC art. 1663 that, in case of services qualified as *appalto*, the service provider must warn the client if the latter supplies inadequate materials. Following the general duty of the service provider to carry out the service with the required care and skill, the services provider owes a duty to warn with respect to any inadequate input from the client in the service process and which the service provider should have noticed taking into account his expertise and diligence (cf. F. Voltaggio Lucchesi, Responsabilita' decennale dell'appaltatore, vizi del progetto fornito dal committente e "gravi difetti" ex. CC art. 1669, in Giust.civ., 1959, I, p. 1780; Trib. Torino, 24 August 1979, in Rep.Foro it., 1980, V° *Appalto*).

THE NETHERLANDS The duty of the provider of a service qualified as *aanneming van werk* developed from his general duty to carry out the service with reasonable care and skill (cf. Van den Berg, Samenwerkingsvormen in de bouw, no. 69; Asser-Thunnissen, Bijzondere overeenkomsten. Overeenkomst van opdracht, arbeidsovereenkomst, aanneming van werk, no. 537; Jansen, Towards a European building contract law, p. 285; HR 25 November 1994, NJ 1995, 154 (Bouwbedrijf Stokkers/Vegt Vloeren)). The duty has recently been enacted in CC art. 7:754 which states that the service provider must warn the client in the course of the service for errors in the contract, insofar as he knew or should have known these errors. When applying the latter criterion, the expertise of the client is deemed to be irrelevant (cf. HR 18 September 1998, NJ 1998, 818 (KPI/Leba)). Relevant factors are, however, the obviousness of the inadequacy of the input of the client, given the required intensity of the analysis of that input and given the expertise that may be expected from the service provider on the ground that he agreed to carry out the service, or on the basis of expertise otherwise pretended by him (cf. Asser-Thunnissen, Bijzondere overeenkomsten. Overeenkomst van opdracht, arbeidsovereenkomst, aanneming van werk, no. 538). The service provider is not under a duty to warn if the client has the same knowledge as the service provider with respect to facts that are considered relevant for the duty and if the client, although supported by an expert and despite his aforesaid knowledge, failed to carry out further investigation that ought to have been undertaken on the basis of the said facts (cf. HR 8 October 2004, JOL 2004, 506). The duty to warn stated in CC art. 7:754 covers inadequacies in materials supplied by the client, as well as errors or defects in plans, drawings, calculations and instructions that have been provided by the client for the purpose of performance of the service. Additional duties to warn about price risks are further stated in CC arts. 7:752(2), 7:753(3) and 7:755. The duty to warn is also imposed upon the service provider in case the service is qualified as *opdracht* and

follows from the general duty to carry out the service with reasonable care and skill (cf. CC art. 7:401).

POLAND In the event of a contract for work, the service provider's duty to warn the client for the supply of inadequate materials follows from CC art. 634. Likewise, the service provider owes a duty to warn in case inadequate directions are issued by the client: cf. CC art. 641(2) and the decision of the Supreme Court, 22 of April 1986 (II CR 531/80, OSNCP 1981, z. 9, poz. 174. A similar duty exists under the building contract (CC art. 651).

PORTUGAL If the service is qualified as *empreitada,* the service provider owes a duty to the client to warn in case of inadequate materials or directions supplied by the latter. This duty follows from the general duty to carry out the service with reasonable case and skill (cf. Romano Martinez, Direito das Obrigações, nos 354 and 443; Pires de Lima, Antunes Varela, Código Civil anotado, vol II, 796 art. 4).

SPAIN The duty to warn of the service provider follows from his general duty to carry out the service with reasonable care and skill (cf. CC art. 1258 and several decisions of the Supreme Court: STS 14 June 1976, RJ 1976/2753; STS 27 January 1977, RJ 1977/121; STS 14 November 1984, RJ 1984/5554). A specific duty to warn of the provider of a service qualified as *contratos de obra* follows from CC art. 1590, in case the client supplies inadequate materials. The duty is owed in the event of obvious inadequacy given the diligence which can be required from the service provider (cf. F. Martinez Mas, La recepción en el contrato de obra, Madrid, 1998, p. 20).

2. *Consequences in case of breach of the duty to warn*

AUSTRIA The service provider is liable towards the client if he fails to warn the latter for the consequences of the supply of inadequate tools or materials (CC art. 1168a). But under certain circumstances the liability of the service provider can be reduced on the basis of contributory negligence on the part of the client (Iro, 510 ff).

BELGIUM If the service provider fails to warn under a contract qualified as *louage d'ouvrage,* the consequences of carrying out the service on the basis of inadequate materials or directions supplied by the client will be attributed to the service provider entirely (Cass. 15 December 1995, Entr. et dr. 1997, p. 177, particularly at 195 *in fine*. Cf. Jansen, Towards a European building contract law, pp. 487-488).

ENGLAND Following less recent case law, the consequences of the service provider's failure to warn are attributed to the latter in their entirety (cf. *Duncan v. Blundell* (1820) 3 Stark 7; *Pearce v. Tucker* (1862) 3 F & F 137; *Brunswick Construction Ltee v. Nowlan and Others* (1974) 21 BLR 27). More recent case law, however, allows the service provider to raise contributory negligence of the client as a defence, in the event that the client's inadequate directions have contributed to the occurrence of the non-performance of the contract (cf. *Lindenberg v. Joe Canning and Others* (1992) 9 Const LJ 43). This latter approach is also supported by The Law Commission, Contributory negligence as a defence in contract, no. 219, para. 3.41, p. 23 and para. 4.15(4), p. 34; cf. Jansen, Towards a European building contract law, pp. 502 ff.

FRANCE Similar to BELGIAN law, in the sense that if the service provider fails to warn under a contract qualified as *louage d'ouvrage,* the consequences of carrying out the service on the basis of inadequate materials or directions supplied by the client will be attributed to the service provider entirely (cf. Cass.civ. III, 19 March 1969, Bull.civ. III, no. 243; Jansen, Towards a European building contract law, pp. 486-489). However,

if the service provider failed to warn a notoriously competent client, it is possible to mitigate the damages claim of the client on the basis of contributory negligence (Cass.civ. I, 2 July 1991, Bull.civ. I, no. 228; Cass.civ. III, 20 November 1991, Bull.civ. III, no. 284; Jansen, Towards a European building contract law, pp. 498 ff).
GERMANY The service provider is liable towards the client if he fails to warn the latter and therefore causing the service not to be performed in accordance with the contract (CC arts. 633, 645). But the service provider's liability can be mitigated on the basis of the client's contributory negligence (CC art. 254) given the latter's inadequate input in the service process, unless the service provider actually knew this would lead to non-performance of the service (cf. BGH 18 January 1973, NJW 1973, p. 518; Jansen, Towards a European building contract law, pp. 491-493). It is undisputed that damages and costs that would have incurred anyhow, must be borne by the client (cf. BGH 29 October 1970, BauR 1971, 60).
GREECE If the service provider fails to perform his duty to warn under a contract for work (σύμβαση έργου), he is liable towards the client for the consequences thereof. He may, however, fall back on the rule of CC art. 300 and raise the client's contributory negligence, given the fact that the client contributed to the damage by supplying inadequate materials or directions to the service provider.
ITALY The service provider is liable towards the client for the consequences of his failure to warn (cf. V. Mangini, Il contratto di appalto, p. 134; F. Voltaggio Lucchesi, Responsabilita' decennale dell'appaltatore, vizi del progetto fornito dal committente e "gravi difetti" ex. CC art. 1669, in Giust.civ, 1959, I, p. 1780; Trib. Torino, 24 August 1979, in Rep.Foro it., 1980, V° Appalto).
THE NETHERLANDS Failure to perform the duty to warn of CC art. 7:754 will invoke the service provider's liability towards the client. It follows from an *obiter dictum* in HR 18 September 1998, NJ 1998, 818 (KPI/Leba) that the service provider, in order to mitigate the claim for damages, may bring up contributory negligence of the client (cf. CC art. 6:101) consisting of the supply of inadequate materials, plans or directions. It is at this stage where the expertise of the client is to be taken into account. It is generally accepted that damages and costs that would have incurred anyhow, must be borne by the client (Jansen, De toepassing van de 'Sowiesokostenregel door de Raad van Arbitrage voor de Bouw, in: Van den Berg e.a., Aangenomen werk, p. 253). Failure to perform the duties to warn stated in CC art. 7:752(2), CC art. 7:753(3) and CC art. 7:755 will prevent the service provider from claiming payment of the extra costs incurred.
POLAND The service provider is liable towards the client for the consequences of his failure to warn: cf. CC arts. 634 and 641(2) and the decision of the Supreme Court, 22 of April 1986 (II CR 531/80, OSNCP 1981, z. 9, poz. 174.
PORTUGAL If the service provider failed to perform his duty to warn, he is liable towards the client, although inadequate input provided by the latter may give rise to contributory negligence, resulting in the exclusion or mitigation of the service provider's liability (cf. CA Porto, 21 January 1977, CJ, 1977, I, 73; Romano Martinez, Direito das Obrigações, no. 443; Sá Gomes, Breves notas sobre o cumprimento defeituoso na empreitada in AB VNO AD OMNES-75 anos da Coimbra Editora, p. 614).
SPAIN The service provider must bear the consequences of his failure to warn. This follows particularly from CC art. 1590 in case of failure to warn for the inadequacy of materials supplied by the client under the *contratos de obra*.

Article 1:111: Variation of the Service Contract

(1) Without prejudice to the client's right to cancel the contract under Article 1:115, a party must accept a change of the service that is to be provided under the contract or when read with any direction under Article 1:109, if such a change is reasonable, taking into account:
  (a) the result of the service that is to be achieved;
  (b) the interests of the client;
  (c) the interests of the service provider; and
  (d) the circumstances at the time of the change of the service.
(2) A change of the service is deemed to be reasonable if that change:
  (a) is necessary in order to enable the service provider to act in accordance with Article 1:107 or, as the case may be, Article 1:108; or
  (b) is the consequence of a direction that is given in accordance with Article 1:109(1) and the client has not revoked the direction without undue delay after having been warned in accordance with Article 1:109(3); or
  (c) is a reasonable response to a warning from the service provider under Article 1:110.
(3) For the purpose of paragraphs (1) and (2) a change of service required by a change of circumstances within the meaning of Article 6:111 PECL (Change of Circumstances) is regarded as a reasonable change of service.
(4) The price that is due as a result of the change of the service has to be reasonable and is to be determined using the same methods of calculation as were used to establish the original price for the service.
(5) In so far as the service is reduced, the loss of profit, the expenses saved and any possibility that the service provider may be able to use the released capacity for other purposes are to be taken into account in the calculation of the price that is due as a result of the change of the service.
(6) A change of the service may lead to an adjustment of the time of performance that is proportionate to the extra work required in relation to the work originally required for the performance of the service and the time span determined for performance of the service.

Comments

A. General Idea

Comment A to Article 1:109 explains that the client will generally translate his wishes and needs into directions, that are to be observed by the service provider when carrying out the service. The present Article deals with changes of the choices the client has already made, either in the contract, or in the documents or drawing to which the contract refers, or in directions that are given at a later stage in the course of the service process. Although these changes amount to modifications of the contract, paragraph (1) provides that a party may be required to accept such a change of the contract. A party may only be coerced to do so if that change is to be considered reasonable. In determining whether such is the case, paragraph (1) states that the interests of both parties need to be weighed and balanced. From this, it follows that the interests of the party seeking to change the content of the contract must outweigh those of the other party in

order for a change to be reasonable. In the event that the client is not willing to accept a change, he may walk away from the contract in any event using his right to cancel the contract under Article 1:115. Whenever the service provider is to accept a change under the present Article, his interests are further protected by the provisions of paragraph (4), (5), and (6) as explained below.

The test, whether a change of the contract is to be considered reasonable is deemed to be fulfilled in various situations. Most of these situations are identified in paragraph (2) of the present Article. In addition, a relevant situation could present itself after the application of the rule of Article 1:103(3)(a). Finally, paragraph (3) of the present Article provides for a rule that could be used as a last resort in the event that a situation would occur which would not fit under either of the aforesaid provisions. In the following, all these situations will be further explained.

Firstly, the situation referred to in paragraph (2)(a) can be mentioned. This is situation involves the case where the service provider is prevented from performing his main obligation under the contract *at all* due to a cause that has nothing to do whatsoever with the failure of either party to perform a duty prior to or after the conclusion of the contract.

> *Illustration 1*
> An engineer is ordered to repair the defective part of a conveyor belt. The purpose of the job is clearly to get the conveyor belt moving again. Whilst performing the service, the engineer discovers that the repair of the specific part will not bring back the conveyor belt in operation, given that another part of the belt is defective as well. When the parties entered into the contract, however, they did not agree on the repair of this other defective part. Moreover, this latter defect was not something that was to be noticed by the engineer at the time of conclusion of the contract. Repair of the second defect will cost extra and also delay the service.

According to paragraph (1) in conjunction with (2)(a), in such a case the client is bound to accept a change of the contract – subject to his right to cancel the contract under paragraph (1) in conjunction with Article 1:115 – in order to deal with the situation that has occurred.

Paragraph (2)(b) identifies a second situation in which the client is bound to accept a change of the contract. From Article 1:109(3) it follows that if the client gives the service provider a direction within the boundaries provided by Article 1:109(1) and which would lead to a variation of the contract, the service provider must warn the client for that consequence. If the client subsequently maintains his direction, paragraph (1) in conjunction with (2)(b) of the present Article states that the service provider must accept such a change, which is deemed to be a reasonable change of the contract.

> *Illustration 2*
> A real estate agent is asked by a growing law firm to find a suitable office building in the area of Berlin. The law firm would like to locate itself within a maximum

distance of 5 kilometres from the German capital. After a few weeks, the firm informs the agent to seek for a possible location 'in either Berlin, Munich or Frankfurt'. The real estate agent informs the law firm that this sudden switch of preference leads to an increase of his search activities, and that it will cost extra to carry out the adjusted service.

The third situation is the one referred to in paragraph (2)(c). The client may need to initiate a change of the contract himself in response to a risk for which the service provider under Article 1:110(1) has warned him. Insofar as that change is a reasonable response to that warning, the service provider is in principle bound to accept such a change under paragraph (2)(c).

Illustration 3
A geo-technical surveyor is asked by a client to investigate the subsoil conditions of a piece of land, which the client would like to use for the erection of a building. The client designates the exact area that is to be investigated. Whilst performing the investigation, the surveyor discovers the presence of a small river below the surface of the land investigated. The origin of the river is located somewhere outside the area designated for investigation. The surveyor warns the client that further investigation as regards the river is needed in order to find out its effects on a possible future building. This further investigation, however, is outside the scope of the present service contract. Hence the client expands the surveyor's task under the contract.

The fourth situation in which a change of the contract is considered to be reasonable could occur in a case where the service provider failed to perform his pre-contractual duty to warn under Article 1:103(1).

Illustration 4
A supplier of computer networks is asked by a hospital to make an offer for installing a tailor-made network, following a design prepared on behalf of the hospital. The design has a failure that, if overlooked, could lead to the hospital not being able to use the computer network for the purposes it has in mind. The supplier studies the design for the purpose of preparing his offer. This type of investigation would normally bring to light the design failure.

In this example, Article 1:103(3)(a) protects the client from being confronted with a claim for compensation of extra cost and extension of time under the present Article, given that the service provider failed to warn prior to the conclusion of the contract for any of the risks mentioned in Article 1:103(1). The service provider may try to prove, however, that the client would have entered into the contract anyhow, even if he had been warned about that risk before he entered into the contract. If the service provider succeeds in delivering that proof, the client must accept a change of the service under the present Article – subject to his right to cancel the contract under Article 1:115 – taking into account the consequences of the risk that has come to light.

Finally, there is a fifth situation in which the test whether a change of the contract is to be considered reasonable is deemed to be fulfilled. Occasionally – and contrary to what is the case in the aforesaid first situation – the service provider is indeed able to perform his main obligation under the contract, but performance has become more expensive or will take more time than agreed upon at the time of conclusion of the contract. This will generally be the case in the event that parties agreed on payment of a fixed price under Article 1:102. Dependent on the cause of the service becoming more expensive or being delayed, a change of the contract is considered to be reasonable. This can further be clarified as follows.

Clearly, if the service has become more expensive or has been delayed due to a non-performance of either the service provider or the client, the present Article is not relevant.

> *Illustration 5*
> A gardener is asked to design and create a new garden for a client. The gardener offers to do so for a fixed price, having investigated the client's wishes. Before entering into the contract, the gardener has warned the client that the garden is located in a rather infertile area and that artificial compost is recommended. The gardener has offered to fertilize the land as part of his service, but the client has declined that offer by stating that he already fertilized the land himself some time ago. Once the gardener has started to carry out his service, he finds out that the client has not fertilized the land at all and that it will be difficult to keep all the new trees and shrubs alive without fertilizing the land. The gardener decides to fertilize the land himself and is entitled to send an additional invoice for the extra work and materials.

If such a situation has occurred due to a failure of the client to perform a duty incumbent on him, the service provider may try to seek normal remedies. This is for instance stated in Article 1:103(5) and in Article 1:104(3). But in the event that the service provider might also be to blame for the occurrence of the situation, he cannot invoke a reasonable change of the contract under the present Article. Such a claim has been consistently barred in Article 1:103(3)(a) and Article 1:110(4).

Contrary, if the cause of the service becoming more expensive or being delayed cannot be found in a failure to perform a duty by either of the parties, such a situation is deemed to give rise to a reasonable change of the contract on the basis of paragraph (3) of the present Article. However, in order to prevent the service provider from shifting all kinds of risks to the client – besides the ones that fall within the boundaries of the situations already described above – paragraph (3) forces the service provider to take the hurdle of Article 6:111(2) PECL (Change of Circumstances), in the sense that it has to be established that performance of the contract becomes excessively onerous because of a change of circumstances which should not be for the service provider's account.

All situations set out above are guided to the same system of paragraph (4), (5), and (6) of the present Article, providing rules for the consequences of a reasonable change of the contract.

Paragraphs (4) and (5) deal with the consequences with regard to the adjustment of the price. The rule of paragraph (4) basically states that the new price has to be reasonable and has to be calculated in accordance with the method the original price was determined (see also Comment A to Article 1:102). In this respect it is noted that a change of a contract may result in either an increase or a decrease of the said price. If the change of the contract would lead to extra work for the service provider, his remuneration would increase accordingly. In addition, it has to be taken into account that he service provider may have other than financial interests at stake, for instance because he already entered into contracts with other clients without having sufficient time and/or staff to perform the extra work that results from the change. If the change of the contract implies a reduction of the service, the rule of paragraph (5) states that the parties will have to take into account the expenses spared as a result from the reduction, the loss of profit for the service provider, and the options he has available to use his earning capacity otherwise.

Paragraph (6) deals with the consequences of the change of the contract with regard to the time for performance, in the event that the change results in an increase of the work to be performed under the contract. An extension of time will then have to be granted to the service provider to the extent that extra time is needed to carry out the changed service, taking into account the time for performance agreed upon for the initial service.

B. Interests at Stake and Policy Considerations

A change of the service that is to be supplied under a service contract is a frequently occurring situation. Changes initiated by the client himself are usually not a problem, provided that the service provider gives a warning to the client as regards the consequences of such initiatives. Article 1:109(3) amounts to that effect.

Changes of the service become an issue, however, if they are rooted in undesired circumstances that are outside the control of the parties. One could question whether it is then desirable to have a rule that forces either the one party or the other to accept the change of the service. The main objection is of course that a forced change of the service could lead to a non-voluntary change of the mutual obligations under the contract. On the other hand, if these obligations have become unbalanced due to the event that gives rise to the change of the service, general contract law does not oppose the changing of the contract, provided that this is done having regard to concepts of fairness and reasonableness.

This brings up the related issue whether it is needed to have a separate rule for services contracts stating that a change of circumstances in accordance with Article 6:111 PECL (Change of Circumstances) is deemed to give rise to a reasonable change of the service in accordance with paragraphs, allowing the service provider to ask for extra payment

and extension of time under paragraph (4), (5), and (6) of the present Article. One could argue that such a rule is not needed, given that PECL provides for a solution in Article 6:111(2) and (3) PECL. On the other hand, one could argue that the latter provision needs particularisation in the context of services contracts, especially since Article 6:111 would require the party instigating the change to rely on the courts, which would have discretionary powers here. This is rather impractical in the case of a service contract, which is already being performed.

C. Comparative Overview

In many of the countries investigated general contract law concepts and provisions exist on the basis of which a service contract can be changed as an answer to unforeseen external cost-increasing circumstances, causing the equilibrium between the costs and benefits of performing the obligations of the parties to be seriously disrupted: BELGIUM, FRANCE, ENGLAND, GERMANY, GREECE, ITALY, THE NETHERLANDS and PORTUGAL. Successful application of these concepts and provisions, however, will be possible in very limited situations only or will, as is the case in FRANCE, hardly be possible at all. In addition to such general contract law provisions, particular rules exist in the countries investigated in order to deal with unforeseen external cost-increasing circumstances in the framework of particular services contracts. GREECE (σύμβαση έργου), ITALY *(appalto)*, THE NETHERLANDS *(aanneming van werk; opdracht* and *overeenkomst inzake geneeskundige behandeling; bewaarneming)* and POLAND (contracts for work). These additional rules are particularly needed in the event that parties agreed on payment of a fixed price for the initial service, which is why many of these provisions relate to cost-increasing circumstances occurring in the supply of construction and processing services. It appears that these additional rules are less severe for the service provider than the aforesaid general contract law concepts and provisions. A specific provision for consumer services exists in SWEDEN.

An express unilateral right of the client to change the service exists in BELGIUM and FRANCE for services pertaining to the construction of an immovable structure, in THE NETHERLANDS for services that qualify as *aanneming van werk* and in ITALY *(appalto)* and PORTUGAL *(empreitada)* for construction and processing services, although agreement of the parties is sometimes needed in PORTUGAL. As for consumer services in SWEDEN, the unilateral right indirectly follows from the Consumer Services Act. In GERMANY the unilateral right of the client is not undisputed for services qualified as *Werkvertrag*, although the law allows price adjustment to the service provider in the event of substantial and unexpected extra work induced by the client. This is also the solution in BELGIUM and FRANCE for all services qualified as *louage d'ouvrage* outside the scope of the construction of immovable structures. In ENGLAND the unilateral right of the client to change the contract must follow from express wording in the contract. In all countries investigated (BELGIUM, ENGLAND, FRANCE, GERMANY, ITALY, THE NETHERLANDS, PORTUGAL, SWEDEN), the client must pay the service provider for extra work, resulting from a change of the service as ordered by the client, in principle. The requirements that need to be fulfilled, however, in order for the service provider to be able to pursue his payment claim, may differ.

D. Preferred Option

It is thought wise to have a rule that forces the parties to a services contract to accept a change of the service in a number of situations, provided that the purpose of the rule is to keep the interests of the parties in balance. The rules of paragraphs (1), (2), and (3) amount to this effect. The interests of the client are further safeguarded by allowing him to exercise his right to cancel the contract on the basis of paragraph (1) in conjunction with Article 1:115, even if a change of the service is considered to be reasonable.

It is thought that the rule now to be found in paragraph (3) of the present Article is needed, in order to allow the service provider – in the event of a change of circumstances as meant in Article 6:111 PECL (Change of Circumstances) – to ask for extra payment and extension of time under paragraph (4), (5), and (6). It is true that, in the event of a change of circumstances, Article 6:111(2) PECL will push the parties to the very sensible route – particularly sensible in the context of a service contract – of reconsidering their options. For the Article requires them 'to enter into negotiations with a view to adapting the contract or terminating it'. But one has to realise that in practice, it is the service provider who is faced with the problem, not the client. The client can simply state: 'What has happened is not my concern. If it will cost you extra, it is your problem'. Most likely, the client will not take the initiative for the negotiations required under Article 6:111(2) PECL. And even if he would respond positive to the service provider's invitation to negotiate, it is not very likely that he is willing to adapt the contract in the sense that it would cost him extra. If that is indeed the case, one could subsequently argue that the service provider should then resort to Article 6:111(3) PECL. But going to court is a final and radical option, which would take a considerable amount of time. In the meantime, the service provider is still in the middle of the performance of a service contract that costs him extra money and time and from which he cannot walk away. By allowing him to recover these extras under paragraph (3), his interests are safeguarded. At the same time, it might give an incentive to the client to reconsider the future of the contract under Article 6:111(2) PECL – partly overlapping paragraph (1) of the present Article – in the sense that the client is also shown the escape route of cancelling the contract.

E. Relation to PECL and Other Parts of the Principles

This Article is related to Article 6:111 PECL (Change of Circumstances). Under the latter Article, the change of the contract is an answer to external circumstances that cause the equilibrium between the costs and benefits of performing the obligations of the parties to be seriously disrupted. As far as that function of Article 6:111 is concerned, the present Article provides additional and different rules in the sense that paragraph (1), (2)(b), and (2)(c) deal with situations in which a change is initiated by one of the parties, and in which it is beneficial to both parties to adjust it to reasonable changes in preferences, leaving the contractual equilibrium intact.

As regards the situation dealt with in paragraph (2)(a) and (3), the present Article particularises the rules of Article 6:111 PECL. The service provider will not be able to

invoke a change of the contract under paragraph (2)(a) on the basis of the allegation that he is prevented from performing his main obligation, if that situation is caused by his own failure to perform a duty prior to or after the conclusion of the contract. To that extent, the said provision does not differ from Article 6:111 PECL. But if the situation indeed occurs, it will not be necessary to test the criterion of Article 6:111(2) PECL in order to establish whether or not performance of the contract becomes excessively onerous. Paragraph (3), contrary, explicitly provides for the application of the test of Article 6:111(2) PECL, in the event that the service provider alleges that performance of the service has become more expensive and or will take more time than agreed upon at the time of conclusion of the contract.

Furthermore, both paragraph (2)(a) and (3) provide a more practical and favourable solution for the service provider who would like the contract to be adjusted to later developments. The difference with Article 6:111(2) PECL is that under paragraph (2)(a) and (b), the service provider is entitled to a change of the contract instead of only being entitled to negotiations or being dependent on the discretionary powers of the court.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules under the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7, that either modify or deviate from the rules under the present Article, or that give a particularisation of these rules. The significance of the present Article for Chapters 2 to 7 is therefore explained and illustrated in the General Comments to the said Chapters, particularly in Comment O (Chapter 2: Construction), Comment M (Chapter 3: Processing), Comment M (Chapter 4: Storage), Comment M (Chapter 5: Design), Comment M (Chapter 6: Information), and Comment Q (Chapter 7: Treatment).

G. Burden of Proof

First of all, if a party invokes a change of the contract under paragraph (1) of the present Article, that party will have to establish the reasonableness of the said change.

Secondly, the service provider must prove that the situation mentioned in paragraph (2)(a) occurs. If it is established that the situation occurs, the change of the service is deemed to be reasonable. The client may thereupon try to establish that the change is not reasonable.

As for the situation dealt with in paragraph (2)(b), the service provider will have to establish that he warned the client under Article 1:109(3). If he is able to do so, the change of the service is deemed to be reasonable. The client may thereupon try to establish that the change is not reasonable.

The rule under paragraph (2)(c) of the present Article implies that the client will have to prove that the change initiated by him is a reasonable response to the warning given by the service provider under Article 1:110(1), whereupon the service provider may try to establish that the change is not reasonable.

The burden of proof under paragraph (3) of the present Article is imposed upon the service provider in the sense that he will have to establish that performance of the contract becomes excessively onerous for him due to a change of circumstances which should not be for his account given the rules of Article 6:111 (1) and (2) PECL (Change of Circumstances).

Finally, if is established between the parties that the change of the contract is reasonable, the burden of proof regarding the (method of) adjustment of the price and the time for performance under paragraph (4), (5), and (6) is on the service provider.

H. Character of the Rule

This Article contains default rules.

I. Remedies

Any party may resort to any of the remedies under Chapter 9 PECL if the other party does not perform the contract in accordance with the change of the service as allowed for under this Article. Moreover, the service provider may resort to any of the remedies under Chapter 9 PECL if a change of the service is deemed to be reasonable under paragraphs (1), (2), or (3) of the present Article and the client subsequently refuses to pay the price adjusted under the rules of paragraphs (4) and (5).

Comparative Notes

1. *External cost-increasing circumstances and (specific) contract law*
   In many of the countries investigated (BELGIUM, ENGLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, SWEDEN) general contract law concepts and provisions exist on the basis of which a service contract can be changed as an answer to unforeseen external cost-increasing circumstances, causing the equilibrium between the costs and benefits of performing the obligations of the parties to be seriously disrupted: BELGIUM and FRANCE *(imprévision)*, ENGLAND *(frustration)*, GERMANY (*Störung der Geschäftsgrundlage*, art. 313), GREECE (Απρόοπτη μεταβολή των συνθηκών, CC art. 388), ITALY (CC art. 1467), THE NETHERLANDS (*onvoorziene omstandigheden*, CC art. 6:258) and PORTUGAL (*alteração das circunstâncias*, CC art. 437). Successful application of these concepts and provisions, however, will be possible in very limited situations only (BELGIUM, ENGLAND, GERMANY, GREECE, ITALY, THE NETHERLANDS, PORTUGAL) or will hardly be possible at all (FRANCE). See also the comparative and national notes to PECL

art. 6:111: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. In addition to such general contract law provisions, particular rules exist in the countries investigated in order to deal with unforeseen external cost-increasing circumstances in the framework of particular services contracts. GREECE (σύμβαση έργου, CC arts. 696-697), ITALY (*appalto*, CC art. 1664), THE NETHERLANDS (*aanneming van werk*, CC art. 7:753; *opdracht* and *overeenkomst inzake geneeskundige behandeling*, CC art. 7:406; *bewaarneming*, 7:601(3)) and POLAND (CC art. 632). These additional rules are particularly needed in the event that parties agreed on payment of a fixed price for the initial service, which is why many of these provisions relate to cost-increasing circumstances occurring in the supply of construction and processing services. It appears that these additional rules are less severe for the service provider than the aforesaid general contract law concepts and provisions. A specific provision for consumer services exists in SWEDEN (art. 38 of the Consumer Services Act).
No information from AUSTRIA, DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND, SPAIN.

2. *Change of the service ordered by the client*
An express unilateral right of the client to change the service exists in BELGIUM and FRANCE for services pertaining to the construction of an immovable structure (CC art. 1793), in THE NETHERLANDS for services that qualify as *aanneming van werk* (CC art. 7:755) and in ITALY (CC art. 1661, *appalto*) and PORTUGAL (CC art. 1216, *empreitada*) for construction and processing services, although agreement of the parties is sometimes needed in PORTUGAL (CC arts. 1214-1215). As for consumer services in SWEDEN, the unilateral right indirectly follows from art. 38 of the Consumer Services Act. In GERMANY the unilateral right of the client is not undisputed for services qualified as *Werkvertrag* (CC art. 632), although the law allows price adjustment to the service provider in the event of substantial and unexpected extra work induced by the client. This is also the solution in BELGIUM and FRANCE for all other services qualified as *louage d'ouvrage* outside the scope of the specific rule of CC art. 1793. In ENGLAND the unilateral right of the client to change the contract must follow from express wording in the contract. In all countries investigated (BELGIUM, ENGLAND, FRANCE, GERMANY, ITALY, THE NETHERLANDS, PORTUGAL, SWEDEN), the client must pay the service provider for extra work, resulting from a change of the service as ordered by the client, in principle. The requirements that need to be fulfilled, however, in order for the service provider to be able to pursue his payment claim, may differ (see particularly the strict rule of CC art. 1793 in BELGIUM and FRANCE as regards construction services).
No information from AUSTRIA, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, POLAND, SCOTLAND, SPAIN.

National Notes

1. *External cost-increasing circumstances and (specific) contract law*
BELGIUM If the parties agreed on payment of a fixed price, the general rule for all services qualified as *louage d'ouvrage* is that the service provider must bear the consequences of external cost-increasing circumstances in principle (Goossens, Aannem-

ing van werk: Het gemeenrechtelijk dienstencontract, no. 619). Case law and legal doctrine, however, firmly accept that the service provider is entitled to price adjustment when confronted with conditions unexpected at the time of conclusion of the contract *(sujétions imprévues)*, causing considerable difficulties in the performance of the service and leading to serious disturbance of the balance of the contract (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 682 and 688 ff). Case law generally acknowledges that the entitlement to price adjustment can be based on general contract law provision on the construction of contracts (CC art. 1163), whereas legal doctrine seeks its basis in the doctrine of *imprévision* (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 685-686).

ENGLAND If cost-increasing external consequences occur in the course of a service process, the question to be answered under ENGLISH contract law is whether or not performance of the service may considered to be frustrated. *Frustration* occurs if a contract is impossible to perform because its object is no longer attainable due to something beyond the control of either party, or where to require performance would be to render the obligation something radically different from what was undertaken by the contract (Chitty on Contracts, nos. 24-007 ff). The fact, however, that unforeseen events make a contract more onerous than was anticipated *(hardship)* do not frustrate it (cf. *Davis Contractors v. Fareham UDC* [1956] AC 696; *Tsakiroglou & Co Ltd v. Noblee, and Thorl GmbH* [1962] AC 93). In case performance of the contract becomes more difficult or onerous, frustration may be accepted if it can be argued that, assuming the consequences of the unforeseen cost-increasing circumstances are to be borne by the service provider, the obligations of the parties will radically change from their original intentions. If frustration is accepted in a case like this, the service provider is not entitled to adjustment of the price. The doctrine of frustration operates to discharge the contract and the legal consequences of a frustrated contract will be that the parties are relieved of all obligations under the contract. If the parties wish to suspend or vary a service contract that is frustrated they must do so by entering into a new contract in clear and unambiguous terms. If the service provider contractor is allowed to carry on with the service process after the frustrating event, then, unless a new contract is made, he is not doing work pursuant to the initial contract. Nevertheless, he must be paid a fair remuneration for any work done, on the basis of *quantum meruit* or *restitution* (Chitty on Contracts, no. 24-096). Frustration cannot be argued in a case where – often the case in ENGLISH contract law practice – the parties have made specific provisions in the contract for what might otherwise have been a frustrating event (Chitty on Contracts, no. 24-056).

FRANCE The doctrine of *imprévision* is accepted in FRENCH law in exceptional circumstances only (see Starck, Roland, Boyer, Obligations, Contrat, Litec, no. 1222). The doctrine is applied, however, by administrative courts to contracts concluded with public entities. Given the restricted application of the doctrine, the provider of a service qualified as *louage d'ouvrage* is not entitled to adjustment of the agreed fixed price in the event of external cost-increasing circumstances, even if these circumstances were unexpected at the time of conclusion of the contract (cf. Bénabent, Droit civil, Les contrats spéciaux, no. 563; Cass.civ. III, 6 May 1998, Bull.civ. III no. 94). As regards construction contracts for a fixed price, this rule is stated in CC art. 1793 *(intangibilité du forfait)*. In what appears to be an isolated case, price adjustment was allowed in a situation where the service provider encountered difficulties unverifiable

at the moment of the conclusion of the contract, leading to unexpected extra work (Cass.civ. III, 17 May 1995, Mon.TP 18 August 1995, p. 28).

GERMANY The general contract law rule relevant for external cost-increasing circumstances in the framework of services is to be found in CC art. 313 *(Störung der Geschäftsgrundlage)*. As regards services qualified as *Werkvertrag* the occurrence of external cost-increasing circumstances cannot give rise to adjustment of the price in case the initial price has been fixed by the parties. But this principle can nevertheless be set aside if the requirements of CC art. 313 are met (cf. BGH VersR 1965, 803).

GREECE External cost-increasing circumstances occurring in the service process may first of all be regarded as an issue of unforeseen change of circumstances (Απρόοπτη μεταβολή των συνθηκών). This concept is rooted in good faith and is dealt with by CC art. 388. The service provider is allowed to demand the court to reduce performance of his obligations or to terminate the contract in whole or in part in the event that unforeseen circumstances have caused the performance of the service to become excessively onerous. In addition to this general provision, specific provisions apply to services qualified as contract for work (σύμβαση έργου) dealt with in CC arts. 681 ff. If the parties have concluded the contract on the basis of a fixed price, the service provider bears the risk for the cost of subsequent extra work and additional labour which was not calculated in advance (subject to a change of the service ordered by the client, *supra* no. 2). In such a case the raise in price of the materials or wages will also be for the risk of the service provider. If the parties have explicitly agreed the service on a cost estimation and if the service provider has guaranteed that cost estimation, he is not entitled to price adjustment in the event of the occurrence of cost-increasing circumstances (CC art. 696). In no guarantee has been provided, the client will have to bear the consequences, although CC art. 697 allows the client to terminate the contract is the financial consequences of the cost-increasing circumstances are substantial. It is stated in CC art. 696 that it is to be applied subject to the general provision of CC art. 388.

ITALY The general contract law provision relevant in this respect is CC art. 1467 on unforeseen circumstances. The provision entitles the service provider to ask the court to terminate the contract on ground of excessive onerousness of the performance of the service. The rule is particularised for construction and processing services qualified as *appalto* (CC arts. 1655 ff). According to CC art. 1664, a claim for price adjustment is available on grounds of an increase of costs for material, staff and production due to unforeseeable events (cf. Cass., 17 July 1976, no. 2845, in Rep.Foro it., 1976, V° *Appalto*, c. 115, no. 8. The limit of normal risk of consequences of unforeseeable events to be borne by the service provider is set at an increase of more than 10 per cent of the initial price (Cass., 5 February 1987, no. 1123, in Rep.Foro it., 1987, V° *Appalto*, c. 144, no. 47; Cass., 25 September 1953, no. 3042, in Rep.Foro it., 1953, V° *Appalto*, c. 109, no. 16).

THE NETHERLANDS In addition to the rather strict general contract law provision of CC art. 6:258 *(onvoorziene omstandigheden)*, CC art. 7:753(1) provides a rule for services qualified as *aanneming van werk* in the event that cost-increasing circumstances occur after the conclusion of the service contract. If these circumstances cannot be attributed to the service provider, and if he did not have to take these circumstances into account when calculating the price for the service, he may ask the court to adjust the price initially agreed. A further requirement is to be found in CC art. 7:753(3), stating that the service provider cannot ask the court for price adjustment if he did not promptly warn the client for the need of such adjustment. Costs incurred and damage

suffered by the service provider in the framework of the performance of other types of services are to be compensated if these costs are not included in the price following CC art. 7:406 (services qualified as *opdracht* and *overeenkomst inzake geneeskundige behandeling*, with the exception of damage that can be attributed to the service provider) and CC art. 7:601 para. 3 (services qualified as *bewaarneming*).

POLAND If the supply of a material service is qualified as a contract for work (CC arts. 627 ff) and if the parties agreed on payment of a fixed price, the issue of external cost-increasing circumstances is to be considered on the basis of CC art. 632. According to CC art. 632 para. 1, the service provider cannot demand an increase of the price, even if it was impossible at the time of conclusion of the contract to foresee the amount of work or the cost of the work to be carried out. The consequences of this rule are mitigated, however, by the rule of CC art. 632 para. 2. This provision states that if the performance of the service contract in case of unforeseen cost-increasing circumstances would cause a considerable loss, the court may adjust the price or terminate the contract.

PORTUGAL If the parties to a service contract did not agree on a price revision clause, unforeseen external cost-increasing circumstances can only lead to adjustment of the price on the basis of the general contract law provision of CC art. 437 *(alteração das circunstâncias)* which is rooted in the concept of good faith.

SWEDEN A service provider may be entitled to payment for extra work in the framework of a service supplied to a consumer on the basis of art. 38 of the Consumer Services Act *(KTjL)*. Having regard to that provision, a situation that would probably amount to an external unforeseen cost-increasing circumstance would be situation where the service provider carries out the service in accordance with art. 8 of the Consumer Services Act. This provision states that if, in the course of performing the service, it appears that other work which, by reason of its relationship with the service, ought to be performed simultaneously with such service (additional work), the service provider shall notify the consumer and request his instructions. If the consumer cannot be reached, the service provider is allowed to perform the additional work but only if the price for the extra work is insignificant, or where there are special grounds for assuming that the consumer client would have opted for carrying out the extra work. Furthermore, the provision includes the situation where the service provider is obliged to perform any additional work which cannot be postponed without exposing the consumer client to risk of serious damage.

2. *Change of the service ordered by the client*

BELGIUM Changes ordered by the client in the framework of services qualified as *louage d'ouvrage* will either fall under the application of general contract law rules or, in the event of services pertaining to the construction of an immovable structure, under the specific provision of CC art. 1793 (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 652 and 666). As regards the former category, it is disputed in BELGIAN law whether or not the client can change the service without the provider's consent (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 809-814). If the service provider demands adjustment of the price on the grounds of a change of the service induced by the client, such demand is to be assessed following the normal rules on formation of contracts and on evidence (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 653 ff). The specific provision of CC art. 1793 is less problematic in the sense that it allows the

client to change the construction service unilaterally (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, no. 678). The provider of the construction service, however, may only demand adjustment of the price if he can demonstrate that the change order was issued in writing and that, following the order, the price adjustment was approved by the client (Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, nos. 658 ff).

ENGLAND The general rule is that parties to contract may effect a variation of the contract by modifying or altering its terms by mutual agreement (Chitty on Contracts, no. 23-033). A service provider will generally not be able to claim payment for extra work. Express wording in the contract may validly give the client the power unilaterally to vary the obligations of the parties to the contract (Chitty on Contracts, no. 23-038). If the client exercises that power and if the contract provides for the payment of extra work done, the service provider may claim payment of that work under the contract.

FRANCE If the service provider can demonstrate that he has actually carried out extra work, not being work resulting from unexpected circumstances, and that the extra work has been ordered by the client, the general rule for all services qualified as *louage d'ouvrage* is that the service provider is entitled to adjustment of the price (Bénabent, Droit civil, Les contrats spéciaux, no. 564). Whether the client agreed to the extra work is a matter that has to be resolved on the basis of the ordinary rules on formation of contracts and on evidence. The aforesaid general rule is particularised by CC art. 1793 for services related to the construction of an immovable structure. In order for the service provider to be entitled to adjustment of the price, written approval by the client of both the extra work and the price adjustment are required. There is case law, however, allowing price adjustment without approval of the client in the event that the equilibrium of the contract has been disturbed as a result of the client's change order (see Cass.civ. III, 24 January 1990, D. 1990, 257, note Bénabent; Cass.civ. III, 8 March 1995, Bull.civ. III, no. 73; Cass.civ. III, 20 January 1999, Bull.civ. III, no. 16; Defr. 1999, 1128, note Périnet-Marquet).

GERMANY As regards services qualified as *Werkvertrag* it is not undisputed whether the client is allowed to order a unilateral change of the service (Jansen, Towards a European building contract law, p. 165; Goossens, Aanneming van werk: Het gemeenrechtelijk dienstencontract, no. 812). Nevertheless, if the service provider carries out extra work without an additional (price) agreement supplementing the initial contract of the parties, he may be entitled to payment of the extra work under CC art. 632, provided the extra work is substantial, unexpected, and induced by the client (cf. BGH 8 January 2002, X ZR 6/00, not published).

ITALY The client has a unilateral right to change the service if the service qualifies as *appalto* (CC art. 1655 ff) on the basis of CC art. 1661. In case of changes ordered by the client, compensation is due to the service provider (D. Rubino, Dell'Appalto, p. 161; C. Giannattasio, L'appalto, p. 184).

THE NETHERLANDS In the event of services qualified as *aanneming van werk,* the client may order a change of the service in principle. In that case the service provider may increase the price following the rule of CC art. 7:755, but only if he has indicated in due time to the client that the price will have to be increased as a result of the order, unless the client should have understood this without such warning. Changes ordered by the client under a service contract qualified as *opdracht* are dealt with by CC

art. 7:402(1). Such orders, as any other direction given by the client, must be given in time and within the boundaries of the framework of the contract. The characteristics of the particular *opdracht* may limit the duty of the service provider to follow the order as well (Parl. Gesch., p. 324), particularly if such an order would be in conflict with his professional ethics, professional codes of conduct and the independent position he may have to take towards the client (Asser-Kortmann, Bijzondere overeenkomsten. Overeenkomst van opdracht, arbeidsovereenkomst, aanneming van werk, no. 61). Changes ordered under *opdracht* are paid according to the general rules on price for such services, which are stated in CC art. 7:405 para. 2.

POLAND In general, POLISH law does not provide possibility to change contract unilaterally.

PORTUGAL In case of construction and processing services *(empreitada)* changes in the service must be agreed upon by client (CC art. 1214), unless said changes are necessary: in the latter case, if parties disagree on the subject matter, the court is to decide whether the change is necessary (CC art. 1215). If as a consequence of such changes the price is increased by more than 20 per cent, the service provider is entitled to equitable compensation. If the client orders a change of the service, the service provider must follow the order as long as the change neither amounts to an increase of 20 per cent of the price initially agreed, nor to a substantial change of the nature of the work originally ordered (CC art. 1216).

SWEDEN A service provider will be entitled to payment for extra work in the framework of a service supplied to a consumer on the basis of art. 38 of the Consumer Services Act *(KTjL)* in the event that the extra work has been ordered by the consumer client unforeseeable at the time of conclusion of the contract.

Article 1:112: Remedies for Breach of Duties of the Service Provider

(1) Damages recoverable by the client include the costs the client has incurred in order to establish the breach of any duty of the service provider, and or to prevent the result stated or envisaged by the client from not being achieved, provided that the client acted reasonably in incurring these costs.

(2) If the service provider has breached a duty under the contract, and if it is not yet clear whether the result stated or envisaged by the client will be achieved, the client may withhold performance of any reciprocal obligations under Article 9:201 PECL (Right to Withhold Performance).

(3) The client is entitled to terminate the contract in accordance with Article 9:304 PECL (Anticipatory Non-Performance) only if it is clear that the breach of a duty of the service provider under the contract will result in a non-performance of an obligation fundamental to the contract in accordance with Article 8:103 PECL (Fundamental Non-Performance).

Comments

A. General Idea

This Article contains some provisions clarifying the client's right to resort to a remedy under Chapter 9 of PECL in the context of service contracts.

First of all it is noted that Articles 1:104(1)(d), 1:104(1)(e), 1:105, 1:106, 1:107, 1:109(1) and 1:110(1) and 1:110(2) impose contractual duties upon the service provider that could be breached. Provided that the test of Article 1:108 is fulfilled, such breach might coincide with the service provider's failure to achieve the result stated or envisaged by the client. In that case, a claim that would in effect seek double compensation of the same damages under Article 1:108 and under one of the other Articles mentioned, would be barred on the basis of the principle underlying Article 9:502 PECL (General Measure of Damages).

Secondly, if the service provider has a duty under Article 1:108 to achieve the result the client has in mind and if he manages to achieve that result, the client still may sustain other damage due to the non-performance of any of the duties under Articles 1:104(1)(d), 1:104(1)(e), 1:105, 1:106, 1:107, 1:109(1) and 1:110(1) and 1:110(2). Such non-performance might cause personal injury or damage to goods either of the client, or of third parties seeking compensation from the client. One might further think of the situation in which the client discovers the breach of one or more of the aforesaid duties in the course of the service process, and is able to prevent the envisaged result from not being achieved by warning the service provider, or by taking emergency measures. All these actions may lead to damage for the client, for which he can still seek compensation under Article 9:501 PECL (Right to Damages). The reasonable costs of taking such precautionary measures, as well as the reasonable costs of establishing whether the service provider failed to perform a duty under the said Articles, are recoverable under paragraph (2). The right to recover these reasonable costs exists, irrespective whether the service provider is under a duty under Article 1:108 to achieve the result stated or envisaged by the client.

Paragraph (2) is likewise relevant whether or not the duty under Article 1:108 is imposed upon the service provider. The said paragraph clarifies that if the service provider has breached any of his duties under Articles 1:104(1)(d), 1:104(1)(e), 1:105, 1:106, 1:107, 1:109(1) and 1:110(1) and 10(2), the client is allowed to withhold performance of his reciprocal obligation, even if it is not yet certain whether the outcome of the service will conform to the result envisaged by the client.

The rule provided for in paragraph (3) is to prevent the client from terminating the contract on the basis of the allegation that the service provider breached any of the duties of Articles 1:104(1)(d), 1:104(1)(e), 1:105, 1:106, 1:107, 1:109(1) and 1:110(1) and 1:110(2), in the event that the service provider is still able to achieve the result envisaged by the client.

B. Interests at Stake and Policy Considerations

The result that is achieved by the application of the rules of paragraphs (2) and (3) of the present Article, could in theory also be achieved by applying the rules of PECL, as is explained in Comment E below. These uncontroversial rules are merely inserted in this Chapter for the purpose of clarifying general principles in the specific context of a service contract.

Contrary, one could question the need to have a rule as the one to be found in paragraph (1). One could of course argue that a client will just have to wait for the outcome of the service, and that he will always have the option to resort to a remedy once the outcome of that service turns out not to be to his satisfaction. This would be an argument against allowing the client to make the kind of costs – in the course of the service process – as referred to in paragraph (1).

But one could also argue that – given the sometimes rather close involvement of a client in the service providing process – he has the ability to notice and prevent possible problems in due time. This proposition is to be regarded in the light of the client's options to check the service process in various ways. First of all, he could do so through the exercise of his power under Article 1:104(1)(d). Checking and following the service process could further take place if the parties communicate with one another as a consequence of the performance of ancillary duties under the contract. One might think of requests by the service provider for information and directions under Article 1:104(1)(a) and (b), the co-ordination of activities under Article 1:104(1)(e), the issuing of a warning by the service provider under Article 1:110, as well as communication in the context of a variation under Article 1:111. If, as a result of any such communication, the client finds out that the service provider fails to perform any ancillary duty under the contract, he might anticipate the failure to achieve the result he wishes to obtain from the service, by taking appropriate actions such as the ones that are mentioned in paragraph (1) of the present Article. Actions could further consist of a notification under Article 1:113, a direction under Article 1:109, and they could also involve a demand for adequate assurance of due performance under Article 8:105(1) PECL (Assurance of Performance).

Hence the argument that could be used here is that early prevention and solution of problems is not only in the interest of the client, but also of the service provider himself. This would make it not unreasonable to allow the client to claim compensation of reasonable costs that are made by him, whilst anticipating the failure of the service provider to achieve the result the client has in mind.

C. Comparative Overview

This Article contains some provisions clarifying the client's right to resort to a remedy under Chapter 9 PECL in the context of service contracts only. The content of the Article does not follow from comparative legal research.

D. Preferred Option

For reasons set out in Comment B, the client is allowed to claim compensation of costs incurred in order to establish the breach of any duty of the service provider, and or to prevent the result stated or envisaged by the client from not being achieved, provided that the client acted reasonably in incurring these costs.

E. Relation to PECL and Other Parts of the Principles

Paragraph (2) allows the client to resort to the remedy of withholding performance of Article 9:201 PECL (Right to Withhold Performance), even if achievement of the result envisaged by the client through the service is still possible. A similar solution could be reached via Article 8:105(1) PECL (Assurance of Performance), in the sense that the latter provision allows the client to demand adequate assurance of due performance and meanwhile withhold performance of its own obligations, if he believes that there will be a fundamental non-performance by the service provider.

Paragraph (3) is a clarification of the rules of Article 9:301 PECL (Right to Terminate the Contract) in conjunction with Article 9:304 PECL (Anticipatory Non-Performance) which is needed in the event that the service provider fails to perform any duty under Articles 1:104(1)(d), 1:104(1)(e), 1:105, 1:106, 1:107, 1:109(1) and 1:110(1) and 1:110(2), notwithstanding the fact that the service may still lead to the outcome envisaged by the client at the time of conclusion of the contract.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules under the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7 that modify or deviate from the rules under the present Article. The implication of the present Article for services contracts dealt with in the specific Chapters is explained and illustrated in the General Comments to the said Chapters, particularly in Comment P (Chapter 2: Construction), Comment N (Chapter 3: Processing), Comment N (Chapter 4: Storage), Comment N (Chapter 5: Design), Comment N (Chapter 6: Information), and Comment R (Chapter 7: Treatment).

Additional rules for the client's resort to remedies, in the event of the failure of either a constructor, a processor, or a storer to perform a duty under the contract, are to be found in Articles 2:109 and 3:110 (Specific Performance and Cure), Articles 2:110 and 3:111 (Resort to Other Remedies), and Article 4:111 (Remedies for Non-Conformity). Article 7:110 (Remedies for Non-Performance) provides for additional rules in the event that the treatment provider has a right to resort to a remedy under Chapter 9 PECL.

G. Character of the Rule

This Article contains default rules.

H. Remedies

This Article is a remedies-article. As such, it does not itself impose duties on either party.

Comparative Notes

PELSC art. 1:112 contains some provisions clarifying the client's right to resort to a remedy under Chapter 9 PECL in the context of service contracts only, namely PECL art. 9:201 (Right to Withhold Performance) and PECL art. 9:304 (Anticipatory Non-Performance) in connection with PECL art. 8:103 (Fundamental Non-Performance). The content of PELSC art. 1:112 does not follow from comparative legal research. See for the comparative and national notes to PECL arts. 9:201, 9:304 and 8:103: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law.

Article 1:113: Failure to Notify for Non-Conformity

(1) The client is under a duty to notify the service provider if the client becomes aware, or if a comparable client in the same situation as this client from all the facts and circumstances known to the client without investigation has reason to know that the service provider will either fail to achieve the result stated or envisaged by the client or has failed to achieve that result.
(2) If the client fails to notify under paragraph (1) that the service provider will fail to achieve the result stated or envisaged by the client, causing the service to become more expensive or to take more time than agreed upon in the contract, 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.

Comments

A. General Idea

This Article imposes a duty to notify on the client, in the event that he becomes aware of the service provider's failure to achieve the result envisaged by the client. The duty may arise in two distinct situations.

The first situation could occur once the service process has finished and has indeed led to a result, albeit not the result envisaged by the client at the time of conclusion of the contract. If that outcome becomes obvious to the client, or if he actually discovers that the result envisaged has not been achieved, the duty under paragraph (1) is imposed upon him. An example of a case where the duty arises is given in the following illustration:

> *Illustration 1*
> A car owner asks a garage to check the engine of his car, and to do whatever is necessary to get rid of the unusual noise that is to be heard when the car drives at a speed of 50 kilometres. When the car owner returns after a day to collect his car, he discovers that the odd sound is still present.

The second situation could occur when the service process is still on its way. In that situation, it may become either obvious to the client, or he may actually discover, that there might be a risk that the result he wishes to obtain through the service will not be achieved. Correct performance of the contract may still be possible, provided that the risk is brought to the attention of the service provider. This too would give rise to a duty of the client to notify the service provider, as is illustrated in the following example:

> *Illustration 2*
> A client has entered into a contract with a lawyer for the purpose of bringing a case to court. The court of first instance dismisses the client's case. The lawyer tells the client that it is possible to ask for an appeal ultimately within 6 weeks of the date of the court's decision. After 3 weeks, the client reads the court's decision and finds out that appeal must be asked within 4 weeks of the decision of the court of first instance.

The client will only have to notify, however, if the service provider's non-performance is obvious, or if that non-performance is actually discovered by him. Non-performance may be claimed to be obvious or actually discovered in the light of the client's ability to check the service process or its result in various ways. The most appropriate way would be through the exercise of his power under Article 1:104(1)(d). But checking and following the service process and its result could also take place if the parties are merely communicating with one another as a consequence of the performance of ancillary duties under the contract. In this respect one might think of requests by the service provider for information and directions under Article 1:104(1)(a) and (b), the co-ordination of activities under Article 1:104(1)(e), the request for approval to subcontract (part of) the service under Article 1:106(1), the giving of a direction by the client under Article 1:109, the issuing of a warning by the service provider under Article 1:110, as well as communication in the context of a variation under Article 1:111. Although the said provisions might enable the client to check and follow the service as it proceeds, however, they do not impose a duty upon him to actually do so. The client is not bound to investigate whether or not the service provider is carrying out the service in accordance with the obligations imposed upon him. But if the client actually follows what is happening in the service process, as a consequence of the aforesaid communication that will sometimes necessarily have to take place, he should be normally attentive.

If the client does not perform his duty under paragraph (1), this will most likely coincide with the service provider's failure to achieve the result the client has in mind. This implies that both parties can seek remedies under Chapter 9 PECL. This is further explained in Comment H below. In most cases, the service provider will not seek for a remedy. What will usually happen is that, given the client's failure to notify under the present Article, the latter will be prevented from invoking remedies against the service provider.

In the event that the second situation described above will occur, however, the service provider might be more inclined to resort to a remedy. This is also where paragraph (2) becomes relevant. As explained, situation 2 is the situation in which the client fails to notify whilst the service provider is still in the middle of his service. A further restriction of the situation is that the client will eventually notify the service provider before the service process has finished, but that he does so too late. The situation is illustrated in the following example:

> *Illustration 3*
> A client has entered into a contract for a fixed price with a builder for the purpose of designing and building a house with two floors. The client has asked the builder to design a large window in the roof of the house. The client needs that large window for his hobby: artistic painting. When the builder presents the first basic design to the client, the paper shows no window in the roof. The client does not mention this to the builder, who continues with the service by making a more detailed design and by submitting that design to the local authorities for the purpose of obtaining building permission. At that stage, the client tells the builder that he has noticed the absence of the large window. The builder can adjust the design, but he will have to make extra technical calculations. Moreover, he will have to redo the procedure of asking for building permission.

The service provider might still be able to perform his main obligation under the contract, but it is not unlikely that the service will have become more costly for him and that he needs more time to achieve the required result. This will not cause problems if payment of a fee based on an hourly rate was agreed upon at the time of conclusion of the contract. But in the event that payment of either a fixed price or a fee based on a no cure no pay-basis was agreed upon, the service provider would incur a loss due to the client's late notification. The service provider may then resort to the provision of paragraph (2) and claim compensation of that loss and/or extension of time to perform the service.

B. Interests at Stake and Policy Considerations

The duty of the client to give notice to the service provider, in the event that the latter failed to achieve the result stated or envisaged by the client, is not controversial and has good ground in general principles of good faith and fair dealing and mitigation of loss. It is less evident, however, to impose a duty on the client to give notice whilst the service is still on its way. It is true that the interests of both parties to the service contract are

met when the client signals that performance of the service may not lead to the outcome he has in mind. But it is also true that it is the service provider's job to achieve that result, and that one should not burden the client with taking care of problems that are in fact to be dealt with by the service provider himself. Moreover, imposing a duty to notify on the client in the course of the service process brings to table the question whether and to what extent the client must also investigate the performance of the service in order to discover failures that could be the object of notification.

C. Comparative Overview

An express duty of the client to notify the service provider in the event of defects discovered in the service is only to be found in FINLAND in the framework of consumer services. A duty to give notice can be implied indirectly in ENGLAND if a remedy is pursued in equity and also on the basis of general concepts stemming from good faith in FRANCE, GERMANY, THE NETHERLANDS, PORTUGAL and SPAIN. For some services, implied duties to notify at the time of acceptance of the result of the service are specifically recognized: FRANCE (construction and processing services qualified as *louage d'ouvrage*), GERMANY *(Werkvertrag)*, THE NETHERLANDS *(aanneming van werk)*, POLAND and PORTUGAL *(empreitada)*. In all the countries investigated (ENGLAND, FINLAND, FRANCE, GERMANY, THE NETHERLANDS, POLAND, PORTUGAL, SPAIN) failure by the client to notify the service provider in case of discovered defects may prevent the client from seeking resort to remedies. In GERMANY, however, failure to notify defects at the time of acceptance of the result of a service qualified as *Werkvertrag* will cause the client to lose some remedies only.

D. Preferred Option

If the client discovers in the course of the service process that there is a risk that the result he has in mind might not be achieved, it would be inefficient to allow him to refrain from giving notice to the service provider. As explained in Comment A, the client has ample ability to find out that there might be a problem with the performance of the service. At the same time, one should keep in mind that the service provider has the prime responsibility for the performance of the duties incumbent on him. The service provider should not be allowed to shift that responsibility to the client, by stating that the latter failed to discover a risk of non-performance of the service provider in the course of the service process. It is thought inefficient to actually impose a duty to investigate on the client. The responsibility of the service provider can only be mitigated by the non-performance of the client's duty to notify a failure, or a possible risk of a failure, to achieve the result he has in mind. This latter duty is only imposed on the client in the event of an obvious failure or of a failure that was actually discovered. This latter approach is captured by the concept of 'Reason to Know' that is acknowledged in American law (see: Restatement (2nd) Contracts § 19, comment b). It is explained in Comment D to Articles 1:103 and 1:110 and has been followed in the present Article for reasons of consistency. In the context of the client's duty to notify under the present Article, it implies that the client will have to give notice of any

failure that leaps to the eye whenever he checks or follows the service process as explained in Comment A above. It also implies that, for instance, if the client decides *not* to use his authority under Article 1:104(1)(d), there will be less possibility for the service provider to allege that the client had 'reason to know' of a non-performance.

E. Relation to PECL and Other Parts of the Principles

There is no enforceable duty to be found in PECL requiring a party to a contract to give notice to the other party, in the event of that other party's non-performance. On the other hand, if the aggrieved party fails to give such notice, it may affect his right to resort to remedies under Chapter 9 PECL (see also Comment H below). This principle is reflected in Article 9:102(3) PECL (Non-monetary Obligations) regarding the remedy of specific performance. It is also to be found in Article 9:303(2) and (3)(b) PECL (Notice of Termination), as well as in Article 9:505(1) PECL (Reduction of Loss). It is noted that the principle is further acknowledged in the Principles of European Sales Law.

There is a further relation to Article 8:105 (Assurance of Performance) and 8:106 (Notice Fixing Additional Period for Performance). Article 8:105 empowers the client to demand adequate assurance of due performance if he reasonable believes that there will be a fundamental non-performance by the service provider. The Article further allows him to withhold performance of his own obligations so long as such reasonable belief continues. It is argued that a demand under the said Article will follow upon a notification of the client dealt with in paragraph (1) of the present Article. According to Article 8:106 the client may in any case of non-performance by notice to the service provider allow an additional period of time for performance. This notice will most likely coincide with a notice under paragraph (1) of the present Article.

Finally, it is observed that notification by the client under the present Article must be in accordance with the formal requirements imposed upon any party by Article 1:303 PECL (Notice).

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules under the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7 that modify or deviate from the rules under the present Article. The significance of the present Article for services contracts dealt with in the specific Chapters is explained and illustrated in the General Comments to the said Chapters, particularly in Comment Q (Chapter 2: Construction), Comment O (Chapter 3: Processing), Comment O (Chapter 4: Storage), Comment O (Chapter 5: Design), Comment O (Chapter 6: Information), and Comment O (Chapter 7: Treatment). There is a further relation between the present Article and some of the Articles to be found in Chapters 2 to 5.

First of all, Article 2:105 (Inspection, Supervision and Acceptance) and Article 3:106 (Inspection and Supervision) deal with the effect of the client's control of the service process in the particular context of a construction contract or a processing contract. The specific rules are explained and illustrated in Comment A to Article 2:105 and Comment E to Article 3:106. The rules provided for in these specific Articles do not prejudice the rules of Article 1:113. This implies that – despite the rules provided for in Article 2:105(3) and 3:106(2) – the client will have to give notification in the event that the service provider's non-performance is obvious, taking into account the manner in which the client actually carried out inspections, supervision or an acceptance procedure, or if a non-performance is actually discovered by him, whether or not in the framework of such inspection, supervision, or acceptance.

Secondly, Article 2:106 (Handing over of the Structure), Article 3:107 (Return of the Thing), Article 4:106 (Return of the Thing), and Article 5:106 (Handing over of the Design) deal with the effect of the client's acceptance of the result that is achieved by the service procedure through the service. Such acceptance is particularly relevant in the context of contracts for construction, processing, storage, and design. The specific rules are explained and illustrated in Comment D to Article 2:106, Comment E to Article 3:107, Comment E to Article 4:106, and Comment E to Article 5:106. Again, these rules do not prejudice the rules of Article 1:113. This implies that, although the specific rules state that acceptance by the client does not relieve the service provider wholly or partially from his liability, the client must notify under paragraph (1) of the present Article, in the event that the service provider's non-performance is actually discovered at the time of acceptance, or if the non-performance is obvious, taking into account the manner in which acceptance by the client actually took place.

G. Character of the Rule

This Article contains default rules in principle.

H. Remedies

The issue of remedies will be discussed below, following the distinction that can be made between the two situations that have been sketched out in Comment A above.

The first situation could occur once the service process has finished and has led to a result, which is not in accordance with the client's expectations. It may well be that the achievement of that unsatisfactory result gives rise to the client's duty under paragraph (1), but that he fails to perform that duty. This is in fact what happened in *Illustration 1* above: the car owner does not contact the garage. And if the problems with his car get worse, he might eventually try to resort to a remedy under Chapter 9 PECL on the allegation that the service provider failed to perform his obligation under Article 1:107 or, if the test of Article 1:108 is successfully applied, under that latter Article. Article 8:101(3) PECL (Remedies Available) will not prevent the client from doing so, given that the client's failure to notify was something that happened when the non-perform-

ance of the service provider's main obligation was already a matter of fact. Presuming that the service provider can neither find an excuse under Article 8:108 PECL (Excuse Due to an Impediment), the client may then resort to any of the remedies under Chapter 9 PECL. But the client will not be able to claim specific performance as a result of Article 9:102(3) PECL (Non-monetary Obligations), which sanctions his failure to notify. However, provided the conditions of Article 8:104 PECL (Cure by Non-Performing Party) are fulfilled, the service provider might opt for curing his non-performance, for instance in order to prevent the situation of having to pay damages. Given the client's failure to notify, such claim for damages might have to be considered in the light of Article 9:505(1) PECL (Reduction of Loss). The remedy of termination is barred for the same reason as the remedy of specific performance on the basis of Article 9:303(2) PECL (Notice of Termination).

The above analysis shows that non-performance of the client's duty to notify will not cause the service provider to resort to a remedy, at least not in the situation sketched out. Instead, it will prevent the client from invoking a remedy on the basis that the service provider failed to perform his main obligation under the contract.

The second situation, however, is the one in which the client fails to perform his duty to notify whilst the service is still on its way. This is the situation where it may become obvious to the client – or where he might even actually discover – that the result envisaged by him will not be achieved unless the service provider takes proper action. Subsequently, two scenarios might develop.

In the first scenario under the second situation, the client fails to notify the service provider *at all* whereupon the service provider does not perform his main obligation. This scenario would occur in the example given in *Illustration 2* above, if the client would keep silent and if his lawyer is thereupon no longer able to file the case for appeal. The facts of this scenario are then almost similar to the facts of the first one. As regards the issue of remedies, the reasoning will therefore go along the same lines. One might hesitate whether Article 8:101(3) PECL (Remedies Available) would now perhaps be capable of blocking the client's resort to remedies, given that his failure could be seen as a cause of the service provider's non-performance. On the other hand, it is noted that the client's failure is not the only cause. Hence the client will be able to resort to remedies to the same extent as sketched out for the first situation above. As regards the remedy of damages, the client's failure to notify is now to be taken into account on the basis of either Article 9:504 (Loss Attributable to Aggrieved Party) or of Article 9:505(1) (Reduction of Loss).

The second scenario that might develop under the second situation is that the client notifies the service provider – who is still in the middle of the service process – but that he does so too late. Notification will cause the service provider to improve his service in order to obtain the result envisaged by the client. Time and money could have been saved, however, if the client would have notified earlier. This is in fact what happened in the example that was given in *Illustration 3* above, where the client's failure has have brought the service provider in the position of having to invest extra money and time. This would particularly be a problem to him, in the event that payment of either a fixed

price or a fee based on a no cure no pay-basis was agreed upon. In theory, the service provider may seek compensation for the loss occurred by submitting that the client failed to perform a duty under the contract, and resort to any of the remedies set out in Chapter 9 PECL. The situation described is in fact similar to what may occur if the client fails to perform a duty to co-operate under Article 1:104(1) (see also Comment H to Article 1:104). This is why a rule similar to Article 1:104(3) is stated in paragraph (2) of the present Article. It allows the service provider to claim both compensation of the loss occurred and extension of time to perform the contract.

Comparative Notes

1. *The duty to notify of the client in (specific) contract law*
   An express duty of the client to notify the service provider in the event of defects discovered in the service is only to be found in FINLAND in the framework of consumer services (chap. 8 and chap. 9 art. 16(1) (16/1994) Consumer Protection Act). A duty to give notice can be implied indirectly on the basis of general concepts stemming from good faith in FRANCE, GERMANY *(Verwirkung)*, THE NETHERLANDS (CC art. 6:89; *rechtsverwerking*), PORTUGAL (CC art. 334) and SPAIN (CC art. 1258). The equitable doctrine of *laches* appears to be to the same effect in ENGLAND although the doctrine is considered relevant only if a remedy is pursued in equity. For some services, implied duties to notify at the time of acceptance of the result of the service are specifically recognized: FRANCE (construction and processing services qualified as *louage d'ouvrage*), GERMANY (CC art. 640(2); *Werkvertrag*), THE NETHERLANDS (CC art. 7:758(3); *aanneming van werk*), POLAND (CC art. 563) and PORTUGAL (CC art. 1219(2); *empreitada*).
   No information from AUSTRIA, BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, SCOTLAND, SWEDEN.

2. *Consequences in case of failure to notify*
   In all the countries investigated (ENGLAND, FINLAND, FRANCE, GERMANY, THE NETHERLANDS, POLAND, PORTUGAL, SPAIN) failure by the client to notify the service provider in case of discovered defects may prevent the client from seeking resort to remedies. In GERMANY, however, failure to notify defects at the time of acceptance of the result of a service qualified as *Werkvertrag* will cause the client to lose some remedies only.
   No information from AUSTRIA, BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, SCOTLAND, SWEDEN.

National Notes

1. *The duty to notify of the client in (specific) contract law*
   ENGLAND Whether the client to a service contract is under a duty to notify in ENGLISH law in the event of discovery of a defect in the service is first of all a matter of limitation. The Limitation Act 1980 imposes arbitrary time limits on certain defined causes of action in common law. As regards contracts for the supply of services, the general rule of art. 5 of the Limitation Act 1980 applies. According to this provision no

action founded on simple contract can be brought after the expiration of 6 years from the date on which the breach of the service provider takes place (cf. Chitty on Contracts, 29-051). As regards construction services, the breach is considered to take place on practical or substantial completion (cf. Chitty on Contracts, 29-052). According to art. 36(1) of the Limitation Act 1980, the time limit of art. 5 does not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as they may be applied by analogy. Such equitable remedies may then be barred, however, by equitable doctrines according to art. 36(2) of the Act. Of particular relevance in this respect is the equitable defence of *laches* (cf. Chitty on Contracts, nos. 29-140 ff). This doctrine has similarities with concepts such as *rénonciation tacite* and *abus de droit* in FRENCH law, and the concept of *Verwirkung* in GERMAN law. The essence of the doctrine of *laches* is that the claimant must be reasonably diligent in seeking relief and in consequence not prejudice the position of the defendant (cf. Chitty on Contracts, 29-140).

FINLAND According to chap. 8 and chap. 9 art. 16(1) (16/1994) Consumer Protection Act, the consumer client must notify the service provider within a reasonable period from the time he noticed or should have noticed the defective service.

FRANCE The client's duty to notify the service provider in case of a defective service may arise under the general principles of *rénonciation tacite*. It has been stated that the principle of *rénonciation tacite* operates very similar to the GERMAN concept of *Verwirkung* cf. (Ranieri, Verwirkung et rénonciation tacite, p. 427 at 440). The duty of the client is indirectly acknowledged in the framework of services related to the construction or processing of an immovable structure and qualified as *louage d'ouvrage* (CC art. 1792). The client must notify the contractor at the time of reception of the work of apparent defects, although the notion of *apparent* has been construed in case law in a manner protecting the interests of the client to a far reaching extent (cf. Cass.civ. III, 3 November 1983, GazPal 1984, 2, 577, note Liet-Veaux; see also Jansen, Towards a European building contract law, pp. 399 ff).

GERMANY A duty of the client to notify the service provider in the event of a defect in the service may be acknowledged on the basis of *Verwirkung*. This concept has been developed in GERMAN law as a particularisation of the principle of *venire contra factum proprium* and is nowadays based on the concept of *Treu und Glauben* (CC art. 242). *Verwirkung* may be invoked if a party, due to the passing of time and the specific circumstances of the case, may reasonably assume that its counterpart will no longer exercise a right to which that party is entitled. An additional requirement is that the party has acted on the basis of its reasonable assumption (BGH, NJW 1980, 880). If the service can be qualified as *Werkvertrag,* the client's duty to notify indirectly follows from CC art. 640(2) in the sense that the client may be under a duty to reserve his rights at the time of acceptance of the result that has been accomplished by the service provider. The duty is limited to defects in the service the client actually knows of.

THE NETHERLANDS The duty to notify of the client, in the event that the service provider does not supply the service in accordance with the contract, follows indirectly from general contract law provision CC art. 6:89. According to this provision, the client must inform the service provider within due time as soon as he discovers or should reasonably have discovered the breach of the service contract. As regards services that can be qualified as *aanneming van werk,* CC art. 7:758(3) is to the same effect although

the duty of the client can then only arise as from the time upon which acceptance of the (modified) thing or structure, resulting from the service process, occurs.

POLAND The client's duty to notify in case the service provider breaches the service contract follows from CC art. 563. The duty is to be performed within one month from discovery of the breach. According to CC art. 563(1), in the event that it is customary to inspect the service process, the client must notify the service provider within one month after the passing of the period during which the client could have discovered the breach by observing due diligence.

PORTUGAL General contract law imposes an obligation upon the client to promptly notify the service provider in the event that a defect in the service is noticed (CC art. 334; cf. Romano Martinez, Direito das Obrigações, no. 343). In case of construction or processing services qualified as *empreitada*, evident defects are presumed to be known by the client according to CC art. 1219(2). Furthermore, evident defects are those which the client in due diligence should have noticed (CA Porto, 17 November 1992, CJ 1992, V, 224).

SPAIN The duty of the client to notify the service provider in the event that defects in the service are noticed or should have been noticed, given the due diligence to be observed by the client, stems from the general contract law provision on good faith (CC art. 1258). The duty is particularly recognized in the framework of construction and processing services (cf. F. Martinez Mas, La recepción en el contrato de obra, Madrid, 1998, p. 73).

2. *Consequences in case of failure to notify*

ENGLAND The effect of limitation under the Limitation Act 1980 is merely to bar the client's remedy and not to extinguish his right. The right continues to exist even though it cannot be enforced by action (cf. Chitty on Contracts, 29-129). If a party can raise the equitable defence of *laches*, the counterpart will be barred from pursuing his remedy.

FINLAND If the consumer client fails to notify under chap. 8 art. 16(1) (16/1994) Consumer Protection Act, he cannot invoke the defect. Notwithstanding the failure to notify, however, the consumer client may invoke the defect following art. 16(2) if (i) the service provider's conduct has been grossly negligent or incompatible with honour or good faith; (ii) the defect is based on the fact that the service does not conform to the requirements issued in provisions for the protection of health and property; (iii) the defect is based on the fact that the result of the service is otherwise hazardous to health or property. Chap. 8, art. 16(2) (16/1994) Consumer Protection Act on construction services is to the same effect, and includes the client's right to invoke defects based on the fact that the service does not conform to the requirements set for it in the Product Safety Act.

FRANCE In the event that *rénonciation tacite* of a party is demonstrated, that party will no longer be able to exercise its rights (cf. Ranieri, Verwirkung et rénonciation tacite, p. 427 at 440). Likewise, if the client of a construction or processing service involving an immovable structure qualified as *louage d'ouvrage* fails to notify the service provider of defects apparent at the time of reception of the work, he can no longer invoke the provider's liability for such defects (Jansen, Towards a European building contract law, pp. 399 ff). The rule is said to be applied to all service contracts and not only to construction contracts (J. Huet, Principaux contrats spéciaux, nos. 32331-32332).

GERMANY If a party is able to establish *Verwirkung*, its counterpart can no longer exercise the right to which it is entitled. In case of a service qualified as *Werkvertrag*, if the client does not perform his duty to notify under CC art. 640(2) he looses all rights and remedies granted by CC art. 633 and CC art. 634. He will still be able, however, to claim damages under CC art. 635 according to case law (BGHZ 61, 369 at 371). This will only be different if it is apparent that the client renounced his right to pursue damages (cf. Jansen, Towards a European building contract law, pp. 405-406).
THE NETHERLANDS If the client fails to notify the service provider under general contract law provision CC art. 6:89, the client will not be able to seek resort to a remedy. As regards services qualified as *aanneming van werk*, CC art. 7:758(3) is to the same effect.
POLAND Failure to notify according to CC art. 563 will put a bar to the client's normal remedies under the contract.
PORTUGAL If the client does not promptly notify the service provider on the basis of CC art. 334, the latter is excluded from liability for defects in the service (cf. Romano Martinez, Direito das Obrigações, no. 343).
SPAIN The client must observe his duty to notify in order not to lose any of his remedies under the contract as regards the defective service.

Article 1:114: Limitation of Liability

(1) The service provider may neither limit nor exclude liability for death or personal injury caused by the performance of the service.
(2) The service provider may limit or exclude liability for damage, other than death or personal injury, caused by the performance of the service if, at the moment of conclusion of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case, unless provided otherwise in Chapters 2 to 7.

Comments

A. General Idea

This Article is relevant in the event that it is established that the service provider was under a duty, and that he failed to live up to that duty due to which damage occurred. The Article deals with contractual limitation or exclusion of liability for such damage.

Paragraph (1) states that liability for death or personal injury cannot be excluded. This general principle is not altered by any of the rules to be found in Chapters 2-7 of this Part.

Paragraph (2) generally allows clauses limiting or excluding liability for damage other than death or personal injury. Such clauses are, however, subject to a reasonableness test. In determining whether a limitation or exclusion clause is to be considered fair and

reasonable in the circumstances of the case, one will have to take into account, among other things, the following factors: the nature, magnitude and foreseeability of the risk involved in the service; the frequency of materialisation of the risk and the possibility and costs to prevent the materialisation of the risk; the amount of the remuneration in relation to the risk; the possibility and costs of insurance coverage by the service provider and by the client; the capacity and experience of the service provider and that of the client; and whether or not the term was individually negotiated.

As to the application of the criterion mentioned in paragraph (2), Article 3:112, 4:112, and 5:108 (Limitation of Liability) provide more clarity, by indicating whether or not in principle a clause is fair and reasonable in the context of a processing contract, a storage contract, or a design contract.

B. Interests at Stake and Policy Considerations

A ban on clauses limiting or excluding liability for death or personal injury is not controversial in the context of a service contract. But clauses limiting or excluding liability for damage, other than death or personal injury, are very common in service contract practice. It is also common to allow the use of such clauses within the boundaries of fairness and reasonableness. But in practice these boundaries are set in very different ways, usually dependent on the type of service contract for which the clause is meant to be. The question therefore raises whether a general provision, dealing with the admissibility of clauses limiting or excluding liability for damage other than death or personal injury, is useful, given that it is impossible to draft such a general provision for all types of service contracts. One can in fact only draft such a provision by using general and abstract phrases. At the same time, however, practice obviously needs some guidance on the admissibility of clauses limiting or excluding liability.

C. Comparative Overview

As regards the enforceability of limitation or exclusion clauses, the distinction between services provided to consumers and non-consumers is relevant to all countries investigated (ENGLAND, FINLAND, FRANCE, GERMANY, THE NETHERLANDS). In the event of services provided to consumer clients, contract clauses limiting or excluding liability for death or personal injury may be considered as unfair on the basis of Directive 93/13/EC on unfair terms in consumer contracts. A similar provision is to be found in ENGLAND, FRANCE and GERMANY, although the provision in GERMANY seems stricter in the sense that limitation or exclusion of liability for death or personal injury in consumer contracts is not allowed at all. This is also the approach in FINLAND. The provision of the Directive has no equivalent in THE NETHERLANDS. Outside the scope of consumer services, clauses limiting or excluding liability for death or personal injury are not prohibited in principle in the countries investigated (with exceptions in ENGLAND and THE NETHERLANDS) although they may turn out to be invalid after the application of rules that exist for reviewing limitation and exclusion clauses in general.

The review of contract clauses limiting or excluding liability for loss or damage other than death or personal injury is mainly facilitated by so-called 'reasonableness tests' that are to be applied by the courts. These tests are available both for consumer services and for non-consumer services in ENGLAND, GERMANY and in THE NETHERLANDS. They are available only for consumer services in FRANCE. In FRANCE, a reasonableness test does not exist for non-consumer services, although attempts have been made to determine the factors that might prove relevant to the review of exemption clauses on the basis of general concepts such as good faith. This concept will usually also be the basis for reviewing clauses in non-consumer services contracts in GERMANY. As regards FINLAND, a reasonable test is available for non-consumer services only. As regards other services, the service provider is only allowed to limit or exclude liability for any other loss or damage if it was caused indirectly, and provided that it was not caused by negligence attributable to the service provider. In applying the reasonableness tests, if available, in ENGLAND, FINLAND and THE NETHERLANDS, the courts take into account all circumstances of the case. Guidelines have been developed in these countries as regards the kind of circumstances that are relevant in this respect. In ENGLAND there is a strong focus on circumstances which the parties knew or should have known at the time of conclusion of the contract. In FINLAND and in GERMANY, circumstances occurring after the conclusion of the contract are considered relevant as well. In GERMANY, the concrete circumstances of the case prevailing at the time of conclusion of the contract are not taken into account. The reason for this appears to be that the courts are able to achieve satisfying solutions by reviewing the content of a standard contract clause in a more abstract manner. In practice, notwithstanding an express provision in the CC implementing the directive on unfair contract terms, this does not seem to be very different for consumer contracts. Whether or not the (standard) contract involves a service supplied to a consumer client, the legal systems of all countries seem to focus on the protection of the weaker contractual party when reviewing clauses limiting or excluding liability.

D. Preferred Option

It is preferred to give practice some guidance on the admissibility of clauses limiting or excluding liability for damage other than death or personal injury. Such a provision on limitation and exclusion clauses necessarily has to be drafted in rather general and abstract wording – as has been done in paragraph (2) – given that it is to be applied in the context of numerous services that all have their own characteristics and problems. The provision states that the fairness and reasonableness of a limitation or exclusion clause is to be considered in the circumstances of the case. In doing so – and despite the fact that these factors are not explicitly stated in the text of the Article – one will have to take into account, among other things: the nature, magnitude and foreseeability of the risk involved in the service; the frequency of materialisation of the risk and the possibility and costs to prevent the materialisation of the risk; the amount of the remuneration in relation to the risk; the possibility and costs of insurance coverage by the service provider and by the client; the capacity and experience of the service provider and that of the client; and whether or not the term was individually negotiated, see also Comment G below.

E. Relation to PECL and Other Parts of the Principles

The present Article deals with clauses limiting or excluding the client's right to damages under Chapter 9, Paragraph 5 PECL (Damages and Interest). This Article is first of all related to Article 4:110 PECL (Unfair Terms Not Individually Negotiated). It has a broader scope than the latter Article, however, in the sense that it applies to all clauses, whether or not individually negotiated. Moreover, the present Article is not relevant in the context of establishing whether a contractual limitation or exclusion of a duty is allowed. That issue will still have to be dealt with under Article 4:110 PECL, provided that such limitation or exclusion has not been individually negotiated.

Secondly, the Article is related to Article 8:109 PECL (Clause Excluding or Restricting Remedies). Paragraph (2) of the present Article, however, contains a different test in the sense that is has to be established whether the clause limiting or excluding liability was fair and reasonable at the time of conclusion of the contract. Insofar as a clause is valid under paragraph (2) of the present Article, its application may still be blocked by Article 8:109 PECL (Clause Excluding or Restricting Remedies) if, under the specific circumstances of the case, it would be contrary to good faith and fair dealing to invoke it. In this second test, all circumstances that are known at the time the contractual clause is invoked are to be taken into account, see also Comment G below.

F. Relation to Other Chapters of this Part of the Principles

According to both Article 1:101(2) and the present Article itself, the rules under the Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7 that modify or deviate from the rules under the present Article.

Particularisations of paragraph (2) are to be found in Article 3:112, 4:112, and 5:108 (Limitation of Liability) for processing contracts, storage contracts, and for design contracts. The reasons for these particularisations as well as their purport are further clarified in Comment E to Article 3:112, Comment E to Article 4:112, and Comment E to Article 5:108.

The significance of the present Article for Chapters 2, 6, and 7 is explained and illustrated in the General Comments to the said Chapters, particularly in Comment R (Chapter 2: Construction), Comment P (Chapter 6: Information), and Comment S (Chapter 7: Treatment).

G. Burden of Proof

The burden of proof that a limitation or exclusion clause is not valid under paragraph (1) rests upon the client. The burden of proof that such clause is valid under paragraph (2) rests upon the service provider.

H. Character of the Rule

Paragraph (1) of this Article constitutes mandatory rules from which the parties may not derogate to the detriment of the client. Paragraph (2) of this Article contains default rules.

I. Remedies

If a limitation or exclusion clause is not valid under this Article, the service provider is liable to pay damages under Article 9:501 PECL (Right to Damages), without prejudice to other remedies the client may have under Chapter 9 PECL and subject to the rules of Article 1:112.

Comparative Notes

1. *Limitation or exclusion of liability for death or personal injury*
   As regards the enforceability of limitation or exclusion clauses, the distinction between services provided to consumers and non-consumers is relevant to all countries investigated (ENGLAND, FINLAND, FRANCE, GERMANY, THE NETHERLANDS). In the event of services provided to consumer clients, contract clauses limiting or excluding liability for death or personal injury may be considered as unfair on the basis of art. 1(a) on the annex related to art. 3(3) of Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 L 95/95. A similar provision is to be found in the legislation of ENGLAND (para. 1(a) of schedule 2 of the Unfair Terms in Consumer Contracts Regulations 1999), FRANCE (annex to ConsC art. L. 132-1) and GERMANY (CC art. 309 no. 7a), although the provision in GERMANY seems stricter in the sense that limitation or exclusion of liability for death or personal injury in consumer contracts is not allowed at all. This is also the approach in FINLAND (chap. 8, art. 2 in conjunction with art. 20(1) and art. 21(3); chap. 9, art. 2 in conjunction with 20(3) (16/1994) of the Consumer Protection Act). The provision of the Directive has no equivalent in THE NETHERLANDS. Outside the scope of consumer services, clauses limiting or excluding liability for death or personal injury are not prohibited in principle in the countries investigated, although they may turn out to be invalid after the application of rules that exist for reviewing limitation and exclusion clauses in general (see no. 2 below). Clauses limiting or excluding liability for death or personal injury are generally prohibited as a matter of principle (with the exclusion of THE NETHERLANDS), however, in THE NETHERLANDS in the event of treatment services qualified as *overeenkomst inzake geneeskundige behandeling* the prohibition is laid down in a statutory provision (CC art. 7:463). A prohibition can also be found for all types of services in ENGLAND in art. 2(1) of the Unfair Contract Terms Act, which states that exemption of liability for death or personal injury caused by the negligence of the service provider is not allowed.
   No information from AUSTRIA, BELGIUM, DENMARK, GREECE, ITALY, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN, SWEDEN.

2. *Limitation or exclusion of liability for damage other than death or personal injury*

In the countries investigated (ENGLAND, FINLAND, FRANCE, GERMANY, THE NETHERLANDS), the review of contract clauses limiting or excluding liability for loss or damage other than death or personal injury is mainly facilitated by so-called 'reasonableness tests' that are to be applied by the courts. These tests are available both for consumer services and for non-consumer services in ENGLAND (art. 2(2) Unfair Contract Terms Act and art. 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999), GERMANY (CC arts. 307-310) and in THE NETHERLANDS (CC art. 6:233(a) in conjunction with arts. 6:237(g) and 6:248(2)). They are available only for consumer services in FRANCE (ConsC art. L. 132-1). In FRANCE, a reasonableness test does not exist for non-consumer services, although attempts have been made to determine the factors that might prove relevant to the review of exemption clauses on the basis of general concepts such as good faith (CC art. 1134(3)). This concept (CC art. 242) will usually also be the basis for reviewing clauses in non-consumer services contracts in GERMANY, in so far as that they are not covered by the specific provisions of CC arts. 305-310). As regards FINLAND, a reasonable test is available for non-consumer services only (chap. 3 art. 36(1) (956/1982) of the Contract Act (228/1929)). As regards services that are covered in FINLAND by chap. 8 and chap. 9 of the Consumer Protection Act, the service provider is only allowed to limit or exclude liability for any other loss or damage if it was caused indirectly, and provided that it was not caused by negligence attributable to the service provider. In applying the reasonableness tests, if available, in ENGLAND, FINLAND and THE NETHERLANDS, the courts take into account all circumstances of the case. Guidelines have been developed in these countries as regards the kind of circumstances that are relevant in this respect. In ENGLAND there is a strong focus on circumstances which the parties knew or should have known at the time of conclusion of the contract. In FINLAND and THE NETHERLANDS, circumstances occurring after the conclusion of the contract are considered relevant as well. In GERMANY, when the courts consider the reasonableness of a clause under the provisions of CC art. 307, the concrete circumstances of the case prevailing at the time of conclusion of the contract are not taken into account. The reason for this appears to be that the courts are able to achieve satisfying solutions by reviewing the content of a standard contract clause in a more abstract manner. An exception applies for consumer contracts, where the directive on unfair contract terms explicitly required the German legislator to adapt its law in this respect; the amendment is implemented in CC art. 310 (3)(3.), albeit that it appears that the existing practise by the courts has not changed much since the implementation of the amendment. Whether or not the (standard) contract involves a service supplied to a consumer client, the legal systems of all countries seem to focus on the protection of the weaker contractual party when reviewing clauses limiting or excluding liability. Comparative legal references with respect to the issue, whether or not a clause in a business to business contract for the supply of processing, storage or design services, limiting or excluding liability for damage other than death or personal injury, is presumed to be fair and reasonable within the meaning of PELSC art. 1:114(2), are to be found in the comparative and national notes to PELSC arts. 3:112, 4:112 and 5:108.

No information from AUSTRIA, BELGIUM, DENMARK, GREECE, ITALY, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN, SWEDEN.

National Notes

1. *Limitation or exclusion of liability for death or personal injury*

ENGLAND The issue of limitation or exclusion of liability in services contracts is dealt with by general contract law, in particular the Unfair Contract Terms Act 1977 (UCTA). The client can only seek protection under the UCTA if the service provider acts in the course of a business (art. 1(3)), whereas the recourse to some of the Act's provisions is only possible if the client acts in his capacity of consumer (e.g. art. 12). The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) apply to consumer services contracts that have not been individually negotiated. According to art. 2(1) UCTA, exemption of liability for death or personal injury caused by the negligence of the service provider is not allowed. A clause to that effect may be regarded as unfair in a consumer contract, having regard to para. 1(a) of schedule 2 of the UTCCR.

FINLAND As regards services provided to consumers, chap. 8, art. 2 (16/1994) of the Consumer Protection Act provides that contract terms derogating from the provisions of that chapter to the detriment of the consumer shall be void unless otherwise provided. Chap. 9, art. 2 (16/1994) of the Consumer Protection Act, applicable to construction services provided to consumers, is to the same effect. Given these basic rules, it then follows from chap. 8, art. 20(1) in conjunction with art. 21(3) that it is not possible to limit or exclude liability for personal injury caused by materials used in the performance of the service. Chap. 9, art. 20(3) is to the same effect, with some modifications.

FRANCE Consumer clients are offered protection by the ConsC, particularly by art. L. 132-1, which provides the legal basis for reviewing the fairness of a contract clause creating a significant imbalance to the detriment of the consumer client. The application by the courts of this fairness test is facilitated by (among other texts) an annex to art. L. 132-1. This annex contains an indicative and non-exhaustive list of clauses that may be considered unfair. The list mentions clauses that have the effect of limiting or excluding the service provider's liability for death or personal injury. In general, doctrine is of the opinion that liability can never be excluded in case of death of personal injury (P. Esmein, Méditation sur les conventions d'irresponsabilité en cas de dommage causé à la personne, Mélanges R. Savatier, 1965, p. 271 ff).

GERMANY Clauses limiting or excluding liability will usually have to be considered under the specific provisions of CC arts. 305-310 on standard contract clauses. Although these provisions are of great importance in the context of services supplied to consumers (see for instance CC art. 310 in conjunction with art. 308 and art. 309), other clients can seek resort to these provisions as well on the basis of CC art. 307. According to CC art. 309 no. 7a, exemption of liability for death or personal injury is not allowed.

THE NETHERLANDS Clauses limiting or excluding liability for death or personal injury are dealt with by the same legal provisions as clauses exempting liability for any other loss or damage. An exception can be found in CC art. 7:463 on treatment services qualified as *overeenkomst inzake geneeskundige behandeling*. This provision does not allow limitation or exclusion of liability for death or personal injury. As a result of developments in European law, – especially art. 3 para. 1 of the directive on unfair terms in consumer contracts (directive 93/13/EEC) and the indicative and non-ex-

haustive list of terms incorporated in the annex to that directive, point 1, under lit. a – it is questioned whether such clauses can still be allowed at all in other consumer (services) contracts (Loos, Algemene voorwaarden. Beschouwingen over het huidige recht en mogelijke toekomstige ontwikkelingen, p. 67; Duyvensz, De redelijkheid van de exoneratieclausule, p. 35).
POLAND Limitation or exclusion of liability for death or personal injury is expressis verbis excluded in the case of consumer contracts (CC art. 385^3 para. 1). The POLISH CC does not regulate this issue with respect to the services contract, however normally the cases of liability for death and personal injury are based on tort claims (CC art. 415).

2. *Limitation or exclusion of liability for damage other than death or personal injury*
ENGLAND The issue of limitation or exclusion of liability in services contracts is dealt with by general contract law, in particular the Unfair Contract Terms Act 1977 (UCTA). The client can only seek protection under the UCTA if the service provider acts in the course of a business (art. 1(3)), whereas the recourse to some of the Act's provisions is only possible if the client acts in his capacity of consumer (e.g. art. 12). The Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) apply to consumer services contracts that have not been individually negotiated. In the case of loss or damage other than death or personal injury, UCTA art. 2(2) allows exclusion or limitation of liability for negligence, whether or not the client is a consumer, if a term to that effect satisfies the requirement of reasonableness. This reasonableness test hardly differs from the 'fairness test' to be applied under the UTCCR art. 5(1) (see however Treitel, The law of contract, pp. 245-246). Relevant factors to be taken into account by the courts, when applying the reasonableness test, all relate to facts and circumstances which the parties knew or should have known at the time of conclusion of the contract (art. 11(1)). These factors can be found in a non-limitative list of guidelines which has been added to the UCTA as schedule 2, whereas other relevant factors are stated in art. 11(4). Relevant factors are: the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met; whether the client received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term; whether the client knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties); whether the goods were manufactured, processed or adapted to the special order of the client; the resources which the service provider could expect to be available to him for the purpose of meeting the liability should it arise; how far it was open to him to cover himself by insurance; whether the (commercial) parties have agreed on the clause after negotiations (cf. *The Salvage Association* v. *CAP Financial Services Ltd* [1995] FSR 654 and *Watford Electronics Ltd.* v. *Sanderson CFL Ltd* [2001] 1 AllER (Comm) 696.); whether the exemption clause resembles clauses used by other parties operating in the same market or industry or in similar markets or industries (*Overseas Medical Supplies Ltd* v. *Orient Transport Services Ltd* [1999] 2 Lloyd's Rep 273, p. 277); whether the service to be supplied is considered to be difficult, or dangerous (*Smith* v. *Eric S. Bush* [1989] 2 AllER 514). See also *Photo Production Ltd* v. *Securicor Transport Ltd*

[1980] AC 827, 843 where it was held that, despite the reasonableness test to be applied under the UCTA, the courts should not intervene in commercial matters generally, when the parties are of equal bargaining power, and when risks are normally borne by insurance. In such cases, the courts should leave the parties free to apportion the risks as they think fit and respect their decisions.

FINLAND As regards services that are supplied in business to business transactions, chap. 3 art. 36(1) (956/1982) of the Contract Act (228/1929) states that if a term is unfair or if its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors. As regards services provided to consumers, chap. 8, art. 2 (16/1994) of the Consumer Protection Act provides that contract terms derogating from the provisions of that chapter to the detriment of the consumer shall be void unless otherwise provided. Chap. 9, art. 2 (16/1994) of the Consumer Protection Act, applicable to construction services provided to consumers, is to the same effect. Given these basic rules, it then follows from chap. 8, art. 20(1) in conjunction with art. 21(1) that limitation or exclusion of liability for damage to other property than the object of the service is possible, if such property has an essential connection of use with the object of the service. Chap. 8, art. 20(1) in conjunction with art. 10(3) and (4) shows that the service provider is allowed to limit or exclude liability for any other loss or damage, provided that such loss or damage was caused indirectly, and provided that it was not caused by negligence attributable to the service provider. The above provisions elaborating the aforesaid basic rules are relevant for consumer services other than construction services, although similar provisions are to be found for the latter in chap. 9, art. 20 in conjunction with art. 11(3) and (4).

FRANCE One of the features of FRENCH law appears to be the well-organised and structured character of the protection of consumer clients against unfair limitation or exclusion clauses, in comparison with the protection that is offered by law to weaker non-consumer clients. Consumer clients are offered protection by the Code de la consommation, particularly by art. L 132-1, which provides the legal basis for reviewing the fairness of a contract clause creating a significant imbalance to the detriment of the consumer client. The application by the courts of this fairness test is first of all facilitated by an annex to art. L 132-1. This annex contains an indicative and non-exhaustive list of clauses that may be considered unfair. Application of the fairness test is further facilitated by a series of non-binding Recommendations issued by the Commission des Clauses Abusives. A third text that can be of relevance for the application of the fairness test is art. R. 132(1) of the Code de la Consommation, which prohibits clauses in (consumer) contracts of sale that have the purpose or effect to exclude or restrict the consumer's right to remedies in case his counterpart defectively performs his obligations. This prohibition of exemption clauses has also been held by the courts to apply to mixed contracts that showed features of both a contract of sale and a service contract (Cass.civ. I, 25 January 1985, D. 1989, Jur. p. 253 and Cass.civ. I, 6 June 1990, Bull.civ. I, no. 145). Although there has been some doubt in the past whether or not the courts are restricted to the aforesaid provisions of the Code de la consommation when applying the fairness test, it is now clear that they are fully competent to hold clauses as unfair whenever they imply a significant imbalance to the consumer's detriment (Girot, User Protection in IT Contracts, pp. 398-399). In the

event that the client's interests are not protected by the Code de la consommation, the client will have to seek resort to general contract law. In the past the courts have been reluctant to intervene in contracts concluded between service providers and non-consumer clients. One exception is the Chronopost Case and the application of the consideration that a contracting party cannot limit its liability in case of non performance of an essentiel obligation (Com. 22 oct. 1996, Bull.civ. IV, no. 261, JCP 1997.II.22881, with annotation D. Cohen). The main exception to the efficiency of limitation clauses has to be fund in CC art. 1150, according to which such a clause is invalid in case of fraud or gross negligence (this latter conditions has been added by case law, see Com. 3 april 1990, Bull.civ. IV, no. 108). There are specific provision that exclude systematically efficiency to limitation clauses in specific service contract. Such is the case for CC art. 1792-5 for construction services qualified as *louage d'ouvrage*. This Article states that clauses limiting or excluding the service provider's defects liability and warranties under CC arts. 1792, 1792-1, 1792-2, 1792-4 and 1792-6, are considered to be void.

GERMANY Clauses limiting or excluding liability will usually have to be considered under the specific provisions of CC arts. 305-310 on standard contract clauses. Although these provisions are of great importance in the context of services supplied to consumers (see for instance CC art. 310 in conjunction with art. 308 and art. 309), other clients can seek resort to these provisions as well on the basis of CC art. 307. As regards liability for loss or damage other than death or personal injury, the provision of CC art. 307(1) states that a standard contract clause is invalid if, contrary to the requirement of good faith, such clause places the client at an unreasonable disadvantage. It then follows from CC art. 307(2) that an unreasonable disadvantage is assumed if a clause cannot be reconciled with essential basic principles of the statutory rule from which it deviates (CC art. 307(2) no. 1), or restricts essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved (CC art. 307(2) no. 2). The latter provision is of particular relevance for the review of clauses excluding liability. Such clauses are not allowed in the event of the service provider's non-performance of essential duties, given that the client may rely on the purpose of the contract being achieved (BGH NJW 1993, 335). The nature of the contract may indicate such an essential duty, given that the service provider may have agreed to undertake specific care and responsibility for the benefit of the client's financial interests (BGH, NJW 1991, 2559) or for things entrusted to him (Duyvensz, De redelijkheid van de exoneratieclausule, p. 28). An essential duty will also be involved if the service provider professes a higher standard of care and skill (BGH NJW 1980, 1619), or if he causes considerable damage despite the fact that he has the ability to prevent and control this (BGH NJW-RR 1986, 271). In the event that it is not possible to acknowledge an essential duty, an exclusion clause may still be invalid if its upholding would lead to unreasonable sharing of risks to the client's detriment (BGH NJW 1990, 761). It will then have to be considered whether and to what extent the parties are capable to control the risk, and whether it is common for either the service provider or the client to insure such risk (see BGH NJW 1988, 1785). The above analysis is only relevant for reviewing clauses excluding liability. If such a clause turns out to be invalid on the basis of CC art. 307(2) no. 2, a clause limiting liability to foreseeable damage may still be valid (BGH NJW 1993, 335). When the courts consider the reasonableness of a clause under

the provisions of CC art. 307, the concrete circumstances of the case prevailing at the time of conclusion of the contract are not taken into account (see Ulmer, in: Ulmer, Brandner & Hensen, AGB-Gesetz, Einl., nos. 29, 32 and 43a.). This practice does not seem to have been changed since the introduction of CC art. 310(3) no. 3, which states that the circumstances surrounding the conclusion of the contract must also be taken into account (see Brandner, in: Ulmer, Brandner & Hensen, AGB-Gesetz, art. 9, no. 148 ff). The reason for this appears to be that the courts are able to achieve satisfying solutions by reviewing the content of a standard contract clause in a more abstract manner (Duyvensz, De redelijkheid van de exoneratieclausule, pp. 21-22 and 24). In the event that the provisions of CC arts. 305-310 are not applicable, for instance, when the relevant contract clause has been negotiated between the parties (cf. CC art. 305(2)), the courts may consider whether or not a limitation or exclusion clause can be allowed on the basis of other, more general provisions: CC art. 134 *(Gesetzliches Verbot)*, CC art. 138 *(Sittenwidriges Rechtsgeschäft; Wucher)* and CC art. 242 *(Leistung nach Treu und Glauben)*. In doing so, however, they must be very cautious and reluctant, particularly when such clauses have individually been agreed upon between the parties.

THE NETHERLANDS In case of consumer services contracts, clauses limiting or excluding the service provider's liability for any loss or damage will have to be considered under the specific provisions of CC arts. 231-247 on standard contract clauses. The client may, if this suits him for whatever reason better or if applicability of the reasonableness test of CC art. 6:233(1) is not available or does not result in the avoidance of the term, also seek resort to the general provision of CC art. 6:248(2) *(beperkende werking van redelijkheid en billijkheid)* to be discussed below (HR 14 June 2002, NJ 2003, 112). According to CC art. 6:237(f), a limitation or exclusion clause in a standard consumer service contract is presumed to be unreasonable. The service provider may, however, prove that the clause is not unreasonable having regard to the reasonableness test of the general provision of CC art. 6:233(a), which is to be applied to the circumstances of the case. When applying the reasonableness test, the following factors are to be taken into account: the nature of the contract; the other provisions of the contract, for instance whether they restore the disadvantage that may result from the clause excluding or limiting liability; the circumstances surrounding the conclusion of the contract, for instance whether the parties have negotiated the clause; the interests of the parties, to the extent that parties were aware or ought to have been aware of one another's interests. Circumstances that occurred after the conclusion of the contract may not be taken into account and can only play a role when applying the test of the general provision of CC art. 6:248(2) *(beperkende werking van redelijkheid en billijkheid)*. This implies, for instance, that the degree of negligence of the service provider is relevant for the application of the reasonableness test of CC art. 6:233(a). According to CC art. 6:235(1) the general reasonableness test of CC art. 6:233(a) does not only apply if the client is a consumer, but also in the event that the client acts in the capacity of a small or medium-sized business. In that case, the client will have to prove that the reasonableness test can be applied to the detriment of the service provider. Even the rule of CC art. 6:237(f) may then be taken into account by the courts, provided however that the client, when entering into the service contract, was in a position rather similar to that of a consumer. The general reasonabless test of CC art. 6:233(a) cannot be applied if the parties have concluded contracts with one an-

other in the past by agreeing on the application of the same or similar standard contract clauses (cf. CC art. 6:235(3)). Non-consumer clients other than small and medium-sized businesses cannot seek resort to the general reasonableness test of CC art. 6:233(a). They will instead have to follow the route provided by the aforesaid general provision of CC art. 6:248(2) (beperkende werking van redelijkheid en billijkheid). This provision also involves the application of a reasonableness test. When applying the test the courts will have to take into account all individual circumstances of the case prevailing at the time of and after the conclusion of the contract. CC art. 6:248(2) will also be available to other clients, for instance when the limitation or exclusion clause is not considered to be a standard contract clause or when the relevant circumstance occurred after conclusion of the contract (e.g. the concrete measure of negligence). The following factors are to be taken into account under the reasonabless test of CC art. 6:248(2): the nature of the contract, particularly if the limitation or exclusion relates to the consequences of non-performance of an essential duty (Duyvensz, De redelijkheid van de exoneratieclausule, p. 24); the other provisions of the contract, for instance those related to the price to be paid by the client; the position of parties in society and their mutual relationship; the mutual interests of the parties known to one another; the circumstances surrounding the conclusion of the clause; whether the client has been aware of the purport of the clause; the degree of negligence of the service provider, having regard to the nature and importance of the interests involved (cf. HR 19 May 1967, NJ 1967, 261; HR 20 February 1976, NJ 1976, 486). If application of these factors shows evidence of a well-considered and individually agreed clause, the courts will not intervene on the basis of CC art. 6:248(2) (cf. Duyvensz, De redelijkheid van de exoneratieclausule, p. 20). Additional guidelines as regards the reasonableness of clauses limiting or excluding liability for loss or damage are developed by case law: a clause is considered to be invalid if loss or damage has been caused intentionally or through gross negligence (HR 12 December 1997, NJ 1998, 202); a limitation or exclusion clause in a service contract will not be invalid if both parties are businesses, provided that they operate in the same market or industry where (standard) contracts with such clauses are commonly used (HR 31 December 1993, NJ 1995, 389). Insurance possibilities of the parties involved are considered to be a relevant factor as well (Hof Den Haag 27 juni 1996, NJ kort 1996, 62).

POLAND POLISH law in general (CC art. 473 para. 2) rejects the possibility of exclusion of liability for a damage caused intentionally. Such exclusion is null and void. The parties may exclude liability of the debtor related to the unintentional fault, including gross negligence (judgement of the Supreme Court of 6. 10. 1953, II C 1141/53, OSN 1955, nr 1, poz. 5). Additionally, in the case of consumer contracts a provision, which excludes or limits in a significant way the liability of the professional for non-performance or improper performance of the contract is assumed to be unfair (CC art. 385^3 para. 2)

Article 1:115: Cancellation of the Service Contract

(1) The client may cancel the contract at any time.
(2) If the contract is cancelled under this Article the service provider is entitled to damages to put the service provider as nearly as possible into the position in which the service provider would have been if the contract had been duly performed. Such damages cover the loss which the service provider has suffered and the gain of which the service provider has been deprived.
(3) In determining the position into which the service provider is to be put under paragraph (2), regard is to be had, among other things, to the following rules:
  (a) if payment of a price was agreed, the service provider is entitled to that price minus the expenses that should reasonably have been saved and the benefit that could reasonably have been earned using the capacity that has become available;
  (b) if payment of a fee based on a particular rate was agreed, the service provider is entitled to payment of the fee on the basis of that rate, to the extent that the service has already been performed; and
  (c) if payment of a fee based on a 'no cure no pay' basis was agreed, the service provider is entitled to payment of both the reasonable costs incurred, to the extent that the service has already been performed, and to the gain of which the service provider has been deprived as a result of the cancellation.

Comments

A. General Idea

Paragraph (1) of this Article empowers the client to bring the service contract to an end at any time by way of cancellation. Cancellation is to be distinguished from termination. The client must resort to termination if he wishes to escape from having to pay (part of) the price for reason that the service provider failed to perform a duty under the contract, subject to the provisions of Chapter 9, section 3 PECL (Termination of the Contract). Such failure is not a condition that is to be fulfilled in order to allow the client to cancel the contract. Cancellation will become an option for the client, in the event that he would like to walk away from the contract for other reasons than an alleged non-performance on the side of the service provider.

> *Illustration*
> A house owner has entered into a contract with an architect for the purpose of designing an extension to the house. After a few weeks, the house owner decides he no longer wants to have the extension and cancels the contract with the architect.

Cancellation is therefore not to be regarded as a remedy. It is basically the recognition of the client's right no longer to want the service to be performed even though the service provider is adequately performing his obligations under the contract.

The client, however, will have to pay the price for walking away from the contract. Paragraph (2) reflects the general principle in this respect, consistent with the approach taken in Article 9:502 PECL (General Measure of Damages). Paragraph (3) provides for a non-limitative list of rules to be taken into account when establishing the position into which the service provider is to be put under paragraph (2). The distinction that is made between the categories (a), (b), and (c) in paragraph (3), relates to the method in which the parties agreed to determine the price to be paid for the service under Article 1:102 (see also Comment A to Article 1:102). As for some services, it is very common for the parties to agree on payment of a fixed price. For other services, it will be more likely that the service provider will be paid on the basis of an agreed tariff, such as an hourly rate. Occasionally, payment on a 'no cure no pay' basis could also be a method by which parties agreed to determine the price. Paragraph (3)(a), (b), and (c) are all based on the principle that cancellation of the contract obliges the client to reimburse both the costs already incurred by the service provider as a consequence of carrying out the service, as well as the profit that has been lost as a consequence of the cancellation.

Payment under paragraph (3)(a) would imply that the fixed price agreed upon at the time of conclusion of the contract is to be divided into two parts: costs on the one hand and profit on the other. Costs will have to be paid to the extent that the service provider as a consequence of carrying out the service reasonably incurs them. If he could reasonably have cut them after the cancellation of the contract, they will not be reimbursed. As regards the profit that was part of the agreed fixed price, the rule implies that it is to be paid to the service provider in full. If the service provider, however, could reasonably have earned profit elsewhere, as a result of using the capacity that has become available, he cannot claim lost profit from the client in full. The rule under paragraph (3)(b) amounts to the same effect. Payment on the basis of a particular tariff implies that the service provider will secure coverage of his profit in the calculation of his tariff. This is why the said paragraph does not mention payment of lost profit separately. It is, however, mentioned specifically in paragraph (3)(c), dealing with cancellation of a contract for which payment on a 'no cure no pay' basis was agreed. This is to prevent a client, who agreed to pay on a 'no cure no pay basis', to cancel a successful service merely for the avoidance of having to pay the agreed price.

B. Interests at Stake and Policy Considerations

The main issue that could be raised here is whether a client should be allowed to cancel a service contract at all. One could indeed question what is so special about services contracts that the client should be entitled to unilaterally bring the contract to an end. Moreover, such a rule does not have a general counterpart in PECL, whereas Article 6:109 PECL (Contract for an Indefinite Period) only recognises the right in the specific context of contracts that are concluded for an indefinite period.

On the other hand, one has to realise that circumstances, including the client's interests, may have changed after the conclusion of the service contract, which might constitute a legitimate interest for the client in walking away from the contract. It is true that this situation could also arise under any other type of contract – for instance a

sales contract – but in such a case a client sometimes has other options to deal with the new situation, without having to cancel the contract. He could for instance still perform his part of the sales contract, and subsequently resell the good in order to safeguard his financial interests. Reselling the finished – though unwanted – result of a completed service, however, will not always be practically possible. By the same token, a client will not always be able to safeguard his interests either by ordering a change of the contract under Article 1:109(1) in conjunction with Article 1:111(1) or by renegotiating the contract. Hence cancellation could be regarded as a useful instrument, particularly if the service provider's financial interests would be sufficiently protected as well.

C. Comparative Overview

It is established law in the countries investigated that the client may cancel the service at any time: AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL, SPAIN and SWEDEN. In ENGLAND, this will amount to a case of renunciation of the contract allowing the service provider to consider the contract as repudiated. It is also an established principle that if the client cancels the service, he must compensate the service provider for the part of the service already performed. There are various ways to calculate the amount of the compensation to be paid by the client. One way to do this, is to indemnify the service provider for all costs he has actually incurred as a result of the (partial) performance of the service, and to compensate the latter for the benefit which he could have obtained from the cancelled service: BELGIUM, FRANCE, ITALY, SPAIN and SWEDEN (consumer services). Another way to calculate the amount of money which the client must pay, is to take as a starting point the price which the client agreed to pay the service provider, and to deduct from this all money which the service provider was able to save as a result of the cancellation of the service: THE NETHERLANDS and POLAND. This deduction can sometimes include the benefit which the service provider actually gained as a result of the cancellation, or which he could have gained but deliberately failed to do so, by using his earning capacity for other services instead: AUSTRIA, GREECE and GERMANY. In ENGLAND renunciation of the service contract entitles the service provider to sue the client for damages for the loss sustained in consequence of the non-performance of the service contract, or to wait till the time for performance arrives and then sue for damages.

D. Preferred Option

The client's right to cancel the service contract is accepted in principle in paragraph (1) of the present Article. The arguments, as set out in Comment B, in favour of that position, are convincing and have been put forward in various legal systems to underpin the rule constituting such right. The client's right is balanced in paragraphs (2) and (3) with a rule allowing the service provider financial compensation for the consequences of the cancellation of the contract. This approach, balancing the interests of the parties, is followed in many legal systems.

E. Relation to PECL and Other Parts of the Principles

Cancellation of contracts is not dealt with in PECL for contracts in general, unless they are concluded for an indefinite period. If that is the case, both parties to the contract are allowed to end the contract on the basis of Article 6:109 PECL (Contract for an Indefinite Period). Some service contracts are contracts for an indefinite period. This would mean that the said Article in PECL would then safeguard both the client's right to cancel the contract as well as the service provider's right to do so. As for services contracts that are for a definite period, the present Article gives an additional rule.

F. Relation to Other Chapters of this Part of the Principles

According to Article 1:101(2) the rules under the present Article are applicable to the specific services contracts that are dealt with in Chapters 2 to 7 of this Part, unless provided otherwise in these Chapters. There are no Articles to be found in the Chapters 2 to 7, that either modify or deviate from the rules under the present Article, or that give a particularisation of these rules. The significance of the present Article for Chapters 2 to 7 is therefore explained and illustrated in the General Comments to the said Chapters, particularly in Comment S (Chapter 2: Construction), Comment P (Chapter 3: Processing), Comment P (Chapter 4: Storage), Comment P (Chapter 5: Design), Comment Q (Chapter 6: Information), and Comment T (Chapter 7: Treatment).

G. Burden of Proof

If the client cancels the contract, the burden of proof as regards the position in which the service provider would have been if the contract had been duly performed, is upon the latter.

H. Character of the Rule

This Article contains default rules.

I. Remedies

The service provider may resort to any of the remedies under Chapter 9 PECL if the client cancels the contract and subsequently refuses to pay the agreed remuneration under the rule of paragraphs (2) and (3).

Comparative Notes

1. *The right of the client to cancel the service in (specific) contract law*
The right of both parties to a contract to cancel the contract, in the event that it was concluded for an indefinite period, follows from PECL art. 6:109 (Contract for an Indefinite Period). See for the comparative and national notes to PECL art. 6:109: O. Lando & H. Beale (ed.), The Principles of European Contract Law, Parts I and II, prepared by the Commission on European Contract Law. As for service contracts that concern a definite period, PELSC art. 1:115 gives an additional rule stemming from the nature of a service contract. For it is established law in the countries investigated that the client may cancel the service at any time: AUSTRIA (*Dienstvertrag*; CC art. 1158(4) in connection with CC art. 1159, art. 1162 and art. 1162b, and *Werkvertrag*; CC *art. 1168)*, *BELGIUM and FRANCE (louage d'ouvrage*; CC art. 1794), GERMANY (*Werkvertrag*; CC art. 649), GREECE (σύμβαση έργου; CC art. 700), ITALY (*contratto d'opera*; CC art. 2227 and *appalto*; CC art. 1671), THE NETHERLANDS (*aanneming van werk*; CC art. 7:764(1), and *opdracht* and *overeenkomst inzake geneeskundige behandeling*; CC art. 7:408(1)), POLAND (contract for work, CC art. 644), PORTUGAL (*mandato*; CC art. 1170 and all other *prestação de serviços*; CC art. 1156), SPAIN (*contratos de obra*; CC art. 1594), SWEDEN (consumer services; art. 42 of the Consumer Services Act *(KTjL)*). In ENGLAND the client's *renunciation* of a contract is not regarded as an issue in itself but is regarded as a case of immediate breach of contract.
No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

2. *Consequences in case of cancellation of the service by the client*
If the client cancels the service, he must compensate the service provider for the part of the service already performed. This is an established principle in all countries investigated. There are various ways, however, to calculate the amount of the compensation to be paid by the client. One way to do this, is to indemnify the service provider for all costs he has actually incurred as a result of the (partial) performance of the service, and to compensate the latter for the benefit which he could have obtained from the cancelled service: BELGIUM and FRANCE (*louage d'ouvrage*; CC art. 1794), ITALY (*contratto d'opera*; CC art. 2227 and *appalto*; CC art. 1671), SPAIN (*contratos de obra*; CC art. 1594), SWEDEN (consumer services; art. 42 of the Consumer Services Act *(KTjL)*, unless the purpose of the contract has been frustrated due to certain circumstances). Another way to calculate the amount of money which the client must pay, is to take as a starting point the price which the client agreed to pay the service provider and to deduct from this all money which the service provider was able to save as a result of the cancellation of the service: THE NETHERLANDS (*aanneming van werk*; CC art. 7:764(2) and *opdracht*; CC art. 7:411(2)), POLAND (contract for work; CC art. 644). This deduction can sometimes include the benefit which the service provider actually gained as a result of the cancellation, or which he could have gained but deliberately failed to do so, by using his earning capacity for other services instead: AUSTRIA (*Dienstvertrag*; CC art. 1162b and *Werkvertrag*; CC art. 1168), GREECE (σύμβαση έργου; CC art. 700), GERMANY (*Werkvertrag*; CC art. 649). In ENGLAND renunciation of the *contract for the supply of a service* entitles the service provider to sue the client for damages for the loss sustained in consequence of the non-performance of the service contract, or to wait till the time for performance arrives and then sue for damages.

No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND.

National Notes

1. *The right of the client to cancel the service in (specific) contract law*

AUSTRIA If the service can be qualified as *Dienstvertrag* the right of the client to cancel the service follows from CC art. 1158(4) in connection with CC art. 1159, art. 1162 and art. 1162b. The right of the client to cancel a service qualified as *Werkvertrag* follows indirectly from CC art. 1168.

BELGIUM Similar to FRENCH law, the client may cancel the contract at any time if the service provider agreed to carry out a service qualified as *louage d'ouvrage* for a fixed price (cf. CC art. 1794).

ENGLAND Whether or not a client to a *contract for the supply of a service* has a right to cancel the service, is not regarded as a particular issue in ENGLISH law. If the client by words or conduct makes clear to the service provider that he will not perform his obligations under the contract in some essential respect, this will amount to a *renunciation* of the contract and the service provider may treat the contract as repudiated. Subsequently, the service provider may either accept the renunciation or affirm the contract by treating it as still in force. The consequences vary according to the choice of the service provider (cf. Chitty on Contracts, nos. 25-017 and 25-020 ff).

FRANCE According to CC art. 1794 the client may cancel services qualified as *louage d'ouvrage* at any time, if the service provider agreed to carry out the service for a fixed price.

GERMANY The client is allowed to cancel the service qualified as *Werkvertrag* at any time (cf. CC art. 649).

GREECE If the service can be qualified as a contract for work (σύμβαση έργου), the client may cancel the contract at any time following CC art. 700.

ITALY According to CC art. 2227, which states a general rule on *contratto d'opera* and which is relevant for all types of services, the client may cancel the service at any time. CC art. 1671 states the same rule for services qualified as *appalto*.

THE NETHERLANDS A service qualified as *aanneming van werk* can be cancelled by the client at any time on the basis of CC art. 7:764(1). A similar rule applies to services qualified as *opdracht* on the basis of CC art. 7:408(1). The latter provision is also applicable in the event of a service qualified as *overeenkomst inzake geneeskundige behandeling*. If the client is a consumer, CC art. 7:408(1) is mandatory, cf. CC art. 7:413(2).

POLAND According to CC art. 644, until the work is completed the client may cancel service at any time. This rule applies to the contract of specific work and to the building contract (CC art. 565 para. 1).

PORTUGAL If the service is qualified as *mandato*, the right of the client to cancel the service at any time follows from CC art. 1170. According to CC art. 1156, this rule is also applicable with appropriate modifications to other types of services falling within the scope of *prestação de serviços* and mentioned in CC art. 1155. As regards one of these other services, *empreitada*, the right of the client to cancel the service has been confirmed in STJ 21 October 1997, CJ (STJ), 1997, III, 88.

SPAIN The client may cancel the service at any time if the service is qualified as *contratos de obra* (CC art. 1594). The right of the client to cancel the contract does not require fulfilment of the conditions on termination on the basis of CC art. 1124, given that these conditions are only relevant in the event of non-performance of the service provider (cf. STS 13 May 1993, STS 4 February 1997, STS 9 March 1999).
SWEDEN In case of services supplied to consumers, the client's right to cancel the service, or part of it, before it has been completed, can be derived from art. 42 of the Consumer Services Act *(KTjL)*). Also under non-consumer contracts, the client has a right to cancel the service, although this right is more limited than under consumer services, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 101.

2. *Consequences in case of cancellation of the service by the client*
AUSTRIA Cancellation of a service qualified as *Dienstvertrag* requires the client to pay the service provider the price that was agreed for the service. The client may deduct costs from the price to the extent that the service provider did not incur these costs as a result of the cancellation of the service. Such deduction may include benefits which the service provider actually gained or could have gained, but deliberately failed to do so, by using his earning capacity for other services instead (cf. CC art. 1162b). The same rule follows from CC art. 1168 for services qualified as *Werkvertrag*. The aforesaid deductions cannot be made in case of a *Dienstvertrag,* however, if the part of the service that has been cancelled would have taken the service provider less than three months to perform (cf. CC art. 1162b).
BELGIUM When the client cancels the service *(louage d'ouvrage)* he must indemnify the service provider for all costs, work done and for the benefit which the service provider could have obtained from the service (cf. CC art. 1794).
ENGLAND If the client renunciates the service contract, the service provider may accept the renunciation, treat it as discharging him from further performance, and sue the client for damages for the loss sustained in consequence of the non-performance of the service contract (Chitty on Contracts, nos. 25-020, 021, 022 and 25-046). The service provider my also affirm the contract by treating it as still in force and wait till the time for performance arrives and then sue for damages (cf. Chitty on Contracts, 25-020, 023).
FRANCE The client's right to cancel the service *(louage d'ouvrage)* is subject to his duty to indemnify the service provider for all costs, work done and for the benefit which the service provider could have obtained from the service (cf. CC art. 1794).
GERMANY Cancellation of a service qualified as *Werkvertrag* requires the client to pay the price that was agreed for the service. The client may deduct, however, the costs which the service provider was able to save as a result of the cancellation. This deduction includes the benefit which the service provider actually gained or could have gained, but deliberately failed to do so, by using his earning capacity for other services instead (cf. CC art. 649).
GREECE If the client cancels the service qualified as contract for work (σύμβαση έργου) following CC art. 700, he must still pay the price that was agreed. He may, however, deduct costs from the price to the extent that the service provider did not incur these costs as a result of the cancellation of the service. Similar to AUSTRIAN and GERMAN law, this deduction may include benefits which the service provider actually gained or could have gained, but deliberately failed to do so, by using his earning capacity for other services instead.

ITALY If the client cancels the service on the basis of CC art. 2227 *(contratto d'opera)* or CC art. 1671 *(appalto)*, he must compensate the service provider for all costs, work done and for the benefit which the service provider could have obtained from the service.
THE NETHERLANDS Given that cancellation of a service qualified as *opdracht* is something which can be attributed to the client, the latter must pay the service provider the full price that was agreed for the service, provided that payment in full is reasonable taking into account all circumstances of the case. The client may deduct, however, all savings on the side of the service provider which result from the cancellation, cf. 7:411(2). If the client is a consumer, CC art. 7:411 is mandatory, cf. CC art. 7:413(2). In addition, the client will also have to compensate the service provider for the costs which the latter has incurred as a result of the performance of the service, unless these costs are considered to be part of the agreed price: cf. CC art. 7:406(1). Cancellation of a service qualified as *aanneming van werk* does not affect the service provider's entitlement to the price that was agreed for the work, although the client may deduct all savings on the side of the service provider which result from the cancellation: cf. CC art. 7:764(2).
POLAND If the client cancels the service qualified as contract for work on the basis of CC art. 644, his duty to pay the price that was agreed upon remains unaffected. The client may, however, deduct costs from the price to the extent that the service provider did not incur these costs as a result of the cancellation of the service.
SPAIN Cancellation of the service on the basis of CC art. 1594 requires the client to indemnify the service provider for all costs, work done and for the benefit which the service provider could have obtained from the service performed. See also Martínez Mas, La recepción en el contrato de obra, 1998, p. 83.
SWEDEN If a service is cancelled by a consumer client, art. 42 of the Consumer Services Act *(KTjL)* provides that the service provider is entitled to compensation for the part of the service which has already been performed, as well as for work which must be completed notwithstanding the cancellation. The compensation is equivalent to the price which would have been due had the contract only related to the work actually performed. art. 42(2) states that the service provider is also entitled to compensation of loss as a consequence of costs incurred for the remaining part of the service, including arrangements made in preparation for performance of the work to which the ordered service relates, and compensation of loss otherwise suffered as a consequence of the fact that the service provider has refrained from accepting other contracts. The service-provider is not entitled to compensation if the purpose for which the client ordered the service has been frustrated because: (a) the thing with respect to which the service was performed has been damaged or lost without negligence on the part of the client, or (b) the client has been prevented from benefiting from the service as a result of statutory provisions, decisions of public authorities or similar circumstances beyond his control.. Under non-consumer contracts, the service provider's right to compensation will be calculated with the contract price as a starting point, minus the costs the provider has saved due to that the contract has not been fully performed, Hellner/Hager/Persson, Speciell avtalsrätt II, first bok, p. 101.

Chapter 2:
Construction

General Comments

A. General Idea

Construction can be described as the process by which the input of materials and components leads to the formation of a new structure or thing (output). The building of an immovable structure is one of the most important examples of construction. The major problem the rules on construction have to deal with is the attribution to the parties of the causes that lead to the structure not being fit for the purpose as envisaged by the parties. Materials or components may be of insufficient quality. The way they are combined into an immovable structure may lead to problems. The problem may also originate in the design provided by the architect on behalf of the client. The constructor may not have noticed mistakes in the design, although they may have been rather obvious. The parties have a common interest in achieving high- quality results and in preventing quality problems. They will also want the work to be done in an efficient manner and in time. Therefore, the parties will have to co-operate closely and smoothly. Other problems to be addressed by rules on construction are the timely handing over of the structure ('delivery') and the possibilities and consequences of changes in the structure envisaged.

B. Scope of Application

This Chapter applies to the building of immovable structures and to the rebuilding or reconstructing materially altering of an existing building or other immovable structure. It can also be applied to the construction of movables, such as equipment, machinery, hardware and structures used for transport (boats, airplanes), be it with appropriate modifications; see Article 2:101. The construction of incorporeal things (software, websites, databases, films, books) can be covered by the principles contained in this Chapter as well, although appropriate modifications may be necessary.

C. Basic Principles

The rules of this Chapter, in combination with the rules of Chapter 1 (General Provisions), reflect some basic principles:

I. The attribution of liability for defects, as a rule, follows the principle that each party is responsible for its own choices relating to the input and the process of construction. Each party, for instance, is responsible for damage caused by mate-

rials it has supplied (Chapter 1, General Provisions, Article 1:106: Duties of the Service Provider regarding Input and Article 1:109: Directions of the Client).

II. This principle is linked to the idea that when a party observes choices of the other party which may threaten the achievement of a final structure that is in conformity with the contract, it has to warn the other party. 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 (Article 1:110: Contractual Duty of the Service Provider to Warn). On the other hand, defects discovered by the client during the building process or during inspection of the final result must be notified to the constructor (Article 1:113: Failure to Notify for Non-Conformity).

III. If the cause of the defect cannot be established, the constructor will bear the risk. The structure has to be fit for its purpose, unless the constructor proves that one of his defences applies (Article 2:104).

IV. In order to prevent defects occurring and to give the client the opportunity to monitor the construction process from the start, the constructor has various duties. Moreover, he is to gather information regarding the existing situation, like the conditions of the soil on which to build (Article 1:105: Circumstances in which the Service Is to Be Performed), he is to use materials and other input of sufficient quality (Article 1:106: Duties of Service Provider regarding Input) and he is to take sufficient care during the construction process (Article 1:107: General Standard of Care for Services).

V. The parties have a duty to co-operate. Before the contract is concluded, they have to exchange essential information in order to enable them to conclude a contract that is optimally beneficial for them and, more in particular, to enable the client to compare the offer of the constructor to alternatives as well as assessing the risks involved. These duties are laid down in Articles 1:103 (Pre-contractual Duties to Warn) and 1:104 (Duty to Co-operate) of Chapter 1 (General Provisions).

VI. Acceptance of certain decisions of the constructor, inspection and supervision are presumed to take place only in the interest of the client. So, failure to take these measures does not relieve the constructor from his liability (Article 2:105).

VII. The basic idea governing variation is that the client should be granted some protection because of his dependence on the constructor in the form of a proportionality rule regarding the price for variations (Article 1:111: Variation of the Service Contract).

VIII. The system of remedies is that of the PECL, with some modifications regarding specific performance and, more in particular, repair (Article 2:109).

These principles are explained in the Comments to the various Articles.

D. Terminology

The term 'contractor', which is commonly used in ENGLISH building contract law, is avoided in order to make it easier to apply the rules to other construction processes than the building of immovables. Instead, the term 'constructor' is used as a general term to describe the provider who has an obligation to construct. Likewise, the term 'client' is preferred to 'employer'.

E. Sources of the Rules

The rules in this Chapter have been designed on the basis of rules deriving from the codes, case law and standard conditions in the countries of the European Union. All existing codes deal with the subject of 'creation', usually within the framework of a contract for work. As a general rule, their starting point is that the constructor is strictly liable for defects in the structure. More details on the scope of the rules and the tradition of codification in this area are discussed in the Comments to Article 2:101. The rules in the civil codes often have a wide scope, sometimes extending to every contract for work where a final result in whatever form is the object of the contract. In some countries, special statutory rules for specific categories of construction have been enacted. Case law, on the other hand, primarily deals with the building of immovables. Uniform general conditions have been developed by the building industry in almost every country, which of course just apply to contracts within this industry. These sets of standard conditions form an integrated part of building contract law in most countries, directly or indirectly through their influence on case law.

As is explained in the General Introduction to the Principles of European Law on Services Contracts, not every legal system of the Member States of the European Union could be studied. For lack of manpower, the law of the Member States that have joined the European Union on 1 May 2004 could not be taken into account, with the exception of Poland, from which country a national reporter could be recruited. Moreover, as no reporters from DENMARK, IRELAND, LUXEMBURG, and SCOTLAND have been found, these legal systems are not represented in the comparative legal study underlying this Chapter. Finnish, Polish and Belgian law are represented only to a certain extent in this Chapter. In the comparative and national notes for each Article it is indicated whether or not (and to what extent) comparative legal information was collected for a particular topic. Firstly, the comparative notes generally show the reader for which Member States information has been collected and for which this was not possible. Additionally, if no (reliable) information was collected for a particular Member State, the relevant national note will read: "No information". If a national note only refers to statute law, to any other statutory instrument, or to a provision taken from a national standard form of contract, it means that the information in the note is not based on a further analysis of relevant case law or legal doctrine. If, however, references to case law and/or legal doctrine have been inserted in a national note, it means that the information is based on a more thorough analysis of the topic in the relevant Member State. In the national notes, the Member States that have joined the European Union on 1 May 2004 are not listed, with the exception of Poland, for reasons set out above.

Relation to Other Parts of the Principles

F. Relation to the Principles of European Contract Law (PECL) in General

The obligations arising from construction contracts are normal contractual obligations, so they are governed by the PECL. In the Comments to each Article, the relationship to the PECL is explained. Mostly the Articles are applications of the rules in the PECL to the specific area of construction. Because the Articles are more attuned to the typical facts in construction disputes, they are easier to apply than the more abstract rules of the PECL and give parties better guidance. Where the rules presented in this Chapter deviate from the PECL, this is mentioned explicitly.

G. Relation to Article 7:102 PECL (Time of Performance)

Timely performance is an important practical problem in construction law. In some construction contracts, the date of completion of the structure is not or vaguely stated, so it has to be established by means of interpretation of the contract. If the contract is silent, Article 7:102 PECL (Time of Performance) applies. This Article only states the criterion, however, that performance is to take place within a reasonable time after the conclusion of the contract. What is 'reasonable' is to be determined by the parties and, if they do not agree, by the court; see Article 1:302 PECL (Reasonableness) for the criteria.

If the contract states a date of completion, the date originally intended may have to be adjusted during the process, depending on circumstances the parties did or did not take into account. Unfavourable weather conditions, delays in the delivery of drawings or other directions, variations, lack of co-ordination between the parties and insufficient planning may interplay to cause delays. Whether these circumstances should lead to an adjustment of the contractual time of completion is again a matter of interpretation of the contract. If the contract is silent, the general rules in Article 6:111 PECL (Change of Circumstances) and Article 8:108 PECL (Excuse Due to an Impediment) will have to be applied.

Even if the date for performance is stated, problems may still arise. In particular, the incentives for the constructor to perform on time may be insufficient. Damages for late performance will be difficult to calculate. Consumers may, for instance, merely experience the nuisance of having to adjust their expectations or of having to reorganise their daily affairs. Before the completion of the structure by the constructor – and even thereafter, when minor defects have to be repaired – the client will often be hesitant to invoke his rights relating to the time of performance, because he is afraid to upset the relation with the constructor. Withholding payment of the price due or part thereof may have similar consequences. Obviously, its usefulness also depends on the payment structure the parties agreed to. The only contribution the present rules offer to the solution of these problems is that they give an indication of the manner in which the time of performance may shift in the case of a variation or the occurrence of an impediment beyond the control of the constructor. The general principle, which may be helpful in other comparable situations as well, is that the time of performance is

extended proportionally; see Article 1:111(6) (Variation of the Service Contract) and Article 2:108(2)(c).

H. Relation to Chapter 1 (General Provisions): General Remark

According to Article 1:101(2), the rules of Chapter 1 (General Provisions) apply to contracts concerning construction activities unless provided otherwise. Below, each of the Articles of Chapter 1 will be discussed briefly in order to explain how these rules can be applied to construction. This will only be done, however, for the Articles which have no equivalent in the present Chapter. For Articles of Chapter 1 that have an equivalent Article in the present Chapter, such as Article 1:104 (Duty to Co-operate), which is related to Article 2:102, the specific applications of the general rules to construction will be explained in Comments to the latter Article.

I. Relation to Article 1:102 (Price)

This Chapter contains no specific rule on the calculation of the price further to the one in Chapter 1 (General Provisions), which as a default rule refers to a reasonable price and protects the customer by reference to the market price generally charged at the time of the conclusion of the contract. The way the price is determined is thus left to the parties. Another default rule states that the consequences of variations for the price are to be determined using the same methods of calculation as were used to establish the original price for the service; Article 1:111(4) (Variation of the Service Contract).

In construction contracts, there are usually three ways to determine the price of the construction. The most common way is that the parties agree upon a fixed price (a lump sum) to cover the whole of the construction work as agreed at the time of conclusion of the contract. A variation of the contract under Article 1:111 (Variation of the Service Contract) will then necessarily lead to an adjustment of the price; see paragraphs (4) and (5) of this Article. Secondly, the parties may agree upon a 'measures and values' contract, leading to a price per unit. Variations in the structure to be built will lead to a change of the number of units to be used, but does not necessarily mean that the remuneration needs to be reconsidered since the price is not determined by a fixed price but by a reference to the price per unit. A third approach implies that a price estimate is given at the time the contract is concluded, often combined with a margin of error or an adjustment margin. A later change of the content of the contract will then lead to a change of the price. In such instances, the methods of price calculation used by the constructor for the determination of the original contract price will determine the additional price he can charge.

Illustration 1
A constructor calculated the fixed price on the basis of the estimated costs of materials, the services bought from third parties and the hours to be spent, adding a profit margin of 7 per cent and then subtracting a 4 per cent discount. These same principles will also determine the price consequences of a contract variation.

J. Relation to Article 1:103 (Pre-contractual Duties to Warn)

Article 1:105 (Circumstances in which the Service Is to Be Performed) requires the constructor to obtain information from the client about the circumstances in which the contract is to be performed. Article 1:103 (Pre-contractual Duties to Warn) states that the constructor is to warn the client against certain risks connected to the service. This is a general principle for services contracts, which can be found throughout case law and statutory law regulating services, as is explained in greater detail in the Comments to Article 1:103.

> *Illustration 2*
> 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.

In respect of construction, there may be doubt whether such a pre-contractual duty to warn exists according to the national laws applicable. The same principle, however, underlies the traditional approach in the national systems regarding construction and the duty to warn. According to this approach (reflected in Article 1:110: Contractual Duty of the Service Provider to Warn), the constructor is to inform the client if mistakes in the directions issued by the client – for instance drawings made by the architect hired by the client – endanger the quality of the outcome that can be contractually expected. A duty to warn also exists when the constructor obtains other information – for instance information about the foundations on which a building is to be erected – that poses a threat to the quality of the result. The basic idea is thus that the constructor is to warn the client against the risk that the structure will not be fit for its purpose.

As explained in the Comments to Article 1:103, in the case law of some countries it is assumed that this duty to warn already existed in the phase before the conclusion of the contract. In other legal systems, such a pre-contractual duty to warn is not yet accepted, nor do the EC directives on public procurement yet cover such a pre-contractual duty to warn. A drawback of the systems in which a pre-contractual duty to warn is not accepted is that it may be a reason for the constructor to keep silent about any difficulties he notices, until after the conclusion of the contract. Then, after the contract has been carried out, the constructor does warn his client, making clear that changes are necessary, and claims a variation for which an additional price is to be paid. This course of events is undesirable, because it leads to extra and unexpected costs for the client after the contract has been agreed upon and signed. Preferably, the client is informed of such risks before he agrees to the contract and the costs of repairing potential defects are covered by the contract price. Such a solution also is in line with Article 4:103(1)(a)(ii) PECL (Fundamental Mistake as to Facts or Law), which already implies a duty to inform the client of such risks.

Another argument in favour of such a provision is that it protects competent and trustworthy constructors bidding for contracts. In practice, more than one constructor is usually invited to tender for a construction contract. If constructors are allowed to withhold essential information from the client, they may be tempted to do so in order to be able to offer the lowest price, speculating that they can recover a higher price later by variations. Thus, a pre-contractual duty to inform may contribute to levelling the playing field at the stage of procurement.

K. Relation to Article 1:105 (Circumstances in which the Service Is to Be Performed)

Before he starts the construction activities, the constructor has to assess the existing situation, for instance the soil or foundations on which a building is to be erected or the existing hardware and software surroundings in which a computer program is to function. The goal of this assessment is to ensure that the constructor eventually delivers a structure that is fit for its purpose. Article 1:105 also obliges the constructor to adapt the structure to the existing circumstances, which is related to his obligation to deliver a structure fit for its purpose. The primary function of the rule is to stimulate the constructor to take such measures preventing defects to the structure.

If the constructor fails to make such an assessment or to adapt the structure to the circumstances, the result may be that the structure is not fit for its purpose. The remedies that are available in such a case are the ones related to defects in the structure and are due on the basis of Article 2:104. When the constructor does not perform the duties contained in these Articles but no defects are the result, in general no loss will be caused by the non-performance so no damages can be awarded. If assessment of the existing situation was due, however, the client may require the constructor to perform his duty during the process of construction and invoke other remedies in accordance with the system of Article 1:112 (Remedies for Breach of Duties of the Service Provider). Moreover, the rule states that defects arising from the manner in which the structure fits to its surroundings are the constructor's risk, unless he shows he sufficiently assessed the situation and warned the client against dangers that became apparent from this assessment (Article 1:110: Contractual Duty of the Service Provider to Warn).

Illustration 3
The constructor of tailor-made machinery for a manufacturing plant does not research the condition of the foundations on which the machines are to be placed. Although the machines are heavy and produce vibrations when operational, the foundations are not damaged and the machines work fine, even in the long run. The structure is fit for its purpose and no remedies are available. Generally, in such a situation an assessment of the existing situation should have taken place, however. During the process of construction, the client may require the constructor to make such an assessment.

L. Relation to Article 1:106 (Duties of the Service Provider regarding Input)

This rule relates to the input in the construction process: materials, components, tools, planning and other persons used in the performance, such as subcontractors. The general idea behind the rule is that the constructor is to ensure that input is of sufficient quality.

The duties lead to strict liability, in the sense that absence of fault does not exonerate the constructor. If, for instance, the materials provided by the constructor are fit for their purpose under normal circumstances, but a particular stock of materials is of substandard quality, the constructor is liable even if he was not in a position to have noticed the quality problem. Relief of liability is only possible if the quality problem is caused by an impediment excusing the constructor under Article 8:108 (Excuse Due to an Impediment) PECL.

The rule only applies to the input provided by the constructor. Insofar as the input is provided by the client, the client is responsible because the choice of this particular type of input is at the same time a direction in the sense of Article 1:109 (Directions of the Client), but the constructor may have a duty to warn under Article 1:110 (Contractual Duty of the Service Provider to Warn).

Illustration 4
A constructor of tailor-made software uses off-the-shelf components, which he buys from a software company, as well as software formerly made by the client. The constructor is strictly liable for the components he integrated into the software he delivers, with the exception of the components provided by the client. The constructor may have to warn the client, however, against these components if he becomes aware of the malfunctioning of these components.

M. Relation to Article 1:109 (Directions of the Client)

The first paragraph of this Article establishes the extent to which the client has a right to give instructions to the constructor. The choices of the client as to input (materials, components, tools to be used), process (building methods) and structure will be laid down in the contract itself or in the documents and drawings it refers to (subparagraph (a)). The contract will probably explicitly leave open some choices that the client will have to make later (subparagraph (b)) or choices that may be made by either party at a later stage (subparagraph (c)).

Illustration 5
The construction of a house is specified in drawings and calculations provided by an architect on behalf of the client. During the construction process, the architect asks the constructor to use particular methods and materials. The client provides the tiles for the bathroom. All these count as directions which the constructor has to follow. They may lead to a variation of the contract, however, under Article 1:111.

Some directions are refinements of the choices already made in the agreement between the parties. It is possible for the client to deviate from the framework of the choices made by the parties together, but then the rules on variation of the contract apply (Article 1:111: Variation of the Service Contract). Because the borderline between a direction within the existing contractual framework and a direction deviating from this framework will often be vague, the constructor is to warn the client if he feels the borderline is crossed; see paragraph (3).

Paragraph (2) deals with the situation that the directions of the client lead to quality problems. In principle, the client is liable for these problems because they are a consequence of his choices. But an important exception to this rule is to be found in Article 1:110 (Contractual Duty of the Service Provider to Warn).

N. Relation to Article 1:110 (Contractual Duty of the Service Provider to Warn)

The constructor has a duty to warn his client when he discovers imperfections in the directions given by the client or obtains other information that will endanger the result. The constructor is not bound to check actively whether the directions contain such mistakes, but he should be normally attentive.

> *Illustration 6*
> 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.

Insofar as the constructor has a duty to warn, he must take reasonable measures to ensure that the other party understands the content of the warning (paragraph (2)). The constructor may not disregard his duty to warn because he assumes that the client or another person involved in the construction process will discover the imperfection. Only if he knows that the client is actually aware or should be aware of the imperfection, a warning is not necessary; see paragraphs (3) and (6).

O. Relation to Article 1:111 (Variation of the Service Contract)

Variations are an important topic in construction law, and equally relevant to other processes that have a 'structure' as a goal, like the building of a computer program, a website or a movable good. Article 1:111 states that both parties should accept reasonable variations.

> *Illustration 7*
> In the situation of the preceding example, the parties will have to consult whether the technique for constructing the windows or that for the walls has to be changed. The client is in the position to give directions in this respect. His directions

will lead to a variation of the contract, and the price will have to be adjusted. The construction may also be delayed by this variation. For both adjustments, the proportionality rules of Article 1:111(4) and (6) apply.

Moreover, the Article provides guidelines for dealing with the price consequences and with the extra time that the constructor may have to be granted to take the variations into account.

P. Relation to Article 1:112 (Remedies for Breach of Duties of the Service Provider)

This Article covers the remedies for the breach of the duties of the constructor contained in the Articles regarding the duty to co-operate, circumstances in which the service is to be performed, input, the standard of care for services, the duty to follow directions and the duty to warn. The remedies are the same as those in the PECL, with some restrictions.

Illustration 8
The constructor of an office building delivers a building that is fit for its purpose. During the process, however, the architect had to intervene many times. He had to ask the constructor to inform him about the condition of the soil, to use reliable subcontractors and to test the materials before applying them. Although the client has no complaints about the final result, the costs incurred by the client for extra employment of the architect are recoverable.

In practice, the issue of the determination of damages is very important in the case of construction contracts. The present principles have no detailed rules on this issue, however. The rules of Chapter 9, Section 5 PECL will have to apply.

Q. Relation to Article 1:113 (Failure to Notify for Non-Conformity)

If the client becomes aware of a non-conformity, he has to notify the constructor thereof within a reasonable time.

Illustration 9
A client contracted a software company for the building of a web interface that is to enable his customers to buy services online. The client receives many complaints from his customers about the lack of user-friendliness of the interface. He is to inform the software company of this within a reasonable time. If he fails to do so, this constitutes a non-performance on the part of the client.

Although the client is entitled to inspect the structure or to supervise the process of construction and may require the constructor to put certain decisions before him for approval, the client is, however, not bound to actively examine the structure or the way

the constructor proceeds. Failure to notify for non-conformity may lead to loss of some remedies, but the right to obtain damages is not affected by it.

R. Relation to Article 1:114 (Limitation of Liability)

This Article deals with contractual limitations of liability. Such clauses are generally subject to a test of reasonableness.

> *Illustration 10*
> A constructor of an office building limits his liability. He cannot do so concerning death or personal injury. For rental payments lost by the owner of the building in the case of late delivery, he can limit his liability if this is fair and reasonable.

The constructor's liability for death or personal injury cannot be excluded.

S. Relation to Article 1:115 (Cancellation of the Service Contract)

In principle, a construction contract is to be performed fully by both parties. However, there may be circumstances in which it is better to end the contract before it is scheduled to end. Article 1:115 states that a construction contract may be cancelled at any time, so also before the service is completed, and regulates the remuneration to which the constructor is entitled in the case of cancellation. It basically states that the client may at all times cancel the contract, provided that he fully compensates the constructor for the premature ending of the contract.

> *Illustration 11*
> A client who ordered the building of a house may cancel the contract if he is required to move to another country for his job and thus no longer needs the house. The constructor, however, is entitled to repayment of the costs he already incurred, or cannot avoid anymore, and to the profits he would have made on the contract, taking into account the ways he would have been able to use his spare capacity for other purposes.

T. Relation to Other Chapters on Specific Services: Design and Processing

The present Chapter is closely related to other Chapters on specific services. One of these is Chapter 5 (Design). Design and construction are quite closely related. Some people will even argue that design and construction cannot be distinguished logically from each other. Both design and construction essentially consist in making the choices that are needed to complete a structure. The construction of a building or of other structures or things usually takes place on the basis of a design. During the construction process, however, further choices will have to be made, and the process of planning these can also be seen as designing.

The reason to distinguish between contracts regarding construction and design is, nonetheless, that a division of responsibility is needed if a person other than the one who constructs made the design. In this situation, the designer does not have the opportunity to change the design on the basis of feedback from the construction process. Meanwhile, the designer cannot beforehand take into account every contingency that may arise during the construction process. Moreover, the designer has no control over the construction process carried out by the constructor. This leads to a somewhat limited liability for the designer. When design and construction are in the same hands, however, these reasons for limitation of liability disappear. Therefore, in so-called 'design and construct contracts' the responsibility of the designer is absorbed by that of the constructor. The designer/constructor is liable for choices made by him on the same basis as a constructor would be. In traditional terms: design/construction is an obligation of result.

Construction is also related to processing: the work on an existing structure or thing, which includes maintenance, cleaning and repair services. It is not always easy to tell the difference between making something new and applying a process to something existing. Still, the need for regulation will be different because of the different interests involved. In the area of construction, the main problem will be whether the building or other structure to be built will be fit for its purpose. For processing, the problems are twofold. First, the question is whether the process will lead to the result expected. For some processing services, like the repair of a car, this will usually be the case, but for other services, like maintenance and cleaning, the result to be achieved will be less evident or the service provider will usually not be able to guarantee a result. Secondly, the work that is done on the existing good may lead to damage to this good, which exposes the service provider to liabilities he may wish to exclude or limit contractually, which he often succeeds in doing in practice. Whether the rules on processing or on construction have to be applied in borderline cases will be difficult to decide. But the practical relevance of qualification as processing or construction is limited because the rules regarding the two subjects are closely aligned, especially with respect to limitation periods and liability rules and defences.

During a construction project, the client will sometimes hire a person who supervises the construction process. For smaller construction projects, it is often the designer of the structure who is also the supervisor. This task is covered by the general rules on services.

U. Relation to the Principles of European Sales Law (PELS)

Construction is also related to sales contracts. Whether an obligation is one to merely supply a good or to construct a thing is a question that is often difficult to answer. Under the regime of the present Chapter, however, it will often not be necessary to distinguish between the two types of obligations because the rules on sales as expressed in the Principles of European Sales Law and on construction are attuned to each other as well. This is especially the case with the rules on conformity and fitness for purpose, on the handing over of the structure, on risk and on the remedies available to the seller and the constructor. The main exception to this is the area of time limits for actions based on these remedies. More information on this can be found in the Comments to Article 2:101.

V. Character of the Rules

The rules in this Chapter are all default rules.

Article 2:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the constructor, is 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.
(2) This Chapter applies with appropriate modifications to contracts whereby the constructor is to construct a movable or incorporeal thing, following a design provided by the client.
(3) This Chapter applies with appropriate modifications to contracts whereby the constructor is to construct a building or other immovable structure, to perform construction work on an existing building or other immovable structure, or to construct a movable or incorporeal thing, following a design provided by the constructor.
(4) When, under a contract, a party is bound to construct and to supply another service, this Chapter applies to the parts of the contract that involve construction, with appropriate modifications.

Comments

A. General Idea

This Chapter covers services whose aim it is to bring about a new structure or thing. The core area of application is the building of immovable structures, based on a design by an architect hired by the client or a design otherwise provided by the client.

> *Illustration 1*
> The building of houses, offices, roads and other infrastructure are examples of activities falling under this Chapter.

The rules are drafted in such a manner, however, that they can also be applied to the construction of movable or incorporeal things, be it with appropriate modifications.

> *Illustration 2*
> The construction of tailor-made machinery, software and websites are examples of this.

Likewise, they can be applied to 'design and construct' contracts, where the constructor is also responsible for the design of the structure and where the construction work is to be performed next to other services, or even next to obligations from other contracts; see Article 1:101(3) (Scope of Application). In these situations, however, modifications may be warranted as well.

B. Interests at Stake and Policy Considerations

This Article covers the scope of application of the rules on construction. The main policy issue is whether the rules should only cover the building of immovables or also the formation of other structures and things. A limited scope of application would be supported by the argument that extensive case law exists on building contracts, so that there is a firm basis for codification in this field. However, many activities that are very similar economically – in the sense that they are also oriented towards creating an object and require very similar interaction processes between the parties in order to achieve this – would then be excluded from the application of this Chapter: the building of ships, airplanes and machinery or the construction of software, databases, websites and the like.

C. Comparative Overview

Some systems, notably the ENGLISH, SWEDISH and FINNISH systems, have no codified rules regarding construction activities in general. SWEDEN and FINLAND, however, have codified rules regarding consumer contracts. Most other EU jurisdictions have codified rules that cover all construction activities, whether they relate to immovables, or to movable or incorporeal things. In ITALY and PORTUGAL, intellectual work is not covered by the same rules, however. THE NETHERLANDS, FRANCE, SPAIN and POLAND have additional rules for the construction of immovables. Building contract law is a particularisation in legal practice in all jurisdictions, although there are some links to adjoining areas such as software law. For building contracts, most countries have one or more sets of standard conditions which are commonly used and also tend to influence case law.

D. Preferred Option

In the present Article, the solution chosen is that of a main scope of application for the rules on construction, that is, building contracts regarding immovables. Outside this scope, the rules are applicable with 'appropriate modifications' to other construction activities. This solution reflects the idea that such activities are very similar economically, require very similar interaction processes between the parties in order to effectuate the envisaged structure and therefore can be governed by similar rules. At the same time, the solution acknowledges that the law regarding such activities is less well established, that these activities relate to many different objects and that the relevant business practices may vary considerably. Thus, although it is very likely that the rules can be applied without modification to those situations, the rules may need to be adapted to these specific situations by the courts.

> The rules of this Chapter may apply to the construction of software. An appropriate modification may be warranted for the conformity rule of Article 2:104, in situations where the software is highly innovative, for instance. A court may try to find an appropriate solution by applying the reasoning that is laid down in Article

1:108(b) (Result Stated or Envisaged by the Client). If the construction of the software entailed substantial risk in the sense of this Article, a court may find that the 'fitness for purpose' test is too harsh for the provider of the software, and apply Article 1:107 (General Standard of Care for Services) instead.

E. Relation to PECL and PELS

Construction contracts are governed by the general rules of contract law contained in the PECL, by the general legal principles on services contracts contained in Chapter 1 and by the specific rules of the present Chapter. As to the applicability of the General Provisions, Article 1:101 (Scope of Application) is relevant in particular. In addition, this Article provides that the rules of the present Chapter may also apply in the case of contracts which 'mix' construction with other activities.

According to Article 1:102 PELS (Goods to Be Manufactured or Produced), contracts for the supply of assets to be manufactured or produced are to be considered sales unless the party that orders the assets undertakes to supply a preponderant part of the materials necessary for such manufacture or production. This means that there may be transactions for which it is uncertain how the rules on sales and construction will interact. In many situations, the practical relevance of this qualification will be limited because the conformity rules for sales and those for construction are similar. Moreover, in this borderline area the courts will often be entitled to apply the rules on services and construction 'with appropriate modifications'; see Article 1:101(3) (Scope of Application) and Article 2:101(2)-(4). The same applies to the PELS, which apply with appropriate adaptations to other objects than corporeal movables; see Article 1:105 PELS (Application to Other Assets). In practice, the courts will thus be able to find solutions that strike a balance between the principles underlying the rules on sales and the rules on construction.

Illustration 3
A company orders tailor-made equipment from a supply company, which will also assemble the equipment using the specifications of the company. The conformity issues that arise can be dealt with under Article 2:201 PELS (Conformity with the Contract) and Article 2:202 PELS (Fitness for Purpose, Qualities, Packaging, etc.), or under Article 2:104. With respect to pre-contractual duties to warn or the duty to co-operate during the process of constructing the machinery, Article 1:103 (Pre-contractual Duties to Warn) and Article 2:102 can be applied, because there are no conflicting rules in the PELS.

This is not to suggest that there will be no issues in which the rules on sales and the ones on services will seem to offer different solutions, and it is uncertain which rules should apply. The main issues on which differences may be present, which will have to be solved by the powers of interpretation conferred on courts, are the following. With respect to inspection, the rules on construction depart from the principle that only apparent defects have to be reported to the constructor (see Article 2:105). Article 4:301 PELS (Examination of the Goods) requires examination by the buyer. If defects

are discovered, the constructor must report these, but will not lose all remedies (Article 1:113: Failure to Notify for Non-Conformity). The professional buyer will lose them all if he does not notify; see Article 4:302 PELS (Notification of Lack of Conformity). This is different for the consumer; see Article 4:302(6) PELS (Notification of Lack of Conformity). The time limits for remedies are also different; see Article 2:111 and compare with Articles 4:305 PELS (Remedy to Be Claimed Within a Reasonable Time). These differences have their origins in the different legal traditions in the areas of sales law (with emphasis on the rules concerning commercial trade) and of construction law. Borderline issues between sales and construction, therefore, are very much a reality in the existing EU legal systems, and this is reflected in the current principles.

F. Design by the Client or the Constructor

The main area of application is delimited further by presupposing that the good to be constructed is designed by the client or by an agent of the client, such as an architect. In these situations, the structure to be made is defined by the client to a greater or lesser extent and the choices made by the client are part of the initial contract or become binding on the constructor by way of directions; see Article 1:109 (Directions of the Client). In these situations, the client generally bears the risk of mistakes in the design, unless the constructor has a duty to warn; see Article 1:110 (Contractual Duty of the Service Provider to Warn).

If the structure is only described in a more general manner and the constructor is to design the structure before he actually starts building, the rules of the present Chapter apply with appropriate modifications. Generally, however, no modifications will be necessary for such 'turnkey' or 'design and construct' contracts. In these contracts, the constructor will bear more responsibility for the result because he did not only construct the structure, but also design it. That, however, is exactly what the present rules lead to. According to these rules, the responsibility for the design shifts to the constructor because the contract only describes the construction in general terms and it is the constructor who has the responsibility to ensure that the design is such that the structure becomes fit for its purpose (Article 2:104). In situations where the designer and the constructor are one and the same person or entity, the rules of Chapter 5 (Design) are not applicable to the 'design' part of the work undertaken by the constructor. These rules are only applicable when the designer and the constructor are different persons or entities (See Article 5:101(1) and (4): Scope of Application). Construction is thus a 'subsequent service' in the sense of this Article.

G. Construction Work on Existing Immovables or Processing?

The rules of this Chapter also apply to contracts whereby the constructor is to perform construction work on an existing building or other immovable structure, following a design provided by the client. In general, processes applied to existing structures and things are covered by the rules on processing. So, maintenance work on buildings, such as painting, repairs to sewage systems and wiring and the cleaning of windows, is

classified as processing. Extensive reparations, however, such as the removal and renewal of an entire roof structure or restoration work on old buildings with a value similar to the value of the good prior to the restoration, constitute construction work on existing goods that is covered by the present Chapter because it is more similar to construction than to processing.

The exact borderline between construction and processing may, in some situations, be difficult to determine. At this borderline, however, the rules regarding processing and construction are very similar. Processing services that are similar to construction work on existing immovables will consist mainly of repairs. Contracts involving important repairs to buildings will generally be successful, so that a reasonable client will have no reason to believe that the result will not be achieved by the service provider. Thus, the supplier will generally be under an obligation to achieve a specific result (Article 3:105: Conformity and Article 1:108: Result Stated or Envisaged by the Client), as he would be under the regime of the present Chapter (Article 2:104). A potential difference may also be the consequence of different rules on contractual limitations of liability, but the results that can be reached under Article 3:112 and Article 1:114 (Limitation of Liability) are very similar as well. Finally, the prescription period may be different, because in the rules on construction the right to obtain other remedies than damages may no longer be upheld; see Article 2:111(3).

H. Character of the Rule

The parties may deviate from the rules in this Chapter because they are all default rules. The scope of application rule of this Article, however, is mandatory in the sense explained in the Comments to Article 1:101 (Scope of Application) of the General Provisions.

I. Remedies

This rule has no remedies in the classical sense. The consequences attached to the rule are the applicability of the rules of this Chapter.

Comparative Notes

1. Scope of the Rules on Construction

ENGLISH, SWEDISH and FINNISH law have no codified rules regarding construction activities, see D. Wallace, Hudson's building and engineering contracts, 1995, no. 1-001, Chitty no. 37-001 and Hellner, Speciell avtalsrätt II, first book, p. 122. SWEDEN and FINLAND, however, do have rules regarding consumer contracts, art. 1 Konsumenttjänstlagen (KTjL) and Chapter 8/9 of the Finnish Consumer Protection Act. Most other European jurisdictions have codified rules that cover all construction activities, see CC art. 7:750 ff (THE NETHERLANDS), CC arts. 1710 and 1787 (BELGIUM), CC art. 1787 ff (FRANCE), CC art. 1544 (SPAIN), CC arts. 1655-1677. (ITA-

LY), CC arts. 631 ff (GERMANY), CC art. 1151 para. 1 (AUSTRIA), CC art. 681 (GREECE). In ITALY and PORTUGAL, see CC art. 1207 and STJ 29 September 1998, CJ 1998 III, p. 34 intellectual work is not covered by the same rules, however. Some countries have additional rules for construction of immovables, arts. 7:765 ff DUTCH CC (only for consumer contracts), arts. 1792-1793 FRENCH CC, arts. 1588 to 1600 SPANISH CC and arts: 647-658 POLISH CC.
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Standard Conditions*
In all countries dealt with, building contract law is covered to a large extent by standard conditions, that have to be agreed on by the parties to be relied on directly, but which also influence case law indirectly. See for details under National Systems. International conditions are provided by FIDIC (Féderation International des Ingenieurs Conseils) http://www.fidic.org and ICE (Institution of Civil Engineers) http://www.ice.org.uk standard contract terms.
No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Scope of the Rules on Construction*
AUSTRIA CC art. 1151 para. 1 defines the *Werkvertrag*. That contract is commonly defined as an achievement of a certain result. The result has to be understood in the broadest sense possible in order to cover a wide range of activities: manufacture, treatment, amending, restitution, or improvement of a corporeal thing, but also creation of non-corporeal works as well (writing of a play, data processing program), see Rummel [*-Krejci*], ABGB Kommentar, arts. 1165, 1166, no. 9.
BELGIUM CC art. 1710 defines a contract for work *(louage de services)*. More specific rules are given in arts. 1787 ff for contracts that relate to the construction of material and immaterial objects.
ENGLAND There is no specific legal regime for construction. Writers tend to concentrate on the creation of immovable property, D. Wallace, Hudson's building and engineering contracts, 1995, no. 1-001 and Chitty no. 37-001.
FINLAND Chapter 8 of the Consumer Protection Act covers work or other performance relating to movables, immovables and other structures, including production of movables. Chapter 9 covers construction of immovables. Other construction contracts are covered by general contract law.
FRANCE A contract for service *(louage d'ouvrage, contrat d'entreprise)* regulated by arts. 1787 ff of the Civil Code is a contract by which one party (the *entrepreneur*) undertakes to perform a work independently. This general contract concerns every kind of work both material and intellectual (Cass.civ. III, 28 February 1984, Bull.civ. III, no. 51). The CC contains specific provisions concerning the building construction contract (CC arts. 1792-1793).
GERMANY Construction activities fall under the scope of the law of *Werkvertag* regulated in CC arts. 631 ff. These rules apply to works at facilities of the client (e.g. installations, cleaning of a house), work at things which were handed over by the client (e.g. cleaning of clothes, reparation of a car), handcraft, intellectual works, processing, construction and others.

GREECE CC art. 681 defines a contract for work, which could be of material or immaterial nature. When the contract of work involves the supply of services, specific rules apply in the context of consumer contracts (Act 2251/94, Article 8).
ITALY A construction contract falls within the scope of application of the provisions on the *contratto d'appalto* regulated in CC arts. 1655-1677. The *appalto* is a contract whereby a party undertakes to perform a work or a service. There is an often-debated borderline dividing an activity on tangible materials (to which provisions on *appalto* apply) and one on immaterial ideas (governed by rules on intellectual work). The contract of engineering is governed by the provisions on *appalto* even where only an intellectual activity is required (preliminary studies, drafting of a project, advice on technical and administrative matters, etc.).
THE NETHERLANDS CC art. 7:750 describes a contract for work on goods as a contract relating to a work of a physical nature. Subchapter 2 (CC arts. 7:765 ff) contains specific rules for construction of houses ordered by a consumer.
POLAND A building contract is regulated in CC arts. 647-658. In the POLISH CC it is treated as a special kind of a contract of specific work (CC art. 656 envisages corresponding application of provisions on the contract of work to the effects of the delay by the constructor of the beginning of the building work or the finishing of the object or performance of building work in a manner which is defective or inconsistent with the contract, to the warranty for the defect of the object built, and to the client's right to renounce the contract before the object is completed). Nevertheless, the building contract constitutes a separate type of contract (judgement of the Supreme Court of 12. 12. 1990, I CR 750/90 (OSNCP 1992 Nr 5, poz. 81), although historically it derives from the contract of work (judgement of the Supreme Court of 12. 2. 1991, III CRN 500/90, OSNCP 1992, Nr 7-8, poz. 137). Position of the parties, which conclude a building contract is also determined by the provisions of the administrative building law, which imposes certain obligations on both – the contractor and the client. Non-observance of such obligations may cause civil law consequences. Applicability of the administrative building law provisions constitutes the criterion, which distinguishes the contract of work from the building contract. Provisions on the building contract apply respectively to the contracts for repair of a building or a construction (CC art. 658).
PORTUGAL The contract for work *(empreitada)* is regulated by CC art. 1207 and following, but the trend of recent case law is that provisions on the contract for work do not apply to immaterial works: STJ 2 February 1988, BolMinJus 374, p. 449; STJ 17 June 1998, CJ 1998 II, p. 116; STJ 29 September 1998, CJ (STJ) 1998 III, p. 34.
SPAIN Contracts for work *(contratos de obra)* are regulated together with services contracts, see CC art. 1544. Construction contracts, but not of movables, are further regulated in CC arts. 1588 to 1600, see Diez Picazo, Sistema de derecho civil, vol. II, pp. 433 ff. On the classification of contracts for work, STS 6 November 1982, RJ 1982\6530. The most important legal source regarding construction contracts is the new Statute on building (Ley 38/1999 de 15 de Noviembre, *Ley de Ordenación de la Edificación*, hereinafter LOE).
SWEDEN Construction work (entreprenad) for immovables is covered by general contract law and standard conditions, see Hellner, Speciell avtalsrätt II, first book, p. 122. Consumer services with respect to movables are regulated in the Consumer Services Act, Konsumenttjänstlagen (KTjL). They include work on movables (lösa

saker), KTjL art. 1 second sentence, and work on immovables, buildings or other constructions on land, in water and other stationary objects. KTjL art. 2 exempts production of movables, except when the consumer supplies a major part of the material.

2. *Standard Conditions*

AUSTRIA The norms of the AUSTRIAN Standards Institute [*Österreiches Normungsinstitut; www.on-norm.at* deal with contractual and technical aspects of various types of construction contracts. Important examples of such norms are ÖNORM A 2060 (*Allgemeine Vertragsbestimmungen für Leistungen*/General conditions for contracts – Works contract) and ÖNORM B 2110 (*Allgemeine Vertragsbestimmungen für Bauleistungen*/General conditions of contracts for works of building and civil engineering construction).

ENGLAND The most commonly used general conditions are the *Joint Contracts Tribunal (JCT)* forms of the Royal Institute of British Architects, and the *Institute of Civil Engineers* (ICE) standard form, D. Wallace, Hudson's building and engineering contracts, 1995, nos. 1007-1008 and Chitty no. 37-002. International contracts may be covered by the FIDIC models.

FRANCE The most important standard conditions for the public sector are found in the *Cahier des clauses administratives générales applicables aux marchés publics de travaux* (CCAG-Travaux), enacted by the Decree no. 76-87 of the 21 January 1976. In the private area such standard conditions do exist as well, see the AFNOR norm NF P 03-001.

GERMANY The Verdingungsordnung für Bauleistungen (VOB) is the most important source of standard conditions. Part A deals with procurement, Part B entail standard conditions and Part C the technical norms *(DIN-Normen)*.

GREECE The use of standard contract terms is common practice, particularly in the area of building construction.

THE NETHERLANDS In practice, use is made of national standard contract terms, the most important of which are the *Uniforme Administratieve Voorwaarden voor de uitvoering van werken (UAV 1989)*. Construction of houses for consumers is usually coverned by the *Algemene Voorwaarden voor Aannemingen in het bouwbedrijf (AVA 1992)* For design and construct contracts the *Uniforme Administratieve Voorwaarden voor geïntegreerde contractvormen (UAV-GC 2000)* are now available.

POLAND In the practice there are a few typical variations of the building contracts. These are: (1) contract of a general performance of the building, concluded by the client or the general executor of the project with the party that accepts position of the prime contractor, (2) contract of realisation of the building investment, concluded by the client with a so-called general executor of the project, (3) contract of a performance of building or assembling works concluded by the prime contractor with a subcontractor, (4) contract of a part-performance, concluded by the prime contractor with a so-called part-subcontractor, in cases when the main functions of the prime contractor are executed by the client, (5) contract of investment substitution, (6) so-called developer contracts (Strzępka in Rajski, System Prawa Prywatnego, Tom 7, p. 398).

PORTUGAL Contracts are sometimes based on FIDIC and ICE standard contract terms. Most times, however parties base some clauses of the contract on the REOP.

Although this is a statute on public construction, even in private contracts parties opt to incorporate them in the contract, see P. Romano Martinez, Direito das Obrigações, no. 296.
SPAIN Contracts of construction concluded with the Public Administration are subject to clauses are contained in the Statute on Contracts concluded with the State *(Ley 13/1995 de Contratos del Estado)*.
SWEDEN The most frequently used standard contract form is the AB 92 *(allmänna bestämmelser för byggnads-, anläggnings- och installationsentreprenader)*, see Hellner, Speciell avtalsrätt II, first book, p. 122. Another important standard contract is the ABS 95 *(Allmänna bestämmelser för småhusentreprenader)* used between a constructor and a consumer, who has received governmental financial support for the contract work. In such cases, the KTjL is not applicable. The ABS 95 can however be said to be a mixture between AB 92 and the KTjL.

Article 2:102: Duty to Co-operate of the Client

The duties under Article 1:202 PECL (Duty to Co-operate) and Article 1:104 (Duty to Co-operate) require in particular the client to:
(a) provide access to the site where the construction has to take place in so far as is reasonably necessary to enable the constructor to perform the contract; and
(b) in so far as they must be provided by the client, provide the components, materials and tools at such time as is reasonably necessary to enable the constructor to perform the contract.

Comments

A. General Idea

This Article specifies the specific instances of the general duty to co-operate that can be found in Article 1:202 PECL (Duty to Co-operate) and is already particularised for services in general in Article 1:104 (Duty to Co-operate). From the latter Article, it already becomes clear that the client must answer reasonable requests for information by the constructor, for instance regarding the existing situation. Moreover, directions – such as drawings or other specifications to be delivered by an architect – should be given timely. The same holds for permits and licences. The constructor is to enable the client to follow the construction process in order to determine whether the constructor performs his duties; see also Article 2:105. The parties are also to co-ordinate their efforts.

The present Article mentions two additional issues for which the co-operation of the client is essential. The client is to provide timely access to the site of construction and he is to provide input from his side, such as components, materials and tools, in time.

Illustration
The owner of a farm wants a constructor to build a shed on his premises. The constructor is to use the wood from the old shed, which the owner will tear down himself. The owner is to provide the constructor access to the place where the shed is to be built, and deliver the wood in time.

B. Interests at Stake and Policy Considerations

As explained in the Comments to Article 1:104 (Duty to Co-operate), the process of the delivery of a service like construction is in general a quite complicated interaction between the parties. Input from both parties has to be co-ordinated; the client has to communicate his directions to the constructor; variations will take place; and quality problems may arise. Whether the final result will eventually be in conformity with the legitimate expectations of the client will to a considerable extent depend on the manner in which the parties co-ordinate their efforts, communicate and deal with disputes.

Access to the input provided by the client, and to the site of construction, are particular examples of essential co-operation. If such access is not given timely, the construction process may be delayed, and the constructor may be precluded from using his workforce and other resources optimally. The issue is whether the constructor or the client is to have the primary responsibility for organising these efforts.

C. Comparative Overview

The general principle that the client of a constructor has a duty to co-operate is firmly established in the GERMAN and AUSTRIAN codes and in ENGLISH case law. In FRENCH law, the client's duty to co-operate is limited to delivering the information necessary for the performance of the contract. Other countries, such as PORTUGAL, derive the client's duty to co-operate from the concept of good faith. The constructor is under a full duty to co-operate in the FRENCH legal system. In other countries, the constructor's duty to co-operate is not as such articulated in case law, but there are no indications that the idea behind it meets with substantive opposition.

There are important traces of the more specific examples of the duty to co-operate in the EU legal systems. The client's duty to give the constructor access to the site where construction has to take place is accepted in many countries. The duty to give instructions in time exists in ENGLISH and DUTCH law, and the duty to answer reasonable requests for information by the constructor also in GERMAN law. The constructor's duty to allow the client to access the structure for inspections, an instance of the duty to enable the client to determine the quality of the performance, is implied in the right of the client to inspect that is accepted everywhere; see Article 2:105.

D. Preferred Option

Both specific instances of co-operation mentioned in this Article are essential elements of a well co-ordinated construction effort. Placing this burden on the client is a solution that is sufficiently supported by construction law in various jurisdictions. There are no indications that such duties are contested in other jurisdictions. The client usually is in the best position to ensure that these elements of the co-operation are taken care of.

E. Relation to PECL and Other Parts of the Principles

The present Article states some specific instances of the general duty to co-operate of Article 1:202 PECL (Duty to Co-operate). Under Article 2:202 (Revocation of an Offer) and 1:301(4) (Meaning of Terms) PECL, failure to co-operate is a breach of a contractual duty. The remedies, therefore, are the ones contained in Chapters 8 and 9 PECL: specific performance, withholding performance, termination, price reduction and/or damages; see also Article 1:112 (Remedies for Breach of Duties of the Service Provider).

F. Other Issues for Co-operation

Apart from the topics mentioned in the Article, there are other issues for co-operation. When undertaking construction activities, the parties may find it useful to design procedures for some aspects of co-operation. In standard conditions, it is common to have a detailed procedure for handing over of the structure, for inspection of the end result, for complaints resulting from this inspection, for discussing the progress of the project and for recording the outcomes of such discussions. Whether such elaborate procedures are useful and which procedures are pertinent depends on the size of the construction project and the ability of the parties to meet the procedural requirements. The costs of designing and implementing these procedures should be weighed against the expected benefits. Keeping written records of all the essential communications that take place is costly, but may lead to important savings in dealing with quality problems and other potential disputes later on.

Procedures for directions, variations, inspections, acceptance and handing over of the structure are very common in the standard conditions, but this is not yet the case with provisions regarding disputes, with the exception of arrangements regarding the court or arbitration tribunal that should deal with disputes and the law applicable. In the construction industry, and also in the software business, there is an increasing awareness of the necessity to solve disputes early and in an efficient manner. This is reflected in the development of the concept of 'Partnering' and in the establishment of 'Dispute Review Boards' for larger construction projects. Stimulating co-operation through the development of such procedures, or resorting to them when disputes arise, may be very useful.

G. Character of the Rule

The duties contained in this Article are default rules.

H. Remedies

The remedies are the remedies for non-performance; see Article 1:102 PECL (Freedom of Contract), as well as Article 1:104 (Duty to Co-operate) and the Comments thereto.

Comparative Notes

1. *Duty to Co-operate in General*
   All jurisdictions accept a rather extensive duty to cooperate of the client, arising from implied terms in ENGLAND (see D. Wallace, Hudson's building and engineering contracts, 1995, no. 1-186 and Chitty nos. 37-067 and 068), from a specific rule for construction contracts in GERMANY (art. 642 para. 2 and CC art. 643) and AUSTRIA, (CC art. 1168 para. 2), or from general good faith, see art. 6:248 DUTCH CC, art. 1134 BELGIAN CC, art. 1258 SPANISH CC, art. 1375 ITALIAN CC (see also the general principles of correctness in performance of CC Article 1175) and arts. 762, 813 para. 2 PORTUGUESE CC. In the Scandinavian countries and in POLAND the situation is less clear, but they have many specific rules on cooperation, see art. 3:12 and 17 SWEDISH AB 92 and Section 9.31 of the FINNISH Consumer Protection Act, as well as FIDIC Conditions Clause 42. In FRANCE, the duty to cooperate of the client is more limited, but he may have duties in good faith, see CC art. 1134 para. 3.
   No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Duty to Give Access*
   A duty to give access is an implied term in ENGLAND (see D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-150 and Chitty no. 37-067). Other countries derive it from good faith or the duty to cooperate: BELGIUM (Goossens, Aanneming van werk, no. 987), GERMANY (CC art. 242 and art. 642), SPAIN (CC art. 1258), PORTUGAL (Romano Martinez, Direito das Obrigações, no. 344) and POLAND (see art. 635). Many standard conditions mention it as well, for instance in SWEDEN (AB 92 art. 3:14) THE NETHERLANDS (art. 5-1, sub b, *UAV 1989* and art. 3, para. 1, *AVA 1992*), AUSTRIA (ÖNORM B 2110 5. 9. 1). See also FIDIC Conditions Clause 42.
   No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Duty to Co-operate in General*
   AUSTRIA If the client does not co-operate, CC art. 1168 paragraph 2 grants the constructor a right to rescind the contract under certain conditions. Positive duties to co-operate can be found in ÖNORM B 2110, which contains many provisions stipulating an indirect duty to cooperate, for instance a duty to ensure a proper

cooperation between his contractors, especially to coordinate their work, para. 5.14. The contractor is under a similar obligation *vis-à-vis* his supplier and sub-contractors.

BELGIUM A duty of the client to enable the work to be realized or to make this easier is generally assumed. It is based on good faith (CC art. 1134), see Goossens, Aanneming van werk, nos. 979 ff.

ENGLAND The doctrine of implied terms results in both parties having a positive obligation to do all that is necessary to enable the other party to perform, and to refrain from hindering the other's performance (D. Wallace, Hudson's building and engineering contracts, 1995, no. 1-186 and Chitty nos. 37-067 and 068).

FINLAND Chapter 9 art. 31 of the Consumer Protection Act deals with delays due to failure to cooperate by the consumer-client, entitling the constructor to compensation and other remedies.

FRANCE The duty to cooperate of the client is limited to delivering the information necessary for the performance of the work. If the client conceals this information, this can lead to his contributory negligence and to the partial exoneration of the constructor (Cass.civ. I, 17 March 1969, D. 1969, 532, knowledge of the client of particular characteristics of the soil), but he may have duties in good faith, see CC art. 1134 para. 3.

GERMANY CC art. 642 entails a general duty to cooperate and contribute to the work for the client. He may have to provide the material, get official permissions, deliver the design, and provide with technical support (e.g. electricity, water). art. 6 no. 6 VOB/B also states that it is a lack of cooperation if another service supplier hired by the client does not provide his work, on which the constructor has to build its contribution. Under the CC the duty to cooperate is not enforceable (*Glaeubigerobliegenheit*, BGH NJW 1954, 229). But the constructor may ask for compensation for the fruitless keeping ready of his facilities and may terminate after setting an additional period of time, see CC art. 642 para. 2, art. 643 and art. 9 VOB/B. If the lack of the client's contribution is of such intensity that it is unreasonable to continue the contractual relationship, the contractor may rescind from the contract immediately and demand damages because of non-performance (BGH NJW 1954, 229, *positive Vertragsverletzung*).

ITALY A general duty to co-operate may be deduced from the general principles of correctness in performance (CC art. 1175) and of good faith both in a pre-contractual (CC art. 1337) and contractual stage (art. 1375).

THE NETHERLANDS The client's duty to co-operate not codified, but standard conditions deal with the contractor's duty to provide access to the client or persons on his behalf to exercise the right to supervision of the work (cf. art. 6-20 and 6-22 *UAV 1989*), and to be (presented) at the construction site at all times in order to receive and carry out directions given by or on behalf of the client (cf. art. 6-19 *UAV 1989*).

POLAND Both of the parties are under a duty to cooperate, which follows from the general rules of contract law, CC arts. 354 and 355. Additionally, parties of a building contract are obliged to cooperate in all phases of the building process, which follows from CC arts. 651 and 655 (Strzępka in Rajski System Prawa Prywatnego, Tom 7, p. 407).

PORTUGAL No express provision exists on the duty to cooperate. It follows however from the general principles of good faith: CC arts. 762, 813 para. 2. It includes the

supply of the terrain, the plan, materials, tools, instructions, and cooperation to obtain administrative licenses, see Romano Martinez, Direito das Obrigações, no. 344.

SPAIN The obligation of the parties to cooperate, even when not expressly codified or agreed by the parties in their contracts, is to be enforced because it stems from good faith, usages and the law (CC art. 1258). LOE art. 9, para. 2 imposes specific obligations on the client. Some of those are within the framework of co-operation duties: to deliver documents and previous information to allow the performance by the constructor and to authorize the variations to it; to get all necessary licenses and administrative permits; to subscribe the mandatory insurance (art. 19).

SWEDEN The AB 92 does not contain any general duty for the parties to cooperate. The provisions are instead rather detailed, for instance art. 3:12 laying upon the client the responsibility to coordinate his own work and work of other side-contractors with the constructor. Moreover, the parties are obliged to attend building meetings, which shall address questions relevant to both parties and be held in necessary extent, art. 3:17.

2. *Duty to Give Access*

AUSTRIA ÖNORM B 2110 lays down that the client has to provide for working and storage facilities at, access roads or railroads to, and gas, water, and electricity supplies for the construction site in as far that is required to perform the contract (5. 9. 1).

BELGIUM The duty to enable the constructor to carry out the work is a general principle of the law regarding construction, see W. Goossens, Aanneming van werk, no. 987.

ENGLAND Implied term to give possession of the site within reasonable time (D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-150 and Chitty no. 37-067).

FRANCE The client is generally considered to have a duty to give access to the constructor (Huet, Principaux contrats spéciaux, no. 32329; Picod, L'obligation de cooperation dans l'exécution du contrat, J.C.P. 1988.I.3318).

GERMANY The client has to give access to his territory if necessary. This obligation results from CC art. 242 (good faith) as well as CC art. 642.

THE NETHERLANDS The client's duty to give access to the construction site is implied in art. 5-1, sub b, *UAV 1989* and art. 3, para. 1, *AVA 1992*.

POLAND The POLISH CC does not contain expressis verbis the duty to give access in the case of a building contract; it may be however derived from, for example, CC art. 636, which applies to the building contract on the basis of CC art. 656 para. 1.

PORTUGAL Supply of access to the terrain is part of the duty to cooperate, see Romano Martinez, Direito das Obrigações, no. 344.

SPAIN The client-proprietor grants the constructor the instrumental possession *(posesión instrumental o servil)* of the place where the construction work takes place. The client is the proprietor and may make use of such right when ever it wants, since it has a better right over the good.

SWEDEN The constructor has a right to dispose of the site in a way that is necessary for the carrying out the contract work, in consultation with the client, AB 92 art. 3:14.

Article 2:103: Duty of Care of the Constructor

The duties under Article 1:107 (General Standard of Care for Services) require in particular the constructor to take reasonable precautions in order to prevent any damage to the structure.

Comments

A. General Idea

This Article relates to the process of construction. Article 1:107 (General Standard of Care for Services) applies here. More in particular, the constructor must comply with the statutory and disciplinary rules applicable to the activity, and has responsibilities regarding the prevention of damage to other goods and people. During the construction activity, the constructor must also take reasonable precautions against foreseeable damage to the structure.

> *Illustration*
> The constructor of a building is to protect the structure against external harm such as weather conditions and theft. This may require the building site to be covered in a way that protects it against rain and wind. If valuable materials are present on the site, the site may have to be fenced or even guarded.

B. Interests at Stake and Policy Considerations

When construction activities take place, the risk of damage to the structure is usually higher than when the building is completed and in use. The structure is generally more easily accessible, more exposed to the elements and less stable than a completed building. Protection is therefore needed; however, who is to provide protection, the constructor or the client?

Because the constructor will normally supervise the site where construction takes place, or at least the structure, and will also be accessing the structure regularly and frequently, he is usually in the best position to take protective measures.

More generally, the constructor is usually in the best position to take safety measures and measures limiting a negative impact of the activity on goods and on third parties. Construction, by its nature, is a process that easily leads to damage to goods or even personal injury; see Article 1:107 (General Standard of Care for Services). The constructor will have to protect his own goods and workforce anyhow, and protecting other goods and people is therefore not burdensome. Insurance cover is widely available. In exceptional cases, the client may be in a better position to take safety measures, and the parties may then wish to deviate from this default regime.

C. Comparative Overview

A general duty like the one contained in this Article, which should be read in conjunction with Article 1:107 (General Standard of Care for Services), exists in many countries, though in slightly different versions, which may stress various aspects of the general standard of care. Examples are a general 'workmanship' obligation (ENGLAND), a duty to do the work as a reasonable and diligent expert (AUSTRIA), with due care (GREECE), according to the general standard of technique (GERMANY), with due diligence and knowledge (SPAIN, ITALY, PORTUGAL), to process materials and components in a competent manner, carrying out the work with reasonable skill (THE NETHERLANDS) and to perform the service professionally (*fackmannamässigt*; SWEDEN). In FRANCE, the damage to the final work is the central issue.

In the FRENCH system, there is also discussion in the literature regarding a duty to guarantee the safety of the client and possibly also third parties (*obligation de sécurité*), which would go in the direction of strict liability. But this safety guarantee is not firmly accepted in FRENCH case law, although other rules will lead to a very similar outcome. The other countries have no special rules in this respect. The parties are supposed to solve this matter by means of terms in the contract or through tort law. Thus, the discussion is not so much whether a duty of care regarding other goods or persons is to be accepted as what the legal status of this rule is, or should be.

D. Preferred Option

According to this Article, the constructor is the one who has the principal responsibility for safeguarding the structure during construction, for the reasons set out under B. With respect to the care for the structure itself, the rules of Article 1:107 (General Standard of Care for Services) and the present Article underline and enforce the more important rule of Article 2:104 dealing with the final outcome of the construction process. These rules encourage the parties to specify what has to be done in order to enable the constructor to deliver a structure fit for purpose of the client. Moreover, they emphasise that external causes of damage to the structure will not be an excuse for non-performance under Article 8:108 PECL (Excuse Due to an Impediment) if a reasonable constructor took measures to prevent potential damage.

E. Relation to PECL and Other Parts of the Principles

In the PECL, there is no rule on the quality of the activities envisaged by the contracting parties. In the Comments to Article 6:102 PECL (Implied Terms), however, the distinction between duties to make reasonable efforts and duties to achieve a specific result is discussed. The rules in this Article may be seen as implied terms stemming from the nature of a contract that deals with construction. Furthermore, they are related to Article 6:108 PECL (Quality of Performance), which mentions performance of 'at least average quality' if the contract does not specify the quality.

F. Nuisance

Apart from the situations mentioned above, the rules in Article 1:107 (General Standard of Care for Services) may also be used in cases of nuisance to third parties caused by the construction activities. Again, the basis for a third-party action against the constructor (or the client) will then have to be found in the rules regarding tort and in particular in the Principles of European Law on Non-Contractual Liability Arising out of Damage Caused to Another (PEL Liab.Dam.). The contractual action (or recourse action) of the client can be based on the current Articles.

G. Burden of Proof

In general, the burden of proof in relation to this Article will be on the client. The client, however, may rely on Article 1:104(1)(d) (Duty to Co-operate) to obtain more information from the constructor.

H. Character of the Rules

This Article contains normal default rules. As to the interpretation of contractual arrangements that cover this issue, considerations apply that are similar to those that were discussed in the Comments to the preceding Article.

I. Remedies

The remedies are the ones for non-performance in general (Chapters 8 and 9 PECL); see also Article 1:112 (Remedies for Breach of Duties of the Service Provider) and the Comments to Article 1:107 (General Standard of Care for Services). Damages will be the most common remedy, but other remedies are available as well.

Comparative Notes

1. General Standard of Care

Some jurisdictions use a general obligation to carry out the work with reasonable (professional) skill, notably ENGLAND (see D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-124, Chitty, no. 37-069, Supply of Goods and Services Act 1982, s. 13), SWEDEN (AB 92 art. 2:1 and KTjL art. 4) and THE NETHERLANDS (Jansen, Towards a European building contract law, pp. 252-253). Most jurisdictions, however, have a strict liability for the result of the construction efforts, and use a standard of care liability only for damage to the work, to other goods, or to persons, as well as in respect of other structures then immovables, see FINLAND (Consumer Protection Act Section 8.12 and Consumer Protection Act 9.13), FRANCE (Malaurie/Aynès/Gautier, Contrats spéciaux, no. 740 and Collart Dutilleul, Delebecque, Contrats civils et commerciaux, nos. 727 ff), SPAIN, F. Martínez Mas, El Contrato de Obra

y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 12, C. Padrón Díaz, La Responsabilidad de los distintos agentes intervinientes en el proceso edificatorio, Jornada sobre diferentes aspectos de la Ley de Ordenación de la Edificación, Gran Canaria, 2000, p. 17 and art. 11, para. 2 LOE, ITALY (CC art. 1176 and V. Mangini, Il contratto di appalto, p. 134), GERMANY (BGH NJW 1998, 3707, art. 13 no. 1 VOB/B and CC art. 633), AUSTRIA (CC art. 1299, Rummel [*-Krejci*], ABGB Kommentar, arts. 1165, 1166, no. 86 and ÖNORM A 2060), 2.10, GREECE (CC art. 685 para. 1), PORTUGAL (CC art. 1208, RGEU art. 15, CC art. 762 para. 2) and POLAND (CC art. 355).
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Prevention of damage to (the existing part of the structure) and to other persons and goods*
The constructors duty to prevent damage to the structure is established in SWEDEN, AB 92 art. 5:4, In other countries there is a more general duty to prevent damage to goods and persons, see ENGLAND (D. Wallace, Hudson's building and engineering contracts, 1995, nos. 1-273 ff), FINLAND (Sections 8.20, 8.21 and 9.20 Consumer Protection Act (but with some restrictions)), THE NETHERLANDS (art. 6-6 and art. 6-16 *UAV 1989*, art. 5, para. 1, *AVA 1992)* SPAIN (preamble and LOE art. 3 b.3*)*, GERMANY (BGH VersR 1969, 927; BGH NJW 83, 113; OLG Karlsruhe VersR 1985, 297; Staudinger [*-Peters*] Kommentar BGB, art. 635 nos. 6-7), AUSTRIA (ÖNORM B 2110, 5.13 and 5.41.2), PORTUGAL (RGEU arts. 15 ff, and art. 135), and POLAND (CC art. 652). This duty even tends to go in the direction of a strict liability in FRANCE (see with regard to this *obligation de sécurité:* Le Tourneau, Cadiet, Droit de la Responsabilité, no. 1827, and Malaurie, Aynès, Gautier, Contrats spéciaux, no. 748 (against), but case law is not clearly established).
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *General Standard of Care*
AUSTRIA CC art. 1299 rises the (standard) level of diligence up to the usual degree of care and attention that is necessary for the task/job in question, see JBl 1962, 152; SZ 34/153, JBl 1962, 322; SZ 35/130, EvBl 1963/164; JBl 1982, 245, EvBl 1981/159; Gschnitzer, Schuldrecht, 482, and Schwimann [*-Harrer*], Praxiskommentar, art. 1299, no. 2. If the mode of construction is not contractually agreed, the contractor has to perform pursuant to the usage, local custom and technical rules, see Rummel [*-Krejci*], ABGB Kommentar, arts. 1165, 1166, no. 86 and ÖNORM A 2060, 2.10.
BELGIUM Art. 1135 CC (contractual good faith) is a basis for such obligations, see Goossens, Aanneming van werk, 2003, nos. 955 ff.
ENGLAND There is a general 'workmanship' obligation, to carry out the work with reasonable skill, (*Young & Marten v. McManus Childs* [1969] 1 AC 454, HL, see D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-124 and Chitty, no. 37-069). Where a service is supplied in the course of a business, there is an implied term that it will be carried out with reasonable skill and care, Supply of Goods and Services Act 1982, s. 13.

FINLAND For minor work on immovables delivered to consumers the service shall be carried out with professional skill and care and taking into account the interests of the client, see Chapter 8 art. 12 Consumer Protection Act. For other construction work the requirements of good building practice and the reasonable expectations of the consumer are relevant, see Chapter 9 art. 13 Consumer Protection Act.
FRANCE Under FRENCH law, the constructor of a corporeal thing is generally under an obligation of result with respect to the construction itself. Other *entrepreneurs* may be under an *obligation de moyens*, however. Additional responsibilities may also arise, in relation to the conservation of the good on which construction work is performed, or the safeguarding of other goods, see Malaurie, Aynès, Gautier, Contrats spéciaux, no. 740 and Collart-Dutilleul, Delebecque, Contrats civils et commerciaux, nos. 727 ff.
GERMANY German Law does not focus on the quality of the construction activity itself, but more on the outcome of the work. The construction work has to be fit for its normal purpose (BGH NJW 1998, 3707). The work is defective if it is not built according the general standard of technique *(Regeln der Technik)*, see art. 13 no. 1 VOB/B and CC art. 633 (BGH BauR 1981 577, 579).
GREECE The constructor must exercise the care required in the respective trader or business, CC art. 330. Moreover, CC art. 685 para. 1 states that a contractor shall be bound to use with care materials supplied by the master of the work, to render account in respect thereof and to restitute any remainder to the master.
ITALY As a technician of his art, the constructor is asked to perform with the diligence and knowledge, which are inherent to the exercise of his professional activity (CC art. 1176). The constructor is entitled to perform in a position of autonomy and thus has to abide by the general standard of care which is typical of his profession, see V. Mangini, Il contratto di appalto, p. 134; F. Marinelli, La responsabilità del committente per danni cagionati a terzi dall'appaltatore nel corso dell'esecuzione dell'opera, in Giust.civ. 1982, ii, p. 116).
THE NETHERLANDS The constructor has to process the goods in a competent manner, carrying out the work with reasonable skill. Cf. Jansen, Towards a European building contract law, pp. 252-253.
POLAND The constructor must observe the generally required standard of care, higher in a case of professionals, see CC art. 355.
PORTUGAL Constructor is under the duty to produce a flawless and fit for purpose work in conformity with the contract (CC art. 1208). In building construction the *leges artis* and technical standards (*as melhores normas da arte de construir,* the best standards of the construction art) must be observed, RGEU art. 15. This is complemented by duties of enlightenment, information, security, secrecy, etc., emerging from the principle of good faith, see CC art. 762 para. 2 and Romano Martinez, Direito das Obrigações, no. 350.
SPAIN The contract for work imposes an obligation of result (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 12). However, this obligation of result is complemented by the LOE with specific obligations to be observed by the constructor during the construction process and which mean to guarantee that the constructor is to achieve the expected result, see LOE art. 11, para. 2: the constructor is obliged to carry out the construction work in accordance with the

designed project, applicable legislation and the instructions of the technicians in order to achieve the quality required in the project.
SWEDEN The contractor shall perform the work in a professional manner (*fackmässigt)*, AB 92 art. 2:1 and KTjL art. 4. Regarding consumers, the professional shall also with due care consider the interests of the consumer and consult him to the extent necessary and possible, KTjL art. 4.

2. *Prevention of damage to (the existing part of the structure) and to other persons and goods*
AUSTRIA It is a general principle of law that the contractor has to perform his obligation without causing any damage to other persons and goods. This holds true both for his contractual partners (according to the contractual duties of diligence and care) and third parties (according to the law of delict: *Verkehrssicherungspflichten*), S. ÖNORM B 2110 contains more detailed provisions in that regard: the contractor is obliged to secure the construction site (*Baustellensicherung,* 5.13); furthermore, he is liable vís-a-vís third parties for certain damage caused by the construction activity (*Schaden Dritter,* 5.41.2).
ENGLAND The liability will be based on the tort of negligence, see D. Wallace, Hudson's building and engineering contracts, 1995, nos. 1-273 ff.
FINLAND In relations with consumers, the constructor is liable for damage in relation to personal injury and property, see Chapter 8 arts. 20-21 and Chapter 9 art. 20 Consumer Protection Act, but with some restrictions.
FRANCE A part of the legal doctrine is of the opinion that the *entrepreneur* and more particularly the constructor are under an *obligation de sécurité* (Le Tourneau, Cadiet, Droit de la Responsabilité, no. 1827). On the other hand some are against this idea (Malaurie, Aynès, Gautier, Contrats spéciaux, no. 748). The case law is not clearly established. Additional responsibilities may also arise, in relation to the conservation of the good on which construction work is performed, or the safeguarding of other goods, see Malaurie, Aynès, Gautier, Contrats spéciaux, no. 740 and Collart-Dutilleul, Delebecque, Contrats civils et commerciaux, nos. 727 ff.
GERMANY The constructor has got secondary obligations resulting out of the principle of good faith (CC art. 242) to act with consideration regarding the property of the client (BGH VersR 1969, 927; BGH NJW 83, 113) and may not endanger his life or health (OLG Karlsruhe VersR 1985, 297). The constructor also has to compensate the client for damages sustained by third parties, e.g. neighbours (Staudinger [*-Peters*] Kommentar BGB, art. 635 nos. 6, 7).
ITALY The constructor is liable for any damage which derives upon third parties from the performance of the work. Only in those situations in which the constructor has no room to decide and acts as a *nudus minister* of the client, or when the damage to the third party was caused by a decision taken by a director of the work, nominated by the client, there is room for liability of the client himself, R. Danovi, La responsabilità del direttore dei lavori, in Foro pad., 1991, fasc. 4 (December), pt. 2, pp. 99-110).
THE NETHERLANDS The contractor must carry out the work in such a manner that the client and others are unnecessarily hindered and that damage to persons, goods or the environment is limited as much as possible (art. 6-6 *UAV 1989,* art. 5, para. 1, *AVA 1992*). He further has to provide order and safety at the construction site, as well as a sufficient degree of illumination as to warrant a good execution of the work (art. 6-16 *UAV 1989*).

POLAND With regards to the preventing the damage, there is a specific regulation, concerning the damage on the building site. If the performer has taken over from the investor the building site by protocol, he shall be liable, until the time of hanging over the object, on general principles for the damages resulting on that site (CC art. 652).
PORTUGAL During the execution of works of any sort, measures must be taken in order to guarantee the security of the public and the workers, and safeguard, as well as possible, the normal traffic and circulation in the public way, and as well avoid material damages, see arts. 15 ff, and RGEU art. 135.
SPAIN In the preamble of the LOE, it is stated that the enactment of the new statute responds, among other things, to the demands of society regarding the quality of the buildings, which refer to the security of the structure and protection against fire, but also regards other aspects related to the welfare of persons, such us the protection against noise, thermical insulation or accessibility for handicapped persons, see also LOE art. 3 b 3. However, the LOE only deals with the consequences of material damage and not of personal injury. Art. 19, LOE para. 1 imposes on the constructor the obligation to subscribe insurance for material damage caused by the construction work.
SWEDEN The constructor is liable for damage to the contract work not yet delivered, AB 92 art. 5:4. The constructor is also obliged to effect an all-risks insurance, art. 5:22, para. 2.

Article 2:104: Conformity

(1) The constructor must deliver a structure that is of the quantity, quality and description required by the contract.
(2) Except where the parties have agreed otherwise, 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 Article 1:111 (Variation of the Service Contract) 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.
(3) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client pursuant to Article 1:109 (Directions of the Client) is the cause of the non-conformity and the constructor did not breach the duty to warn pursuant to Article 1:110 (Contractual Duty of the Service Provider to Warn).

Comments

A. General Idea

This is one of the central rules on construction. The constructor is to guarantee the fitness for purpose of the structure. When the structure is not fit for its purpose, the constructor will have to prove that the cause thereof was beyond his control. The rule is

a specific application and refinement of Article 1:108 (Result Stated or Envisaged by the Client). The client may expect that the result will be achieved.

The structure must conform to a particular purpose made known to the constructor at the time of conclusion of the contract. If such a particular purpose is made known to the constructor at a later time, the constructor is obliged to make sure the structure will be fit for that particular purpose if the content of the contract is changed in accordance with Article 1:111 (Variation of the Service Contract).

Furthermore, the structure must be fit for the purpose or purposes for which a structure of the same description would normally be used. Without indications to the contrary, the client may reasonably expect that the structure will be fit for such a normal purpose. If the constructor is not able to render the structure fit for such a purpose, he must inform the client thereof.

> *Illustration 1*
> A client and a shipbuilder agreed on a contract for the construction of a large sailing ship. The client may expect a sufficiently large sailing ship to be seaworthy. If the client made known to the shipbuilder that he wishes to use the ship for trips with groups consisting of a maximum of ten people, he may expect the ship to offer sufficient sleeping and sitting space for ten persons, albeit perhaps in shifts.

Similarly, the structure does not conform to the contract if a part or component is not fit for its particular or normal purpose, even though the whole structure may be fit for its purpose. Of course, such a partial non-conformity would only lead to an adjusted remedy.

B. Interests at Stake and Policy Considerations

The liability with regard to the quality of the outcome is an important issue for both parties. When the liability for the quality is strict, the constructor will have to remedy defects even when he met every relevant quality criterion regarding the assessment of the existing situation, the input and the process of construction; see the Comments to the preceding Articles and those to Articles 1:103 to 1:107 in Chapter 1. His only escape is to advance that specific defences apply. When there is no liability for 'fitness for purpose', the central issue will be whether the constructor satisfied the quality criteria set for his activities. In practice, the difference between the two approaches should not be overstated, especially when the burden of proving that the duties were performed is on the constructor. In that case, the question is rather which defences are allowed under both regimes.

An advantage of the former approach is that the quality of the outcome may be easier to discuss and to establish than the quality of the processes and interactions that led to that outcome. It may, for instance, be hard to reconstruct the events that preceded the apparent defect in the outcome and to what extent the constructor exercised care with respect to these events. So, the legal and other administrative costs of the strict liability

system are likely to be lower. Another issue to take into account is the possibility of insurance. In most countries, there is 'construction all risk' coverage available with regard to the risks of construction of buildings. In France, this coverage is even obligatory for most building projects.

The costs of strict or stricter liability and/or insurance will be reflected in the price. So, accepting the former system will lead to somewhat higher prices of construction. There may be only an effect on the initial price, however. Under a fault liability for defects, the client will in many cases let the constructor repair the defects anyhow, because he will wish to obtain a structure that is fit for its purpose. Thus, the client will in most cases pay the extra price for remedying, be it under the heading of costs for extra work and not under the heading of an element of the initial price intended for coverage of the strict liability.

Whether liability for the fitness for purpose of the outcome or an obligation of means is the more acceptable system will also depend on the frequency of constructors not being able to attain the result envisaged. When it is normally relatively easy for the constructor to construct a structure that is fit for its purpose, strict or stricter liability is more acceptable than in situations where it is rather uncertain whether a structure will be fit for its purpose. Taking normal precautions in most circumstances may prevent major defects. This may be different for highly innovative structures or things, such as entirely new and tailor-made machinery or software, but in such situations special contractual arrangements will be necessary anyhow, and the parties can adjust the liability regime to these specific needs. In many construction projects, the problem will rather be that some small defects are next to unavoidable. The main issue there is probably who is generally in the best position to prevent as many of these defects as possible. Furthermore, it is a matter of how the various solutions work in terms of costs of sorting out whether the constructor is liable and, if not, of negotiating for extra work.

A related issue is the extent of control the constructor has over the construction process. If the client or experts hired by him make decisions on the design and on the other input, the constructor may argue that he has less influence on the final outcome. Whether this argument is acceptable will also depend on the extent of care that is expected from the constructor with respect to input and instructions from the client. This issue is generally covered by the constructor's duty to warn; see Article 1:110 (Contractual Duty of the Service Provider to Warn).

C. Comparative Overview

The principle that the final outcome of the construction process (the structure) should be fit for its purpose or – which amounts to the same thing – should not contain defects is a central idea in FRENCH, SPANISH, GERMAN, AUSTRIAN and GREEK law. In these countries, the constructor has the duty to construct a structure that is fit for its intended use, which may be either the purpose for which it is generally considered to be used or a specific purpose for this specific structure. Therefore, in these countries the principle of perfect final result is accepted: the constructor is under an *obligation de*

résultat. This implies that the constructor will be liable unless he proves that the client's specifications were the cause of the problem and amount to an impediment beyond the contractor's control, excusing the contractor's bad performance as *force majeure*. Whether he can or cannot prove that there was *force majeure* of course heavily depends upon the way in which the concept is interpreted.

Although ENGLISH courts now apply the 'fitness for purpose' test to the building of houses and some other structures, the traditional rule in ENGLISH law is different. If the client provides the constructor with more or less detailed instructions, the constructor is not under an obligation to produce a structure which is fit for its purpose. He is only bound to prove that he carried out the work in accordance with the plans and specifications in a workmanlike manner, using proper materials. If the constructor proves he has followed the instructions conscientiously and exercised proper care, he will not be liable if the structure is not fit for its purpose. Where the client, however, relies on the constructor's skill and judgment, such as in a contract to build a house for use by the client, there will be an implied warranty that the house will be reasonably fit for its purpose. In BELGIUM, THE NETHERLANDS and SWEDEN, the systems are in between the ENGLISH and the 'fit for purpose' system.

Under the ENGLISH system, the constructor can prove that he carried out the work in accordance with the quality requirements set in the contract. With respect to those issues on which the contract is silent, the constructor has to prove that he used high-quality materials and processed them in a good and workmanlike manner, which includes warning the client against apparent defects in instructions or other input from his side. SWEDISH, SPANISH, PORTUGUESE, GERMAN and DUTCH law give the constructor the possibility of proving that the defect is caused by contractual requirements or other decisions for which the client is responsible, unless the constructor had to warn the client against the possible defects resulting from this. The FRENCH system is different in that it allows a defence based on decisions for which the client is responsible only when the client knew or had to know the unsuitability of the decision – a rule that is seldom applied. All systems are similar in that they allow a defence in real *force majeure* cases, which, however, are extremely rare.

D. Preferred Option

Although the results may in the end be very similar, depending largely on the way the concept of *force majeure* is understood, the interpretation of the duty of a careful constructor and the burden of proof in this respect, the two approaches fundamentally differ from each other. Therefore, an explicit choice between the two approaches has to be made.

A solution may be to distinguish between traditional contracts and 'turnkey' or 'design and build' contracts. In the latter type of contract, the constructor is able to control to a large extent the achievement of a perfect final result and it will also be much easier for him, thanks to his expertise, to establish that the defect occurred due to a circumstance

that was beyond his control. On the other hand, in a traditional building contract the decisions made by the client – and, more in particular, an architect – may diminish the constructor's ability to achieve the perfect final result too much to put such a heavy liability upon him. However, with regard to the extent of control left to the constructor, probably no fundamental difference exists between a traditional building contract on the one hand and a turnkey or design and build contract on the other. Certainly, the constructor's freedom is more restricted in a traditional building contract, where important decisions are usually taken by the client, whereas in a 'turnkey' or in a 'design and build' contract, such decisions will usually be taken by the constructor. Nevertheless, the constructor's freedom in a traditional building contract may be far greater if the client does not take these decisions, whereas the constructor's presupposed freedom under a 'design and build' contract may be limited considerably by a client's interference.

Therefore, the amount of influence the client may exercise on the outcome of the construction process is not necessarily related to the choice of a modern or traditional model, but to the extent of the control of the constructor over the choices that are to be made. Making the amount of influence exercised by the other party the decisive criterion is problematic, however. It is difficult to determine the right borderline, and such a criterion would therefore lead to considerable uncertainty.

Now that a choice between the two systems has to be made, the rule about fitness for purpose seems to be preferable. If the structure is unfit for its purpose, the constructor is generally in a much better position to explain the reasons for this than the client. Moreover, the constructor will generally be in the best position to repair the defect perceived, irrespective of who has to bear the costs in the end. Finally, in most countries insurance is available which covers the main risks of construction.

The burden on the constructor will also depend on what he has to prove in order to escape liability for fitness for purpose. In this respect, the system is followed where the constructor can be discharged when he proves that the defect is caused by decisions made by the client. Such decisions may either be contained in the contract (paragraph (1)) or in subsequent directions (paragraph (3)), unless the constructor had a duty to warn. In this manner, liability is linked to the extent of control the constructor has over the process. Finally, the constructor may prove that an impediment beyond his control was the cause of the non-performance, and that he could not reasonably have expected to take the impediment into account at the time of conclusion of the contract, or to have avoided or overcome the impediment or its consequences; see Article 8:108 PECL (Excuse Due to an Impediment).

E. Relation to PECL and Other Parts of the Principles

This Article can be seen as an application of Article 1:108 (Result Stated or Envisaged by the Client). For construction, the general rule is that the constructor must achieve the specific result stated by the client: 'fitness for purpose'. Paragraphs (1) and (2) can

also be seen as specifications of Article 6:102 PECL (Implied Terms) and Article 6:108 PECL (Quality of Performance). The requirements of paragraphs (1) and (2) are similar to the ones of the rules on conformity in sales; see Article 2:201 PELS (Conformity with the Contract).

F. Terminology

The wording of the first two paragraphs of this Article is in line with that of the Article on conformity (Article 35) of the Vienna Sales Convention (CISG). The issues are very similar. This Article also uses the 'fit for purpose' criterion. Using the same concepts diminishes the need to solve issues regarding the borderline between sales and construction. Moreover, it is a rule that is already part of the legal traditions of the EU countries. This is not to say that interpretation of Article 35 CISG and the present Article should always coincide. Sales contracts and construction contracts differ in character and this may be reflected in the interpretation of the relevant rules.

The adjustments made in the present Article to the text of Article 35 CISG follow from this difference in character. Construction is usually oriented towards one structure, so the plural 'goods' has been replaced by 'structure'. The reference to 'samples' or 'models' is also more appropriate for sales, so this has been deleted as well. In construction cases, a design will perform a similar function and even a three- dimensional 'model' may exceptionally serve as a guideline for construction. It may be clear, however, that a design or a model will be part of the contract in most cases, so explicit reference in the Article was not deemed necessary. Moreover, such a reference is not part of the tradition of construction law. Even though the 'quantity' will usually not be at stake, reference thereto has been included, especially to cover excavation activities.

G. Relying on Incompetence?

According to subparagraph (2)(a), the structure must be fit for the particular purpose made known to the constructor at the time of the conclusion of the contract or at the time the contract was changed in accordance with Article 1:111 (Variation of the Service Contract). Unlike the rule in sales, there is no exception for those situations where the client knew or should have known that the constructor would not be able to render a structure that would be fit for that particular purpose. One might argue that, in such a case, the client could not rely on the structure to be fit for the particular purpose. On the other hand, the reasoning might be that the client may rely upon the constructor to acquire the necessary skills and competence to render the structure fit for that purpose if the constructor does not make known to the client that he will not be able to render the structure for the particular purpose the client has for the structure. In other words, if the constructor keeps silent when confronted with the particular purpose the client has for the structure, he more or less 'guarantees' that he will have or hire the necessary skills and competence.

Illustration 2
A multinational orders a software system for a very specialised area of application. It has in-house IT specialists, who are familiar with this area of application. The software does not work. The constructor cannot defend himself by maintaining that the client should have known the software would not work.

The national laws on construction support this solution. There, such a defence is not common. In construction situations, it will generally be less burdensome for the constructor to state expressly that he cannot guarantee the fitness of a structure for a particular purpose, because the parties will communicate frequently. This is different for important categories of sales transactions, such as consumer transactions and trading, where the parties will not communicate as frequently.

H. Specific Purpose

Like in the Article regarding sales, the present Article primarily focuses on the normal purpose of a structure of the kind in question. In construction cases, there will frequently be a specific purpose that is made known to the constructor. This may happen during the negotiations preceding the contract, but also at the time of later variations or directions. In the latter case, the purpose of the structure made known to the constructor will generally be a more specific one.

Illustration 3
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.

Illustration 4
When a shipbuilder in the Mediterranean is requested to build a ship and he is not informed about any specific purpose, he will probably not make the ship fit for use in northern, stormy seas. This shipbuilder enters into a construction contract with a client, who does not inform the shipbuilder of any specific purpose before conclusion of the contract. At a later stage, when the ship is nearly completed and the parties discuss the ship's interior design, the client informs the shipbuilder about his specific purpose of using the ship in stormy seas. This will not influence the requirements for the ship as it has already been built. The parties will have to find a solution by adjusting the contract, by the client adjusting his plans or by selling the ship already constructed and entering into another contract concerning the building of a new ship.

I. Burden of Proof

The burden of proof with regard to the structure not being fit for its purpose is on the client. The client will not have much difficulty in proving communication about the structure's normal purpose. Proving that a specific purpose has been communicated to the constructor will be less easy, but it is reasonable to require this of the client. With respect to the defences of paragraph (3), the burden of proof is on the constructor.

J. Character of the Rule

The present rule is a default rule.

K. Remedies

The remedies for breach of the duty to deliver a structure that is fit for its purpose will be the normal remedies for non-performance in Chapters 8 and 9 PECL, but there is a more prominent place for specific performance. This is dealt with in Article 2:109 and Article 2:110 relating to remedies. Article 1:113 (Failure to Notify for Non-Conformity) requires the client to notify the non-conformity to the service provider. See also the Comments to Article 1:108 (Result Stated or Envisaged by the Client).

Comparative Notes

1. *Fitness for purpose*
   The European jurisdictions generally accept strict liability for specifications of the structure expressed in the contract, ENGLAND (D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-080), SWEDEN (AB 92, art. 4:7 and 5:6), FINLAND (in consumer construction projects regarding immovables, Section 9.13 Consumer Protection Act), THE NETHERLANDS (cf. Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 513), SPAIN (STS of 30 January 1997, Aranzadi Civil 845), ITALY L'appalto, Rassegna di giurisprudenza commentata, directed by A. Jannuzzi, I, Milano, p. 310, AUSTRIA ÖNORM A 2060. On top of this, some countries have a fitness for purpose requirement, at least for some contracts or for some (generally important) defects: ENGLAND (where the client relies generally on the constructor and in a contract to build a residential house, see *Hancock v B.W. Brazier (Anerly) Ltd.* [1966] 1 WLR 1317, Court of Appeal, D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-105 and Chitty no. 37-071), FRANCE (Collart Dutilleul, Delebecque, Contrats civils et commerciaux, pp. 81, 97, 99-100 and Huet, Les principaux contrats spéciaux, nos. 32246 and 32276), SPAIN (F. Martinez Mas, La recepción en el contrato de obra, Madrid, 1998, p. 87), ITALY (CC arts. 1667-1669; Cass. 7 October 1970, no. 1834, in Giust.civ.Mass., p. 979), GERMANY (BGH NJW 1998, 3707), AUSTRIA (CC arts. 922 ff and 1167), GREECE CC (arts. 688, 689, but fault is required with regard to the award of damages), PORTUGAL (CC art. 1208 and CA Lisboa, 27 November 1981, CJ 1981, V, 164), and POLAND (CC arts. 556, 568,

637, 638). Others only require the service to be performed professionally SWEDEN (AB 92 art. 2:1 first paragraph and art. 4 KTjL for consumers), THE NETHERLANDS (Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 513) and ENGLAND (D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-105, Chitty no. 37-071, for other structures).
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Fitness for purpose*
AUSTRIA CC arts. 922 ff contain basic rules on legal warranty *(Gewährleistung)* valid for all types of contracts for consideration *(entgeltliche Verträge)*. Basically, this regime is one of liability without the requirement of fault on the part of the contractor: art. 1167 is a special provision on warranty for defects in the field of contracts of work, specifying the remedies. Art. 928 exempts obvious defects *(offensichtlicher Mangel)* from warranties but should not apply in cases of contract of work. Rummel [*-Krejci*], ABGB Kommentar, art. 1167, no. 6, arguing that art. 928 deals with the situation at the point of conclusion of the contract (‚Augen auf, Kauf ist Kauf'). ÖNORM A 2060 repeats and clarifies the legal regime of Gewährleistung: ‚Der AN leistet Gewähr, daß seine Leistungen die im Vertrag ausdrücklich bedungenen und die gewöhnlich vorausgesetzten Eigenschaften haben und den anerkannte Regeln der Technik entsprechen.'
BELGIUM Fault is a requirement for liability of the constructor, see Jansen. Towards a European building contract law, pp. 265 ff.
ENGLAND The question whether there is a duty to construct a building fit for its purpose is dependent upon the contract, *Viking Grain Storage v T.H. White*, (1985) 33 BLR 10, Court of Appeal, – simple contract to supply and erect a grain storage building, no architects employed by client, held constructor liable when unfit for its purpose. When detailed instructions, duty to follow instructions but no general fitness for purpose, D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-080. Where the client relies generally on the constructor, there is likely to be an implied term that the work carried out by the constructor will on completion be reasonably fit for its purpose, *Duncan v Blundell* (1820) 3 Stark. 6 ("Where a person is employed in a work of skill the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed and he should know whether it will or not; of course it is otherwise if the party employing him chooses to supersede the workman's judgment by his own", per Bayley J., see also D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-081, Chitty 37-071. It is clear law that a contract to build a residential house includes a implied warranty that the house will be reasonably fit for its purpose, i.e. human habitation, *Hancock v B.W. Brazier (Anerly) Ltd.* [1966] 1 WLR 1317, Court of Appeal, D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-105.
FINLAND In consumer construction projects regarding immovable, the performance of the constructor is defective if it does not in contents, quality or other characteristics conform to what can be deemed agreed, Consumer Protection Act Chapter 9 art. 13. Regarding defective work or other performance relating to movables, immovables and other structures, the service provider has the option to prove that the service has been provided with professional care and skill, Consumer Protection Act Chapter 12 art. 4.

FRANCE The quality of the materials and the way they are processed have to be so that they render the final construction fit for its purpose Collart Dutilleul, Delebecque, Contrats civils et commerciaux, pp. 81, 97, 99-100; Huet, Les principaux contrats spéciaux, nos. 32246 and 32276. This relates to three types of damages: 1. The damages which compromise the solidity of the work or render it unsuitable for its purpose (CC art. 1792); 2. The damages which compromise the functioning of the equipment separable from the work; 3. The damages reported by the client at the moment of the reception of the work (CC art. 1792-6). On other damages, what FRENCH lawyers call "dommages intermédiaires", the legal regime of guarantee is not applicable, but the general provisions on contractual liability are. They require a fault.

GERMANY The construction work has to be fit for its normal purpose (BGH NJW 1998, 3707). The work is defective if it is not built according the general standard of technique (Regeln der Technik). This is not explicitly laid down in the CC but only in VOB/B art. 13 no. 1. Nevertheless this principle is to be applied for CC art. 633 as well (BGH BauR 1981 577, 579). An important means to determine the general standard of technique are the DIN-Normen (published by the Deutsche Institut für Normung e.v.), the guidelines by German society of engineers (VDI-Richtlinien).

GREECE Primarily the contract for work is a contract directed towards the production of a certain result. That alone indicates that the contractor is accountable for the quality of the final result. The contractor is liable for defects of the work that has been carried out (το έργο που εκτελέστηκε). The contractor is liable for defects in the work (CC arts. 688, 689). Fault is required only with regard to the award of damages, but not for other remedies, See AP 620/1995 EEN 1996, p. 536.

ITALY The constructor has to deliver the client a construction which is in conformity with the contractual provisions and performed following the rules of the art. In case of vices or non-conformities of the construction, which do not affect its stability and solidity, the constructor is liable pursuant to CC arts. 1667 and 1668. In case of a vice or a defect which represents more grave deficiencies and endangers the stability of the construction, the constructor is liable under CC art. 1669. Both liabilities for non-conformities and vices of the construction and for other grave defects constitute, together, typical manifestations of the general and ordinary liability of the constructor in relation to the outcome of the construction process (Cass. 7 October 1970, no. 1834, in Giust.civ.Mass., p. 979). A construction is thus vitiated when, even if normally conform to the contractual agreement, it does not respect the relevant rules of art (L'appalto, Rassegna di giurisprudenza commentata, directed by A. Jannuzzi, I, Milano, p. 310). Therefore a construction may be non conform and defective, or conform but defective, or non conform but non defective (M. Rubino-Sammartano, Appalti privati: responsabilità dell'appaltatore e sua prescrizione nei vari ordinamenti europei, in Foro pad., 1986, I, 1, pp. 43-47). In case a specific use was agreed upon and the construction is fit for a normal use, but not for this unusual one, there is a case of non-conformity.

THE NETHERLANDS No fitness for purpose, merely a duty to materialise a work that meets the level of quality specified in the contract, Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 513; Jansen, Towards a European building contract law, pp. 265 ff. Many authors have argued that this obligation is to be regarded as an obligation de résultat, see for instance Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, nos. 509 ff, but only for conformity with the

contract, not general fitness for purpose, Cf. Van den Berg, Samenwerkingsvormen in de bouw, nos. 69-70; Jansen, Towards a European building contract law, p. 271.
POLAND The work has to be performed 'correctly' and in a manner consistent with the contract. If the contract does not specify otherwise, the performer is liable for the defects of the object made and rules on sales apply respectively (CC arts. 556, 568, 637, 638). Physical defects are defined as: defects, which reduce the value or utility of the work with respect to the purpose stipulated in the contract or resulting from the circumstances or the destination of the work; if the work does not have the properties about which the performer has assured, or if the work was released to the investor in the incomplete condition (CC art. 556 para. 1). The legal defect, in the case of the building contract occurs if the work is the property of a third party or if it is encumbered with a right of a third party (CC art. 556 para. 2).
PORTUGAL The work must be flawless and fit for purpose (CC art. 1208). It is an obligation of result: constructor is liable for defects of the work, even without fault. Fault is presumed: CC arts. 798, 799. CA Lisboa, 27 November 1981, CJ 1981, V, 164. In building construction contractor is liable towards client and third parties acquiring the construction or fraction of it for vices of construction or soil (CC art. 1225).
SPAIN The construction work is not in conformity when the structure is not fit for the purpose or purposes for which a structure of the same description would normally be used (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 87; F. Martinez Mas, La recepción en el contrato de obra, Madrid, 1998, p. 163) and thus the expectations of the client are frustrated. The TS has repeatedly stated that in order to ask liabilities for a defective construction it is not necessary the ruin of the building but it is just enough when the construction does not fit for its purpose (STS 17 February 1986, Aranzadi Civil 683). The STS of 30 January 1997 (Aranzadi Civil 845) points out that the obligation of the constructor is to execute and deliver the construction work and assure that it is adequate, correct, and the one agreed. Doctrine and jurisprudence only regard the general fitness for purpose test as the criterion for conformity. It may be concluded that if the structure must conform to a particular purpose, the client must have informed the constructor of such circumstance.
SWEDEN According to the AB 92, the constructor can be said to be strictly liable for remedying defects emerging during the two-year guarantee period, arts. 4:7 and 5:6. In AB 92 the general rule is that the work performed shall conform to what is agreed upon in the contractual documents and other documents and other instructions submitted before the ending of the contracting time aimed at specifying and clarifying the contract documents. If there is no special agreement upon the level of quality of a certain part of the work, the work shall be performed in accordance with the standard of the contract works in general, AB 92 art. 2:1 first paragraph. Concerning consumer contracts, KTjL art. 4 states that they shall perform the service professionally (fackmässigt).

Article 2:105: Inspection, Supervision and Acceptance

(1) In accordance with Article 1:104(1)(d) (Duty to Co-operate), the client may inspect or supervise the input in the construction process, the process of construction and the resulting structure in a reasonable manner and at any reasonable time, but is not bound to do so.
(2) If the parties agree that the constructor has to present certain elements of the input, process or the resulting structure to the client for acceptance, the constructor may not proceed with the construction before having been allowed by the client to do so.
(3) Absence of, or inadequate, inspection, supervision or acceptance does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

Comments

A. General Idea

This Article deals with the options of the client to control what the constructor does in order to perform his duties. Reasonable supervision and inspection are allowed. The parties may agree that certain input, elements of the process, or parts of the final structure have to be presented to the client for agreement (acceptance). If they agree upon such a go/no-go decision, the constructor must wait for the client's answer before proceeding with the construction.

The general approach is that all these measures are deemed to serve the interests of the client only. This means that the client has no duty to inspect or supervise. The client's failing to do so does not relieve the constructor from any of his duties even if the contract provides for inspection or supervision. Acceptance, the requirement of a go/no-go decision, is also seen as an extra check for the client. Only if the client noticed a defect during inspection, supervision or the acceptance procedure and did not notify the constructor within a reasonable time, the remedies of the client are influenced in accordance with Article 1:113 (Failure to Notify for Non-Conformity) and the rules on prescription; see Article 2:111. Because it will be difficult for the constructor to prove that the client was aware of a defect, he can rely on the more objective criterion of what a 'comparable client' in the given circumstances 'would have had reason to know'. But this rule is not meant to impose any duty nor, in German terminology, any *Obliegenheit* on the client to actively search for defects either.

Illustration 1
The client of a provider of tailor-made machinery for a production facility is entitled to supervise and inspect the work of the constructor. He may also require the constructor to submit parts of the machinery for testing. If the constructor delivers machinery that is not fit for its purpose, however, he cannot defend himself by indicating that the client should have discovered the defect during an appropriate inspection or whilst supervising the construction process. Accept-

ance by the client is no defence either, because acceptance is deemed to take place in the interest of the client. The constructor may however, show that the allegedly defective performance was a result of a direction by the client, or of a variation of the contract.

B. Interests at Stake and Policy Considerations

The client will often want to monitor the input, process and results of construction activities during construction. Inspections, or even constant supervision of the activity, may cause some disturbance to the constructor, but when well timed and organised they usually can be carried out with minimal costs to the constructor. When there are important choices to be made by the constructor, the client may want the constructor to put the choices before him and ask for his agreement. Similarly, the client may wish the constructor to present certain input, elements of the process or results for approval before the constructor proceeds to the next stages of construction. But what are the consequences of inspection, supervision or acceptance for the liability of the service provider?

Inspections – or supervision as a more intensive type of monitoring – are beneficial to the constructor as well. Costs may be saved by early discovery of potential defects or of changes in preferences of the client which might have led to repair or to variations. When inspections are carried out by well-informed clients, or even by experts hired by the client, the constructor will probably even take advantage of their knowledge and use it to reach superior results against lower costs. In some construction activities, the roles of the constructor and the supervisor may even be reversed. The constructor then is just the one who carries out the detailed instructions by the supervisor; the supervisor provides the expertise.

The position of the client needs careful consideration in this respect. The supervision provided or hired by the client will lead to some overlap in expertise. Both the supervisor and the constructor will, for instance, spend time considering the advantages and disadvantages of certain alternatives. This overlap is essential and intended, because the interaction will presumably lead to better results, but it also leads to extra costs. There will be a point where the doubling of expertise starts to become detrimental to the client's interests. On the other hand, situations may develop where the experts rely on each other to solve a particular problem. Hiring a supervisor, for instance, may lead to the constructor's relying on his own expertise for every minor decision, which will drive up the costs of supervision and not substantially diminish the costs on the part of the constructor, whose contract may be at a fixed price. And when the constructor relies on the supervisor to solve an issue, whilst the supervisor expects the constructor to deal with it, the client may suffer in the end. He will be confronted with a defect, and will have difficulties attributing the responsibility for this defect to the constructor, to the supervisor, or even to himself.

What is needed here, therefore, is a clear division of responsibilities, or at least a procedure that leads to that state of affairs. The rule to be accepted is to prevent an

unnecessary overlap of the efforts of the parties involved, but also cover situations where no party is responsible. At the same time, the rule to be chosen is to enable different possible and equally valuable types of co-operation between constructor, supervisor and client.

With respect to the acceptance of certain elements by the client, the situation is somewhat different. The client may want the constructor to put choices before him. The constructor, on the contrary, may want to obtain the client's approval in order to be protected against future claims, especially in cases where there is uncertainty as to the quality of particular alternatives.

C. Comparative Overview

In all countries, inspection or supervision is a right of the client, subject to qualifications only in the domain of execution of this right that prevent unnecessary disturbance of the activities of the constructor. In no EU country there is a duty for the client to inspect or supervise the construction activity regularly. In most countries supervision is very common in larger construction projects. In other countries (FRANCE and SPAIN), even in small construction projects an architect is likely to be 'in charge'.

Even if the parties agreed that the client is to supervise or inspect, this is generally thought to be purely in the interest of the client. In most jurisdictions (ENGLAND, SWEDEN, FRANCE, ITALY, GERMANY, AUSTRIA, PORTUGAL), the highest courts have ruled that inadequate supervision by the client is no reason to diminish the constructor's liability regarding defects, or standard conditions provide for this (SWEDEN). In other countries, the legal position is yet unclear (GREECE). In THE NETHERLANDS, case law has gone in a different direction, but this approach is heavily criticised.

D. Preferred Option

The EU systems seem to agree on the position with regard to inspection and supervision. As a rule, supervision or inspection is a right of the client even if it has been explicitly agreed that it must take place. Inadequate inspection or supervision should not lead to a shift in the liability as to defects. The client is only under a duty to complain about defects actually discovered. This means that, under the default rule, there is no room for a shift of responsibilities from constructor to client (or the supervisor hired by the client).

E. Relation to PECL and Other Parts of the Principles

This Article can be seen as an application of Article 6:102 PECL (Implied Terms). There are no specific rules in the PECL regarding these topics. Article 1:104(1)(d) (Duty to Co-operate) deals in a more general manner with the information the con-

structor is to give to the client. It is complementary to the present Article. Whilst inspecting or supervising, the client may have additional questions regarding the way the constructor performs his duties. Obtaining an answer to such questions by himself will often be much more costly for the client than having the constructor answer the request for information. This is especially the case for intangible work, or for complicated construction processes. As an expert, and as the one who carried out the construction activity, the constructor is generally in a much better position to provide information on the steps he has taken to perform his duties than the client. But there is a limit to what can be expected from the constructor in this respect, because explaining to the client what has been done has its costs.

Whether the constructor has to give such information is also an important issue when disputes regarding non-performance arise. The relevant interests are then very similar: it is a matter of the relative costs of the client searching for information and the constructor providing the information. This is also a matter of applying Article 1:104(1)(d) (Duty to Co-operate).

F. Constructor Relying on the Knowledge of the Client or Supervisor

In practice, the system provided by the present rules will be flexible enough to cover the situation where the client – or, more likely, the supervisor – is the more knowledgeable person and the constructor relies on this knowledge. When the constructor relies on the supervisor, and the supervisor actually takes the decisions on behalf of the client, the rules on directions will apply and will shift much of the responsibility to the client, who in turn will be able to take action against the supervisor if the supervisor acted negligently under Article 1:107 (General Standard of Care for Services).

> *Illustration 2*
> An architect hired by a client tells the constructor of a house how to construct a part of the roof. The architect provides the solution. This will count as a direction under Article 1:109 (Directions of the Client). The liability of the constructor will now be limited to liability under Article 1:110 (Contractual Duty of the Service Provider to Warn). In establishing whether there is a duty to warn, the criterion is whether a comparable constructor in a similar situation should from all the facts and circumstances known to him without investigation, be aware of the possibly detrimental situation. So, the extent of the constructor's competence will influence his responsibility.

There is a difference in consequences between a direction and acceptance. Directions lead to a shift in responsibilities; acceptance – as defined in paragraph (2) as a go/no-go decision during the construction process – does not. In practice, it may be very difficult to distinguish between the two situations. The constructor may even strategically use this difference and try to redirect liability in situations where that is undesirable.

Illustration 3
A constructor is uncertain which of two possible solutions for the part of the roof will hold; one looks slightly more promising, but is also slightly more expensive. He puts the issue before the architect hired by the client. After some deliberation, they jointly choose one solution. The solution chosen turns out to be inferior. If this is considered to be a direction by the client, the client will have to prove that the constructor should have warned against the probable inferiority (Article 1:110: Contractual Duty of the Service Provider to Warn), whereas if this is regarded as acceptance, the constructor will be liable for the defect (Article 2:104).

The distinguishing criterion is which of the parties – the constructor or the client (or his representative), actually made the choice. Was it the constructor who had the biggest influence on the decision? Or was it the client or the supervisor hired by him who made the choice? Sometimes it will be very difficult to reconstruct the communication that took place between the parties and to establish what each party knew at what moment in time. A guideline may be to determine which party was the most knowledgeable about the issue in question. In some cases, the courts may have to decide that it was a joint decision of people of equal knowledge. Attribution of liability in accordance with Article 9:504 PECL (Loss Attributable to Aggrieved Party) may then be the adequate solution.

G. Burden of Proof

The burden of proof with regard to an agreement that shifts liability is thus on the constructor.

H. Character

The rules contained in this Article are again default rules. The parties may opt for a regime according to which insufficient inspection, inadequate supervision or acceptance wholly or partially relieves the constructor from liability; see paragraph (3). As indicated above, the mere fact that the contract provides for inspection, supervision or acceptance is not sufficient to warrant such consequences. The presumption is that inspection, supervision and acceptance are agreed upon solely in the interests of the client. When a change in the distribution of risks is intended, this consequence should be contracted explicitly. Such a clause may not be invoked unless the constructor drew it to the attention of the other party in a way that was reasonably appropriate in the circumstances.

I. Remedies

This Article deals with the consequences of acts by the client that take place to ensure performance by the constructor. It deals with the consequences of these acts for the remedies that are available to the client.

Comparative Notes

1. *Right to Supervise and Inspect During the Performance of the Service?*
All jurisdictions accept a right of the client to supervise the construction process or to inspect the structure, to be exercised in a reasonable manner, without unnecessary interference with the construction activities. In most countries, this is even considered to be self-evident. Explicit references to such a right were found for ENGLAND (D. Wallace, Hudson's building and engineering contracts, 1995, nos. 2-182 ff.), for SWEDEN (AB 92 art. 3:5 first paragraph), for THE NETHERLANDS (Van den Berg, Samenwerkingsvormen in de bouw, no. 112; Van den Berg, Verdeling van aansprakelijkheden en risico's bij moderne bouwcontractvormen, in: M.A.M.C. van den Berg, C.E.C. Jansen (eds.), De ontwerpende bouwer, Over turnkey- en design & build-contracten, p. 83; art. 3-2 *UAV 1989)*, for ITALY (CC art. 1662 and Cass., 18 January 1980, no. 434, in Rep.Foro it., V° *Appalto*, c. 115, no. 13), for GERMANY (VOB/B art. 4 no. 1 para. 2, where even a duty of the constructor to disclose information may exist, see VOB/B art. 4 no. 1 para. 2 sent. 2), for AUSTRIA (ÖNORM A 2060 2.11), and for PORTUGAL (CC art. 1209 para. 1).
No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Obligation to Inspect the Finalised Structure?*
In most countries, there is no positive duty to inspect the structure at the time it is finalised and delivered to the client, not even when an acception procedure is envisaged, see for THE NETHERLANDS Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 562, for ITALY CC art. 1665, for AUSTRIA Rummel [*-Krejci*], ABGB Kommentar, art. 1170, no. 5. The exceptions where a duty to inspect is assumed are BELGIUM (Goossens, Aanneming van werk, no. 1018), PORTUGAL (CC art. 1218) and POLAND (for contracts between business men and when inspection is customary, see CC art. 563 para. 2). But this may be a matter of what is called a duty and what remedies exist, because in most jurisdictions the client who does not inspect the structure may loose rights, in particular with regard to manifest defects, see under 3.
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

3. *Liability for Defects not noticed during Inspection*
In ENGLAND (D. Wallace, Hudson's building and engineering contracts, 1995, no. 5-021) and GERMANY (Staudinger [*-Peters*] Kommentar BGB, art. 640 no. 1) liability is unaffected by the fact or not of an inspection. The majority of jurisdictions, however, attaches consequences to 'inadequate' inspection. Many countries exclude liabi-

lity for manifest defects, if they are not notified to the constructor at the time of final inspection or shortly thereafter, see AB 92 art. 7:13 (SWEDEN), CC art. 758, para. 3, (THE NETHERLANDS), CC art. 692 (GREECE) and CC art. 1219 para. 2 (PORTUGAL). FRENCH case law reversed the burden of proof, presuming that the defect is hidden at the moment of the reception of the work, using the normally diligent client (and not an architect or a third adviser, see Cass.civ. II, 19 May 1958, JCP 1958.II.10808, note B. Starck; Cass.civ. III, 14 May 1985, D. 1985, 439, note Rémery) at the moment of the reception as point of reference, see Cass.civ. III, 23 November 1976, Bull.civ. III, no, 415. For AUSTRIAN law, the position is uncertain. CC art. 928 exempts an obvious defect from warranties, but it is disputed whether this provision applies in the context of contracts of work, see Rummel [*-Krejci*], ABGB Kommentar, art. 1167, no. 6 (against) and Gschnitzer, 239 (in favour). The standard for the discoverability of defects varies. GREEK law (CC art. 692) seems to be the most favourable for the constructor, requiring an inspection that lives up to the standards of an expert who has the necessary expertise to detect defects of a given construction, followed by PORTUGAL, where evident defects are those the duly diligent client should have noticed and hidden defects are not detectable by due diligence, even of an average technician proficient in that field (CA Porto, 17 November 1992, CJ 1992, V, 224). In other countries, the diligence of the client is the focus, whereas the standard may be subjective, referring to the degree of expertise of the client, the way the supervision is organised and the nature and seriousness of the defect, see Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 566 (THE NETHERLANDS), and Goossens, Aanneming van werk, nos. 178-1083 (BELGIUM) or be more objective, see for FRANCE Cass.civ. III, 3 November 1983, GazPal 1984, 2, 577, note Liet-Veaux and for SPAIN LOE art. 17. In ITALIAN law, the literature is divided between the objective approach, see, M. Stolfi, Appalto. Trasporto, p. 58; and a more subjective one, see C. Giannattasio, L'appalto, p. 197.
No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

4. *Inadequate Performance of Agreed Duty to Supervise: Defence or Contributory Negligence?*
Under ENGLISH law, inadequate performance of an agreed duty to supervise, is not available as a defence for the constructor, *Kingston-upon-Hull Corporation v Harding* (1892) 2 QB 494, Court of Appeal, see also D. Wallace, Hudson's building and engineering contracts, 1995, nos. 5-021, 5-022, 5-0245, opposing the application of contributory (comparative) negligence. The same is true for SWEDEN, see AB 92 arts. 3:2 and 3:5, first paragraph, for GERMANY (BGH NJW 1973, 518; OLG Koeln BauR 1996, 548, BGH NJW 1999, 893), for AUSTRIA (ÖNORM A 2060 2.11.4 and 2.27.1, Diettrich/Tades, "Kapfer"[35], 1999, 1168a E 111 and Rummel [*-Krejci*], ABGB Kommentar, art. 1168a, no. 34), and most likely for FRANCE, where the liability is shifted to the supervisor, see under 2, GREECE, where CC art. 691, is not interpreted in that manner in doctrine or case law, PORTUGAL (compare art. 1209 para. 2 CC and CA Porto, 10 April 1970, BolMinJus 196, 299) as well as for ITALY, where some scholars assume that a check during the performance sets the contractor free to the extent of what has been tested as regular and consistent to contractual previsions A. Vitale, Dell'appalto, p. 388. In THE NETHERLANDS, however, the *Raad van Arbitrage* and art. 12-3 of the *UAV 1989* allow contractors to be released from liability for

defective work if it can be established that either the client or his agent on his behalf might have been capable of noticing the defective work at any stage of the construction process but failed to do so, but this approach has been criticised, see Van den Berg, Samenwerkingsvormen in de bouw, no. 116, and especially Jansen, Towards a European building contract law, pp. 378-392.
No information from BELGIUM, DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Right to Supervise and Inspect During the Performance of the Service?*
AUSTRIA ÖNORM A 2060 establishes a right to supervise (2.11) the construction activities at the construction site. The contractor has to enable a supervision of the sub-contractors as well. Supervision includes a right to check the relevant documentation of the building process; the client has to inform the contractor about doubts raised in the supervision.
ENGLAND The client has the right to supervise the construction process or to inspect the structure. Architects and engineers may be under a duty to perform these activities in relation to the client, see D. Wallace, Hudson's building and engineering contracts, 1995, nos. 2-182 ff. There is no apparent authority or doctrinal statement to the effect that the constructor has to allow this, because it would seem too obvious.
FINLAND The Consumer Protection Act does not contain provisions on inspection or supervision.
FRANCE The client can supervise the work, but he is not obliged to do so. Most of the time in building construction practice a person is appointed to supervise the work and to coordinate the construction process between the different constructors. This person is the *maître d'œuvre*, which is very often a function given to the architect. The client is not under an obligation to inspect the construction at the end of the work. It is only his interest to inspect the work, but he can accept the work without inspecting it. In practice the client will inspect the work before the acceptance, because the consequences of such an acceptance are important: transfer of risks, impossibility for the client to seek the liability of the contractor for manifest defects (Cass. civ. III, 1 February 1984, RD imm. 1984, 314; Cass.civ. III, 9. October 1991, Bull.civ. III, no. 231).
GERMANY The client does have the right (no obligation) of supervision according VOB/B art. 4 no. 1 para. 2. The constructor is obliged to tolerate any supervision and even has to disclose information (VOB/B art. 4 no. 1 para. 2 sent. 2). According to the VOB/B the client may even not only have access to the building site but also to the workshop of the constructor in which preparatory work is undertaken. He also has access to documents. The border-line is drawn where business secrets are endangered, which are all facts, where the constructor has an objective economic interest that they will not be made known. The client, furthermore, may not impede the constructor from his work.
GREECE The right to supervise is not codified, but follows from the cooperative nature of the construction contract. The right to inspect is assumed by Ef. Thessalonikis 1864/1999 Harm. 1999, 8 p. 1054.

ITALY CC art. 1662 establishes an option for the client to examine the constructor's activity while performing, paying all costs, see also Cass., 18 January 1980, n. 434, in Rep.Foro it., V° *Appalto*, c. 115, no. 13. The examination should not cause purposeless difficulties to the constructor (Cass., 10 May 1965, no. 891, in RGE, 1965, I, p. 945, comment of E. Favara, Limiti del controllo del committente sull'opera dell'appaltatore).

THE NETHERLANDS The right to supervise is considered to be self-evident. There is normally no duty to supervise, unless the contract provides otherwise, although there may be exceptional circumstances under which such a duty could arise, see HR 4 December 1970, NJ 1971, 204 (*Bouchette/Van Limburg)*; Van den Berg, Samenwerkingsvormen in de bouw, no. 112; Van den Berg, Verdeling van aansprakelijkheden en risico's bij moderne bouwcontractvormen, in: M.A.M.C. van den Berg, C.E.C. Jansen (eds.), De ontwerpende bouwer, Over turnkey- en design & build-contracten, p. 83; Jansen, Towards a European building contract law, p. 380; UAV art. 3-2 1989. This Article, however, provides that if the client does not want to supervise the work, he is under a duty to inform the contractor of such (in writing) before the execution of the work commences. If, as a result of the decision not to supervise the work, the demand on the contractor exceeds what can reasonably be expected of him, the contractor is entitled to extra payment, see cf. Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 718. An obligation to inspect does probably not exist, see Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 562, but failure to inspect can have consequences for the client, because CC art. 7:758 para. 3 provides that the constructor is not liable for defects that the client could reasonably have discovered at the time of delivery and CC art. 7:758 para. 1 implies a certain amount of inspection at that time.

POLAND The right to supervise during the performance of the service is not directly mentioned in the POLISH CC, however, it may be deducted form CC art. 636 para. 1, which applies on the basis of CC art. 656 para. 1. According to CC art. 363 para. 1 if the contractor makes the work defectively or in a manner inconsistent with the contract the client may ask him to change the mode of its making and set him an appropriate time limit, after lapse of which the client may renounce the contract or entrust another person with the correction of the further making of the work.

PORTUGAL CC art. 1209 para. 1 says that the client may supervise the execution of the work as long as he does not interfere with the regular flow of the construction process. The only interests protected by supervision are clients': CA Porto, 15 June 1973, BolMinJus 229, 235. This is a strict rule, see Antunes Varela, Código Civil anotado, vol II, p. 793.

SPAIN Supervision of the construction work is not a legal obligation for the client. It is not contained in the new LOE, nor in the regime of the CC. The client has the right to supervise but not the obligation.

SWEDEN AB 92 art. 3:5 first paragraph states that the client may supervise the contract work as he finds it suitable. His supervision shall as far as possible be performed in a way, which does not hinder the contractor in his work.

2. *Obligation to Inspect the Finalised Structure?*

AUSTRIA The CC contains no duty to inspect or to point out defects. The client, however, can inspect the work before acceptance, see Rummel [*-Krejci*], ABGB Kom-

mentar, art. 1170, no. 5, EvBl 1959/107. ÖNORM A 2060 2.24 mentions quality inspections and operational tests, and art. 2.25 deals with test runs that are contractually agreed upon. Acceptance (art. 2.26) is a tool to determine when the contractor has performed (art. 2.26.1) and to trigger the passing of risk (art. 2.26.10). In case of formal acceptance (as opposed to an informal one), there is mention of a record in which, *inter alia*, defects are to be noted (art. 2.26.5), but it is not entirely clear what the legal consequences of acceptance as to a possible waiver of rights are. Art. 2.26.8 says that 'if the client accepts the work despite essential defects the rules on legal warranties apply', which implies a need to inspect/notify non-essential defects at the point of acceptance, since the regime on legal warranties differentiates between essential and non-essential defects (for a definition see art. 2.27.4).

BELGIUM The client is required to inspect the result of the construction activities, and to accept it if they are performed adequately, see Goossens, Aanneming van werk, no. 1018.

FINLAND The Consumer Protection Act does not contain provisions on final inspection.

FRANCE The client is not under an obligation to inspect the construction at the end of the work. It is only his interest to inspect the work, but he can accept the work without inspecting it. In practice the client will inspect the work before the acceptance, because the consequences of such an acceptance are important: transfer of risks, impossibility for the client to seek the liability of the contractor for manifest defects (Cass.civ. III, 1 February 1984, RD imm. 1984, 314; Cass.civ. III, 9. October 1991, Bull.civ. III, no. 231).

GERMANY As the acceptance *(Abnahme)* of the work according CC art. 640 also means that the client considers the work to be made according to the contract he has the right to inspect the work in detail and try it out. VOB/B art. 12 no. 5 para. 2 prescribes a period of 6 working days for construction works. This period is rather short and may be longer for other works, e.g. Computer software (OLG Köln BB 1993 enclosure 13 to issue 19 page 12). The client is not obliged to use the possibility of inspection. But he is obliged to accept the work if it was achieved according to the contract, is finished and not impossible to be accepted, which according to CC art. 646 may be the case for immaterial works as well as works which have always remained in the possession of the client, such as a teeth-prosthesis. VOB/B art. 12 requires the constructor to send a demand for acceptance, which has to be undertaken within 12 working days, but partial acceptance is allowed.

GREECE As with regard to the duty to inspect, CC art. 692 provides that after acceptance of the work by the master, the contractor shall be released from any liability by reason of deficiencies except if upon delivery of the work such deficiencies could not be discovered following a proper survey or were fraudulently concealed by the contractor. According to this Article the client does not only have a right to inspect the work but also a duty, for if he fails to do so the contractor is exempted from liability for defects that could have normally been discovered upon inspection (unless the contractor fraudulently concealed them).

ITALY The code refers to a right of the client to verify the accomplished work (CC art. 1665). Inspection is necessary in order not to loose guarantees for vices and non-conformities of the construction (M. Stolfi, Appalto. Trasporto, p. 52). The constructor must put the client in a condition where he can test the accomplished work (Cass., 15

December 1955, in Giust.civ, 1956, I, p. 1096, with comment of F. Voltaggio Lucchesi, Verifica dell'opera appaltata e presunzione di accettazione). Where, despite the constructor's offer to inspect the work, the client does not inspect without justified reasons, the work is considered accepted, as is the case when the client does not inform the contractor about his evaluation within a short period of time.

THE NETHERLANDS An obligation to inspect does probably not exist, see Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 562, but failure to inspect can have consequences for the client, because CC art. 7:758 para. 3 provides that the constructor is not liable for defects that the client could reasonably have discovered at the time of delivery and CC art. 7:758 para. 1 implies a certain amount of inspection at that time.

POLAND The existence of the duty to inspect depends on the nature of the contractual relationship. If the contract is concluded between persons engaged in economic activity, inspection is obligatory (art. 563 para. 2). Otherwise, it is seen as a duty only if the inspection is customary in the given relationship (art. 563 para. 1).

PORTUGAL CC art. 1218 obliges the client to inspect the work before accepting it, in order to verify if it is in conformity with the agreement and lacks defects. The client has the burden of inspecting the work; failure to inspect it resulting in full acceptance.

SPAIN Two different moments juridical acts to be distinguished: 1) delivery of the construction work and 2) reception of the construction work. Material delivery of the work consists in putting the work at the disposal of the client. Reception of the work consists in the client accepting its characteristics and qualities (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructores, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 40). Delivery may take place before, at the same time or after reception of the work, and does not imply tacit acceptance. With reception the party accepts the good, unless it has defects. If such is the case, the client can refuse reception but it has to indicate in writing the reasons for refusal (LOE art. 6, para. 3). Unless otherwise agreed, reception is to take place within 30 days after the construction work is finalized. Such moment is to be communicated to the client-promotor by means of a certificate. The period of 30 days starts counting from the moment the client receives the certificate (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 71). There is tacit reception when after 30 days the client does not communicate the existence of defects, and also when the client pays the price without giving notice on any non-conformity of the work, when the client takes possession and makes use of the construction work without giving notice of a defect (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, pp. 64 and 65).

3. *Liability for Defects not Noticed during Inspection*

AUSTRIA An acceptance without reservation cannot be deemed a waiver of the rights based on defects that were neither apparent nor known to the client unless there is an express or factual approval, see Klang [*-Adler-Höller*], Band V, art. 1167, no. 398. CC art. 928 exempts an obvious defect from warranties, but it is disputed whether this provision applies in the context of contracts of work, see Rummel [*-Krejci*], ABGB

Kommentar, art. 1167, no. 6 (against) and Gschnitzer, 239 (in favour). Moreover, the client may then have conclusively waived his rights; Diettrich/Tades, "Kapfer"[35], 1999, art. 1167 E 87.] However, the client can still reserve his rights upon acceptance, see Diettrich/Tades, "Kapfer"[35], 1999, art. 1167 E 86.

BELGIUM The liability for defects after acceptance requires that the defect is hidden. These depend on the type of defect, and on the qualifications of the client, see Goossens, Aanneming van werk, no. 178-1083.

ENGLAND Liability is unaffected by the fact or not of an inspection, see D. Wallace, Hudson's building and engineering contracts, 1995, no. 5-021.

FRANCE Case law reversed the burden of proof, presuming that the defect is hidden at the moment of the reception of the work, using the normally diligent client test (and not an architect or a third adviser, see Cass.civ. II, 19 May 1958, JCP 1958.II.10808, note B. Starck; Cass.civ. III, 14 May 1985, D. 1985, 439, note Rémery) at the moment of the reception as point of reference, see Cass.civ. III, 23 November 1976, Bull.civ. III, no. 415. The evaluation is made *in abstracto* and the concrete competence of the initiator is of no relevance. This standard is applied rather strictly in case law. The defect must be visible, the causes (the origin) of the defect must be identified and the consequences (the damage) must be foreseeable, see Cass.civ. III, 3 November 1983, GazPal 1984, 2, 577, note Liet-Veaux. But the contractor can prove that the initiator had the effective knowledge of the defect, even if it is hidden (Cass.civ. III, 20 October 1993, Bull.civ. III, no. 122). Even if the initiator gives a mandate to a professional (for ex. architect) to receive the building, the evaluation of the manifest of the defect is made in the same way (Cass.civ. III, 17 November 1993, Bull.civ. III, no. 146).

GERMANY If the work was accepted but the client did not notice the defect, the constructor can still be held liable. Important is whether the client really knew about the defect. It is irrelevant whether he ought to have noticed it or not as there is no duty of inspection (see above). The main consequence of the acceptance is the shifting of the burden of proof from the constructor proving the non-existence of a defect to the client of proving the existence of it, see Staudinger [*-Peters*] Kommentar BGB, art. 640 no. 1.

GREECE CC art. 692 regarding approval of the work, releases the constructor after acceptance from liability for defects, except if upon delivery of the work such deficiencies could not be discovered following a proper inspection or were fraudulently concealed by the contractor. In general, if the client accepts the work without inspection, he bears the risk for detectable failures. Given the fact that acceptance of the work may be explicit or tacit, the latter presumed from acceptance without reservation of rights, the distinction between manifest and non-detectable defects is central to the rights and obligations of the parties. The only direction the code gives for the definition of a manifest defect stems from the premise that manifest is the defect that can be ascertained on dutiful inspection.

ITALY The constructor is not liable if the client does not inspect the completed construction or performs an inadequate inspection. A manifest defect is a defect that can easily be detected at the moment of delivery. The inspection of the completed work can be carried out by a client himself or by a trusted technician. According to one view, the point of reference is that of the cognition of a person with medium technical diligence (M. Stolfi, Appalto. Trasporto, p. 58; F. Voltaggio Lucchesi, Vizi, p. 44; R. Albano, In tema di riconoscibilità dei vizi nell'appalto di costruzione di navi

ed in quello di montaggio, in Foro it., 1956, I, c. 219; Cass., 16 February 1955, no. 452, Foro it., 1956, I, c. 219 with comment R. Albano, CA Genova, 30 March 1951, in Rep.Foro it., 1951, V° Appalto, c. 97, no 51). Another view considers that the point of reference varies: inspection by an inexperienced client triggers the criterion of the knowledge that can be expected from an inexperienced person; if the client is a technician of the art or is assisted by a professional supervisor the identification of vices has to be established in relation to the medium expertise of a technician of the art (C. Giannattasio, L'Appalto, p. 197; D. Rubino, Dell'Appalto, p. 251; G. Mirabelli, Dei singoli contratti, p. 464; Cass., 27 April 1957, no. 1423, in Rep.Foro it., 1957, V° Appalto, c. 118, n. 36; CA Milano, 12 February 1957, Rep.Foro it., 1957, V° Appalto, c. 119, no. 42; CA Firenze, 28 May 1954, Rep.Foro it., 1954, V° Appalto, c. 116, no. 22).

THE NETHERLANDS CC art. 7:758, para. 3, implies an exemption of liability for any defects the client should have discovered at delivery. By accepting the work (without reservations), the client loses the right to claim damages or other remedies for any defect that is not 'hidden'. Cf. Jansen, Towards a European building contract law, p. 398. A defect is 'hidden' if the client could not have noticed the defect at *or before* the acceptance of the work or if the defect manifests itself only after acceptance of the work. Whether or not a defect should have been noticed before or at acceptance of the work, depends on (1) the degree of expertise of the client, (2) the way the supervision is organised and (3) the nature and seriousness of the defect. Cf. Rb Roermond 10 January 1985, BR 1986, p. 145; Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 566. From a client who cannot be considered to be an expert, only a reasonable degree of attentiveness may be expected. Cf. M.A. van Wijngaarden, M.A.B. Chao-Duivis, Hoofdstukken Bouwrecht, 2001, no. 113, with references to case law of the *Rv*A. If, on the other hand, the client is assisted by a professional supervisor, a defect can only be considered 'hidden' if it could not have been reveiled by a normally careful and skilful supervision during the execution of the construction. Cf. M.A. van Wijngaarden, M.A.B. Chao-Duivis, Hoofdstukken Bouwrecht, 2001, no. 111, with references to case law of the *Rv*A. If the supervision did not take place at a regular basis but merely incidentally, a defect will be considered hidden more rapidly. Cf. *Rv*A 7 January 1980, no. 9329, BR 1980, p. 395, note Thunnissen (standing case law). If in fact supervision did not take place at all, a defect will indeed be considered to be hidden. Cf. *Rv*A 3 April 1981, no. 9979, BR 1981, p. 625, note Thunnissen. Thus, the risk of not noticing a defect in the construction partly shifts towards the client if he exercises his right to supervise, and less intensive supervision increases the odds that a defect is considered 'hidden'.

POLAND If it was possible to notice the defects observing due diligence, the client looses his rights (CC art. 563). Otherwise, if the defect is discovered only later, the client should notify immediately the contractor (CC art. 563) about it.

PORTUGAL Evident defects are presumed known by the client, even if he did not take inspection (CC art. 1219 para. 2). Evident defects are those, the duly diligent client should have noticed (CA Porto, 17 November 1992, CJ 1992, V, 224). Hidden defects are not detectable by due diligence, even of an average technician proficient in that field. Generally, constructor's liability ceases regarding evident defects upon acceptance by client.

SPAIN LOE art. 17 states the responsibility regime of the edification agents for hidden defects (those not noticeable during inspection applying a simple diligence). It establishes three different periods of guarantee of ten, three and one year, which start counting from the moment the construction work is accepted *(reception)*: ten years for defects which regard the founding, supporters, walls and other structural elements of the building; three years for defects on the construction elements or installations which lead to non compliance with the habitability requirements; and one year (only for constructors) for defects in the execution of the work which regard elements of final process of the work.
SWEDEN AB 92 makes a distinction between hidden and manifest defects. A hidden defect is described as a defect existing at the time of the final inspection, that was not or should not have been noticed then, art. 7:13. All other defects are manifest defects. According to the general rule in art. 7:13 the contractor can only be made liable for defects noticed and recorded in the inspection protocol. However, the provision states that this rule does not apply to hidden defects and all kinds of defects can be reported in writing to the contractor within a period of three month after the final inspection, regardless if they should have been noticed at the inspection or not.

4. *Inadequate Performance of Agreed Duty to Supervise: Defence or Contributory Negligence?*
AUSTRIA It is expressly stated in ÖNORM A 2060 that supervision by the client does not exempt the constructor from his liability (arts. 2.11.4 and 2.27.1). Case law and doctrine similarly assume that supervised contractors do not see their liability exempted or reduced because of contributory negligence on the part of the client based on insufficient supervision (Diettrich/Tades, "Kapfer"[35], 1999, 1168a E 111 and Rummel [*-Krejci*], ABGB Kommentar, art. 1168a, no. 34).
ENGLAND Inadequate performance of an agreed duty to supervise is not available as a defence for the constructor, *Kingston-upon-Hull Corporation v Harding* (1892) 2 QB 494, Court of Appeal. This includes noticing defective work and not informing the constructor of it, *East Ham Corporation v Bernard Sunley* [1966] AC 406, HL, D. Wallace, Hudson's building and engineering contracts, 1995, nos. 5-021, 5-022, there suggesting the constructor must expressly ask for approval of defective work and receive express approval in order to be absolved from liability. There are no cases in which a contractor used the defence of contributory negligence, D. Wallace, Hudson's building and engineering contracts, 1995, no. 5-0245 and such a defence is there opposed.
FRANCE The *maître d'œuvre* can be liable if he does not perform properly the obligation contractually agreed of supervision and coordination. The client cannot be held liable (i.e. contributory negligent) if he fails to supervise correctly the construction, since this is not an obligation for him, see under note 2.
GERMANY The client has the right to supervise but is not obliged to. Therefore the constructor does not obtain any rights from inadequate performance of the supervision. His liability for these defects cannot be reduced because of contributory negligence of the client (BGH NJW 1973, 518; OLG Köln BauR 1996, 548, BGH NJW 1999, 893).
GREECE Support – albeit very limited – for recognising an obligation to supervise may be provided by CC art. 691, which states that a contractor may not be held liable for defects of the work that can be attributed to the fault of the client manifested by his directions or in any other way, but the Article is not interpreted in that manner in doctrine of case law.

ITALY The right to check the progress of work can be exercised during the performance, when the client feels such an exigency. Leading scholars such as C. Giannattasio, Dei singoli contratti, p. 442; V. Mangini, Il contratto di appalto, p. 148, ff conceive it having a different nature from the right to a final inspection. Because it is a right and not an obligation, the non-exercise does not lead to a loss of the right. Some scholars assume that a check during the performance sets the contractor free to the extent of what has been tested as regular and consistent to contractual previsions A. Vitale, Dell'appalto, p. 388. Case law seems to share the first opinion CA Torino, 17 July 1959, in Giust.civ.Mass., 1959, p. 814.

THE NETHERLANDS The *Raad van Arbitrage* allows contractors to be released from liability for defective work if it can be established that either the client or his agent on his behalf might have been capable of noticing the defective work at any stage of the construction process but failed to do so. Cf. Van den Berg, Samenwerkingsvormen in de bouw, no. 115. Although this approach has been heavily criticised by some Dutch authors, see Van den Berg, Samenwerkingsvormen in de bouw, no. 116, and especially Jansen, Towards a European building contract law, pp. 378-392, the approach has been 'codified' in art. 12-3 of the *UAV 1989*. A failure to supervise correctly, where supervision has been agreed upon, will therefore constitute a full defence to liability for the contractor.

POLAND According to CC art. 655 if the object made undergoes destruction or damage as a result of the work being done in accordance with the client's instructions, the contractor may demand the remuneration agreed upon or its appropriate part if he warned the client of the danger of destruction of or damage to, or if in spite of observing due diligence he could not have found it

PORTUGAL Supervision is a right not a duty. Supervision does not exclude constructor's liability, even if defects were evident or the bad execution of the work obvious (CC art. 1209 para. 2). CA Porto, 10 April 1970, BolMinJus 196, 299.

SPAIN Supervision of the construction work is not a legal obligation for the client, see under note 2.

SWEDEN The general rule in AB 92 art. 3:2, provides that the contractor alone is responsible for the execution of the contract work. Furthermore, art. 3:5, first paragraph, states that the client may supervise the contract work as he finds it suitable, but that such supervision does not limit the contractual liability of the contractor.

Article 2:106: Handing over of the Structure

(1) If the constructor regards the structure, or any part of it that is fit for independent use, as sufficiently completed and wishes to transfer control over it to the client, the client must accept such control within a reasonable time after being notified. The client may refuse to accept the control when the structure, or the relevant part of it, does not conform to the contract and such non-conformity makes it unfit for use.

(2) Acceptance by the client of the control over the structure does not relieve the constructor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to inspect, supervise or accept the structure or the construction of it.

Comments

A. General Idea

This Article deals with the actual handing over of the structure at the time the structure is sufficiently completed. Paragraph (1) contains the idea that the constructor takes the initiative for the transfer of control and that the client is to accept control, unless there are serious defects. Minor defects and defects that can be repaired in a short period of time do not prevent the constructor from transferring control. The client may refuse control if the defects make the structure unfit for use.

The transfer of control is detached from rights related to non-performance. To that extent, paragraph (2) provides that acceptance by the client of the control over the structure may not be construed as a waiver of any rights related to non-performance. The client's position as to remedies for non-performance only becomes less strong when he does not notify the constructor within a reasonable time of defects he actually discovered or should have discovered without investigation; see Article 1:113 (Failure to Notify for Non-Conformity) and Article 2:111 (by way of prescription).

Paragraph (2) does, however, not deny the constructor the possibility of bringing to the attention of the client situations that might lead to complaints regarding the way the constructor performed his duties. If there is a non-conformity that is or should be discovered by the client without investigation, the duty to notify emerges and the period within which the duty is to be observed starts running (Article 1:113(2): Failure to Notify for Non-Conformity).

> *Illustration 1*
> A constructor of a building wishes to transfer the control of the building to the client. He notifies the client. The client is obliged to take over control, unless the building is unfit for use. The client does not have to refuse taking over control because he should be afraid to lose rights with respect to non-performance. The present Article expressly provides that the client keeps his rights, acceptance of the control over the building notwithstanding.

B. Interests at Stake and Policy Considerations

With respect to the handing over of the structure, several issues arise which best can be discussed and dealt with separately. The first issue is that the constructor has an interest in transferring the control over the structure to the client. His duties and liabilities connected to the safeguarding of the structure are to end at some stage because they translate into costs, for instance the costs of insurance. The client has an obvious interest in obtaining control, so that he can use the structure for its purposes. He will also need to know when control is transferred, so that he can take measures in the area of security and insurance. The transfer of control is a burden on the client, however, if the structure cannot yet be used for its purpose because it is not finished yet or if there are serious defects.

Another point is the right to payment. Under most contracts, and under the default rule contained in the following Article, at least a substantial part of the price will be due at the time the structure, or the control over it, is handed over. The constructor has an obvious interest in collecting his money, whereas the client may want to postpone payment in order to keep the constructor under pressure to perform or for other reasons.

When the structure is completed, it is in the constructor's interest to be informed about what else will be expected from him. He will want to know whether the client is satisfied with the result and, if not, what the client perceives to be defects that are to be remedied. At some time, he also wishes to be certain that no additional effort is expected, except perhaps the remedying of any future defects. For the client, it also is relevant to bring additional wishes to the attention of the constructor. The sooner this is done, the higher the probability that the constructor will be prepared to fix the problem without delay or extra charge. In this respect, the client will want to inspect the structure thoroughly. But the time and money that need to be invested in inspection compete with other preferences of the client, so the intensity of inspections undertaken will vary greatly across clients. The problem is similar to the ones arising in the context of monitoring before the handing over of a structure that were discussed in the Comments to the preceding Article. Early detection of problems is still important. Added to this, there is now the desire of both parties to end their co-operation and to be able to exploit their resources to the benefit of other projects.

When not adequately inspecting the structure means that the client risks losing his rights relating to non-performance, this is a powerful extra incentive for inspection. But the optimum level of inspection will be hard to determine. Because of the difficulties the courts will have in establishing what level of inspection is reasonable, some clients will inspect very thoroughly and will issue many complaints in order to cope with the resulting uncertainty. Other clients may think they have inspected sufficiently, but lose their rights because the courts decide differently. The constructor may also strategically use such rules. They may induce him to hide defects. Generally speaking, the constructor has superior expertise, and during the construction process he will have gathered even more information regarding potential defects. If this presupposition holds, it will be more efficient to urge the constructor to disclose this information than to have the client searching for potential defects whilst not knowing where to look.

C. Comparative Overview

The moment of the transfer of control is not dealt with explicitly in the codes. It is often deduced from the rules on acceptance, that is, the rules on remedies relating to defects which survive the moment of completion of the structure. As discussed above in the Comments to Article 2:105, the systems vary widely as to the rules on final inspection and acceptance of the structure as it stands at that time. Some codes state that the client is to inspect the work, and the constructor is to some extent relieved from liability for defects that could have been noticed at that time (THE NETHERLANDS, FRANCE, GERMANY, GREECE, PORTUGAL). Another possible system is that the client is granted additional period for notifying the constructor of defects that

are not hidden (general conditions in SWEDEN). In these systems, much depends on what is considered to be a defect that should have been noticed. At one end, there is the GERMAN system, which requires the client to actually know about the defect. Then there is the FRENCH system, which requires that the defect be visible, that its origin be identified and that the resulting damage be foreseeable. Moreover, expertise or knowledge on the part of representatives of the client is not relevant, only the client's knowledge. Then there are systems where the defect has to be known to the client or obvious. In other countries (THE NETHERLANDS, ITALY, PORTUGAL), great importance is attached to the actual expertise of the client or his representatives. At the other end is the GREEK system, which requires dutiful inspection by an expert.

D. Preferred Option

In the present Article, acceptance and the transfer of control are separated. Transfer of control is a part of the obligations of the constructor. When it is to take place is determined by the general rules on time of performance contained in Article 7:102 PECL (Time of Performance). The client is to accept control within a reasonable time span after the constructor has informed him about his wish to transfer. It is the constructor who determines whether the structure is sufficiently completed in order to transfer control. In many cases, the right time to transfer control is when the structure is completed in every respect and every defect is remedied. A partly finished structure may already be very useful to the client, but the client is not obliged to accept control as long as the structure still has essential defects and cannot be used for the client's purposes. This situation is captured in paragraph (1), by referring to fitness for use. The idea is that small defects, which are more or less inevitable in large construction projects, and minor elements of the construction work that still need to be finished are no obstacle to transfer of control.

Thus, the date on which control is transferred not necessarily is the date on which the constructor has performed his obligations in the sense of Article 7:102 PECL (Time of Performance). It may very well be that some elements of his performance are not yet ready.

> *Illustration 2*
> The control over a house is transferred to the client. The constructor still has to finish the painting part of the job and to construct the parking bays in front of the building. Thus, he has not yet fully performed his obligations. Whether he will perform this part of his obligations in time is a matter of interpretation of the contract or of application of Article 7:102 PECL (Time of Performance).

In principle, the rules for final acceptance and inspection are the same as for the intermediate ones on which the preceding Article focuses. No investigation of any kind is required. The client is just expected to be as attentive as could be expected from a comparable client in that situation. The client is not obliged to inspect the structure, not even to take a look at it. But the interests of the constructor are protected because he has the opportunity to bring elements to the attention of the client, so that the

client obtains the knowledge that is needed to trigger Article 1:113 (Failure to Notify for Non-Conformity) and the prescription of Article 2:111.

E. Relation to PECL and Other Parts of the Principles

The relation to the PECL is already explained under A. The rules on sales have a similar regime in Article 2:101 PELS (Delivery) and Article 3:201 PELS (Taking Delivery). Like in the present Article, the buyer has an obligation to accept control: he is to accept delivery, meaning that he is to perform all the acts which could reasonably be expected from the buyer in order to enable the seller to make his delivery and to take over the assets.

F. Burden of Proof

In some cases it may be unclear whether the client has actually taken over the structure. It is generally easier for him to show that control over the structure has been transferred than for the client to show that this has not been the case. Moreover, the constructor benefits from transferring control because his position with regard to payment (Article 2:107) and risk (Article 2:108) will improve.

G. Character

The rules contained in this Article are default rules.

H. Remedies

When the time determined for performance is not met by the constructor, the normal remedies for late performance will apply, for instance damages in accordance with Chapter 9, Section 5 PECL (Damages and Interest); see Article 7:102 PECL (Time of Performance) and the General Comments to this Chapter under G. Parties may wish to agree on a payment for non-timely performance; see Article 9:509 PECL (Agreed Payment for Non-Performance). Sometimes such a payment has the character of a penalty, which is to prevent late handing over of the structure. But the payment may also be justified by the reduction of the value of the performance when it is late. In modern construction contracts, the parties often agree to a price reduction for every unit of time that performance is late. This may even be an appropriate sanction when it is not agreed, for which Article 9:201 PECL (Withholding Performance) provides the basis.

If the client does not accept the control over the structure while he is bound to do so, the constructor may invoke Article 7:110 PECL (Property Not Accepted). In particular, he may deposit the structure with a third party, or even sell the structure, though only after reasonable notice to the client. The rules regarding these remedies should be

applied, however, taking the interests of the client into account. Usually, the client in a construction contract will have chosen the construction of a specific structure because it is not available on the market for existing goods. When the structure is sold to another person, the client will often again have to hire another person to construct the object. The costs and delay involved will generally be substantial. This has to be reflected in the appropriate means of giving notice (explicitly and in writing, in most cases) and in the reasonable time for the notice; see Article 1:303 PECL (Notice) and Comment E to Article 7:110 PECL (Property Not Accepted). See also the Comments to Article 1:104 (Duty to Co-operate).

Comparative Notes

1. *Procedure of Handing over of the Structure: Delivery and Acceptance*
Most jurisdictions have a system where the constructor takes the initiative for transfer of control to the client, with the client having to accept within a reasonable time (in which inspection may take place), unless refusal is warranted by serious defects. If no explicit acceptance takes place within that period of time, there is usually implicit acceptance. The rights as to defects may also be reserved, see SWEDEN (AB 92 art. 7:15), THE NETHERLANDS (CC art. 758), FRANCE (CC art. 1792-6), SPAIN (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 40 and art. 6 LOE), ITALY (Cass., 11 January 1975, no. 1787, in Rep.Foro it., 1976, V° *Appalto,* c. 116, n. 17; Cass., 27 July 1987, no. 6489, Rep.Foro it., 1988, V° Appalto, c. 137, no. 49, and in Giust.civ., 1988, I, p. 2357), GERMANY (CC arts. 638, 641, 644), AUSTRIA (CC art. 1048, Klang [*-Adler-Höller*], V, art. 1168a, no. 406; Karesek, Die Übernahme des Bauwerkes nach CC und den ÖNORM B2110, in: Ecolex 1996, 836; Rummel [*-Krejci*], ABGB Kommentar, art. 1168a, no. 10), GREECE (compare CC art. 694) and PORTUGAL (CC art. 1218, CC art. 1218 para. 4, CC art. 1218 para. 5). The term delivery is sometimes used for the unilateral act of offering transfer of control by the constructor, which then requires acceptance by the client in SPAIN (F. Martinez Mas, La recepción en el contrato de obra, Madrid, 1998, p. 40) and ITALY, and sometimes for the completion of the bilateral procedure of offering transfer of control and (explicit or tacit) acceptance (see for instance THE NETHERLANDS CC art. 758 and SWEDEN AB 92 art. 7:15).
No information from BELGIUM, DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Procedure of Handing over of the Structure: Delivery and Acceptance*
AUSTRIA Acceptance *(Übernahme)* and delivery CC art. 1048 *(Übergabe)* tend to be identified, see Klang [*-Adler-Höller*], Band V, art. 1168a, no. 406. The systems of ÖNORM B 2110 and the CC differ. Pursuant to the CC the ordering party can refuse to accept the work on grounds of non-essential defects as well only subject to a ban of chicanery *(Schikaneverbot)*. ‚*Übernahme*' is understood as consisting of both the actual handing over and the acceptance of the work as performance pursuant to the contract.

Decisive is the taking over of the work into the ordering party's sphere of influence and disposition that might even consist of a whole procedure of acceptance, e.g. in the field of installations/plants (*Anlagenrecht)*, see Karesek, Die Übernahme des Bauwerkes nach CC und den ÖNORM B2110, in: ecolex 1996, 836. Rummel [*-Krejci*], ABGB Kommentar, art. 1168a, no. 10.

ENGLAND The general principles on performance of contracts apply (D. Wallace, Hudson's building and engineering contracts, 1995, nos. 4-003 ff.). Acceptance is no bar to a claim for damages (D. Wallace, Hudson's building and engineering contracts, 1995, nos. 5-007).

FRANCE The relevant moment in time is the acceptance of the work *(réception de l'ouvrage)*, because it triggers a large number of consequences regarding the future claims of the client. The acceptance can be simple, i.e. accepting the work as is. But the acceptance can be made with reservations *(avec réserves)*, CC art. 1792-6.

GERMANY CC art. 640 requires the client to accept the structure, if it is made in accordance with the contract. The acceptance cannot be refused in case of a minor defect. If the client accepts the structure, knowing it is defective, it looses some of its rights.

GREECE The code does not clearly distinguish the notions of delivery, approval and acceptance. For example, according to CC art. 694 payment of the contractor is due on delivery of the work and the risk passes also on delivery of the work, whereas the prescription period starts on acceptance of the work.

ITALY The simple delivery and obtaining control of the construction does not correspond to acceptance of the work. Where there is no explicit acceptance, a presumption of acceptance operates when the client acts in a way not compatible with the intention not to accept or accepting with a reserve (Cass., 11 January 1975, no. 1787, in Rep.Foro it., 1976, V° Appalto, c. 116, no. 17; Cass., 27 July 1987, no. 6489, Rep.Foro it., 1988, V° Appalto, c. 137, no. 49, and in Giust.civ., 1988, I, p. 2357).

THE NETHERLANDS The moments of delivery and acceptance coincide, as is expressed in CC art. 7:758. According to this Article, the constructor will notify that the structure is ready to be delivered and the client has then to inspect and accept, possibly with reservations, or refuse, under notification of the defects that prevent acceptance.

POLAND According to the opinion of the Supreme Court (judgement of the Supreme Court of 5. 3. 1997, II CKN 28/97, OSNC, Nr 6-7, poz. 90) if the contractor has notified the end of the building work, the client is obliged to accept it. The acceptance protocol should contain establishments of the parties concerning the quality of the work and the defects together with the time for their removal, or with a statement of the client concerning his choice of another remedy. The obligation to deliver, which rests on the constructor is mirrored by the obligation to accept and pay the price on the side of the client. Obligation to accept is independent from the approval of the quality of the performance, because whether the contractor has performed the work according to the project and the rules of the technical knowledge may be questioned. This opinion of the Supreme Court has been heavily criticised in the legal writing (Strzępka in: Rajski, System Prawa Prywatnego, Tom 7, p. 409), which claims that the client does not have the duty to accept the building built by the contractor in the way contrary to his obligations (contrary to the contract and the technical knowledge).

PORTUGAL The first step is inspection (CC art. 1218), followed by a notice of its results to constructor (CC art. 1218 para. 4). If notice is not given in due time, acceptance is presumed (CC art. 1218 para. 5). If this notice does not mention any defects, it means silent acceptance. If defects are mentioned, the result is non acceptance, carrying out the consequences of defective performance. Acceptance may also be express. Transfer of property and the immediate duty to deliver work occurs upon: (1) acceptance if a moveable is concerned; (2) incorporation of materials in soil, in case of a building construction and the soil's proprietor is client (CC art. 1212). Cf. Romano Martinez, Direito das Obrigações, nos. 403 ff.

SPAIN Delivery consists in putting the work at the disposal of the client and it is carried out by the constructor. Acceptance of the work corresponds in Spanish Law to the moment of *recepción de la obra* and consists in accepting the characteristics and qualities of the work and it has to be done by the client (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 40). Acceptance of the construction work is an obligation established in LOE art. 6. In order for the client to accept with all guarantees, it must have inspected the good. Otherwise it may accept without noticing the non-hidden defects and thus losing its actions to claim responsibilities.

SWEDEN AB 92 art. 7:15 states that the contract works are delivered after acceptance at the final inspection. The final inspection *(slutbesiktning)* is essential according to AB 92, since the approval at the inspection leads to delivery of the contract work, art. 7:15.

Article 2:107: Payment of the Price

The price or a proportionate part of it is due and payable as of the time the constructor transfers the control of the structure or a part of it to the client in accordance with Article 2:106.

Comments

A. General Idea

This Article determines the time at which the price generally should be paid. This is the time of the transfer of control. If the transfer of control is to take place but the client does not accept control, the price becomes due and payable as well; see Article 2:106(1), second sentence read in conjunction with the present Article.

Illustration 1

The constructor of a private road has put the road at the disposal of the client in conformity with Article 2:106. The payment of the price is now due. The client may only refuse to pay the price if he is entitled to refuse to accept control under

that Article, that is, if non-conformity makes the road unfit for use. The client may, however, use the remedies of withholding performance or price reduction in accordance with Chapter 9 PECL (Particular Remedies for Non-Performance).

B. Interests at Stake and Policy Considerations

The time of payment of the price is unproblematic if the contract is completely performed at the time of transfer of control. In construction projects, however, it is quite common that there are some defects at the time of delivery. This may be a matter of delays in the delivery of some elements of the structure or of defects that show up in the final stage of the construction process. The system of Article 2:106 is that these defects do not prevent the transfer of control to the constructor. Under this system, often the structure will not yet be completed at the time of transfer of control. This will induce the client to withhold payment partially, because he will want the constructor to finalise the structure. The constructor, however, will feel entitled to payment because he has completed the greater part of the work and loses some of his power over the client when he transfers control over the structure to the client and the client starts to use it.

C. Comparative Overview

The general rule in the codes is that payment is due at the time of the transfer of control (NETHERLANDS, BELGIUM, SPAIN and GREECE) or the moment of acceptance (FRANCE, ITALY, GERMANY, PORTUGAL, FINLAND). ENGLAND and AUSTRIA opt for the moment of completion of the structure.

D. Preferred Option

The time of payment is certainly an issue that the parties should give attention to when drafting a construction contract. As a default rule, the moment of transfer of control is a better solution than the moment of acceptance, because there may be discussions about defects, which can be difficult to solve. The client is protected because it does not have to accept control if the structure does not conform to the contract and such non-conformity makes it unfit for use (see the preceding Article). The solution where payment is due at the time of the transfer of control may be problematic because in most projects the client will want to withhold part of the payment if the work is not entirely finished. If the parties did not take this into account in their contract – for instance by giving the client the right to withhold 10 per cent of the price for a period of six months – the client may wish to invoke Article 9:201 PECL (Right to Withhold Performance). Application of this Article, in conjunction with the present Article, may lead to similar results.

Illustration 2
A website built for a client is not entirely free of defects at the time control is transferred to the client. The client starts using the site. According to Article 2:107, the client is to pay the price. Article 9:201 PECL (Right to Withhold Performance), however, allows him to withhold a percentage of the price.

E. Relation to PECL and Other Parts of the Principles

The calculation of the price is governed by Article 1:102 (Price). The PECL state as a default rule that payment and delivery are due at the same time; see Article 7:104 PECL (Order of Performance). The right of the client to withhold part of the payment can be found in the general rule on withholding performance of Article 9:201 PECL (Right to Withhold Performance).

F. Character of the Rule

This rule is a default rule.

G. Remedies

If the client does not pay the price in time, the remedies of Chapters 8 and 9 PECL apply.

Comparative Notes

1. *Moment of Payment of the Price*
In ENGLAND (see D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-140) and AUSTRIA (CC art. 1170) payment is due at the moment of completion of the structure. Most countries opt for the moment of delivery: THE NETHERLANDS (CC art. 7:758, following the general principle of reciprocity), BELGIUM (see Goossens, Aanneming van werk, nos. 768 and 821), SPAIN (CC art. 1599), GREECE CC art. 694 or the moment of acceptance: FRANCE (see Collart Dutilleul, Delebecque, Contrats civils et commerciaux, no. 732), ITALY (CC art. 1665), GERMANY (CC art. 641), PORTUGAL (CC art. 1211) and FINLAND (for consumer construction contracts, the client will pay on demand of the constructor, but not before delivery and before the client has had a reasonable period to examine the performance, see Section 8.25.1 and 9.25.1 Consumer Protection Act).
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

National Notes

1. *Moment of Payment of the Price*

AUSTRIA Payment is due at the moment of completion of the structure, see CC art. 1170.

BELGIUM The price has to be paid on the moment of delivery, see Goossens, Aanneming van werk, nos. 768 and 821.

ENGLAND Generally, payment has to be made until the whole of the contract has been performed, subject to the doctrine of substantial performance, see D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-140.

FINLAND In consumer construction contracts, the client will pay on demand of the constructor, but not before delivery and before the client has had a reasonable period to examine the performance, see Chapter 8 art. 25(1) and Chapter 9 art. 25(1) Consumer Protection Act.

FRANCE The relevant moment in time is the acceptance of the work *(réception de l'ouvrage)*, see Collart Dutilleul, Delebecque, Contrats civils et commerciaux, no. 732.

GERMANY For the remuneration of the work (if not otherwise contracted), the time of acceptance is decisive (CC art. 641).

GREECE According to CC art. 694 payment of the contractor is due on delivery of the work.

ITALY Unless the parties have agreed otherwise, the moment of acceptance is the decisive moment for payment of the price, see CC art. 1665.

THE NETHERLANDS The price is due at the moment of delivery, which is completed at the moment of (explicit or tacit) acceptance, see CC art. 7:758, following the general principle of reciprocity. According to this Article, the constructor will notify that the structure is ready to be delivered and the client has then to inspect and accept, possibly with reservations, or refuse, under notification of the defects that prevent acceptance.

POLAND Unless the parties decided otherwise, the payment is due upon the acceptance of the structure (CC art. 455) as it follows from the nature of the obligation. However, if, in the absence of a different stipulation in the contract, the contractor demands acceptance of the work done partially, as it is completed, the client is obliged to do so and pay appropriate part of the remuneration (CC art. 654).

PORTUGAL The price has to be paid at the moment of acceptance of the work, see CC art. 1211.

SPAIN The price is to be paid at the moment of delivery, see CC art. 1599.

Article 2:108: Risks

(1) This Article applies if the structure is destroyed or damaged due to an event for which the constructor cannot be held accountable and which the constructor could not have avoided or overcome.
(2) When the situation mentioned under paragraph 1 has been caused by an event occurring before the structure or control of it has been, or should have been, transferred to the client in accordance with Article 2:106 and it is still possible to perform:
  (a) the constructor still has to perform or, as the case may be, perform again;
  (b) the client is only obliged to pay for the constructor's performance under (a);
  (c) the time of performance is extended in accordance with Article 1:111(6) (Variation of the Service Contract);
  (d) the rules of Article 8:108 PECL (Excuse Due to an Impediment) may apply to the constructor's original performance; and
  (e) the constructor is not obliged to compensate the client for losses to input provided by the client.
(3) When the situation mentioned under paragraph 1 has been caused by an event occurring before the structure or control of it has been, or should have been, transferred to the client in accordance with Article 2:106, and it is no longer possible to perform:
  (a) the client does not have to pay for the service rendered;
  (b) the rules of Article 8:108 PECL (Excuse Due to an Impediment) may apply to the constructor's performance; and
  (c) the constructor is not obliged to compensate the client for losses to input provided by the client, but is obliged to return the structure or what remains of it to the client.
(4) When the situation mentioned under paragraph 1 has been caused by an event occurring after the structure or the control of it has been, or should have been, transferred to the client in accordance with Article 2:106:
  (a) the constructor does not have to perform again; and
  (b) the client remains obliged to pay the price.

Comments

A. General idea

This Article deals with the liability for external causes of harm to the structure see paragraph (1). According to Article 2:104, the constructor is liable when the structure is not fit for its purpose (and the defect is not attributable to the client because it is caused by a direction for which no duty to warn existed). In theory, Article 8:108 PECL (Excuse Due to an Impediment) could apply. But this Article requires that the impediment was outside the debtor's sphere of control, that it could not be taken into account and that it was insurmountable. That the sphere of control of the constructor includes protecting the structure against outside harm is provided for in Article 2:103.

Before delivery – the transfer of control over the structure pursuant to Article 2:106 – the risks identified in paragraphs (2) and (3) remain with the constructor, subject to

the limitations in these paragraphs. After the transfer of control, the liability regime changes; the client becomes responsible for external harm (paragraph (4)).

Illustration 1
During construction, an office building is severely damaged by external harm, such as a storm. Assuming that the constructor has done everything that can reasonably be expected of him to prevent the harm (see Article 2:103), the constructor will have to rebuild the building. The time span for performance will be adjusted. Materials delivered by the client that were lost will have to be provided by the client again or paid for by the client.

B. Interests at Stake and Policy Considerations

Nowadays, the topic of risk is only of limited practical interest. The causes for non-performance will usually be attributed to one or the other party. In construction contracts, each party will generally bear the consequences of its own choices if the outcome of the contractual co-operation is not satisfactory. Residual risk will be limited. Damage caused by natural disasters such as landslides and flooding is likely to occur less frequently in the future, because national authorities in the EU have been taking preventive measures for years. Still, the responsibility for external harm to the structure has to be distributed over the parties. This will have to change in time. Whilst it is reasonable that the constructor bears much of the risk as long as he is in the best position to take preventive measures, there will be a time when the client has to take over responsibility.

External harm may have various consequences. One issue is whether the constructor has to do again what he already did in performing the contract. Another issue is what happens to the input (materials or components) provided by the client that is lost due to the external harm. Is it to be supplied by the constructor or again, by the client? And what about the payment of the price by the client?

C. Comparative Overview

EU countries differ with respect to risk distribution in the period before the constructor has finished the structure. Some countries are more lenient to the debtor than others. This is extensively discussed in the Notes to Article 8:108 PECL (Excuse Due to an Impediment). The present Article follows the system of that Article.

With respect to input provided by the client, such as materials and components, the general rule in most countries is that the constructor is only under a duty to guard these with the care that is appropriate in the circumstances. The natural corollary of this is that, in the case of an unfortunate event not related to non-performance of one of the duties of the constructor, the client has to supply the input again, and still has to pay the price and is not entitled to compensation from the constructor. Such is the system in ENGLAND, SWEDEN, THE NETHERLANDS, BELGIUM, FRANCE, ITALY, GERMANY, AUSTRIA, GREECE and PORTUGAL.

There is no significant difference between the systems relating to risk distribution after the completion of the construction contract. It will be clear that prevention against external harm then is to be taken care of by the client. But the constructor remains responsible for the non-performance of his obligations under the contract, which may include the duty to make the structure resistant to particular causes of external harm (see also Article 2:106(2)).

Illustration 2
The duty to deliver a structure fit for its purpose will normally entail several measures to make it less susceptible to external harm. A building should normally be protected against rain, storm and lightning. It should not have exterior parts that are easy to remove by thieves.

The third issue the Article deals with is when the first type of distribution of responsibilities switches to the second one. In most countries, risk passes at the time the control of the structure is transferred (ENGLAND, SWEDEN, THE NETHERLANDS, BELGIUM, FRANCE, GERMANY, AUSTRIA). In some countries ownership is decisive (PORTUGAL).

D. Preferred Option

Many events that were once considered unforeseeable or insurmountable are now within the reach of affordable preventive measures. As a consequence, the constructor will have far-reaching duties to protect the structure against the consequences of events coming from the outside under Article 2:103. But unexpected events may still occur, and the constructor is not accountable for them. Before delivery, this is dealt with by Article 8:108 PECL (Excuse Due to an Impediment).

If the non-performance is not excusable under this Article, the constructor has to perform again. He is then considered not to have performed yet, so the rules on non-performance apply. If the non-performance is excusable, however, the client will not have a right to specific performance or damages, and termination of the contract may be the result. The client will also have to pay the price, which may be reduced, however; see Comment D to Article 8:108 PECL (Excuse Due to an Impediment), Article 9:303(3) PECL (Notice of Termination) and Article 9:401 PECL (Right to Reduce Price). According to subparagraph (2)(c) of the current Article, the time of performance will need to be extended since the constructor, due to the unfortunate event, can no longer perform in time. Article 1:111(6) (Variation of the Service Contract) covers a similar situation. The idea is that the time of performance will be extended proportionally.

The situation is different when performance has become impossible. In that case, termination of the contract may be the best solution; see Article 8:108 PECL (Excuse Due to an Impediment), in particular Comment D to this Article.

After completion of the structure, there will be a time from which the structure is no longer within the constructor's sphere of control. In the case of external harm to the structure, the constructor will still be liable for non-performance of his obligations; see paragraph (1) and Article 2:106(2). He is not liable, however, if the damage cannot be traced back to non-fulfilment of one of these obligations.

With regard to the time of switching, this Article follows the system of most EU countries: the time of the transfer of control is decisive. This is also consistent with the comparable rules regarding sales; see Chapter 5 (Passing of Risk) PELS.

E. Relation to PECL and Other Parts of the Principles

This Article can be seen as an application of Article 8:108 PECL (Excuse Due to an Impediment), because at the time of delivery the structure leaves the sphere of control of the constructor and thus more impediments will be 'beyond his control'. Many codes, however, have a specific rule for construction contracts referring to this shift in liabilities before and after the transfer of control. This Article follows that tradition.

This is similar to the solution of the sales rules. Here, the risk of loss of or damage to the assets passes when control over the assets is handed over to the buyer; see Article 5:102 PELS (Time When Risk Passes). The third paragraph of this Article is not followed, however. In sales, risk passes to the buyer at the time he commits a non-excused non-performance by not taking over the asset or by not complying with the duty to co-operate; Article 1:202 PECL (Duty to Co-operate). This is a solution that is appropriate for sales contracts, because it provides extra incentives for the buyer to accept delivery and relieves the seller from his responsibility to take care of the assets without the need to take action against the seller. In construction contracts, the constructor may request specific performance of the duty of the client to take control and the client will normally have sufficient incentives to take control. If not, the client can be forced to accept control by court action, or the constructor may try to use the remedy of Article 9:201 PECL (Right to withhold Performance).

F. Burden of Proof

The burden of proof that the control has been taken over by the client is on the constructor; see Article 2:106, Comment G.

G. Character of the Rule

This is a default rule. The parties may opt for a different risk distribution.

H. Remedies

This Article deals with the remedial consequences of different situations of external harm. The remedies are described in the Article itself.

Comparative Notes

1. *General System of Risk*
The general rule is that the contractor is liable for deterioration on non-delivered parts of the contract work, see ENGLAND (*Brocknock Navigation* Co. V Pritchard (1796), D. Wallace, Hudson's building and engineering contracts, 1995, nos. 4-248, 5-001), SWEDEN (AB 92 art. 5:4, first paragraph and art. 39 KTjL), FINLAND (Consumer Protection Act Chapter 9 art. 6(1)), THE NETHERLANDS (CC art. 7:758 para. 2, Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 521), BELGIUM (CC art. 1788), FRANCE (CC art. 1788, but with special provisions for the contract of sale of building to be built), SPAIN (CC arts. 1589 and 1590, see also STS 10 May 1997, Europea de Derecho, N. 3006028509), ITALY (CC arts. 1672 and 1673), GERMANY (CC art. 644), AUSTRIA (CC art. 1168a, ÖNORM B 2110 5.41, see also ÖNORM A 2060 2.26.10), GREECE (CC art. 698) and PORTUGAL (CC art. 1228 para. 1; STJ 24 October 1995: BolMinJus, 450, 469).
No information from DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Risk as to Materials and Goods Provided by Other Party*
In the majority of European jurisdictions the risk for deterioration of materials falls on the client, if the client supplies these, see for SWEDEN Hellner, Speciell avtalsrätt II, first book, p. 100, AB 92 art. 5:5, THE NETHERLANDS (CC compare art. 7:757), FRANCE CC art. 1789, with reversal of burden of proof to the detriment of the constructor, see Cass.req. 19 June 1886, D.P. 1886, 1, 409; Cass.civ. I, 7. October 1963, D. 1963, p. 748; Cass.civ. III, 17 February1999, CCC 1999, no. 67 with note L. Leveneur, ITALY CC art. 1673, Cass., 1 February 1950, no. 271, in Giust.civ, 1950, II, p. 37, with comment of D. Rubino, Il perimento fortuito dell'opera, prima dell'accettazione nel contratto d'opera. GERMANY CC art. 644 para. 1, AUSTRIA CC art. 1168a sentence 2, GREECE CC art. 698 and PORTUGAL CC art. 1228 para. 1. The exception is SPAIN, where pursuant to CC arts. 1589 and 1590 the constructor is to bear the risk if the construction work is lost before delivery both when it has provided the construction material and when it has not, subject to the possibility of a warning about the defective quality of the material.
No information from BELGIUM, DENMARK, ENGLAND, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *General System of Risk*
AUSTRIA The CC allocates the risk of failure of the result pursuant to the spheres from where the risk was stemming from (Sphärentheorie) [K / W, Grundriss I, 409; Gschnitzer, 250ff., 'Jeder trägt Gefahr für seine Bereiche']. Art. 1168a operates if the

work is destroyed by accident before it has been accepted the contractor. It is then not entitled to demand the price and the risk of loss of the material is upon the party who furnished it. In addition to the risk of his own sphere the contractor has to bear the risk materializing in the 'neutral' sphere since he owes a result. ÖNORM B 2110 has a similar system in 5.41, see also ÖNORM A 2060 2.26.10.

BELGIUM Risk passes at the moment of delivery if the contractor has supplied the materials, see CC art. 1788.

ENGLAND Constructor is generally liable for work until it has been accepted or should have been accepted, *Brocknock Navigation Co. V Pritchard* (1796), D. Wallace, Hudson's building and engineering contracts, 1995, nos. 4-248, 5-001. In large contracts this moment is indicated by Architect's certificate.

FINLAND In consumer construction contracts, the constructor shall before delivery bear the risk for the elements being destroyed, lost or damaged for a reason not attributable to the client, see Chapter 9 art. 6(1) Consumer Protection Act.

FRANCE If the material is furnished by the constructor, CC art. 1788 states that risk is for the contractor if the thing has not been delivered and the client is not urged *(en demeure)* to receive the construction. "*Si, dans le cas où l'ouvrier fournit la matière, la chose vient à périr, de quelque manière que ce soit, avant d'être livrée, la perte en est pour l'ouvrier, à moins que le maître ne fût en demeure de recevoir la chose*". This means that the risks are transferred to the client at the time of the delivery of the construction. This is the application of the rule *res perit domino* for movables, but not for immovables. If the client is the owner of the soil the property is transferred at the time of the incorporation of the construction at the soil, but the risks remain with the constructor until the delivery. The *Cour de cassation* said explicitly that, for immovables, art. 1788 determines only the burden of risks, independently of the question of the passing of the property (Cass.civ. III, 23 April 1974, D, 1975, 287, with note J. Mazeaud). The risks are not just those of the constructed work, but also the risks of the contract: the contractor cannot claim any salary and if he received down payment *(acomptes)* he is obliged to pay back the client (Cass.civ. III, 27 January 1976, Bull.civ. III, no. 34). Special provisions exist for the contract of sale of building to be built *(vente d'immeuble à construire)*. For this contract the transfer of risks depends on the date of the passing of the property. The law of 3 January 1967 provides two sorts of contracts: the *vente à terme* and the *vente en état futur d'achèvement*, between which the parties can choose. In the first contract the transfer of property occurs the day of completion of the building, but it produces effects retroactively at the date of the conclusion of the contract (CC art. 1601-2). In the second contract, the passing of the property occurs immediately according to the performance of the construction (CC art. 1601-3), as for the *contrat d'entreprise*.

GERMANY The constructor has to bear the risk for any fortuitous event prior to delivery (CC art. 644). The only exception is the fortuitous demise or deterioration of materials, which were supplied by the client. The emphasis lies here really on "fortuitous events", i.e. the impact of this event can even with utmost diligence not be averted (BGH NJW 1997, 3018; 1998, 456). Therefore, even extreme weather conditions do not fall under the scope of this rule. The VOB/B does not provide any big different solutions in VOB/B arts. 7, 12 no. 6. Events, like strikes do generally only lead to a prolongation of construction time.

GREECE CC art. 698 states: Until delivery the risk attaching to the work shall be borne by the contractor. If the master was put on notice to accept, the risk shall be borne by him. The master shall bear the risk of a fortuitous destruction and deterioration of materials supplied by him.
ITALY The constructor bears the risk in case of the impossibility of the work due to a fact that does not depend upon the client. In case of impossibility of the performance of the activity of the constructor, which is only partial, and intervened in a second stage, the client may only be asked to pay that part already performed, within the limits it is useful, in proportion to the price agreed for the entire work (CC art. 1672). Secondly, the constructor bears the risk in case of perishing of the construction, if, for a cause which is not attributable to any of the parties, the work is deteriorated or perished before it is accepted by the client or before the client is late in verifying it. The constructor looses any entitlement to remuneration for the activity already performed and also bears the loss of the material, in those situations in which he was the one to supply it (CC art. 1673). In those cases in which it is the client to supply the material, the risk for the perishing or deterioration of the work is upon the client, as far as the material is concerned, and for the rest it is upon the constructor.
THE NETHERLANDS On the basis of CC art. 7:758, until delivery, the risk of deterioration or destruction of the work before delivery lies on the contractor, whether he only provides the 'labour' (the accomplishment of the work itself) or also the materials. Cf. Van den Berg, Samenwerkingsvormen in de bouw, nos. 76-77; Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 521.
POLAND If the constructor has taken over from the client the building site by protocol, he is liable, until the time of handing over the object on the general principles on damages resulting on that site (CC art. 652).
PORTUGAL The general rule when a unexpected event or "act of god" occurs is *Res suo domino perit,* pertaining to the owner (CC art. 1228 para. 1; STJ 24 October 1995: BolMinJus, 450, 469. It is not applied though when the contractor is in *mora debitoris,* therefore assuming the risk (CC art. 807 and 1228 para. 2) under any circumstances, unless he can prove that the perishing of the work would have occurred anyway even if the work was delivered in due time. Whenever *mora creditoris* occurs, the risk is immediately transferred to the creditor Henrique Mesquita, Empreitada: danos causados na obra ou em bens do empreiteiro por um evento fortuito ou de causa maior, RLJ, 1995, p. 3854. Risk of perishing or deterioration of materials and tools applied to the construction burden the contractor. Cf. Romano Martinez, Direito das Obrigações, no. 419.
SPAIN The CC provides the regime of risks in construction contracts in arts. 1589 and 1590. Art. 1589 states that when the constructor undertakes the obligation to provide the construction material, it bears the risk if the construction work is lost before delivery, unless the client was in mora in receiving the work (the client is in mora when the agreed time to receive the good has passed and the reception of the good has not taken place due to causes attributed to the client). Pursuant to CC art. 1590, if the constructor only undertakes the obligation to execute the work but not to provide the construction material, it has also to bear the risk of losing the good before delivery, unless the client was in mora in receiving the work or the lost is due to the lack of quality of the construction material, provided the constructor has warned the client of such circumstance. Case law confirms that the constructor bears the risk until the

construction work is delivered (STS 10 May 1997, Europea de Derecho, N. 3006028509), the risk regards cases of force majeure or fortuitous case and not cases where the lost is due to the constructor's fault, which is to be regulated by the general norms on contractual liability (CC art. 1124 and 1101) and the constructor is not to bear the risk when the client is in mora *(mora accipiendis)* (STS 3 May 1993, La Ley Juris: 765-5/1993).

SWEDEN The general rule is that the contractor is liable for deterioration on non-delivered parts of the contract work, AB 92 art. 5:4, first paragraph. The rules on consumer services are mainly identical with the regime in the AB 92. Accordingly, KTjL art. 39 states that the consumer is not obliged to pay for work that the professional has performed or material he has supplied, if the work or material fortuitously deteriorates before delivery.

2. *Risk as to Materials and Goods Provided by Other Party*

AUSTRIA CC art. 1168a sentence 2 states that 'the risk of loss of the material is upon the party who furnished it.

FRANCE If the material is furnished by the client, the risks of the constructed work burden on the client, in principle. CC art. 1789 says that the contractor is liable only for his fault. But according to case law, it is up to the contractor to prove that he committed no fault, Cass.req. 19 June 1886, D.P. 1886, 1, 409; Cass.civ. I, 7 October 1963, D. 1963, p. 748; Cass.civ. III, 17 February 1999, CCC 1999, no. 67 with note L. Leveneur. This solution has been criticised by a part of the FRENCH doctrine (H., L., and J. Mazeaud, Droit civil, Principaux contrats, 5th ed. by de Juglart, no. 1350; L. Leveneur, note cit) because it seems unfair to impose the burden of the loss due to indeterminate reasons to the provider (and his insurance) instead of the client who is still the owner (and his insurance).

GERMANY If the client supplies the constructor with the material and it is destroyed by a fortuitous event, he also has to bear the risk. (CC art. 644 para. 1)

GREECE Art. 698 says that the master shall bear the risk of a fortuitous destruction and deterioration of materials supplied by him, see also CC art. 699: If by reason of a defect in the materials supplied by the master, or of the method of performance determined by him the work has been destroyed or deteriorated before delivery or its performance has become impossible the contractor shall be entitled provided he has drawn the master's attention to such risk in time to claim remuneration in respect of the work performed and reimbursement of the expenses incurred which have not been included in the contractor's remuneration. A further liability of the master due to the latter's fault shall not be excluded.

ITALY Following CC art. 1673, II co, the risk in case of perishing or deterioration of the construction is upon the client as far as the material he supplied is concerned. The remaining risk is for the account of the constructor. Case law accepts that the general principle offered in CC art. 1465 applies: res perit domino (Cass., 1 February 1950, no. 271, in Giust.civ, 1950, II, p. 37, with comment of D. Rubino, Il perimento fortuito dell'opera, prima dell'accettazione nel contratto d'opera).

THE NETHERLANDS With regard to the good itself, the owner of the good runs the risk of deterioration or destruction, be it the contractor or the client, unless fault can be proved, see art. 7:757 in conjunction with CC art. 6:75.

POLAND According to CC art. 655 if the object undergoes destruction or damage as a result of the materials, machines or facilities supplied by the client, the constructor may demand remuneration agreed upon or its appropriate part if he warned the client of the danger of destruction of, or damage to, the object or in spite of observing due diligence, he could not have found the defects of the materials, machines or facilities supplied by the client.
PORTUGAL Generally, the owner of the materials bears the risk (CC art. 1228 para. 1). If materials are provided by the constructor, he bears the risk thereof, as well as the risk of losing consideration. If materials are provided by client, constructor is obliged to execute the construction, the client being obliged to provide replacement materials. Constructor is entitled consideration and expanses.
SPAIN Pursuant to CC arts. 1589 and 1590, the constructor is to bear the risk if the construction work is lost before delivery both when it has provided the construction material and when it has not. However, in the latter situation, the constructor can shift the risk to the client, if the former warns the client about the defective quality of the material. Doctrine considers that the provision regards a quality which is known or should have been known by the constructor in accordance with the required diligence (F. Martínez Mas, El Contrato de Obra y la Responsabilidad de Promotores, constructors, Técnicos y Subcontratistas, seminarios Dar, Las Palmas de Gran Canaria, Enero 2002, p. 20).
SWEDEN The general rule is that the owner of the goods or material has to bear the risk, see Hellner, Speciell avtalsrätt II, first book, p. 100. The other party can only be held liable if he has caused the damage through negligence, AB 92 art. 5:5. As for consumer service, the same principles mainly apply as in the AB 92. Regarding material the consumer has supplied himself, he must also bear the risk, see Hellner, Speciell avtalsrätt II, first book, p. 100. Concerning existing goods on which the contract work is being performed belonging to the consumer, for instance real estate, which deteriorated while in the possession of the professional or otherwise under the control of the latter, it is presumed that the professional is liable, KTjL art. 32. The professional can only escape liability if he demonstrates that the damage was not caused through his negligence or through somebody else whom he has engaged to perform the service.

Article 2:109: Specific Performance and Cure

(1) If the constructor does not deliver a structure in accordance with Article 2:104, the client is entitled to have the non-conformity cured by specific performance under Article 9:102 PECL (Non-Monetary Obligations), provided that:
  (a) cure is not unlawful or impossible;
  (b) cure will not cause the constructor unreasonable effort or expense; and
  (c) the performance does not consist in the provision of services or work of a personal character or depends on a personal relationship.
(2) Article 9:102(d) PECL (Non-Monetary Obligations) does not apply to any case to which paragraph (1) applies.

(3) If the constructor fails to deliver a structure in accordance with Article 2:104, the constructor may cure the non-conformity, provided that this can be done:
  (a) before the end of any additional period of reasonable length fixed by a notice by the client under Article 8:106(3) PECL (Notice Fixing Additional Period for Performance); and
  (b) before the delay caused by the cure constitutes a fundamental non-performance under Article 8:103(b) or (c) PECL (Fundamental Non-Performance).
(4) Article 8:103(a) PECL (Fundamental Non-Performance) does not apply to any case to which paragraph (3) applies, unless it is expressly agreed that strict compliance with the time of delivery is essential to the contract.
(5) The constructor is free to determine how to meet the obligation of specific performance. In particular, the constructor is free to decide whether to repair the structure, replace it by a new structure or have the structure repaired at the constructor's expense by a third party.
(6) Until the constructor has cured the non-conformity, the client may withhold performance under Article 9:201 PECL (Right to Withhold Performance).
(7) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest) for any loss not remedied by the constructor's cure.

Comments

A. General Idea

Under general contract law, the client would not always have a right to specific performance by the constructor. The constructor, on the other hand, may have to allow the client to choose other remedies, such as damages, price reduction or even termination, because under the Principles of European Contract Law there is no hierarchy of remedies. As a rule, the creditor to a performance is free to choose from among the remedies available, without having to choose the remedy that burdens the debtor the least.

In construction, however, the primary remedy should be specific performance, usually taking the form of repair. Other remedies are usually far more costly for the constructor, whereas they normally do not provide better result for the client. Therefore, both parties are stimulated to choose this solution. Paragraph (1) specifies the exceptional situations where specific performance is not a right of the client. Paragraph (2) ascertains that the mere possibility of obtaining performance from another source is not a reason to deny the right of the client to specific performance. Paragraph (3) gives the constructor the right to cure the non-conformity in a manner that is for him to decide (paragraph (5)), but protects the client to some extent against attempts to cure which are not likely to be successful. In general, in construction contracts the time of performance will not be essential. Merely not complying with the obligation of time by delivery will, therefore, not be a fundamental non-performance (paragraph (4)) unless this is expressly agreed. Pending the attempts to cure the defects by the constructor, the client may withhold part of his payment (paragraph (6)) and may recover damages not covered by the cure (paragraph (7)).

Illustration 1
A carpenter who contracted to make a table and chairs for a client and who fails to deliver a table that is fit for its purpose is to repair the table. He is also entitled to do this if doing so causes no unreasonable delay. It is for the carpenter to determine how he carries out the repair as long as he stays within the boundaries of the contract and the directions of the client (which may lead to variations). The client is entitled to damages for the late performance.

B. Interests at Stake and Policy Considerations

The issue this Article deals with is whether the constructor and the client should be tied to each other in the case of non-performance. Once a construction activity is under way, it will as a rule be very costly for the client to obtain performance from another source. Both the constructor and the client will have invested in enabling the constructor to assemble a structure that is fit for the purposes of the client. Construction is normally a process that is so individualised that the costs of switching to another provider of the service before the structure is finished are high. On the other hand, the costs of repair will generally not be that high for the constructor. So, it is generally not unreasonable of the client to demand repair. What is required from a constructor when he has to repair a defect will generally be very similar to what was required under the construction contract in the first place. The constructor also requires some protection against the use of other remedies, because damages, or even termination, will generally imply that the costs of repair by another party will have to be borne by the constructor and, as we have seen, these might well be considerable.

C. Comparative Overview

Both the right of the client to specific performance (repair of the defects) and the right to cure of the constructor are universally accepted in European jurisdictions. Only ENGLISH law still contains some uncertainty in this respect.

D. Preferred Option

The Article reflects the policy according to which the constructor and the client are to try to solve the issue first by allowing the constructor to perform his contract. In practice, the exceptions relating to unlawfulness of performance referred to in subparagraph (1)(a) and relating to services or work of a personal character or depending on a personal relationship (subparagraph (1)(c)) will hardly ever apply. Construction work will normally not conflict with personal liberty; see Comment G to Article 9:102 PECL (Non-Monetary Obligations). More important, though rather self-evident is the exception where performance would be impossible (see also subparagraph (1)(a)). Where a non-conformity cannot be cured, a right to have the non-conformity cured would not be of any practical use.

The most important exception to the right to specific performance is the situation where performance would cause the constructor unreasonable effort or expense (subparagraph (1)(b)). Factors to take into account in determining this include the reduction in value of the structure by reason of the conformity, the significance of the lack of conformity in relation to the purposes of the client, the adequacy of an alternative remedy and the costs of remedying the defect. In general, the client has the right to demand the completion of the work by the constructor. But remedying the defect may be unreasonable in some circumstances.

Illustration 2
In an office building, the floors are not completely horizontal. This causes some inconvenience, but repair would require partial rebuilding of the structure. It does not substantially influence the usefulness of the building, although in some corners desks have to be adjusted. Damages may be an adequate remedy.

In this type of situations, monetary compensation may be more appropriate, but in balancing the interests of the parties when deciding on reasonableness of the repair, the court must take into account whether damages are an appropriate remedy for the loss in question. The damages to be awarded can be based on the loss of value of the structure (see also Article 2:110(4) for the situation where cure is unsuccessful or not warranted). But some defects will have no, or only minor, effects on the sales price of the structure.

Illustration 3
In a house, the fireplace is not built in conformity with the contract, which reflected the personal taste of the client, but in accordance with the general taste of the public. Potential buyers are therefore not likely to pay less for the house in the future, so that its value is not diminished.

In such cases, where the defect merely impairs the subjective enjoyment of the structure, the court may award additional damages which reflect this or require more of the constructor in terms of efforts and costs directed to repair. Only in extreme situations, thus, the client can be obliged to accept a work different from the one he initially asked for. Paragraph (2) explicitly excludes the defence of the constructor that the client may obtain performance from another source.

E. Restrictions to the Right to Cure

The right to cure is not unrestricted. Where specific performance were to lead to unreasonable delay or were to cause unreasonable inconvenience to the client, the constructor may not insist on curing the non-conformity. This is reflected in paragraph (3). The first situation where the right to cure does not exist is when the time necessary to cure the non-conformity would be unreasonably long. The client may set a reasonable time frame. The second exception pertains to the nature of the non-conformity. The constructor may have done such a bad job that the client is substantially deprived of what he reasonably could have expected, or the constructor may have defaulted intentionally in such a way that the client has lost faith in the constructor. If the client believes this,

and this is reasonable, the client cannot be expected to give the constructor another chance. The right to cure of the constructor is also denied if the parties expressly agreed that timely performance is of the essence of the contract; see paragraph (4).

F. Relation to PECL and Other Parts of the Principles

Paragraph (1) is partly a repetition of the content of Article 9:102(2) PECL (Non-Monetary Obligations). According to this rule, the client will have the right to 'remedying of a defective performance'. The Comment C to Article 9:102 PECL mentions 'repair, delivery of missing parts; or delivery of a replacement' as examples of this, and paragraph (4) of the present Article ascertains that the constructor may choose the way he performs. The wording of the Article is similar to Article 4:202 PELS (Remedying the lack of conformity), with some adjustments to the specific situation of construction contracts.

G. Character of the Rule

This is a default rule. The parties may wish to make more explicit arrangements for remedies in the case of defects.

H. Remedies

The remedies in the case of non-performance are the main topic dealt with in this Article.

Comparative Notes

1. *Specific Performance*
   In ENGLAND The court will order specific performance of an agreement to build if (a) the building work is sufficiently defined by the contract, (b) the plaintiff has substantive interest in the performance of such a nature that damages would not compensate him, and (c) the defendant is in possession of the land (see D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-301). Other countries give the client a right to require the constructor to remedy the defect: SWEDEN (Hellner, Speciell avtalsrätt II, first book, p. 132), THE NETHERLANDS (CC art. 7:759, para. 2), FRANCE (CC art. 1792-6 para. 2), ITALY (CC art. 1668), SPAIN (STS 8 June 1996, Europea de Derecho, N. 1996080009) GERMANY (CC arts. 634 and 635), AUSTRIA (CC art. 932) and PORTUGAL (CC art. 1221), generally unless the costs of repair are not proportional to the interests of the client to have the structure repaired instead of being compensated in money.
   No information from BELGIUM, DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Specific Performance*

AUSTRIA According to CC art. 932 the client has the right to require the constructor to remedy the defect.

ENGLAND The court will order specific performance of an agreement to build if (a) the building work is sufficiently defined by the contract, (b) the plaintiff has substantive interest in the performance of such a nature that damages would not compensate him, and (c) the defendant is in possession of the land, see D. Wallace, Hudson's building and engineering contracts, 1995, no. 4-301.

FRANCE The right to repair of the defects is granted by CC art. 1792-6 para. 2 *(garantie de parfait achèvement)*. It extends for one year after delivery. More generally the general provision of CC art. 1142 is said not to apply to construction contract with allows the client to ask for specific performance (Huet, Principaux contrats spéciaux, no. 32294).

GERMANY The client has the remedy of specific performance (CC arts. 634 and 635).

ITALY The guarantee for defects of the construction embraces all vices and non conformities that a work may present, both when they are intrinsic or extrinsic. Case law has outlined that in case of a construction contract there are two categories of vices of the work (Cass. 27 April 1968, no. 1331, in Giust.civ.Mass., p. 670). On the one hand there are those vices and difformities that diminish the economic value of the construction but do not deprive the construction of essential requisites and the fitness for purpose and are easily eliminable. On the other hand, there are those difformities and defects that render the construction absolutely non fit for the typical purpose it is meant for or for the specific purpose wanted by the parties. For the defects of the first category, the client may ask to have them eliminated 'at the expenses' of the constructor or to obtain a proportional diminution of the price (CC art. 1668). Termination of the contract is only possible if the difformities and vices are of such a nature that the construction is completely unfit for its purpose (Cass. 12 January 1972, no. 83, in Giur.it., 1972, 1, c. 1612).

THE NETHERLANDS art. 7:759, para. 2, gives the client the right to specific performance, unless the costs of repair are not proportional to the interests of the client to have the structure repaired instead of being compensated in money.

POLAND In its judgement, the Supreme Court (judgement of the Supreme Court of 26. 8. 1984, II CR 373/84, unpublished) has ruled that CC art. 636 applies to the claims resulting from the defective making of the work. According to this article the client is entitled to demand removal of the defects within specified time, and after ineffective lapse of that time the client may entrust another person with the correction of the work at the cost and the risk of the service provider. If the defects are essential the client may demand reduction of the price (CC art. 637 para. 2).

PORTUGAL CC art. 1221 gives the client the right to require the constructor to remedy the defect.

SPAIN STS 8 June 1996 (Europea de Derecho, N. 1996080009) gives a complete overview of the remedies available for the client when the work is not in conformity with the contract or with the *lex artis*. It relies on the general law of obligations to deduct that the client has the right to ask for repair of the defects, with no supplementary charges, or to a

reduction of the price. If repair is not possible or does not lead the work to fit for its purpose, the client can claim new performance or termination (resolution) of the contract. The TS refers to two different regimes: the first one *(via reparatoria)* aims at curing the defects or the establishment of a price adequate to the actual performance. The second (general remedies for non -performance) only applies when the aim of the contract is frustrated (because repair was not possible, or because being possible did not lead the work to fit for purpose, or because there is an *aliud pro alio*). (see also STS 30 January 1992, RJ 1992\1518 and STS 12 June 1998, La Ley Juris: 6217/1998). Specific performance implies here that the constructor has to perform again (see STS 8 June 1996, Europea de Derecho, N. 1996080009). When specific performance is not possible, the client may claim resolution (CC art. 1124, para. 2). The TS considers in STS 8 June 1996 that specific performance refers to new performance of the obligation (replacement) and that replacement is only possible if repair is not feasible.

SWEDEN The contractor is liable for defects appearing during the guarantee period of two years, AB 92 art. 5:6, and has a duty to repair the defects, unless he can prove that the defects are due to the client's neglect, see Hellner, Speciell avtalsrätt II, first book, p. 132.

Article 2:110: Resort to Other Remedies

(1) The client may resort to other remedies as provided in this Article, if
  (a) the constructor refuses to cure because the client is not entitled to ask for cure under Article 2:109(1); or
  (b) the constructor is unable or fails to cure according to Article 2:109(3).
(2) The client may terminate the contract in accordance with Chapter 9, Section 3 PECL (Termination of the Contract) if the non-conformity is a fundamental non-performance according to Article 8:103(b) or (c) PECL (Fundamental Non-Performance).
(3) The client may reduce the price in accordance with Article 9:401 PECL (Right to Reduce Price).
(4) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest), including the costs of repair or replacement.

Comments

A. General Idea

This Article complements the preceding Article by specifying the instances in which the client is allowed resort to other remedies than specific performance. Because specific performance generally will be the best solution, the client can only invoke other remedies if specific performance is not an option or has failed to provide relief. A deviation from the PECL is that a breach is not fundamental merely because strict compliance is of the essence. Unless the parties decide otherwise, non-performance only is fundamental if it substantially deprives the aggrieved party of what it was entitled to expect under the contract if not, the non-performance is intentional.

Illustration 1
The constructor of tailor-made machinery has failed to deliver equipment that does what it is supposed to do: produce the products of the client. The constructor has tried to cure the non-performance by repairing the machinery. The machinery still does not perform as it should. The client is now entitled to choose between the remedies of termination and price reduction, and damages if the conditions for the remedy are met.

B. Interests at Stake and Policy Considerations

If specific performance is not available as a remedy, the client can choose another remedy. The remedies of damages and price reduction are relatively unproblematic then. In this situation, the client may also wish to exercise his right of termination. Termination, however, may be a solution that is detrimental to the constructor. A construction contract often relates to a structure that is tailored to the needs of a specific client. If the constructor cannot deliver it to the client, he may not be able to sell it to another customer, or at a much lower price. This may be particularly harsh to the constructor if the result of the work, although unsatisfactory and perhaps amounting to fundamental non-performance, has a much higher value to the client than to another customer.

C. Comparative Overview

The right to cure of the constructor is universally accepted. This has consequences for the other remedies, which are generally restricted in order to let the constructor first try to remedy the non-performance by repair or replacement.

D. Preferred Option: Exceptions to the Right to Termination

Because of the interests of the constructor specified under B, the client's options to pursue other remedies than specific performance are restricted. The interests of the client are not harmed in any substantial manner because the construction activity he originally contracted for and the cure are very similar. If cure does not succeed, he is entitled to other remedies. If time of delivery without any remaining deficiencies is of essence to the client, he may wish to be able to resort to other remedies at an earlier stage than allowed under this Article. He may also contract for this explicitly.

E. Relation to PECL and Other Parts of the Principles

This Article is related to the Articles of the PECL that are mentioned in the text of the Article itself. The wording of the Article is taken from Article 4:205 PELS (Resort to Other Remedies) regarding sales, with some self-explanatory adjustments to the specific situation of construction contracts.

F. Character of the Rule

This is a default rule. The parties may wish to make more explicit arrangements for remedies in the case of defects.

G. Remedies

Remedies in the case of non-performance are the main topic dealt with in this Article.

Comparative Notes

1. *Right to Cure*
   In ENGLAND the law is not settled (see D. Wallace, Hudson's building and engineering contracts, 1995, nos. 5-052 and 5-053), but in other countries the client must give the constructor the possibility to remove the defects, unless this cannot be required of the client because the cure is impossible or unreasonably costly. See THE NETHERLANDS (CC art. 7:759), BELGIUM (Goossens, Aanneming van werk, no. 842), ITALY (see CC art. 1667 and 1668), SPAIN (STS 8 June 1996, Europea de Derecho, N. 1996080009), GERMANY (arts. 636, 637), AUSTRIA (CC art. 932 para. 2) and PORTUGAL (CC arts. 1221 para. 2 and 1222).
   No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

National Notes

1. *Right to Cure*
   AUSTRIA According to CC art. 932 para. 2 the client should first ask for remedying of the defect, unless this is impossible, or unreasonably costly.
   BELGIUM In general, the client has to give the constructor the possibility to cure the non-performance, see Goossens, Aanneming van werk, no. 842.
   ENGLAND The law is not settled. D. Wallace, Hudson's building and engineering contracts, 1995, nos. 5-052 and 5-053, argues it would appear reasonable to imply a term that the contractor should be given notice of defects if the owner intends to exercise his rights and require them to be remedied under a defects clause. Another approach may be that the right to damages is limited, if the owner untimely presses for damages.
   FRANCE It is considered that the client can refuse the proposal of the constructor to repair a defective performance. This means that the client can chose for the compensation of the cost of repair (Cass.Civ. 3, 7 December 1976, Bull.civ. III, no. 444).
   GERMANY The paragraphs CC arts. 636 and 637 restrict the rights to other remedies than repair. Repair is to be tried first.
   ITALY In case of vices and non conformities that only diminish the economic value of the construction or its functionality, but still allow the construction to fit its purpose, the client is entitled to choose, alternatively, for the elimination of the defects at the expenses of the constructor or the reduction of the price. The constructor may be asked to cure the construction without any further remuneration. In case the con-

structor refuses, the client that does not only accept to be compensated by damages, may ask for a proceeding of 'forced performance' *(esecuzione forzata)* of obligations 'to do' (L'appalto. Rassegna di giurisprudenza commentata, directed by A. Jannuzzi, I, Milano, 1978, p. 372; Cass. 14 March 1975, no. 964, in Giust.civ.Mass., p. 436).
THE NETHERLANDS According to CC Article 7:759 the client must give the constructor the possibility to remove the defects, unless this cannot be required of the client in the circumstances.
POLAND Upon demand of the client the contractor may cure the defects.
PORTUGAL The other rights of the client can only be exercised if remedying the defect is not successful, see CC arts. 1221 para. 2 and 1222.
SPAIN Pursuant to STS 8 June 1996 (Europea de Derecho, N. 1996080009) and other judicial decisions supporting this judgement, non-conformity of the construction work gives the right to the client in the first place to claim repair of the defects or reduction of the price. Only when it is not feasible or being feasible does not lead the work to fit for its purpose (and thus frustrates the expectations of the party), specific performance (meaning replacement of the work) or termination (resolution). Based on this decision, the constructor could offer repair, if the client ask for the remedies of CC art. 1124 when there are no grounds for its application. In case CC art. 1124 applies, and the client ask for resolution, the constructor could avoid the granting of it by proving to the judge that there are grounds which justify the granting of an additional period for performance (on the basis of CC art. 1124, para. 3).

Article 2:111: Prescription of Remedies based on Non-Conformity

(1) In accordance with Article 14:201 PECL (General Period), the prescription period for a remedy for non-conformity of the structure is three years.
(2) In accordance with Article 14:203(1) PECL (Commencement), the period of prescription runs from the time that the control over the structure, or part of it, is handed over to the client in accordance with Article 2:106.
(3) In accordance with Article 14:301(1) PECL (Suspension in Case of Ignorance), the running of the period of prescription is suspended as long as the creditor does not know of, and could not reasonably know of, the facts giving rise to the claim including the type of damage. This does not apply to remedies other than damages.
(4) In accordance with Article 14:307 PECL (Maximum Length of Period), the period of prescription cannot be extended, by suspension of its running or postponement of its expiry, to more than ten years or, in the case of claims for personal injuries, to more than thirty years. This does not apply to suspension under Article 14:302 (Suspension in Case of Judicial and Other Proceedings).

Comments

A. General Idea

In the prescription rules for construction, the rules from Chapter 14 of the PECL are followed, with one exception. The prescription period is generally three years, running from the date of the transfer of control, except for hidden defects and similar situations; see paragraphs (1), (2) and (3). The right to a remedy is barred, however, ten years after the handing over of the structure and thirty years in the case of claims for personal injuries (paragraph (4)).

The exception is that for 'hidden defects' noticed up to three years after delivery only damages claims are allowed, no other remedies, such as specific performance or termination. The constructor may have to pay damages up to three years after handing over the structure, but is not obliged to repair the structure. Termination and price reduction are not allowed either, if they are realistic options at all at this time.

Illustration 1
A constructor and a client agreed on the construction of a house. After completion, control was transferred to the client, although the client noticed some defects in the way the painting was done. Five years after delivery, the client discovers a major defect in the roof and wishes to claim for all defects. Claims for the painting are now barred by the three-year prescription period. The claim relating to the roof is still allowed, presuming that the defect was hidden, but is limited to damages. Specific performance or termination is no longer allowed.

B. Interests at Stake and Policy Considerations

How long is the client allowed to bring claims related to non-performance? The constructor has an interest in time limits for claims based on defects. Liabilities arising from projects that were completed many years ago are difficult to insure, to account for in financial statements and to remedy by means of specific performance. This particularly applies to remedies such as termination and specific performance. The client has a reasonable interest in having access to remedies if defects occur during the expected lifetime of the structure.

C. Comparative Overview

The length of prescription periods for the most common situations regarding building contracts varies between countries: twenty years (THE NETHERLANDS), twelve years (ENGLAND), ten years (SWEDEN, FRANCE for the most common situations, ITALY, GREECE), five years (PORTUGAL, GERMANY – for buildings), three years (AUSTRIA) and two years (GERMANY – for movables). Long prescription periods tend to be shortened by the means of contractual arrangements; short periods invite attempts to base claims on other legal grounds for which the prescription rules are longer.

Many countries have a range of prescription periods. They have periods that are longer for more serious defects (THE NETHERLANDS, FRANCE, ITALY), for structures that have a longer expected lifetime (SWEDEN, ITALY, GERMANY, GREECE, PORTUGAL) or for liability for fault as opposed to strict liability (THE NETHERLANDS, SWEDEN, FRANCE).

D. Preferred Option

Prescription periods that differ according to the expected lifetime of the structure may be the most reasonable solution. But this solution, and other distinguishing criteria used in the legal systems described under Comment C, may lead to serious qualification problems. In particular, there will be pressure on the courts to limit the categories with short limitation periods (minor defects, shorter expected lifetime) and to extend the categories with long limitation periods (considerable defects, longer expected lifetime and liability for fault). Criteria referring to the type of the structure, distinguishing for instance between buildings and other structures, are easiest to apply, but there may be structures with a similar expected lifetime that are excluded in an unfair manner. The seriousness of defects is difficult to establish in an objective manner, thus the costs of establishing what limitation period should apply and the resulting uncertainty may be substantial. Allowing longer limitation periods by providing the possibility of showing fault of the constructor deprives the constructor of much of the protection the limitation period is supposed to give him. This is because it will often be possible to frame the situation as one where the constructor could have prevented the defect by taking precautions.

The solution laid down in the PECL is to have a relatively short limitation period of three years, which can be extended to ten years in some situations, especially in the case the creditor was not aware of the facts that gave rise to the claim and could not reasonably be aware of them. This solution is accepted for construction as well, because a ten-year period is reasonably in line with national laws. However, ignorance on the part of the client is no ground for suspension of prescription of claims for other remedies that generally are very burdensome for the constructor, such as specific performance and termination.

E. Relation to PECL and Other Parts of the Principles

The rules of this Article are closely related to the rules of the PECL mentioned in the Article itself and to the other rules on prescription in Chapter 14 PECL.

F. Character of the Rule

In principle, the parties may deviate from the prescription rules in this Article, either extending or limiting the prescription period or altering the moment it starts running. Deviation to the detriment of the client in standard contract terms may, however,

constitute an unfair term under Article 4:110 PECL (Unfair Terms not Individually Negotiated).

G. Remedies

The availability of remedies in the case of non-performance is the main topic dealt with in this Article.

Comparative Notes

1. *Limitation Period for Actions based on Defects*
The length of prescription periods for the most common situations regarding building contracts varies between countries and between situations. Caution is necessary. The general trend can be seen by showing the range: from twenty years (THE NETHERLANDS for buildings, CC art. 7:761), twelve years (ENGLAND, Section 5 and 8 Limitation Act 1980), ten years (SWEDEN, for consumer contracts KTjL art. 17, THE NETHERLANDS CC art. 7:761 for other goods, FRANCE for the most common situations (CC art. 1792), ITALY (CC art. 1669), GREECE (CC art. 693), BELGIUM (CC art. 1792), five years in PORTUGAL (CC art. 1226) and GERMANY for buildings (CC 634a para. 1), three years in AUSTRIA (CC arts. 933, 1167 and 1489) and finally to two years in GERMANY for movables (CC 634a para. 2). Shorter periods may apply to the issuing of complaints for known defects.
No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Limitation Period for Actions based on Defects*
AUSTRIA The client basically has two avenues of complaint with respect to the defects. CC art. 1167 is a special provision on warranty for defects *(Gewährleistung)* in the field of contracts of work. The general rules for non-performance set forth in CC art. 922 ff are still applicable to the extent that CC art. 1167 does not deviate from them K / W, Grundriss I, 406. CC Art. 933 sets forth a period of 6 months in case of movables and 3 years in case of immovables in order to bring a claim based on a defect becoming apparent within the periods mentioned running from the acceptance. The parties may deviate from these rules contractually in both directions (that is either prolonging or cutting short) only subject to Consumer Law and *Sittenwidrigkeit*; the ÖNORMEN establish a period of 2 years for immovables and 1 year for movables including a duty to inform *(Rügepflicht)*. The loss inherent in the defect itself *(Mangelschaden)* can be recovered by means of legal warranty, subject to a shorter period of limitation, but also by means of damages K / W, Grundriss I, 408, (269ff.). Here, the limitation period of 3 years is running as of the knowledge of the wrongdoer and the damage (CC art. 1489), see Welser, Schadenersatz statt Gewährleistung, 1994.
BELGIUM The prescription period is 10 years, see CC arts. 1792 and 2270.

ENGLAND The general rule is 6 years from the relevant non-performance, however for contracts made under seal (which construction contracts commonly are) the limitation period is 12 years: Limitation Act 1980, arts. 5 and 8

FRANCE Four different time limits apply: 1. For damages jeopardising the solidity of the work or render it unsuitable for its purpose, the time limit is ten years (CC art. 2270). If such damage arises, whatever is the cause of it, the contractor is under an obligation of result, according to CC art. 1792. This liability is called the '*garantie décennale*'. 2. For damages jeopardising the functioning of the equipment separable from the work, the guarantee is extending two years. This is a strict liability (CC art. 1792-3). 3. The constructor must guarantee the complete achievement *(parfait achèvement)* of the work for one year. This guarantee covers the defects reported by the client at the moment of the reception of the work or the defects noticed afterwards (CC art. 1792-6 para. 2.). 4. When the malperfomance on the side of the contractor does not lead to a damage of point 1 and 2, what FRENCH lawyers call "*dommages intermédiaires*", the legal regime of guarantee is not applicable. Then the general provisions on contractual liability are applicable. For those damages the client must prove that the contractor committed a fault, which means that he is under an obligation of means, Cass.civ. I, 6 October 1981, Bull.civ. I, no. 269. The time limit is then the general one for contracts, which is 30 years.

GERMANY The prescription period for claims is regulated in CC art. 634a. It is now generally five years for (work on) buildings and two years for (work on) movables.

GREECE CC Article 693 mentions prescription periods of ten years in case of buildings or other immovable installations; six months in the other cases. This limitation period applies to claims of the client against the contractor for defects in the work. The prescription period starts with acceptance of the work (the coming of the work into the possession of the client or in any other way under his control). The parties may not deviate from the time limits provided. Any contractual stipulation for shorter or longer limitation period is invalid, according to CC art. 275. The parties may, however, agree that the contractor will remain liable for a certain period of time. CC Art. 556 (a provision relating to sales contracts which applies by analogy to construction contracts) relates to a time period that has been agreed for the liability of the constructor in respect of a defect or the lack of an agreed quality. In case of doubt the meaning of such stipulation shall be that the limitation period regarding defects and deficiencies that have appeared within the said period shall begin to run as from the time they were revealed.

ITALY When the defect is apparent, the client has to notify it at the moment of the acceptance of the work, in order not to loose the claims. The time limit for prescription is two years from delivery of the work. In case of hidden defects, one should differentiate between ruin and grave defects and other defects. In case of grave defects (CC art. 1669), such as total or partial ruin of the construction, or clear danger of damage or any other grave defect, one may detect three different steps: the discovery, that has to intervene within ten years from completion of the work; the notification within one year from discovery; a term for prescription of two years from the denunciation. Therefore, the maximum amount of time is thirteen years. For other hidden defects, the client has to notify within sixty days from discovery and in any case not after two years from delivery. The time limit for prescription is two years. The time limit may therefore reach a maximum of 4 years from delivery.

THE NETHERLANDS CC art. 7:761, para. 1, states the prescription period is two years after the client's initial protest. If the client has given the contractor an additional period of time to perform correctly, the prescription period starts at the end of that additional period of time. In any case, the client looses the right to claim in 20 years after delivery of the work in case of a building and in 10 years after delivery of other works (para. 2). According to *UAV 1989* art. 12-4, a claim against the contractor for hidden defects is inadmissible if more than 5 years have expired after delivery, even if the defect remained hidden for more than 3 years. *AVA 1992* art. 10, para. 2 contains a similar rule for 'normal' hidden defects; for 'serious defects', the time limit is 10 years. The Article states that a defect is only to be considered 'serious' if it endangers the stability of the building or an essential part thereof.

POLAND Claims based on defects expire after lapse of 3 years, counted from the moment of the final acceptance of the structure (CC art. 568 para. 1 applicable on the basis of CC art. 656).

PORTUGAL Client must give notice of defects to constructor within 30 days after discovering them (CC art. 1220), but never more than 2 years after delivery (CC art. 1224 para. 2). It is a condition for claiming remedies (STJ 19 November 1971, BolMinJus 211, 297; CA Evora, 15 October 1987, CJ 1987 IV, 293. Client has then a term of 1 year to claim for remedies (art. 1224 CC), otherwise prescription will be the consequence thereof: STJ 17 May 1983, BolMinJuS 327, 646. Evident defects are presumed known by client: CC art 1219 para. 2, and the client bears the burden of proof of not knowing them, see CA Porto, 25 May 1992, CJ 1992 III, 291. There is also a guarantee term of 5 years for building construction works (CC art. 1226).

SPAIN Pursuant to LOE art. 18, para. 1, the action to claim for defects in the construction work prescribed in two years from the moment the defects appear (hidden defects). Pursuant to the STS of 15 October 1991 (Aranzadi Civil 7449), the period starts counting from the moment the client knows about the defects. Regarding non-hidden defects, the client is obliged to give notice of them within 30 days from the moment the construction work is finalized (LOE art. 6).

SWEDEN For defects which should have been noticed at the final inspection the client has a period of three months to notify the contractor, AB 92 art. 7:13, second paragraph. As for a defect that was not and should not have been noticed at the final inspection, AB 92 contains a guarantee period of two years, unless otherwise agreed, running from the time of the approval of the contract work, art. 4:7. The contractor is liable for defects appearing during the guarantee period, art. 5:6, and has a duty to repair the defects, unless he can prove that the defects are due to the client's neglect, see Hellner, Speciell avtalsrätt II, first book, p. 132. The contractor is also liable for major defects appearing after the expiry of the guarantee period, if the defect was caused by his negligence, art. 5:7. For this kind of defect, the general limitation period of ten years will apply, art. 1 *preskriptionslagen*, the Limitation Act. The limitation period concerning consumer services generally amounts to two years after the completion of the service. However, a ten-year time-period will apply for services provided on land, buildings or other constructions on land or in water or on other immovables, KTjL art. 17, first paragraph. The limitation period is always ten years if the professional has acted grossly negligent or against good faith, art. 17 para. 2.

Chapter 3:
Processing

General Comments

A. General Idea

This Chapter applies to services performed on existing things, hereafter referred to as 'processing'. Processing may be seen as the improvement of the condition of an existing thing, in order to effect or prevent a change in that thing. In essence, processing is therefore mainly about repair, cleaning or maintenance of a thing. It is characterised by the fact that the thing is physically handed over to the service provider or otherwise placed under his control. The main problem that the rules on processing will have to deal with is the prevention of damage to the thing during the period that it is under the service provider's control and the service provider's liability for the occurrence thereof.

B. Scope of Application of this Chapter

The present Chapter applies to any contract where a service is performed on an existing thing. When drafting these rules, the focus has been on repair, maintenance and cleaning services, although these rules may also be applied to other processing services when deemed appropriate. An exception to the general rule of applicability is where construction work is being performed on a thing: Article 2:101(1) (Scope of Application) explicitly qualifies such a contract as a construction contract.

C. Basic Principles

The rules of this Chapter, in combination with the rules of Chapter 1 (General Provisions), reflect some basic principles:

I. The attribution of causes for defects, as a rule, follows the principle that each party is responsible for is own choices relating to the performance of the service. Each party, for instance, is responsible for damage caused by the materials it supplied; see Articles 1:106 (Duties of the Service Provider Regarding Input) and 1:109 (Directions of the Client).

II. This principle is linked to the idea that when a processor observes that a choice of the client may threaten the final outcome of the service being in conformity with the reasonable expectations of the client, he has to warn the client. This is, for instance, reflected in the duty of the processor to warn about problems regarding the circumstances in which the service is to be performed; see Articles 1:110

(Contractual Duty of the Service Provider to Warn) and 3:103. On the other hand, defects discovered by the client during the performance of the service or during inspection before the thing is returned must be notified to the processor; see Article 1:113 (Failure to Notify for Non-Conformity).

III. If the cause of the defect in the outcome of the service cannot be established, the processor will bear the risk if the processor can be expected to achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract; see Article 3:105. However, under Article 3:104 the client will bear the risk if the processor cannot be expected to achieve such a result. In any case, the thing is eventually to be returned to the client. This is expressed in Article 3:107.

IV. In order to prevent defects occurring, the processor has various duties. The processor is to gather information regarding the existing situation, such as the condition of the thing for which the processing contract was concluded, cf. Article 1:105 (Circumstances in which the Service Is to Be Performed), he is to use materials and other input of sufficient quality, cf. Article 1:106 (Duties of Service Provider regarding Input) and he is to take sufficient care during the performance of the service, cf. Article 1:107 (General Standard of Care for Services) and Article 3:104.

V. The parties have a duty to co-operate. Before the contract is concluded, they have to exchange essential information in order to enable both to conclude a contract that is as beneficial as possible for each of them, and more in particular to enable the client to compare the offer of the processor with alternatives as well as assessing the risks involved. These duties are laid down in Article 1:103 (Pre-contractual Duties to Warn) and Article 1:104 (Duty to Co-operate).

VI. Inspection and supervision are presumed to take place only in the interest of the client. So, failure to take these measures does not relieve the processor from his liability; see Article 3:106.

VII. The basic idea governing variation is that the client should be granted some protection – because of his dependence on the processor – in the form of a proportionality rule regarding the price for variations; see Article 1:111 (Variation of the Service Contract).

VIII. The system of remedies is that of the Principles of European Contract Law (PECL), with some modifications regarding specific performance and, more in particular, repair, and a predominance of that remedy over other remedies, notably termination; see Articles 3:110 and 3:111. If the processor breached a duty, which has not or not yet lead to a fundamental non-performance, Article 1:112 (Remedies for Breach of Duties of the Service Provider) applies. It contains specific provisions regarding the possibility of claiming damages and of terminating the contract on the basis of fundamental non-performance.

These principles are explained in the Comments to the various Articles.

D. Terminology

This Chapter applies to all services performed on existing things. In this Chapter, such services are indicated by the term 'processing' or 'processing services'. The term 'processor' is used to refer to the provider of the service. The term is used as a generic term, thus covering all persons who repair, maintain or clean things or otherwise provide processing services. In the Comments and Notes, the terms 'repairer', 'maintainer', 'cleaner' or other terms will be used to refer to the provider of the service when such is deemed appropriate. The term 'thing' encompasses movable goods, immovable property and intangibles alike.

E. Sources

This Chapter is based on comparative material regarding the repair, maintenance and – to a lesser extent – cleaning of existing movable things. In most legal systems that have a Civil Code, processing services are at present governed by the rules on the contract for work. These rules often also apply to construction contracts. In contrast to the situation concerning construction, specific rules for processing services usually are lacking. Moreover, case law on processing services hardly exists, whereas standard conditions for different types of processing services are not very much harmonised. Therefore, apart from repair, maintenance and cleaning, comparative material that specifically relates to processing services is very hard to find. For ENGLISH law, comparative information has been collected regarding the rules applicable to bailment, which need not be based on a contractual relation between the parties.

However, as is explained in the General Introduction to the Principles of European Law on Services Contracts, not every legal system of the Member States of the European Union could be studied. For lack of manpower, the law of the Member States that have joined the European Union on 1 May 2004 could not be taken into account, with the exception of POLAND, from which country a national reporter could be recruited. Moreover, as no reporters from BELGIUM, DENMARK, IRELAND, LUXEMBURG, and SCOTLAND have been found, these legal systems are not represented in the comparative legal study underlying this Chapter either. FINNISH, GREEK and SPANISH law are represented only to a certain extent in this Chapter.

In the comparative and national notes for each Article it is indicated whether or not (and to what extent) comparative legal information was collected for a particular topic. Firstly, the *comparative* notes generally show the reader for which Member States information has been collected and for which this was not possible. Additionally, if no (reliable) information was collected for a particular Member State, the relevant *national* note will read: "No information". If a national note only refers to statute law, to any other statutory instrument, or to a provision taken from a national standard form of contract, it means that the information in the note is not based on a further analysis of relevant case law or legal doctrine. If, however, references to case law and/or legal doctrine have been inserted in a national note, it means that the information is based on a more thorough analysis of the topic in the relevant Member State. In the national

notes, the Member States that have joined the European Union on 1 May 2004 are not listed, with the exception of POLAND, for reasons set out above.

From the above, it follows that in the legal systems of the Member States that have been studied, the law of processing services is rather underdeveloped. This may, at least in part, be explained from an economic point of view by the fact that the value added by this type of services is relatively low compared to the value added in construction services and professional services. The financial interests that are at stake in disputes arising from processing services are often rather insignificant, thus making it hardly worthwhile for parties to go to court. Because of the small number of cases before court, there has not been a strong incentive for the legislatures to develop detailed regulation in statutory law.

However, the small number of cases and the lack of specific legislation does not mean that legislation is not needed. On the contrary, one could argue that the fact that the state of the law is unclear prevents parties from going to court as they are both faced with an uncertain outcome of a costly procedure, whereas the gains they may expect from such a procedure are relatively low. Under these circumstances, a cost-benefit analysis would require any lawyer to recommend his client not to take any legal action. As a result, many small claims are not settled in or out of court, but simply written off. This may cause substantial economic loss to both small and medium-sized enterprises and consumers. This Chapter aims at taking away part of the legal uncertainty, thus paving the way for settlements of claims in or out of court, which, from an economic point of view, may benefit general welfare.

Relation to Other Parts of the Principles

F. Relation to Principles of European Contract Law (PECL) in General

The obligation to process a thing, whether it is cleaning, repairing or maintaining the thing, is a normal contractual obligation, which is governed by the PECL. In the Comments to each Article, the relationship to the PECL will be explained. Most of the time, the Articles are applications of the rules in the PECL to the specific area of processing. Because the Articles are more apt to deal with the typical facts that may arise in disputes on processing, they are easier to apply than the more abstract rules of the PECL. They will therefore give the parties better guidance. The rules presented here build on the PECL and, with some exceptions, do not deviate from those rules. Where the rules do deviate from the PECL, this is done to take into account the peculiarities of the specific service. Such a deviation is indicated explicitly in the Comments to the relevant Articles. Articles 3:110 and 3:111 contain the most important derogations from PECL. In these Articles, as is also done for sales contracts and construction contracts – the rules of PECL are slightly amended in order to emphasise the right to specific performance. Article 3:108 contains a further derogation as to the order of payment.

G. Relation to Chapter 1 (General Provisions) of the Principles of European Law on Service Contracts (PELSC) in General

According to Article 1:101(2) (Scope of Application), the general provisions of Chapter 1 (General Provisions) are directly applicable to processing contracts unless the present Chapter explicitly provides otherwise. In the next parts of these Comments, each of the Articles of Chapter 1 (General Provisions) will be discussed briefly in order to explain how these rules can be applied to processing contracts. This will only be done, however, for the Articles, which have no equivalent in the present Chapter. For Articles of Chapter 1 (General Provisions) that have an equivalent Article in the present Chapter, like Article 1:104 (Duty to Co-operate), which is linked to Article 3:102 the specific applications of the general rules to processing will be explained in Comments to the latter Article even if that Article only touches on a specific element of the provision in Chapter 1 (General Provisions).

H. Relation to Article 1:102 (Price)

Article 1:102(1) (Price) states that a processor who has concluded a contract in the course of his profession or business is entitled to a price. Paragraph (2) adds that where the parties have neither determined the price nor the way to calculate it, the price is equal to the market price. In processing contracts, the parties will often not have explicitly discussed the price due for the performance of the service. In practice, this means that the price will be determined unilaterally by the processor, in accordance with his normal rate; this rate presumably is in accordance with the market price. The client may often be considered to have tacitly agreed to this way of establishing the price, and bears the burden to prove that the market price differs from the price that this processor charges.

In some situations, the processor may have agreed to a price that does not cover his costs. Normally, this will be his professional risk. As a professional provider of services, the processor should have foreseen that it might be necessary to make other expenses than those that could be anticipated at the time that the contract was concluded. To that extent, the processor should have included a margin on top of the costs that he would certainly have to make to serve as a buffer. Illustration 1 may serve as an example of a situation where the processor should have included such a margin.

> *Illustration 1*
> A painter notices that he needs more paint to finish painting a wall than he had expected, and orders new paint. The painter will have to bear these expenses himself, for he should have better calculated the amount of paint he would need to perform the service.

More difficult to deal with are the situations where the 'extra' expenses exceed even the level of such a margin.

Illustration 2
A client requests a garage keeper to replace the exhaust pipe of his Lamborghini, a very expensive and rare car. When the garage keeper examines the car, he notices that the brakes are almost worn out. He tries to contact the client to inform him about this and to ask for instructions. As he does not succeed in getting in touch with the client and does not have the necessary storage facilities himself, he leaves the car in a parking place. Given the great value of the car, the garage keeper has the parking place guarded.

Should the client compensate these costs? In this case, it is not so much a matter of extra expenses, but more of a variation of contract under Article 1:111 (Variation of the Service Contract), or even a change of circumstances as meant under Article 6:111 PECL (Change of Circumstances).

I. Relation to Article 1:103 (Pre-contractual Duties to Warn)

Article 1:103(1)(a, b) (Pre-contractual Duties to Warn) occasionally requires the processor to obtain information from the client before the contract is concluded about the client's reason for having the service performed – thus also about the expectations the client has of the outcome of the service – and about the condition of the thing on which the service is to be performed. Subsequently, the processor may be required to inform the client about the main characteristics of the processing service to be performed and the main risks involved in the performance of the service, in order for the client to make an informed decision as to the service being performed. This is a general principle for services contracts, which can be found throughout case law and statutory law regulating services, as is explained in more detail in the Comments to Article 1:103 (Pre-contractual Duties to Warn).

The borderline between pre-contractual duties to warn and the co-operation that is required during the contractual phase is rather vague. However, whenever information that should have been acquired pre-contractually is gathered after conclusion of the contract and, as a result thereof, the service is more expensive than the processor had thought it to be, the processor is not entitled to raise the price of the service nor to ask for a change of the contract under Article 1:111 (Variation of the Service Contract). In exceptional cases, Article 6:111 (Change of Circumstances) may provide relief for the processor.

In order to perform the service in accordance with the reasonable expectations of the client, the processor has to collect the necessary information in so far as is needed to properly perform the service. Such information, at least in part, must be gathered even before the contract is concluded, in order to have an indication of whether or not the service to be provided by the processor can at all meet the client's interests. This implies that the processor will need to inquire about the client's wishes. A stronger obligation to that extent exists after the conclusion of the contract, but a more restricted obligation already exists pre-contractually. Furthermore, the client is not to expect the provider to ask about specifics the provider cannot reasonably know of.

Therefore, the client has to take the initiative in offering information about specific and special wishes.

J. Relation to Article 1:106 (Duties of the Service Provider regarding Input)

Paragraphs (1) and (2) of Article 1:106 (Duties of the Service Provider regarding Input) deal with the question whether the processor must perform the contract himself or may call in a third party to perform the contract in his place. In processing contracts, the person of the processor is usually not relevant to the client. Therefore, the client is normally not worse off if the contract is actually performed by a third party, as long as performance of the contract is in accordance with what the client could reasonably have expected from the processor he concluded the contract with. As the processor would be liable for any non-performance of the third party under Article 8:107 PECL (Performance Entrusted to Another), there is not a problem from the point of view of liability either. However, the client is entitled to demand that any subprocessor engaged by the processor is competent and therefore capable of performing the contract properly.

If the processor is to provide the tools or materials for the performance of the service – which is normally the case –, he must use tools and materials that are in conformity with the contract, applicable statutory rules and fit to achieve the particular purpose for which they are to be used; see Article 1:106(3) (Duties of the Service Provider regarding Input).

> *Illustration 3*
> A farmer contracts the spraying of pesticides on his crop out to a specialised company. This company is to use pesticides that have not been banned by the government and that protect the crop from diseases that are typical for that crop.

Where the *client* provides the tools or materials, the processor is not liable for their not being fit to produce a proper outcome of the service, unless he has breached his duty to warn under Article 1:110 (Contractual Duty of the Service Provider to Warn).

K. Relation to Article 1:109 (Directions of the Client)

In many situations, it is impossible to foresee every detail of the service, especially if the contract runs for a prolonged period. Often it is much easier to take decisions about particular details at a later stage. Directions are then the tools that may ensure that the service will eventually meet the client's interests. Directions may deal with all aspects of the input, the process and the final result of the service. On the other hand, directions may run contrary to the expectations of the processor, for they may force the processor to change the way he intended to perform the service, thus leading to extra costs. Article 1:109 (Directions of the Client), together with Article 1:111 (Variation of the Service Contract), provides an in-between solution by acknowledging the client's right to give directions, without ignoring the processor's legitimate interests.

Directions may be given explicitly or implicitly, for instance by providing materials or tools to the processor with the intention that they be used for the performance of the service.

Directions may conflict with the obligations of the processor under the present Chapter or under Chapter 1 (General Provisions), and/or lead to a result that is not in conformity with the client's expectations. Article 1:109 (Directions of the Client) deals with this problem by providing that, as a general principle, the client is responsible for the consequences of his directions. In following the directions of the client, the processor merely fulfils his obligations. On the other hand, the processor – as a professional provider of services – is usually in a much better position to assess the consequences of the directions given by the client. Channelling some of the responsibility to the processor is therefore reasonable in those cases where he should have foreseen problems and neglected to act. In other words, the processor should not bear the consequences of problems arising from a bad direction, and should therefore be free from liability, unless the processor was under a duty to warn – i. e. he knew or had reason to know that the direction was wrong – and breached that duty. Whether or not the processor had reason to know that the direction was wrong is to be determined in accordance with Article 1:110(1) (Contractual Duty of the Service Provider to Warn).

L. Relation to Article 1:110 (Contractual Duty of the Service Provider to Warn)

A duty to warn may exist with regard to the defectiveness of a direction, given by the client, provided that the processor knows or has reason to know of the defectiveness of the direction. Whether or not the processor has reason to know that the direction is defective will depend upon the obviousness of the problematic nature of the direction and of the expertise the client may expect from the processor, according to the standard of care the processor is under, as is expressed in Article 1:110(1) (Contractual Duty of the Service Provider to Warn). The duty to warn is not intended to be a disguised duty for the processor to investigate the correctness of a direction. Therefore, the processor may not be required to investigate the matter actively, but insofar as he notices or without specific investigation of the matter should have noticed that the instruction is defective, he is to inform the client thereof.

A duty to warn is only useful and efficient insofar as the client is or is presumed to be in need of information. Where such is not the case – i. e. if the client knows or most likely will know the information independently of being warned by the processor – a duty to warn would only burden the processor and would lead to unnecessary transfer of information. Such a transfer leads to added costs, and therefore higher prices, without any real advantage for any of the parties. However, the mere fact that the client was assisted by another person or that he, in theory, was competent himself does not relieve the processor from his duty to warn. In establishing whether or not the client had or should have had a particular item of knowledge, the same criterion is applied as with regard to the question whether or not a duty to warn exists for the processor. It should especially be clear that the client is not under any duty to investigate the matter actively.

M. Relation to Article 1:111 (Variation of the Service Contract)

Variations in a processing contract often result from a warning under Article 1:110 (Contractual Duty of the Service Provider to Warn). Article 1:111 (Variation of the Service Contract) establishes that both parties should accept reasonable variations. Moreover, it provides guidelines for dealing with price consequences and with the extra time that the processor may have to be granted to take the variations into account.

> *Illustration 4*
> A client requests a bicycle repairer to fix a puncture. When he examines the tyres of the bicycle, he notices that they are both worn and warns the client thereof. The client may wish a variation of the contract in that the bicycle repairer changes both tyres, but the price of the service will be changed accordingly.

As regards the situation where a variation leading to a higher price may be claimed by the processor when he has agreed to too low a price, see Comment H above.

N. Relation to Article 1:112 (Remedies for Breach of Duties of the Service Provider)

Article 1:112 (Remedies for Breach of Duties of the Service Provider) contains modifications of Chapter 9 PECL (Particular Remedies for Non-Performance). Article 1:112(1) (Remedies for Breach of Duties of the Service Provider) specifies that, where the client has a claim for damages, such a claim includes the costs incurred to establish the breach by the processor of any of his duties and, more importantly, the costs the client incurred to prevent the end result of the service from non-conforming to the contract, provided the client acted reasonably in incurring these costs.

> *Illustration 5*
> A museum has Egyptian artefacts restored. The restorer is to protect the artefacts against humidity, wind and changes in temperature. The museum director, when visiting the restorer's workshop, notices that the artefacts are not sufficiently protected. He immediately takes measures to prevent the artefacts from being damaged. The costs thereof have to be borne by the restorer.

In paragraph (2) it is specified that, where it is not yet clear whether the end result will be achieved in spite of a breach of a duty by the processor, the client may withhold performance of any reciprocal obligations under Article 9:201 PECL (Right to Withhold Performance). Termination at such a time is allowed only when it is already clear that the breach of the processor's duty will lead to a fundamental non-performance (paragraph (3)).

O. Relation to Article 1:113 (Failure to Notify for Non-Conformity)

Even if the client is entitled to inspect or to supervise the service being performed, the client is not bound to inspect the performance of the service actively. However, if the client becomes aware of a non-performance – either during or after the performance of the service – he has to notify the processor thereof within a reasonable time. Failure to notify may lead to loss of some remedies, but the client's right to obtain damages is not affected by it.

P. Relation to Article 1:115 (Cancellation of the Service Contract)

Under Article 1:115 (Cancellation of the Service Contract), the client is entitled to end the contract, but the client who invokes that privilege is required to compensate the processor fully. A specific situation arises when, in response to the processor's warning against a specific risk, the client decides to cancel the contract. This may be the case, for instance, if the measures necessary to prevent the risk from materialising are so costly that performance of the service becomes too expensive or if the precautionary measures to be taken render the service so different (or take so long to be performed) that the service would no longer be of use to the client. In such a case, it would no longer be in the interest of the client to pursue the performance of that service. Cancellation would in that case constitute a good solution. However, the processor should retain the right to recover the expenses he already made and to receive the profit he would have earned upon completion of the service.

Illustration 6
The elevator of a hotel has broken down. The hotel-keeper requests a processor to repair the elevator. When the processor examines the elevator, he notices that the elevator needs extensive repair for it to be safe; it would even be better to renew the entire system. The processor warns the client. As both extensive repair and renewal are too costly for the client, he may cancel the contract. He is, however, required to pay the price for the service requested minus the expenses the processor would have incurred if the service were performed.

Q. Relation to Chapters 2 (Construction) and 4 (Storage)

There is a close relation between the rules on processing and the rules on construction. While construction is about the creation of a new thing (usually, though not necessarily immovable property), processing relates to the work on an already existing thing. In theory, it is easy to distinguish between making something new and applying a process to something that already exists. Moreover, the need for regulation will be different, because of the different interests involved. In the area of construction, the main problem will be whether the building or other thing to be built will be fit for its intended purpose. Whether or not the end product (the building) meets that purpose can usually be established relatively easy. At first glance, the situation does not seem to be different when a car mechanic has to repair a car: whether or not he has succeeded is relatively

easy to establish. Yet, the car mechanic charged with repairing the car usually does not know what exactly is wrong with the car before he examines it. Therefore, he is usually not in a position to know beforehand whether he can solve the problem or not. Consequently, a processor will often not be able to guarantee a particular result before he has examined the thing that is to be repaired. For other processing services, such as maintenance and cleaning, it is even harder to determine what result is to be achieved. Moreover, in the case of construction the risk of damage occurring to the thing rests upon the constructor until the time of delivery of the thing to the client. Consequently, damage occurring during the construction period in principle falls upon the constructor, obliging him to repair the damage or even to perform again. On the other hand, in the case of processing the thing already belongs to the client. If damage occurs during the processing of the thing, the question arises whether the costs thereof are on the client or whether the client may invoke the processor's liability. The processor is therefore not automatically the one who has to bear the damage. Furthermore, the processor will often be able to exclude or limit his liability contractually.

Although building a new thing (construction) and working on an existing thing (processing) are thus distinctly different, in some situations it will be difficult to distinguish between the two. The replacement of an old roof of a building by a new one may be seen as repair of the old roof, in which case the service could be qualified as processing. However, one could also regard this as the building of a new thing (the roof) on top of an old thing (the rest of the building). In the latter case, the replacement of the roof would be qualified as construction. Finally, insofar as repair of the roof is intended to remedy non-conformity of the building (specific performance), the repair would definitely be governed by the rules on construction. To avoid these specific qualification problems, Article 2:101(3) (Scope of Application) explicitly provides that the rules on construction apply, with appropriate modifications, to contracts by which the service provider undertakes to perform construction work on an existing thing. In Comment E to Article 3:101 it is explained why in this particular case the rules on processing do not apply.

More generally, it may be noted that the rules on processing and those on construction have been carefully aligned. To that extent, the rules on processing are very similar to, yet not always as detailed as, those on construction. As a consequence, the rules on processing and construction do not produce substantively different results, thus leaving the difficult question of qualification – drawing the borderline between construction and processing – to be of little practical relevance. To this general rule, one exception should be mentioned. Whereas Chapter 2 (Construction) does not contain any specific rules on the limitation of liability, Article 3:112 contains a specification of Article 1:114(2) (Limitation of Liability), creating a 'safe haven' for particular limitation clauses.

A strong link also exists between processing and storage. Both processing and storage are characterised by the fact that the control over a thing is handed over to the provider of the service. Although the reason for that shift in control is different (a processor has to work on the thing, whereas a storer merely has to store it), both services run the risk of damage occurring to the thing during the service. For that reason, the rules on processing and storage, just like the rules on processing and construction, have been

closely aligned. A hierarchy of remedies, as introduced in Chapter 2 (Construction) and in the present Chapter, does, however, not exist for storage contracts.

R. Relation to Principles of European Law on Sales (PELS)

Under Article 2 of the Consumer Sales Directive (Directive 1999/44/EC, OJ 1999, L 171/12), the rules on consumer sales also apply if the seller, in addition to selling a thing, undertakes to install or assemble it. The solution in the present Chapter is different, as the installation or assembly of the thing would be considered a processing service: under Article 3:101(3) the rules on processing apply to the installation or assembly of the thing, but appropriate modifications will be made to accommodate the operation of the sales provisions. It should be noted, however, that the rules on processing and sales have been closely aligned, especially with regard to the applicable remedies, so that qualification is of less importance. Differences may be noted, nevertheless, especially with regard to the rules on notification, as the rules on notification in services contracts in Article 1:113 (Failure to Notify for Non-Conformity) may not be as harsh on the client as the rules in the Principles of European Law on Sales.

S. Mandatory or Default Rule

The present Chapter only contains default rules. It could be argued that there is a need for specific consumer protection in the present Chapter, so that no recourse needs to be had to general rules of consumer protection. Such an approach would mean that the protection awarded to consumers in consumer sales contracts would be extended to service contracts. In SWEDEN, such is already the case, since the *Konsumenttjänstlagen* (Law on Consumer Services) in essence awards the same kind of protection as does the *Konsumentköplagen* (Law on Sales of Consumer Goods). In FINLAND too, specific legislation governing consumer contracts exists (Chapter 8 of the Consumer Protection Act on Certain consumer service contracts). However, such mandatory rules hardly exist in other legal systems. For that reason, mandatory provisions have not been included in this Chapter.

Article 3:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the processor, is to perform a service on an existing movable or incorporeal thing or to an immovable structure for another party, the client.
(2) This Chapter applies in particular to contracts whereby the processor is to repair, maintain or clean an existing movable or incorporeal thing or immovable structure.
(3) When, under a contract, a party is bound to process and to supply another service, this Chapter applies to the parts of the contract that involve processing, with appropriate modifications.

Comments

A. General Idea

Processing may be described as the improvement of the condition of an existing thing, in order to effect or prevent a change in that thing.

Illustration 1
A car has broken down and is brought to a garage for repair.

This is the 'classical' example of the work on an existing thing. It of course falls within the scope of this Chapter.

In order to discharge the obligation, the thing, especially in the case of a movable good, will normally – though not necessarily – be brought into the care of the provider of the service (the processor). Like storage, processing will therefore often go together with the handing over of the thing to the provider of the service. In contrast to storage, the thing is not handed over for safeguarding, but to be worked on by the provider of the service. In performing the service, many things may go wrong, thus damaging the thing. The risk of such damage occurring is the main issue in processing contracts.

When the contract concerns the processing of immovable property, the property will of course not be handed over. The client will, however, have to hand over to the processor the control over the immovable property or part thereof. He will often do so by giving access to the property. The main issue for the work on immovable property, again, is the risk of damage, in this case not only to the thing itself but also to other things located at or near the thing.

B. Interests at Stake and Policy Considerations

The present Article states the scope of application of the rules on processing. The main policy issue is why some types of contracts are to be covered by the abstract and unfamiliar concept of processing. The idea behind the present Chapter is that contracts concerning work on existing things are traditionally covered by the same rules as construction contracts, which were, however, designed to regulate the creation of a new thing instead of its alteration or maintenance. As a result, the rules that traditionally govern repair contracts, maintenance contracts and cleaning contracts are not very apt for dealing with the specificities following from such contracts and do deal with issues that are relatively unimportant to such contracts. For processing, the fact that the processor takes control over the thing – either because it is handed over to the processor or because the processor is given access to the site on which the immovable property is being erected – implies that the main risk involved in the performance of the contract on behalf of the client is that the thing is damaged during the performance of the contract. The rules in this Chapter aim at minimising that risk by imposing quality standards on the processor.

C. Comparative Overview

In most systems, processing services are presently covered by the general rules on the contract for work *(Werkvertrag, contrat d'entreprise)*, even though that contract type usually primarily focuses on the *creation* of goods – more specifically, the creation of immovable property. The rules of the contract for work apply to processing services that are performed on movable goods and immovable property alike, and in some countries also on intangible things such as software programs. Mostly, they are also applied to gratuitous services, either directly or by way of analogy.

D. Preferred Option

As is the case in existing legislation, the scope of the present Chapter is broad. Thus, in the first paragraph of the Article it is stated that the Chapter applies to all contracts whereby a party is to perform a service on an existing thing. In order to give the reader some more information as to the type of services covered by this Chapter, paragraph (2) specifies that it applies in particular to contracts whereby the processor is to repair, maintain or clean an existing thing. The present Chapter, however, also applies to modern types of services, e. g. a contract by which a software program is to be reprogrammed or a computer system is to be maintained. Moreover, the present Chapter also applies to purely commercial contracts, e. g. where the packaging of things produced by a client is outsourced to a professional packaging or wrapping service provider. Paragraph (3) is a specification of Article 1:101(3) (Scope of Application).

E. Relation to PECL and Other Parts of the Principles

As was remarked in Comment Q of the General Comments to this Chapter, the relation between the rules on processing and the rules on construction is a close one as the services rendered are rather similar. For this reason, the rules in Chapters 2 (Construction) and 3 (Processing) have been closely aligned. Nevertheless, it may be difficult to qualify a specific contract as either a processing or a construction contract.

> *Illustration 2*
> A thatcher replaces the existing roof of a cottage by new thatch. This is a rather traditional example of a contract for work on an existing thing, but its qualification is not as simple as it seems.

As is set out in Comment Q of the General Comments to this Chapter, Article 2:101(3) (Scope of Application) states that the rules on Construction apply instead of the rules on Processing.

The replacement of an old roof of a building by a new one may be regarded as repair of the old building, in which case the service would be qualified as processing, but it may also be regarded as the building of a new thing (the new roof) on top of an existing structure (the rest of the building). In the latter case, the exchange of the roof would be

qualified as construction. Even though this qualification seems to make less sense then qualification as a processing contract, construction work on existing immovable property is traditionally considered to be governed by the rules on construction. To avoid these specific qualification problems, Article 2:101(3) (Scope of Application) in Chapter 2 (Construction) explicitly provides that the rules on construction apply, with appropriate modifications, to contracts by which the service provider undertakes to perform construction work on an existing immovable property. Consequently, the rules on processing do not apply. The most notable consequence hereof is the exclusion of the application of Article 3:112.

The present Chapter is also related to the Principles of European Law on Sales (PELS). Under Article 2 of the Consumer Sales Directive (Directive 1999/44/EC, *OJ* 1999, L 171/12), the rules on consumer sales also apply if the seller, in addition to selling a thing, undertakes to install or assemble the thing. The solution in the present Chapter is different, as the installation or assembly of the thing would be considered a processing service. It should be noted, however, that the rules on processing and sales have been closely aligned, especially with regard to the applicable remedies, so that qualification is of less importance. Differences may be noted, nevertheless, especially with regard to the rules on notification, as the rules on notification in services contracts in Article 1:113 (Failure to Notify for Non-Conformity) are not as harsh on the client as the rules in the Principles of European Law on Sales.

F. Scope of Application of the Rules

The present Chapter is applicable whenever an existing thing is being worked upon. The main examples of contracts falling within the scope of this Chapter are listed in paragraph (2). According to that paragraph, contracts to maintain, repair or clean an existing (movable, immovable or intangible) good are deemed to be covered by the present Chapter.

The following illustrations may provide more insight into the borderline between processing and other services.

Illustration 3
A piece of furniture is made to look antique by applying specialised techniques.

Even though this treatment would seem to decrease the value of the thing, the goal definitely will be to increase its value. The present Chapter therefore applies.

Illustration 4
A car has broken down and is towed to a garage.

The towing of the car does not 'do' anything to improve the condition of the car. This situation will have to be governed by rules on the transportation of goods.

Illustration 5
A car is to be demolished.

Although the condition of the car will definitely be changed, the work on the car is not meant to improve or even to maintain the condition of the car; moreover, the economic value of the thing *may* increase – for the various parts of the car, sold separately, may yield a higher profit than the car wreck; however, such will not always be the case. Yet, there does not seem to be any reason for not applying the rules on processing.

Illustration 6
A surveillance company supervises the building in which a factory is located.

Although the control over the building is – partly – handed over to the surveillance company, the building is not 'worked' on by the surveillance company. Therefore, the rules on processing do not apply.

As was indicated above, the rules of the present Chapter apply with appropriate modification to such contracts where, in addition to a sales contract, processing services are rendered.

Illustration 7
A client buys a do-it-yourself closet. As the client is all fingers and thumbs, the parties agree that the seller will put the closet together, in return for extra money.

Under Article 3:101(3) the rules on processing will be applied with appropriate modifications to accommodate the operation of the sales provisions.

Illustration 8
A client buys some 5 m planks from a do-it-yourself shop. He wants to use the planks to construct a small wooden shed. The client requests the do-it-yourself shop to saw the planks to the length of 2m each. The employee of the shop accidentally saws the planks to the length of 1.80 m each.

In this illustration, the provisions on processing directly apply to the sawing of the planks, without the appropriate modifications rule of paragraph (3).

Illustration 9
A chimney sweep is requested to sweep the chimney of a house.

This could be considered a borderline situation. Although the thing (the house) is to be worked on, the building as such does not change all that much by the work. Yet, it should be recognised that the work *does* improve the condition of the house, for the sweeping of the chimney reduces the risk of fire. The sweeping of the chimney (a type of cleaning) is therefore covered by the rules in this Chapter.

G. Character of the Rule

This rule determines the scope of application of the present Chapter. It is mandatory in the sense that the parties cannot, in their contract, qualify it as a different type of contract if the contract contains the essential elements included in the present Article. Conversely, if the parties qualify their contract as a processing contract but it does not contain the essential elements set out in this Article, the rules contained in this Chapter do not apply.

H. Remedies

No remedies stem from this provision since, as a scope and definitions provision, it does not itself impose obligations on the parties.

Comparative Notes

1. *Place in existing codes/statutes/case law*
   Processing is covered by the rules on contract for work in AUSTRIA (CC arts. 1165 ff), FRANCE (CC art. 1787 ff), GERMANY (CC arts. 631-650), GREECE (CC art. 681-702), ITALY (CC arts. 1655-1677), POLAND (CC art. 627 ff); in practice, the same holds true for THE NETHERLANDS (CC arts. 7:750-764), PORTUGAL (CC arts. 1207 ff.) and SPAIN (CC arts. 1544 ff). In ENGLAND, the contract is governed by the general requirements of the Supply of Goods and Services Act 1982 and, often, may be qualified as bailment (cf. Miller/Harvey/Parry, Consumer and Trading Law, p. 179). In SWEDEN and FINLAND, specific legislation exists, governing consumer contracts (Consumer Services Act, respectively Chapter 8 of the Consumer Protection Act on Certain consumer service contracts). If the contract is not a consumer contract, in SWEDEN sales law is applied by way of analogy when this is considered appropriate.
   No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Application to immovable and movable goods?*
   The rules that in the national legal systems apply to processing contracts, are normally applied both when the object of the contract is a moveable good and when it is an immovable good, e. g. a building. This has been explicitly regulated in SWEDEN (Consumer Services Act art. 1, 2nd sentence), but is considered to be self-evident in most other systems. In FRANCE, the Cour de Cassation decided that in the case of repair of a roof on a building, the rules on the contract for work are to be applied (and not those on construction), unless the whole roof is replaced (Cass.civ. III, 9 November 1994, Bull.civ. III, no. 184). An exception is FINLAND, where, for consumer contracts, specific rules have been developed regarding processing services on immovable goods (cf. Chapter 9 Consumer Protection Act).
   No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

3. *Application of rules to gratuitous processing services*
In most legal systems, the rules on processing are applied either directly or by way of analogy to gratuitous services. The situation is different in GERMANY, ITALY, FINLAND and SWEDEN, where application of the rules on the contract for work is explicitly limited to contracts for remuneration.
No information from BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

National Notes

1. *Place in existing codes/statutes/case law*
AUSTRIA Processing contracts are covered by the wide ambit of the contract for work (*Werkvertrag*, CC arts. 1165 ff), which require the processor to achieve a specific result. Cf. Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166, no. 9; Koziol/Welser, Bürgerliches Recht II, p. 242; cf. also, explicitly for the contracts for repair and maintenance, Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166 nos. 56 and 65. If the processor (explicitly) only promises to *try* to achieve a result, the contract is a *freier Dienstvertrag*, for which no statutory rules have been developed.
ENGLAND A processing contract may be qualified as a contract of bailment, cf. Miller/Harvey/Parry, Consumer and Trading Law, p. 179, albeit that bailment as such is not necessarily based on a contractual relationship, cf. Chitty on Contracts [*-McKendrick*], no. 33-002. A processing contract is subject to the general requirements of sections 13-17 Supply of Goods and Services Act 1982 to the extent that a service is carried out; cf. art. 12 (3). Miller/Harvey/Parry, Consumer and Trading Law, pp. 85-86, 151, 153, set out that when, materials are used in the in the performance of the contract, s. 1-5a apply to that part of the contract, including the requirement that these materials are fit for purpose (s. 4, subs. 5); if the materials used are dissipated by their use, common law provides the same standard of quality, cf. *Ingham v Emes* [1955] 2 QB 366.
FINLAND For consumer contracts, processing contracts are generally covered by Chapter 8 of the Consumer Protection Act on Certain consumer service contracts.
FRANCE Under FRENCH law this contract falls under the scope of application of the more general *contrat de louage d'ouvrage et d'industrie'*, often called *contrat d'entreprise* (contract for work, CC art. 1787 ff).
GERMANY CC arts. 631-650 on the 'Werkvertrag' (contract for work) apply to a processing contract, as the contract concerns a clearly outlined object of the service (rather then a general activity), cf. BGH, NJW 2000, 1107; BGH, NJW 2002, 595.
GREECE Any activity that involves processing is considered to be a service and it is regulated by the contract for work/service in the civil code (art. 681-702).
ITALY A processing contract falls within the scope of application of the provisions on the *contratti d'appalto* regulated in CC art. 1655-1677, the *appalto* being a contract whereby a party undertakes to perform a work or a service.
THE NETHERLANDS Processing will normally be qualified as *aanneming van werk* (contract for work) (CC art. 7:750-764), cf. Den Boer/Wildenburg, TvC 1993, p. 294. Since the rules on the contract for work are not very apt for processing contracts, parties normally make use of standard contract terms, which often have been drafted after negotiations with consumer organisations.

POLAND Normally processing would be classified as a contract of specific work under CC art. 627. In some cases also rules on a building contract could apply on the basis of CC art. 658, according to which provisions of the title on the building contract apply respectively to the contract for repairs of a building or a construction.
PORTUGAL Normally, a processing contract is considered to be a contract for work (CC art. 1207 ff); the processor is then under an obligation of result. However, qualification may be problematic. Activities such as finishing works in a new structure (e. g. paperhanging) have been regarded as a contract for work (CA Coimbra, 20 June 1990, BolMinJus 398, 593) but also as a contract for services (STJ 25 September 1991, BolMinJus 409, 764).
SPAIN Processing contracts are not covered by the rules on service contracts but by those on construction contracts (CC 1544 ff) if the main obligation for the service provider is to come up with a final outcome in conformity with the expectations of the client. When such is not the case, the rules on service contracts (CC art. 1583 ff) do apply, leading to a mere obligation of means.
SWEDEN Rules for consumer services can be found in the Consumer Services Act, which cover work on movable and immovable goods alike (cf. Consumer Services Act art. 1, 2nd sentence,). Apart from this it is an unregulated area, however, the Sales Act *(KöpL)* can be used by way of analogy, when appropriate.

2. *Application to movable and immovable goods?*
AUSTRIA The rules on the contract for work apply irrespective of the type of good that is the object of the contract, as they apply to the construction of a building, the repair of a good and the programming of software alike. Cf. Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166; Koziol and Welser, Bürgerliches Recht II, p. 242.
ENGLAND The Supply of Goods and Services Act 1982 applies irrespective of the type of good that is the object of the contract, as long as a service is carried out; cf. art. 12 (3).
FINLAND In the case of repair or renovation of a consumer's house, not Chapter 8 but Chapter 9 of the Consumer Protection Act on Sale of building elements and construction contracts applies, cf. Chapter 9, Section 1 (3) Consumer Protection Act.
FRANCE The rules on the contract for work in principle apply irrespective of the type of good that is the object of the contract. However, the borderline with construction contracts is difficult to draw (yet important for its far-reaching consequences). To give an example: the Cour de Cassation decided that repair of a roof is to be considered a construction contract if the structure of the roof is replaced, and a contract for work otherwise, cf. Cass.civ. III, 9 November 1994, Bull.civ. III, no. 184.
GERMANY CC art. 631 para. 2 provides that both the creation and the change of a good can be the object of a contract for work, as well as another service if a certain result is to be achieved. A division as to the type of good that is the object of the contract is not made.
GREECE The rules on the contract for work apply irrespective of the type of good that is the object of the contract.
ITALY The rules on the contract for work apply irrespective of the type of good that is the object of the contract.
THE NETHERLANDS The rules on the contract for work apply irrespective of the type of good that is the object of the contract.

POLAND The rules on the contract for specific work apply to the contract of specific work to be performed on immovable and movable alike. However, if the administrative rules of building law are applicable to a given contract, then it is classified as a building contract (CC art. 647).
SWEDEN The Consumer Services Act covers work on movable and immovable goods alike (cf. art. 1, 2nd sentence). Accordingly this means for instance that construction, repair, painting, wall-papering, laying out a garden and digging work is covered by the same regime, see Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 86ff.

3. *Application of rules to gratuitous processing services*
AUSTRIA According to the prevailing opinion, gratuitous processing contracts are not covered by the rules on *Werkvertrag*, but by the rules on mandate. However, the rules on *Werkvertrag* are generally applied by way of analogy if and insofar as this may be considered appropriate. Cf. Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166 no. 100; Koziol and Welser, Bürgerliches Recht II, pp. 243-244.
ENGLAND The Supply of Goods and Services Act 1982 only applies if there is a contract and the supplier of the service acts in a professional capacity, cf. Miller/Harvey/Parry, Consumer and Trading Law, p. 153. The client must perform at least *some* kind of obligation, otherwise consideration for the contract is lacking and the 'contract' cannot be enforced. Cf. McKendrick, Contract Law, p. 74. Yet, the rules on bailment may apply to gratuitous processing contracts, cf. Chitty on Contracts (McKendrick), no. 33-029.
FINLAND The Consumer Protection Act does not apply to gratuitous contracts, as may be deducted from Chapter 1, Section 5, where the definition of 'business' is restricted to cases where the party concluding the contract with the consumer offers his services 'for consideration'.
FRANCE The same rules apply in principle to gratuitous processing services, cf. Huet, Les principaux contrats spéciaux, no. 32113. Yet, the parties are presumed to have agreed upon a remuneration for the processor, cf. Cass.civ., III 17 December 1997, Bull. civ. III, no. 226.
GERMANY The rules on the contract for work only apply if the client undertakes to pay a price, even if he does so only tacitly, cf. CC arts. 631 para. 1, 632. In such a case, the rules on *Auftrag* (mandate) apply (cf. Staudinger [*-Peters*] Kommentar BGB, art. 632 no. 1; Palandt [*-Sprau*], BGB, art. 631 no. 12).
ITALY In order to qualify a processing contract as a *contratto d'appalto*, the work has to be performed in exchange for a sum of money (App Palermo 31 October 1947, in Foro. Sic., p. 22).
THE NETHERLANDS In principle, the same rules will apply to gratuitous processing services. However, the standard of care will probably be lower than for a service that is provided for a remuneration.
POLAND The contract for specific work is to be performed against remuneration (CC art. 627). If the parties did not agree on the price a number of rules indicate how to calculate the due remuneration (CC arts. 628-630). Also the building contract is classified as a remunerative contract (CC art. 647).
SWEDEN The Consumer Services Act does not apply to gratuitous services. This limitation is not expressly provided in the text, but can be derived especially from the provisions concerning price, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 251.

Article 3:102: Duty to Co-operate of the Client

The duties under Article 1:202 PECL (Duty to Co-operate) and Article 1:104 (Duty to Co-operate) require in particular the client to:

(a) hand over the thing or to give the control of it to the processor, or to give access to the site where the service is to be performed in so far as is reasonably necessary to enable the processor to perform the contract; and

(b) in so far as they must be provided by the client, provide the components, materials and tools at such time as is reasonably necessary to enable the processor to perform the contract.

Comments

A. General Idea

The client is to enable the processor to perform the service the client has asked for. This means, first of all, that the client must provide the processor with the thing that is to be worked on; secondly, if the parties agreed that materials, tools or components are to be supplied by the client, he must do so at such time that performance of the contract is not held up.

Illustration 1
According to a governmental regulation, cars older than three years must be checked yearly by a licensed garage. To that extent, the owner of a 2001 BMW rings a garage and agrees the car to be serviced the next day. The client is to take the car to the garage at the agreed time and place.

Illustration 2
A client is no longer able to regularly clean his house, and requests the services of a cleaning company. The parties agree that the client will provide the cleaning materials, brooms and mops. The client is to make sure that sufficient materials and tools are available.

B. Interests at Stake and Policy Considerations

The processor can only perform the contract if the client provides him with the thing to be worked on or gives access to the site on which the service is to be performed. Moreover, if the parties agreed that the client is to provide the materials, tools or components, he must do so at such a time that the processor is not forced to postpone performance merely because the client has not yet provided these materials, tools or components. Meeting these requirements clearly is in the client's own interest as performance is upheld until the client does meet them. However, the processor has an independent interest in the client meeting these requirements, as he will have calculated the price in accordance with the duration of performance of the contract and cannot use his workforce for performance of another contract if performance of this

contract is frustrated by the client's not meeting the requirements. The present Article is to prevent such frustration.

C. Comparative Overview

If the processor can perform the contract only if the client hands over the thing, the client is required to provide the processor with the thing in time. To that extent, the client is burdened with an express or implied obligation (ENGLAND, GERMANY and POLAND), such a duty follows from good faith (GREECE, ITALY, PORTUGAL) or the rules on *mora creditoris* – the client is not under a 'real' obligation to co-operate, but cannot invoke non-performance on the part of the processor – have that effect (AUSTRIA, FRANCE and THE NETHERLANDS; in effect also, for consumer contracts, FINLAND and SWEDEN).

D. Preferred Option

The present Article contains specifications of Article 1:104 (Duty to Co-operate) and concerns the *client's* duty to co-operate. These specifications, which are particular to processing contracts, indicate what can be expected of the client under a processing contract. The most important of these can be found in paragraph (1): the client is obliged to hand over the thing or the control of it to the processor in order for the service to be performed on that thing. If the thing is immovable property or if the processor is required to collect the thing, the client must give the processor access to the thing. In all cases, the client must perform his obligation at such time as is reasonably necessary to enable the processor to perform the contract.

E. Relation to PECL and Other Parts of the Principles

The present Article is a specification of Article 1:202 PECL (Duty to Co-operate) and, especially, Article 1:104 (Duty to Co-operate). It applies in conjunction with Article 1:104 (Duty to Co-operate). Under Article 1:104(1) (Duty to Co-operate), the client must provide the answers to questions put before him by the processor. The processor will need those answers in order to assess the risks involved and the way the service is to be performed.

> *Illustration 3*
> A client wants to have his car washed at a car wash. The car wash provider is to ask what kind of washing programme the client wants to have run. It is then up to the client to specify his wishes.

These questions will often relate to the existing circumstances as meant in Article 1:105 (Circumstances in which the Service Is to Be Performed) and Article 3:103. Yet, the client's duty to answer questions cannot be unrestricted, for the provider of the service does have his own responsibility and expertise, and may therefore be considered to be

able to receive certain information through other channels. Moreover, he is required only to answer questions pertaining to the performance of the service.

Illustration 4
An owner of land calls upon a woodcutter to help him cut down trees in his backyard. The woodcutter asks the owner whether he has the required governmental permit, what variety of trees are to be cut and why the owner wants to dispose of the trees. The owner must answer the question about the permit, for the woodcutter needs to know whether it is allowed to cut down the trees, as well as the question about the variety of trees, for particular varieties of trees produce more solid wood than others and may therefore take longer to be cut down, which makes the performance of the performance more costly. The owner does not have to answer the question why he wants to dispose of the trees, since the woodcutter does not need the answer to that question to perform the service.

F. Specific Duties to Co-operate for Processing Contracts

The duties to co-operate that are specific for processing are first of all the obligation to hand over the thing or the control thereof and, especially if the service is to be performed on the premises of the client, to give access to the site (paragraph (1)), as well as timely provide the components and materials that the client agreed to supply (paragraph (2)).

Another specification of the duty to co-operate is the processor's obligation to accept inspection and supervision of the service. This particular duty is dealt with in a separate Article, Article 3:106. The same goes for the mutual obligations to co-operate when the processor wishes to return the thing or the client requests its return (Article 3:107).

G. Burden of Proof

In principle, the processor bears the burden of proof that the client did not comply with the provisions of this Article, but the court may require the client to substantiate his claim he has correctly performed his obligations under the present Article.

H. Character of the Rule

This Article contains default rules.

I. Remedies

Non-performance of any of the duties to co-operate leads to the remedies for non-performance under Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider). Since

the parties will usually have an interest in these duties being performed, as a rule, the other party may call for specific performance of the duty under Article 9:102 PECL (Non-Monetary Obligations) or demand assurance of future performance under Article 8:105 (Assurance of Performance). Alternatively, the other remedies of Chapter 9 PECL (Particular Remedies for Non-Performance) may be applied. See further extensively Comment H to Article 1:104.

Comparative Notes

1. *Client's obligation to hand over (the control over) the good or give access to the good on time*
   The client is under an implied obligation to hand over (the control over) the good or give access to the good on time in ENGLAND (cf. *Mackay v Dick* (1861) 6 App.Cas. 251, at p. 263), GERMANY (cf. CC art. 642 para. 1, BGH, BGHZ 11, 80, 83) and POLAND (CC art. 640). A similar duty may arise from good faith in GREECE (CC art. 288), ITALY (CC art. 1175 and 1375) and PORTUGAL (CC art. 762 para. 2 and 813 para. 2). A comparable result is achieved for consumer contracts in SWEDEN (Consumer Services Act arts. 45, 46) and FINLAND (Chapter 8, section 29 para. 3 of the Consumer Protection Act), where the processor may terminate for failure to co-operate if the client does not enable the processor to perform the contract. In AUSTRIA (cf. CC art. 1168), FRANCE (cf. Huet, Les principaux contrats spéciaux, no. 32328-32329) and THE NETHERLANDS (CC art. 6:58 ff), the rules on *mora creditoris* and contractual provisions lead to the same result.
   No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, SCOTLAND, SPAIN.

National Notes

1. *Client's obligation to hand over (the control over) the good or give access to the good on time*
   AUSTRIA The client is normally not under a duty to co-operate, i. e. not obliged to give the processor the good or to give him access thereto on time, but failure to do so leads to *mora creditoris*. Cf. Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166 no. 113; art. 1168 no. 33. In such a case, the processor may cancel the contract after having set a reasonable period of time for the client to enable performance (CC art. 1168); in case of cancellation under this provision, the client would still be required to pay the price for the service. Cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1168 nos. 33, 35-36.
   ENGLAND The client is under an implied obligation to hand over the good if such an implied term is *necessary* to give business efficacy to the contract and the term is so obvious that 'it goes without saying'. Cf. *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978), ALJR 20, 26. These conditions will normally be met, for the processor can't perform the contract unless the client performs this particular duty to co-operate. Cf. *Mackay v Dick* (1861) 6 App.Cas. 251, at p. 263.
   FINLAND In consumer contracts, the processor may terminate the contract if the client fails to co-operate in the delivery of the contract as required for the rendering of the service (Chapter 8, section 29 (3) of the Consumer Protection Act. From this, a duty to hand over the good or the control thereover may be deducted if and insofar as

such is necessary for the proper performance of the contract. For contracts leading to, e. g., the repair or renovation of a house, Chapter 9, section 31 of the Consumer Protection Act leads to the same result.
FRANCE The client is required to hand over the good that is to be worked on, or to give access to the good, at such a time as is necessary for the performance of the contract, cf. Huet, Les principaux contrats spéciaux, no. 32328-32329.
GERMANY Under CC art. 642 para. 1, the client is required to give the necessary co-operation; in a processing contract, this includes at least the duty to hand over (the control over) the good or give access to the good on time. The Bundesgerichtshof considers this duty to co-operate to be a contractual *obligation*; a breach thereof therefore does not lead to *mora creditoris*, but to a breach of contract. Cf. BGH, BGHZ 11, 80, 83.
GREECE Under Greek law, an obligation to hand over te good on time may be deemed to arise from the general provision on good faith (CC art. 288).
ITALY A general duty to co-operate may be deduced from the general principles of correctness in performance (CC art. 1175) and of good faith (CC art. 1375). Under these provisions, the client would be required to provider the processor on time with the good or the control thereover.
THE NETHERLANDS The client has to enable the processor to perform the contract. This duty to co-operate, following from the rules on *mora creditoris* (CC art. 6:58 ff) and good faith and fair dealing, is often explicitly or impliedly regulated in standard contract terms. From this general duty to co-operate, a duty to hand over the good or the control thereover may be derived when such is needed for the fulfilment of the contract. Cf. Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 558.
POLAND A duty to co-operate exists as a general rule concerning performance of obligations (CC art. 354). In the contract for specific work, the client's duty to co-operate is specially underlined in CC art. 640, according to which, if co-operation on the part of the client is required for the making of the work and such cooperation is lacking, the service provider may set the client an appropriate time limit with the sanction that after an ineffective lapse of that time he will be entitled to renounce the contract. In such a case the service provider may also demand remuneration, but the client may deduct what the service provider has saved for not making the work (CC art. 639). The service provider may ask for damages, based on the general rule of CC art. 471. In the case of the building contract the client is obliged to hand over or give access to the building site and the agreed machines and devices (Strzępka in Rajski System Prawa Prywatnego, Tom 7 p. 407).
PORTUGAL Although not expressly provided for in the law, the client's obligation to hand over the good is ascertainable from CC art. 762 para. 2 and 813 para. 2 regarding good faith in the execution of a contract. Cf. Romano Martinez, Direito das Obrigações (Parte especial), Contratos, 342.
SWEDEN Under Consumer Services Act arts. 45, 46, the professional has a right to suspend its work, and to terminate the contract, if the consumer's failure to render assistance constitutes a delay which is of material significance to the professional. From this, indirectly a duty to co-operate follows.

Article 3:103: Circumstances in which the Service Is to Be Performed

The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the processor to collect information about the characteristics of the thing on which the service is to be performed in so far as is reasonably necessary to perform the service.

Comments

A. General Idea

The present Article, together with Article 1:105 (Circumstances in which the Service Is to Be Performed) is intended to lay down the processor's duties prior to the performance of the service. These Articles state that the processor has to assess the existing situation and the condition of the thing in order to determine whether the service can be performed at all and, if so, in what manner. The purpose of this assessment is to ensure that the processor eventually will render a service that is in conformity with the client's reasonable expectations. If, during this phase, the processor discovers potential risk factors, proper performance of the present Article may require the processor to warn the client thereof, but in any case he is not required to specifically look for such risk factors. As will be explained in the Illustrations below, this contractual duty to warn may even exist when materialisation of the 'specific and significant risk' would not jeopardise the proper performance of the contract, but would seriously harm the client's interests otherwise.

Illustration 1
A client asks an audio/video repair technician to repair a broken-down DVD player. Before repairing the DVD player, the repairman has to find out what is actually wrong with the machine.

Illustration 2
A painter, who has been requested to paint a house, is to examine the condition of the house before performing his service. Thus, he can determine whether he can start painting the house without taking other precautions, such as filling up cracks first.

B. Interests at Stake and Policy Considerations

Typical for processing contracts is the fact that the thing that is worked on, already exists. The processor needs to investigate the thing before and during the performance of the service in order to be able to perform the contract properly. However, as the thing already belonged to the client, the client may have specific knowledge about it. The client is not to expect the processor to ask about specifics he cannot reasonably know of. Besides collecting the necessary information, the processor needs to find out whether the thing is in a condition to undergo the service. The question that needs to be

addressed here, therefore, is who is responsible for the processor becoming properly informed: should the processor actively examine the thing and put questions to the client, or is the client required to inform the processor of his own accord. The depth of the duty which is placed on the processor also influences his liability in other ways: if he is obliged to examine the specificities of the thing thoroughly, he may discover risks relating to the thing, in which case he may be required to warn the client. If he is only required to conduct a limited examination, such risks may not be brought to light, and a duty to warn would not emerge. Failure to warn would not constitute a non-performance of the contract in that case. An in-between solution would be that the processor is only required to examine the thing in so far as is needed for him to perform the contract properly.

C. Comparative Overview

The processor is under an express or implied obligation to collect information and to examine the thing in most legal systems, as a separate obligation (as is the case in FINLAND, THE NETHERLANDS and POLAND), or as a derivative of the processor's obligation to exercise proper care (ENGLAND) or of his obligation to safeguard the client's things (AUSTRIA and GERMANY). Finally, in some countries (notably ITALY and SWEDEN) the processor will be held liable for not achieving the result promised if he cannot prove a supervening event causes him not to achieve that result; if his failure to examine properly or to collect the necessary information is the cause of the result not being achieved, the processor can be held liable.

D. Preferred Option

Article 1:105 (Circumstances in which the Service Is to Be Performed) requires the processor primarily to collect information about the circumstances in which the service is to be performed and ensure that these circumstances will be taken into account during the performance of the service. In processing contracts, this means in particular that the processor – in so far as relevant – is obliged to examine the thing before and during the performance of the service. To that extent, he is required to examine whether the thing is in a condition to undergo the service. Such an examination is necessary in order to prevent damage to the thing that is to be worked on.

> *Illustration 3*
> A painter, who has been requested to paint a house, is to examine the condition of the house before performing his service. Thus, he can determine whether he can start painting without taking other precautions, such as filling up cracks. Problems that will be apparent to processor at first glance, given his knowledge and experience, are to be recognised and to be taken into account by the processor when determining whether the service can be performed and at what price.

If the processor during his examination comes across any specific risks that the client may not be aware of, the former may be under a duty to warn the client. However, the

processor is required to examine the thing only in so far as is reasonably necessary to perform the contract. Therefore, he cannot be expected to examine the thing actively in order to see whether there may be risks other than those resulting from his cursory examination.

E. Relation to PECL and Other Parts of the Principles

In order to perform the service in accordance with the reasonable expectations of the client, the processor has to collect the necessary information to render the service. Article 3:103 clarifies that it is up to the provider of the service to ask the questions he needs to perform the service, which includes inquiries about the client's wishes. Such an obligation may exist and may be performed before or after the conclusion of the contract. The counterpart of this obligation can be found in Article 1:104(1) (Duty to Co-operate), where it is stated that the client is under a duty to answer to such questions.

Typical for processing contracts is the fact that the thing that is worked on already exists. The processor is, insofar as relevant, obliged to examine the thing before and during the performance of the service. If, during the examination, the processor discovers potential risk factors, the processor may be under a duty to warn the client. This duty to warn does not necessarily follow from Article 1:110 (Contractual Duty of the Service Provider to Warn), as the risk may not be related to the service requested. However, in the case of a 'specific and significant risk' that would not jeopardise the proper performance of the contract, but would seriously harm the client's interests otherwise, Article 1:201 PECL (Good Faith and Fair Dealing) or Article 3:104 may require the processor to warn the client.

F. Specific Duty as to Existing Circumstances in Processing Contracts

Typical for processing contracts is the fact that the thing that is to be worked on already exists and has already belonged to. The client may therefore have specific knowledge about the thing. The client is not to expect the provider to ask about specifics he cannot reasonably know of. Besides collecting the necessary information, the processor needs to find out whether the thing is in a condition to undergo the service.

Besides considering the condition of the thing on which the service is to be performed, the processor is also to investigate whether there are other obstacles to the performance of the service. Such obstacles may stem from the place where the service is to be performed, but also from public law regulations.

Illustration 4
A farmer contracts the harvesting of his maize crop out to a company that specialises in providing labourers and machinery for that purpose. The company is to establish whether the soil can support tractors despite the recent heavy rainfall.

Illustration 5
A company is charged with spraying pesticides on a farmer's crop. The company is to find out which pesticides may be used and which the government has banned.

G. Burden of Proof

The client has to prove that the processor did not fulfil his obligations under the present Article.

H. Character of the Rule

This Article contains default rules.

I. Remedies

Non-performance under the present Article leads to the remedies for non-performance under Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider). Since the client has an interest in performance under the present Article, he may invoke specific performance of the duty under Article 9:102 PECL (Non-Monetary Obligations) or demand assurance of future performance under Article 8:105 (Assurance of Performance). Alternatively, the other remedies of Chapter 9 PECL (Particular Remedies for Non-Performance) may be applied. However, more often the breach of the present Article will become apparent only afterwards; in such a case, it will often lead to a breach of the standard of care or to non-conformity of the service. This would then lead to the appropriate remedies for non-performance. In such a case, Articles 3:110 and 3:111 would entitle the client, first of all, to specific performance. Only if such is not or no longer possible, or if the processor fails to comply with a demand for specific performance within a reasonable time, the client may resort to other remedies, notably termination. See further extensively Comment H to Article 1:105 (Circumstances in which the Service Is to Be Performed).

Comparative Notes

1. *Processor's duty to collect information and to investigate the good*
In FINLAND (Consumer Protection Act Chapter 8, section 14 para. 1), THE NETHERLANDS (art. 7:554 CC and Koninklijk Instituut van Ingenieurs, arbitrational award of 12 October 2001, TvA 2002, p. 107) and POLAND (Supreme Court of 20 May 1986, III CRN 82/86, OSNCP 1987, z. 8, poz. 125), the processor is under a continuous obligation to inform the client if and that the material supplied by the client is not suitable for proper performance of the work, thus implying an obligation to investigate the good, the material and the surrounding conditions in which the service is to be performed. Such an obligation is implied in many legal systems as being part of the

processor's standard of care (ENGLAND, *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978), ALJR 20, 26), the obligation to safeguard the client's interests (AUSTRIA, cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1169 nos. 3, 8-9) or as a prerequisite for the processor to produce the required result (FRANCE, SWEDEN, cf. Olsen, Konsumentskyddets former, p. 93). The depth of the inspection depends on the knowledge that can reasonably be expected from the processor, it was decided in GERMANY (cf. BGH, NJW 1987, 643).
No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

2. *Duty to warn for specific dangers*
The processor is under an obligation to warn if the material supplied by the client is unfit for proper performance of the work in FINLAND (cf. Chapter 8, Section 14 Consumer Protection Act), GERMANY (BGH, NJW 2000, 280), THE NETHERLANDS (cf. CC art. 7:554) and POLAND (cf. CC art. 634). In ENGLAND, a duty to warn may arise if a fiduciary relationship exists or under s. 13 Supply of Goods and Services Act 1982, or even under the tort of negligence (cf. McKendrick, Contract Law, pp. 257-258). A similar result may follow from duties of diligence and care in AUSTRIA (cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1169 nos. 3, 8-9). In FRANCE, the processor often is under a further-reaching 'safety obligation', implying that he must guarantee the safety of the good after the service is completed (cf. Cass.civ. I, 15 July 1999, Bull.civ. I, no. 238).
No information from BELGIUM, DENMARK, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

National Notes

1. *Processor's duty to collect information and to investigate the good*
AUSTRIA There is no express obligation for the processor to collect information and to investigate the good. Extensive investigation may certainly not be required of the processor, cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1168a no. 20. However, the processor is under general duties of diligence and care (cf. CC art. 1169). From this, an obligation to safeguard the client's interests, cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1169 nos. 3, 8-9. From this, a limited obligation to collect information about the good and to investigate it may occasionally be deduced. Moreover, if the processor does not investigate the good, he runs the risk that the required result may not be achieved, rendering him in principle liable for non-performance.
ENGLAND The processor is under an implied obligation to collect information and to investigate the good if such an implied term is necessary to give business efficacy to the contract and the term is so obvious that 'it goes without saying'. Cf. *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978), ALJR 20, 26. These conditions will normally be met, for the processor can't perform the contract 'with reasonable skill and care', as required in art. 13 Supply of Goods and Services Act, if he fails to collect the necessary information or to investigate the good.
FINLAND Under Chapter 8, Section 14 (1) Consumer Protection Act, the processor is required to immediately inform the client if it becomes evident that the service will not be in conformity with the client's expectations. The obligation is to be performed

both pre-contractually and contractually; failure to do so will amount to a non-performance of the service itself, Section 14 (3) provides. From this, a duty to collect information and to investigate the good may be derived.

FRANCE An independent obligation to collect information and to investigate the good does not exist in FRANCE. However, as the processor's main obligation in a processing contract usually is an *obligation de résultat attenuée* (fault-based liability with reversal of the burden of proof), he will be held liable for he can't prove he has acted with the required care and skill.

GERMANY Under CC art. 241 para. 2, the processor is required to examine the good and the surroundings in which the service is to be executed. The depth of inspection depends on the knowledge that can reasonably be expected from the processor (BGH, NJW 1987, 643). The inspection has to be fulfilled with special care where generally defects can be expected or where new working methods were or are used. Further inspection by the processor is not required necessary where extra costs may be needed, but in that case he must warn that further inspection has to be undertaken (OLG Düsseldorf, BauR 1997, 840).

ITALY From the processor's obligation to render a service in conformity with the contract and with the standard of care of his profession, it can be deduced that the processor must analyse the factual situation surrounding the performance of the service in order to be able to perform the service.

THE NETHERLANDS In an arbitrational award of 12 October 2001, TvA 2002, p. 107, the Koninklijk Instituut van Ingenieurs set out that it is the processor who is required to investigate the good that is to be worked on and to inform the client of any dangers it finds out, and to take necessary precautions to protect the client. A duty to investigate may also be deduced from the duty to warn under CC art. 7:554.

POLAND In a case of processing, when the obligation of processor consists of work on the existing goods, the processor must determine if the goods arte suitable to perform the contract, and inform the other party if it is not the case (CC art. 634). This duty was underlined in the judgement of the Supreme Court of 20 May 1986, III CRN 82/86, OSNCP 1987, z. 8, poz. 125.) In the case of a building contract the implied duty to investigate arises from CC art. 651, which obliges the constructor to inform if the documentation, the building site, the machines and facilities supplied are not suitable for the correct performance of the building work or if there are other circumstances which may prevent the correct performance of that work.

SWEDEN The processor must in one way or another investigate what shall be done, e. g., concerning repair, finding the defect and deciding what measures to be taken, see Olsen, Konsumentskyddets former, p. 93. If the investigation is inadequate, the whole result of the service will be non-conform, even if the work performed has been executed in a correct manner, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 95.

2. *Duty to warn for specific dangers*

AUSTRIA Under CC art. 1169, both parties are under duties of diligence and care *(Schutz- und Sorgfaltspflichten)*. For the processor, this implies an obligation to safeguard the client's interests and to prevent personal injury to the client or damage to the client's goods, cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1169 nos. 3, 8-9. From this, a duty to warn may follows if the processor is or should be aware of specific and

significant dangers concerning the good on or the situation in which the service has to be carried out.

ENGLAND Normally, a duty to disclose does not exist in ENGLISH law. However, in this type of contract, a duty to warn may arise if a fiduciary relationship exists between the parties, under s. 13 Supply of Goods and Services Act 1982, or even under the tort of negligence, cf. McKendrick, Contract Law, pp. 257-258; H. Collins, The Law of Contract, pp. 312-315.

FINLAND If the processor becomes (or should become) aware that the service will not be in conformity with the client's expectations, he must warn the client thereof (Consumer Protection Act Chapter 8, Section 14 (1)). Failure to do so will amount to a non-performance of the service itself, Section 14 (3) provides.

FRANCE A processor must give all warnings and advice needed for the good use of the good after the performance of the contract, cf. Cass.civ. I, 19 January 1983, Bull.civ. I, no. 30. Moreover, the processor often is under an 'obligation de securité', implying (for a processing contract) that he must guarantee the safety of the good after the service is completed. Cf. Cass.civ. I, 15 July 1999, Bull.civ. I, no. 238, concerning the repair of an elevator. An *obligation de securité* often is an obligation of result and, therefore, may even be more strict than a mere obligation to warn. Cf. Malaurie/Aynès/Gautier, Contrats spéciaux, no. 750.

GERMANY The processor is under a duty to warn if he has any concerns about, e. g., the previewed performance of the service, the quality of the materials to be used (BGH, NJW 2000, 280), the compliance with technical standards (DIN-Normen) (OLG Düsseldorf, NJW-RR 1994, 281), or the quality of the work of other service providers (OLG Hamm, BauR 1997, 309). Generally, a duty to warn may exist when the processor is building upon the performance of another service supplier (BGH, NJW 1974, 747).

THE NETHERLANDS CC art. 7:554 requires the processor to warn – when concluding or performing the contract – for any defects in the commissioned service that he knows or should know of, including defects or unfitness of materials provided by the client or the good that is to be worked on. To the same extent is Koninklijk Instituut van Ingenieurs, arbitral award of 12 October 2001, TvA 2002, p. 107.

POLAND The processor is under a duty to notify if the material supplied by the client is not suitable for proper making of the work, or if other circumstances arise, which may hinder the proper performance (CC art. 634), for example that there is a danger of destruction of or damage to the work (CC art. 641 para. 2). If the processor fails to do so, he will be liable for the defects and he will not be entitled to ask for remuneration or its appropriate part if the work is destroyed or damaged due to the defects of the material delivered by the client or as a result of the work having been made in accordance with the client's instructions (CC art. 641 para. 2). Liability of the constructor in the case of the building contract is constructed in a similar way, however, the constructor may also demand remuneration or its appropriate part, if in spite of observing due diligence he could not found the defects of the materials, machines or facilities supplied by the client (CC art. 655).

SWEDEN There is no such express duty. However, KTjL art. 5 expressly points out that the performance of the processor must be in accordance with safety regulations etc. Also, the seller is under the obligation to advice the consumer against unfavourable services under KTjL art. 6.

Article 3:104: Duty of Care of the Processor

The duties under Article 1:107 (General Standard of Care for Services) require in particular the processor to take reasonable precautions in order to prevent any damage to the thing or other loss.

Comments

A. General Idea

The client's highest risk in the performance of the contract is the potential damage the processor may inflict on the thing that he is working on. In order to minimise that risk, the present Article requires the processor to take precautionary measures to prevent such damage, whether inflicted upon the thing by the processor himself or his staff or a third party. As such, it contains a specification of the standard of care that is to be upheld by the processor: the processor must take reasonable precautions to prevent unnecessary damage to the thing he is to work on, whether such damage is caused by the processor or his staff, by third parties or by other external causes.

Illustration 1
A cleaning company is contracted to clean an office building daily between 6 and 8 p. m. At that time, usually a number of employees of the firms housed in the office building are still working. When mopping the ground floor, the cleaning company is to place warning signs near all elevators, staircases and entrances in order to prevent the employees from slipping. After having finished an individual office, the employee of the cleaning company is to lock the doors of that office in order to prevent theft.

Illustration 2
A cabinetmaker is requested to restore a precious Chinese folding screen. In the cabinetmaker's workshop, the folding screen is to be placed in such a manner that it will not be damaged by an opening door.

B. Interests at Stake and Policy Considerations

When an existing thing is worked on, there is an almost inherent risk of damage to the thing. Because the processor will normally have control over the thing, he is usually in the best position to take protective measures. More generally, the processor is usually in the best position to take safety measures and measures limiting the impact of the activity on goods and on third parties. Damage is to be prevented as much as possible, but there is a limit to the protective measures the processor can be expected to take: damage cannot always be prevented, or only at very high costs. It would not be reasonable nor economic al to require the processor to take all possible precautionary measures.

C. Comparative Overview

In many legal systems, the processor is under an obligation of result, rendering the standard of care the processor must meet of lesser importance. Where or when the processor is under an obligation of means, the standard of care is that of a professional party, performing the service with reasonable, ordinary care and skill, bearing in mind the standard of the profession, the state of the art and usage and customs. For the client to be able to claim damages, negligence on the part of the processor is required in AUSTRIA and ITALY; in FINLAND, negligence is required in order for the client to claim pure economic loss. For the client to be able to claim damages, negligence is required also in FRANCE and GERMANY, but is presumed in these legal systems. Such a presumption applies as well in FINLAND and SWEDEN as regards the damage to a thing in the possession or under the supervision of the processor. In THE NETHERLANDS, the processor must prove his non-performance cannot be attributed to him because of negligence *or* 'common opinion' *(verkeersopvatting)*, implying that fault is not required for liability. In ENGLAND, in principle any breach of obligation leads to a right to claim damages.

In order to perform the service in accordance with the reasonable expectations of the client, the processor must observe statutory and disciplinary rules regarding the performance of the service. This is self-evident with regard to statutory rules, but also applies to disciplinary rules. In such rules, organisations of professionals lay down the proper way of conducting business with regard to particular activities that are performed by such professionals. They may, therefore, also give guidance to the parties. Disciplinary rules are, however, not very common in the field of processing services.

D. Preferred Option

In order to perform the service in accordance with the reasonable expectations of the client, the processor is to comply with statutory and disciplinary rules regarding the performance of the service. These rules have often been developed in order to prevent injury to people and damage to things. This is especially true for the safety rules developed in the field of labour law, which aim at protecting the employee while at work. Safety measures that are required under labour law also need to be taken as regards the client if the client assists in the performance of the processing contract.

> *Illustration 3*
> A client (A) has a cart repaired in B's workshop. A provides assistance in the repair of the cart. Together, they dismantle the cart and place a jack under the axle; other normal safety measures, such as blocking the wheels by using wedges, are not taken. If, as a consequence thereof, an accident occurs and A is injured, B is liable because he failed to taken normal safety precautions.

Furthermore, the processor is to make use of a processing method that would normally lead to a result in conformity with the reasonable expectations of the client. Failure to

use a proper method may lead to liability if damage follows as a result of the improper method.

Illustration 4
A painting of a landscape is to be restored by a professional restorer. The restorer is liable if the painting is damaged because he used a method of processing which was objectively unsuitable for this particular restoration. The restorer should have known that the use of the method was not in accordance with his standard of care.

With respect to care to be taken for the thing itself, the processor is to take *reasonable* measures to prevent damage occurring. The Article therefore does not require the processor to take all possible protective measures: a cost/benefit analysis of the risks involved, of the damage that may occur, and the likelihood that such damage will occur is to take place when determining whether or not the processor is required to take protective measures. The present Article indicates that the processor is not to limit his efforts to the prevention of damage to the thing itself, he is also to prevent other loss when such is reasonably possible.

Illustration 5
A client wants to upgrade his computer by installing a newer version of the operating software system. The processor charged with the installation of the software knows that there is a 10 per cent chance that the computer's hard disk will have to be reformatted due to conflicting programming rules. The client then runs the risk of losing all the information that is stored on his computer, unless precautions are taken. In any case, the processor has to inform the client of the risk; either the client or the processor can then take precautions (e. g. by temporarily storing the information on CD-ROMs or diskettes).

E. Relation to PECL and Other Parts of the Principles

It should be noted that this Article is to be read together with Article 3:105: if under the latter Article the processor is required to achieve a particular result, viz. the specific result stated or envisaged by the client at the time of the conclusion of the contract, liability is – at least in theory – much stricter than it would be if the processor were not under such an obligation. Whether such an obligation exists is explained in the Comments to Article 3:105.

The present Article contains a specification of Article 1:107(1) and (5) (General Standard of Care for Services). It underlines that the processor must take *reasonable* measures to prevent the infliction of damage. The concept of 'reasonableness' is defined in Article 1:302 PECL (*Reasonableness*), which states that 'reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable'. Moreover, Article 1:107(4) (General Standard of Care for Services) lists a number of circumstances that need to be taken into account in order to determine whether the processor fulfilled his obligation to try to prevent damage.

If the processor claims that he is a specialist, he must meet the higher standard of care and skill of such a specialist; Article 1:107(2) (General Standard of Care for Services). Paragraph (3) adds that if he is a member of a group of professional processors for which standards exist that have been set by a relevant authority or by that group itself, the processor must exercise the care and skill expressed in these standards.

Illustration 6
A manufacturer of frames for paintings claims to be a member of a guild of restorers of antique paintings. In judging the manufacturer's work, the higher quality standards of the guild are to be applied.

When investigating the thing prior to the performance of the service, the processor may discover specific risks. His duty of care requires the processor to warn the client of the risk he identified. The duty to warn then does not follow from Article 1:110 (Contractual Duty of the Service Provider to Warn), but even from the standard of care itself. The provisions of Article 1:110 (Contractual Duty of the Service Provider to Warn) may be used by analogy.

The duty to warn under Article 1:110 (Contractual Duty of the Service Provider to Warn) extends even to those cases where materialisation of the unusual risk would not jeopardise the proper performance of the contract itself, but would seriously harm the client's interests otherwise.

Illustration 7
A client asks a mechanic to replace the exhaust pipe of his car. When the mechanic examines the car, he notices that the brakes are almost worn out. He is to warn the client about the dangers arising from that fact.

The processor may not be able to contact the client to deliver the warning, or he may have to await the client's decision. In the meantime, the processor must act like a reasonable processor would in the circumstances of the case. This may imply that the processor has to take precautionary measures. Insofar as needed, the Principles of European Law on Benevolent Intervention in Another's Affairs (PEL Ben. Int.) apply either directly or by way of analogy.

Illustration 8
A client requests a garage owner to replace the exhaust pipe of his Lamborghini, a very expensive and rare car. When the garage owner examines the car, he notices that the brakes are almost worn out. He warns the client about the dangers arising thereof. While he awaits the client's reaction, he leaves the car in a parking place. Given the great value of the car, the garage owner has the parking place guarded.

The client should compensate for the costs incurred by the processor in having the parking place guarded, provided that guarding the car is seen as a reasonable measure against theft. If, in such a case, the rules in Article 1:111 (Variation of the Service Contract) or Article 6:111 PECL (Change of Circumstances) do not provide relief, the Principles of European Law on Benevolent Intervention in Another's Affairs may.

If there are risks attached to the performance of the service, the client is to be told of them, at least when these risks are so serious that the client may want to reconsider. If the client, on the basis of the warning, decides not to have the service performed, the processor is entitled to remuneration on the basis of Article 1:115 (Cancellation of the Service Contract).

From this, it follows that no causal link need exist between the danger that is -or should have been- noticed and the performance of the contract itself. Such a warning may lead to a variation of the contract under Article 1:111 (Variation of the Service Contract), but, occasionally, also to cancellation of the contract under Article 1:115 (Cancellation of the Service Contract). The latter may be the case if variation of the contract is needed for the service to retain any use for the client, but is considered to be too costly by the client, e. g. given the remaining value of the thing. Of course, a cancellation would entitle the processor to remuneration under Article 1:115 (Cancellation of the Service Contract).

The duty to warn, however, is restricted to risks that the processor comes across or should have come across during his preparations for the performance of the service. In other words, he is not required to look for risks actively, but if, during the fulfilment of his other obligations, he notices or should notice such risks, he is to warn the client thereof.

F. Prevention of Occurrence of Damage to the Thing

Perhaps the most typical risks inherent to processing contracts is the risk that damage is done to the thing while it is being worked on by the processor. The obligation to prevent the occurrence of damage to the thing will often lead to the applicability of Article 3:105.

> *Illustration 9*
> Blankets are sent to a laundry. Upon their return, the client notices that the blankets are stained by bleach. Unless the laundry can prove the blankets were already stained before they were sent to be cleaned, the laundry will be held liable.

The underlying assumption is that if the processor had taken the necessary precautions, as he was obliged to, the damage would not have occurred. The occurrence of damage, therefore, is prima facie-evidence of a failure to take the precautions that the processor should have taken. It is then op to the processor to prove that he did take the necessary precautionary measures. Of course, he may also try to prove that the thing was already damaged before it was handed over to him.

G. No Breach of Duty of Care when Warned

Equally capable of constituting a defence against liability is the situation in which the processor had in good time and before the service was performed, warned the client against the risk that damage might result from the performance of the service; see Article 1:110(3) (Contractual Duty of the Service Provider to Warn). The reason for

the exception is that if the processor timely warned the client, the client was or should have been aware of the risk. Knowledge or presumed knowledge of the risk that damage might occur influences the client's reasonable expectations of the service. In this particular case, the mere fact that the thing is damaged is not sufficient evidence for the establishment of a breach of contract. However, the fact that the client was warned does not always exonerate the processor.

Illustration 10
A painting of a landscape is to be restored by a professional restorer. The restorer warns the client that the restoration is not without risks. The restorer is not liable if such a risk materialises and the painting is damaged. However, the restorer is liable if he used a method of processing which was objectively unsuitable for this particular restoration, and he should have realised that, given his professional expertise.

H. Infliction of Damage Needed for Proper Performance of Contract

Even though the wording of the present Article indicates that precautionary measures need to be taken to prevent *any* damage from occurring, from the contract it may follow that this does not apply to damage necessary for the proper performance of the contract. In this case, the infliction of damage is a necessary prerequisite for the service to be performed. Such may be the case if the initial infliction of damage is necessary in order to subsequently improve the thing, but may also be the actual purpose of the contract.

Illustration 11
Confidential records are handed over to be shredded.

Destruction of the records could be seen as the infliction of damage on the thing, but liability is of course excluded because that damage is intended by both parties.

Illustration 12
A table is handed over to a furniture maker to be revarnished. Prior to the application of new varnish, the old varnish is removed and the table is sandpapered.

Although the removal of the varnish and the sandpapering temporarily worsen the condition of the table, it is clear that this procedure is needed to enable the furniture maker to revarnish the table properly. The 'damage' inflicted is therefore 'necessary' and not affected by the present Article.

I. Prevention of Damage Caused by External Events

The processor is required not only to take reasonable steps to prevent himself or his staff from inflicting damage upon the thing, but also to take reasonable steps to prevent damage arising from external causes.

Illustration 13
A museum has Egyptian artefacts restored. The restorer is to protect the artefacts against humidity, wind and changes in temperature, and to guard them from theft by his staff or third parties.

J. Occurrence of Personal Injury or Damage to Other Things

Similarly, the performance of the service may lead to damage to the person of the client or that of a third party, or of *another* thing than the thing that is being worked on. Again, occurrence of such damage often implies that the processor did not take the necessary precautions.

Illustration 14
A painter is painting a wall. Some paint drips on the table on which the tin is placed. The painter did not put protective material on the table.

In this situation, the processor had neglected to take the precautions he should have taken under the present Article.

As set out above, the present Article may entail a duty to warn the processor. This will be the case if the processor, when investigating the thing prior to the performance of the service, comes across specific risks. The duty to warn extends even to those cases where materialisation of the unusual risk would not jeopardise the proper performance of the contract itself, but would seriously harm the client's interests otherwise.

Illustration 15
A client asks a mechanic to replace the exhaust pipe of his car. When the mechanic examines the car, he notices that the brakes are almost worn out. He must warn the client against the dangers arising from that fact.

K. Burden of Proof

The client has to prove that the processor did not fulfil his obligations under the present Article.

L. Character of the Rule

This Article contains a default rule.

M. Remedies

Non-performance of the duties under this Article will lead to non-conformity under Article 3:105 if the client could reasonably have expected that the result that the parties

had envisaged would be achieved. In such a case, Articles 3:110 and 3:111 would entitle the client, first of all, to specific performance. Only if such is not or no longer possible or if the processor fails to comply with a demand for specific performance within a reasonable time, the client may resort to other remedies, notably termination. In any case, an established breach of the standard of care leads to application of the normal remedies for non-performance. Since the client has an interest in performance under the present Article, he may invoke specific performance of the duty under Article 9:102 PECL (Non-Monetary Obligations) or demand assurance of future performance under Article 8:105 (Assurance of Performance). Alternatively, the other remedies of Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider), may be applied. See further extensively Comment I to Article 1:107 (General Standard of Care for Services).

Comparative Notes

1. *Standard of care*
   In many legal systems, the processor is under an obligation of result, rendering the standard of care the processor must live up to of lesser importance. Where or when the processor is under an obligation of means, the standard of care is that of a professional party, carrying out the service with reasonable (ordinary) care and skill, bearing in mind the standard of the profession, the state of the art, and usage and customs (AUSTRIA, cf. CC art. 1299 and OGH, SZ 34/153=JBl 1962, 322; ENGLAND, cf. art. 13 Supply of Goods Act 1982 and *Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 at p. 738, Court of Appeal; FINLAND, cf. Consumer Protection Act Chapter 8, Section 12 para. 2; GREECE, cf. CC art. 330 and art. 8 Act 2251/94 on consumer protection, ITALY, cf. CC art. 1176 para. 2); THE NETHERLANDS, cf. HR 26 April 1991, NJ 1991, 455, Benjaddi/Neve, POLAND, cf. CC art. 355 para. 1; SPAIN, cf. Law proposal 1994; SWEDEN, cf. Consumer Services Act art. 4, and Olsen Konsumentskyddets former, p. 95. In FRANCE, an express reversal of the burden of proof mostly applies, cf. Ph. Le Tourneau, Le contrat de maintenance, GazPal, doctr., 446. The standard of care is then measured by the comparison with the 'bon père de famille' (cf. CC arts. 1137, 1927), bearing in mind the processor's professional capacity.
   No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Liability if damage to good occurs, unless warned or inevitable*
   Undisputed is that damage to the good on which the service is executed, must be avoided. This follows in most systems from an explicit or implied contractual term to use due diligence and care (*Schutz- und Sorgfaltspflichten*; AUSTRIA, cf. CC art. 1169; ENGLAND, cf. *Brabant & Co. v King* [1895] AC 632, at. p. 641) or the general provision of good faith (GERMANY, cf. CC arts. 241, 242, BGH NJW 1983, 113). In consumer contracts in FINLAND (cf. Consumer Protection Act Chapter 8, Section 12 para. 2 and Chapter 9, Section 13 para. 2 under 5) and SWEDEN (cf. art. 32 of the Consumer Services Act), damage to the good that was worked on will be considered a defect of the service if the client would have had reason to expect that the performance of the service would not lead to such damage. In ENGLAND, in the case of

damage to the good, a reversal of the burden of proof occurs, cf. *Levison v Patent Steam Carpet Cleaning Co Ltd*. [1977] 3 AllER 498, [1978] QB 69, Court of Appeal
No information from BELGIUM, DENMARK, GREECE, IRELAND, LUXEMBURG, SCOTLAND, SPAIN.

3. *Liability in case of damage to other goods of the client*
The processor may also be held liable if it inflicts damage upon other goods of the client. In AUSTRIA (cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1169 nos. 3, 8-9) and GERMANY (cf. CC arts. 241, 242, BGH NJW 1983, 113), liability follows from the breach of a duty of care in performing the contract. The same can be said for DUTCH (CC art. 6:74 ff), ENGLISH (Supply of Goods and Services Act 1982 art. 13), FINNISH (Consumer Protection Act Chapter 8, Section 12 para. 2 and Chapter 9, Section 13 para. 2 under 5) and SWEDISH law (Consumer Services Act art. 32). In PORTUGAL, liability may sometimes be based only on tort law, cf. CA Porto,, 21 October 1991, BolMinJus 410, 874.
No information from BELGIUM, DENMARK, GREECE, IRELAND, LUXEMBURG, SCOTLAND, SPAIN.

National Notes

1. *Standard of care*
AUSTRIA As processing contracts are normally contracts for work, the mere fact that the promised result was not achieved, implies a non-performance. Where the processor (explicitly) only promises to try to achieve a result, the contract is qualified as a *freier Dienstvertrag,* which is not regulated in the CC. In such a case, the processor is only required to exercise due care, cf. Rummel [*-Krejci*], ABGB Kommentar,, arts. 1165-1166 no. 118. CC art. 1299 then requires the processor to exercise the usual degree of care and attention that is necessary for the task or job in question. Cf. OGH, SZ 34/153=JBl 1962, 322; OGH, JBl 1982, 245=EvBl 1981/159.
ENGLAND art. 13 of the Supply of Goods and Services Act 1982 provides that 'there is an implied term that the supplier will carry out the service with reasonable care and skill.' The degree of care and skill required of a professional is that which is to be expected of a member of its profession of ordinary skill and competence, cf. *Bolam* v *Friern Hospital Management Committee* [1957] 1 WLR 582, 586 (High Court); cf. for bailment *Morris v CW Martin* & *Sons Ltd* [1966] 1 QB 716 at p. 738, Court of Appeal *per Salmon LJ*; for gratuitous bailment, cf. *Port Swettenham Authority v TWWu* & *Co (M) Sdn Bhd* [1979] AC 580, at p. 589, Privy Council *per Lord Salmon*. Moreover, the service must comply with any applicable regulations governing safety standards and practices, cf. *Wilson v Best Travel Ltd* [1993] 1 AllER 353, QB.
FINLAND In consumer contracts, the processor must perform the contract with professional skill and care, taking into account the interests of the client, and in accordance with the requirements set out by law, decree or official decision, cf. Chapter 8, Section 12 (2) of the Consumer Protection Act. If the service does not conform to these standards, it is deemed to be defective (para. 4). Moreover, the burden of proof for the service having been performed with professional skill and care is explicitly placed on the processor, para. 4 sets out.

FRANCE The nature of the obligation of the processor varies in accordance with the difficulty of the task performed, cf. Ph. Le Tourneau, Le contrat de maintenance, GazPal, 1988, 2, doctr., 446. When the service promised does not involve particular difficulty or particular hazard, the processor is presumed to have promised a result and he is liable if the such a result is not achieved. The obligation is then called *obligation de résultat*. The provider of a material service is in principle under an obligation of result, Cass.com., 6 July 1993, Bull.civ. IV, no. 280, repair of a coffee machine, Cass.civ. I, 20 December 1993, Bull.civ. I, no. 376; RTD civ 1994, 611 obs. Jourdain, dry cleaner's. Nevertheless, the processor can often prove the *absence* of negligence in order to escape liability. In such a case the obligation is of result alleviated *(obligation de résultat attenué)*. This seems to be the case for garage mechanics, Cass.civ. I, 22 June 1983, Bull.civ. I, no. 181; RTD civ 1984, 119, obs. Rémy; Cass.civ. I, 2 February 1994, JCP 1994.II.22294, note Delebecque. There are, however, cases where a pure obligation of result is accepted. Finally, in some circumstances, it has been ruled that some processors are under a simple obligation of means, i.e. the client has to prove that the processor has not acted with the required diligence, cf. Cass.civ. I, 5 March 1985, Bull.civ. I, no. 84; RTD civ 1986, 359, maintenance of an elevator, CA Montpellier, 9 October 1986, quoted by Huet, Maisl, Droit de l'informatique et des télécommunications, no. 431, maintenance of a computer system. The standard of care is then measured by the comparison with the '*bon père de famille*' (cf. CC art. 1137), bearing in mind the processor's professional capacity.

GERMANY German Law does not focus on the quality of the processing activity itself but more on the outcome of the work. The work has to be fit for its normal purpose and must have the qualities which are common for works of the same kind and which the client, from the nature of the work, may expect, cf. CC art. 633 para. 2, BGH NJW 1998, 3707. In doing so, the processor must act in accordance with the general standard of technique *(Regeln der Technik)*.

GREECE According to CC art. 330, the processor is liable for damages on the ground of negligence when the care required in the carrying out of business is not furnished. Furthermore, Act 2251/94 art. 8 on consumer protection provides a list of guidelines to assess the fault of the supplier of the service, which are in line with the criteria included in the proposal for a directive on the liability of the service provider.

ITALY As a professional provider of services, the processor must perform the contract with the diligence and knowledge, required by his profession (CC art. 1176 para. 2); see V. Mangini, Il contratto di appalto, p. 134; F. Marinelli, La responsabilità del committente per danni cagionati a terzi dall'appaltatore nel corso dell'esecuzione dell'opera, in Giust.civ, 1982, ii, p. 116.

THE NETHERLANDS According to the general standard of care, a processor has to use due care and to act as a reasonably skilled and a reasonably acting processor would. Cf. HR 26 April 1991, NJ 1991, 455 (Benjaddi/Neve, standing case law).

POLAND CC art. 355 para. 1 provides that the debtor is obliged to act with the diligence generally required in relationships of a given kind; para. 2 adds that the professional capacity of the debtor is to be taken into account, leading to a higher standard of care.

PORTUGAL In case of a contract for service, the standard of care becomes the central category to establish performance. The processor is a professional, being bound by the *leges artis* of the profession and, as the case may be, of his specialisation. However, a

processing contract mostly leads to a contract for work and therefore to an obligation to achieve some result in conformity with the contract and fit for purpose.
SPAIN Under the law proposal of 1994, the standard of care is determined by obliging the service provider to observe the due diligence required by the type of service provided and in accordance with the rules which regulate its profession or art. During the execution of the service, the provider has to follow the guidelines given by the client, unless these instructions imply a modification to the agreed counter-performance or an interference with the professional field of the provider or may cause damages.
SWEDEN Concerning contracts for consumer services, Consumer Services Act art. 4 states that the professional shall perform the service in a professional manner, to safeguard the consumer's interests with due care and to consult the consumer to the extent that this is necessary and feasible. The same norm should apply to non-consumer contracts, but here the parties are free to agree upon the quality and standards they like, cf. Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 95.

2. *Liability if damage to good occurs, unless warned or inevitable*
AUSTRIA The processor is required to safeguard the client's interests. To that extent, the processor is under duties of diligence and care *(Schutz- und Sorgfaltspflichten)*, cf. CC art. 1169. He must care for the goods that are entrusted to him by the client in the same diligent way as a storehouse would have to do, cf. OGH, SZ 2/11.
ENGLAND As a processing contract may generally be qualified as bailment, the processor is required to prevent damage to the good handed by the client, cf. *Brabant & Co. v King* [1895] AC 632, at. p. 641. In case of damage, the processor must prove all the circumstances known to him in which the loss or damage occurred; failure to do so leads to liability; cf. *Levison v Patent Steam Carpet Cleaning Co Ltd.* [1977] 3 AllER 498, [1978] QB 69, Court of Appeal. In practice, this leads to a reversal of the burden of proof.
FINLAND The client normally has reason to expect that the good that is worked on will not be damaged in the performance of the service. Occurrence of damage to the good then is considered to be a defect, it follows from Consumer Protection Act Chapter 8, Section 12 para. 2 and Chapter 9, Section 13 para. 2 under 5. Section 32 entitles the client to compensation for damage to the good while it is in the possession or under the supervision of the processor, unless the processor proves the occurrence of damage was not due to negligence on his part.
FRANCE The loss of or damage to the good is governed by CC art. 1789, leading to a fault-based liability of the processor; yet, the processor bears the burden of proof that he did act with care *(obligation de résultat attenué)*, cf. Cass. civ. I, 14 May 1991, D. 1991.449, note J. Ghestin (standing case law). The processor has especially to prove that he has taken the normal precautions for the protection of the thing processed.
GERMANY The processor is under an obligation to act with consideration regarding the property of the client, cf. CC arts. 241, 242 (BGH, VersR 1969, 927; BGH, NJW 1983, 113) and may not endanger the client's life or health (OLG Karlsruhe, VersR 1985, 297). There is no difference between the care required as to the good that is the object of the contract, and other goods of the client.
ITALY The processor is required to respect statutory standards as regards safety rules. Cf., more specifically for construction, G. Marando, Sicurezza del lavoro e respons-

abilità nell'appalto, nel contratto d'opera e nella gestione dei cantieri edili, in Resp. Civ. e Prev., pp. 33-56.

THE NETHERLANDS The processor is liable for any damage occurring to the good that can be attributed to its actions, cf. CC arts. 6:74 ff (general contract law). An explict obligation not to damage the client's good is recognised in standard contract terms, cf. art. 5, para. 4, VNI-Installatievoorwaarden.

POLAND If the damage to the work occurs due to any reason covered by the contractual liability of the processor, the work does not conform and he is liable. If however the work is destroyed or damaged due to defects of the material delivered by the client or as a result of the work having been made in accordance with the client's instructions, the person who received the order may demand the agreed remuneration or the appropriate part for the work made, provided that he has warned the client of the danger of destruction of, or damage to the work (CC art. 641 para. 2).

PORTUGAL According to CC art. 1228, it must be ascertained if the damage is imputable to processor; if so he is liable for that damage. However, in CA Porto, 21 October 1991, BolMinJus 410, 874, is was made clear that sometimes not a contractual, but a tortious claim is to be made. In this particular case, a client delivered his car to a garage for repair. The car mechanic applied an oil pump that was inadequate for that engine, resulting in the total destruction of the engine. The court held that the damage, although resulting from the non-performance of a contract for work, is to be indemnified in tort since the act causing the damage was forbidden and faulty under the law of torts.

SWEDEN According to Consumer Services Act art. 32 the service provider is presumed liable for damage to the goods while in its possession, or otherwise subject to its control. For commercial contracts, the general rules on tort will be applicable, presuming liability for goods in the possession of the service-provider, but otherwise limiting liability to proven causation, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 118.

3. *Liability in case of damage to other goods of the client*

AUSTRIA The processor is required to safeguard the client's interests. To that extent, the processor is under duties of diligence and care (*Schutz- und Sorgfaltspflichten)*, cf. CC art. 1169. From this, it follows that the processor must prevent personal injury to the client and, in sofar as foreseeable, to third parties. He further must prevent damage to the client's goods, cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1169 nos. 3, 8-9.

ENGLAND Supply of Goods and Services Act art. 13 applies, requiring the processor to exercise reasonable care and skill. The mere occurrence of damage to other goods does not imply a breach of that standard or a presumption to that extent: *Levison v Patent Steam Carpet Cleaning Co Ltd.* [1977] 3 AllER 498, [1978] QB 69, Court of Appeal does not apply as it is not the good itself that was damaged.

FINLAND The client normally has reason to expect that the good that is worked on will not be damaged in the performance of the service. Occurrence of damage to another good belonging to the client then is considered to be a defect, it follows from Consumer Protection Act Chapter 8, Section 12 para. 2 and Chapter 9, Section 13 para. 2 under 5. Section 32 entitles the client to compensation for damage to his property while it is in the possession or under the supervision of the processor, unless

the processor proves the occurrence of damage was not due to negligence on his part.

FRANCE When the service is performed at the client's place, the processor's liability for damage to the goods in that place is fault-based, without a reversal of the burden of proof. Cf. Cass.civ. I, 5 March 1991, CCC 1991-5, no. 132. In such cases the most important issue is the determination of the causal link, the proof of its existence is on the client, Cass.civ. III, 14 June 1983, Bull.civ. III, no. 138. The liability is based on contract and not on tort. Huet, Les principaux contrats spéciaux, no. 32303.

GERMANY The processor is under an obligation to act with consideration regarding the property of the client, cf. CC arts. 241, 242 (BGH, VersR 1969, 927; BGH, NJW 1983, 113) and may not endanger the client's life or health (OLG Karlsruhe, VersR 1985, 297). There is no difference between the care required as to the good that is the object of the contract, and other goods of the client.

ITALY The processor is required to respect statutory standards as regards safety rules. Cf., more specifically for construction, G. Marando, Sicurezza del lavoro e responsabilità nell'appalto, nel contratto d'opera e nella gestione dei cantieri edili, in Resp.Civ. e Prev., pp. 33-56.

THE NETHERLANDS The processor is liable for any damage occurring to the good that can be attributed to its actions, cf. CC art. 6:74 ff (general contract law). An explicit obligation not to damage the client's good is recognised in standard contract terms, cf. art. 5, para. 4, VNI-Installatievoorwaarden.

POLAND Contractual liability within the scope of normal causation covers damage of any part of the property of the client. Moreover, in a case of a building contract if the constructor has taken over from the client the building site by protocol, he is liable, until the time of handing over the object, on the general principles for the damages resulting on that site (CC art. 652).

PORTUGAL According to CC art. 1228, it must be ascertained if the damage is imputable to processor; if so he is liable for that damage. Yet, again, it may be that a tortious claim is to be made in stead of a contractual claim, cf. CA Porto, 21 October 1991, BolMinJus 410, 874.

SWEDEN For consumer services, Consumer Services Act art. 32 not only applies to the goods on which the service is being performed, but also if other property belonging to the consumer or some member of its household is being damaged while in the possession of the professional, or otherwise subject to its control. This means that if a service-provider is performing a service in the consumer's house, it will be presumed liable for damage to the house or furniture, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 117.

Article 3:105: Conformity

The processor must achieve the specific result stated or envisaged by the client at the time of the conclusion of the contract, provided that:

(a) any result envisaged but not stated was one that a reasonable client in the same circumstances as the client might have envisaged; and

(b) a reasonable client in the same circumstances would have no reason to believe that there was a substantial risk that the result would not be achieved by the service.

Comments

A. General Idea

Often, the client may expect the service to yield the result the parties envisaged when the contract was concluded. The present Article is intended to determine when such expectation is justified. It provides that if such expectation is justified under the circumstances of the case and the result is not met, the processor will normally be liable for non-performance.

> *Illustration 1*
> A car is being worked at a garage to make it fit for use on a racing circuit. After the mechanic has finished his job, the car may no longer be driven in a public street since its exhaust pipe produces too many polluting gasses.

If such is a normal consequence of having the service performed, the fact that the car is not to be used in a public street is in accordance with what may be expected of a car undergoing this particular service. If, on the other hand, the client could normally have expected still to be able to drive the car in a public street, the car will still have to be fit for that normal purpose.

B. Interests at Stake and Policy Considerations

The liability with regard to the quality of the outcome of the service is an important issue for both parties. When the processor's liability is strict, the processor will have to remedy defects even if he satisfied every relevant quality criterion regarding the assessment of the existing situation, the input and the process of performance of the contract; see the preceding Articles and Articles 1:103 to 1:107 of Chapter 1 (General Provisions). His only escape is showing that specific defences apply. When there is no liability for 'conformity' of the service, the central issue will be whether the processor satisfied these quality criteria set for his activities. In practice, the difference between the two approaches should not be overstated, especially when the burden of showing whether or not the processor performed his duties is on the processor. In such a case, the question is rather which defences are allowed under both regimes. Nevertheless, the starting point for legal reasoning would in any case be different.

For processing contracts, the situation is somewhat more problematic than for construction contracts. For the latter contract type, it is usually quite clear what result is to be achieved and whether or not that result is achieved. Similarly, in some processing contracts, the fact that the outcome of the service is not in conformity with the client's expectations may constitute evidence that the processor did not meet his obligations under the contract. However, in other processing contracts the outcome of the service may not be as predictable and such an assumption may not be justified. It is therefore difficult to introduce a uniform regime for all processing contracts.

C. Comparative Overview

The processor is normally under an obligation of result in AUSTRIA, FRANCE, GERMANY, ITALY, THE NETHERLANDS and POLAND. A contrasting approach is taken in ENGLAND and SWEDEN, where the processor generally only is under an obligation of means, either with or without reversal of the burden of proof. However, in all legal systems the court may come to a different decision in a concrete case, as the nature of the obligation of the processor in a specific case heavily depends on the interpretation of the contract. In FINLAND, this has been made explicit for consumer services; the Consumer Protection Act, Section 12(2) states explicitly that 'the service shall conform to what the consumer generally has reason to expect in the case of such a service'; if the service does not conform to the consumer's reasonable expectations, it is deemed to be defective.

D. Preferred Option

The Article serves to determine whether, in a processing contract, the client may expect that the service yields the result the parties had envisaged when the contract was concluded. If such an expectation is justified and the result is not yielded, the client can easily establish the processor's non-performance. This approach is taken over from the Finnish Consumer Protection Act, where the focal point explicitly is the reasonable expectations of the client. This modern approach avoids the traditional qualification of the obligation as either an obligation of result or an obligation of means, which in practice is but a starting point for legal reasoning since, in all systems, it is recognised that the nature of the obligation of the processor in a specific case heavily depends on the interpretation of the contract.

E. Relation to PECL and Other Parts of the Principles

The Article is an almost literal restatement of Article 1:108 (Result Stated or Envisaged by the Client) and, as such, does not specifically add to that provision. The present Article serves another purpose. Both processing contracts implying a mere obligation of means and processing contracts that imply an obligation of result are fairly common, whereas national legal systems are more or less evenly divided as to the nature of the obligation. Given the specific importance of the issue for processing contracts, an

explicit restatement was deemed necessary, to provide the possibility of giving concrete comments as to the application of Article 108 (Result Stated or Envisaged by the Client) in processing contracts.

In processing contracts, the client may normally expect that after the service has been completed, the thing that was worked on is fit for the specific purpose for which the client had the service performed. Of course, this is true only insofar as the processor knew or should have known of that specific purpose at the time of the conclusion of the contract or at the time of any variation in accordance with Article 1:111 (Variation of the Service Contract), and did not inform or warn the client that such a result could not be expected.

Moreover, and unless a warning was issued by the processor, the client may reasonably expect that the service will be performed in such a manner that the thing can be used in a manner which is normal for things that have undergone the specific service, taking into account the purpose the thing would normally have after having undergone the service and the manner in which it would be used.

In determining whether the thing is fit to be used in the normal manner or for a normal purpose, or for the specific purpose made known to the processor, private and public statements from the processor or his representative are to be taken into account, both when these statements relate to the characteristics of the thing that the service is being performed on and when they relate to the service itself; cf. Article 6:101 PECL (Statements giving rise to Contractual Obligation).

Another situation in which there will often be a case of non-conformity under the present Article is when the thing was damaged during the period that it was worked on by the processor. Avoidance of such damage may normally be expected by the client; cf. the Comments to Article 3:104.

F. Burden of Proof

The burden of proof of the fact that the client could reasonably expect the result that the parties had envisaged and of the fact that that result has not been achieved, or the burden of proof that a concrete result was stated is on the client.

G. Character of the Rule

The Article contains a default rule.

H. Remedies

Non-conformity under this Article gives rise to the normal remedies for performance under Chapter 9 PECL (Particular Remedies for Non-Performance), as modified in Articles 3:110 and 3:111. This means in particular that the client is entitled, first of all, to specific performance. Only if such is not or no longer possible, or if the processor fails to comply with a demand for specific performance within a reasonable time, the client may resort to other remedies, notably termination. See further extensively Comment I to Article 108 (Result Stated or Envisaged by the Client).

Comparative Notes

1. *Process normally leading to result in conformity with contract: obligation of result or means*
The processor is normally under an obligation of result in AUSTRIA (cf. Koziol and Welser, Bürgerliches Recht II, p. 247; Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166 no. 56), FRANCE (cf. Huet, Les principaux contrats spéciaux, nos. 32276-32277); GERMANY (cf. CC art. 633 para. 2, BGH NJW 1998, 3707), THE NETHERLANDS (cf. Den Boer/Wildenburg, TvC 1993, pp. 286-287) and POLAND (CC art. 627). A contrary approach is taken in ENGLAND (cf. *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 AllER 99, [1975] 1 WLR 1095, Court of Appeal) and SWEDEN (cf. Consumer Services Act art. 4 and Olsen, Konsumentskyddets former, p. 94f), where the processor generally only is under an obligation of means, either with or without reversal of the burden of proof. However, in all legal systems the court may come to a different decision in a concrete case, as the nature of the obligation of the processor in a specific case heavily depends on the construction of the contract. In FINLAND, this has been made explicit for consumer services, where it is stated explicitly that 'the service shall conform to what the consumer generally has reason to expect in the case of such a service'; if the service does not conform to the consumer's reasonable expectations, it is deemed to be defective (Consumer Protection Act Chapter 8, Section 12, para. 2 and 4).
No information from BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, SCOTLAND, SPAIN.

National Notes

1. *Process normally leading to result in conformity with contract: obligation of result or means*
AUSTRIA As processing contracts are considered *Werkverträge*, the mere fact that the promised result was not achieved, implies a non-performance. The processor then can't escape liability by arguing he has lived up to the standard of care for his profession, cf. Koziol and Welser, Bürgerliches Recht II, p. 247. However, insofar as the processor merely undertakes to find out what is wrong with a good, he is under a mere obligation of means. If subsequently he undertakes to repair the good, he again is under an obligation of result, cf. Reischauer, in: Rummel, Kommentar, CC, arts. 918-933 no. 2. Where the processor can't guarantee such a result, he must inform the client thereof and explicitly contract for an obligation of means only. Cf. Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166 no. 56, using the example of a *Reperaturvertrag* (contract of repair).

ENGLAND Whether a processing contract entails an obligation of means or one of result, depends on the interpretation of the contract. An obligation of reasonable skill and care (i. e. an obligation of means) is more common, but from the specific circumstances of the case sometimes an implied warrant may be deduced; cf. *Greaves & Co (Contractors) Ltd v Baynham Meikle & Partners* [1975] 3 AllER 99, [1975] 1 WLR 1095, Court of Appeal. If a good is used and consumed in the performance of the contract, that good must be fit for purpose, cf. s. 4, subs. 5 Supply of Goods and Services Act 1982 and, under common law (especially relevant if the good dissipates), *Stewart v Reavell's Garage* [1952] 1 AllER 1191 (repair of a car), [1952] 2 QB 545; *Ingham v Emes* [1955] 2 QB 366 (dying of a woman's hair).

FINLAND Consumer Protection Act Chapter 8, Section 12, para. 2, 2nd sentence, provides that the 'service shall conform to what the consumer generally has reason to expect in the case of such a service'. If the service does not conform to the consumer's reasonable expectations, it is deemed to be defective, para. 4 provides.

FRANCE The processor normally is to deliver a material performance, which would imply that he would be under an obligation of result. However, nowadays, his responsibility is brought back to an *obligation de résultat attenué,* which implies that he may prove the absence of negligence on his behalf to be absolved from liability. Cf. Cass.-com, 20 March 1985, Bull.civ. I no. 105. In practice, this means that the liability is fault-based with a reversal of the burden of proof. In a contract of maintenance, the processor sometimes even is under a mere obligation of means, cf. Cass.civ. I, 5 March 1985, Bull civ. I, no. 84. Cf. Huet, Les principaux contrats spéciaux, nos. 32276-32277.

GERMANY The work has to be fit for the specific purpose made known to the processor at conclusion of the contract, as well as fit for the normal purpose of such a work. To that extent, it must have the qualities which are common for works of the same kind and which the client, from the nature of the work, may expect, cf. CC art. 633 para. 2, BGH NJW 1998, 3707. The work is defective if it is not undertaken according the general standard of technique *(Regeln der Technik)*. This is not explicitly laid down in the CC but e. g. in art. 13 Nr. 1 VOB/B, the standard conditions for construction contracts, which sometimes apply for processing contracts too.

THE NETHERLANDS As a processing contract is considered to be a contract for work, normally the processor is under an obligation of result, cf. Den Boer/Wildenburg, TvC 1993, pp. 286-287. However, some standard contract terms indicate a mere obligation of means (e. g. art. 5, para. 1, VNI-Installatievoorwaarden, relating to, among other things, the installation of utilities). In any case, the practicallity of the qualification may be questioned: far more decisive is the way the facts of the case are presented in court.

POLAND The contract of specific work (CC art. 627) as well as the building contract (CC art. 647) belongs to the category of obligations of result.

PORTUGAL Activities such as finishing works in a new processing (e. g. paperhanging) have been regarded as either contract for work (CA Coimbra, 20 June 1990, BolMinJus 398, 593), but sometimes as a contract for services (STJ 25 September 1991, BolMinJus 409, 764). In the former case, the processor is under an obligation of result, in the latter case he is under an obligation of means.

SWEDEN The concrete performance of the service must be performed in a professional manner (Consumer Services Act art. 4), meaning that it has to reach a certain quality,

and fulfil some minimum standards as to safety requirements, Olsen, Konsumentskyddets former, p. 94f. While judging if the service has been performed in a professional manner general descriptions of material and instructions regarding working methods are regarded, Olsen, Konsumentskyddets former, p. 95.

Article 3:106: Inspection and Supervision

(1) In accordance with Article 1:104(1)(d) (Duty to Co-operate), if the service is to be performed at a site provided by the client, the client may inspect or supervise the input, the performance of the service and the thing on which the service is performed in a reasonable manner and at any reasonable time, but is not bound to do so.
(2) Absence of, or inadequate inspection or supervision does not relieve the processor wholly or partially from liability. This rule also applies when the client is under a contractual obligation to accept, inspect or supervise the processing of the thing.

Comments

A. General Idea

The client may, but is not obliged to watch the processor executing the contract when the service is performed on his premises. If the client does not exercise his right to watch the performance of the service, or does so inattentively, this does not have negative consequences for him.

Illustration 1
A security company is requested to install a security camera system on the outside of an office building. The client is entitled to supervise the installation of the cameras. When attaching the cameras to the building, the security company accidentally uses the wrong type of screws. As a consequence, the cameras become detached and fall down damaged beyond repair.

The client's failure to notice the use of the wrong screws when he supervised the installation of the cameras does not exempt the processor in whole or in part from his liability.

B. Interests at Stake and Policy Considerations

The client has an interest in inspection of the performance of the service, for during the inspection the client may notice that the processor is not fulfilling obligations under this Chapter. In that case, he would able to intervene timely by giving the processor a direction or by insisting on specific performance under, for instance, Article 1:105 (Circumstances in which the Service Is to Be Performed), Article 1:106 (Duties of the

Service Provider regarding Input) or Article 3:103. On the other hand, conflicting interests of the processor – especially the risk of disclosure of trade secrets – and of third parties – especially the right to privacy – may be at stake.

A second issue is what is to happen if the client was entitled to inspect or supervise, but did not do so, or if the client actually did inspect or supervise, but did so inadequately. One could think that in such a case the client forfeited his right to claim damages for non-performance as he could have noticed the non-performance earlier. On the other hand, one could argue that there is no reason why the client should lose his rights when, after all, it was the processor whose non-performance led to damage.

C. Comparative Overview

With the possible exception of SWEDEN in the case of a commercial service at the time risk passes to the client, in none of the legal systems an *obligation* to inspection exists. A *right* to inspection has been accepted in many of them, the principal exception being ENGLAND. In most legal systems, no distinction is drawn between construction contracts and processing contracts as to this matter. Consequently, a right to inspection would in principle exist even if the service were performed at the processor's site. If inspection does take place but is performed inadequately, this may have detrimental effects for the client in THE NETHERLANDS as the client may lose his remedies. This is the same in ITALY when the client during inspection actually discovers a defect but neglects to inform the processor thereof.

D. Preferred Option

The general system is that the client has no duty to inspect, and that inadequate or lack of inspection does not relieve the processor from any of his duties. Only if the client noticed a defect and did not notify the processor within a reasonable time, the processor may assume the client accepted the defect.

As the interest of the client in inspection and supervision of the performance of the service, the processor's conflicting interest concerning the risk of the disclosure of trade secrets and the interests of third parties need to be balanced, the right to inspection and supervision in processing contracts is restricted to cases where the service is performed on the client's premises.

Inspection and supervision are a mere *right* of the client. It is not considered an obligation weighing on the client in any legal system, and it is not considered as such under this Article either. Therefore, it does not seem justified to deprive the client of any of his rights if he *could* have discovered the non-performance, but in fact did not do so, for instance because he did not inspect at all. Even inadequate inspection should not lead to such a result, for it would mean a counter-incentive to inspect at all. Only if the client reasonably could not have *not* noticed the non-performance, the client's loss of rights could be considered a proper outcome.

E. Relation to PECL and Other Parts of the Principles

There is no direct link between this Article and the PECL, other parts of the Principles and Chapter 1 (General Provisions).

The present Article to a large extent mirrors Article 2:105 (Inspection, Supervision and Acceptance) in Chapter 2 (Construction). The Article differs from that provision in two respects. Firstly, given the weight of the processor's interests in defending his trade secrets and the right of third parties (other clients of the processor) to their privacy, the right to inspection and supervision in processing contracts is restricted to cases where the service is performed on the client's premises. Secondly, a specific provision as to the presentation of elements in the process to the client for acceptance is not needed for processing contracts and has therefore been left out. Given the default character of the present Article, the parties may of course include such a provision in their contract.

In practice, and in line with the de facto situation in several legal systems, the client may be required to inspect the work, as a failure to notify a non-performance that could have been detected at delivery may lead to the loss of some rights under Article 1:113 (Failure to Notify for Non-Conformity). It should be mentioned that such a loss of rights does not automatically occur at the time of delivery, but only after a particular period of time has elapsed, during which the client could have notified the processor of the non-performance. The parties may contract around that. However, as follows from Article 2:104 PECL (Terms Not Individually Negotiated), the processor may only invoke a not individually negotiated contractual provision to that extent if he has taken reasonable steps to bring them to the client's attention before or when the contract was concluded. In such a case, the client will be aware beforehand of the importance of inspection and/or supervision.

F. Burden of Proof

The thesis that the client noticed the processor's non-performance constitutes a defence to the processor's liability under this Chapter. The burden of proof that the requirements of that defence apply therefore must rest upon the processor.

G. Character of the Rule

This Article contains default rules.

H. Remedies

The remedy for failure to notify the processor where the client noticed or should have noticed the non-performance is the loss or reduction of his remedies for non-conformity under Articles 3:110 and 3:111. See further extensively the Comments to Article 1:113 (Failure to Notify for Non-Conformity).

Comparative Notes

1. *Right to inspect*
The client is not obliged to inspect, but is entitled to do so in AUSTRIA (cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1170 no. 5), GREECE (CC art. 692), ITALY (CC art. 1662). A right to inspect the service probably does exist in GERMANY (analogous application of construction law) and may also exist in THE NETHERLANDS and SWEDEN. Such a right does not exist in ENGLAND, since the Supply of Goods and Services Act 1982 does not contain such an implied term and the conditions for an implied term to that extent under common law, as set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978), ALJR 20, 26, have not been met. If the client does inspect or supervise the service during its performance, defects sometimes should be discovered; a failure to inform the processor of defects that could have been discovered at such an inspection would then lead to a loss of remedies in THE NETHERLANDS (cf. Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 569). A contrary approach is taken in ITALY, where inadequate inspection does not lead to the loss of any rights for non-performance (cf. App Torino, 17 July 1959, in GCM, 1959, p. 814).
No information from BELGIUM, DENMARK, FINLAND, FRANCE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

National Notes

1. *Right to inspect*
AUSTRIA The CC contains no duty to inspect or to point out defects. The client, however, *can* inspect the work before acceptance, a right that cannot be denied to him. Cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1170 no. 5.
ENGLAND The Supply of Goods and Services Act 1982 does not recognise an implied term entitling the client to inspect the service. It is unlikely that under common law such a right would exist, since inspection is not a necessary condition to give business efficacy to the contract and does not 'go without saying'. Therefore, the conditions for an implied term to that extent, set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1978), ALJR 20, 26, have not been met.
GERMANY The client does has the right, but not an obligation to inspect or supervise the performance of the service under art. 4 no. 1, para. 2 VOB/B. The VOB/B is applicable to construction contracts, but there is no reason not to apply the provision to processing contracts.
GREECE Under Greek law there is not a duty to inspect but rather a right the client may exercise (CC art. 692).
ITALY CC art. 1662 establishes an option for the client to examine the processor's activity while performing the contract, provided that he pays for the costs of such inspection and that the inspection does not cause needless difficulties to the processor, cf. Cass., 10 May 1965, no. 891, in RGE, 1965, I, p. 945, comment of E. Favara, Limiti del controllo del committente sull'opera dell'appaltatore. Absence or inadequate inspection during the performance of the contract does not lead to the loss of remedies, cf. App Torino, 17 July 1959, in GCM, p. 814.
THE NETHERLANDS An obligation and possibly even a right to inspect does not exist, see Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III,

no. 562. However, it is thought that if the client does inspect or supervise the service during its performance, defects sometimes should be discovered. A failure to inform the processor thereof at that time would then lead to a loss of remedies, cf. Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 569.

POLAND In the POLISH law the manner in which the contract of specific work is to be performed is in principle left for the service provider to decide. The client has only a right to control the performance from the point of view of its correctness and accordance with the contract (CC art. 636 para. 1) (Brzozowski in Rajski System Prawa Prywatnego, Tom 7 p. 336-337). If the service provider makes the work defectively or in a manner inconsistent with the contract, the client may ask him to change the mode of its making and renounce the contract or entrust another person with its performance, after an ineffective lapse of the additional time limit set by the client. Moreover, the client may control the timing of the performance (CC art. 635) and if the service provider is in delay with beginning or finishing the work so much that is unlikely that he could finish it on time, the client may without setting an additional time limit, renounce the contract even before the lapse of the time limit for making the work.

SWEDEN For commercial services, the client will have a duty to inspect the work after the passing of risk, cf. Sales Act art. 31, which is applied by analogy. Whether there is a right to inspect while the service is being performed, will depend upon the circumstances, whether the inspection hinders the service-provider in its performance and if the performance of the service will take a long time or not.

Article 3:107: Return of the Thing

(1) If the processor regards the service as sufficiently completed and wishes to return the thing or the control of it to the client, the client must accept such return or control within a reasonable time after being notified. The client may refuse to accept the return or control when the thing is not fit for use in accordance with the particular purpose for which the client had the service performed, provided that such purpose was made known to the processor or that the processor otherwise has reason to know of it.

(2) The processor must return the thing or the control of it within a reasonable time after being so requested by the client.

(3) Acceptance by the client of the return of the structure or the control of it does not relieve the processor wholly or partially from liability for non-performance.

(4) If, given the nature of the thing and the contract, the processor has become the owner of the thing as a consequence of the performance of the contract, the processor must transfer ownership of the thing when the thing is returned.

Comments

A. General Idea

This Article deals with the return of the thing or the control of it to the client. Firstly, when the processor has completed his service – and, if need be, has informed the client thereof – the client must enable the processor to return the thing to him.

> *Illustration 1*
> A garage owner has repaired a car. When the repair is completed, the garage owner rings the client informing him that the car is ready. The client is to go to the garage and collect the car.

However, the client is not required to accept the return of the thing if it becomes clear to him that the service was not rendered correctly and the defects are so serious that the client would be entitled to terminate the contract for fundamental non-performance.

> *Illustration 2*
> A handyman has repaired a washing machine. When the handyman delivers the washing machine at the client's house and does a final test run, the washing machine does not function at all. As this clearly constitutes a fundamental non-performance, the client may refuse the return of the washing machine.

Equally, the client may request the return of the thing whenever he wants to. If the client orders the return of the service before the service has been performed, this may amount to cancellation of the contract under Article 1:115 (Cancellation of the Service Contract), which means that the processor is still entitled to receive the price for his service.

> *Illustration 3*
> Arthur is the owner of a sophisticated mobile radio, with which supposedly transmissions from all over the world can be received. At some point, only the FM wave functions, so Arthur takes the radio to the shop for repair. One week later, the Olympics start. Arthur, a sports fan, demands the return of the radio, even though the repair has not yet taken place. The radio is to be returned, yet Arthur remains obliged to pay the price for the service that was requested.

Where, in the course of the performance of the contract the processor has become the owner of the thing, he is to return ownership of the thing to the client together with the thing itself.

B. Interests at Stake and Policy Considerations

As long as the processor has the thing in his possession, he must take proper care of the thing and prevent it from being damaged. The processor therefore has an interest in being freed from these obligations when the service is finished. The client, on his part,

may want the thing returned, either after he has been informed about completion of the service or before it is performed. The present Article is to deal with these interests, as well as with the consequences of the return of the thing: does acceptance of the return of the thing imply acceptance of any defects in the service or damage to the thing?

A different problem may arise if the original value of the thing is less than the value of the service that is performed on it. In many legal systems, this means that the processor has become the owner of the thing. The present Article must remedy that when the thing is returned to the client.

C. Comparative Overview

Acceptance of the thing leads to loss of the rights concerning non-performance if at that time defects were or should have been discovered (FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS) and if the client is a commercial party (POLAND and SWEDEN). In other legal systems, a different approach is taken. In those countries, the mere acceptance of the thing is not conceived as acceptance of the proper performance of the service. This appears to be the case in AUSTRIA, ENGLAND and, if the client is a consumer, in FINLAND, POLAND and SWEDEN. However, when the defect is or should have been discovered, notification is to take place within one month in POLAND and within a reasonable period in FINLAND and SWEDEN, whereas notification in a consumer case is always regarded as being in time in SWEDEN if it is made within two months after discovery.

D. Preferred Option

As the processor may have an interest in being freed from his obligation to take proper care of the thing once the service has been rendered, the present Article introduces an obligation of the client to accept the return of the thing. However, as the client is not to refuse the return of the thing (unless in the case of fundamental non-performance), mere acceptance of the thing implies nothing more than that the client performs his obligation. In other words, the mere acceptance of the thing should not be interpreted as acceptance of a non-reported defect. Moreover, in processing contracts, especially when a movable good has been worked on at the premises of the processor, packaging of the thing in order to enable safe transportation of the thing is not uncommon. In such circumstances, there does not to seem to be a compelling reason to oblige the client to inspect the thing immediately or at the processor's premises when it is returned to the client.

Where performance of the contract led to the transfer of ownership, that transfer is to be undone when the thing is returned to the client. To that extent, the present Article introduces an obligation on the processor to accomplish also a retransfer of ownership. The provision, of course, only applies if ownership did in fact pass. Whether such is the case, is a matter for property law.

E. Relation to PECL and Other Parts of the Principles

The present Article is the functional equivalent of Article 2:106 (Handing over of the Structure) in Chapter 2 (Construction) and Article 4:106 (Return of the Thing) in Chapter 4 (Storage). In this respect, these Chapters have in common that they all primarily deal with tangible things that are in the possession of a service provider and need to be transferred to the client. The Articles mentioned serve to facilitate such transfer.

Occasionally, the law of property, e. g. the *Principles of Transfer of Ownership in Movable Goods*, may interfere with the ownership of the thing. This is especially true if the value of the materials used in the performance of the contract exceeds the value of the good. When the thing is returned, ownership of the thing must be returned under paragraph (4); Article 1:106(4) (Duties of the Service Provider regarding Input) sets out that ownership must be returned free from rights of third parties that did not exist when the thing was handed over to the processor. The following illustration may serve as an example:

> *Illustration 4*
> A garage is requested to restore a virtually worthless wreck of a Bugatti. Performance of the service includes the use of original and expensive spare parts, supplied by the original manufacturer.

If the value of these spare parts exceeds the value of the car wreck, the law of property may bring about a transfer of ownership of the car to the processor. If such transfer has occurred, paragraph (4) requires the processor to return the ownership of the car to the client when the car is returned to the client. In such a case, as follows from Article 1:106(4) (Duties of the Service Provider regarding Input), ownership must be returned free from any third-party rights – including intellectual property rights – that did not exist before the contract was concluded, unless the parties have agreed otherwise, be it explicitly or impliedly. Such an agreement must be proven by the processor.

The present Article is closely connected to Article 3:108, which provides that the price becomes due when the thing is returned to the client in accordance with this Article, or when the client fails to accept the return without being entitled to do so under paragraph (1) of this Article. As the processor bears the burden to prove that the price has become due, Article 3:108 may bring about that the processor will ask the client to sign a statement in which he acknowledges the return of the thing.

F. Burden of Proof

Where the processor initiates the return of the thing, he has to prove that he has notified his wish to return the thing or the control of it to the client and that the client did not accept the return of the thing or the control of it within a reasonable time after having been notified. It is then up to the client to prove that his refusal to accept the thing was justified because the thing was not or not yet fit for use in accordance with

the purpose for which the service was originally performed; the client must also prove that the processor knew or had reason to know of the purpose for which the service was requested.

Where the client initiates the return of the thing or the control of it, he bears the burden to prove that he made his request to that extent known to the processor.

G. Character of the Rule

This Article contains default rules.

H. Remedies

Both the client – if the processor performs his right to have the thing or the control thereof returned to the client – and the processor – if the client performs his corresponding right – are under a duty to co-operate with the transfer of the thing or the control thereof. Breach of that duty to co-operate amounts to non-performance, leading to the normal remedies for non-performance under Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider). In such a case, Articles 3:110 and 3:111 would entitle the client, first of all, to specific performance. Only if such is not or no longer possible, or when the processor fails to comply with a demand for specific performance within a reasonable time, he may resort to other remedies, notably termination.

Comparative Notes

1. *Acceptance of the return of the good: consequences for claim for non-performance*
   If the client accepts the outcome of the service without protesting against a defect in the service that could be noticed by that party by inspecting the service at the end of the service, e. g. by examining the good that was worked on, then the processor can no longer be held liable in FRANCE (cf. Cass.civ. III, 16 December 1987, Bull.civ. III, no. 208), GERMANY (CC art. 640 para. 1 and 3), GREECE (CC art. 692), ITALY (CC art. 1665 para. 3 and 4, Cass. 1 May 1967, no. 809, in Rep.Foro it., 1967, V° *Appalto*, c. 103, n. 59), THE NETHERLANDS (CC art. 7:758 para. 1 and 3) and, if the client is a commercial party, in SWEDEN (by way of analogous application of Sales Act art. 31).
   To the contrary, the mere acceptance of the return of the good or the control thereover is not construed to be an acceptance of the proper performance of the service in AUSTRIA (cf. Klang [*-Adler-Höller*], V, art. 1167, 398), ENGLAND (cf. Hudson nos. 5-021, 5-022, commenting on the construction case *East Ham Corporation v Bernard Sunley* [1966] AC 406, House of Lords) and, if the client is a consumer, in FINLAND (Consumer Protection Act Chapter 8, Section 16) and SWEDEN. However, in FINLAND (Consumer Protection Act Chapter 8, Section 16) the client is required to notify the processor of the existence of a defect within a reasonable time after he

notices or should have noticed that defect; in POLAND, the period is one month after the return of the good or, in the case of a hidden defect, after the moment that client notices or should have noticed that defect (CC art. 563 para. 1). Notification of a discovered hidden defect by a commercial party is to take place immediately after the discovery thereof (cf. art. 563 para. 2).
No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

National Notes

1. *Acceptance of the return of the good: consequences for claim for non-performance*
AUSTRIA An obligation for the client to accept the work does not exist, but a refusal to accept the work leads to *mora creditoris* if the work conforms to the contract. Cf. Rummel [*-Krejci*], ABGB Kommentar, arts. 1165-1166, no. 111. An acceptance without reservation cannot be deemed a waiver of the rights based on defects that were neither apparent nor known to the client, unless there is an express or factual approval. Cf. Klang [*-Adler-Höller*], V, art. 1167, no. 398.
ENGLAND The fact that the client accepts the return of the good or the control cannot be construed to imply an acceptance of the conformity of the work. Only in the case of express approval of the result by the client is the processor absolved from liability. Cf. Hudson nos. 5-021, 5-022, commenting on the construction case *East Ham Corporation v Bernard Sunley* [1966] AC 406, House of Lords, which is to the same extent.
FINLAND Consumer Protection Act Chapter 8, Section 16 requires the client to notify a defect within a reasonable time after he notices or should have noticed a defect. The mere acceptance of the return of the good without protest therefore does not, by itself, lead to the immediate loss of remedies. Moreover, in certain cases the client may claim the application of a remedy even after the 'reasonable period' has expired.
FRANCE The client is under an obligation to accept the return of the good or the control thereover. At that point, the client is required to verify whether the service is in conformity with the contract. Acceptance without protest against defects that are or should have been recognised by the client at that time (manifest defects) amounts to an acceptance of these defects, exonerating the processor thereof. Cf. Cass.civ. III, 16 December 1987, Bull.civ III, no. 208; Huet, Les principaux contrats spéciaux, nos. 32330-32332.
GERMANY The client is required to accept delivery of the work if the service has been performed correctly; acceptance may not be refused for minor defects (CC art. 640 para. 1, 1st and 2nd sentence). The client is not required to inspect the service when it is completed, but when the client, although required to do so, does not take delivery within a reasonable period determined by the processor, he has deemed to have accepted the work (CC art. 640 para. 1, 3rd sentence). Acceptance of a work that has defects the client knows of, is deemed to be a waiver of the rights for non-performance unless the client reserves his rights at acceptance (para. 3). After acceptance, the client bears the burden to prove the existence of the defect, cf. Staudinger [*-Peters*] Kommentar BGB, art. 640, no. 1.

GREECE According to CC art. 692 the processor after inspection is exonerated from liability for defects unless these could not be ascertained with a dutiful inspection or the processor maliciously kept them secret.
ITALY CC art. 1665 para. 1 gives the client the right to verify the accomplished work. A defect which could be detected during an inspection at such time, must be mentioned to the processor; failure to do so leads to the loss of any action against the processor (CC art. 1665 para. 4). Cf. Cass., 1 May 1967, no. 809, in Rep.Foro it., 1967, V° *Appalto,* c. 103, no. 59. Where the client does not inspect without justified reasons, the work is considered accepted unconditionally (CC art. 1665 para. 3), leading to the loss of guarantees for any defects and non-conformities of the service that should have been detected at such an inspection, cf. M. Stolfi, Appalto. Trasporto, p. 52. Notification of hidden defects must take place within sixty days from their discovery, CC art. 1667 para. 2.
THE NETHERLANDS Failure to inspect the work within a reasonable period of time amounts to an unconditional acceptance of the work, cf. CC art. 7:758 para. 1, 1st. sentence, which implies exemption of liability for any defects the client should have discovered at delivery, cf. art. 7:758, para. 3, CC art. 8, para. 1, AVA 1992 and, yet only implicitly, art. 12 AVA 1992, are to the same extent.
POLAND According to CC art. 643 the client is obliged to accept the return of the work, which the service provider releases, to him in accordance with his obligation. It means that the work has to be done according to the contract and offered at the place and time as indicated in the contract or by the default rules of CC arts. 454 and 455. If these conditions are not met, the client is not obliged to accept the work. Claims of the client may be based on the general rules on the non-performance or on the rules concerning warranty for defects in the sales contract. (Brzozowski in: Rajski System Prawa Prywatnego, Tom 7, p. 358).
SWEDEN In consumer services, the client is not obliged to inspect (Hellner/Hager/Persson Speciell avtalsrätt II, first book, p 110.) For commercial services, the client does have a duty to inspect the work when the good is returned, cf. Sales Act art. 31, which is applied by analogy. Normally an obligation to notify exists only if the client actually detects a defect in the performance, not if he merely should have detected it. Failure to notify discovered defects leads to the loss of remedies.

Article 3:108: Payment of the Price

The price is due and payable as of the moment the processor transfers the thing or the control of it to the client in accordance with Article 3:107 or the client, without being entitled to do so, refuses to accept the return of the thing.

Comments

A. General idea

The central question in this Article is when the client has to pay for the service rendered or to be rendered. The Article sets out that this is after the processor has performed his part of the contract and as of the moment he returns the thing to the client.

Illustration 1
A handyman has repaired a client's modem, needed for connection to the Internet. Upon return of the modem, the client is to pay the agreed price.

The client is not to frustrate the processor's right to payment by unjustifiably refusing the return of the thing. He may, however, refuse the return of the thing if the service clearly has not been performed properly.

Illustration 2
When the handyman returns the modem, electric wires are sticking out of it on all sides. Obviously, the modem has been repaired very sloppily. The client need not accept the return of the thing and therefore does not yet have to pay the price for the service rendered.

Illustration 3
A washing machine has been repaired by a handyman. When the handyman delivers the washing machine at the client's house and does a final test run, the washing machine does not function at all. The client may refuse the return of the washing machine and does not yet have to pay the price for the service.

B. Interests at Stake and Policy Considerations

The Principles of European Contract Law start from the assumption that both parties to a contract will perform their obligations simultaneously. In processing contracts, however, performance of the processor's obligation will normally take some time. This implies that normally either the processor or the client is required to perform his obligation before the other party performs his. The party that is required to perform first therefore runs the risk that he performs his obligation without having certainty about the other party's intention to perform his part of the contract. A choice has to be made whether the uncertainty is to be placed on the processor or on the client.

C. Comparative Overview

In FRANCE, ITALY, THE NETHERLANDS, POLAND and SWEDEN, the normal situation is that unless the parties have agreed otherwise, the client is obliged to pay when the service is completed and the thing is returned to him; in practice, this means that the processor's obligation to return the thing is performed simultaneously with the

client's obligation to pay *(Zug-um-Zug-Leistung)*. In AUSTRIA, ENGLAND and, in the case of a consumer, in FINLAND, the client is even allowed a reasonable period to examine the thing after its delivery before having to pay.

D. Preferred Option

In processing contracts, usually the service is provided before the processor requests payment of that service, although it is not uncommon that the order is reversed. In the present Article, the general trend is followed, stating – by way of a default rule – that the client is only obliged to pay when the service has been completed, either because the processor so notifies to the client or because the client requests the return of the thing. However, the client is to be prevented from frustrating the coming into being of his obligation to pay by failing to accept the return of the thing. Therefore, the present Article sets out that the processor is also entitled to his remuneration if the client unjustly refuses to accept the return of the thing, i. e. when the processor did not deliver a fundamental non-performance.

E. Relation to PECL and Other Parts of the Principles

The default rule contained in Article 7:104 PECL (Order of Performance) is that both performances are to be rendered simultaneously. However, this is not very easy to apply in the case of services. Usually, the service is provided before the provider of that service requests payment for that service, although it is not uncommon that the order is reversed. As set out in Comment D above, in the present Article the general trend is followed. Therefore, the present Article derogates from the rule contained in Article 7:104 PECL (Order of Performance). It mirrors the provision of Article 2:107 (Payment of the Price) in Chapter 2 (Construction).

The present Article connects the moment that the price becomes due to the moment that the client accepted the return of the thing under Article 3:107 or refused to do so without sufficient reason. Whether the client was entitled to refuse the return of the thing – thus preventing the price from becoming due – is to be established in accordance with Article 3:107(1).

F. Long-Term Processing Contract

A processing contract may be a long-term contract. This is especially true for maintenance contracts. In such a contract, which may be concluded for a definite or an indefinite period of time, it is common for the parties to agree upon payments during the performance of the contract, for instance before or after a specific period has started or ended. A specific provision to this extent is not deemed necessary here, as parties will agree upon such payments when needed. When the parties agree upon such a mode of payment, a price due for a period that has elapsed remains due even if the thing is subsequently destroyed by a supervening event; cf. Article 3:109(3).

G. Burden of Proof

The processor is to prove that the price has become due under this Article. To that extent, he has to prove either that the client accepted the return of the thing or the control thereof – which will usually not be very difficult, but may de facto require the processor to ask the client to sign a statement to that extent – or that he offered to return the thing to the client. The client then has to prove that his refusal to accept the return of the thing was justified under Article 3:107(1), thus preventing the price from becoming due.

H. Character of the Rule

This Article contains a default rule.

I. Remedies

The remedies of Chapter 9 PECL (Particular Remedies for Non-Performance) apply to non-performance of the monetary obligation, including the right to specific performance thereof under Article 9:101 PECL (Monetary Obligations). Furthermore, the processor is entitled to withhold the thing until the client pays the price, as Article 9:201 PECL (Right to Withhold Performance) sets out.

Comparative Notes

1. *Moment when payment is due*
   Remuneration is normally due when the service is completed in FRANCE (cf. Huet, Les principaux contrats spéciaux, no. 32335), GERMANY (CC art. 641 para. 1), THE NETHERLANDS (cf. Asser [*-Kortmann-De Leede-Thunnissen*], no. 607) and POLAND (cf. CC art. 642 para. 1). In AUSTRIA (cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1170 no. 5), ENGLAND (cf. *Hughes v Lenny* (1839) 5 M & W183, as quoted in Chitty on Contracts (McKendrick), no. 22-053), SWEDEN (Consumer Services Act art. 41 (1)) and, in a consumer case, in FINLAND (cf. Consumer Protection Act Chapter 8, s. 25) the client is even entitled a reasonable period to examine the performance after its delivery.
   No information from BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN, SWEDEN.

National Notes

1. *Moment when payment is due*
   AUSTRIA Unless the parties have agreed differently, the price is due when the service is completed and the client has had a chance to inspect the result of the work, cf. Rummel [*-Krejci*], ABGB Kommentar, art. 1170 no. 5; Koziol/Welser, Bürgerliches Recht II, p. 244.

ENGLAND Where the processor contracts to work on the client's good and no time for payment has been fixed, the client must pay as soon as the processor has completed the work and given the client a reasonable opportunity of seeing that the work has been properly done, *Hughes v Lenny* (1839) 5 M & W183, as quoted in Chitty on Contracts (McKendrick), no. 22-053; see also H. Collins, Law of Contract, p. 342. If the work is delivered in parts and no time for payment has been fixed, the processor may sometimes be entitled to claim payment for the parts of the work already completed, *Roberts v Havelock* (1832) 3 B. & Ad. 404, as quoted in Chitty on Contracts (McKendrick), no. 22-053. However, in the interest of protection of the client (especially if he is a consumer), sometimes an 'entire obligation' is imposed upon the processor, i. e. an obligation which must be substantially performed before any payment falls due, cf. *Bolton v Mahadeva* [1972] 2 AllER 176, 1 WLR 1009, Court of Appeal.

FINLAND Consumer Protection Act Chapter 8, Section 25 provides that if no time has been agreed for the payment of the service price, the processor is entitled to payment when the service is delivered, i. e. when the good or the control thereover is returned to the consumer, and the consumer has had a reasonable period of time to examine the performance of the service.

FRANCE Payment is normally due when the service is completed, cf. Huet, Les principaux contrats spéciaux, no. 32335.

GERMANY Unless agreed otherwise, payment is due when the good is returned to the client (CC art. 641 para. 1), cf. Schlechtriem, Schuldrecht, Besonderer Teil, 5. Aufl. 1998, no. 367.

THE NETHERLANDS Unless agreed otherwise, payment is due when the service is completed in accordance with the contract and the good is returned to the client. Cf. Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, no. 607.

POLAND If the parties did not agreed otherwise, the remuneration is due at the moment of completion of the service (art. 642 para. 1). If the work is delivered in parts and the remuneration was calculated for each part separately, such remuneration is due at the moment of each of the partial performances (art. 642 para. 2).

SWEDEN Under consumer services contracts, unless agreed otherwise, the consumer shall pay upon request after the constructor has completed the service, KTjL art. 41 (1). If the consumer in due time has requested a specified receipt, he is not obliged to pay until he has received the receipt, KTjL art. 41 (2). The same principles will mainly be applicable to non-consumer services contracts, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 102.

Article 3:109: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event for which the processor cannot be held accountable and which the processor could not have avoided or overcome.

(2) If, prior to the event mentioned in paragraph (1), the processor had indicated that the processor regarded the service as sufficiently completed and that the processor wished to return the thing or the control of it to the client:
   (a) the processor is not required to perform again; and
   (b) the client must pay the price.
   The price is due as of the occurrence of the event and the moment that the processor returns the remains of the thing, if any, or the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's costs. This provision does not apply if the client was entitled to refuse the return of the thing under Article 3:107(1).

(3) If the parties had agreed that the processor would be paid for each period that has elapsed, the client is obliged to pay the price for each period that has elapsed before the event mentioned in paragraph (1) occurred.

(4) If, after the event mentioned in paragraph (1) occurred, performance of the contract is still possible for the processor:
   (a) the processor still has to perform, as the case may be, again;
   (b) the client is only obliged to pay for the processor's performance under (a); the processor's entitlement to a price under paragraph (3) is not affected by this provision;
   (c) the client is obliged to compensate the processor for the costs the processor has to incur in order to acquire materials replacing the materials supplied by the client, unless the client upon being so requested by the processor supplies these materials himself; and
   (d) if need be, the time for performance is extended in accordance with Article 1:111(6) (Variation of the Service Contract).
   The client is, however, entitled to cancel the contract under Article 1:115 (Cancellation of the Service Contract); the consequences of such cancellation are governed by that provision.

(5) If, in the situation mentioned in paragraph (1), performance of the contract is no longer possible for the processor:
   (a) the client does not have to pay for the service rendered; the processor's entitlement to a price under paragraph (3) is not affected by this provision; and
   (b) the processor is obliged to return to the client the thing and the materials supplied by the client or what remains of them, unless the client indicates that the client does not want the remains. In the latter case, the processor may dispose of the remains at the client's costs.

Comments

A. General Idea

Sometimes the thing handed over to be worked on is damaged or destroyed without any fault or other cause attributable to either the client or – for breach of contract – the processor. In this case, the damage to or destruction of the thing is to be borne by the client. It is, however, unclear whether the client still has to pay for the service he requested.

In this Article, a distinction is made between the situation where the processor had already informed the client that his service was completed and the situation where he did not yet indicate so. In the former situation, the client bears the consequences of the unfortunate event: he still is to pay the price for the service rendered, even though he cannot enjoy the benefits thereof.

> *Illustration 1*
> A DVD player is being repaired by a handyman. When the reparation is completed, the handyman rings the client to tell him so. Before the DVD player is collected, the handyman's workshop is struck by lightning; in the subsequent fire, the DVD player is damaged. The processor is not required to try to repair the DVD player again. The client, however, is required to pay the price for the service that was rendered.

In the latter situation, a further distinction is to be made, viz. whether performance of the service is still possible or not. If performance is still possible, the processor must still perform; if he had already completed the service but not yet informed the client thereof, he has to perform again. The processor will be paid only for this performance. Extra costs resulting from performance after the unfortunate event must be compensated for by the client, and if the processor needs extra time to be able to perform the contract, he is entitled to an extension of the time that was originally agreed upon for the performance of the contract.

> *Illustration 2*
> A DVD player is repaired by a handyman. Before the handyman has had the time to ring the client to tell him so, a fire breaks out. Because of water damage, the DVD player no longer works, but the handyman can repair the machine. He is required to do so, and only receives payment for the second repair.

If performance is no longer possible, the processor is not entitled to payment, and must return the thing or what remains thereof to the client if the client notifies himself of his wish to receive the thing or what remains thereof.

> *Illustration 3*
> The DVD player is damaged so severely by the fire that repair is no longer possible. In this case, the processor is to return the remains of the DVD player to the client if the client so wishes, but does not have the right to payment.

A specific situation exists in the case of a long-term processing contract. In such a contract, the parties will often have agreed upon payment per period. The client is still required to pay for the periods that have ended, even if future performance is no longer possible.

Illustration 4
A company renders daily cleaning services. When the building where the service is performed has collapsed as a result of an earthquake, further performance is no longer possible. The cleaning services that have been rendered before the building's collapse are still to be paid by the client.

B. Interests at Stake and Policy Considerations

Nowadays, the topic of risk is only of limited practical interest. The causes for non-performance will mostly be attributed to one or the other party. Residual risk will be limited. Damage caused by natural disasters like landslides or flooding, for instance, will occur less frequently, because processors will have taken precautionary measures – failure to do so when such measures should have been taken implies non-performance by the processor – and public authorities will have taken preventive measures as well. Yet, where such damage does occur and no duty of care or other obligation burdening on the processor was breached, the question needs to be answered who should bear the consequences of the unfortunate destruction or deterioration of either the thing that was worked on or the materials supplied by the client. In this respect, the question also arises whether the processor may still claim performance of the client's obligation to pay the price when the thing has been destroyed or damaged due to an accident for which the processor cannot be held liable.

C. Comparative Overview

In all legal systems, the risk of unfortunate destruction or deterioration of the thing or the materials supplied by the client is on the client, who is normally the owner of the thing. However, in all these systems it is on the processor, who had the thing or the materials under his control, to prove the unfortunate nature of the destruction or deterioration in order to escape liability. As to the consequences of the unfortunate deterioration or destruction of the thing for the client's main obligation, Article 7:757(2) of the DUTCH Civil Code explicitly provides that the client is not required to pay the price if and insofar as the thing was under the control of the processor.

D. Preferred Option

It should be emphasised that the practical relevance of the present Article is relatively low. Many events that were once considered unforeseeable or insurmountable can now be covered by affordable preventive measures. As a consequence, under Article 3:104 the processor will have far-reaching duties to protect the thing against the consequences

of events coming from the outside. But unexpected events may still occur, for which the processor is not accountable.

If such an unfortunate event occurs before the processor has indicated to the client that he has finished the performance of the service and that he wishes to return the thing to the client, the consequences of the occurrence of the unfortunate event are dealt with by Article 8:108 PECL (Excuse Due to an Impediment). If the non-performance is not excusable under that Article, the processor has to perform again if such is still possible. The processor is then considered not to have performed yet, so the rules on non-performance apply. If the non-performance is excusable, however, the client will not have the right to specific performance or damages, and termination of the contract may be the result. The client will also have to pay the price. According to subparagraph (4)(d) of the current Article, the time needed for performance will have to be extended, since the processor, due to the unfortunate event, can no longer perform in time. The idea is that the time for performance will be extended proportionally. The situation is different when performance has become impossible. Then, termination may be the optimal solution.

After completion of the service, the situation changes, provided that the processor has notified the client that he finished performance of the service and wishes to return the thing to the client. In the case of external harm to the thing, the processor is still liable for non-performance of his obligations; see paragraph (1). He is not liable, however, if the damage cannot be traced back to non-performance of one of the processor's obligations. In other words, in accordance with case law and legal doctrine throughout Europe, the risk of unfortunate destruction or deterioration of the thing or the material supplied by the client is on the client. The same applies if the client had notified the processor he wished the thing to be returned to him, but had not yet collected the thing. The reason for this is that the only reason why the processor still had the thing under his control is that the client had not yet collected it. In both cases, it is deemed to be fair that the client bears the consequences of his failure to collect the thing.

E. Relation to PECL and Other Parts of the Principles

The present Article builds on Article 8:108 (Excuse Due to an Impediment). Under that Article, an impediment beyond the processor's control leads to an excused non-performance. If, because of the event, the thing or the material supplied by the client is destroyed or deteriorated, the processor is not liable under the present Article either; yet, if and insofar as performance is still possible, the processor must in principle still perform or, as the case may be: again perform.

The subject of the present Article is the same as Article 2:108 (Risks) in Chapter 2 (Construction) and Article 4:110 (Risks) in Chapter 4 (Storage). However, different from the situation under a construction contract, but similar to the situation under a storage contract, the client is the owner of the thing and of the materials supplied by him. As a consequence thereof, the situation that the risk is completely on the processor does not occur in processing contracts. Moreover, as to the transfer of the risk a slightly

different moment is chosen: where, under Article 2:108 (Risks), the moment of the transfer of control is decisive in a construction contract, in the present Chapter the decisive moment is when the processor notifies the client that he regards the service as sufficiently completed and that he wishes to return the thing or the control thereof to the client. The reason for this is that the client still is the owner of the thing and that, from the moment that the processor notified him of the completion of the service, it is up to him to prevent the thing's accidental destruction or damage to it by simply performing his obligation to accept the return of the thing. Failure to do so may therefore be attributed to the client.

F. Risks in the Case of Destruction or Deterioration of the Thing in Processing Contracts

In the case of unfortunate destruction or deterioration of the thing, the risk of the loss of the thing itself in all legal systems is on the owner of the thing *(res perit domino)*. Total loss of the thing, therefore, will have to be borne by the client, who is the owner. However, the situation is different if the service can still be performed. The present Article sets out what the consequences of unfortunate destruction or deterioration of the thing are.

Paragraph (1) states when the Article applies. To that extent, the wording of Article 8:108 PECL (Excuse Due to an Impediment) is used to describe the unfortunate event. Paragraph (2) deals with the situation in which the service had already been completed prior to the unfortunate event. It provides that from the moment that the processor had indicated that he regarded the service as sufficiently completed and that he wished to return the thing or the control over the thing to the client, the processor can be considered to have kept his end of the bargain. Therefore, the client is to keep his end of the bargain too. In other words, in this situation the risk of unfortunate destruction is transferred to the client. The transfer of risk is justified here by the fact that the very reason why the processor had the thing in his possession was because the client had not yet collected the thing. Whether or not he was late in accepting the return of the thing does not matter here. The outcome is only different if the client was entitled to refuse the return of the thing under Article 3:107(1).

Paragraph (3) deals with the situation in which the parties, in derogation of the default rule of Article 3:108, have agreed upon payment per period that has elapsed. Such payments will normally be agreed upon in the case of processing contracts concluded for an indefinite period of time, *e. g.* maintenance contracts, but may also be agreed upon in other contracts that need a considerable period of time before completion. The paragraph provides that a price that has become due remains due, irrespective of whether performance is still possible (paragraph (4)) or not (paragraph (5)).

Paragraph (4) sets out than when performance is still possible, the processor is required to perform – or perform again. Only for his new performance the processor is entitled to payment. However, the final sentence of the paragraph makes clear that if further performance has become of no use to the client, he may cancel the contract. In that case, the consequences as to the price will be dealt with under Article 1:115 (Cancella-

tion of the Service Contract). Clearly, this provision does not apply if, prior to the unfortunate event, the processor had notified the client that he regarded the service as sufficiently completed and that he wished to return the thing to the client. As paragraph (2) states, in this particular case the processor does not have to perform again, but the client still must pay the price for the service rendered. Paragraph (5), finally, provides that if performance is not or no longer possible, the processor is not required to complete performance of the contract and the client does not have to pay the price for the service that did not lead to a positive outcome. Paragraphs (4) and (5) therefore impose the so-called *Preisgefahr,* i. e. who has to suffer the financial consequences in the case of an unfortunate event, on the processor. The processor, however, may – by demanding payment per period – burden the client with that risk.

G. Burden of Proof

The processor is to prove the unfortunate nature of the event that has caused the destruction or deterioration of the thing or the materials supplied by the client in order to escape liability. He further has to prove that he is entitled to the price or a part thereof.

H. Character of the Rule

This Article contains default rules.

I. Remedies

No remedies stem from this Article.

Comparative Notes

1. General system of risk

In processing contracts, following the Roman principle *res perit domino,* the risk of fortuitous destruction or deterioration of the good is generally on the client, who is the owner of the good. The processor is normally only then liable if he is at fault; yet, he will have to prove the fortuitous nature of the destruction or deterioration of the good, since he often is under an obligation of result or an obligation of means with a reversal of the burden of proof (AUSTRIA, CC art. 1168a; FINLAND, Consumer Protection Act Chapter 8, Section 12 para. 4; FRANCE, art. 1789 CC; GERMANY, CC art. 644 para. 1; GREECE, CC art. 698; ITALY, CC art. 1673; THE NETHERLANDS, Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, nos. 516-517 and CC (old) art. 7A:1642; POLAND, CC art. 641 para. 1; PORTUGAL, CC art. 1228 para. 1 and STJ 24 October 1995, BolMinJus, 450, 469; SWEDEN, Consumer Services Act art. 32 and 39 and Hellner/Hagner/Persson, Speciell avtalsrätt II, first book, p. 100). As to the consequences of the fortuitous deterioration or destruction of the good for

the client's main obligation, art. 7:757 para. 2 of the DUTCH CC explicitly provides that the client need not pay the price if and insofar as the good was under the control of the processor.

No information from BELGIUM, DENMARK, ENGLAND, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

National Notes

1. *General system of risk*

AUSTRIA As in processing contracts the good belongs to the client, under CC art. 1168a, the risk of fortuitous destruction of the good is on the client. Cf. Koziol and Welser, Bürgerliches Recht II, p. 250.

FINLAND In a processing contract, the client is the owner of the good that was worked on. The risk of fortuitous destruction or deterioration of the good rests upon him. However, according to Consumer Protection Act Chapter 8, s. 12 para. 4, the processor must prove that he performed the contract with reasonable care and skill, i. e. he must prove the absence of negligence.

FRANCE In processing contracts, the principle *res perit domino* applies, which implies that the fortuitous destruction or deterioration of the good burdens on the owner of the good that was worked on, i. e. the client. CC art. 1789 provides that the processor is liable only in case of fault; yet, he must prove the fortuitous nature of the event (reversal of the burden of proof), cf. Malaurie/Aynès/Gautier, Contrats spéciaux, no. 781.

GERMANY As the good was provided by the client, the processor is not liable for destruction or deterioration of the materials by way of fortuitous events. Cf. CC art. 644 para. 1. According to the Bundesgerichtshof, an event is only then fortuitous if its impact can't even with the utmost diligence be averted (BGH, NJW 1997, 3018; BGH, NJW 1998, 456).

GREECE. As the good is supplied by the client, the risk of fortuitous destruction or deterioration of it is on him, cf. CC art. 698.

ITALY As follows from CC art. 1673, since the client supplied the good, he will have to bear the risk; the same follows from the general principle in CC art. 1465: *res perit domino*. Cf. Cass., 1 February 1950, n. 271, in CC, 1950, II, p. 37, with comment of D. Rubino, Il perimento fortuito dell'opera, prima dell'accettazione nel contratto d'opera.

THE NETHERLANDS Under CC (old) art. 7A:1642, it was stated explicitly that if the client is required to provide the good, the processor is only liable for the destruction or deterioration of the good in case of negligence; the rule was thought to be an application of the principle *res perit domino*, cf. Asser [*-Kortmann-De Leede-Thunnissen*], Bijzondere overeenkomsten III, nos. 516-517. The new CC does not contain a provision to this extent anymore, but there is no reason to assume that the law has changed in this respect. CC art. 7:757 only deals with the consequences as to the processor's right to payment; para. 2 provides that the client is not required to (also) pay the price if and insofar as the good was under the control of the processor.

POLAND The risk of accidental loss or damage to the material for the performance of the work lies on the person who supplied the material (CC art. 641 para. 1).

PORTUGAL The general rule when a unexpected event or 'act of god' occurs is *Res suo domino perit*, pertaining to the owner (CC art. 1228 para. 1; STJ 24 October 1995, BolMinJus, 450, 469).
SWEDEN There are two aspects of risk in this case. Firstly, there is the question what happens if the result of the service is lost, that is if the work already done has to be performed again, or if material provided in order to perform the service is destroyed. Accordingly, KTjL art. 39 states that the consumer is not obliged to pay for work that the professional has performed or material he has supplied, if the work or material fortuitously deteriorates before delivery. Here, the risk is on the processor, until the service has been finished, KtjL 12 and 39. If the service regards an object which has been handed over to the seller, or of another reason is in his possession, the serviced is not regarded as finished until the object has come into the consumer's possession. For instance, if the seller is to provide a new roof to the consumer's house and during a storm and the half-finished roof gets blown away, the consumer does not have to pay the costs for the extra work and extra material required, since the damage occurred while the risk was on the processor, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 103. In contrast, if the consumer has supplied the material himself, he must also bear the risk, see Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 103. Secondly, there is the question who is to bear the risk if the object on which the service is performed is damaged. As a general rule, since the good is owned by the client, he has to bear the risk, cf. Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 103.However, concerning existing goods on which the contract work is being performed belonging to the consumer, which deteriorated while in the possession of the professional or otherwise under the control of the latter, it is presumed that the professional is liable, KTjL art. 32. The professional can only escape liability if he demonstrates that the damage was not caused through his negligence or through anybody else whom he has engaged to perform the service.

Article 3:110: Specific Performance and Cure

(1) If the processor has not fulfilled the duties under Article 3:105, the client may claim specific performance under Article 9:102 PECL (Non-Monetary Obligations). Article 9:102(2)(d) PECL (Non-Monetary Obligations) does not apply.
(2) The processor may cure the non-conformity, provided that this can be done:
  (a) before the end of any additional period of reasonable length fixed by a notice by the client under Article 8:106(3) PECL (Notice Fixing Additional Period for Performance); and
  (b) before the delay caused by the cure would constitute a fundamental non-performance under Article 8:103(b) or (c) PECL (Fundamental Non-Performance).
(3) Article 8:103(a) PECL (Fundamental Non-Performance) does not apply to any case covered by paragraph (2), unless it is expressly agreed that strict compliance with the time for delivery is of the essence of the contract.
(4) The processor is entitled to choose the method of specific performance or cure.

(5) Until the processor has cured the non-conformity, the client may withhold performance under Article 9:201 PECL (Right to Withhold Performance).
(6) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest) for any loss not remedied by the processor's cure.

Comments

A. General Idea

The present Article, together with Article 3:111, states that specific performance (repair, cure) is the primary remedy in processing contracts, allowing the client to terminate the contract or to ask for price reduction only where specific performance is not appropriate. The introduction of this hierarchy of remedies is a derogation of the rules in the Principles of European Contract Law, but is in line with the introduction of such a hierarchy in Chapter 2 (Construction) and the Principles of European Law on Sales.

Illustration 1
A swimming pool is maintained by a specialist. The specialist does not take proper precautions and seriously damages the bottom of the pool.

If the specialist can easily repair the damage, the client must accept the specialist to repair the bottom of the pool and not of claim termination.

B. Interests and Policy Considerations

What should the remedies be if the processor has failed to perform the contract properly? One could argue that, in accordance with the PECL, all normal remedies should be available to the client. On the other hand, termination is very burdensome on the processor if the non-performance can easily be cured. Moreover, readily allowing termination in processing contracts would significantly increase the importance of qualification of the contract (and thus lead to much more litigation), as the priority of specific performance over termination has been established in the regulation of two similar types of contracts, i. e. in Chapter 2 (Construction) and the PELS. If the remedial consequences of a non-performance were to differ in processing, construction or sales contracts, the number of cases concerning the qualification of the contract would rise considerably.

C. Comparative Overview

In most legal systems, the client normally has the right to claim specific performance, unless specific performance is impossible or would cause disproportionate costs to the processor. As the repair of a defect – if possible – is often cheaper for the processor, in AUSTRIA, THE NETHERLANDS, SWEDEN and, in consumer cases, in FINLAND the

right to termination or price reduction is normally restricted to three situations: (1) cases where the client is not entitled to specific performance, (2) cases where the client is entitled to specific performance but the processor does not perform accordingly within a reasonable period of time after being so requested by the client, and (3) cases where specific performance is possible, but the client, in the circumstances of the case, cannot be expected to give the processor a second chance. In FRANCE and GERMANY, the client is in principle entitled to termination and price reduction but may have to give notice and may have to allow a reasonable period for the processor to cure the defect. The situation is fundamentally different in ENGLAND, where the client may freely choose between the remedies available to him, and where specific performance is not a general right of the client but awarded only at the court's discretion.

D. Preferred Option

In most processing contracts, the most efficient remedy is specific performance by the processor. The present Article introduces a hierarchy, establishing priority of that specific remedy, either because the client prefers specific performance or because the processor chooses specific performance (cure) over another remedy. The introduction of a hierarchy of remedies is needed to prevent unnecessary litigation as to the qualification of the contract as such a hierarchy of remedies for processing contracts already exists in Chapter 2 (Construction) and the Principles of European Law on Sales. By doing so, the issue of qualification is of not much relevance as the remedies that are available to the creditor of the service provider's service are the same.

E. Relation to PECL and Other Parts of the Principles

The present Article only applies in the case of non-conformity under Article 3:105. In other cases, for instance where there is a delay in performance or where an obligation under another Article is breached, Chapter 9 PECL (Particular Remedies for Non-Performance) applies and, as the case may be, Article 1:112 (Remedies for Breach of Duties of the Service Provider) of Chapter 1 (General Provisions).

Under the system of Article 9:102 PECL (Non-Monetary Obligations), which has been followed here, the client has the right to the remedying of a defective performance. Paragraph (2) of Article 9:102 PECL (Non-Monetary Obligations) states exceptions to the availability of specific performance: unlawful or impossible performance, performance requiring unreasonable effort or expense, personal character of the obligation and another source for the performance being readily available. Articles 3:110 and 3:111 state that the client will generally be entitled to repair (or, occasionally, replacement) by the processor and, vice versa, the processor will generally be *entitled* to repair or replace before the client can exercise another remedy. The present and following Articles therefore introduce a hierarchy of remedies, as such unknown in the Principles of European Contract Law, giving priority to specific performance.

The present Article excludes one of the exceptions listed to the right to specific performance, i. e. Article 9:102(2)(d) PECL (Non-Monetary Obligations), where it is stated that specific performance cannot be obtained where the aggrieved party may reasonably obtain performance from another source. In processing contracts, performance may occasionally be obtained from a third party, but in almost all cases this will entail extra costs, time and effort for the client. This means that in almost all cases the exclusion of the right to specific performance will not be applicable. The exception is deleted to avoid litigation on this issue.

In practice, the exception relating to unlawfulness of performance in Article 9:102(2)(a) PECL (Non-Monetary Obligations) will also apply only in rare cases, but is nevertheless deemed useful. More important, but rather self-evident is the exception where performance would be impossible. Where non-conformity cannot be cured, a right to have the non-conformity cured would not be of any practical use.

The most important exception to the right to specific performance is the situation where performance would cause the processor unreasonable effort or expense; see Article 9:102(2)(b) (Non-Monetary Obligations). Specific performance will cause the processor unreasonable effort or expense if costs are imposed on the processor, which are unreasonable in comparison with the alternative remedy, if available. Factors to take into account in determining this include the costs of remedying the non-performance, the value the service would have had if there had been no non-performance, the significance of the non-performance, whether an alternative remedy can be completed without significant inconvenience to the client, the adequacy of that alternative remedy and the costs involved in the performance of that remedy.

Illustration 2
A car is being serviced in a garage. The mechanic accidentally scratches the lacquer; the result is a tiny scratch on one of the doors. Repair of the scratch is possible, but costly for the garage owner (€ 1,000). Given the insignificance of the scratch, the value of the car is virtually unaffected.

In this case, specific performance would mean unreasonable expense to the processor. The client will have to accept damages.

In this type of situations, monetary compensation may be more appropriate, but in balancing the interests of the parties when deciding on the reasonableness of the repair, the court should take into account whether damages are an appropriate remedy for the loss in question. The damages awarded will often be based on the loss of value of the thing. But some defects, such as the scratch mentioned in the illustration, will have no, or only minor, effect on the sale price of the thing. In such a case, Article 9:502 PECL (General Measure of Damages) allows other ways of calculating the amount of damages to be awarded.

F. Restrictions to Right to Cure

The right to cure is not unrestricted. Where specific performance would lead to unreasonable delay or would cause the client unreasonable inconvenience, the processor may not insist on curing the non-performance. This is reflected in paragraph (2). The first situation where the right to cure does not exist is when the time necessary to cure the performance would be unreasonably long. The client may set a reasonable time frame. The second exception pertains to the nature of the performance. The processor may have done such a bad job that the client is substantially deprived of what he was entitled to expect or the processor may have failed intentionally to live up to expectations in such a way that the client has lost all faith in the processor. If the client has lost all faith, and this is reasonable, the client cannot be expected to give the processor another chance. The processor's right to cure is also denied if the parties expressly agreed that timely performance is of the essence of the contract; see paragraph (3). Such would be the case if the time necessary to cure the non-conformity would render the service itself useless for the particular purpose for which it was requested.

Illustration 3
A bride-to-be requests a tailor to let out her mother's wedding dress, to be finished three days before the wedding day. At the agreed moment, it becomes clear that it would take the tailor at least three more days to finish the work. In this situation, the bride-to-be should be entitled to terminate the contract and find a shop that can provide – if need be, a new – dress in time.

Illustration 4
A bride-to-be requests a tailor to let out her mother's white wedding dress. When she comes to collect the wedding dress, it turns out that the tailor used red thread to stitch the dress back together. The dress looks terrible. The bride-to-be should be entitled to terminate the contract and find another tailor who can let out the dress properly and repair the damage done.

G. Period for Specific Performance and Cure

The processor must of course fulfil his obligation of specific performance or the cure without unreasonable delay after being notified by the client of the non-performance. If necessary, the client can fix a specific additional period for performance. If the processor does not fulfil his obligation, the client may terminate the contract in accordance with Article 3:111.

H. Burden of Proof

The burden of proof is on the party that wishes to benefit from applicability of this Article.

I. Character of the Rule

This Article contains default rules.

J. Remedies

This Article is a remedies-Article.

Comparative Notes

1. *Specific performance in processing contracts*
In most legal systems, the client normally has the right to claim specific performance, cf. AUSTRIA (CC arts. 1167, 932), FINLAND (Consumer Protection Act Chapter 8, s. 18 para. 1), FRANCE (Ghestin/Jamin/Billiau, Les effets du contrat, no. 450), GERMANY (CC art. 635), ITALY (CC art. 1668), THE NETHERLANDS (CC art. 7:759 para. 2), POLAND (CC art. 637), SWEDEN (Consumer Services Act art. 20 (1)). In ENGLAND, the client is only at the court's discretion entitled to specific performance; specific performance will be awarded only if the client proves that it would be 'the more appropriate remedy' and lead to a 'just result', cf. *Beswick v Beswick* [1968] AC 58. Specific performance will not only be refused where performance is impossible, but also where the remedy would cause severe hardship to the debtor (cf. *Patel v Ali* [1984] Ch 283). Similar restrictions apply in those systems where a right to specific performance is recognised as a normal remedy, cf. GERMANY (CC art. 635 para. 3), THE NETHERLANDS (CC art. 7:759 para. 2) and POLAND (CC art. 637 para. 1), SWEDEN (Consumer Services Act art. 20 (1)).
No information from BELGIUM, DENMARK, GREECE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

2. *Processor has right to cure the defect?*
As repair of the defect is often cheaper for the processor, in some countries other remedies than the right of specific performance may only be invoked if repair is not possible or would cause disproportionate costs to the processor, if the processor does not provide specific performance within a reasonable period of time after being so requested by the client, or if, in the circumstances of the case, the client cannot be expected to accept giving the processor a second chance. Such is the case in AUSTRIA (CC art. 932 paras. 2 and), FINLAND (Consumer Protection Act Chapter 8, s. 18 para. 2 and 3) and THE NETHERLANDS (CC art. 7:559 para. 1), SWEDEN (Consumer Services Act art. 20 (2)). In other countries, the client may freely choose between the remedies available to him. Such is the case in ENGLAND (cf. McKendrick, Contract Law, p. 386) and POLAND.
In some countries, a middle position is taken: other remedies are normally available only if a notice has been given, allowing the processor to repair within a reasonable period of time, thus effectively giving the processor a right to cure; yet, a notice is not required if repair is not possible or if performance of the contract at the time specified in the contract was of the essence. This is the situation in FRANCE (cf. Ghestin/

Jamin/Billiau, Les effets du contrat, no. 452) and GERMANY (CC arts. 323 para. 1, 637-638).
No information from BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

National Notes

1. *Specific performance in processing contracts*
AUSTRIA As regards the consequences of non-performance, the general rules of contract law apply, CC art. 1167 provides. Under CC art. 932 para. 1 and 2, the client's primary right is the right to specific performance, consisting – in the case of a processing contract – mainly in the form of repair of the defect. A right to specific performance does not exist if specific performance is impossible or brings about disproportionate costs for the processor compared to other remedies the client may have, cf. CC art. 932 para. 2. The repair must take place within a reasonable period and with as little inconvenience as possible, cf. para. 3.
ENGLAND Specific performance is available only in the discretion of the court, and awarded only if it would be 'the more appropriate remedy' and lead to a 'just result', cf. *Beswick v Beswick* [1968] AC 58. Whether that is the case is to be proven by the creditor. The remedy will not be available where performance is impossible (cf. *Watts v Spence* [1976] Ch 165) or the remedy would cause severe hardship to the debtor (cf. *Patel v Ali* [1984] Ch 283), nor when the contract involves a *personal* service or relationship. Cf. Chitty on Contracts [*-Treitel*], nos. 28-001, 005, 021-022, 027 and 28-028; McKendrick, Contract Law, pp. 441-442, 445. Specific performance to (build or) repair a building can be ordered if the work is precisely defined, damages would not adequately compensate the client and the processor is in the factual possession of the land on which the work is to be done, so that the client cannot effectively get the work done by another processor, cf. *Jeune v Queens Cross Properties Ltd* [1974] Ch. 17.
FINLAND In the case of a defect, the client is entitled to specific performance, *i. e.* to repair the defect or to replacement of the service with a non-defective service without additional costs, cf. Consumer Protection Act Chapter 8, s. 18 para. 1.
FRANCE The client is entitled to invoke specific performance or any other remedy the requirements of which have been met. Cf. Ghestin/Jamin/Billiau, Les effets du contrat, no. 450.
GERMANY The client is entitled to specific performance; however, the processor may refuse to repair the defect or replace the whole service if the costs of repair or replacement are disproportionate (CC art. 635 para. 3). The processor is allowed to choose between the repair or replacement (CC art. 635 para. 1).
ITALY The client has the right to claim specific performance, cf. CC art. 1668.
THE NETHERLANDS If the processor is liable for a defect, the client may demand that the processor, within a reasonable, repairs the defect, unless the costs of repair are disproportionate to the client's interest in damages in stead of repair (CC art. 7:759 para. 2).
POLAND If the work has defects, the client may demand their removal, designating an appropriate time limit for this purpose under the sanction that after its passing without effect he will not accept the repair. The processor may refuse to repair if that would require excessive costs (CC art. 637 para. 1).

SWEDEN The consumer may ask that the seller remedies the defect unless this causes the processor unreasonable inconvenience or expense compared to the significance of the defect to the consumer (Consumer Services Act art. 20 (1)). The processor is obliged to remedy within reasonable time (art. 20 (3)) and without cost to the consumer (art. 20 (4)). The same principles apply to non-consumer contracts, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 116.

2. *Processor has right to cure the defect?*

AUSTRIA The client is only then entitled to invoke another remedy than specific performance if the client is not entitled to specific performance under CC art. 932 para. 2, if the processor refuses to perform the remedy of specific performance or does not repair the service within a reasonable period, or if the client, because of serious reasons, can't be expected to let the processor cure the defect, cf. CC art. 932 para. 4 and art. 933 para. 2. In practice, this means that the processor has a right to cure, or, in other words: the right to specific performance takes precedence over other remedies, cf. Koziol and Welser, Bürgerliches Recht II, pp. 70-71.

ENGLAND In principle, the client may choose between damages and, if available, termination and specific performance. The client's right to choose is restricted by his duty to mitigate his losses. Cf. McKendrick, Contract Law, p. 386.

FINLAND The processor is entitled to repair the defect, provided that he does so at his own expense and that he offers to do so as soon as the client notifies him of the defect. However, the client has the right to refuse repair if that would cause him essential inconvenience or the danger that he would not be compensated for the costs incurred by him or if he has 'another special reason' for his refusal (Consumer Protection Act Chapter 8, s. 18 para. 2). The client may, however, have the defect remedied by another if he can't be expected to have the defect remedied by the processor (Consumer Protection Act Chapter 8, s. 18 para. 3).

FRANCE The client is allowed to freely choose among the remedies available to him; the processor does not have the right to cure the defect. However, if a notice is required for the applicability of other remedies, especially termination, the processor may cure within the period specified in the notice. Cf. Ghestin/Jamin/Billiau, Les effets du contrat, no. 452.

GERMANY As regards termination, CC art. 323 para. 1 generally requires that the processor be given a chance for *Nachbesserung* within a period of time determined by the client. Moreover, only when the conditions for termination are met, the client may in stead thereof repair the defect himself and claim the costs thereof under CC art. 637 or demand price reduction under CC art. 638. In practice, this means that the processor is entitled to cure if cure is possible, unless a fixed period of time for the performance of the service was agreed upon or the interests of the client in immediate termination outweigh the processor's interests in having the chance to cure; cf. Palandt [-*Sprau*], BGB, art. 634 no. 2.

THE NETHERLANDS The processor has the right to cure within a reasonable time, unless giving him the opportunity to cure can't be required from the client under the circumstances of the case, and notwithstanding the client's right to damages for the defective delivery (CC art. 7:559 para. 1).

POLAND No right to cure exists. The processor has to repair if the client so requires (if it does not require unreasonable costs). If the processor does not repair, the client may renounce the contract or ask for price reduction, cf. CC art. 637 para. 1.
SWEDEN The processor also has a right to cure defects even if not so requested by the consumer, if he offers cure immediately upon being notified by the consumer about the defect, and the consumer has no special reason for refusing the offer (Consumer Services Act art. 20 (2)). The same principles apply to non-consumer contracts, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 116.

Article 3:111: Resort to Other Remedies

(1) The client may resort to other remedies as provided in this Article, if:
  (a) the client is not entitled to specific performance under Article 9:102 PECL (Non-Monetary Obligations) and Article 3:110(1); and
  (b) the processor is unable or fails to cure according to Article 3:110(2).
(2) The client may terminate the contract in accordance with Chapter 9, Section 3 PECL (Termination of the Contract) if the non-performance is a fundamental non-performance according to Article 8:103(b) or (c) PECL (Fundamental Non-Performance).
(3) The client may reduce the price in accordance with Article 9:401 PECL (Right to Reduce Price).
(4) The client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest), including the costs of repair or replacement.

Comments

A. General Idea

This Article complements the preceding Article, by specifying the situation in which the client may resort to other remedies than specific performance. Because specific performance will generally be the best solution, the client may only invoke other remedies if specific performance is no option, or has failed to provide relief.

Illustration 1
A specialist does the maintenance of a swimming pool. When removing traces of chlorine, the specialist does not take proper precautions and seriously damages the pool floor. If the damage cannot be repaired, or the specialist cannot repair the damage himself, the client may terminate the contract for fundamental non-performance.

B. Interests and Policy Considerations

If specific performance is not or no longer available as a remedy, the client can choose another remedy. The remedies of damages and price reduction in the area of processing services do not pose problems other than those, which generally exist, such as concerning the calculation of the damages.

The situation is different when the client wishes to make use of his right to terminate the contract for non-performance. The question may arise whether the right to termination should be restricted even further than already follows from the priority of the right to specific performance. Such a further restriction is included in Chapter 2 (Construction). In a *construction* contract, given the fact that such a contract is normally specifically tailored to the individual needs of the client and the fact that, until the delivery of the thing, the constructor is often the owner of the thing, there is a need to restrict the right to termination to cases of fundamental non-performance. Such a need does not exist in the case of a processing contract, so termination could be allowed in the situation where the processor did not perform within an additional period of time of reasonable length, thus allowing termination. On the other hand, different rules as to the termination of a construction contract and to the termination of a processing contract would invite litigation as to the qualification of the contract.

C. Comparative Overview

Subject to restrictions as to the processor's potential right to cure, in most legal systems the client is entitled to termination if the defect is sufficiently serious. In FRANCE, onl the court can grant termination of the contract, but a unilateral right to terminate in fact exists as well. With the exception of ENGLAND, for breaches of contract that are not serious enough to justify termination, price reduction is available as a remedy in practice; ENGLISH law comes to a similar result via its liberal law on damages.

D. Preferred Option

In Chapter 2 (Construction), the right to termination is not only subordinate to the right to specific performance, but also even further restricted. The same holds true for the Principles of European Law on Sales. In order to prevent qualification problems that would result from diverging solutions as to the applicable remedies for non-performance, the restriction is upheld for processing services as well.

E. Relation to PECL and Other Parts of the Principles

This Article builds on the Articles in Chapter 9 PECL (Particular Remedies for Non-Performance) and Article 1:112 (Remedies for Breach of Duties of the Service Provider), making clear that if specific performance or cure is either not available or not

performed, the other remedies for non-performance are open to the client. The Article does indicate, however, that – unlike the PECL – a hierarchy of remedies exists in the case of non-performance of a processing contract. Chapter 1 (General Provisions) does not provide rules in this respect, neither in Article 1:112 (Remedies for Breach of Duties of the Service Provider), nor elsewhere.

However, in order to prevent qualification problems with construction and sales contracts, termination is not possible in a situation in which the processor has been given an additional period for performance of reasonable length. Under Article 8:106(3) PECL (Notice Fixing Additional Period for Performance) and Article 9:301(2) PECL (Right to Terminate the Contract), termination would have been possible in such a case. However, given the serious consequences termination may have on the part of the non-performing party, the right to terminate in such a situation does not exist under sales contracts and construction contracts. To avoid qualification problems with these related types of contract, the right to terminate has not been listed as an option in paragraph (2) of the present Article.

The wording of the present Article, with some adjustments to the specific situation of processing contracts, has been taken from Article 2:110 (Resort to Other Remedies) of Chapter 2 (Construction) and a similar, draft provision in the Principles of European Law on Sales. In order to prevent qualification problems with construction and sales contracts, termination as a remedy in cases where the processor did not perform within an additional period of time of reasonable length has been excluded by not listing that option in paragraph (2) of the present Article.

F. Burden of Proof

The burden of proof is on the party that wishes to benefit from applicability of this Article.

G. Character of the Rule

This Article contains default rules only, which apply if the non-performance consists in non-conformity under Article 3:105. The parties may wish to make more explicit arrangements for the remedies in the case of defects, including more lenient or more restrictive provisions as to the right to terminate the contract.

H. Remedies

This Article is a remedies- Article.

Comparative Notes

1. *Price reduction and termination*
   Subject to restrictions as the processor's possible (legal or factual) right to cure, in most legal systems the client is entitled to termination if the defect is major, or to price reduction if the defect is too minor to justify termination. Cf. AUSTRIA (CC art. 932 para. 1 and 4), FINLAND (Consumer Protection Act Chapter 8, s. 19), GERMANY (CC arts. 323, 636-637), ITALY (CC art. 1668), THE NETHERLANDS (art. CC 7:759 para. 1), POLAND (CC art. 637 para. 2), SWEDEN (Consumer Services Act art. 21); in effect also ENGLAND (cf. McKendrick, Contract Law, pp. 208-209). In FRANCE, only the court can grant the termination of the contract (cf. CC art. 1184), but a unilateral right to terminate in fact exists as well on the basis of CC art. 1794 (cf. Ghestin/Jamin/Billiau, Les effets du contrat, nos. 428, 450). A right to price reduction is not recognised in ENGLAND (cf. *White Arrow Express Ltd. V Lamey's Distribution Ltd* [1996] Trading Law Reports 69).
   No information from BELGIUM, DENMARK, GREECE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

2. *Damages*
   The client is entitled to damages if he has caused the damage negligently in AUSTRIA (cf. CC art. 933a para. 1), FINLAND (as regards pure economic loss, cf. Consumer Protection Act Chapter 8, s. 20, para. 1) and ITALY (CC art. 1668 para. 1). Negligence is presumed, implying that the processor must prove the opposite in FINLAND (as regards damage to a good in the possession or under the supervision of the processor, cf. Consumer Protection Act Chapter 8, Section 32), GERMANY (CC art. 280 para. 1). In THE NETHERLANDS, the processor must prove the non-performance cannot be attributed him either because of negligence *or* common opinion (cf. CC art. 6:74-75). In SWEDEN the processor must prove that there was an impediment beyond his control. He will however be strictly liable for specific undertaking made by him (Consumer Services Act art. 31 (3). In ENGLAND, in principle any breach of obligation leads to a right to claim for damages (cf. McKendrick, Contract Law, p. 383).
   No information from BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN.

National Notes

1. *Price reduction and termination*
   AUSTRIA The client is entitled to price reduction and, insofar as the defect is not minor, termination, cf. CC art. 932 para. 1 and 4. These rights are, however, subordinate to the right to specific performance, cf. CC art. 932 para. 4. In practice, this means that the processor has the right to cure if he can do so, cf. Koziol and Welser, Bürgerliches Recht II, p. 71.
   ENGLAND A right to terminate the contract only exists if the debtor has breached an obligation that may be qualified as a condition of the contract. An implied term, such as the requirement to exercise reasonable care and skill (cf. Supply of Goods and Services Act 1982. s. 13), is a condition of the contract, cf. McKendrick, Contract Law, pp. 208-209. The same goes if the parties themselves have qualified a term to be a

condition, and when the court classifies it as such. The latter is, for instance, the case where performance of the term goes to the root of the contract, and a breach thereof substantially deprives the creditor of which it was entitled to under the contract cf. McKendrick, Contract Law, pp. 208-209. A right to price reduction on the grounds that only a part of the service was rendered, is debated, but so far has not been accepted in ENGLISH law, cf. *White Arrow Express Ltd. V Lamey's Distribution Ltd* [1996] Trading Law Reports 69; the client would have to claim damages in stead.

FINLAND If repair or replacement of the service is not possible or has not been effected within a reasonable time from the client's notice, the client is entitled to a price reduction corresponding to the defect. Only if no other result may be deemed reasonable to the client, he may terminate the contract for non-performance if the processor has performed, but defectively. Cf. Consumer Protection Act Chapter 8, s. 19.

FRANCE The client may choose between specific performance or termination with damages for non-performance; however, termination for non-performance requires a decision by the court, cf. CC art. 1184. CC art. 1794 further introduces for the client a unilateral right to terminate the contract outside a situation of non-performance ('résiliation', i. e. cancellation) as long as the service is not completed; if the client invokes *résiliation* in a case of non-performance, he may still claim damages for non-performance. Cf. Ghestin/Jamin/Billiau, Les effets du contrat, nos. 428, 450; Huet, Les principaux contrats spéciaux.

GERMANY The client is entitled to termination of the contract under CC art. 323, but is generally required to set a time period during which the processor may 'repair' the defect. Such a period need not be set if the processor clearly (explicitly) refuses to repair the defect, the contract included a fixed term for performance in the interest of the client, or other circumstances justify the absence of such a right to cure, para. 2 provides; the same goes if the client claims specific performance but such is refused by or can't be required of the processor, or an attempt to repair the defect has failed (cf. CC art. 636). If these conditions are met, in stead of termination the client may opt for 'self-help' under CC art. 637 or price reduction under CC art. 638.

ITALY The client may only then claim termination if the non-performance of the processor is of such nature that the result thereof is such that it is unfit for its purpose. Cf. CC art. 1668 para. 2; Cass. 12 January 1972, n. 83, in Giur.it., 1972, 1, c. 1612. In case of defects that do not render the good unfit for their purpose, the client obtain a proportional reduction of the price (CC art. 1668 para. 1). Cf. Cass. 27 April 1968, n. 1331, in Giust.civ.Mass., p. 670.

THE NETHERLANDS As follows from CC art. 7:759 para. 1, the right to termination (CC art. 6:265 ff) and the right to price reduction – in THE NETHERLANDS, except for consumer sales, modeled as a partial termination, cf. CC art. 6:270 – are restricted to those cases where the processor can't cure (impossibility), doesn't want to cure or doesn't cure within a reasonable time after having been given the opportunity to do so.

POLAND If the defects cannot be removed or if, from circumstances, it appears that the processor will not be able to remove them in appropriate time, the client may renounce the contract, if the defects are major. If the defects are minor, the client may demand a reduction of remuneration at a proportional rate. The same applies if the processor failed to remove the defect within the time-limit designated by the client (CC art. 637 para. 2).

SWEDEN The consumer is entitled to a price reduction under KTjL art. 21 (1) if the defect is not remedied in accordance with art. 20. The consumer may also terminate the contract if the service substantially fails to achieve its purpose, KTjL art. 21 (2). The same principles apply to non-consumer contracts, however, the right to termination is very limited for services which have been fully performed, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 116.

2. *Damages*

AUSTRIA The client is entitled to damages if the processor has negligently caused the damage, CC art. 933a para. 1. However, CC art. 933a para. 3 explicitly provides that in a case in which the client claims damages after 10 years have passed since delivery of the good, he must prove not only the defect and the damage, but also the negligent behaviour of the processor. A *contrario* it would seem that within the period of 10 years, negligence is presumed, leaving the client only the burden to prove the defect and the damage. As regards damages payable in money for the defect itself, the remedy of specific performance takes precedence under the same conditions as for price reduction and termination, CC art. 933a para. 2 provides.

ENGLAND Every breach of an obligation under the contract gives the creditor to that obligation the right to recover damages, unless the liability for breach has been effectively excluded by a valid and appropriately drafted exclusion clause, cf. McKendrick, Contract Law, p. 383. Damages may be awarded in addition to specific performance, e. g. damages for delay in completion of the performance in addition to specific performance, cf. *Ford-Hunt v Raghbir Singh* [1973] 1 WLR 738.

FINLAND The client is entitled to damages for any loss he suffers as a consequence of the defect in the service, including personal injury and damage in property (Consumer Protection Act Chapter 8, s. 20 para. 1). However, if damage to other goods is caused by the use of materials, the client is only then entitled to compensation if the damaged good bears an essential connection of use to the object of the service, cf. Consumer Protection Act Chapter 8, s. 20 para. 1. This is different if the damage occurs while the good concerned is in the possession or under the supervision of the processor: in that case, the client is entitled to compensation unless the processor proves the occurrence of damage was not due to negligence on his part (Consumer Protection Act Chapter 8, s. 32). The client is only then entitled to compensation for *indirect* damage (pure economic loss) if the defect is attributable to negligence on the part of the processor (Consumer Protection Act Chapter 8, s. 20, para. 1).

FRANCE The client is entitled to claim damages under CC art. 1142, 1147, cf. Ghestin/Jamin/Billiau, Les effets du contrat, no. 450.

GERMANY The processor is required to compensate personal injury and or damage to goods of the client or of third parties caused by a breach of a contractual obligation, unless the breach can't be attributed to the processor (CC art. 280 para. 1). Damages for delayed performance may be demanded if the processor is in default with the performance of the contract, CC art. 286.

ITALY The client is entitled to damages if the processor has acted negligently, cf. CC art. 1668 para. 1.

THE NETHERLANDS The client's right to compensation of the damage, caused by the defective performance, is not effected by the precedence of the right to cure over the right to termination and price reduction, as CC art. 7:759 para. 1 sets out. Negligence

is not required, it is sufficient that the contractual breach leading to the damage can be 'attributed' to the processor according to common opinion; it is up to the processor to prove it cannot be attributed (cf. CC art. 6:74-75).
POLAND If the claims of the client are based on the general rules on non-performance and the defect of the work cannot be removed, then the client may ask for damages instead of the performance or renounce the contract (CC art. 493 para. 1). If the claims are based on warranty for defects, then apart from removing the defects, the client may demand damages (CC arts. 566 and 574). The scope and method of application of these rules are subject to a discussion in the Polish doctrine (Brzozowski in Rajski System Prawa Prywatnego, Tom 7, pp. 376-378).
SWEDEN The consumer is entitled to compensation for damage caused by the defect unless the processor demonstrates the existence of an impediment beyond his control which he could not reasonably have been expected to have anticipated at the time of the conclusion of the contract, and the consequences of which he could not have reasonably avoided or overcome. The processor will however be strictly liable if the result of the service deviates from a specific undertaking made by him (KTjL art. 31 (3). The liability for damages also applies to damage to the object on which the service is performed or to other property belonging to the consumer or other household members (KTjL art. 31 (4). It is unclear if these principles can be used on non-consumer contracts. Most likely, the liability for damages will be more limited, Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 116.

Article 3:112: Limitation of Liability

In contracts between two parties that both act in the course of their business, a term restricting the processor's liability for non-performance to the value of the thing, had the service been performed correctly, is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability), unless the damage was caused intentionally or by way of grossly negligent behaviour on the part of the processor or any person for whose actions the processor is responsible.

Comments

A. General Idea

The present Article creates a relatively 'safe haven' for a specific type of limitation clauses in processing contracts: if in a contract between two professional parties the processor's liability is limited to the value of the thing before the service is performed, that clause is presumed to be fair and reasonable within the meaning of the general Article 1:114(2) (Limitation of Liability). Only if the processor caused damage intentionally or by way of grossly negligent behaviour – i. e. such reckless behaviour that it is tantamount to intentional infliction of damage – the presumption that the clause is valid, does not hold true. The processor may, nevertheless, prove that despite the fact

that the damage was caused intentionally or by way of grossly negligent behaviour, it would be fair to invoke the exemption clause.

> *Illustration 1*
> A mechanic repairs the tyre of a car, owned by a lease company. The mechanic forgets to bolt the wheel on the car properly. As a result, the wheel comes off in a curve and the car hits a tree. The driver is not hurt, but the car is a complete write-off. Furthermore, the lease company is held liable by the municipality that is the owner of the tree that was hit. The lease company claims damages, but is confronted with a limitation clause limiting damages to the amount of the value of the car at the time the car was repaired.

Under the present Article, as both the garage owner and the lease company act in the course of their business, the limitation clause is presumed to be fair and reasonable. Had the client been a private individual, or had the garage owner acted intentionally or had the damage been caused by way of grossly negligent behaviour of the mechanic, the presumption would not have applied, and the limitation clause would have to be tested against Article 1:114(2) (Limitation of Liability).

The presumption can only apply if the damage sustained by the client is larger then the value of the thing that was processed. When the damage is less, the validity of a term limiting or excluding damages is to be determined under Article 1:114(2) (Limitation of Liability). However, if the damage is even less than the value of the thing, such a clause will, at least in commercial cases, most often be considered fair and reasonable within the meaning of that Article.

> *Illustration 2*
> A mechanic repairs the tyre of a car, owned by a lease company. The mechanic forgets to bolt the wheel on the car properly. As a result, the wheel comes off in a curve and the car hits a brick wall. The car is seriously damaged, but can still be repaired. When the lease company claims damages, the garage owner invokes a contractual clause, limiting the garage owner's liability to the value the car had when it was brought in for the original repair and excluding liability if the damage is less.

As the damage is less than the value of the car was before the original service was performed, the garage owner cannot invoke the present Article; whether or not the clause is valid, is to be determined under Article 1:114(2) (Limitation of Liability); it seems, however, likely that the exclusion will be upheld by a court.

B. Interests at Stakes and Policy Considerations

Article 1:114(1) (Limitation of Liability) bans all clauses in which liability of the processor is limited or which excludes liability for death or personal injury caused by the performance of the service. Article 1:114(2) (Limitation of Liability) states that the processor may limit or exclude his liability for other damage if, at the time of conclusion

of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case. This does, however, lead to a case-by-case appreciation of exemption and liability clauses, causing much uncertainty for legal practice as to the validity of such clauses. As a result, parties will have an interest in litigating the question whether or not the clause can be invoked. It would certainly benefit commercial practice if more guidance could be given in this matter. The question then arises whether this present Chapter should contain a specification of the general provision, indicating that certain clauses are deemed or presumed to be fair and reasonable in a processing contract. A further question would be whether such a clause would also be upheld in a case where damage was caused intentionally or by way of grossly negligent conduct. On the other hand, introducing such a general rule would take away much of the flexibility an open text such as Article 1:114(2) (Limitation of Liability) provides to find an appropriate solution for the case at hand. Moreover, one could argue that a distinction should be made between commercial and consumer contracts, in the sense that a general rule is more acceptable in commercial contracts than in consumer cases.

C. Comparative Overview

The legal systems differ as regards the issue of limitation of liability to the amount of the price or to a fixed amount. Such is, subject to the general rules on unfair contract terms, in principle allowed in ENGLAND, ITALY and THE NETHERLANDS, as well as in GERMANY. In these countries, exclusion or limitation of liability for hidden defects is not allowed if these defects were known to the processor and were not disclosed by him to the client. In SWEDEN, in commercial services limitation or exclusion clauses are normally not considered unreasonable as long as the client has access to other remedies. In ENGLAND, if damage occurs to the thing that was worked on while in the possession of the processor, the processor may only invoke an exemption or limitation clause if the processor proves all the circumstances known to him in which the damage occurred.

By contrast, in consumer contracts clauses limiting liability are never valid in FINLAND. The same holds true for SWEDEN, with the exception of clauses limiting or excluding liability for loss in commercial activities of the consumer. Regardless of the capacity of the client, in FRANCE any clause limiting the processor's liability to the amount of his fee is not valid if the limitation of liability also applies to the breach of an essential obligation of the contract, as it allows the professional to choose either to perform the contract or not. A limitation to a fixed amount is generally perceived as a penalty clause; consequentially, courts can revise the amount fixed.

D. Preferred Option

The legal systems at present are divided as to the acceptability of limitation clauses. In this Chapter, an in-between solution is found by the introduction of so-called 'safe havens' for commercial processing contracts. In such contracts, a clause restricting the processor's liability for non-performance to the value of the thing had the service been performed correctly, is *presumed* to be fair and reasonable. The presumption, however, is

not generally applied. Firstly, it does not apply in a case where damage was caused intentionally or by way of grossly negligent conduct. In this respect, it is remarked that even though it can be argued that a clause excluding or limiting liability may sometimes be fair and needed, it cannot be argued convincingly that a clause limiting or excluding liability even in those cases should *always* or even *normally* be considered to be 'fair and reasonable'. Therefore, clauses excluding liability for damage caused intentionally or by way of grossly negligent conduct need to be excluded from the present Article. Whether such clauses are valid or not is to be determined on the basis of Article 1:114(2) (Limitation of Liability). It should be noted that, given the fact that such a clause is not allowed in most legal systems and is met with severe reservations in most other legal systems, it is not very likely that such a clause would be considered 'fair and reasonable' under that provision.

Secondly, the client may prove that, despite the presumption in this Article, in this particular case the clause cannot be considered fair and reasonable. It should be noted that the proof thereof will also be difficult, as the Article aims at providing practice with hard and fast rules for one of the most important types of exclusion or limitation clauses in processing contracts. That goal cannot be achieved if proof of the opposite were easily accepted.

Thirdly, the presumption only applies in *commercial* cases. In consumer cases, the damage inflicted by non-performance on the part of the processor is normally fairly limited. Usually, both the extent of the damage and the risk of its occurrence are not so extreme that that this cannot be borne by the processor. There is, therefore, insufficient reason to introduce a 'safe haven' even for consumer cases. This does not mean that a clause limiting liability in a consumer case cannot be accepted; whether the clause is valid is to be determined in accordance with the test of Article 1:114(2) (Limitation of Liability). It should, however, be noted that, as many legal systems are somewhat "suspicious" of limitation or exemption clauses in consumer processing contracts, it is not self-evident that such a clause would pass that test.

E. Relation to PECL and Other Parts of the Principles

The present Article applies alongside Article 4:110 PECL (Unfair Terms not Individually Negotiated), although it does not seem probable that a term which is considered 'fair and reasonable' would be considered 'unfair' under Article 4:110 PECL (Unfair Terms not Individually Negotiated). The present Article has a broader scope than Article 4:110 PECL (Unfair Terms not Individually Negotiated), as the present Article applies to individually negotiated and standard contract terms alike.

The Article is also related to Article 8:109 PECL (Clause Excluding or Restricting Remedies). According to that provision, a contractual exclusion or restriction of a remedy is possible, but it may be contrary to good faith and fair dealing to invoke the clause. Insofar as a clause is valid under the present Article, its application may be blocked by Article 8:109 PECL (Clause Excluding or Restricting Remedies) if, under the

specific circumstances of the case, it would be contrary to good faith and fair dealing to invoke it.

Article 1:114(1) (Limitation of Liability) states that the service provider may neither limit nor exclude his liability for death or personal injury that was caused by the performance of the service.

> *Illustration 3*
> A mechanic repairs the tyre of a car, owned by a lease company. The mechanic forgets to bolt the wheel on to the car properly. As a result, the wheel comes off in a curve and the car hits a tree. The driver is seriously wounded. A clause excluding or limiting the processor's liability is invalid under Article 1:114(1) (Limitation of Liability).

Article 1:114(2) (Limitation of Liability) states that, unless provided otherwise in the specific Chapters, the service provider may limit or exclude his liability for other damage that was caused by the performance of the service other than death or personal injury if, at the time of conclusion of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case. The present Article provides more clarity as to that criterion by indicating when a clause *is* presumed fair and reasonable if used in a commercial contract.

The validity of clauses that are not presumed to be fair under the present Article, are tested against the general provision of Article 1:114(2) (Limitation of Liability).

> *Illustration 4*
> A company by the name of ICL supplied the claimant local council of St. Alban's with defective tax-calculation software, resulting in a loss of GBP 685,000. A clause limiting ICL's liability to GBP 100,000 was considered unreasonable, as ICL was a large, well-resourced company, it was insured and it was one of a small number of companies that were able to meet the claimant's requirements, all conducting their business on similar terms.

This particular clause would not be considered fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability).

The present Article is the equivalent of Article 4:112 (Limitation of Liability) in Chapter 4 (Storage) and Article 5:108 (Limitation of Liability) in Chapter 5 (Design). It is worded along the same lines as these Articles.

F. Burden of Proof

The burden of proof that a limitation or exemption clause falls within the scope of the present Article is on the processor. In principle, this would mean that the processor would have to show that the damage was not caused intentionally or by way of grossly negligent behaviour. It should be noted, however, that the fact that the limitation

clause does *not* fall within the scope of the present Article does not mean that the processor would not be able to invoke the clause, as it would then be up to the client to prove that in the circumstances of the case the clause does not fulfil the requirement of it being fair and reasonable. The mere fact that the damage was caused intentionally or by way of grossly negligent conduct may not suffice to deliver such proof.

G. Character of the Rule

This Article contains a default rule, which only applies in the case both parties act in the course of their business. The parties may agree upon a stricter regime for liability or a more lenient one. Clauses that are not presumed to be fair under the present Article will be tested, however, under the general provision of Article 1:114(2) (Limitation of Liability).

H. Remedies

The present Article states when a clause may be seen as fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability). When the clause falls within the scope of the present Article, the clause will normally be valid, freeing the processor in whole or part from his liability.

Comparative Notes

1. *Limitation of the processor's liability to the processor's fee or to a fixed amount*
   Limitation of liability to the amount of the fee received by the processor is in principle allowed, subject to the general rules on unfair contract terms, in ENGLAND (cf. Unfair Contract Terms Act 1977 s. 2), ITALY (CC art. 1469-bis) and THE NETHERLANDS (CC art. 6:237 under f). The same holds true for GERMANY; however, such a clause, used in standard contract terms, is there considered invalid under general rules on unfair contract terms when the fee would not reach the amount of the damage by far (CC arts. 138, 307 para. 2 no. 2); exclusion or limitation of liability for hidden defects is not allowed in GERMANY (CC art. 639) and THE NETHERLANDS (CC art. 7:762) if these defects were known to the processor and not disclosed by him to the client. In SWEDEN, such clauses are normally not considered unreasonable, as long as the client has access to other remedies. In ENGLAND, if damage occurs to the good that was worked on while it is in the hands of the processor, the processor may only then invoke an exemption or limitation clause if the processor proves all the circumstances known to him in which the damage occurred, cf. *Levison v Patent Steam Carpet Cleaning Co Ltd.* [1977] 3 AllER 498, [1978] QB 69, Court of Appeal. In FINLAND, a clause limiting the processor's liability is not allowed if the client is a consumer (Consumer Protection Act Chapter 8 s. 2). Finally, in PORTUGAL, legal doctrine is divided as to the validity of limitation clauses (cf. Antunes Varela, Das Obrigações em geral, vol II, p. 134). in FRANCE these clauses are in principle valid and general contract law applies. Such clauses are not valid in FINLAND if the client is a consumer

(Consumer Protection Act Chapter 8 s. 2), whereas in ENGLAND the rule developed in *Levison v Patent Steam Carpet Cleaning Co Ltd*. [1977] 3 AllER 498, [1978] QB 69, Court of Appeal applies here, too.
No information from AUSTRIA, BELGIUM, DENMARK, GREECE, IRELAND, ITALY, LUXEMBURG, SCOTLAND, SPAIN.

National Notes

1. *Limitation of the processor's liability to the processor's fee or to a fixed amount*
ENGLAND Subject to the provisions of the Unfair Contract Terms Act 1997, the processor may exempt himself from liability. However, in *Levison v Patent Steam Carpet Cleaning Co Ltd*. [1977] 3 AllER 498, [1978] QB 69, the Court of Appeal *per Lord Denning MR* held that in the case of loss of damage of a good that was handed over to a processor for treatment, the processor must prove all the circumstances known to him in which the loss or damage occurred. If the cause of loss or damage remains undiscovered or unexplained, he may not rely on the exemption clause, for the loss or damage is then probably caused by theft or reckless or wilful misconduct by a member of his staff; such conduct would be a fundamental breach against which an exemption or limitation clause will not protect him. More generally, exclusion or limitation of damage (other than for death or personal injury) resulting from negligence is allowed if that term satisfies the requirement of reasonableness, cf. s. 2 Unfair Contract Terms Act 1997. A clause limiting damages to the value of the processed good was held to be unreasonable and therefore ineffective in a consumer case where the processing of a roll of film containing wedding photographs lead to the loss of most of the photographs, cf. *Woodman v Photo Trade Processing* (1981) 131 NLJ 933.
FINLAND Limitation of the processor's liability is not allowed if the client is a consumer, cf. Consumer Protection Act Chapter 8 Section 2.
FRANCE A clause limiting damages to a maximum corresponding to the amount of fees the processor received the contract, is in principle valid. However, the integral compensation of the damage can be sought in case of intentional or gross negligent non-performance (CC art. 1150). Moreover, regarding an essential obligation of the contract, such limitation of liability seems to be an invalid term, because it allows the professional to choose either to perform or not the contract. This had in the past led to invalidation on the ground of lack of consideration *(cause)*, Cass.com., 22 October 1996, D. 1997, 121 note Sériaux (*Chronopost* case). The regime is the one of general contract law, see notes 2 to art. 1:114.
GERMANY Limitation of the processor's liability in standard contracts to the fee for the work is prohibited if the fee would not reach the amount of the damage by far (CC arts. 138, 307 para. 2 no. 2). CC art. 639 adds that a limitation or exclusion of liability for hidden defects is not allowed if these defects were known to the processor and he did not disclose this to the client, nor if he had given a guarantee for the conformity of the work.
GREECE The parties may exclude liability for negligence, though any agreement that limits or excludes liability for intention or gross negligence is null (CC art. 332). Thus, limitation is envisaged only with regard to the degree of fault and not with reference to the fees or otherwise. Nevertheless, freedom of contract prevails and the parties may limit the ceiling of liability accordingly.

ITALY Parties may modify the system of the legal guarantee for defects of the work, cf. A. Januzzi (ed.), L'appalto Rassegna di giurisprudenza commentata, I, p. 362. However, parties cannot derogate from the principle established in CC Article 1229: any agreement which excludes or beforehand limits liability if the debtor in case of fraud or grave fault is null. Furthermore, under CC art. 1469-bis, clauses limiting or restricting the processor's liability or the consequences of the non-performance are presumed to be unfair.

THE NETHERLANDS A limitation to the amount of the fee or a fixed amount is in principle allowed, with the usual limitations: no limitation for gross negligence by the processor or managing staff (HR 20 February 1976, NJ 1976, 486, Pseudovogelpest); presumption of unfairness if the client is a consumer and the limitation is included in standard contract terms, CC art. 6:237 sub f). CC art. 7:762 adds that a limitation or exclusion of liability for hidden defects is not allowed if these defects were known to the processor or to the person(s) in charge with the management of the actual performance of these defects were not disclosed to the client.

POLAND In principle limitation of liability is allowed, with the exception of exclusion of a liability for damage caused intentionally (CC art. 473 para. 2). If the liability is limited to a fixed amount, one may consider if the parties did not agree on a contractual penalty (CC arts. 483 and 484). Limitation in the consumer contracts is deemed to be unfair if it excludes or limits essentially liability of the service provider of non-performance or improper performance of the contract (CC art. 385^3 para. 2).

PORTUGAL Liability limitations are certainly void in case of *dolus* or gross negligence, according to CC art. 809. Doctrine is divided on the issue of limitation in case of negligence (limitation allowed: Pinto Monteiro; limitation void even in case of minor negligence: Antunes Varela, Das Obrigações em geral, vol II, p. 134; l). The same goes in the case of standard contracts: Article 18 sub d) DL no. 446/85. Case law is divided. Limitation of liability is most times not upheld regardless of the degree of fault.

SWEDEN Nowadays most standard agreements do not rule out the right to damages all together, but limit the amount of damages in relation to the contract price. For example IML 2000 limits the liability to 50 per cent of the price, NL 01 and AB 04 respectively to 15 per cent, except for damage due to gross negligence. Normally such limitation clauses are not considered unreasonable, as long as the client has access to other remedies. Whether the limitation to a fixed amount is allowed, will depend upon the relationship between the amount compared to the contractual work as a whole.

Chapter 4:
Storage

General Comments

A. General Idea

Storage involves the placing and leaving of – usually: movable – things in the care of another person for preservation or later use or disposal. Such a service is often characterised by the fact that the client hands over things to somebody else and trusts that the other person will look after them. The provider of the service therefore has a somewhat limited task: he is not required to work on or with the things; he must 'only' keep them in good condition and return them. It follows that the most important topic that the rules on storage have to address is the occurrence of damage to the things that were entrusted to the provider. Since the prevention of damage to the things is the core of the contract, the most important issues arising in this area of the law of contract is whether the mere fact that the things are damaged when they are returned to the client is sufficient to lead to liability of the service provider or that it must be established that the provider of the service did something 'wrong', i. e. in one way or another acted negligently.

Furthermore, since safe storage is of the essence of the contract, it must be decided whether the provider of the service may limit his liability to some extent or that such limitations are prohibited altogether.

B. Scope of Application

The storage of things will often be the main object of the contract. Storage for commercial purposes is a very common activity. A less commercial, but very much common-or-garden example is the storage of a bicycle in a bike shed. Storage may, however also be an ancillary obligation under a contract, e. g. when a processor is to repair software on a computer and needs to save the files on the hard disk temporarily on a CD-ROM or floppy disk.

The rules in this Chapter are primarily designed with the storage of movable things in mind. However, the same principles with regard to the quality of the services performed and the safeguarding of the items worked on may be applied to the storage of other things, especially of software and information.

Storage for commercial purposes is at present very often combined with other activities, for instance stock administration, combining things in parcels addressed to one client, packaging things and the like. Here, we approach the borderline to the processing of things.

Outside the scope of this Chapter is the storage of money, foreign currency, stocks and bonds, which will be covered by specific, forthcoming, Chapters on Financial Services and, so far, in most countries have been the object of specific regulations. This does, however, not preclude the rules in the present Chapter from being applied by analogy insofar as the rules in the specific Chapters on Financial Services do not deal with a specific matter. Moreover, Article 4:113(1) provides that the present Chapter *does* apply where a hotel guest hands over money (or securities or rights) to the hotel-keeper. In such cases, the specific regulations do not apply, and the service provided by the hotel is much more similar to the storage of other things than is normally the case. In this particular case, a reason not to apply the present Chapter is lacking.

Also outside the scope of this Chapter is the 'storage' of immovable property, e. g. surveillance contracts. Such contracts – which in some legal systems are governed by the rules on storage or rent – fall within the scope of Chapter 1 (General Provisions).

C. Basic Principles

The rules of this Chapter, in combination with the rules of Chapter 1 (General Provisions), reflect some basic principles:

I. The attribution of causes for defects, as a rule, follows the principle that each party is responsible for its own choices relating to the performance of the service. This means, for instance, that if the client has indicated in what way the things are to be stored, the client is responsible for damage caused by storing the things in that manner, whereas the storer is responsible if the storer determined the method of storage, cf. Article 1:106 (Duties of the Service Provider regarding Input) and 1:109 (Directions of the Client).

II. This principle is linked to the idea that when a storer observes that a choice of the client may threaten the final outcome of the service being in conformity with the reasonable expectations of the client, he has to warn the client. This is, for instance, reflected in the duty of the storer to warn about defective directions, which he had reason to know that they were defective given his professional expertise, e. g. when the storer should know that the method of storage indicated by the client would not be safe for storage of the things handed over: Article 1:110 (Contractual Duty of the Service Provider to Warn). On the other hand, defects discovered by the client during the actual storage of the thing or upon return of the thing must be notified to the storer; see Article 1:113 (Failure to Notify for Non-Conformity).

III. Characteristic for the storage contract is that the thing is eventually to be returned to the client, in principle unaffected by its storage. This is expressed in Articles 4:106 and 4:107. If the cause of the defect in the outcome of the service cannot be established, the storer will bear the risk, as he is required to return the thing in its original condition unless the parties have agreed otherwise or, given the nature of the thing or the contract, it cannot reasonably be expected that the

thing is returned in the same condition. In the latter case, the storer will bear the risk if the thing is not returned in such condition as the client could reasonably expect; Article 4:107.

IV. In order to prevent defects occurring, the storer has various duties. Moreover, the storer is to gather information regarding the existing situation, such as the condition of the thing handed over for storage (cf. Article 1:105 Circumstances in which the Service Is to Be Performed), he is to use a location fit for storing the thing in such a manner that it can be returned in the condition the client may expect (cf. Article 1:106 Duties of Service Provider regarding Input and Article 4:104), and he is to take sufficient care during the performance of the service (cf. Article 1:107: General Standard of Care for Services and Article 4:105).

V. The parties have a duty to co-operate. Before the contract is concluded, they have to exchange essential information in order to enable both to conclude a contract that is as beneficial as possible for each of them, and more in particular to enable the client to compare the offer of the constructor with alternatives as well as assessing the risks involved. These duties are laid down in Article 1:103 (Pre-contractual Duties to Warn), Article 1:104 (Duty to Co-operate) and Article 4:102.

VI. The basic idea governing variation is that the client should be granted some protection – because of his dependence on the storer – in the form of a proportionality rule regarding the price for variations; Article 1:111 (Variation of the Service Contract).

VII. The system of remedies is that of the PECL, as is explicitly stated in Article 4:111. If the storer breached a duty, which has not or not yet led to a fundamental non-performance, Article 1:112 (Remedies for Breach of Duties of the Service Provider) applies. It contains specific provisions regarding to the possibility of claiming damages and of terminating the contract on the basis fundamental non-performance.

VIII. Hotelkeepers are generally treated as storers of the things left in their hotels by their guests during or directly surrounding their stay. This calls for specific rules governing the liability of a hotelkeeper, as is done in Article 4:113.

These principles are explained in the Comments to the various Articles.

D. Terminology

In this Chapter, the service of storing things is indicated as storage. As is explained in Chapter 1 (Chapter 1 (General Provisions)), the term 'things' encompasses movable things, incorporeal things and immovable property. However, the scope of this Chapter is limited to the storage of movable things and incorporeal things such as software and information. Nevertheless, for the sake of brevity, it is deemed to be more useful to use

the generic term 'things' in this Chapter, with the exception of the scope rule of Article 4:101(1).

The provider of the service is indicated with the term 'storer'. The term 'bailee' has been avoided, for it is likely to cause misinterpretation in common law systems, where it is used for any relationship where a party has the possession of things belonging to another, whether or not that possession results from a contract. For the same reason, 'depositary' (with its strong Roman law based connotation of gratuitous service) has not been used.

E. Sources of the Rules

This Chapter is based on comparative material regarding the storage of movable things. In all legal systems that have a Civil Code, the contract of storage (sometimes called deposit) is recognised. These regulations and their application in the legal systems are the source of the compara'tive information. For ENGLISH law, comparative information has been collected regarding the rules applicable to bailment, which need not be based on a contractual relation between the parties. It should be noted that no information was collected regarding storage of things that are excluded from the scope of application of the present Chapter, i. e. storage of immovable structures, storage of movable or incorporeal things during transportation, and storage of money, securities or rights, cf. Article 4:101.

In many legal systems, provisions dealing with the liability of hotelkeepers have been included in the Civil Code or a separate statute, even though the liability dealt with in these provisions is not a liability for storage in the strict sense. These provisions are mostly based on the 1962 Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests, concluded in Paris under the auspices of the Council of Europe. Article 4:113 is based on the provisions of this Convention.

However, as is explained in the General Introduction to the Principles of European Law on Services Contracts, not every legal system of the Member States of the European Union could be studied. For lack of manpower, the law of the Member States that have joined the European Union on 1 May 2004 could not be taken into account, with the exception of POLAND, from which country a national reporter could be recruited. Moreover, as no reporters from DENMARK, FINLAND, IRELAND, LUXEMBURG and SCOTLAND could be found, these legal systems are not represented in the comparative study underlying this Chapter; GREEK, POLISH and PORTUGUESE law is represented only occasionally. As we did have access to some RUSSIAN and SWISS materials, these legal systems have occasionally been taken into account. In the comparative and national notes it is indicated whether for a particular topic comparative information was collected; in this overview, with the exception of POLAND, the Member States that have joined the European Union on 1 May 2004 are not listed.

In the comparative and national notes for each Article it is indicated whether or not (and to what extent) comparative legal information was collected for a particular topic.

Firstly, the *comparative* notes generally show the reader for which Member States information has been collected and for which this was not possible. Additionally, if no (reliable) information was collected for a particular Member State, the relevant *national* note will read: "No information". If a national note only refers to statute law, to any other statutory instrument, or to a provision taken from a national standard form of contract, it means that the information in the note is not based on a further analysis of relevant case law or legal doctrine. If, however, references to case law and/or legal doctrine have been inserted in a national note, it means that the information is based on a more thorough analysis of the topic in the relevant Member State. In the national notes, the Member States that have joined the European Union on 1 May 2004 are not listed, with the exception of Poland, for reasons set out above.

Relation to Other Parts of the Principles

F. Relation to Principles of European Contract Law (PECL) in General

The obligation to store things is a normal contractual obligation, which is governed by the Principles of European Contract Law. In the Comments to each Article, the relationship to the PECL will be explained. Most of the time, the Articles are applications of the rules in the PECL to the specific area of storage. Because the Articles are more specific to the typical facts that arise in disputes on storage, they are most likely easier to apply than the more abstract rules of the PECL. They will therefore give the parties better guidance. The rules presented here build on the PECL and, with some exceptions, do not deviate from those rules. Where the rules do deviate from the PECL, this is done to take into account the peculiarities of the specific service. The most prominent example of such a derogation is included in Article 4:108 as to the time and order of payment. The Comments to such an Article will then indicate explicitly that it derogates from PECL and why such was deemed needed.

G. Relation to Article 1:202 PECL (Duty to Co-operate)

Under the present Chapter, the actual handing over of the thing is not needed for the storage contract to be concluded. However, the actual handing over of the thing remains to be a prerequisite for the *performance* of the contract. A specific rule requiring the client to hand over the thing is not needed, as Article 1:202 PECL (Duty to Co-operate) already requires the client to hand over the thing in due time in order for storage to take place.

> *Illustration 1*
> A client concludes a contract for the storage of 1,000 cars imported from South Korea. The contract requires the client to deliver the cars no later than 1 June 2005.

Given these contractual provisions, the client commits a non-performance under Article 1:202 PECL (Duty to Co-operate) and Article 1:301(4) (Meaning of Terms) if he does not deliver the cars before or on 1 June 2005.

However, this does not mean that the storer may always require specific fulfilment of the obligation, as such remedy will often be blocked under Article 9:102(2) (Non-Monetary Obligations) because performance may be impossible or cause the client unreasonable effort or expense, or the storer can reasonably conclude a storage contract with another client.

Illustration 2
A client concludes a contract for the storage of oil imported from Saudi Arabia. As the market price of oil rises considerably, the client decides not to buy the oil after all.

In this situation, the storer cannot claim specific fulfilment of the obligation to hand over the oil, but may terminate the contract after having granted the client an additional period for fulfilment of his obligation under Article 8:106 (Notice Fixing Additional Period for Performance). Moreover, under Article 8:105 PECL (Assurance of Performance), the storer may require the client to assure that he will meet his obligations under the contract, i. e. to pay the price for the agreed period of storage.

H. Relation to Chapter 1 of Principles of European Law on Service Contracts (PELSC) in General

According to Article 1:101(2) (Scope of Application), the rules of Chapter 1 (General Provisions) are directly applicable to storage contracts unless the present Chapter explicitly provides otherwise. In the next parts of these Comments, each of the Articles of Chapter 1 (General Provisions) will be discussed briefly, in order to explain how these rules can be applied to storage contracts. This will only be done, however, for the Articles, which have no equivalent in the present Chapter. For Articles of Chapter 1 (General Provisions) that have an equivalent Article in the present Chapter – such as Article 1:103 (Pre-contractual Duties to Warn), which is linked to Article 4:102 – the specific applications of the general rules to storage will be explained in Comments to the latter Article even if that Article only touches on a specific element of the provision in Chapter 1 (General Provisions).

I. Relation to Article 1:102 (Price)

Article 1:102(1) (Price) states that whenever a service provider acts in the course of his profession or business he is entitled to a price. Paragraph (2) adds that where the parties have neither determined the price nor the way to calculate it, the price is equal to the market price. In line with the more modern civil codes, the commercial codes and practical experience, this provision also applies in the case of a storage contract.

However, as follows from Article 1:101(6) (Scope of Application), the present Chapter does apply to those storage contracts where the parties have agreed not to award the storer any remuneration for his services, thereby excluding the applicability of Article 1:102 (Price). The free-of-charge nature may, of course, be taken into account when

determining whether or not the storer is liable, as this may influence both the extent of the care that may be expected from the storer under Article 1:107 (General Standard of Care for Services) and Article 4:105, and the reasonable expectations of the client as to the condition in which the thing will be returned under Article 4:107.

Illustration 3
An opera house offers its public the possibility of storing coats in the cloakroom. After a performance a coat is missing. If the service is performed for free and without the client being required to make use of the service, the opera house's obligation to exercise due care does not include the obligation to have the cloakroom guarded, whereas such an obligation may exist if the use of the cloakroom was not for free and/or obligatory.

Moreover, as the present Chapter starts from the idea that the services of a professional storer will not be rendered free of charge, the client bears the burden to prove that the parties had agreed to a gratuitous service. Therefore, in many storage contracts storage will be done for a price. In both consumer and commercial storage contracts, the parties will often have explicitly discussed the price due for the performance of the service. If the parties, for some reason, neglected to do so, the price will be determined unilaterally by the storer, in accordance with his normal rate; this rate presumably is in accordance with the market price. The client may often be considered to have tacitly agreed to this way of establishing the price, and bears the burden to prove that the market price differs from the price that this storer charges.

J. Relation to Article 1:104 (Duty to Co-operate)

Article 1:104 requires the parties to communicate with each other in order to enable proper performance of the contract. For storage contracts, the most important obligation stemming from this Article is that the client must answer reasonable requests for information by the storer. From this, it follows that it is first and foremost the storer who is to gather the information reasonably needed for the performance of the service. However, the client need only answer such questions as the storer needs to have answers to in order to be able to perform the contract correctly.

Illustration 4
A client requires the storage of 'an aeroplane'. The storer is to inquire about the type and size of the aeroplane. It is up to the client to answer these questions. However, the client is not required to answer the question why he bought a glider instead of a motorised aeroplane or why the colours of the aeroplane are yellow and blue instead of a more neutral colour, as the storer does not need the answers to these questions to be able to perform the contract correctly.

K. Relation to Article 1:109 (Directions of the Client)

Directions may deal with all aspects of the service. The client may, for instance, want to instruct the storer to use a specific method of storage. Generally, the client's directions must be followed, provided that they are given timely and that they are reasonable.

Illustration 5
A client orders the storage of bottles of wine. At the time of conclusion of the contract, the parties did not make arrangements regarding the method of storage. At the delivery of the bottles for storage, the client states that the bottles are to be stored at a temperature of 15° C. As storage of wine at this temperature is normal, the storer must follow this direction.

L. Relation to Article 1:110 (Contractual Duty of the Service Provider to Warn)

A duty to warn may exist with regard to the defectiveness of a direction, given by the client, provided that the storer knows or has reason to know of the defectiveness of the direction. Whether or not the storer has reason to know that the direction is defective will depend upon the obviousness of the problematic nature of the direction and of the expertise the client may expect from the storer, according to the standard of care the storer is under, as is expressed in Article 1:110(1). The duty to warn is not intended to be a disguised duty for the storer to investigate the correctness of a direction. Therefore, the storer may not be required to investigate the matter actively, but insofar as he notices or without specific investigation of the matter should have noticed that the instruction is defective, he is to inform the client thereof.

Illustration 6
A client orders the storage of bottles of wine at a temperature of 6° C. The storage of wine at this temperature will diminish the quality of the wine, the direction is not reasonable and the storer does not need to follow the direction. In fact, the storer is to warn the client about the defectiveness of the direction.

A duty to warn is only useful and efficient insofar as the client is or is presumed to be in need of information. Where such is not the case – i. e. if the client knows or most likely will know the information independently of being warned by the storer – a duty to warn would only burden the storer and would lead to unnecessary transfer of information. Such a transfer leads to added costs, and therefore higher prices, without any real advantage for any of the parties. However, the mere fact that the client was assisted by another person or that he, in theory, was competent himself does not relieve the storer from his duty to warn. In establishing whether or not the client had or should have had a particular knowledge, the same criterion is applied as with regard to the question whether or not a duty to warn exists for the storer. It should especially be clear that the client is not under any duty to investigate the matter actively.

M. Relation to Article 1:111 (Variation of the Service Contract)

Variations in a storage contract often result from a warning under Article 1:110 (Contractual Duty of the Service Provider to Warn). Article 1:111 (Variation of the Service Contract) establishes that both parties should accept reasonable variations.

> *Illustration 7*
> A client orders the storage of bottles of wine, and later requires them to be stored at a temperature of 6° C. After having been warned by the storer, he requires the wine to be stored at 15° C. As this is a response to a warning by the storer, the storer is required to accept the change of the original direction.

More problematic is the question whether the client may require the things handed over for storage for a relatively long period of time. In such a case, the storer is required to accept the change of the contract if the change requested is reasonable, taking into account, notably, the interests of the client and those of the storer.

> *Illustration 8*
> A car dealer enters into a contract for the storage of 1,000 cars imported from South Korea for a period of one month, to be stored in a warehouse in the harbour of Tangier (Morocco); a choice-of-law clause is included in the contract, resulting in the contract to be governed by the Principles of European Law on Service Contracts (PELSC). The cars are to be sold in FRANCE and Spain. Just before the end of the storage period, a trade war between the European Union and South Korea is launched; the European Commission bars cars from South Korea from entering the European Union. As a result, the car dealer cannot collect the cars at the agreed time and needs more time to find alternative buyers.

Unless the warehouse has already contracted with other clients and therefore cannot continue storage of the cars without breaking another contract, the warehouse is required to accept a prolongation of the contract under Article 1:111 (Variation of the Service Contract). In accordance with paragraph (4), the price for the prolonged period of storage must be reasonable and is to be determined using the same methods of calculation as were used to establish the original price for storage.

N. Relation to Article 1:112 (Remedies for Breach of Duties of the Service Provider)

Article 1:112 (Remedies for Breach of Duties of the Service Provider) contains modifications of Chapter 9 PECL (Particular Remedies for Non-Performance). Article 1:112(1) specifies that, where the client has a claim for damages, such a claim includes the costs incurred to establish the breach by the storer of any of his duties and, more importantly, the costs the client incurred to prevent the end result of the service from non-conforming to the contract, paragraph (1), provided that the client acted reasonably in incurring these costs.

Illustration 9
A client has a precious antique painting stored. The storer must keep the painting safe from theft. The client, when visiting the warehouse, notices that the painting is left out in the open, ready to be taken by anybody with criminal intent. He immediately takes measures to prevent the painting from being stolen. The costs thereof have to be borne by the storer.

In paragraph (2) it is specified that, where, in spite of a breach of a duty by the storer, it is not yet clear whether the thing can be returned in the condition the client could reasonably expect it to be on return, the client may withhold fulfilment of any reciprocal obligations under Article 9:201 PECL (Right to Withhold Performance). Termination at such a time is allowed only when it is already clear that the breach of the processor's duty will lead to a fundamental non-performance (paragraph (3)).

O. Relation to Article 1:113 (Failure to Notify for Non-Conformity)

If, after the thing has been returned to the client in accordance with Article 4:106, the client notices or should notice non-conformity under Article 4:107, he must inform the storer thereof within a reasonable time; see Article 1:113 (Failure to Notify for Non-Conformity). Under Chapter 9 PECL (Particular Remedies for Non-Performance), failure to do so may lead to the loss of some remedies for non-performance, notably specific performance and termination, but in principle does not affect the right to damages. For storage contracts, the right to specific performance will not be particularly relevant once the storage has ended. This may be different for termination, as by terminating the contract the client may free himself from his obligation to pay the price for storage. Under Article 1:113 (Failure to Notify for Non-Conformity), the client may lose that right. However, in practice the right to damages – which is generally not affected by a failure to notify – will be more important and, moreover, may substitute for the effects of termination. Therefore, Article 1:113 (Failure to Notify for Non-Conformity) does not have much practical relevance for storage contracts. Of course, the storer is not liable for damages if and insofar as the damage increased as a result of the client's failure to notify; cf. Article 1:113(2)(a) (Failure to Notify for Non-Conformity).

P. Relation to Article 1:115 (Cancellation of the Service Contract)

Article 1:115(1) (Cancellation of the Service Contract) allows the client to cancel the storage contract at any given time. On the basis thereof, he can claim back the thing handed over for storage in accordance with Article 4:106. Of course, the client is to pay the price for the service performed in accordance with Article 1:115(2) (Cancellation of the Service Contract).

Illustration 10
A client enters into a contract concerning the storage of oil imported from Saudi Arabia. As the market price of oil rises considerably, the client decides not to buy the oil after all. The client therefore cancels the storage contract, but is required

to compensate the storer to such an extent that the storer's position approximates the situation in which he would have been if the contract had been duly performed. Such damages include the storer's loss of profit.

Q. Relation to Construction and Processing, and International Conventions on Transportation

Storage is closely related to processing and transportation. In each of these contracts, things are entrusted to the provider of the service. Therefore, storage, processing and transportation partly have the same problems in common, i. e. the occurrence of damage to the thing entrusted and the occurrence of damage to other things, caused by the thing entrusted to the service provider. However, the aims of processing and transportation differ from storage insofar as the thing is only entrusted to the provider of the service in order to facilitate the main goal of the contract, i. e. the improvement of the thing or the transportation of the thing to another place. As a consequence, in the performance of such contracts, risks are added to those that follow from the mere fact that the thing is under the service provider's control.

A provision on inspection similar to the one in Chapters 2 (Construction) and 3 (Processing) is absent in the present Chapter. Inspection is not a common feature in storage contracts. Besides the fact that a storer, like most providers of services, may consider inspection to be an intrusion into his business affairs, third-party interests regarding the safekeeping of *their* things may also oppose such a right by way of a default rule. In practice, the inspection of things handed over for storage during the performance of the contract is rare. Consequently, during the performance of the contract the client usually has no way of knowing whether the contract is being performed properly or not. The absence of the possibility of inspection and, therefore, the possibility of timely discovering potential problems also adds to the reason why the liability for the storer is rather strict. If, atypically, the client would want inspection during the performance of the contract, the parties would have to include such a right of inspection in the contract.

Given their close resemblance to the rules on processing and the potential difficulty in a precisely demarcating the two types of services, the rules on storage are carefully aligned with those on processing. However, given the lack of practical use for remedies other than termination and/or damages, a hierarchy of remedies leading to specific performance being the primary remedy is not included in this Chapter.

R. Mandatory or Default Rule

With the exception of Article 4:113(5), the present Chapter only contains default rules. It could be argued that specific consumer protection should be provided for in the present Chapter, so that no recourse needs to be had to general rules of consumer protection. Such an approach would mean that the protection awarded to consumers in consumer sales contracts would be extended to service contracts. However, such man-

datory rules hardly exist in the legal systems investigated. For that reason, mandatory provisions have not been included in this Chapter.

An exception is Article 4:113(5), which states that a hotel-keeper cannot limit or exclude liability where damage is caused to a thing brought to the hotel by a client and that damage is caused intentionally or by way of grossly negligent conduct of the hotel-keeper or of any person for whose actions the hotel-keeper is responsible. This rule, which copies Article 2 of the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests, is mandatory, as is the original.

Article 4:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the storer, is to store a movable or incorporeal thing for another party, the client.
(2) When, under a contract, a party is bound to store and to supply another service, this Chapter applies with appropriate modifications to the parts of the contract that involve storage.
(3) This Chapter does not apply to the storage of:
  (a) immovable structures;
  (b) movable or incorporeal things during transportation; and
  (c) money, securities or rights.

Comments

A. General Idea

Storage means to place things elsewhere and leave them in the care of somebody else for preservation, later use or disposal. Storage is characterised by the fact that the client hands over things to another person, with the mutual intention of the parties to ultimately have the things returned to the client.

Illustration 1
A client hands over 1,500 oranges to be stored at a warehouse.

This is the 'classical' example of storage. Of course it falls within the scope of this Chapter.

In order to fulfil the obligation, the client is to hand over the thing to the storer; as compared to a processing contract, in a storage contract the storer only needs to make sure the thing can ultimately be returned to the client in the same condition as it was in when it was handed over to the storer, or in such a condition as the client could reasonably expect the thing to be in when returned. When the storer does not properly store the thing, the client runs the risk that the thing is damaged during storage.

The present Article describes the scope of application of this Chapter. From paragraphs (1) and (3) it follows that it mainly applies to the storage of *movable* things. However, as it is possible to store other things, such as information on a computer server, the scope of application of the present Chapter is not limited to purely physical things, as is clarified by the reference to incorporeal things in paragraphs (1) and (3). Moreover, as paragraph (2) clarifies, in the case where, apart from storage, another service is rendered, the provisions of the present Chapter apply to the part of the contract that involves storage, but these rules may be modified so as not to conflict with the rules governing the other service.

Illustration 2
An Internet service provider (ISP) offers its clients access to the Internet, e-mail facilities and the possibility of storing files on its server.

The present Chapter applies to the storage of files on the ISP's server, but the rules of the present Chapter may be adapted to accommodate the fact that other services are offered too.

B. Interests at Stake and Policy Considerations

The present Article states the scope of application of the rules on storage. The main policy issue is whether a contract of storage can be concluded consensually or only by the actual handing over of the thing. The latter, more formal way of conclusion of the contract is in accordance with the Roman-law background of the storage contract and relates to the second main issue to be dealt with: traditionally, storage was a gratuitous contract. As the storer was not to receive any benefit from the contract, he should not too easily be held to his word. Before a legal obligation emerged on the part of the storer, he therefore would have to not only promise to care for the thing, but to actually accept it being handed over to him. However, such a formal way of concluding storage contracts is somewhat problematic in a commercial setting, where especially the client has an interest in being able to demand the thing taken into the storer's custody. As a consequence, it seemed better to accept a more flexible way of concluding contracts. On the other hand, such a mode of concluding contracts can only be accepted if the traditional concept of storage as a gratuitous contract is abandoned.

Another traditionally important issue to be decided is whether this Chapter should apply to gratuitous storage, to storage for a price or to both and whether, if the latter option is chosen, specific rules are needed to accommodate the fact that both gratuitous and remunerated contracts are governed by the storage rules, e. g. more stringent rules if the contract is for a price, or more lenient rules if the contract is to be performed by the storer for free.

A third issue relates to the question whether the rules on storage should apply to all things or only to some. For the storage of particular types of things, notably money, securities and rights, legislatures have developed specific rules. Should the present Chapter govern the storage of these types of things or should the existing specific rules

be upheld? Similarly, international treaties deal with things being stored in the course of the performance of a transportation contract. Does this mean that storage in combination with transportation should be left outside the scope of the present Chapter? Finally, the question whether so-called surveillance contracts – in which immovable property is guarded or otherwise taken into the care of a professional service provider – should be governed by these rules or, alternatively, be subject only to Chapter 1 (General Provisions).

A difficult question is whether the present Chapter should apply to contracts by which a client parks his car in a privately owned car park: such a contract could easily qualify as a lease contract. An argument in favour of qualification as storage is that the operator of the car park may prevent damage to the car by having the car park guarded and by taking precautionary measures against, for instance, theft. On the other hand, such measures might also be required of a lessor.

Finally, one could argue whether the present Chapter should apply to contracts by which a client hands over things to be stored in a safety deposit box. An argument against qualification as a storage contract would be that the service provider does not know what he takes into custody. Therefore, he cannot take specific precautionary measures to prevent damage to the thing. General precautionary measures, such as to prevent theft and fire, can be taken. The service provider can guarantee that he will return the safety deposit box in the state he receives it and that nobody has opened it in the meantime. However, that does not necessarily qualify the contract as a storage contract: a landlord, or lessor may also be under an obligation to take such measures.

C. Comparative Overview

In the FRENCH Civil Code and the civil codes based thereupon, in accordance with its Roman-law background, storage was included as a gratuitous service. However, in the AUSTRIAN Civil Code of 1811, the possibility of a remunerated storage contract was explicitly recognised, as in the GERMAN Civil Code of 1896. The law has further developed in the direction of a remunerated contract, and some of the newer civil codes such as the ITALIAN, POLISH and DUTCH civil code explicitly provide that a professional storer is entitled to remuneration. In *commercial codes*, the storage contract is always for remuneration. In ENGLAND, bailment – which need not be contractual – can be gratuitous or for reward.

In practice, 'commercial' storage is far more important than gratuitous storage services. Furthermore, when storage is combined with another service – for instance transport or processing – remuneration is agreed upon, either separately from the other service or in the form of an all-in price for the services rendered.

In ROMAN law, the storage contract was a so-called *real contract*, meaning that the contract was concluded not by mere consensus between the parties, but by the actual handing over of the thing that was to be stored. In the codifications of the nineteenth and early twentieth century, this remained. At present, the storage contract is still a *real*

contract in AUSTRIA, BELGIUM, FRANCE, GERMANY, ITALY, POLAND and PORTUGAL, and probably also in SPAIN and SWEDEN. In some of the newer codes, the contract has become a consensual contract, e. g. in HUNGARY, THE NETHERLANDS and POLAND. This tendency towards a consensual contract can also be discerned in codes of countries outside the European Union: storage is a consensual contract in SWITZERLAND; in the Civil Code of the RUSSIAN FEDERATION, a distinction is made between storage by a commercial or professional party and storage by others. In the former case, the contract is either consensual or the contract is concluded when the thing is handed over to the storer. In both cases, often form requirements must be upheld.

Moreover, in the case of commercial storage some of the older commercial codes also accept consensus instead of the actual handing over of the thing as the way in which the contract is concluded, e. g. in the GERMAN Commercial Code.

In some legal systems, notably AUSTRIA, the storage of immovable property is possible, but such is not the case in BELGIUM, GERMANY, ITALY, POLAND and SPAIN. Many legal systems, including AUSTRIA, GERMANY, ITALY and SPAIN do not recognize the storage of incorporeal things and rights. Specific legislation exists for the storage of money and securities in AUSTRIA, GERMANY and GREECE, but the rules on storage – with some modifications – do apply in FRANCE.

In the case of car-parking contracts, the rules on storage apply in SPAIN. In AUSTRIA, BELGIUM, FRANCE, GERMANY and THE NETHERLANDS, where a car is parked in a guarded place, the contract is a storage contract; if not it is considered to be a rental contract. In ENGLAND, such a contract is qualified as bailment only if the client also hands over the keys of the car, thus giving the car in possession to the storer.

The contract to use a safety deposit box is again a rental contract in AUSTRIA, GERMANY, THE NETHERLANDS, but most likely qualifies as a storage contract in FRANCE.

D. Preferred Option

The requirement of the actual handing over of the thing is not longer needed and is not in line with the developments in the newer civil codes nor with the needs of commercial practice. The present Chapter therefore accepts consensus as the method of conclusion of the contract.

As is the general approach to gratuitous services (cf. Article 1:101(6): Scope of Application), this Chapter applies not only to commercial and remunerated contracts, but also – albeit with appropriate modifications – to gratuitous storage contracts. In practice, this means that the gratuitous nature of the service may be taken into account when determining whether or not the storer is liable, as the fact that storage is provided free of charge may influence the extent of care that may be expected from the storer under Article 1:107 (General Standard of Care for Services) and Article 4:105, and the reasonable expectations of the client as to the condition in which the thing will be returned under Article 4:107.

Illustration 3
The owner of a yacht has it stored during winter. In spring, he finds out that the yacht is stolen. If the service is performed for free, the storer's obligation to exercise due care does not include the obligation to have the place of storage guarded, whereas such an obligation may exist if storage was not for free.

Storage during actual transportation is usually provided for in treaties on transportation contracts. Specific legislation also exists for the storage of money, securities and rights. Such storage is excluded from the scope of application of the present Chapter in order to prevent interference with these treaties and specific legislation, which are tailor made to the needs of these a-typical kinds of storage. However, an exception is made if, apart from a contract for accommodation with a hotelkeeper, things (e. g. money) are handed over for storage in a hotel safe. The exception is explained in the Comments to Article 4:113.

This Chapter also does not apply to the storage of immovable things as this type of storage is of a different nature, e. g. the thing is not stored at the storer's place of business, but remains on site. As the rules in this Chapter are not aimed at taking the specificities of such contracts into account and storage of immovable property is not recognized in BELGIUM, GERMANY, POLAND and SPAIN, the scope of this Chapter does not cover the 'storage' of immovable property. The rules of Chapter 1 (General Provisions) will apply to such contracts. Of course, the exclusion of the applicability of the present Chapter to such contracts does not stand in the way of analogous application.

As to the applicability of the present Chapter to the 'storage' of cars parked in a car park, a dividing line may be drawn where the car park is, in some manner, guarded. When such is the case, the contract is to be considered a storage contract, as the operator of the car park is in a position to prevent damage to the car and to take precautionary measures.

Illustration 4
A client parks his car in a multi-storey car park, which is secured at both the exit and the entrance with a barrier; the exit barrier only opens when the client produces the ticket he received at the entrance and has paid the price for the use of the car park. The contract concluded by the parties is a storage contract.

Illustration 5
A client parks his car in a privately owned car park. The price for the use of the car park is to be paid when entering the car park. As is clear before the client enters the car park, there is no check whatsoever whether the person leaving with a car is the same as the person who entered with the car. The contract concluded by the parties is not a storage contract.

The present Chapter applies when a client hands over things to be stored in a safety deposit box. Even though the storer cannot take specific precautionary measures to prevent damage to the thing as he does not know what he stores, he may take general

precautionary measures, for instance to prevent theft and fire. Moreover, in the case of the storage of sealed things, the storer does not know what the container he stores contains either; nevertheless, such a contract is generally seen as a contract for storage. That being the case, there is no convincing reason why the contract to make use of a safety deposit box should not be considered storage. The fact that the storer does not know what it is he is keeping, of course influences what the client may expect under the contract and, therefore, influences the extent of any of the storer's obligations under the present Chapter.

Illustration 6
A client has a sixteenth-century painting stored in a large safety deposit box. As the storer does not know that he is storing such a painting, he cannot be required to use specific installations rendering a stable temperature and humidity level. However, the storer can be expected to prevent theft from the safe by, e. g., providing a closed-camera circuit.

E. Relation to PECL and Other Parts of the Principles

Traditionally, if in the course of a contract between a hotel-keeper and a guest things are brought to the hotel, the hotel-keeper is treated as if he were a storer. One may consider this to be an expression of the situation meant under paragraph (2). This typical situation is explicitly dealt with in Article 4:113, both to acknowledge the fact that the 1962 Convention on the Liability of Hotel-Keepers concerning the Property of their Guests and national legislatures implementing the Convention regulated the matter in this way and as an example of how the 'application with appropriate modifications'- rule in paragraph (2) may operate. Moreover, where the hotel guest hands over things for storage in a hotel safe, the storage rules apply directly under paragraph (1) (i. e. a separate storage contract is concluded); see Article 4:113(1). This even applies if the thing that is handed over to the hotelkeeper is money (or securities or rights). Storage thereof is normally governed by specific regulations. Such regulations are, however, not meant to apply to the situation in which a hotel guest hands over valuables to a hotelkeeper for safekeeping. For that reason, in this particular case the present Chapter does apply. Such is in conformity with the Convention mentioned above.

F. Scope of Application of the Rules

The provisions of this Chapter apply whenever the obligation to store is the main obligation arising from the contract. This is the case when a party entrusts things to another person with no other purpose than safekeeping. The scope of direct application of the rules on storage is restricted to those contracts where storage is the main obligation of the contract and the things to be stored are movable things; cf. paragraph (1).

The situation becomes, however, blurred when a thing is handed over for safekeeping, but storage of the thing constitutes only a minor part of the contractual relation between the parties. In such a case, the handing over of the thing may be seen as the conclusion of a separate contract or as an additional obligation within the framework of another contract.

Illustration 7
A client hands over his coat at the guarded cloakroom of a theatre.

Even if the theatre's obligation as to the storage of the coat could be seen as a mere additional obligation under the contract entitling the client to attend a play at the theatre, the rules of this Chapter apply to the storage of the coat.

As a consequence, the issue of qualification of the theatre's obligation as constituting the core of a separate contract or as a mere additional obligation under the contract entitling the client to attend a play at the theatre is of minor importance.

Similar questions may arise when a hotel stores things belonging to its guests.

Illustration 9
A hotel guest hands over her jewellery to a member of the hotel staff to be kept in the hotel safe.

As Article 4:113(1) states, under this Chapter a separate storage contract is concluded, to which the rules on storage apply directly.

Illustration 10
A hotel guest leaves her suitcase in her hotel room.

In this case, the 'storage' of the suitcase is an additional obligation under the contract entitling the hotel guest to stay at the hotel. This situation is governed by the specific provisions of Article 4:113.

The present Chapter applies to the storage of animals, but it is clear that the storer's duty of care entails more obligations for the storer than is normally the case in a storage contract.

Illustration 11
A racehorse is kept in a stable not belonging to the owner of the horse. The stable owner is required to provide food and water for the horse.

In this case, the contract is a mixture consisting of storage as the main object of the contract and maintenance (processing) as an ancillary obligation under the contract. This implies that, with appropriate modifications, the present Chapter applies to the part of the contract that involves storage and that Chapter 3 (Processing), with appropriate modifications, applies to the part of the contract that involves processing; cf. Article 4:101(2) and Article 3:101(3) (Scope of Application). One could argue that in

any case riding the horse, but possibly also feeding it is to be regarded as processing (to be more precise, maintenance). However, as both the storer and the processor are under an obligation to take precautionary measures to prevent damage or injury to the horse, cf. Article 4:105(1) and Article 3:104 (Duty of Care of the Processor), this will most likely not lead to practical differences.

Especially storage for commercial purposes is at present very often combined with other activities, for instance stock administration, combining things into parcels destined to go to one client, packaging things and the like. And vice versa, the performance of another service, e. g. processing, may involve storage. The question arises whether the rules on storage should also apply when these other services are the primary object of the contract, i. e. when storage of the thing may only be seen as a prerequisite to the fulfilment of the main obligation under the contract (for instance, an obligation to process or transport the thing). Application of the rules on storage may then be in conflict with the rules that are applicable by the rules that govern the main obligations. Nevertheless, from the comparative material it follows that the obligation to take care of the thing applies accordingly in AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, the NETHERLANDS and SPAIN, and probably also in ITALY and PORTUGAL. Paragraph (2) aims to facilitate such by providing that in such a case, the rules on storage only apply 'with appropriate modifications'.

Illustration 12
A computer repairman is to repair the software on a computer and needs to save the computer files on the hard disk temporarily on a durable medium.

Chapter 4 (Storage) applies with appropriate modifications to the storage of the computer files. This implies that the durable medium used must be fit to return the files in the same condition as they were in when they were moved from the computer. To that extent, the computer repairman needs to ascertain whether storage on a floppy disk will be sufficient or that storage on a CD-ROM or virtual disk would diminish the risk that the files are eventually lost, as Article 4:104(1) requires. However, in the case of non-fulfilment of this obligation the hierarchy of remedies under Article 3:110 (Specific Performance and Cure) and Article 3:111 (Resort to Other Remedies) apply. This means that the client will not be allowed to terminate the contract if cure of the non-performance is possible and the computer repairman is both willing and able to do so within a reasonable time after having been notified thereof and the delay caused by the cure does not constitute a fundamental non-performance.

G. Character of the Rule

This Article determines the scope of application of the present Chapter. It is mandatory in the sense that the parties cannot, in their contract, qualify it as another type of contract if the contract contains the essential elements included in the present Article. Conversely, if the parties qualify their contract as a storage contract but the contract does not contain the essential elements contained in this Article, the rules in this Chapter do not apply.

H. Remedies

No remedies stem from this Article since, as a scope and definitions provision, it does not itself impose obligations on the parties.

Comparative Notes

1. *Place in existing codes/laws*
   The storage contract is known in all legal systems. In most of them, the contract is regulated in the Civil and Commercial Codes; in ENGLAND, storage is, as many other services, covered by the rules on bailment.
   No information from DENMARK, FINLAND, IRELAND, LUXEMBURG and SCOTLAND.

2. *Handing over of good required for conclusion of contract?*
   In ROMAN law, the storage contract was a so-called *real contract*, meaning that the contract was concluded not by mere consensus between the parties, but by actual handing over of the good that was to be stored. In the codifications of the 19th and early 20th century, this remained. At this moment, the storage contract is still a *real contract* in AUSTRIA (CC art. 957, first sentence), BELGIUM (CC art. 1919), FRANCE (CC art. 1919), GERMANY (CC art. 688), ITALY (CC art. 1766), POLAND (CC art. 835 and 853) and PORTUGAL (CC art. 1185), albeit that handing over may be fictitious in a case where the good already is in the hands of the storehouse. Somewhat unclear is the situation in SPAIN, where CC art. 1758 requires handing over of the good for the conclusion of the contract, but the Spanish *Tribunal Supremo*, already on 29 December 1928, accepted that the handing over of the good could be symbolic as well (*tradition ficta*). In a ruling from 16 April 1941, the TS appears to have moved back to its more traditional case law. Yet, some of these legal systems do recognise the possibility of a binding precontract, at least obliging the storehouse to accept the good for storage when the client offers the good to the storehouse for that purpose. The situation is the same in ENGLAND, where bailment requires possession of the good, but a contract of custody for reward may be concluded.
   In some of the newer codes, the contract has become a consensual contract; cf. HUNGARY (CC art. 462), THE NETHERLANDS (CC Art. 7:600), POLAND (CC art. 835 and 853). The same goes for SWITZERLAND (OR art. 472). In the Civil Code of the RUSSIAN FEDERATION, a distinction is made between storage by a commercial or professional party, and storage by others. In the first case, the contract is consensual, otherwise the contract is concluded only when the good is handed over to the storehouse; in both cases, often form requirements must be upheld, cf. CC art. 886-887. Moreover, in the case of commercial storage, some of the older commercial codes also accept consensus in stead of actual handing over of the good as the method of conclusion of the contract, cf. CommC art. 467.
   No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, SCOTLAND and SWEDEN.

3. *Gratuitous and remunerated contracts*
In the Civil Codes, storage traditionally was regulated as a gratuitous service, e. g. art. 1917 of the FRENCH and BELGIAN Civil Codes. In art. 969 of the AUSTRIAN CC of 1811, however, the possibility of a remunerated storage contract has explicitly been recognised, as does art. 688 of the GERMAN CC of 1896. The law has further developed in the direction of a remunerated contract, as art. 853 of the POLISH CC, art. 896 of the RUSSIAN CC and art. 7:601 of the DUTCH CC explicitly provide that a professional storehouse is entitled to a remuneration. In *commercial codes*, such as the AUSTRIAN and GERMAN CommC and the SPANISH CommC, the storage contract is always for a remuneration. In ENGLAND, bailment – which need not be contractual – can be gratuitous or for remuneration.
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

4. *Application or exclusion of storage rules in specific cases*
Storage of immovable goods is possible in AUSTRIA, but not in BELGIUM, GERMANY, POLAND and SPAIN. Storage of incorporeal goods and rights is not possible in AUSTRIA, GERMANY and SPAIN. Specific legislation exists for the storage of money and securities in AUSTRIA, GERMANY and GREECE, but the rules on storage – with some modifications – do apply in FRANCE. In the case of car parking contracts, the rules on storage apply in SPAIN. In AUSTRIA, BELGIUM, FRANCE and GERMANY, where the car is park in a guarded place, the contract is storage, otherwise it is considered to be rent. In ENGLAND, such a contract is qualified as bailment only when the client also hands over the keys of the car, thus giving possession to the storehouse. The contract to use a safety deposit box is again a rental contract in AUSTRIA, GERMANY, THE NETHERLANDS, but most likely qualifies as a storage contract in FRANCE. Finally, the rules on storage do not apply in the case of 'storage' of animals in FRANCE, but they do apply in GERMANY.
No information from DENMARK, FINLAND, ITALY, IRELAND, LUXEMBURG, and SCOTLAND.

5. *Application to other duties to store*
When the storehouse is not only obliged to take care of the good but also to undertake measures of administration exceeding the normal obligation of care, in AUSTRIA a mixed contract is concluded to which both the rules of storage and mandate apply. In FRANCE, the rules on storage then apply next to the rules on contract for work. In THE NETHERLANDS and SPAIN, the type of other services to be provided determine which rules, besides those on storage, apply to the contract.
When storage is an *additional* obligation under another contract, the obligation to take care of the good applies accordingly in AUSTRIA, BELGIUM, ENGLAND, FRANCE, GERMANY, THE NETHERLANDS and SPAIN and probably also in ITALY and PORTUGAL; liability usually follows the rules governing the main obligation under the contract. In FRANCE, in such a case exemption of liability is allowed if the 'storehouse' clearly indicates that he will not look after the good; e. g., the mere thing that a client hangs his coat on the coat rack of a restaurant does not lead to the conclusion of a contract of storage, especially not if the innkeeper informs the client that he refuses to look after the coat, cf. Cass.civ. I, 1 March 1988, Bull.civ. I, no. 57.

No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, SCOTLAND and SWEDEN.

National Notes

1. *Place in existing codes/laws*

AUSTRIA Storage is regulated in CC arts. 957-969 *(Verwahrungsvertrag)*. CommC arts. 416-424 deal with commercial warehousing *(Lagergeschäft)*.

BELGIUM The contract of 'dépot' or 'bewaargevingsovereenkomst' is regulated in CC art. 1915-1963.

ENGLAND A storage contract may be qualified as a contract of bailment, cf. Miller/Harvey/Parry, Consumer and Trading Law, p. 179, albeit that bailment as such is not necessarily based on a contractual relationship, cf. Chitty on Contracts [*-McKendrick*], no. 33-002; Charlesworth's Business Law [*-Kidner*], p. 545. A storage contract is subject to the general requirements of sections 13-17 Supply of Goods and Services Act 1982; cf. art. 12 (3).

FINLAND Consumer storage contracts are not covered by Chapter 8 of the Consumer Protection Act on Certain consumer service contracts, cf. Consumer Protection Act s. 1, para. 2, Chapter 8.

FRANCE The contract of storage *(dépôt)* is regulated by CC art. 1915-1963. It is defined as the contract by which one party receives the good of the other party with the obligation to safekeep it and to give it back.

GERMANY The storage contract *(Verwahrungsvertrag)* is regulated in CC arts. 688-700. There are special rules for commercial storage contracts, such as for the storage of goods (CommC arts. 467-475h, applicable only if the storing and safekeeping is part of the operation of a commercial enterprise).

GREECE Storage (παρακαταθήκη – parakatathiki) is regulated in CC arts. 822-833.

ITALY Storage is regulated in CC art. 1766-1797.

THE NETHERLANDS The storage contract *(bewaarneming)* is regulated in CC arts. 7:600-609.

POLAND The contract of *safe-keeping* is regulated in CC arts. 835 ff. Art. 835 states that the keeper shall assume the obligation to keep in undeteriorated condition the movable thing given to him for safe-keeping. The (remunerated) contract of *storage* is regulated in arts. 853 ff. of the Polish Civil Code; the storehouse is then always a professional.

PORTUGAL The storage contract *(depósito)* is regulated in CC and CommC arts. 1185 ff.

SPAIN The storage contract *(depósito voluntario)* is regulated in CommC arts. 1758-1780. These rules apply when the provider of the service receives a good which belongs to another person with the obligation to look after the good and to return it, cf. Sierra, Comentario del Código Civil, p. 1028. When at least the storehouse is a professional party, the goods that are to be stored are tradable and the storage is undertaken as a commercial activity, CommC art. 303-310, apply, cf. CommC art. 303.

SWEDEN Storage is generally an unregulated area. However, the provisions in the Consumer Services Act (KTjL) will apply to consumer transactions, with the exception of the storage of living animals (cf. art. 1:3 KTjL).

OTHER In the Civil Code of the RUSSIAN FEDERATION, storage is regulated in CC art. 886 ff.

2. *Handing over of good required for conclusion of contract?*
AUSTRIA Storage is a so-called 'real contract', implying that handing over of the good is required for conclusion of the storage contract, cf. art. 957, first sentence, CC; Rummel [*-Schubert*], Kommentar ABGB, art. 957 no. 1; Koziol and Welser, Bürgerliches Recht II, p. 183. Yet, the parties may conclude a binding precontract, cf. art. 957, second sentence, and CC art. 936; Rummel [*-Schubert*], Kommentar ABGB, art. 957 no. 1.
BELGIUM The contract of storage is not concluded before the good is handed over factually or fictitiously. Fictitious handing over of the good suffices when the storehouse already has the good under his control (CC art. 1919).
ENGLAND Handing over is required for the creation of the relationship of bailment, cf. Chitty on Contracts (McKendrick), no. 33-002 to 33-003. See e. g. *Ashby v Tolhurst* [1937] 2 KB 242 (Court of Appeal), no handing over of possession in a case where a car was parked in a car park and the keys were not handed over, therefore no bailment. However, a contract of custody for reward may already have been concluded, obliging the client to hand over the possession of the good to the storehouse.
FRANCE Traditionally, the contract of storage is considered to be a *contrat réel,* i. e. handing over of the good is necessary for the formation of the contract, cf. CC art. 1919. Handing over of the good is not required if the good is already in the possession of the storehouse, cf. Huet, Les principaux contrats spéciaux, no. 33105. However, the parties may conclude a binding precontract; such a precontract produces the same effects as the storage contract itself, cf. Huet, Les principaux contrats spéciaux, no. 33129. In practice, storage has therefore a consensual character, cf. Huet, Les principaux contrats spéciaux, no. 33136.
GERMANY Handing over of the good is not required for conclusion of the contract.; cf. Palandt [*-Sprau*], BGB, art. 688 no. 1, 3.
ITALY Storage is a 'real contract', requiring handing over of the good to the storehouse, cf. CC art. 1766. Sometimes, delivery may be obtained by means of a *ficta traditio* of the good, which is already at the disposal of the housestore, cf. Cass.civ.Sez. III, 25 September 1998, n. 9596, Orland c. Fabbri, Giust.civ.Mass. 1998, 1943.
THE NETHERLANDS Under the old CC, handing over of the good was required for conclusion of the contract ('real contract'). Under the present CC, that is no longer necessary: the contract is concluded upon consent between the parties, cf. CC art. 7:600; De Boer, Bijzondere overeenkomsten, note 3.1 to CC art. 7:600, with references.
POLAND The safe keeping contract is a real contract, while contract of storage is deemed to be a consensual contract (Napierała in Rajski, System Prawa Prywatnego, Tom 7, pp. 616 and 641).
PORTUGAL Delivery of the good is essential for the formation of the storage contract, i. e. the contract is a 'real contract', cf. CC art. 1185; Antunes Varela, Das Obrigações em geral, vol II, 304.
SPAIN Both under CC art. 1758 and under CommC art. 305, the storage contract is a 'real contract', which is concluded only when the good is handed over to the storehouse. The handing over may be material or, if the storehouse is already in the

possession of the good, fictitious, cf. STS 29 December 1928, and STS 16 April 1941. Nevertheless, it is under debate whether the mere promise to store a good already may amount to a storage contract. Cf. Serrera, El contracto de depósito mercantil, p. 22, with references. A precontract to conclude a storage contract is, however, binding upon the storehouse.

OTHER In HUNGARY (CC art. 462) and SWITZERLAND (OR art. 472), the contract of storage is consensual. In the Civil Code of the RUSSIAN FEDERATION, a distinction is made between storage by a commercial or professional party, and storage by others. In the first case, the contract is consensual, otherwise the contract is concluded only when the good is handed over to the storehouse; in both cases, often form requirements must be upheld, cf. CC art. 886-887.

3. *Application of rules to gratuitous services*

AUSTRIA A contract of storage can be either for a price or gratuitous, cf. CC art. 969; Rummel [*-Schubert*], Kommentar ABGB, art. 957 no. 1 and to CC, art. 969 no. 1; Koziol and Welser, Bürgerliches Recht II, p. 183. Commercial warehousing excludes gratuitous contracts. The fact that a storage contract is gratuitous, does not affect the care required of the storehouse, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 1.

BELGIUM Storage is traditionally a gratuitous contract (CC art. 1917).

ENGLAND The rules of bailment apply irrespective of the existence of a contract, in particular it can arise without the payment of consideration by the client. Yet, the obligations of the storehouse will in many cases not be as strict (i. e. the assessment of what is 'reasonable care' may be affected by the gratuitous nature of the contract):, cf. Chitty on Contracts (McKendrick), nos. 33-002, 33-029 ff.

FRANCE Originally, storage was a gratuitous contract, cf. CC art. 1917. Therefore, normally the same rules apply to remunerated as to gratuitous storage contracts, albeit that in the case of a gratuitous contract, the amount of care required by the storehouse will be lower than in a storage contract where the storehouse receives a remuneration, cf. CC art. 1928 para. 2; Cass.civ. I, 12 December 1984, Bull. civ. I, no. 335; Huet, Les principaux contrats spéciaux, nos. 33109, 33145.

GERMANY The CC-provisions apply to gratuitous services, cf. Palandt [*-Sprau*], BGB, art. 689 no. 1, albeit that for a gratuitous storage contract the storehouse is only liable if he has not acted with the care one would use for one's own goods, cf. CC art. 690.

ITALY The rules on storage contracts apply equally to gratuitous contracts, but the degree to which fault liability is evaluated in case of a gratuitous service is less strict, cf. CC art. 1768 para. 2 and CC art. 1783.

THE NETHERLANDS The rules on storage apply to gratuitous services alike. Even though it is possible that the standard of care that may be expected of the non-professional storehouse is lower, the obligation to return the good in its original state is not affected by the gratuitous nature of the contract. The one exception is located in the situation where substorage is allowed – that is: if substorage was needed to protect the client's interests and for reasons that can't be attributed to the storehouse. If, and only if, such is the case, the storehouse is not liable for the actions of the substorehouse, as it would be under CC art. 6:76, cf. CC art. 7:603, para. 2 and 3.

POLAND A contract for storage (CC art. 853 ff) is always remunerated, a contract for safe-keeping (CC art. 835 ff) not necessarily.

SPAIN The storage contract is gratuitous unless otherwise agreed, cf. CC art. 1760.

OTHER Storage may be gratuitous or for remuneration in the RUSSIAN FEDERATION. CC art. 891 para. 3 sets out that when storage is not remunerated, the storehouse need only take such care of the good as he would for his own goods.

4. *Application or exclusion of storage rules in specific cases*

AUSTRIA Storage may relate to movable or inmovable goods, cf. CC art. 960; Koziol and Welser, Bürgerliches Recht II, p. 183. Incorporeal goods and rights cannot be the object of a storage contract, unless they are incorporated in physical objects (e. g. securities). However, storage of securities is covered by a specific law *(Depotgesetz)*. Cf. Rummel [*-Schubert*], Kommentar ABGB, art. 957 no. 5, to CC, art. 961 no. 1; Koziol and Welser, Bürgerliches Recht II, p. 185. When a car is parked for a price in a guarded parking place, a storage contract is concluded, cf. OGH, SZ 43/84; when the parking place is not guarded, the relationship is a rental contract, cf. OGH, EvBl 1976/21; Rummel [*-Schubert*], Kommentar ABGB, art. 957 no. 3. The contract to use a safety deposit box is again a rental contract, cf. OGH, SZ 50/25.

BELGIUM Storage is only possible for movables, cf. CC art. 1918. Where a parked car is guarded or placed in a secured place (e. g. a parking garage), a storage contract is concluded, otherwise the rules on rent apply, cf. Herbots, Bijzondere overeenkomsten, p. 270. Decisive is whether the parking place is under the surveillance of a professional operator and whether the owner of the car may expect the car to be under surveillance, cf. Herbots, Bijzondere overeenkomsten, p. 270.

ENGLAND In the case of car park contracts, this means that unless the client not only parks his car, but also hands over the keys of the car, the contract under which a car is parked, is not a storage contract but a contract of license. Cf. *Ashby v Tolhurst* [1937] 2 KB 242 (Court of Appeal). Therefore, the owner of the car park is not under an obligation to look after the good.

FRANCE The contract to park a car in a guarded parking place is generally considered to be a storage contract, cf. Cass.civ. I, 2 November 1966, D. 1967.319, note Pélissier, RTD civ 1967.411, obs. G. Cornu. Where the operator of the car park is not required to look after the car, a contract of rent is concluded, cf. Cass.civ. III, 26 October 1977, Bull.civ. III, no. 362. The 'storage' of something in a safety-deposit box was traditionally considered to be a contract of rent, but nowadays is often seen as a proper storage contract, cf. Huet, Les principaux contrats spéciaux, no. 33116. 'Storage' of an animal is covered by the rules on storage, cf. Huet, Les principaux contrats spéciaux, no. 33117. 'Storage' of immovable goods is covered by the rules on the contract for work (*louage d'ouvrage* or *contrat d'entreprise*); cf. Huet, Les principaux contrats spéciaux, nos. 33117, 33126-33127. 'Storage' of money is in principle covered, albeit with modifications, cf. Huet, Les principaux contrats spéciaux, nos. 33502-33507. Case law is used to apply the provision of the *Code civil* on deposit to regulate several aspects of the bank-account contract.

GERMANY Storage is only possible for movable goods (including animals), cf. BGH, BGHZ 34, 349, but not for rights or immovable goods, cf. Palandt [*-Sprau*], BGB, art. 688 no. 2. The rules on storage do apply to car park contracts when a car is parked on a guarded parking place, cf. BGH, BGHZ 63, 333. The 'storage' of something in a locker is considered to be a contract of rent as the supplier of the locker does not have access to the interior of the locker and therefore cannot care for the good (RG, RGZ 141, 99). Storage of securities is regulated in specific legislation (Depotgesetz).

GREECE Specific legislation exists for the specific type of limited liability company for General Warehouse services (Law 3077/1954), and for the 'storage' of money (ταμείο παρακαταθηκών και δανείων – tameio parakatathikon kai daneion).
THE NETHERLANDS Storage of goods in a rented safety-storage box is covered by the rules on rental contracts, cf. Geschillencommissie Bankzaken 6 August 2001, TvA 2002, p. 115. Storage of *immovable* goods is possible, cf. Wessels, Bewaarneming in het nieuwe BW, p. 749-750; Rutgers, Bewaarneming.
POLAND The rules on safe-keeping contracts only apply to movable goods (CC art. 835). According to the prevailing opinion in legal literature, the same holds true for the contract of storage, cf. Bieniek, Komentarz, p. 453.
PORTUGAL Specific rules exist for the storage of agriculture and industrial products (Statutes Decreto no. 206 of 7 November 1913 and Decreto no. 783 of 21 August 1914).
SPAIN CC art. 1761 sets out that only movable things can be the object of a storage contract. The rules therefore do not apply to 'storage'of immovable goods or of non-corporeal goods, cf. STS 16 April 1941. The rules on storage apply to the contract of parking, cf. Serrera, El contracto de depósito merchantil, p. 34 ff.
SWEDEN Storage is generally an unregulated area. The provisions of the Consumer Services Act (KTjL) do not apply to immovable goods. Moreover, art. 1:3 KTjL excludes the application of the law to the storage of living animals.
OTHER Storage is in Switzerland only possible for movable goods, cf. OR art. 472.

5. *Application to other duties to store*
AUSTRIA When the storehouse is not only obliged to take care of the good but also to undertake measures of administration exceeding the normal obligation of care, a mixed contract is concluded; both the rules of storage and mandate apply, cf. CC art. 960; Rummel [*-Schubert*], Kommentar ABGB, art. 960 no. 2. Storage may also be an additional obligation under another contract. The obligation to take care of the good then applies accordingly, Rummel [*-Schubert*], Kommentar ABGB, art. 960 no. 3.
BELGIUM Storage, especially gratuitous storage, often takes place in addition to another contract, e. g. in addition to a sales contract, cf. Cass. 2 May 1964, Pas., 1964, I, 932; or a processing contract, cf. Rb Brussel 3 November 1964, JT 1965, 676.
ENGLAND The scope of the rules on bailment cover a wide range of services in which a good is handed over into the possession of another. These rules govern storage contracts, but also processing contracts. As a consequence, the rules on bailment apply to situations where storage is but a subsidiary contractual obligation, cf. *Andrews v Home Flats* (1945) 173 LT 408 (landlord providing storage space for tenant's goods); Charlesworth's Business Law [*-Kidner*], p. 545.
FRANCE When services other that storage are provided, the rules on contract for work (CC art. 1989 ff) are applied next to the rules on storage contracts, cf. Huet, Les principaux contrats spéciaux, no. 33117. Reversely, when a service provider, in the course of a contract for work, assumes to guard a good, the rules on storage contracts may be applied either directly or by way of analogy; cf. Huet, Les principaux contrats spéciaux, nos. 33117, 33120. Liability will then normally follow the rules of the main contractual obligations, cf. Huet, Les principaux contrats spéciaux, no. 33120. Moreover, in such a case exclusion of liability is allowed if the 'storehouse' clearly indicates that he will not look after the good; e. g., the mere thing that a client hangs his coat on

the coat rack of a restaurant does not lead to the conclusion of a contract of storage, especially not if the innkeeper informs the client that he refuses to look after the coat, cf. Cass.civ. I, 1 March 1988, Bull.civ. I, no. 57. However, when the coat is received by an employee of the restaurant and hanged in the restaurant's clockroom, a storage contract is concluded, cf. CA Paris, 3 December 1987, D. 1988 I.R 26.

GERMANY If storage – necessarily including an obligation to look after the good – is an additional obligation under another contract, in principle the rules governing that contract also govern the storage obligation; the rules on storage may be applied in addition to these rules, with the exception of the lower liability scheme of CC art. 690. In the case of – even gratuitous – storage in the cloakroom of a theatre – but not in a restaurant, cf. BGH, NJW 1980, 1096 – or in a case where storage is necessary or compulsory (*e. g.* in a swimming pool), such an obligation does exist; in any case where storage tokens are given or a price for the storage is to be paid, the storage rules may apply, cf. Palandt [*-Sprau*], BGB, art. 688 no. 6. Limitation of liability is possible according CC art. 276, but the storehouse must articulate it in clear easily readable words, cf. Palandt [*-Sprau*], BGB, art. 688 no. 7.

ITALY The owner of a garage was considered liable for the theft of a car that was parked outside his garage, in order to be repaired, cf. Tribunale Roma 20 February 1958, Vita c. Soc. Fur Car 90, Gius. 1998, 2015.

THE NETHERLANDS When a contract is concluded in which the storage of goods is an important element, CC art. 6:215 requires the court to simultaneously apply the rules of the storage contract and those of the other specific contract, e. g. transportation. Only if the 'storage' of the good is completely subordinate to the main obligations arising from the contract, the qualification of a storage contract is not possible, cf. Pitlo-Croes [*-Du Perron*], Het Nederlands burgerlijk recht VI, p. 292; De Boer, Bijzondere overeenkomsten, note 5 to the Introduction to CC Title 7.9. Such is the case, Du Perron argues, if a car is brought to a garage in order to be repaired. He concludes, pp. 292-293, that in such a case the rules on storage may not be applied 'in their entirety'.

POLAND First, the duty to safe-keep *(przechowanie)* may constitute an integral part of other typical, nominate contracts. It exists when a party, performing an obligation arising from another contract (sale, leasing, carriage) holds a thing and is obliged to release it (Napierała in Rajski, System Prawa Prywatnego, Tom 7, p. 620). Second, the duty to safe-keep can also be established by accidentalia negotii of certain contracts, such as lease (CC art. 670), precontracted deliveries of agricultural produce (CC arts. 613 and 1615) or contract of forwarding (CC art 794 para. 1) (S. Grzybowski, Umowa kontraktacji w systemie kodeksu cywilnego, RPEiS 1967, nr 1, p. 41). The Supreme Court in its judgement of 11.13.1957 1 CR 183/57, OSN 1959, poz. 43 stated that the rules on safe-keeping apply accordingly in a situation, when the creditor did not collect the thing timely. The rules on safe-keeping apply also to: a quasi contract between a court enforcement officer and a caretaker in the enforcement proceeding on movables (Code of the civil procedure, arts. 856-862), a safe-keeping of things found (CC arts 184-185), a safe-keeping of a thing by a plegee (CC art. 318) and in some other situations created by administrative decisions or court judgements (Napierała in Rajski, System Prawa Prywatnego, Tom 7, p. 621-623).

PORTUGAL An ancillary obligation to safekeep/store a thing may emerge from other contracts, e. g. contract for work, leasehold, transportation, etc., cf. CA Porto, 11 May 2000, www.dgsi.pt.

SPAIN The rules on storage may apply even to contracts of a mixed nature, to the part of the contract imposing the obligations to store. This is the case even when the obligation to store is not the main one. For example, to the contract of parking the rules on storage are applied, cf. Serrera, El contracto de depósito merchantil, p. 34 ff.

Article 4:102: Pre-contractual Duty to Warn of the Client

The duty under Article 1:103(4) (Pre-contractual Duties to Warn) requires in particular the client to warn the storer of any unusual danger connected with the thing or the storage of it that the client knows of.

Comments

A. General Idea

The client normally knows the characteristics of the thing and often also the dangers connected with it or to its storage, whereas the storer may not have that knowledge. The present Article states that the client is to warn the storer of the dangers connected with the storage of the thing insofar as the client knows or cannot be unaware of such dangers. However, if the storer of his own account knows or has reason to know of the dangers, failure to warn does not lead to detrimental consequences for the client, as the failure to warn itself did not lead to extra costs for the storer.

Illustration 1
A client requests the storage of soil. The client knows that the soil is contaminated with heavy metals (such as zinc), and must therefore be stored in such a manner that it cannot come into contact with ground water. The client is to warn the storer of the contamination. If the storer knows that the soil comes from a place that is known to be a toxic waste dump, he must be aware that the soil may be contaminated or at least of his own accord inquire whether the soil is contaminated. The client's breach of his duty to warn does not lead to a remedy for the storer.

B. Interests at Stake and Policy Considerations

In the case of a storage contract, the client will usually be aware of the characteristics of the thing. Sometimes, things consisting of a dangerous or potentially dangerous substance are placed in the care of a storer. If there is no reason for the storer to know of the dangerous quality of the thing, he will not know that he has to take specific precautionary measures and, as a consequence, not only the thing, but also the health of his personnel or of third parties as well as other things may be endangered. This is all the more pressing if the client does know about the danger. Moreover, the client may not expect the storer to ask about specifics he cannot reasonably know of. In such a

case, it will be very costly for the storer to investigate whether an unknown danger is connected with the performance of the service, whereas the client can take away any uncertainty immediately by merely telling the storer what he knows. It would be very uneconomical to demand such an investigation by the storer nevertheless.

On the other hand, the client need not be burdened with a duty to investigate the thing to be handed over for storage. The present Article, together with the following Article, therefore must balance the interests of both parties as well as possible.

C. Comparative Overview

In AUSTRIA and GERMANY, the client is required to disclose to the storer the dangers involved in storing the thing that he is aware of. Failure to inform leads to liability if the dangers materialise, unless the storer was or should have been aware of the danger himself. On the basis of good faith and fair dealing, probably the same holds true for THE NETHERLANDS, PORTUGAL and SPAIN, and possibly also ITALY. In effect, a similar result is reached indirectly in most other legal systems, as the client generally is liable for all costs of storage and for any loss sustained by the storer in the performance of the contract; such loss may occur if the client did not warn of specific dangers he was or should have been aware of and the danger materialises.

D. Preferred Option

As the client will usually be aware of the characteristics of the thing, it will be more practical to demand from him to disclose of his own accord any unusual dangers he knows or cannot be unaware of. The client is not required to actively investigate the nature of the thing – if any party's, such would be the storer's task – but if he is aware of any unusual danger connected with the storage, the client is under a duty to warn the storer thereof. As the client is not required to investigate the potential dangers connected with the thing or the storage thereof, the present Article does not place a too heavy burden on the client, for he is only required to disclose the information he already has.

However, a warning must only be given if the storer may not be aware of the specific and significant danger and this danger, as the measures that are to be taken by the storer may influence the calculation of the price or the storer's considerations on concluding the contract.

E. Relation to PECL and Other Parts of the Principles

Article 1:103(1), subparagraph (a) and (b) (Pre-contractual Duties to Warn) occasionally require the storer to obtain information from the client before the contract is concluded about the client's reason for having the thing stored and about the condition of the thing that is to be stored. The provision includes a policy choice: it is up to the

storer to put the questions he needs answers to in order to be able to perform the service, which includes an inquiry into the client's wishes. The counterpart of this obligation can be found in Article 1:104(1)(a) (Duty to Co-operate), where it is stated that the client is under a duty to answer to such questions. Moreover, the storer must inform the client about the risks involved in the performance of the service if such information may influence the client's decision to have the service performed by the storer. This is a general principle for services contracts, which can be found throughout case law and statutory law regulating services, as is explained in more detail in the Comments to Article 1:103 (Pre-contractual Duties to Warn).

Illustration 2
A warehouse is located on the waterside. Its only entrance is on the side of the water. The storer is to inform the client that the thing to be stored cannot be transported in or out over land. If the client does not have the means to transport the thing in over water, he may want to decide not to conclude the contract.

The storer's duty to collect information is, however, not unrestricted. The client may not expect the storer to ask about specifics he cannot reasonable know of. Therefore, the client is to offer information about specificities or extraordinary needs of his own accord.

Illustration 3
A storer is asked to store oranges. He inquires about the origin and condition of the oranges. If he does not have this knowledge himself, he will have to make inquiries about the temperature in which the oranges are to be stored, about the level of humidity of the storage room and about other specific requirements for storage. The storer is not required to actively investigate whether the oranges contain diseases. However, if he comes across such a disease while investigating the condition of the oranges he is to warn the client thereof; see Article 1:103(1)(a) (Pre-contractual Duties to Warn).

Moreover, the *client* is to inform the storer about facts known to the client that might cause the service to become more expensive or to take more time than expected by the service provider; see Article 1:103(4) (Pre-contractual Duties to Warn).

Article 4:102 imposes a further obligation on the client to disclose particular facts: if the client is aware of an unusual danger connected with the thing or the storage thereof, he is to warn the storer of that danger. This implies that if the client knows of risks that might endanger the thing or the health of the storer's staff or the health of third parties or the safekeeping of other things, he is to mention them to the storer. Failure to do so results in the storer being entitled to damages for the loss he sustained as a consequence of the failure to warn, Article 1:103(5)(a) (Pre-contractual Duties to Warn). However, when the storer should have been aware of the danger – either because the danger is public knowledge or because no storer would be unaware of the danger given his professional expertise – the damage did not occur as a consequence of the client's failure to warn, but rather as a consequence of the storer's incompetence. In such a case, the storer will not be entitled to damages.

Whereas Article 1:110 (Contractual Duty of the Service Provider to Warn) relates to the storer's contractual duty to warn, the present Article includes a (pre-contractual) duty of the client to warn. Nevertheless, the provisions of Article 1:110 (Contractual Duty of the Service Provider to Warn) may be applied analogously to the client's obligation to warn under the present Article. As regards the effectiveness of the warning, it should be noted that a duty to warn implies an intensified form of the obligation to inform on the client: the client is not just required to inform the storer of the danger, but also to take reasonable measures to ensure that the storer understands the warning and is aware of the danger. In determining whether the client has taken sufficient measures to ensure that, the fact that the storer is a professional party and the fact that the client may not be, are to be taken into account.

F. Burden of Proof

The burden of proof that the client did not perform his duty to warn is upon the storer.

G. Character of the Rule

This Article contains a default rule. However, given the fact that this Article includes a pre-contractual duty to warn, the parties can only exclude its applicability when negotiating a contract (by way of a separate contract) or in the contract itself. This implies that when no contract is concluded at any stage, the storer may be held liable in tort.

H. Remedies

The present Article, imposing on the client the obligation to warn the storer against unusual dangers, applies alongside with Article 1:103(1) subparagraphs (a) and (b) (Pre-contractual Duties to Warn), which requires the storer to collect the necessary information and to investigate the thing. This implies that the client may be under an obligation to warn, whereas the storer could also be expected to recognise or have recognised the danger before the conclusion of the contract. If such is the case, the storer cannot claim a change of the price for the service under Article 1:111(3) (Variation of the Service Contract). On the other hand, if the client breaches his duty to warn and the storer learns of the dangers attached to the service only after the contract has been concluded and if the storer cannot be expected to have recognised the danger prior to the conclusion of the contract, the service may need to be adjusted in accordance with Article 1:111 (Variation of the Service Contract). The client is then required to accept such a variation of the contract and the subsequent adjustment of the price.

In practice, this means that the storer is to prove that the client knew or must have known the danger, whereas the storer cannot have been expected to be aware of the danger.

Illustration 4
A client requests the storage of contaminated soil. The soil requires storage in such a manner that it cannot come into contact with ground water. The storer knows that the soil comes from a place that is known to be a toxic waste dump, as this is public knowledge.

In this situation, the storer can be supposed to know that the soil may be contaminated or that he should, of his own accord, inquire whether the soil is contaminated. Therefore, the price cannot be adjusted under Article 1:111(3) (Variation of the Service Contract) if the client fails to warn the storer thereof.

In such a case, the contract may also be avoided under Article 4:103 PECL (Fundamental Mistake as to Facts or Law). If the danger already materialised, the storer may claim damages for non-performance under Chapter 9, Section 5 PECL (Damages and Interest).

Comparative Notes

1. *Client's obligation to warn for specific dangers and consequences of breach thereof*
A specific obligation on the client to inform the storehouse of the dangers attached to the storage of the good the client is or should be aware of, is accepted in AUSTRIA and GERMANY; failure to inform leads to liability if the dangers materialise, unless the storehouse was or should have been aware of the danger (CC art. 967, CC art. 694). In GERMANY, an obligation to inform the storehouse can occasionally also be deduced from CC art. 241 para. 2, requiring the client to take the interests of the storehouse into account; probably the same holds true in THE NETHERLANDS (CC art. 6:2), PORTUGAL (CC art. 227) and SPAIN (CC art. 1258) on the basis of good faith and fair dealing. In effect, a similar result is reached indirectly in BELGIUM (CC art. 1947), FRANCE (CC art. 1947), THE NETHERLANDS (CC art. 7:601, para. 3), PORTUGAL (CC art. 1199). In these legal systems, the client is liable for all costs of storage and for all loss sustained by the storehouse in the performance of the contract; such loss may occur if the client did not warn for specific dangers he was or should have been aware of and such a danger materialises. Moreover, if the storehouse proves he did not and need not have known of the damage, he can't be held liable for negligence if the condition of the good deteriorates in BELGIUM, ENGLAND, FRANCE, probably also THE NETHERLANDS.
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, SCOTLAND and SWEDEN.

National Notes

1. *Client's obligation to warn for specific dangers and consequences of Breach thereof*
AUSTRIA When the client neglects to inform the storehouse of the dangerous nature of the good handed over for storage, he is required to compensate the storehouse for the damage sustained by the storehouse as a consequence thereof, cf. CC art. 967; Rummel [*-Schubert*], Kommentar ABGB, art. 967 no. 1. The client is not required to inform the storehouse about the value of the good, but the storehouse may not be

liable if he need not have been aware of the value of the good. Cf. Rummel [*-Schubert*], Kommentar ABGB, 964 no. 4; Koziol and Welser, Bürgerliches Recht II, p. 183.
BELGIUM The client is liable for all costs of storage and for all loss sustained by the storehouse in the performance of the contract, cf. CC art. 1947. Indirectly, an obligation to warn may be deduced from this provision: such loss may occur if the client did not warn for specific dangers he was or should have been aware of and one or more of these dangers materialise. Moreover, if the storehouse proves he did not and need not have known of the damage, he can't be held liable for negligence if the condition of the good deteriorates.
ENGLAND An obligation to warn the storehouse for dangers attached to storage of the good, unless agreed upon by the parties, does not exist in contract law. However, if the storehouse proves that the absence of a warning has led to damage to the good and that he did not act negligently in not being aware of the danger, he will not be liable towards the client.
FRANCE The client is under an obligation to inform the storehouse about any specific details it knows or should know about the good or the storage thereof and which the storehouse may not be aware of. Failure to do so constitutes negligence on the part of the client, which implies that the storehouse is not liable for the resulting deterioration or destruction of the good. Cf. Cass.com., 6 January 1966, Bull.civ. III, no. 9, in a case of damage caused by humidity where the goods were of a fragile nature, which was not pointed out to the storehouse by the client. Moreover, if the storehouse, as a result of the client's failure to warn for dangers attached to the storage, sustains damage, the client is liable for that, cf. CC art. 1947. From these rules, indirectly an obligation to warn for specific dangers the storehouse may not be aware of, may be deduced.
GERMANY The client has to inform the storehouse of the special nature of the good if he knows or should know the danger that may result from the storage of the good. Failure to do so leads to liability, unless the storehouse was or should have been aware of the danger, cf. CC art. 694. Moreover, an obligation to inform the storehouse can also be deduced from CC art. 241 para. 2, requiring the client to take the interests of the storehouse into account.
ITALY The client is required to give information about the nature of the good handed over for storage; the obligation is to be fulfilled not only contractually, but also pre-contractually. E. g., the hotel keeper (pursuant to CC art. 1784) is to be enabled to refuse the client from bringing dangerous or bulky goods into his hotel (taking into account the size and kind of managing of the hotel).
THE NETHERLANDS The client is not under such a duty, unless it would follow from general contract law (especially CC art. 6:2, requiring the parties to act towards one another in accordance with requirements of reasonableness and equity). Yet, if damage occurs to the storehouse in the performance of the contract, the client is required to compensate the storehouse for damage caused by the storage, cf. CC art. 7:601, para. 3, unless the storehouse has breached its duty of care, cf. Wessels, Bewaarneming in het nieuwe BW, WPNR 1990, p. 753; Rutgers, Bewaarneming, no. 11.
POLAND In both of the contracts – safe-keeping and storage – there is no express duty to warn for specific dangers, nevertheless the keeper and the storehouse are entitled to ask for a redress of a damage incurred as a result of dangerous qualities of the thing given for safe-keeping or storage, unless they were warned about them (A. Rembieliński, in: Komentarz KC 1989, t. II, p. 754).

PORTUGAL A general duty to warn for the client does not exist, but may arise from pre-contractual good faith (CC art. 227), especially if information is requested by the storehouse. Moreover, negligent failure to warn for dangers, e. g. the inflammable nature of the good or the fact that an animal is contaminated with a contagious disease, leads to liability of the client under CC art. 1199 if the storehouse sustains losses as a result of the failure to warn, cf. Antunes Varela, Das Obrigações em geral II, p. 776. In order to claim damages, the storehouse most likely will have to prove that the client withheld essential information.
SPAIN A general duty to warn for the client does not exist, but may arise from good faith (CC art. 1258) or from CC art. 1902 on extra-contractual liability, especially when the client knows there are dangers attached to the good itself or the storage thereof. Cf. Díez Soto, El Depósito Profesional, pp. 273, 274.
OTHER Article 894 para. 1, of the Civil Code of the RUSSIAN FEDERATION provides that the storehouse may destroy or render harmless any stored good that is dangerous if the client did not warn the storehouse thereof at the moment of submission for storage. Furthermore, the client will not be compensated for its loss and will have to answer for any damage caused in connection with the storage of the good to the storehouse and to third persons. If the storehouse is a professional party, this holds true only if the goods were submitted under an incorrect designation and the storehouse at that moment could not confirm the dangerous qualities by an external inspection.

Article 4:103: Circumstances in which the Service Is to Be Performed

The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the storer to collect information about the characteristics of the thing to be stored insofar as is necessary for the performance of the service.

Comments

A. General Idea

The present Article, together with Article 1:105 (Circumstances in which the Service Is to Be Performed), is meant to indicate what the storer has to do prior to the performance of the service. The Articles state that the storer must assess the situation and the condition of the thing in order to determine whether the thing can be safely stored and, if so, in what manner storage is to take place. To that extent, the present Article requires the storer to collect information about the characteristics of the thing before actually performing the service. The duty may sometimes be carried out by simply putting questions to the client – which will be the case especially if the information needed relates to the physical features of the thing, e. g. its size, composition and typical weaknesses (e. g. its fragile or perishable nature) –, whereas in other cases the storer may need to collect information actively, e. g. by studying books or documentation on the Internet.

Illustration 1
A storer is asked to store computer hardware. Prior to the conclusion of the contract, he inquires about the size and the conditions for storage. In doing so, he has met the requirements of the present Article.

Illustration 2
A storer is asked to store 1,000 barrels of beer. The storer is aware of the fact that the barrels may explode if the temperature rises too much. As the client does not know under which conditions the barrels may be stored safely, the storer studies the information he has found on the website of a brewery.

B. Interests at Stake and Policy Considerations

In order to be able to store the thing safely and to return the thing in the condition the client may reasonably expect it to be upon return, the storer needs to investigate the thing before and – depending on the nature of the thing handed over for storage – sometimes also during the performance of the service. However, as the thing has already been in the possession of the client, the client may have specific knowledge about the thing. Therefore, under the previous Article the client is required to inform the storer of is own accord about specific dangers attached to the thing or storage thereof that the storer may not be aware of. Nevertheless, the storer may sometimes nevertheless need more or other information in order to perform the contract properly. The question that needs to be addressed here is who is responsible for the storer becoming properly informed: should the storer actively investigate the thing and put questions to the client or is the client required to inform the storer on his own accord about such information as well? The extent of the duty which is placed on the storer also influences his liability in other ways: if he is obliged to investigate the specificities of the thing thoroughly, he may detect dangers relating to the thing, in which case he may be required to warn the client. If he is only required to conduct a limited investigation, such dangers may not be brought to light, and a duty to warn would not emerge. Failure to warn would not constitute a non-performance of the contract then. An in-between solution would be that the processor is only required to investigate the thing insofar as is needed for him to perform the contract properly.

C. Comparative Overview

An express and general obligation to collect information about the thing and to investigate the thing does not exist as yet in any of the legal systems of the European Union. This does, however, not mean that the storer is not required to do so. In all legal systems, the storer bears the burden to prove that the damage to the thing was not due to his negligence. To that extent, he is to prove he has done all that may reasonably be expected of him when performing the contract. In order to determine a safe method of storage, he may need to collect information or investigate the thing. If he should have done that, but failed to do so, he cannot prove the damage could not have been prevented.

Even though the existing legal systems have not yet as such recognised an independent obligation to collect information about the thing, this does not mean that such an obligation is unprecedented: the new Civil Code of the RUSSIAN FEDERATION contains such an obligation in the case of a commercial storage contract.

D. Preferred Option

An express obligation requiring the storer to collect information actively about the thing is needed to ensure that the storer will be able to store the thing in such a manner that it may eventually be returned to the client or a third party in as good a condition as may reasonably be expected by the client. To that extent, the storer may, for instance, need to inquire whether the thing is subject to natural decay or deterioration and/or needs to be stored in accordance with a specific mode. It should be noted, however, that fulfilment of this obligation does not under all circumstances require the storer to investigate the thing handed over for storage: in many cases, the normal communication between the parties prior to the conclusion of the contract or at the time the thing is handed over for storage will make sufficiently clear what the main characteristics of the thing are.

Illustration 3
A storer is asked to store oranges. He inquires about the origin and condition of the oranges. If he does not have the information himself, he will have to make inquiries about the temperature in which the oranges are to be stored, about the level of humidity of the storage room and about other specific requirements for storage.

E. Relation to PECL and Other Parts of the Principles

In order to perform the service in such a manner that the thing may eventually be returned to the client or a third party in as good a condition as the client may reasonably expect, the storer has to collect the necessary information in order to perform the service safely. Article 1:105 (Circumstances in which the Service Is to Be Performed) and Article 4:103 state that is up to the storer to put the questions he needs answers to in order to perform the service. The counterpart of this obligation can be found in Article 1:104(1) (Duty to Co-operate), where it is stated that the client is under a duty to answer such questions.

Article 1:105 (Circumstances in which the Service Is to Be Performed) and Article 4:103 complement each other. While the obligation under the former Article mainly focuses on the conditions and circumstances in which the service is to be performed, the latter Article focuses explicitly on the characteristics of the thing itself. Moreover, the storer's obligation under Article 4:105 to exercise due care and to take precautionary measures may entail an obligation to investigate the thing if the storer received information pertaining to a potential risk with regard to thing or its condition, e. g. a disease in the case of storage of perishable things. These provisions, of course, apply

simultaneously, implying that the storer must, if need be, investigate the condition of the thing in order to determine the precise mode of storage.

F. Burden of Proof

In accordance with the main rule of civil procedure, the burden of proof of compliance or non-compliance with this Article is on the client.

G. Character of the Rule

This Article contains default rules.

H. Remedies

Non-performance of the duties under the present Article leads to the remedies for non-performance under Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider). Since the client has an interest in performance under the present Article, he may claim specific performance of the duty under Article 9:102 PECL (Non-Monetary Obligations) or demand assurance of future performance under Article 8:105 (Assurance of Performance). Alternatively, the other remedies of Chapter 9 PECL (Particular Remedies for Non-Performance) may be involved. However, usually a breach of the present Article will only become apparent after the storage has ended; in such a case, it will often lead to a breach of the standard of care or to non-conformity of the service. This would then lead to the appropriate remedies for non-performance. See further extensively Comment H to Article 1:105 (Circumstances in which the Service Is to Be Performed).

Comparative Notes

1. *Storehouse's obligation to collect information and to investigate the good*
   In none of the reported legal systems of the Member-States of the European Union, an express and general obligation exists to collect information about the good and to investigate the good. Such an obligation does, however, exist in the RUSSIAN FEDERATION in a commercial contract, cf. CC art. 909 para. 1. Notwithstanding the absence of a straight-forward obligation to investigate the good in the reported legal systems of the Member-States, this does not mean that the storehouse is not required to do so. As in all legal systems, in the case of damage to the good, the storehouse bears the burden to prove that he did not act negligently, he must prove he has done all that could reasonably be expected of him when performing the contract. In order to determine a safe method of storage, he therefore normally will have to collect information and/or investigate the good. If he has not done so, he can't prove the damage could not have been prevented. In THE NETHERLANDS, it is accepted that the

storehouse must collect information about the good in the specific situation that the storehouse has reason to suspect that the client is not entitled to hand the good over for storage (e. g. in the case it suspects the goods to stem from theft).
No information from DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

National Notes

1. *Storehouse's obligation to collect information and to investigate the good*
AUSTRIA Failure to collect the necessary information and to properly investigate the good may lead to the conclusion that the storehouse did not properly perform his obligation to take due care of the good. In that case, the storehouse is liable for negligence under CC art. 964.
BELGIUM In the performance of his obligation to take care of the good diligently, the storehouse is normally required to investigate the good, cf. *a contrario* also CC art. 1931, where investigation of the good is forbidden when the good is handed over sealed or in a closed case.
ENGLAND If upon return of the good, the good appears to be damaged, the storehouse is liable unless it proves that there was no case of negligence. To that extent, he must, among other things, prove he had taken reasonable precautionary measures to prevent unnecessary deterioration or destruction of the good, cf. *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86. This can only be proven if the storehouse also proves that it collected the information needed for storage and properly investigated the good when it was received by the storehouse.
FRANCE In the case of deterioration or destruction of the good, the storehouse is liable unless he proves that the carelessness or negligence of the client is the cause of the defect; cf. Huet, Les principaux contrats spéciaux, nos. 33143, 33147. If the storehouse has failed to collect the information necessary for safe storage of the good, or not sufficiently investigated the good, the storehouse cannot prove its absence of fault and will therefore not escape liability.
GERMANY The storehouse is not required to collect information about the good, nor to investigate it, cf. Palandt [*-Sprau*], BGB, art. 694 no. 1. Yet, failure to collect information or to investigate may lead to liability if the storehouse should have been aware of the danger later materialising, and also mean that the storehouse itself cannot claim damages for the danger it has sustained.
THE NETHERLANDS A contractual obligation to collect information may exist as part of the more general obligation to exercise reasonable care and skill. A specific duty to collect information may emerge if the storehouse has reason to suspect that the client is not entitled to hand the good over for storage (e. g. in the case it suspects the goods to stem from theft). Cf. Reehuis, Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, Boek 7, p. 407; Pitlo-Croes [*-Du Perron*], Het Nederlands burgerlijk recht VI, pp. 303-304. The storehouse is not under an express duty to investigate the good, but failure to investigate may lead to liability, since the storehouse is required to return the good in the condition it has received the good, cf. art. 7:605, para. 4.
POLAND The duties of the keeper and the storehouse are of such nature in Polish law that without obtaining a proper information and investigating the goods it is not

possible to fulfil them. The main obligation of the keeper in the contract of safe-keeping is to keep the thing given for safe-keeping in undeteriorated condition (CC art. 835). If not otherwise agreed, the keeper must keep the thing in a manner which results from the nature of the thing kept and other circumstances (CC art. 837); the keeper is also authorised (and even obliged) to change the place and the manner of safe-keeping of the thing specified in the contract (CC art. 838) and use the thing (CC art. 839) if that proves to be necessary for its protection against loss or deterioration. In the contract of storage the storehouse is obliged to take appropriate conservation measures, and the parties are not allowed to decide otherwise (CC art. 855 para. 2). The storehouse is obliged to secure the goods sent to him and the rights of the depositor, if the goods are in the condition that suggests loss, decrement of or damage to the goods (CC art. 857), and if the goods are perishable and it is not possible to wait for the instructions of the depositor, the storehouse is entitled or even obliged to sell the goods (CC art. 859).

SPAIN The storehouse's main obligation is to preserve the good in storage; to that extent, the storehouse must act in conformity with the contract and, in the absence of à contractual term, with the diligence of the good father (CC art. 1094 and 1104). In order for the storehouse to comply with the required care, it must inform itself about the nature (characteristics of the good, maintenance requirements) before carrying out the storage and, if need be, to investigate the good.

OTHER Under art. 901 para. 1 of the RUSSIAN Civil Code, a professional storehouse is liable for loss of or damage to the good, unless he proves either force majeure or intention or gross negligence of the client, or that the damage has occurred as a result of the properties of the good he did not know and need not have known of. From this, an obligation to investigate may be derived. Moreover, in a commercial contract, the storehouse is even actively required to investigate the good when accepting the good, cf. CC art. 909 para. 1.

Article 4:104: Duties of the Storer regarding Input

(1) The duties under Article 1:106 (Duties of the Service Provider regarding Input) require in particular the storer, insofar as the storer provides the storage place, to provide a place fit for storing the thing in such a manner that the thing can be returned in the condition the client may expect.
(2) The storer may not subcontract the performance of the service without the client's consent.

Comments

A. General Idea

The fact that the storer takes control over the thing implies the main risk involved in the performance of the contract on behalf of the client: the risk that the thing is damaged during the performance of the contract. The rules in this Chapter aim at

minimising that risk by imposing quality standards on the storer. This is especially important as regards the place of storage. The present Article deals specifically with the latter aspect. It states that when the storer provides the location for storage – which normally is the case –, that location must be safe for storage of the thing. The Article indicates what may be expected of the storer in the process of the performance of the contract. The Article is also in the storer's interests, as it provides guidance as to what is expected of him in order to prevent liability.

Illustration 1
A client wants to have cocoa beans stored. The storer must make sure that the location where he wants to store the cocoa beans – including the level of humidity and the temperature in which the cocoa beans are to be stored – is suitable for such storage. If necessary, in order to perform the contract correctly, the storer must see to it that the location is adjusted to enable safe storage.

The Article further states that the storer (or his staff) must perform the contract himself; in other words, performance of the contract cannot be left to a third party, unless the client has agreed to such substorage.

Illustration 2
As the storer's warehouses are fully packed, the storer cannot properly store the cocoa beans he has agreed to store. The storer wants to have the storage done by a competing firm, whose services he commonly makes use of when he lacks storage capacity. Such substorage is allowed only if the client consents to it.

B. Interests at Stake and Policy Considerations

The fact that the storer takes control over the thing implies the risk that the thing is damaged during the performance of the contract. The rules in this Chapter are intended to minimise that risk by imposing quality standards on the storer. This is especially important as regards the place of storage: if the location is not safe for storage of the thing, the risks of damage to the thing are much higher. It would therefore be logical to require the storer to provide a safe location for storage. On the other hand, as long as the storer is able to return the thing in the condition the client may reasonably expect it to be, there does not seem to be much reason to burden the storer with yet another obligation. It could therefore be argued that such an obligation should not be imposed upon the storer.

A different issue is whether substorage should be allowed in the case of a storage contract. Subcontracting is generally accepted, as follows from Article 8:107 PECL (Performance Entrusted to Another) and Article 1:106(1) (Duties of the Service Provider regarding Input); under these provisions, the party that entrusts performance to another remain responsible for the third party's actions. For storage, there are three reasons why subcontracting without the client's consent perhaps should not be allowed. Traditionally, a storage contract is said to be based on a relation of trust between the parties, leading to the personal nature of such a contract. It should be noted that this

argument has lost most of its importance over the years, as even in non-commercial storage a fiduciary relationship is only occasionally needed: whether patient records are stored by one storer or by another is of hardly any relevance as long as the patient's privacy and the confidentiality of the records are safeguarded. A more relevant objection to allowing substorage is that the client may have a need to know where the thing is actually stored, for instance to be able to get it back fast ('just-in-time-deliveries'). Finally, the client's insurance may not cover substorage. One could argue, however, that an exception should be made for 'emergency cases', as substorage then is in the client's best interests because the thing would otherwise be damaged or destroyed.

C. Comparative Overview

Case law in ENGLAND and THE NETHERLANDS explicitly states that the storer is required to provide a location, which is fit for the proper storage of the thing. In other legal systems, an obligation to that extent is considered to be implied; failure to provide such a location will lead to damages for failure to return the thing in accordance with the client's reasonable expectations as to its condition.

In most legal systems, substorage is traditionally permitted only with the client's consent, as it is thought that the contract requires the client's trust in the *person* of the storer. Nevertheless, a minority view in these systems holds that personal considerations are no longer so important, especially not in the case of storage by a professional party; this view therefore denies that substorage without the client's consent should be prevented.

A problem may arise if, in the case of an emergency, the storer is required to have the thing temporarily stored elsewhere and there is no time to contact the client. In some countries, notably SPAIN and THE NETHERLANDS, substorage is allowed in such a case without the client's consent.

D. Preferred Option

Given the importance of a location suited for the storage of the thing, an obligation to provide such a location is needed. The advantage of such an obligation that the client, instead of having to wait for the return of the thing or having to demand adequate assurance of performance under Article 8:105 (Assurance of Performance), may simply claim specific performance of the obligation under Article 9:102 (Non-Monetary Obligations) when he learns that the thing is not stored in a location suited for its storage. Alternatively, Article 1:112 (Remedies for Breach of Duties of the Service Provider) states that other remedies may be applicable.

Substorage without the client's consent should not be allowed. The traditional idea that a storage contract is of a personal nature is no longer a convincing argument. Nowadays, the main reasons for not allowing substorage by way of a default rule are the fact that the client's insurance may not cover substorage, and the practice of 'just-in-time de-

liveries', which require the client to be able to demand the immediate return of the thing. This practice applies especially to modern commercial storage contracts where stocks are often kept to a minimum in order to cut down on expenses. In such a case, the client may need to have direct access to what he has in store to supplement his stock at his place of business. To that extent, he will need to know the exact location of the thing. This will already be difficult when the storer has more than one storage location. However, a default rule allowing substorage would compromise the client's legitimate interests too much. Therefore, under the present Article, subcontracting is not allowed for storage unless agreed otherwise. Such derogating contractual agreements will often be made if the storer uses outsourcing methods.

In the case of an emergency situation, substorage may be the only means to preserve the thing. The obligation to hand the thing over to a third party for storage then follows from the storer's obligation to take reasonable measures to prevent unnecessary deterioration, decay or depreciation of the thing under Article 4:105(1), notwithstanding the normal prohibition thereof. A specific provision stating that substorage is allowed in such a case is not needed.

E. Relation to PECL and Other Parts of the Principles

The relation between paragraph (1) and Article 4:107 seems obvious: if the thing is stored at a location that is not suitable for its storage, the thing may deteriorate and will not be returned in as good a condition as the client may reasonably expect it to be. The client therefore has a direct interest in the compliance with the present Article. Illustration 1, above, may serve as an example.

Article 1:106 (Duties of the Service Provider regarding Input) provides rules as to the performance of the contract. The present Article derogates from Article 1:106(1) (Duties of the Service Provider regarding Input) on subcontracting (substorage). According to that Article, subcontracting is, in principle, allowed. For storage, derogation from this rule is necessary. Article 4:104 (2), which states that the storer is not allowed to subcontract – i. e. to have the actual storage done by a third party – without the client's explicit consent, has a firm basis in comparative research; the reasons for derogation from Article 1:106(1) (Duties of the Service Provider regarding Input) are explained in Comment D above.

When substorage is allowed, i. e. when the client consented to substorage or when substorage is necessary to preserve the thing, the storer must of course choose a substorer of adequate competence, as is expressed in Article 1:106(2) (Duties of the Service Provider regarding Input).

F. Burden of Proof

The client bears the burden to prove that the storer does not fulfil his obligations under this Article.

G. Character of the Rule

The present Article contains default rules.

H. Remedies

Non-performance of the duties under this Article will lead to non-conformity under Article 4:107, in which case Article 4:111 provides that the client may resort to any of the remedies of Chapter 9 PECL (Particular Remedies for Non-Performance), provided that the requirements for such a remedy are met. Moreover, an established breach of the standard of care leads to the application of the normal remedies for non-performance. Since the client has an interest in the performance under the present Article, he may claim specific performance of the duty under Article 9:102 PECL (Non-Monetary Obligations) or demand assurance of future performance under Article 8:105 (Assurance of Performance). Moreover, breach of the present Article entitles the client to termination of the contract for non-performance under Article 9:304 PECL (Anticipatory Non-Performance) if the prospective non-conformity amounts to a fundamental non-performance under Article 8:103 PECL (Fundamental Non-Performance), which will often be the case. Alternatively, the other remedies of Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider), may be applied.

Comparative Notes

1. *Location for execution of the service*
   From the storehouse's obligation to take good care of the good, it follows that the storehouse must store the good in a location fit for that purpose. This has been explicitly decided in ENGLAND, cf. *Searle v* Laverick (1874) LR 9 QB; *Brabant & Co. v King* [1895] AC 632 and THE NETHERLANDS, cf. HR 28 November 1997, NJ 1998, 168 (Smits/Royal Nederland), but holds true for all legal systems. Where the storehouse has not provided a proper place for storage, he will not be able to prove the absence of negligence on his part, as was made clear in FRANCE in a case of storage of a horse; in this particular case, the storehouse could not prove that the doors of the horse's box were sufficiently solid and was therefore held liable for the injuries to the horse, cf. Cass.civ. I, 2 October 1980, Bull.civ. I, no. 240.
   No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

2. *Subcontracting*
   Substorage needs the client's consent in most legal systems as it is generally perceived that personal considerations are involved in the client's choice of the storehouse with whom to store the good, cf. AUSTRIA, Rummel [*-Schubert*], Kommentar ABGB, art. 965 no. 2; ENGLAND, *Edwards v Newland* [1950] 2 KB 534; *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1987] 2 FTLR 319; GERMANY, cf. CC arts. 691, 472 para. 2 CommC, THE NETHERLANDS, CC art. 7:603; cf. also art. 895, first sentence,

of the Civil Code of the RUSSIAN FEDERATION. A general exception to the need to ask for the client's consent seems to be accepted where substorage is urgently needed to preserve the good, yet it is thought that as soon as it is possible to inform the client thereof, the storehouse must do so.

Yet, a different view is advocated as well, as it is argued that personal considerations in the case of storage by a professional party are no longer considered to be that important, cf. FRANCE, Huet, Les principaux contrats spéciaux, no. 33111; in ENGLAND, this has been argued by Charlesworth's Business Law (Kidner), p. 546. Where consent to the substorage is given by the client, the storehouse is liable only if the choice of the substorehouse was bad in GERMANY, cf. Palandt [*-Sprau*], BGB, art. 691 no. 1, as the substorehouse there is not seen as an auxilary person for whose actions the storehouse is liable. By contrast, in THE NETHERLANDS (CC art. 6:76 and 7:603 para. 3) and the RUSSIAN FEDERATION(CC art. 895, para. 3), the storehouse is responsible for the actions of the substorehouse in the same way as for his own actions and of those of his staff, although in THE NETHERLANDS, the liability regime is somewhat more lenient when storage was gratuitous and the storehouse was more or less forced to hand over the good for substorage for reasons that cannot be attributed to the storehouse (CC art. 7:603 para. 3).

No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN and SWEDEN.

National Notes

1. *Location for execution of the service*

AUSTRIA Storage in a location which is not proper for storage of the good leads to liability under CC art. 964 if the storehouse therewith breaches his obligation to take due care of the good.

ENGLAND The storehouse must prove to have taken reasonable care to see that the place where the good is kept is fit for the purpose of storage, cf. *Searle v Laverick* (1874) LR 9 QB; *Brabant & Co. v King* [1895] AC 632. Moreover, the storehouse must prove that the goods were properly protected from theft and, to that extent, the storehouse has taken all reasonable precautions against theft, cf. *Brook's Wharf v Goodman Bros* [1937] 1 KB 534. Cf. Chitty on Contracts (McKendrick), no. 33-045.

FRANCE If the location for storage was unsuitable for storage of the good, the storehouse will not be able to prove that the carelessness or negligence of the client was the cause of the defect, and therefore be held liable for deterioration or destruction of the good; cf. Huet, Les principaux contrats spéciaux, nos. 33143, 33147. In Cass.civ. I, 2 October 1980, Bull.civ. I, no. 240, RTD civ 1981, 405, obs. G. Cornu, in a case of storage of a horse, the storehouse could not prove that the doors of the horse's box were sufficiently solid and was therefore held liable for the injuries to the horse.

GERMANY The storehouse is required to take care of the good. To that extent, it must store the good in a location suitable for its storage, cf. Palandt [*-Sprau*], BGB, art. 688 no. 4.

THE NETHERLANDS The storehouse must provide a location which is fit for the proper storage of the good, cf. HR 28 November 1997, NJ 1998, 168 (Smits/Royal Nederland) (storage of cheese powder). To that extent, the storehouse's obligation of care implies that it must provide adequately functioning cooling rooms and that he is

liable vis-à-vis his client under artt. 6:74, 75 and 77 if the cooling installation malfunctions, even if the malfunctioning of the machine is due to inadequate installation by a certified processor of such machines.
POLAND Neither regulation of the safe-keeping contract nor the storage contract contains express rules indicating the location of execution of services. However, there are rules, which indicate that the location must allow a correct performance of the contract. In the safe-keeping contract, the keeper must keep the thing in the manner determined in the contract, and if it is not agreed upon in a manner which results from the nature of the thing kept and other circumstances (CC art. 837). The keeper is also authorised (and even obliged) to change the place and the manner of safe-keeping of the thing specified in the contract if that proves to be necessary for its protection against loss and deterioration (CC art. 838). In the storage contract, the storehouse is obliged to observe due diligence in preventing the loss, decrement of or damage to the goods accepted for the storage (CC art. 855 para. 1), which indicates that he should choose a location suitable for the performance of the contract.
SPAIN There is no specific provision regarding the location where the activity is to be executed. The storehouse must keep the good in a place which allows it to carry out its activity with the due diligence (CC art. 1094 and 1104), which is of a qualified nature if the storehouse is a professional. Bercovitz, Comentarios al Código Civil, p. 1999 explicitly indicates that the obligation to guard includes an obligation to watch, if not directly the good in storage, at least the place where the good is located.

2. *Subcontracting*
AUSTRIA Subcontracting is only allowed if the client consents to the subcontracting or, in the case of an emergency, if substorage is necessary to preserve the good; consent may be given tacitly. Cf. Rummel [*-Schubert*], Kommentar ABGB, art. 965 no. 2.
ENGLAND The storehouse normally does not have the authority to subcontract the storage of the good without the client's consent, since personal considerations are involved in the client's choice of the storehouse with whom to store the good, cf. *Edwards v Newland* [1950] 2 KB 534; *Metaalhandel JA Magnus BV v Ardfields Transport Ltd* [1987] 2 FTLR 319; a different view is advocated, arguing that personal considerations in the case of commercial storage are no longer considered to be that important, cf. Charlesworth's Business Law [*-Kidner*], p. 546.
FRANCE Traditionally, and connected with the original benevolent character of the storage contract, a storage contract was often intuitu personae, preventing subcontracting. Yet, where a remuneration has been agreed upon and the storehouse is a professional party, this is nowadays different, cf. Huet, Les principaux contrats spéciaux, no. 33111.
GERMANY Substorage is allowed only with the client's consent, cf. CC arts. 691, CommC 472 para. 2. In this case, the third party is a substitute storehouse and not an auxiliary person, i. e. the storehouse is only liable for a bad choice of the third party. Cf. Palandt [*-Sprau*], BGB, art. 691 no. 1.
THE NETHERLANDS In principle, without consent of the client, substorage is not allowed. An exception is made if substorage is needed to protect the client's interests and for reasons that can't be attributed to the storehouse. If, and only if, such is the case, the storehouse is not liable for the actions of the substorehouse, as it would be under CC art. 6:76, cf. CC art. 7:603, para. 2 and 3. The storehouse is responsible for

the actions of the substorehouse in the same way as for his own actions and of those of his staff (CC art. 6:76 and art. 7:603, para. 3). However, the latter paragraph contains a more lenient provision for those case where the storage was gratuitous and the storehouse was more or less forced to hand over the good for substorage for reasons that cannot be attributed to the storehouse.

POLAND In the case of the safe-keeping contract the keeper cannot deposit the thing for safe-keeping with another person unless he is forced by the circumstances to do so. Such circumstances include situations dependent or independent from the keeper, which make impossible further keeping the thing with the keeper (sudden illness of the keeper, destruction of the location, change of the place of living of the keeper, etc) (Bieniek, Komentarz, Księga trzecia, tom II, p. 382). In such a case the keeper is obliged to immediately notify the depositor where and with whom the thing has been deposited, and if the keeper complies with this requirement he is only liable for a lack of due diligence in choosing the substitute (CC art. 840 para. 1). The substitute is liable also to the depositor. If the keeper is liable for the acts of his substitute as for his own acts, their liability is joint and several (CC art. 840 para. 2).

OTHER Substorage is not allowed without the client's consent, unless the storehouse is compelled to do so by force of circumstances in the interest of the client and the storehouse is deprived of the possibility to obtain the client's consent, art. 895, para. 1, of the Civil Code of the RUSSIAN FEDERATION provides. The storehouse will be responsible for the actions of the third party as for its own actions, the third sentence adds.

Article 4:105: Duty of Care of the Storer

(1) The duties under Article 1:107 (General Standard of Care for Services) require in particular the storer to take reasonable precautions in order to prevent unnecessary deterioration, decay or depreciation of the thing stored.

(2) The storer may use the thing handed over for storage only if the client has agreed to such use.

Comments

A. General Idea

The client's main risk in the performance of the contract is the potential damage to the thing stored. In order to minimise that risk, the present Article requires the storer to take precautionary measures to prevent such damage. As such, it contains a specification of the standard of care that is to be upheld by the storer: the storer must take reasonable precautions to prevent unnecessary damage to the thing he has accepted for storage, whether such damage is caused by the storer or his staff, by third parties or by other external causes.

Illustration 1
A museum has Egyptian artefacts stored. The storer is to protect the artefacts against humidity, wind and changes in temperature.

Unless agreed otherwise, the obligation to exercise due care and to take precautionary measures does not require the storer to examine the thing regularly during storage, e. g. in order to discover potential diseases if perishable things are stored. Such an examination may, however, be required if the storer received information to that extent.

Illustration 2
A storer is requested to store onions. If the storer has reason to expect the occurrence of diseases after the onions have been handed over for storage, he must, insofar as this is reasonable, examine them.

The second paragraph deals with the question whether the storer may make use of the thing stored. It states that such use is only allowed if the client has agreed to such use. In some cases, the thing stored will lose its value or part thereof if it is not regularly used. In such a case, agreement may be implied; failure to use the thing would then even constitute a breach of the storer's obligation to prevent deterioration or depreciation of the thing.

Illustration 3
A racehorse is kept in a stable not belonging to the owner of the horse. Whether or not the parties have explicitly agreed to this, the stable owner is both allowed and required to ride the horse regularly in order to keep the horse fit. Unless the client agrees thereto, the storer is not entitled to enter it into horse races, as such is not needed to keep the horse in good condition.

B. Interests at Stake and Policy Considerations

Because the storer has control over the thing during storage, he is usually in the best position to take protective measures to prevent damage to the thing. Damage must be prevented as much as possible, but there is a limit to what protective measures the storer can be expected to take: damage cannot under all circumstances be prevented, or only at very high costs. It would not be reasonable or economic to require the storer to take all possible precautionary measures.

Another issue is whether the storer may use the thing handed over for storage. Generally, the storer will not be allowed to do so without the client's consent, but this may be different when use of the thing is needed to prevent the thing from deteriorating. It could be argued that in such a case, consent to its use may be considered to be implied. On the other hand, one could also argue that if the client had agreed to such use, he would have lent the thing to the 'storer'; if the client did not state such intention, the storer is only allowed to indeed take care of the thing, not to use it.

C. Comparative Overview

In all legal systems, the storer's obligation of care requires the storer to undertake all reasonable measures to maintain the thing or prevent deterioration thereof. In POLAND, this rule is mandatory even in a commercial contract; in SWEDEN, this is the case only if the client is a consumer. The storer is not liable if he could not have prevented the damage to the thing by exercising due care. In determining the extent of the care that may be expected, the price for storage is to be taken into account. In all legal systems reported, the burden of proof that the damage to the thing was not caused by a lack of care is on the storer.

Use of the thing by the storer without the client's consent is not permitted. However, in many legal systems an exception is made if use is actually needed to preserve the thing. In these systems, the use of the thing follows from the storer's obligation to take care of the thing entrusted to him.

D. Preferred Option

The storer is to take proper care of the client's interests when storing the thing. This implies that any measure, insofar as can reasonably be expected from the storer, must be taken to prevent *unnecessary* deterioration or decay of the thing during the period of storage. The storer must avoid any damage to the thing that can be avoided relatively easily.

An express provision that the storer may use the thing only if the client has agreed to such use is useful as it implies that, as a default rule, the use of the thing is generally not reconcilable with the nature of the contract. However, in a case where use of the thing is needed to prevent unnecessary deterioration or decay of the thing or of its value, consent may be considered to have been implied or been given tacitly. Moreover, in such a case, the storer will often be under an express or implied obligation to make use of the thing.

E. Relation to PECL and Other Parts of the Principles

The present Article directly relates to the goal of the contract: the storer is to store the thing in such a manner that he will be able to return it in the same condition as it was when handed over to the storer, as is required under Article 4:107. To that extent, precautionary measures to prevent deterioration or decay of the thing must be taken. In this Chapter, the obligation to exercise due care is regarded as an independent main obligation, which implies that the client may directly claim specific performance or another remedy in the case of breach of the Article. However, it should be noted that in many cases where the storer breaches his obligation to prevent damage to the thing stored, he will not be able to return the thing in the condition the client may expect it to be returned, as is required under Article 4:107.

The present Article may be seen as a particularisation of Article 1:107 (General Standard of Care for Services). Paragraph (1) of that Article requires the storer to use such care and skill as a reasonable storer would use in the circumstances and to act in conformity with any binding legal rule that is applicable to the storage of the thing. What constitute 'reasonable' precautionary measures is to be established on the basis of Article 1:302 PECL (Reasonableness), keeping in mind the nature of the thing handed over for storage and the known risks involved in storage for such a thing and for the safety of persons or other things.

Illustration 4
Bananas that are almost ripe are stored. The storer, operating a normal warehouse, is to take the necessary measures to prevent them from rotting prematurely, insofar as this is possible. This does, however, not mean that the storer is to deepfreeze the bananas at a temperature of –260° C, which supposedly prevents deterioration for a prolonged period of time, for such a measure would not be considered 'reasonable' given the costs involved in keeping the bananas frozen at such a temperature.

Article 1:107(5) (General Standard of Care for Services) complements the first paragraph of this Article in that the storer must take reasonable precautions in order to prevent the occurrence of personal injury or damage to immovable structures and movable or incorporeal things as a consequence of the performance of the service. This obligation primarily refers to things other than the thing handed over for storage; Article 4:105(1) focuses on the thing handed over for storage itself.

According to Article 1:107(1)(b) (General Standard of Care for Services), the storer must perform the contract in conformity with the statutory or other binding legal rules that are applicable to his activities. Such binding legal rules may be of a private law or public law nature.

Illustration 5
The government of an EU Member State orders the storage of plutonium waste resulting from the production of electricity at a nuclear plant. The storer is to store the waste in accordance with safety measures aimed at the prevention of leakage of radioactivity and at the protection of public health.

In this particular case, when performing the service in accordance with the binding public law rules, the storer also meets his obligation under Article 1:107(5) (General Standard of Care for Services), viz. to take adequate precautions in order to prevent the occurrence of personal injury as a consequence of the performance of the service. Moreover, Article 1:107(4) (General Standard of Care for Services) lists a number of circumstances that need to be taken into account in order to determine whether the storer has satisfied the requirement to prevent damage. Where the storer claims that he is a specialist, he is to meet the higher standard of care and skill of such a specialist; Article 1:107(2) (General Standard of Care for Services). Paragraph (3) adds that if the storer is a member of a group of professional storers for whom standards exist that have been set by a relevant authority or by that group itself, the storer must exercise the care and skill expressed in these standards.

Illustration 6
A storer, specialised in the storage of inflammable liquids, mentions the fact that he is ISO certified in advertisements. He must satisfy the requirements set for ISO certification.

Insofar as, in the performance of his duties, the storer comes across any specific and significant dangers concerning the thing, his duty to exercise due care brings along a duty to warn the client thereof. This duty to warn can normally be seen as a specific manifestation of the storer's duty to warn under Article 1:110 (Contractual Duty of the Service Provider to Warn), as in such a case the materialisation of the danger would result in the fact that the thing will not be returned in the condition the client could otherwise reasonably expect it to be in under Article 4:106.

Illustration 7
A storer, charged with the storage of onions, receives information about the outbreak of a serious disease. Upon examination of the onions, the storer discovers that the onions are indeed contaminated with that disease. The storer is to warn the client thereof. Moreover, he is to take reasonable measures to prevent further deterioration or decay of the onions.

Occasionally, the storer may come across a specific and significant danger concerning the thing whose materialisation not necessarily leads to a problem as to the return of the thing in accordance with Article 4:106, but which would otherwise be detrimental to the client's interests. In such a case, a duty to warn may emerge under Article 1:107(5) (General Standard of Care for Services).

In the case of so-called irregular storage (irregular deposit) of generic things, the storer is not required to return the original things, but may sometimes be allowed to replace them with other things of the same quality and quantity. This situation is set out in Article 4:106(6). Where storage of such generic things is agreed upon, consent to the use of the thing may sometimes be implied. In fact, the contract is then a mixed contract of storage and hire, loan or even sale. To such a contract, the rules on storage apply, with appropriate modifications, to the part of the contract that involves storage.

Similarly, if the client has impliedly or explicitly consented to the use of the thing – e. g. because use of the thing is needed for its preservation – the contract is probably of a mixed nature. This will often be a mixture of storage and loan, but may also be a mixture of storage and processing.

Illustration 8
A racehorse is kept in a stable not belonging to the owner of the horse. The stable owner is both allowed and required to ride the horse regularly in order to keep the horse fit.

In this case, the contract concerns a mixture of storage as the main object of the contract and maintenance as a type of processing as an ancillary obligation under the contract. In this case, the maintenance of the horse consists in riding it. The mixed

nature of the contract implies that, with appropriate modifications, the present Chapter applies to the part of the contract that involves storage and that Chapter 3 (Processing), with appropriate modifications, applies to the part of the contract that involves maintenance; cf. Article 4:101(2) and Article 3:101(3) (Scope of Application). However, as both the storer and the processor are under an obligation to take precautionary measures to prevent damage or injury to the horse, cf. Article 4:105(1) and Article 3:104 (Duty of Care of the Processor), this will most likely not lead to practical differences.

When a storage contract is performed for free or for a merely symbolic price, the gratuitous or almost gratuitous nature of the contract may influence what the client may expect of the storer under Article 1:107 (General Standard of Care for Services) and Article 4:105.

Illustration 9
At the price of € 0.20, a client stores his motor scooter in a garage before he goes shopping. When the client comes back, the scooter is missing. As the service was performed almost gratuitously, the garage owner's obligation to exercise due care does not include the obligation to have the garage guarded, but he is to introduce a way of preventing theft, e. g. by issuing tickets that may serve as proof of storage.

F. Burden of Proof

In accordance with the main rule of civil procedure, the burden of proof of compliance or non-compliance with this Article is on the client.

G. Character of the Rule

The present Article contains default rules.

H. Remedies

Non-performance of the duties under this Article will normally lead to non-conformity under Article 4:107. In which case Article 4:111 provides that the client may resort to any of the remedies provided for in Chapter 9 PECL (Particular Remedies for Non-Performance). In any case, an established breach of the standard of care leads to application of the normal remedies for non-performance. Since the client has an interest in performance under the present Article, he may claim specific performance of the duty under Article 9:102 PECL (Non-Monetary Obligations) or demand assurance of future performance under Article 8:105 (Assurance of Performance). Alternatively, the other remedies of Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider), may be invoked. See further extensively Comment I to Article 1:107 (General Standard of Care for Services).

Comparative Notes

1. *Precautionary measures to prevent deterioration or destruction of the good*
The obligation to exercise due care is widely known in legal systems throughout the European Union. That obligation requires the storehouse to take all measures provided by the contract to ensure the preservation of the good and, where the contract does not provide (all) terms, to take all measures that correspond to the customs of trade and the nature of the obligation, including the qualities of the stored good, unless the necessity of taking these measures is excluded by the contract. The obligation is recognised either as an element of the obligation of (alleviated) result burdening on the storehouse, as in FRANCE (cf. Cass.civ. I, 11 July 1984, Bull.civ. I, no. 230; Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173), or as an independent main obligation, e. g. in AUSTRIA (cf. CC art. 961), ENGLAND, THE NETHERLANDS (cf. Article 7:602; HR 30 September 1994, NJ 1995, 45, Diepop Bossche Vrieshuizen/Nouwens), POLAND (contract of safe-keeping CC arts. 385, 837 – 839, storage CC arts. 855 para. 2, 857, 859), SPAIN (CC articles 1094 and 1104), SWEDEN (4 KTjL), RUSSIAN FEDERATION (CC art. 891). This implies that the storehouse must take precautionary measures to enable safe storage of the good, such as providing adequate refrigerators, regulating the temperature in the cells, checking the persitence and intensity of refrigerating energy, etc. Cf. ITALY, Cass.civ.sez. III, 18 July 1996, n. 6489, Soc. De Lucia c. D'Addio, Contratti (I) 1997, 141 with note of (Natale). Generally, a lower amount of care is required in the case of a gratuitous contract, cf. BELGIUM (CC art. 1927); GERMANY (CC art. 690); GREECE (CC art. 823); SPAIN (CC art. 1094 and 1104).
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG and SCOTLAND.

2. *Excuses and burden of proof*
The storehouse is not liable if he could not have prevented the damage to the good by exercising due care, cf. AUSTRIA (CC art. 964). In determining the amount of care that may be expected, the price for storage is to be taken into account, cf. BELGIUM (Kh. Antwerpen 15 September 1970, RW 1970-1971, 620). In all reported legal systems, the burden of proof that the damage of the good is not caused by a lack of care is on the storehouse, cf. AUSTRIA (OGH, SZ 10/87; OGH, SZ 56/143 = EvBl. 1984/11); FRANCE (Cass.civ. I, 11 July 1984, Bull.civ. I, no. 230; Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173); *Houghland v R. R. Low (Luxury Coaches) Ltd* [1962] 1 QB 694; *Levison v Patent Steam Carpet Cleaning Co Ltd.* [1977] 3 AllER 498, [1978] QB 69, Court of Appeal; THE NETHERLANDS (T&C / Castermans, to CC art. 7:605, note 5).
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG and SCOTLAND.

3. *Use of good by storehouse*
Use of the good by the storehouse without the client's consent is not permitted in AUSTRIA (CC art. 958); BELGIUM (CC art. 1930); FRANCE (CC art. 1930); THE NETHERLANDS (CC art. 7:603 para. 1); POLAND (CC art. 839); SPAIN (CC art. 1767). In AUSTRIA, it is added that if use is permitted, not a storage contract but a loan contract is concluded, whereas if consent is given later, the storage contract is by operation of the law changed into a loan contract, cf. Rummel [*-Schubert*],

Kommentar ABGB, art. 958 no. 1; art. 959 no. 1. In SPAIN, the contract would then be qualified as exchange or *comodatus* (CC art. 1768). In many legal systems, an exception is made if use is actually needed to preserve the good; the example of the need to ride a horse is often given to illustrate this point; cf. ENGLAND *Coldman v Hill* [1919] 1 KB; FRANCE cf. Huet, Les principaux contrats spéciaux, no. 33107, 33154; THE NETHERLANDS (CC art. 7:603, para. 1); POLAND (CC art. 839); ibidem RUSSIAN FEDERATION (CC art. 892).

No information from DENMARK, FINLAND, GREECE, ITALY, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

National Notes

1. *Precautionary measures, excuses and burden of proof*

AUSTRIA The storehouse's obligation of care requires the storehouse to undertake all reasonable measures to maintain the goods or prevent deterioration thereof. Cf. OGH, EvBl 1984/11; Rummel [*-Schubert*], Kommentar ABGB, art. 957 no. 2; Koziol and Welser, Bürgerliches Recht II, p. 183. The amount of care that is required of the storehouse depends on the circumstances of the case, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 2. The storehouse is not liable if he could not have prevented the damage to the good by exercising due care; he can't be required to take such measures that would save the good but would sacrifice his own interests, cf. CC art. 964. The burden of proof that the damage of the good is not caused by a lack of care is on the storehouse, cf. OGH, SZ 10/87; OGH, EvBl 1984/11; Rummel [*-Schubert*], Kommentar ABGB, art. 965 no. 3. In a commercial case, CommC art. 388 explicitly allows for a right to sell the goods in case of deterioration.

BELGIUM The storehouse is required to care for the good as he would care for his own goods, cf. CC art. 1927, i. e. as a 'good housefather'; in case of a remunerated storage contract, a higher level of diligence is required, cf. CC art. 1928. The storehouse is required to take reasonable measures to prevent theft of the good, but the type of measures that can be expected to haven been taken also depend on the price for storage, cf. Kh. Antwerpen 15 September 1970, RW 1970-1971, 620.

ENGLAND In situations of storage services which are provided for reward, a storehouse acting in the course of a business is obliged, under both the common law (cf. *Coggs v Bernard* (1707) 92 ENGLISH Reports 107) and the Supply of Goods and Services Act 1982 (s.13), to perform the service with reasonable skill and care (the storehouse also has a duty in tort to take reasonable care of a client's goods). The storehouse bears the burden to prove that there was no case of negligence, i. e. that the standard of care was not breached, cf. *Houghland v R. R. Low (Luxury Coaches) Ltd* [1962] 1 QB 694; *Levison v Patent Steam Carpet Cleaning Co Ltd.* [1977] 3 AllER 498, [1978] QB 69, Court of Appeal. To that extent, he must, among other things, prove he had taken reasonable precautionary measures to prevent unnecessary deterioration or destruction of the good, cf. *Sutcliffe v Chief Constable of West Yorkshire* [1996] RTR 86, to take reasonable care to protect the good against imminent danger, cf. *Brabant & Co. v King* [1895] AC 632 at p. 641) and that he has a proper system for looking after the good and was not negligent in selecting his employees, cf. *Bullen v Swan Electric Engraving Co.* (1907) 23 TLR 258.

FRANCE The care required from storehouse is that of a 'bon père de famille', CC art. 1927; yet is up to the storehouse to prove he has lived up to that standard, cf. Cass.civ. I, 28 May 1984, Bull.civ. I, no. 173; Cass.civ. I, 11 July 1984, Bull.civ. I, no. 230. Therefore, in practice, a reversal of the burden of proof occurs: the storehouse will have to prove that the carelessness or negligence of the client is the cause of the defect; cf. Huet, Les principaux contrats spéciaux, nos. 33143, 33147. In a case of a fire due to unknown causes, the storehouse was held liable for not having taken sufficient precautions, cf. Cass.com., 10 February 1959, Bull. civ. III, no. 72.

GERMANY The commercial storehouse is entitled to carry out himself the work necessary for the preservation of the goods. If, after the goods have been received, their condition have changed in a way which is likely to lead to them being lost or damaged or to causing damage to the warehouse keeper or if such a change is likely, the storehouse shall without delay inform the client or, if a warrant has been issued, the last legitimated holder of the warehouse warrant known to him, and ask for instructions. If the storehouse cannot obtain instructions within a reasonable period, he shall take such measures as seem to be appropriate. In particular, he may have the goods sold, cf. CC art. 471. In the case of a gratuitous storage contract the storehouse is only liable if he has not acted with the care one would use for one's own goods, cf. CC art. 690.

GREECE With regard to the contract of storage, CC art. 823 requires that a storehouse shall be bound to exercise the same care as he bestows on his own affairs, unless the storage is for remuneration, in which case the storehouse will be responsible for any fault (return to the rule, CC art. 330).

ITALY In the performance of the obligation to preserve the goods in a good condition (and to give them back as they were handed over), the service provider may need to take precautionary measure. *E. g.* in the case of storage of food, it must provide refrigerators, regulating the temperature in the cells, checking the persistence and intensity of refrigerating energy, etc., cf. Cass.civ.sez. III, 18 July 1996, n. 6489, Soc. De Lucia c. D'Addio, Contratti (I), 141 with note of Natale. The storehouse is asked to actively prevent any decay or deterioration of the goods even by acting not in accordance with the conditions agreed upon, cf. CommC art. 1770 para. 2.

THE NETHERLANDS The storehouse's obligation to take due care of the good and to return in it the original condition includes an obligation to store the good in a safe manner and, therefore, to take precautionary measures to prevent unnecessary deterioration or decay, cf. Paquay, De aansprakelijkheid van de bewaarnemer, 1994, p. 493-494. Rutgers 1998, no. 12; HR 30 September 1994, NJ 1995, 45 (Diepop Bossche Vrieshuizen/Nouwens, in a case of storage of fruit by a professional storehouse). To that extent, a stored animal must be fed (T&C / Castermans, to CC art. 7:602, note 2) and looked after (Pitlo-Croes [*-Du Perron*], Het Nederlands burgerlijk recht VI, p. 295), a piano must be sheltered from humidity and dehydration (T&C / Castermans, to CC art. 7:602, note 2), and, in case of frost, a car must be provided with antifreeze (Asser-Kleijn, no. 7). The obligation to exercise due care further implies an obligation for the storehouse to insure against theft, fire and – if customary – other unfortuante accidents, cf. Pitlo-Croes [*-Du Perron*], Het Nederlands burgerlijk recht VI, p. 295; Bijzondere overeenkomsten/De Boer, to CC art. 7:602, note 3; Rb Dordrecht 19 April 1989, NJ 1990, 178 (Error Free/Kasteel). However, as the subsequent obligation to return the good in its original state (CC art. 7:605 para. 4) is considered to be an obligation of

result, in practice, the burden of proof of the breach of the standard of care is reversed, cf. T&C / Castermans, to CC art. 7:605, note 5.

POLAND In the contract of safe-keeping the keeper is obliged to keep the thing in an undeteriorated condition (CC art. 835). In order to do so, he is obliged to keep the thing in a manner determined in his obligation, or in a manner which results from the nature of the thing and from the circumstances (CC art. 837). If it is necessary for the protection of the thing against loss or deterioration the keeper is authorised or even obliged to sell the thing (CC art. 838). If it is necessary for preserving the thing in an undeteriorated condition, the keeper is allowed to use the thing without consent of the depositor (CC art. 839). In the case of the storage contract, the storehouse is obliged to take appropriate conservation measures. This obligation is deemed to be so important that the parties cannot agree otherwise cf. CC art. 855 para. 2. The storehouse is obliged to secure the goods sent to him and the rights of the depositor, if they are in the condition that suggests loss, decrement of or damage to the goods (CC art. 857), and if the goods are perishable and it is not possible to wait for the instructions of the depositor, the storehouse is entitled or even obliged to sell the goods (CC art. 859). Generally, the keeper in the case of the contract of safe-keeping is liable for not observing due diligence (CC art. 472), and may release himself from liability by proving that the damage resulting from the non-performance or improper performance were due to the circumstances, for which he is not liable (CC art. 471). Liability of the keeper is modified in the case of depositing the thing with another person. If he is forced by the circumstances to do so and immediately informs the depositor with whom and where the thing has been deposited, then the keeper is liable only for lack of due diligence in choosing the substitute (CC art. 840 para. 1). The burden of proof concerning lack of fault in choosing the substitute lies with the keeper, otherwise his liability is risk based "like for his own actions" (CC art. 474), and liability of the keeper and the substitute is joint and several (CC art. 840 para. 2, sentence 2). If the keeper proves no fault in choosing the substitute, the liability rests on the substitute (CC art. 840, para. 2 sentence 1). In the case of the storage contract, the storehouse is liable for the damage caused by the loss, decrement of or damage to the goods accepted for the storage, during the period between their acceptance and their releasing to the person entitled, unless he proves that he could not prevent the damage in spite of observing due diligence (CC art. 855 para. 1). The storehouse is not liable for decrement not exceeding the limits specified in the relevant provisions of law, and in the absence of such provisions, within the limits accepted customarily (CC art. 855 para. 3). The redress cannot exceed the ordinary value of the goods, unless the damage results from the intentional guilt or gross negligence of the storehouse (CC art. 855 para. 4).

PORTUGAL The storehouse must adopt all methods necessary to conserve the stored thing, avoiding danger, perishing or interference from third parties, using the diligence of an average man. Cf. Antunes Varela, Das Obrigações em geral, vol II, p. 759. In doing so, the storehouse shall avoid damage to other goods and third parties. If the storehouse knowingly accepts the storage of inflammable products or of an ill animal, the storehouse will be liable in tort towards third parties in case of explosion or contamination of other animals if he did not avoid those possibilities. Cf. Antunes Varela, Das Obrigações em geral, vol II, p. 776.

SPAIN The main obligation for the storehouse is to preserve the good in storage, by protecting it and using the care required by the nature of the good. To that extent, it must carry out the activities needed to ensure the preservation of the good, cf. Sierra, Comentario del Código Civil, pp. 1038-1039. To that extent, the storehouse must act in conformity with the agreement reached and, in the absence of such term, with the diligence of the good father, cf. CC art. 1094 and 1104. In the case of a commercial storage contract, the storehouse is under a higher standard of care: CommC art. 306, para. 2 brings about that the storehouse is liable if the good in storage suffers damage due to the storehouse's intentional or negligent behaviour and to defects resulting from the nature of the good if, in the latter case, the storehouse did not do what was necessary to prevent or solve such damage and it did not warn the client thereof.
SWEDEN Under Consumer Services Act art. 4 (KTjL), the storehouse is required to perform the service in a professional manner. This obligation includes using an adequate method of storage. A term limiting or excluding the obligation is void, cf. Consumer Services Act art. 9. Under that provision, even in the absence of negligence, the service is deemed to be non-conform if the non-conformity is the result of an accident or other similar event, cf. ARN 25 May 1992, 1991-5176 (damage to a stored sofa and armchairs by rats in a case where the storehouse had regularly had the goods examined and the parties had agreed that it was up to the client to have the good insured). However, when a consumer leaves her wallet for three hours in the pocket of a jacket in a guarded cloakroom in a restaurant, the restaurant is not liable for the theft of the wallet if the jacket is still in the cloakroom, cf. ARN 9 October 1997, 1997-2289.
OTHER Art. 891 of the Civil Code of the RUSSIAN FEDERATION states that to ensure the preservation of the good, the storehouse is required to take all measures provided by the contract or, in the absence of such contractual terms, that correspond to the customs of trade and the nature of the obligation, including the qualities of the stored good, unless the necessity of taking these measures is excluded by the contract (para. 1). Para 2 explicitly refers to fire safety, sanitation and security measures.

2. *Use of good by storehouse*

AUSTRIA Use of the good by the storehouse is not permitted, cf. CC art. 958. Where such is permitted, a loan contract is concluded, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 958 no. 1. If during storage the client permits the storehouse to make use of the good, then as of that moment or, if the consent to make use of the good was not requested by the storehouse, as of the moment that the storehouse makes use of the good, the contract is qualified by law as a loan contract, cf. CC art. 959; Rummel [*-Schubert*], Kommentar ABGB, art. 959 no. 1 and Koziol and Welser, Bürgerliches Recht II, p. 183.
BELGIUM The client may not use the good without the client's tacit or explicit consent, cf. CC art. 1930.
ENGLAND In the case of gratuitous storage the storehouse is not entitled to use the good for its own advantage without the consent of the client unless such use is necessary for its preservation, cf. Chitty on Contracts (McKendrick) no. 33-031; *Coldman v Hill* [1919] 1 KB. The same principle would seem to apply to storage contracts for consideration, cf. Charlesworth's Business Law [*-Kidner*], p. 549.

FRANCE The storehouse is not allowed to use the stored good, cf. CC art. 1930. This is different if the use of the good is necessary to preserve its value or condition, e. g. riding a horse; cf. Huet, Les principaux contrats spéciaux, nos. 33107, 33154.
GERMANY Normally, the storehouse is not allowed to use the good, unless this is necessary for its preservation, cf. Palandt [*-Sprau*], BGB, art. 688 no. 4.
THE NETHERLANDS Use of the good by the storehouse is permitted only if the client has agreed to such use or if use of the good is needed to preserve or restore the good, CC art. 7:603, para. 1, states.
POLAND The keeper is not allowed to use the thing without consent of the client, unless that it is necessary to preserve it in a non-deteriorated condition (CC art. 839). The storehouse is in principle not allowed to use the goods.
SPAIN Under CC art. 1767, the storehouse is forbidden to use the good in storage without the client's consent. Art. 1768 adds that if the client does give his consent, the contract is deemed to be a contract of exchange or *comodatus*; consent must further be proven by the storehouse. CommC art. 309 is to the same extent. However, if the use of the good is necessary for the adequate preservation of the good in storage, e. g. the storehouse has to ride a horse it has in storage, such is different. More generally, some authors argue that if use of the good is compatible with the obligation of care or if the consent to use the good is meant to reward the storehouse, then it shall be allowed, cf. Bercovitz, Comentarios al Código Civil, p. 2002, with references.
OTHER In the RUSSIAN FEDERATION, a storehouse is not entitled to use the good without the client's consent, unless such use is needed to keep the good safe, cf. CC art. 892.

Article 4:106: Return of the Thing

(1) The storer must return the thing within a reasonable time after being so requested by the client.
(2) The client must accept the return of the thing at the agreed time or, if the storer is entitled to terminate the contract for non-performance by the client, within a reasonable time after notification of the termination of the contract.
(3) Acceptance by the client of the return of the thing does not relieve the storer wholly or partially from liability for non-performance.
(4) If the client fails to accept the return of the thing at the time provided under paragraph (2), the storer has the right to sell the thing in accordance with Article 7:110(2)(b) PECL (Property Not Accepted), provided that the storer has given the client reasonable warning of the storer's intention to do so.
(5) If, during storage, the thing bears fruit, the storer must hand this fruit over when the thing is returned to the client.
(6) If, given the nature of the thing or the contract, the storer has become the owner of the thing as a consequence of the performance of the contract, the storer must return a thing of the same kind and the same quality and quantity and transfer ownership of that thing. Paragraph (1) applies accordingly.
(7) This Article applies accordingly if a third party that holds sufficient title to receiving the thing requests its return.

Comments

A. General Idea

One of the main characteristics of a storage contract is that the thing ultimately is to be returned to the client by the storer, in principle unaffected by its storage. A storage contract basically states that both parties have, in normal situations, the right to enforce the return of the thing and that the mere fact that the client accepted the return of the thing does not mean that he accepted that the storage has been done in conformity with his reasonable expectations. Therefore, by accepting the return of the thing the client does not lose his right to termination of the contract (leading to cancellation of his obligation to pay the price) or to damages.

> *Illustration 1*
> Cocoa beans were stored in a warehouse. Upon the request of the client, the storer returns the cocoa beans. The fact that the cocoa beans were not stored properly and have become mouldy does not entitle the client to refuse their return. However, the client remains entitled to claim damages and to terminate the contract on the ground of fundamental non-performance.

If the client, because of the damage, inflicted upon the thing by the storer refuses to accept the return of the thing, he is himself in breach of his obligation to that effect. Paragraph (4) introduces a specific remedy for the storer: he may free himself from his obligation to continue storing the thing by selling the thing to a third party. Under deduction of the price for storage, the storer must pay the proceeds of the sale to the client. The storer may only do so after having warned the client of that sanction.

The client may request the return of the thing whenever he wants to, even if the contractual period for storage has not yet lapsed. If the client requests the return of the thing before the service has been performed, this may amount to cancellation of the contract under Article 1:115 (Cancellation of the Service Contract), which means that the storer is still entitled to receive the contract price.

> *Illustration 2*
> Carlos holds 10,000 DVD players in storage for Eric, the owner of a number of retail shops. Due to an unexpected increase in demand, the stocks in Eric's shops are sold out. Even though the parties agreed that Carlos would store the DVD players for a period of two months, Eric may claim the instantaneous return of the DVD players, but he must pay the price for storage of the DVD-players for the entire contract period.

If, during storage, the thing has borne fruit, the storer must return the fruit together with the thing itself.

Illustration 3
A farm is struck by lightning. The farmer succeeds in saving his cows, one of which is pregnant at the time. As the cowshed burnt down, the cows are kept at a neighbouring farm. After the cowshed has been rebuilt, the farmer claims back his cows and the calf that was born in the meantime.

B. Interests at Stake and Policy Considerations

As long as the storer has the thing in his possession, he is required to store the thing in accordance with Article 1:107 (General Standard of Care for Services) and Article 4:105, which entails costs for the storer; moreover, continued storage of the thing may prevent the storer from concluding or performing other storage contracts for lack of storage capacity. Moreover, the storer has an interest in being able to demand acceptance of the return of the thing by the client, as acceptance of the return of the thing or an unjustified refusal thereof by the client brings about that payment becomes due under Article 4:108. Similarly, the client has an interest in having the thing returned whenever he is in need of it. The present Article is to deal with these interests, as well as with the consequences of the return of the thing: does acceptance of the return of the thing imply acceptance of any defects in the service or damage to the thing?

Another question is whether the client himself needs to demand the return of the thing (and go and collect it). In practice, it will often occur that the client has sold the thing to a third party and is no longer interested in the return of the thing himself. The third party does have an interest in the return of the thing, but does not have a contract with the storer. In some cases, the law of property may have led ownership to have passed to the third party. Then the question arises whether the storer is entitled to withhold the thing until he has been paid for his service. Moreover, he will need sufficient proof that the third party is indeed entitled to claiming the return of the thing in order to prevent the client from claiming non-performance of the storer's obligation to return the thing to him.

A different problem may arise if the thing is commingled with other things of the same kind belonging to other clients of the storer or to the storer himself and, therefore, can no longer be identified as belonging to a particular client. In such a case, the law of property may bring about the transfer of ownership of the thing. Unless the client has – explicitly or impliedly – consented to such a mode of storage, storing generic things in such a manner that the client loses ownership will amount to non-conformity under Article 4:107. However, it is not uncommon for the parties to agree either expressly or impliedly to such a mode of storage. For such a situation, the issue must be addressed what thing the storer needs to return to the client and how the ownership of that thing is transferred or retransferred.

C. Comparative Overview

When no period was determined for the duration of the storage, the thing – together with any fruits it may have borne during storage – is to be returned when the client or the storer so demands. When a period for storage was fixed in the contract, the client may nevertheless demand earlier return in most legal systems, provided that he compensates the storer for the earlier return of the thing. When the agreed period for storage has ended, the storer may demand acceptance of the return of the thing. In some legal systems, the client may be forced by court order to accept earlier return of the thing if the situation is thus that the storer cannot be required to store the thing any longer as this has become either impossible or immensely difficult for the storer.

When the client does not accept the return of the thing, in AUSTRIA the storer is entitled to having the thing stored by a third party at the cost of the client or to continue storage; in the latter case, the storer's liability is reduced and the client will be accountable for all the damage that results from his failure to accept the return of the thing. In GERMANY, non-acceptance of the thing by the client may occasionally amount to non-performance, but in any case leads to the applicability of the doctrine of *mora creditoris*. Under this doctrine, the client is not under a 'real' obligation to co-operate, but cannot invoke a non-performance on the part of the storer if, following his failure to co-operate, the thing is lost or deteriorated and the loss or deterioration cannot be attributed to the storer's conduct. In SPAIN, the storer may ask the court to order consignment of the thing by a third party. Alternatively, the storer may sell the thing in AUSTRIA, in ENGLAND and SWEDEN. In FRANCE, GERMANY, THE NETHERLANDS and SPAIN, such a right does not exist; the storer may, of course, invoke other remedies, e. g. claim damages or demand specific performance of the obligation to accept the return of the thing.

D. Preferred Option

The storer has a legitimate interest in being freed from his obligation to safely store the thing after the contractual period for storage has ended. Moreover, he may have an interest in ending storage of the thing, as he may need to make room for the storage of other things. Therefore, paragraph (2) is intended to enable the storer to force the client to accept the return of the thing. Paragraph (4) contains a solution for the situation in which the client breaches his obligation to accept the return of the thing: if the storer has sufficiently warned the client and the client nevertheless refuses to accept the return of the thing, the storer may sell the thing and – subtracting his costs in selling the thing and the price for storage – pay the proceeds thereof to the client. The provision is the logical complement to the forced return of the thing under paragraph (2). However, given the fact that the client is not free to refuse the return of the thing, mere acceptance of the return of the thing cannot be construed as a waiver of any of the client's rights as regards non-performance of the storer's obligations; cf. paragraph (3) provides.

The thing is in principle to be returned to the client. However, the client may not want to receive the thing, but allow a third party to claim the return of the thing. Such will often be the case in commercial storage contracts, where the thing is sold during storage and the law of property may have brought about the transfer of ownership of the thing. Whether such is the case, is not addressed in the present Article, but the Article does address the question whether the third party is entitled to claim the return of the thing. The storer is both authorised and obliged to hand over the thing to such a third party; see Article 4:106(7). However, the storer does not lose his right to withhold the thing until either the client or the third party pays the price for storage, as he should not be worse off as a consequence of the transfer of ownership.

The present Article does not deal with the question whether the storer has become the owner of the things handed over for storage because they have been commingled with other things stored by the storer. However, when such a mode of storage has been agreed upon, the client is not entitled to receiving the same thing back. Instead, he is entitled to receiving a thing of the same kind, quantity and quality. Moreover, he is entitled to becoming the owner of the thing that replaces the thing he used to be the owner of. How ownership is transferred, is again a matter for the law of property.

Illustration 4
A farmer harvested 15,000 kilograms of grain. As he lacks storage capacity himself, he has the grain stored in a huge silo operated by a professional storer of grain. As the farmer knows and accepts, the silo does not contain compartments, implying that the grain cannot be separated from the grain handed over for storage by other farmers. When the farmer requests the return of the grain, the storer may return 15,000 kilograms of grain of the same kind and quality and transfer ownership thereof. This does not constitute non-conformity under Article 4:107 as the farmer, when the contract was concluded, knew that the grain would be commingled with grain delivered by other farmers and therefore accepted the method of storage of the grain and the resulting loss of ownership thereof during storage.

E. Relation to PECL and Other Parts of the Principles

The present Article encompasses the obligation of the storer to actually return the thing. After the return of the thing, the client will usually be able to determine whether or not the service has been performed correctly because he will normally be able to establish non-conformity under Article 4:107. He will then be required to inform the storer thereof within a reasonable time; see Article 1:113 (Failure to Notify for Non-Conformity). More importantly, as the client bears the burden to prove that the damage to the thing he discovered occurred prior to its return to the client, he in fact has an interest in reacting quickly and in investigating the thing upon its return for apparent defects: proof of the prior existence of the damage becomes very difficult as time goes by.

Under Article 4:108, payment of the price becomes due when the storer returns the thing. Consequently, the obligation to return the thing and the obligation to pay the price for the storage are normally to be performed at the same time. Where and as long

as the client refuses to pay, the storer may withhold the performance of his obligation to return the thing in accordance with Article 9:201 PECL (Right to Withhold Performance), as is explicitly regulated in Article 4:108(2). This applies even when a third party holding sufficient title to the thing claims the return of the thing, as the right to withhold the thing exists as long as the client (or the third party) has not paid the price for storage.

Both parties are in need of the other party's co-operation in order to establish the return of the thing. Paragraphs (1) and (2) of the present Article include an obligation for each party to contribute to the return of the thing. Breach of such an obligation entitles the other party to claim for damages or to demand specific performance under Chapter 9 PECL (Specific Remedies for Non-Performance). However, these provisions offer insufficient relief if the client is negligent in the performance of his obligation to take the thing back and the storer has an immediate need to end the storage. To remedy that, Article 7:110 PECL (Property Not Accepted) provides a particular remedy for the storer, i. e. to sell the thing and to pay the proceeds thereof subtracting the costs he incurred in selling the thing and, of course, the price for storage. Paragraph (4) explicitly refers to that provision. However, before being allowed to exercise his right under Article 7:110 (Property Not Accepted), the storer is required to give the client a reasonable warning of his intention to do so. By giving such a warning, the client is alerted to the possible consequences of his failure to accept the return of the thing; he is then given a final chance meet to his obligation to accept the return of the thing, thus preventing the loss of ownership over it. When determining whether the warning is to be considered sufficient, Article 1:110(2) (Contractual Duty of the Service Provider to Warn) may be applied by analogy. This implies that the storer must take reasonable measures to ensure that the client understands the content of the warning.

The present Article does not deal with the question *whether* or *how* ownership has been transferred because the thing has been sold to a third party or was commingled with other things stored by the storer. Such is left to the law of property, e. g. the Principles of Transfer of Ownership in Movable Goods. Of course, as is provided in Article 1:106(4) (Duties of the Service Provider regarding Input), the thing that is returned must be free from any right of a third party that did not exist prior to the conclusion of the contract.

The law of property is also to determine when the third party holds sufficient title to demanding the return of the thing. Such will usually be the case if the third party produces a store warrant issued by the storer when the thing is stored.

F. Burden of Proof

The party claiming performance of the other party's obligation to return the thing or to accept its return, bears the burden to prove that it indicated its wishes and that the other party did not comply with its wishes.

G. Character of the Rule

This Article contains default rules.

H. Remedies

Both the client – if the storer performs his right to have the thing returned to the client – and the storer – if the client performs his corresponding right – are under a duty to co-operate in the transfer of the thing. Breach of that duty to co-operate amounts to a non-performance, leading to the normal remedies for non-performance under Chapter 9 PECL (Particular Remedies for Non-Performance), as specified in Article 1:112 (Remedies for Breach of Duties of the Service Provider). A breach of paragraph (2) is sanctioned by allowing the storer to sell the thing under paragraph (4), provided that the storer has given the client reasonable warning of his intention to do so. Alternatively, the storer may claim damages and/or the price for prolonged storage.

Comparative Notes

1. *Condition of the good upon return; burden of proof in case of damage*
   In most legal systems reported, the storehouse is required to return the good entrusted to him to the client in the condition the client may expect; natural deterioration or decay of the good is to be borne by the client, but is up to the storehouse to prove that loss of, or damage to, the good was not due any negligence on its part. Cf. BELGIUM, Cass. 29 February 1996, RW 1998-1999, 1385 (Faillissement V./N. V. E.); FRANCE, CC art. 1933; ENGLAND, *Coldman v Hill* [1919] 1 KB 443; GERMANY, Palandt [*-Sprau*], BGB, art. 695 no. 1; ITALY, Cass. 8 August 1997, n. 7363, Soc. S. Andrea c. Soc. Velo, Giust.civ.Mass. 1997, 1373. In AUSTRIA, CC art. 961; THE NETHERLANDS, CC art. 7:605 para. 4; SPAIN, cf. CC art. 1766 and 1770, CommC art. 306 and the RUSSIAN FEDERATION (CC art. 900 and 902), the starting-point is that the good is to be returned in its *original* condition, together with all the increases (fruits) thereupon, but here, too, natural deterioration or decay of the good is to be borne by the client, and again the burden of proof is on the storehouse. In effect, the two approaches lead to the same result, requiring the storehouse to prove that any loss of, or damage to the good cannot be imputed to the storehouse.
   No information from DENMARK, FINLAND, IRELAND, LUXEMBURG and SCOTLAND.

National Notes

1. *Condition of the good upon return; burden of proof in case of damage*
   AUSTRIA The storehouse is required to return the good entrusted to him to the client in the same state in which it was received, together with all the increases (fruits) thereupon, cf. CC art. 961. Return of the good in a changed condition therefore is normally a non-conformity. The fact that the client did not supervise the performance of the service, does not lead to contributory negligence, cf. OGH, SZ 5/18. However, if

the client knew the mode of storage, he can't argue afterwards that that mode was insufficient, cf. OGH, EvBl 1976/21. The storehouse is not liable if he could not have prevented the damage to the good by exercising due care; he can't be required to take such measures that would save the good but would sacrifice his own interests, cf. CC art. 964. The burden of proof that the damage of the good is not caused by a lack of care is on the storehouse, cf. OGH, SZ 10/87; OGH, EvBl 1984/11; Rummel [*-Schubert*], Kommentar ABGB, art. 965 no. 3.

BELGIUM The storehouse is liable if he does not return the good, unless he proves *force majeure* and that he has not made an error in storing the good, cf. Cass. 29 February 1996, RW 1998-1999, 1385 (Faillissement V./N. V. E.). The mere fact that the good was stolen, does not constitute *force majeure* by itself, cf. Kh. Hasselt 6 February 1996, RW 1999-2000, 446. The storehouse must rather prove that he had taken all reasonable measures that could be expected of him, cf. Herbots, Bijzondere overeenkomsten, Actuele problemen, 1980, pp. 272-273. The good is to be returned in the condition it is at the time of return of the good, cf. CC art. 1933; natural deterioration or decay of the good therefore is to be accepted by the client.

ENGLAND The liability of the storehouse is fault-based, not strict. However, the burden of proof is on the storehouse to prove that loss of, or damage to, a good whilst in his possession was not due any negligence on its part, cf. *Coldman v Hill* [1919] 1 KB 443; *Houghland v R. R. Low (Luxury Coaches) Ltd* [1962] 1 QB 694. To that extent, the storehouse must prove all the circumstances known to him in which the damage occurred, cf. *Levison v Patent Steam Carpet Cleaning Co Ltd*. [1977] 3 AllER 498, [1978] QB 69, Court of Appeal.

FRANCE Art. 1932 CC requires the storehouse to return to the client the same good that he received; if the good has produced fruits, the storehouse must return these as well, cf. art. 1936 CC. The storehouse may not require the client to prove that he is the owner of the good, unless he suspects that the good was acquired from theft; cf. Huet, Les principaux contrats spéciaux, no. 33150. The good must be returned in the condition at the moment of the restitution (art. 1933 CC), implying that the aging and wear and tear of the good that are not imputable to the storehouse, are for the owner. However, in practice, a reversal of the burden of proof occurs: the storehouse is to prove he exercised due care and that the deterioration of the good is not due by a lack of maintenance on his side, cf. Cass.com., 10 February 1959, Bull.civ. III, no. 72 (garage) (fixed line of case law); cf. Huet, Les principaux contrats spéciaux, no. 33147.

GERMANY The goods have to be returned in the condition that may be expected. If the storehouse can't return the good or only in a damaged form, he is liable for non-performance; to escape liability, the storehouse must prove the damage or loss of the good was not caused negligently, cf. Palandt [*-Sprau*], BGB, art. 695 no. 1.

GREECE With regard to the contract of storage, CC art. 823 requires that a storehouse shall be bound to exercise the same care as he bestows on his own affairs, unless the storage is for remuneration, in which case the storehouse will be responsible for any fault (return to the rule, CC art. 330).

ITALY The good is to be returned to the client as it was at the time it was handed over. The obligation is considered to be an obligation of result. The storehouse avoids liability only by proving that deterioration or decay, etc., was due to sudden and unforeseable circumstances falling outside his power of control, cf. CC art. 1218. The mere proof that the goods were stored with the diligence of a good housefather, as CC

art. 1768 prescribes, does not suffice. Cf. Cass.civ.sez. III, 8 August 1997, no. 7363, Soc. S. Andrea c. Soc. Velo, Giust.civ.Mass. 1997, 1373; Cass.civ.sez. III, 12 June 1995, n. 6592, Giro c. Melioli, Giust.civ.Mass. 1995, fasc. 6.

THE NETHERLANDS The storehouse is under a duty to return the good in its original state, cf. CC art. 7:605 para. 4. This duty is considered to be an obligation of result, cf. Paquay, De aansprakelijkheid van de bewaargever, 1994, p. 494; Rutgers, Bewaarneming, no. 12. In practice, this means a reversal of the burden of proof: the storehouse is to prove that he has not breached his duty of care, in which case the non-performance of the obligation to return the good in its original state cannot be attributed to the storehouse, cf. T&C / Castermans, to CC art. 7:605, note 5.

POLAND In the case of safe-keeping contract, the keeper should return the thing in an undeteriorated condition (CC art. 835). Rules on the storage contract specify that the storehouse is not liable for decrement of the goods not exceeding the limits specified in the relevant provisions of law, and in the absence of such provisions, within the limits accepted customarily (CC art. 855 para. 3). The keeper and the storehouse must prove that the damage occurred despite observing due diligence.

PORTUGAL The storehouse is in principle under an obligation of result to return the good to the client in the same conditions the good had when it was handed over.

SPAIN The basic obligation of the storehouse is the custody of the good in storage in order to return it to the client in the same conditions the good had when it was handed over, plus the fruits and accessories to the goods, cf. CC art. 1766 and 1770 and CommC art. 306. There is no provision dealing with the situation where the nature of the good implies that the good is to be returned in a worse condition; in the absence of a contractual agreement, the storehouse can only invoke and prove *force majeure*, i. e. a fortuitous event or the intervention of a third party or the client itself to escape liability, cf. CC art. 1183; Bercovitz, Comentarios al Código Civil, p. 1988.

SWEDEN Consumer Services Act art. 15 (KTjL) provides that if the service regards storage, the consumer can require that the storage is performed in a professional manner (i. e. in accordance with art. 4 KTjL). A term limiting or excluding the obligation is void, cf. art. 9 KTjL. Under that provision, even in the absence of negligence, the service is deemed to be non-conform if the non-conformity is the result of an accident or other similar event, cf. ARN 25 May 1992, 1991-5176.

OTHER Art. 900 para. 2 of the RUSSIAN Civil Code provides that the storehouse must return the good in the condition it was accepted for storage, taking into account its natural degradation, natural loss or other change owing to its natural properties. If the storehouse is a professional party, the storehouse bears the burden of proof that the loss of or the damage to the good occurred in consequence of force-majeure or properties of the good of which the storehouse, while accepting the good for storage did not know and need not have known, or as a result of the client intention or gross negligence, cf. CC art. 902 para. 1.

Article 4:107: Conformity

(1) The storer must store the thing in accordance with the contract.
(2) The storage of the thing does not conform with the contract unless the thing is returned in the same condition as it was in when handed over to the storer.
(3) If, given the nature of the thing or the contract, it cannot reasonably be expected that the thing is returned in the same condition, the storage of the thing does not conform with the contract if the thing is not returned in such condition as the client could reasonably expect it to be returned.
(4) If, given the nature of the thing or the contract, it cannot reasonably be expected that the same thing is returned, the storage of the thing does not conform with the contract if the thing that is returned is not in the same condition as the thing that was handed over for storage, or if it is not of the same kind, quality and quantity, or if ownership of the thing is not transferred in accordance with Article 4:106(6).

Comments

A. General Idea

The present Article states that a storage contract, unless of course the parties agreed otherwise, implies an obligation of result: normally, if the thing is not returned in the same condition as it was in when it was handed over to the storer, the contract has not been performed correctly. The present Article thus enables the client to establish the storer's liability.

> *Illustration 1*
> A shipment of DVDs is stored in a warehouse. When the client claims their return, it turns out that they are damaged. The storer is, in principle, liable for non-conformity of the service.

However, the storer may still prove that the fact that the thing is not returned in its original condition is due to an impediment beyond his control (force majeure). Moreover, the detrimental consequences of this strict liability of the storer are, to a large extent, redressed by the storer's possibility of limiting his liability in a commercial storage contract to the value of the stored thing; see Article 4:112.

The nature of the thing handed over for storage may imply that the thing may or has to be returned in a different condition. The thing then is to be returned in the condition that the client could reasonably expect it to be in upon return, be it in a better or a worse condition than it originally was.

> *Illustration 2*
> Bananas that are already ripe are stored. The mere fact that the bananas have coloured brown when they are returned does not mean that the storer is liable, since the brown colouring of overripe bananas is a natural process.

Illustration 3
Cheese is stored in order to mould. The storer only needs to preserve the cheese and is not required to do anything with the cheese but to store it safely. From the nature of the thing handed over for storage it follows that the cheese cannot be returned in the same condition as it was in when it was handed over. Instead, it will be returned in a better and more valuable condition.

Illustration 4
Because a town's refuse dump is closed due to a strike, the rubbish is temporarily stored. Given the natural decay of the rubbish, the storer is not obliged to return the rubbish in the same condition as it was in when it was handed over to the storer.

B. Interests at Stake and Policy Considerations

While in most services contracts the service provider is merely under an obligation of best efforts (obligation of means) and obligations of result are mainly limited to secondary obligations, on the basis of a storage contract the client may normally expect a concrete result, i. e. that the thing will be returned in the condition it was in when it was handed over for storage. In this sense, storage implies the safekeeping of the thing. However, in some cases it follows from the nature of the thing stored that return of the thing in its original condition cannot reasonably be expected. An important example where such is the case, concerns the storage of perishable things, such as fruit.

The question then arises whether the *default rule* should be that the storer is under an obligation to return the thing in its original condition unless that cannot reasonably be expected given the nature of the thing, or that he need to devote his efforts to bringing this about. In practice, the difference is primarily a matter of proof: does the client only have to prove that the thing was not handed back in its original condition, allowing the storer to prove that he exercised due care and could not have prevented the change of the condition of the thing, or is it up to the client to prove not only the change in the condition of the thing, but also negligence on the part of the storer?

C. Comparative Overview

In some legal systems, notably BELGIUM, FRANCE, ENGLAND, GERMANY and ITALY, the storer is required to return the thing entrusted to him to the client in the condition the client may expect; the risk of natural deterioration or decay of the thing is to be borne by the client, but is up to the storer to prove that loss of, or damage to, the thing was not due any negligence on his part. In other legal systems, notably AUSTRIA, THE NETHERLANDS and SPAIN, the starting point is that the thing is to be returned in its *original* condition, together with all the increases (fruits), but here, too, the risk of natural deterioration or decay of the thing is to be borne by the client, and again the

burden of proof of non-negligence is on the storer. In practice, the two approaches lead to the same result, requiring the storer to prove that he cannot be held liable for any loss of or damage to the thing.

D. Preferred Option

Storage is to take place in accordance with the contract; if the thing is not stored accordingly, the storer is liable for any resulting damage. Moreover, the storer is normally required to return the thing in its original condition (paragraph (2)) – which would qualify as an obligation of result – whereas paragraph (3) states that only an obligation to return the thing in as good a condition as could be expected exists if return of the thing in its original condition could not be expected given the nature of the thing handed over for storage. Paragraph (4) deals with the situation where, in conformity with the contract, the thing stored is commingled with other things of the storer or of third parties, and the storer is required to return another thing of the same kind, quality and quantity and, if need be, to transfer ownership. Since paragraph (2) contains the main rule and paragraphs (3) and (4) the exceptions thereto, the burden of proof that either paragraph (3) or paragraph (4) applies is on the party that wishes to rely on it. In most cases, that party will be the storer; however, in *Illustration 3*, that party is the client.

E. Relation to PECL and Other Parts of the Principles

Article 1:108 (Result Stated or Envisaged by the Client) indicates when the service provider is under an obligation of result by stating that such is the case if a reasonable client in the same circumstances would have no reason to believe that there was a substantial risk that the result would not be achieved. The present Article makes this concrete for storage. Generally, paragraph (2) states that the client may expect the service to result in the unharmed return of the thing. However, the nature of the thing may lead a reasonable client not to believe that the thing will be returned in the condition it used to be in. In such a case, the client may still require the thing to be returned in as good a condition as he may expect under the circumstances of the case; see paragraph (3). Paragraph (4) constitutes a specific rule for the storage of things that are commingled with other things.

The present Article includes an obligation to return the thing either in its original condition, as the main rule of paragraph (2) states, or, if such could not be expected given the nature of the stored thing, in as good a condition as may reasonably be expected by the client; cf. paragraph (3). In the case of the storage of a thing that is commingled with other things, the storer is required to return a thing that is in the same condition as the thing that was handed over for storage; cf. paragraph (4). In all of these cases, the storer may escape liability if he proves that the return of the thing in such condition is prevented by an impediment beyond his control under Article 8:108 (Excuse Due to an Impediment). If he cannot prove that, he will be held liable.

Illustration 5
A shipment of DVDs is stored in a warehouse. During storage, the warehouse is struck by lightning and the resulting fire destroys the DVDs. If the storer substantiates that he has taken all reasonable measures to prevent such an event from happening, he cannot be held liable.

Moreover, as paragraph (1) states, the thing must be stored in accordance with the contract. This does not stand in the way of the storer proving that he *had* to store the thing differently in order to preserve the thing in as good a condition as could reasonably be expected, e. g. because the circumstances of storage changed. If and insofar as this is possible, the storer is required to claim a variation of the contract under Article 1:111 (Variation of the Service Contract).

Illustration 6
During the storage of onions, the storer discovers the onions have a disease that needs to be treated in order to prevent their loss. After treatment, the onions need to be stored at a lower temperature than was agreed upon, in order to prevent the disease from returning. The storer is allowed to store the onions in different circumstances and must, as soon as there is a chance to do so, demand that the contract be changed in accordance with Article 1:111 (Variation of the Service Contract).

Whereas the present Article indicates when the storer is liable for non-performance, Article 4:106 states the storer's obligation to actually return the thing. If, at the moment of return of the thing the client notices or should notice non-conformity under Article 4:107, he is to inform the storer thereof within a reasonable time; Article 1:113 (Failure to Notify for Non-Conformity). Failure to do so leads to the loss of some remedies for non-performance, notably specific performance and termination, but in principle does not affect the right to damages. In practice, for storage contracts the right to specific performance or termination will not be particularly relevant once the storage has ended, whereas the right to damages will be important. Therefore, Article 1:113 (Failure to Notify for Non-Conformity) does not have much practical relevance for storage contracts. Of course, the storer is not liable for damages if and insofar as the damage increased as a result of the client's failure to notify. It should, however, be noted that the client bears the burden to prove that the damage to the thing he discovered occurred prior to its return to the client. Proof thereof becomes very difficult as time goes by. This means that the client in fact has an interest in reacting quickly and also in investigating the thing upon its return for apparent defects.

Article 1:114 (Limitation of Liability) and Article 4:112 indicate the extent of limiting liability if non-conformity has been established under the present Article. The Articles therefore only come into play if the client proved that the thing was not returned in accordance with paragraph (2), (3) or (4) and the storer was not able to prove that such was caused by an impediment beyond his control. Article 1:114(2) (Limitation of Liability) states that a limitation or exclusion of liability for damage other than personal injury or death is allowed if a clause to that extent is to be considered fair and reasonable. Article 4:112 adds that in commercial storage contracts a clause limiting liability

to the value of the thing is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability), unless the damage was caused intentionally or by way of grossly negligent behaviour on the part of the storer or any person for whose actions the storer is responsible – in which case the presumption does not apply and the general test of Article 1:114(2) (Limitation of Liability) applies.

Consequently, even though the return of the thing is to be considered an obligation of result, the detrimental consequences for the storer if he is not able to return the thing in such a condition often are normally not of such a nature that they cannot be borne by the storer.

F. Burden of Proof

The client is to prove that the thing was not returned in the same condition as it was in when it was handed over to the storer or that a different thing is returned. It is then up to the storer to prove that the parties had concluded a different agreement, be it explicitly or impliedly, or that, given the nature of the thing stored, the thing could not be returned in the same condition or that a different thing could be returned. The burden of proof as to the applicability of paragraphs (3) and (4), therefore, normally is upon the storer. The client may then prove that the thing, even though paragraph (3) or (4) applies, was not returned in the condition the client could reasonably have expected it to be in upon return, or that the replacing thing is not of the same kind, quality or quantity as the thing that was handed over to the storer.

A different division of the burden of proof applies if the client claims he could reasonable expect the thing to be returned in a *better* condition than it was in when it was handed over for storage, as is the case in *Illustration 3*. The client bears the burden to prove that this a-typical situation applies.

G. Character of the Rule

This Article contains default rules. The parties may therefore agree upon a different regime of liability, including the possibility of requiring the storer only to exercise due care when storing the thing.

H. Remedies

Non-conformity under this Article gives rise to the normal remedies for performance under Chapter 9 PECL (Particular Remedies for Non-Performance), as is stated in Article 4:111. From this, it follows that the client may in principle demand specific performance, terminate the contract or claim damages. In practice, the main remedy in the case of non-performance of the storer is damages, as is explained in the Comments to Article 4:111. However, liability may be restricted in accordance with Article 1:114 (Limitation of Liability) and Article 4:112.

Comparative Notes

1. *Storehouse's obligation to return the good within reasonable time after request*
When no period was determined for the duration of the storage, the good is to be returned when the client so demands, cf. AUSTRIA, CC art. 963; BELGIUM, CC art. 1944; ENGLAND, s. 14 (1) Supply of Goods and Services Act 1982; FRANCE, CC art. 1944; GERMANY, CC art. 695; THE NETHERLANDS, CC art. 7:605, para. 1; RUSSIAN FEDERATION, CC art. 889 para. 2 and 904. Yet, in GERMANY, in the case of a commercial storage contract concluded for an indefinite period of time, the period of notice for ending of the contract is one month, unless there are 'special reasons' to allow for immediate ending of the contract, cf. CommC art. 473. When a period for storage has been determined, the client can nevertheless demand earlier return in most legal systems, provided that he compensates the storehouse for the earlier return of the good; cf. AUSTRIA, CC art. 962; BELGIUM, CC art. 1944; FRANCE, CC art. 1944 and cf. Huet, Les principaux contrats spéciaux, no. 33161; GERMANY, CC art. 695; RUSSIAN FEDERATION, CC art. 904. This may be different in ENGLAND and THE NETHERLANDS. In any case, as is clearly stated in GERMAN doctrinal works, the storehouse must be given a reasonable time to perform his obligation to return the good, and the client's demand must be brought at a reasonable time (e. g. during normal office hours), cf. Palandt [*-Sprau*], BGB, art. 695 no. 1.
No information from DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

2. *Client's obligation to accept the return of the good*
When no time for storage has been agreed upon, the storehouse may at any time demand the client to accept the return of the good, albeit that the client must be allowed a reasonable period of time to accept the return, cf. AUSTRIA, CC art. 963; FRANCE, Huet, Les principaux contrats spéciaux, nos. 33140, 33162; GERMANY, CC art. 696; ITALY, CommC art. 1771 para. 2; THE NETHERLANDS, CC art. 7:605 para. 1; POLAND, CC art. 354. When the parties have agreed upon a definite period of storage, the storehouse is normally required to store the good for the duration agreed between the parties. When the agreed time for storage has ended, the storehouse may demand the acceptance of the return of the good, cf. AUSTRIA, Rummel [*-Schubert*], Kommentar ABGB, art. 961 no. 4; FRANCE, Huet, Les principaux contrats spéciaux, no. 33140, 33162; GERMANY, CC art. 696; THE NETHERLANDS, CC art. 7:605 para. 1; RUSSIAN FEDERATION, CC art. 889 para. 3 and art. 899 para. 1; implicitly also ENGLAND, cf. Chitty on Contracts (McKendrick), no. 33-043. In THE NETHERLANDS, CC art. 7:605 para. 2 authorises the storehouse to obtain a court order for earlier return in case of important reasons; as such are recognised the situation in which the storehouse can't be required to further care for the good or, in other words, that further storage is either impossible or very arduous for the storehouse, cf. Rutgers, Bewaarneming, no. 17. AUSTRIAN law is to the same extent if, due to unforeseen circumstances, the storehouse is no longer capable of taking care of the good or only at his own loss, cf. CC art. 962. When the client does not accept the return of the good, in AUSTRIA the storehouse is entitled to have the good stored by a third party at the cost of the client or to continue storage; in the latter case, the storehouse's liability is reduced and the client will be accountable for all damage that result from his failure to

accept the return of the good, cf. AUSTRIA, Rummel [*-Schubert*], Kommentar ABGB, art. 961 no. 4. In GERMANY, non-acceptance of the good by the client may occasionally amount to non-performance, but in any case leads to *mora creditoris*, cf. Palandt [*-Sprau*], BGB, art. 696 no. 1. In SPAIN, the storehouse may ask the court to order consignment of the good by a third party, cf. CC art. 1776.
No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

3. *Right for storehouse to sell the good in case of failure to accept the good?*
If the client does not accept the return of the good while he is required to do so, in AUSTRIA (CC arts. 389, 417 para. 1 and 373); ENGLAND (ss. 12, 13 of the Torts (Interference with Goods) Act 1977 and Schedule 1, Part 1, para. 4(1); and in the RUSSIAN FEDERATION (CC art. 899 para. 2) the storehouse may sell the goods. Under RUSSIAN law, a prior warning is required. In ENGLAND, the client requires a court order if there is a dispute with the client over any payment claimed by the storehouse, cf. Chitty on Contracts (McKendrick), nos. 33-052.
In FRANCE, GERMANY, THE NETHERLANDS and SPAIN, such a right does not exist; the storehouse may, of course, invoke other remedies, e. g. claim damages or demand specific performance of the obligation to accept the return of the good. In THE NETHERLANDS, a demand for specific performance of the obligation to take the good back immediately may be done in summary proceedings, cf. Rutgers, Bewaarneming, no. 17; De Boer, Bijzondere overeenkomsten, to CC art. 7:605, note 2.
No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, POLAND, PORTUGAL, SCOTLAND and SWEDEN.

4. *Fruits of the good*
Where during storage the good has borne fruits, the storehouse must provide the client with these fruits when the good is returned, cf. AUSTRIA, CC art. 961; BELGIUM, CC art. 1936; FRANCE, CC art. 1936; SPAIN, CC arts. 1766 and 1770 and CommC art. 306; RUSSIAN FEDERATION, CC art. 900 para. 3.
No information from DENMARK, ENGLAND, FINLAND, GERMANY, GREECE, IRELAND, ITALY, LUXEMBURG, THE NETHERLANDS, PORTUGAL, SCOTLAND and SWEDEN.

National Notes

1. *Storehouse's obligation to return the good within reasonable time after request*
AUSTRIA When the agreed time for storage has ended, the good, together with its fruits, is to be returned by the storehouse. The storehouse can't argue that the client is not the owner, unless he knows that the client had stolen the good or the storehouse is otherwise aware of the thievish origin of the good, as in such a case the contract of storage is void, cf. OGH, EvBl 1958/382; Rummel [*-Schubert*], Kommentar ABGB, art. 961 no. 2. When the client demands earlier return of the good, the storehouse is required to comply with that demand, but any damage sustained as a result of the earlier return must be compensated, cf. CC art. 962; Koziol and Welser, Bürgerliches Recht II, p. 184. When no time for storage has been agreed upon, the client may at any time demand the return of the good, cf. CC art. 963.

BELGIUM The storehouse must return the good as soon as the client so demands, even if the contract was concluded for a definite period of time, cf. CC art. 1944.
ENGLAND The good must be returned at the end of the period agreed upon by the parties; cf. Chitty on Contracts (McKendrick), no. 33-010. If no period had been determined, Supply of Goods and Services Act 1982 under s. 14 (1), the storehouse must return the good within a reasonable time after having been so requested by the client; cf. Chitty on Contracts (McKendrick), no. 33-043.
FRANCE The good must be given back immediately when the client asks for it, cf. CC art. 1944. This applies even when the contract was concluded for a determined period of time, albeit that the storehouse must be indemnified for this; cf. Huet, Les principaux contrats spéciaux, no. 33161. Failure to return the good entitles the client to damages, especially if the good has substantially lost its value between the moment when the return was asked and the actual return of the good, cf. Cass.com., 6 January 1970, Bull.civ. IV, no. 7.
GERMANY The client may ask the good back at any time, even if storage for a definite period of time has been agreed upon, cf. CC art. 695. The storehouse must be given a reasonable time to perform his obligation to return the good, and the client's demand must be brought at a reasonable time (e. g. during normal office hours), cf. Palandt [*-Sprau*], BGB, art. 695 no. 1. In the case of a commercial storage concluded for an indefinite period of time, the period of notice is one month. This period can be shorter only in the case of special reasons, cf. CommC art. 473.
THE NETHERLANDS CC art. 7:605, para. 1, determines that the client may require the return of the good without delay; yet, the parties are free to determine a different moment for return of the good. Under para. 2, in case of 'important reasons' the client may seek the aid of the subdistrict court in whose jurisdiction the good is located, to determine another time for return of the good, in derogation of the time that para. 1 or the contract stipulates. The good is to be returned to the client or to a third party who holds sufficient title to receive the good, e. g. a third party beneficiary, the buyer of the good if the ownership of the good was transferred to the buyer by *traditio longa manu* or by delivery of a storage warrant (CC art. 7:607), or in the case a third party acts as a representative for the client (e. g. mandate). Cf. Pitlo-Croes [*-Du Perron*], Het Nederlands burgerlijk recht VI, p. 299; De Boer, Bijzondere overeenkomsten, to CC art. 7:605 note 6; Asser [*-Kleijn*], Handleiding tot de beoefening van het Nederlands burgerlijk recht; Bijzondere overeenkomsten IV, nos. 20-21.
POLAND The POLISH CC regulates this issue specifically with regards to the safe-keeping contract, where the client may demand the return of the thing at any time (CC art. 844 para. 1). The return should take place immediately after the request (Bieniek, Komentarz, Księga trzecia, Tom 2, p. 387), at the place where the thing was kept (CC art. 844 para. 3). Most probably a similar rule could apply to the storage contract.
SPAIN The CC and CommC only state that the good is to be given to the client when the latter asks for it.
OTHER In the RUSSIAN FEDERATION, under CC art. 889 para. 2, if the parties have not determined a period for the duration of the contract, the storehouse is required to store the good until its return is required by the client. Irrespective whether the parties had agreed upon a definite period of time, the storehouse must return the good at the client's first demand, cf. CC art. 904.

2. *Client's obligation to accept the return of the good*

AUSTRIA When no time for storage has been agreed upon, the storehouse may at any time demand the client to accept the return of the good, albeit that the client must be allowed a reasonable period of time to accept the return, cf. CC art. 963; Rummel [*-Schubert*], Kommentar ABGB, art. 963 no. 1. When a period of storage has been agreed upon, only in the case where due to unforeseen circumstances the storehouse is no longer capable to take care of the good or only at his own loss, the storehouse may demand the earlier return of the good to the client, cf. CC art. 962; Rummel [*-Schubert*], Kommentar ABGB, art. 962 no. 1. When the agreed time for storage has ended, the storehouse mag demand the acceptance of the return of the good. Failure to accept the return of the good entitles the storehouse to have the good stored by a third party at the cost of the client or to continue storage; in the latter case, the storehouse's liability is reduced and the client will be accountable for all damage that result from his failure to accept the return of the good, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 961 no. 4.

ENGLAND The client is required to enable the storehouse to perform his obligation to return the good and to use reasonable diligence, cf. Chitty on Contracts (McKendrick), no. 33-043. This implies that the client must accept the return of the good at a reasonable time after having been so ordered.

FRANCE If the contract is gratuitous or concluded for an indefinite period of time, the storehouse may demand the return of the good at any given time, provided a reasonable period of time is given to accept the return of the good. If the contract is for remuneration and for a determined period of time, the storehouse will have to wait for the end of the agree period to lapse. Cf. Huet, Les principaux contrats spéciaux, nos. 33140, 33162.

GERMANY The storehouse may demand the client to take the good back at any time if there is no agreed moment; if there is such a moment, the storehouse may demand earlier acceptance only in the case of important reasons, cf. CC art. 696. The client must be given a reasonable time to perform his obligation to accept the return of the good, and the storehouse's demand must be brought at a reasonable time, cf. Palandt [*-Sprau*], BGB, art. 696, no. 1. Failure to do so not only leads to *mora creditoris*, but occassionally also to non-performance, cf. Palandt [*-Sprau*], BGB, art. 696 no. 1. In the case of a commercial storage concluded for an indefinite period of time, the period of notice is one month. This period can be shorter only in the case of special reasons, cf. CommC art. 473.

ITALY When a certain deadline is fixed for the return of the goods, parties should respect it. When no moment for the return of the good has been determined by the parties, the storehouse may at any time demand the acceptance of the return of the good, cf. CommC art. 1771 para. 2.

THE NETHERLANDS CC art. 7:605 para. 1 determines that the storehouse may require that the client takes the good back without delay, unless the parties have derogated from that rule. The storehouse may acquire a court order for earlier return in case of important reasons, cf. para. 2. As such are recognised the situation in which the storehouse can't be required to further care for the good or, in other words, that further storage is either impossible or very arduous for the storehouse, cf. Rutgers, Bewaarneming, no. 17.

POLAND In the safe-keeping contract, the keeper may demand the thing to be received even before the lapse of the time limit specified in the contract if as a result of circumstances, which he could not have foreseen he cannot, without a loss to himself or without a danger to the thing, keep the thing in the manner to which he is obliged. If the period of safe-keeping was not specified or if the thing was accepted for safe-keeping without remuneration, the keeper may demand the thing to be received at any time provided that it is not returned at the time inconvenient for the depositor (CC art. 844 para. 2). The thing shall be returned at the place, where the thing was kept (CC art. 844 para. 3). In the storage contract, if the client does not collect the goods, despite the lapse of the agreed period, or the notice period, the storehouse may give the goods for safe-keeping at the cost and risk of the client. The storehouse may exercise this right only if he has warned the client about his intentions to exercise his rights by registered mail, sent not later that 14 days before the lapse of the agreed period (CC art. 859^6. Moreover, despite the fact that the storage contract has been concluded for a specified period of time, the storehouse may, for important reasons, demand from the client to collect the goods, setting an appropriate time for its collection (CC art. 859^7).
SPAIN When the storehouse ends the contract on reasonable grounds and the client refuses to accept the good, the storehouse may ask the judge to order consignment of the good, and then the obligation to hand over the good is fulfilled, cf. CC art. 1776.
OTHER In the RUSSIAN FEDERATION, if the parties have determined a period for the duration of the contract, the storehouse may demand the return of the good at the end of the period agreed upon; the client is required to comply with the demand within a reasonable time, cf. CC art. 889 para. 3 and art. 899 para. 1.

3. *Right for storehouse to sell the good in case of failure to accept the good?*
AUSTRIA If the client does not accept the return of the good while he is required to do so, the storehouse may sell the goods, cf. CC art. 389, read in conjunction with arts. 417 para. 1 and 373.
ENGLAND In ENGLISH law the storehouse is given the right to sell the good in case of failure to accept the return of the good under ss. 12, 13 of the Torts (Interference with Goods) Act 1977 and Schedule 1, Part 1, para. 4(1). Where there is a dispute with the client over any payment claimed by the storehouse, the storehouse must apply to the court for authority to sell, cf. Chitty on Contracts (McKendrick), nos. 33-052.
FRANCE The storehouse is not entitled to sell the good itself, but may ask the court to sell the good in case of non-payment of the price.
GERMANY In principle the sale of the good is not a remedy given to the storehouse in the case of not acceptance of the good. The storehouse may only ask damages.
THE NETHERLANDS The storehouse may not sell the good in the case of failure to accept the return of the good. The storehouse may ask for specific performance of the obligation to take the good back immediately; this may be done in summary proceedings. Cf. Rutgers, Bewaarneming, no. 17; De Boer, Bijzondere overeenkomsten, to CC, art. 7:605 note 2.
POLAND In the POLISH CC the general rule of art. 486 para. 1 allows the debtor, in the case of the creditor's delay to deposit the object of the performance with the court. The creditor is deemed to be delayed if, without a justified reason he either declines to accept the performance offered to him, or refuses to perform the act, without which

the performance cannot be made, or declares to the debtor that he will not accept the performance (CC art. 486 para. 2). In the storage contract a more specific rule exists. If the client does not collect the goods, despite the lapse of the agreed period, or the notice period, the storehouse may give the goods for safe-keeping at the cost and risk of the client. The storehouse may exercise this right only if he has warned the client about his intentions to exercise his rights by registered mail, sent not later that 14 days before the lapse of the agreed period (CC art. 859[6]).

SPAIN The storehouse is not entitled to sell the good, but may withhold the good until the client pays, cf. CC art. 1780. Yet, the storehouse may initiate a judicial proceeding to achieve, as a creditor, the judicial execution of the credit, cf. Sierra, Comentario del Código Civil, p. 1067.

OTHER Failure to accept the return of the good at that time entitles the storehouse under RUSSIAN law to sell the good, provided that he has priorly warned the client of that consequence, cf. CC art. 899 para. 2.

4. *Fruits of the good*

AUSTRIA The storehouse is required to return the good entrusted to him to the client in the same state in which it was received, together with all the increases (fruits) thereupon, cf. CC art. 961.

BELGIUM If the good produces fruits, the storehouse must return these as well to the owner, cf. CC art. 1936.

FRANCE If the good produces fruits, the storehouse must return these as well to the owner, cf. CC art. 1936.

POLAND As a rule the fruits of the goods belong to the owner (CC art. 140).

SPAIN If the good bears fruit during storage, the storehouse must return these together with the good, cf. CC art. 1766 and 1770 and CommC art. 306.

OTHER Under art. 900 para. 3 of the RUSSIAN Civil Code, the storehouse must return the fruits of the good at the same time as the good is returned.

Article 4:108: Payment of the Price

(1) The price is due as of the moment the storer returns the thing to the client in accordance with Article 4:106 or the client, without being entitled to do so, refuses to accept the return of the thing.

(2) The storer may withhold the thing until the client pays the price. Article 9:201 PECL (Right to Withhold Performance) applies accordingly.

Comments

A. General Idea

The central question in this Article is when the client is to pay for the service rendered or to be rendered. The Article states that the price is normally due when the thing is returned to the client.

> *Illustration 1*
> Oranges were stored in a warehouse. Upon request of the client, the storer returns the oranges. Payment becomes due when the client accepts the return of the thing.

However, as the client is not entitled to refuse the return of the thing, he should not by doing so be able to frustrate the storer's right to payment. To prevent this, the Article states that the right to payment also emerges when the client refuses to accept the return of the thing. This does, however, not mean he always has to pay the price for storage: if the client terminates the contract for fundamental non-performance, he is freed from his obligation to pay the price or, if he has already paid, may demand to be paid back his money.

It should be noted, however, that the present Article only contains a default rule. The parties are free to derogate from this provision, and will often do so, especially in the case of a storage contract for a relatively long period of time.

> *Illustration 2*
> Oranges are stored in a warehouse. The parties have agreed upon payment for each month during which the oranges are stored, to be paid at the beginning of the month. In accordance with the contractual agreement of the parties, payment is due at the beginning of the relevant month.

B. Interests at Stake and Policy Considerations

The Principles of European Contract Law start from the assumption that both parties will perform their obligations simultaneously. In storage contracts, which by definition imply that the storer must perform his main obligation for a reasonably long period of time, simultaneous performance would mean that the client is also under a continuous obligation to perform, i. e. to pay. This, of course, would not be very practical. This implies that normally either the storer or the client is required to perform his obligation before the other party performs his. The party that is required to perform first therefore has no certainty about the other party's intention to perform his part of the contract. A choice must be made whether the uncertainty is to be placed on the storer or on the client. An in-between position could be reached if the client were to pay part of the price after a period of storage has ended or before a new period starts. In this way, the risk on the party that is to perform first is reduced.

C. Comparative Overview

In most legal systems, payment for storage is due when the storage ends, although in any legal system the parties may agree to a different time for payment and often do so. Especially in the case of commercial storage, a contractual arrangement to the extent that payment is due per period of storage is more common.

In the case of non-payment by the client, in most legal systems the storer may invoke the right of retention or otherwise withhold the thing. However, such a right to withhold the thing does not exist in AUSTRIA and in ENGLAND.

D. Preferred Option

In the present Article, the general trend in the European legal systems – implying that payment is due when the storer returns the thing – is followed. Thus the storer is to perform his obligation first. However, to prevent him from having to bear the risk of non-performance by the client completely, he is awarded a specific right to withhold the thing. Moreover, as the present Article only contains a default rule, the parties may agree to a different time for payment to become due. In the case of a contract for an indefinite period of time, which will occur primarily in commercial storage contracts, the parties will normally make different arrangements as to the time when the price for storage is to be paid.

E. Relation to PECL and Other Parts of the Principles

The present Article derogates from the rule contained in Article 7:104 PECL (Order of Performance). Moreover, it also derogates from the default rule of Article 7:102 PECL (Time of Performance). As does the present Article, Article 7:102 PECL (Time of Performance) gives way to the parties' own agreement. However, if the time for performance is not clear from the contract, Article 7:102(3) (Time of Performance) provides as a default rule that payment is due within a reasonable time after conclusion of the contract. Especially for long-term storage contracts, this provision cannot be properly applied, as the total price to be paid will augment as the contract period proceeds. It should be noted, however, that most of the time the parties will have made their own arrangements.

Under Article 4:108, payment of the price becomes due when the storer returns the thing. Consequently, the obligation to return the thing and the obligation to pay the price for the storage are to be performed at the same time. Paragraph (2) explicitly provides that when and as long as the client refuses to pay, the storer may withhold the performance of his obligation (to return the thing) in accordance with Article 9:201 PECL (Right to Withhold Performance).

In the case of cancellation of the storage contract, Article 1:115, paragraphs (2) and (3) (Cancellation of the Service Contract) apply, entitling the storer to at least part of the

payment. Again, the storer may refuse to return the thing under Article 9:201 PECL (Right to Withhold Performance) if the client does not perform his obligation to pay the price to which the storer is entitled.

F. Burden of Proof

The storer is to prove that the price has become due under this Article.

G. Character of the Rule

This Article contains default rules.

H. Remedies

The remedies of Chapter 9 PECL (Particular Remedies for Non-Performance) for non-performance of the monetary obligation apply, including the right to specific performance thereof under Article 9:101 PECL (Monetary Obligations). Furthermore, paragraph (2) of the present Article explicitly provides that the storer is entitled to withhold the thing until he has been paid.

Comparative Notes

1. *Moment when payment is due*
   As to the moment when payment is due, the contractual agreements, if any, are decisive. In case of lack thereof, payment is due when storage has ended in AUSTRIA, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 969 no. 1; GERMANY, CC art. 699; SPAIN, CC art. 1780. However, especially in case of commercial storage, a contractual arrangement that payment is due per period of storage is more common, cf. FRANCE, Huet, Les principaux contrats spéciaux, no. 33137; GERMANY, CC art. 699; RUSSIAN FEDERATION, CC art. 896 para. 1; probably also in THE NETHERLANDS. When storage for a determined of time has been agreed upon and the client demands the return of the good before that period has ended, then the storehouse is normally entitled only to a reasonable part of the price in AUSTRIA, cf. OGH, JBl 1974, 622.
   No information from BELGIUM, DENMARK, ENGLAND, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

2. *Storehouse's right of retention in case of non-payment*
   In case of non-payment by the client, the storehouse may invoke a right of retention (*i. e.* withhold the good) in BELGIUM (art. 1948 CCb), FRANCE (art. 1948 CC); GERMANY (CC arts. 273, 320 para. 1,); THE NETHERLANDS (CC art. 6:262, 6:52 and 3:290 ff) and SPAIN (CC art. 1780). The storehouse does not have such a right in AUSTRIA, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 967 no. 3 and to CC, art. 969 no. 1; nor in ENGLAND Chitty on Contracts (McKendrick), no. 33-051.

No information from DENMARK, ENGLAND, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

National Notes

1. *Moment when payment is due*

AUSTRIA Unless the parties have agreed otherwise, payment is due when storage has ended, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 969 no. 1. When storage for a determined of time has been agreed upon and the client demands the return of the good before that period has ended, then the storehouse is entitled only to a reasonable part of the price, cf. OGH, JBl 1974, 622. This is different if interpretation of the contract or common opinion leads to the conclusion that the whole price remains due, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 969 no. 1.

FRANCE Usually, the parties will agree to a payment per period of storage, cf. Huet, Les principaux contrats spéciaux, no. 33137.

GERMANY Payment is due when the good is returned. If the parties have agreed that payment is to be calculated periodically, payment for each period is due when that period has ended, cf. CC art. 699.

THE NETHERLANDS The contractual arrangements of the parties will be decisive. Under general contract law, payment of a term would probably be due with the passing of time, but a sound foundation for this cannot be found. However, the parties can also agree upon payment at return of the good, or – what especially occurs in non-commercial contracts – at the moment the good is handed over for storage.

POLAND In both of the contracts, if not agreed otherwise, the payment should take place at the latest upon collection of the thing (CC art 455) (Napierała in Rajski, System Prawa Prywatnego, p. 629).

SPAIN The price is normally paid when the good is returned to the client. Two main reasons justify this is the due moment: 1. The price normally depends on the duration of the relationship; CC art. 1780 states that the storehouse may retain the good until the client pays (including agreed price, reimbursement of expenses, indemnity for damages)

OTHER In the RUSSIAN FEDERATION, the remuneration for storage is due at the end of the period agreed for storage or, if payment for storage has been stipulated by periods, it must be paid by respective instalments at the end of each period, cf. CC art. 896 para. 1.

2. *Storehouse's right of retention in case of non-payment*

AUSTRIA A right of retention or a right to withhold the good does not exist, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 967 no. 3 and to CC, art. 969 no. 1. Moreover, a claim for payment must be made within 30 days after return of the good, cf. CC art. 967; Koziol and Welser, Bürgerliches Recht II, p. 184

BELGIUM The storehouse is entitled to withhold the good until all charges have been paid by the client, cf. CC art. 1948.

ENGLAND Normally, a storehouse does not have a lien for charges upon the good stored by him, cf. Chitty on Contracts (McKendrick), no. 33-051.

FRANCE The storehouse can withhold the performance of the obligation to return the good if the client does not pay the price, cf. art. 1948 CC.

GERMANY The storehouse may invoke a right to withhold the good, cf. CC arts. 273, 320 para. 1.
THE NETHERLANDS The storehouse may invoke the right of retention, regulated in general contract law (CC arts. 6:262 and 6:52, read in conjunction with CC arts. 3:290 ff) in case of non-payment of the price and/or the costs. Cf. Rutgers, Bewaargeving, 1998, no. 11; Wessels, Bewaarneming in het nieuwe BW VI, 1990, p. 753; De Boer, Bijzondere overeenkomsten, to CC, art. 7:601 note 5. A specific right of retention exists for the hotelier, CC art. 7:609 para. 3.
POLAND In the case of safe-keeping the general rules on retention in case of bilateral contracts apply (CC art. 488 para. 2). The storehouse on the other hand has the statutory right of pledge on the goods accepted for storage until they are in his possession or with a person who holds them in his name or until he may dispose of them by virtue of documents in order to secure the claims for the storage dues and the claims for the reimbursement of the expenses and other dues resulting from the contract of storage (CC art. 859[3]).
SPAIN The storehouse has the right to retain the good until the client pays the amounts due (expenses, indemnity, transport costs, price) according to CC art. 1780.

Article 4:109: Duty to Give Account

After ending of the storage, the storer must inform the client of:
(a) any damage that has occurred to the thing during storage; and
(b) the necessary precautions that the client must take before using or transporting the thing, unless the client has reason to be aware of these precautions.

Comments

A. General Idea

The present Article contains a specific obligation of the storer to inform the client of two different types of information. Firstly, if for some reason the thing was damaged during storage, the storer must inform the client thereof. This is especially important if there is a chance that the client does not notice the damage straight away, and runs the risk of greater damage if he does not take action immediately.

Illustration 1
A computer company has stored a hospital's electronic patient records. During storage, a major power cut has damaged the computer company's mainframe computer, damaging some of the patient records. The hospital will only be able to notice the damage if it specifically looks for information which is stored in the damaged files. The computer company is to inform the hospital of the accident, whether it may be held liable for failure to take precautionary measures or that an impediment beyond its control caused the damage. After having been warned, the

hospital can try to access backup files it may still have. If the hospital is not duly warned, the chances increase that such backup files will have been deleted.

Secondly, the storer may be under a duty to warn the client that precautions need to be taken before the thing is transported or used by him. Such a warning is, however, not necessary if the client can be expected to be aware of the need to take precautions.

Illustration 2
A consumer has his furniture, including a refrigerator, temporarily stored because he moved out of his old house but was not yet able to move into his newly built house. As the storer knows, for health reasons a refrigerator should not be used for two or three days after it is moved from one place to another. He must warn the consumer thereof when the refrigerator is handed back, unless a normal consumer in the same situation as this consumer would be aware of this particular danger. As such is most likely the case, the storer will most probably not be under an obligation to warn the consumer about this.

B. Interests at Stake and Policy Considerations

During storage, all sorts of things may happen to the thing, including damage. Often, such damage will be noticed by the client at the time or shortly after the thing is returned to him. However, certain types of damage may be hidden to the client while the storer may be aware of them, either because of his professional expertise or because he noticed the event causing the damage. If the storer does not inform the client thereof, the damage to the thing may increase considerably as the client may fail to take the necessary measures to control the damage. On the other hand, imposing an obligation upon the storer to inform the client of damage that occurred during storage implies that the storer may have to report his own non-performance of the contract.

A second question that needs to be addressed is whether the storer may be under a duty to warn against dangers when using or transporting the returned thing. One could argue that when the storer has properly taken care of the thing and he returns the thing undamaged, he has performed his obligations and that he need not be burdened with 'after sales services'. On the other hand, one could argue that it follows from his duty of care and his obligation to act in accordance with good faith and fair dealing that the storer must warn the client if he is aware of such dangers, even if these dangers have nothing to do with his performance of the service. An in-between solution would be that a duty to warn only emerges if the client would have no reason to be aware of the need to take these precautions himself.

C. Comparative Overview

In most legal systems, an obligation to inform the client of the condition of the thing and the necessary precautions that the client must take before using or transporting the thing may occasionally follow from the storer's obligation of care or from the principle

of good faith. In SPAIN, such an obligation is explicitly provided for in the case where the client is a consumer. Moreover, in several legal systems, e. g. AUSTRIA, ENGLAND and SPAIN, the storer must inform the client about any damage that occurred to the thing during storage.

D. Preferred Option

If damage occurred during storage, the client must be informed thereof, either upon return of the thing or before that. If duly informed, the client may be able to take appropriate measures to prevent further damage from occurring. Such is the case even if this means that the storer must inform the client of his own non-performance, thus opening up the possibility of liability. It should, however, be noted that if the storer properly informs the client and the client takes appropriate measures in time, the extent of the damage may be limited. This would mean that the storer would be liable to pay damages to a lower amount, either because not all foreseeable damage has occurred or because the occurrence of part of the damage should have been prevented by the client, which would mean that that part of the damage is to be attributed to the client rather than to the storer.

The storer is, of course, only required to inform the client of such damage and of such dangers that he can be aware of himself. When the thing that was handed over to him was sealed, the storer is not allowed to break the seal and cannot investigate it. Consequently, in the case of the storage of sealed things, his obligations under this Article must be restricted to those cases where the seal was broken or where the damage can be noticed even though the seal has not been broken.

> *Illustration 3*
> A firm is preparing to move from one building to another. It has confidential records and office materials stored in a sealed wooden container. The storer may not investigate the container's contents and therefore cannot report the fact that an employee's fishbowl, stored in the container, was broken during transport. However, he must inform the client that the wooden container and its contents were destroyed by a fire in the warehouse where the container was stored.

The storer is under a duty to warn the client that he needs to take precautionary measures before transporting or using the thing if the storer is aware of dangers connected with its transportation or its use by the client, even if these dangers are inherent to the fact that the thing was stored or is transported by the client. The reason for such a duty to warn is that the storer may be aware of dangers because of his professional expertise or merely because he has taken care of the thing, but the client may not be aware of such dangers. However, it would not be fair to burden the storer with a duty to warn against such dangers the client himself has reason to know of. In such a case, a warning does – or should – not have any effect, in which case it would be a waste of time and effort burdening the storer with a duty to warn.

Both the obligation to inform under paragraph (1) and the obligation to warn under paragraph (2) operate at or after ending of the storage of the thing. The provision may be applied if the storage is temporarily suspended, while the contract is still in force, but, more importantly, also post contractually, i. e. when the contract has ended. 'Ending' is meant as a neutral term here, encompassing the situation where the contract is terminated for fundamental non-performance, where the client has cancelled the contract under Article 1:115 (Cancellation of the Service Contract) and the situation where the agreed time for performance of the storage contract has elapsed.

E. Relation to PECL and Other Parts of the Principles

From Article 1:104(1)(d) (Duty to Co-operate) it follows that the storer must enable the client to a reasonable extent to determine whether the service provider is performing his obligations under the contract. Article 1:110 (Contractual Duty of the Service Provider to Warn) contains a duty for the service provider to warn the client about directions that could lead to a non-performance of the contract. Neither of these general obligations to inform or warn explicitly provides for a duty to warn against risks that do not materialise during storage, but only after storage has *ended*. A separate provision, which neither has a specific counterpart in the Principles of European Contract Law nor in Chapter 1 (General Provisions), is therefore needed here. One could, however, argue that a duty to warn that damage has occurred to the thing during storage or that the client needs to take precautions before using or transporting the thing follows from Article 1:201 PECL (Good Faith and Fair Dealing).

F. Burden of Proof

The client is to prove that the storer did not meet *his* obligation to inform or warn under this Article. However, given the fact that the proof of a negative fact is problematic, the court may oblige the storer to substantiate his statement that he did fulfil his obligations under this Article. Moreover, the storer may prove that a duty to warn under paragraph (2) does not exist, as the client may be expected to have known of the need to take precautionary measures himself, e. g. because the danger against which measures are to be taken is public knowledge.

G. Character of the Rule

This Article contains default rules.

H. Remedies

This Article contains an obligation that may need to be performed when the contract is still in force or post contractually. In the former case, the normal remedies for non-performance under Chapter 9 PECL (Particular Remedies for Non-Performance) apply;

in the latter case, the client may claim damages under Chapter 9, Section 5 PECL (Damages and Interest) or under Tort Law.

Comparative Notes

1. *Storehouse's obligation to inform of condition of good and precautions to be taken*
An obligation to inform about the condition of the good or risks that may occur or have occurred as a consequence of storage is accepted in AUSTRIA, cf. Koziol and Welser, Bürgerliches Recht II, p. 183; Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 2. The same holds true for SPAIN if the client is a consumer, cf. LCU art. 13. Such an obligation may follow in GERMANY and THE NETHERLANDS from the obligation to take the interests of the client into account or from good faith, cf. CC art. 241 para. 2 and CC art. 7:602, 6:2 and 6:248; probably the same holds true for FRANCE, especially if the storehouse is a professional party. Moreover, in AUSTRIA (cf. Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 2), ENGLAND (cf. *Coldman v Hill* [1919] 1 KB 443) and SPAIN (cf. CC art. 1102 and 1103), the storehouse must inform the client about any damage that has occurred to the good during storage.
No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

National Notes

1. *Storehouse's obligation to inform of condition of good and precautions to be taken*
AUSTRIA The client is entitled to information regarding circumstances following from the storage of the good and the good itself, cf. Koziol and Welser, Bürgerliches Recht II, p. 183. The storehouse is to inform the client if the good has become more dangerous or that it has become impossible to further take care of the good, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 2. Moreover, the storehouse must inform the client about any damage that has occurred to the good, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 2.
ENGLAND The storehouse is required to inform the client of loss of or damage to the good or to use reasonable care to assist in the recovery of the good. Failure to do so leads to liability of the storehouse, unless he proves that, had he informed, subsequent loss would not have been prevented or the recovery of the good would not have been possible anyway, cf. *Coldman v Hill* [1919] 1 KB 443.
FRANCE Such an obligation may exist on the basis of general criterion of existence of an obligation to inform. This can be especially the case for professionals.
GERMANY An explicit obligation to give account for the storehouse does not exist, but the storehouse is required to take the interests of the client into account, cf. CC art. 241 para. 2. From this, an obligation to inform about the condition of the good and the necessary precautions that the client must take before using or transporting the good may sometimes be deduced, especially if there is a danger to the client or the threat of damage to the good.
THE NETHERLANDS An explicit duty to give account for the storehouse does not exist in DUTCH law, unlike the situation for the provider of most other services (cf. CC art. 7:403). Cf. De Boer, Bijzondere overeenkomsten, to CC, art. 7:605 note 9. The

obligation to inform about risks may occasionally follow from the obligation to take due care, regulated in CC art. 7:602, or from the general requirement of good faith (CC art. 6:248).

POLAND In the case of the safe-keeping contract the primary obligation of the keeper is to keep the thing in an undeteriorated condition (CC art. 835). In order to secure the undeteriorated condition the keeper is allowed (and sometimes obliged) to undertake certain actions (CC arts. 838, 839), even without knowledge or consent of the client. However, sometimes not informing the client about the important events may be qualified as contrary with CC art. 56 (Napierała in Rajski, System Prawa Prywatnego, Tom 7, p. 629). According to the rules on the storage contract (CC art. 858) the storage house is obliged to inform the client about events important from the point of view of the client or relating to the conditions of the goods accepted for storage, unless such a notification is not possible.

SPAIN An obligation to inform especially exist when the client is a consumer, cf. art. 13 LCU. More generally, if the nature of the good has brought about that the storage has led to defects, the storehouse (or its staff) must warn the client thereof. In the case of intentional or grossly negligent failure to do so brings about that the storehouse cannot invoke a limitation or exemption clause, cf. CC art. 1102 and 1103. Doctrine extends the effects of these provisions to negligent behaviour.

Article 4:110: Risks

(1) This Article applies if the thing is destroyed or damaged due to an event for which the storer cannot be held accountable and which the storer could not have avoided or overcome.

(2) If, prior to the event mentioned in paragraph (1), the storer had notified the client that the client was required to accept the return of the thing, the client must pay the price. The price is due as of the occurrence of the event and the moment that the storer returns the remains of the thing, if any, or the client indicates that the client does not want the remains of the thing. In the latter case, the storer may dispose of the remains of the thing at the client's expense.

(3) If the parties had agreed that the storer would be paid for each period of time that has elapsed, the client must pay the price for each period that has elapsed before the event mentioned in paragraph (1) occurred.

(4) If, after the event mentioned in paragraph (1) occurred, further performance of the contract is still possible for the storer, the storer is required to continue performance of the contract. The client is, however, entitled to cancel the contract under Article 1:115 (Cancellation of the Service Contract); the consequences of such cancellation are governed by that provision.

(5) If, in the situation mentioned in paragraph (1), performance of the contract is no longer possible for the storer:

(a) the client does not have to pay for the service rendered; the storer's entitlement to a price under paragraph (3) is not affected by this provision; and

(b) the storer must return to the client the remains of the thing unless the client indicates that the client does not want the remains of the thing. In the latter case, the storer may dispose of the remains of the thing at the client's costs.

Comments

A. General Idea

Sometimes the thing handed over for storage is damaged or destroyed without any fault or other cause attributable to the storer. Under the previous Article, the client must be informed thereof when the thing is returned to the client. If the storer proves that the damage was caused by an impediment beyond his control, he is not liable for the damage. In that case, the damage to or destruction of the thing is to be borne by the client. It is, however not clear whether the client still has to pay for the service he ordered.

In this Article, a distinction is made between the situation where the storer had already informed the client that he was required to accept the return of the thing or the client himself had asked its return and the situation where the storer had not yet indicated that. In the former situation, the client bears the consequences of the unfortunate event: he must still pay the price for the service rendered, even though he cannot enjoy the benefit of the thing anymore.

> *Illustration 1*
> A shipment of 1,000 DVD players is stored at a warehouse for two months. When the two months have passed, the storer requires the client to take the DVD players back, as the storage facility is needed for storage of other things. Before the DVD players are collected, the warehouse is struck by lightning; in the resulting fire, the DVD players are damaged. The storer need only return the remains of the DVD players if the client is still interested in them, but the client is required to pay the price for the service that was rendered.

In the latter situation, a further distinction must be made as to whether performance of the service is still possible or not. If prolonged storage is still possible (and reasonable), the storer is to continue storing the thing, unless the client cancels the contract.

> *Illustration 2*
> A shipment of 1,000 DVD players is stored at a warehouse for two months. Before the contractual period has ended, a fire breaks out. Because of water damage, the DVD players are damaged, but not destroyed. The storer must continue storage, unless the client cancels the contract.

If storage is no longer possible, the storer is not entitled to payment and must return the thing or what remains thereof to the client if the client wants to receive the thing or what remains thereof.

> *Illustration 3*
> Because the DVD players are damaged to such an extent they are of no further use. In this case, the storer must return the remains of the DVD players to the client if the client so requests, but does not have the right to payment.

As storage contracts usually are long-term contracts, the parties will often have agreed upon payment per period. The client is still required to pay for the periods that have ended even if future performance is no longer possible.

Illustration 4
A shipment of 1,000 DVD players is stored at a warehouse for two months. The parties have agreed upon monthly payment, to be paid after the relevant month has ended. When exactly one month has passed, a fire breaks out, destroying the entire shipment. The client need only pay for the first month of storage.

B. Interests at Stake

The question to be answered here is who should bear the consequences of the unfortunate destruction or deterioration of the thing. In most cases, the causes for non-performance will be attributed to one or the other party. Damage caused by natural disasters such as landslides and flooding, for instance, will occur less frequently because storers will have taken precautionary measures – failure to do so when such measures should have been taken implies a non-performance by the storer – and public authorities have taken preventive measures as well. Yet, where such damage does occur and no duty of care or other obligation burdening on the storer was breached, the question needs to be answered who should bear the consequences of the unfortunate destruction or deterioration of the thing that was stored.

In this respect, the question also arises whether the storer may still claim performance of the client's obligation to pay the price when the thing has been destroyed or damaged due to an incident for which the storer cannot be held liable.

C. Comparative Overview

The consequences of *force majeure* to the performance of a storage contract do not attract much attention in legal systems. In storage contracts, the risk of unfortunate destruction or deterioration of the thing is generally on the client, who is the owner of the thing. However, the storer will have to prove the unfortunate nature of the destruction or deterioration of the thing, since he is under an obligation of result. Only in GERMANY, some attention has been paid to the question whether the destruction of the thing leads to the storer losing his right to payment. It is under discussion whether such a right does not exist as to the period in which further storage is no longer possible; the prevailing opinion in legal literature seems to be that such a right is lost also for periods that have already elapsed.

D. Preferred Option

It should be emphasised that the practical relevance of the present Article is relatively low. Many events that were once considered unforeseeable or insurmountable are now

within the reach of affordable preventive measures. As a consequence, the storer will have far-reaching duties to protect the thing against the consequences of events coming from the outside under Article 4:105. However unexpected events for which the storer cannot be held accountable may still occur.

If the client or the storer had already indicated that the thing was to be returned, but the client had not yet collected the thing, the client bears the consequences of the unfortunate event, as he must still pay the price for the service rendered, even though he will not longer be able to enjoy the benefits of the thing. For the only reason why the storer still had the thing under his control was that the client had not yet collected the thing; in such cases, it is deemed to be fair that the client bears the consequences thereof.

In the situation where the desire to have the thing returned had not yet been communicated to the other party, the consequences of the unfortunate event are covered by Article 8:108 PECL (Excuse Due to an Impediment). If the non-performance is not excusable under this Article and prolonged storage is still possible (and reasonable), the storer is to continue storing the thing, unless the client cancels the contract. In the case the storer continues storing, the storer is entitled to the contractual price; in the case the client cancels the contract, the storer is entitled to the contractual price minus expenses saved because of the fact that the storer is not required to continue storage. Where the parties had agreed upon payment per period, the client need only pay for the periods that passed before the unfortunate event took place. If storage is *no* longer possible or reasonable, the storer is not entitled to payment and is to return the thing or what remains thereof to the client if the client wants to receive the thing or what remains thereof. However, as storage contracts usually are long-term contracts, the parties will often have agreed upon payment per period. Paragraph (3) states that the client is still required to pay for the periods that have passed, even if future performance is no longer possible.

E. Relation to PECL and Other Parts of the Principles

The present Article builds on Article 8:108 PECL (Excuse Due to an Impediment). Under that Article, an impediment beyond the processor's control leads to an excused non-performance. If, because of that event, the thing supplied by the client is destroyed or deteriorated, the storer is not liable for that loss under the present Article either; yet, if and insofar as performance is still possible, the storer must in principle still perform or, as the case may be, again.

The subject of the present Article is the same as Article 2:108 (Risks) and Article 3:109 (Risks) in Chapter 3 (Processing). However, contrary to the situation under a construction contract, and unless the thing is commingled with other things, the client is normally the owner of the thing. As a consequence thereof, the situation that the risk is completely on the storer normally does not occur under a storage contract.

F. Risks in the Case of Destruction of or Damage to the Thing in Storage Contracts

In the case of unfortunate destruction of the thing or damage to it, the risk of the loss of the thing itself is on the owner of the thing *(res perit domino)*. Total loss of the thing, therefore, will normally have to be borne by the client, who is the owner. The present Article states what the consequences of unfortunate destruction or deterioration of the thing are.

Paragraph (1) states when the Article applies. To that extent, it makes use of the wording of Article 8:108 (Excuse Due to an Impediment) to describe the unfortunate event. Paragraph (2) deals with the situation in which the service was about to end. It provides that, from the moment the storer had indicated – with good reason – that he wanted the client to accept the return the thing, the whole risk of unfortunate destruction is transferred to the client. The transfer of risk is justified here by the fact that the only reason why the storer still had the thing under him is the client had not yet collected it, although his obligation to accept the return of the thing already has become due when either the storer or the client had indicated that storage of the thing was to be ended. Whether or not the client was late in accepting the return of the thing, does not matter here: as the storer cannot be blamed for the unfortunate event, in this situation there is no reason to burden the storer with the negative consequences of that event: that risk should be on its owner, i. e. the client.

Paragraph (3) deals with the situation in which the parties have agreed upon payment per period that has elapsed. Such payments will normally be agreed upon in the case of storage contracts. The paragraph provides that a price that has become due, remains due, irrespective of whether performance is still possible (paragraph (4)) or not (paragraph (5)).

Paragraph (4) states that, if performance is still possible, the storer is required to continue performance. However, the last sentence of the paragraph makes clear that if further performance has become of no use to the client, he may cancel the contract and that the consequences as to the price will be dealt with under Article 1:115 (Cancellation of the Service Contract). Paragraph (5), finally, explains that if performance is no longer possible, neither the storer nor the client is required to continue performing the contract and that the client is not required to pay the price for the service which, unfortunately, did not lead to a positive outcome. Paragraphs (4) and (5) therefore attribute the *Preisgefahr* to the storer, who may, however, burden the client with that risk by demanding payment per period.

G. Burden of Proof

The storer is to prove the unfortunate nature of the event that caused the destruction or deterioration of the thing.

H. Character of the Rule

The Article contains default rules.

I. Remedies

No remedies stem from this Article.

Comparative Notes

1. Specific performance in storage contracts

The client is in theory entitled to specific performance in AUSTRIA, cf. CC arts. 932 ff; FRANCE, cf. Ghestin/Jamin/Billiau, Les effets du contrat, no. 450; and THE NETHERLANDS, cf. Asser [*-Hartkamp*], Verbintenissenrecht I, no. 190. However, in practice, in the case of a storage contract, the client asks for damages rather than for specific performance as this will better serve his needs. In ENGLISH law, for that reason a claim for specific performance will not be allowed as it does not meet the requirements set out in *Beswick v Beswick* [1968] AC 58.

No information from BELGIUM, DENMARK, FINLAND GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN and SWEDEN.

National Notes

1. Specific performance in storage contracts

AUSTRIA Although a-typical for storage contracts, in theory the normal rules of CC arts. 932 ff apply. Under CC art. 932 para. 1 and 2, the client's primary right would be the right to specific performance, consisting – in the case of a storage contract – in the form of repair of the defect, unless specific performance is impossible or brings about disproportionate costs for the storehouse compared to other remedies the client may have, cf. CC art. 932 para. 2. The repair must take place within a reasonable period and with as little inconvenience as possible, cf. para. 3. In practice, for storage contracts the right to damages will prevail.

ENGLAND Specific performance is available only in the discretion of the court, and awarded only if it would be 'the more appropriate remedy' and lead to a 'just result', cf. *Beswick v Beswick* [1968] AC 58. Such will normally not be the case for storage.

FRANCE The client is entitled to invoke specific performance or any other remedy the requirements of which have been met. Cf. Ghestin/Jamin/Billiau, Les effets du contrat, no. 450. The normal remedy, however, is a claim for damages.

GERMANY A right to specific performance does not exist. The client will normally need to claim damages.

THE NETHERLANDS The right to claim specific performance may be exercised with regard to the storehouse's primary obligation, but also with regard to its secondary obligation to exercise due care as follows from CC art. 6:27 (obligation to provide care for a specific good to be delivered to the creditor) or from CC art. 7:602 (obligation to provide due care in the execution of a storage contract). However, a claim for specific

performance of such an obligation is rare. Cf. Asser [*-Hartkamp*], Verbintenissenrecht I, no. 190.

POLAND The general rule of the Polish contract law is the rule of the real performance of the contract. Normally, the creditor is entitled to ask first for the performance of the debtor's obligations.

Article 4:111: Remedies for Non-Conformity

In the case of non-conformity under Article 4:107, the client may resort to any of the remedies under Chapter 9 PECL (Particular Remedies for Non-Performance).

Comments

A. General Idea

This Article states that the consequences of non-conformity are governed by the general rules on remedies in PECL. In that respect, it differs from Chapters 2 (Construction) and 3 (Processing), where in effect a hierarchy of remedies exists, making specific performance the primary remedy. In storage contracts, the primary remedy in practice is damages.

Illustration 1

A client orders the storage of 2,000 bottles of wine. As the storer is unfamiliar with the storage of wine and fails to inquire about the conditions under which wine is to be stored, the storer accidentally stores the bottles at too high a temperature. As a consequence, the wine is spoilt.

As the bottles of wine cannot be returned in as good a condition as the client could reasonably expect them to be returned, this is a case of non-conformity. The storer is therefore liable for damages; moreover, the client may terminate the contract for fundamental non-performance, thus freeing himself from the obligation to pay the price for storage.

B. Interests at Stake and Policy Considerations

What should the remedies be if the storer has failed to perform the contract properly? One could argue that all normal remedies should be available to the client provided that the conditions for their application have been met. On the other hand, readily allowing termination in storage contracts could increase the importance of qualification of the contract as a storage contract instead of as part of a processing contract, as Article 3:111 (Resort to Other Remedies) gives priority to specific performance over termination. It might be tempting for a client to argue that when the processor has, for instance,

finished repairing the thing handed over to him, a new contract of storage has been tacitly concluded, and that the thing was damaged when the second contract was already in force. If that were the case, termination would be possible, unless the present Chapter would include a similar priority of specific performance over termination. If, on the other hand, the entire contract is considered to be a processing contract, termination would in any case only be possible if repair is no longer possible or if the processor fails to repair the thing in time. Similar qualification problems arise in the case where a movable thing is constructed or sold, and the constructor or seller temporarily remains in factual possession of the thing after the thing has been constructed or the contract has been concluded, as both Chapter 2 (Construction) and the Principles of European Sales Law include a similar hierarchy of remedies as does Chapter 3 (Processing), giving priority to specific performance. These qualification problems (and potential litigation on the matter) could be prevented if Chapter 4 (Storage) would include the priority of specific performance as well.

C. Comparative Overview

In practice, the main remedy in the case of non-performance of the storer is damages. The client is entitled to damages if the storer has negligently caused damage in AUSTRIA, and in effect also in ENGLAND and FRANCE. In other legal systems, e. g. in GERMANY, THE NETHERLANDS and, in the case of consumer contracts, in SWEDEN, negligence is not required as long as the non-performance can be 'attributed' to the storer, i. e. unless the storer proves an impediment beyond his control *(force majeure)*. The right to termination exists in ENGLAND if the storer did not exercise reasonable care and skill; in most other legal systems, the situation is the same, albeit that in some legal systems a decision by the court is required for termination.

Some legal systems, notably AUSTRIA, FRANCE and THE NETHERLANDS, acknowledge the client's theoretical right to specific performance. However, in practice the client will ask for damages rather than for specific performance, as the former will better serve his needs. In ENGLISH law, as it is generally thought that a claim for damages better serves the client's needs, a claim for specific performance will normally not be allowed under storage contracts.

D. Preferred Option

Introduction of a hierarchy of remedies could prevent litigation problems between, on the one hand, the present Chapter and, on the other hand, Chapters 3 (Processing) and 2 (Construction) and the Principles of European Sales Law. Yet, it would be very artificial and misleading to have such a hierarchy in the case of a storage contract, for it would convey the idea that specific performance is normally available and appropriate. Such is, however, not the case. In practice, specific performance will usually not be available to the client, as the storer will probably not be able to repair the defect or only at unreasonably high costs. Furthermore, the most adequate remedy for non-performance of a storage contract will normally be damages. Exactly that remedy is not

blocked under Chapters 2 (Construction) and 3 (Processing) and under the Principles of European Sales Law.

Occasionally, the client may be interested in claiming specific performance of a method of storage agreed upon by the parties or of the obligation to take safety measures, as this may prevent damage to the thing. Such a claim would be available under the Principles of European Contract Law too, provided of course that the client is aware that the storer does not fulfil his obligations while the thing is in storage. However, in reality he will not have that information, rendering a claim for specific performance a rather theoretical possibility. Under these circumstances, there is not sufficient reason to derogate from the normal rules of the Principles of European Contract Law. Therefore, the client may choose any of the remedies under the Principles of European Contract Law available to him, provided that the conditions for their application have been met.

E. Relation to PECL and Other Parts of the Principles

Article 8:101(1) PECL (Remedies Available) states that, whenever a party does not perform an obligation under the contract, the aggrieved party may resort to any of the remedies states in Chapter 9 (Particular Remedies for Non-Performance). The Principles of European Contract Law, therefore, start from the idea that the client may freely choose from among the remedies available to him. Article 2:109 (Specific Performance and Cure) and Article 2:110 (Resort to Other Remedies) in Chapter 2 (Construction), and Articles 3:110 (Specific Performance and Cure) and 3:111 (Resort to Other Remedies) in Chapter 3 (Processing) derogate from that idea by introducing a hierarchy of remedies, introducing specific performance as the main remedy for both construction and processing contracts. The present Article returns to the main rule of Article 8:101(1) PECL (Remedies Available) in stating that, in the case of non-conformity under Article 4:107, the client may resort to any of the remedies stated in Chapter 9 (Particular Remedies for Non-Performance).

F. Burden of Proof

The burden of proof is on the party that wishes to profit from applicability of this Article.

G. Character of the Rule

This Article contains default rules only. The parties may wish to make more explicit arrangements for the remedies in the case of defects, including more lenient or more restrictive provisions as to the right to terminate the contract.

H. Remedies

This Article is a remedies Article.

Comparative Notes

1. *Price reduction and termination*
The client is entitled to price reduction and, insofar as the defect is not minor, termination, cf. AUSTRIA, CC art. 932 para. 1 and 4. In GERMANY and THE NETHERLANDS, the client is entitled to termination of the contract under CC art. 323 and CC art. 6:265; given the type of contract, it is not likely that the storehouse be given a chance to repair. In ENGLAND, a right to terminate the contract exists if the storehouse has not exercised reasonable care and skill, cf. E. McKendrick, Contract Law, p. 208-209. The same holds true for FRANCE, where a court decision is required for termination, cf. CC art. 1184. A right to price reduction so far has not been accepted in ENGLISH law, cf. *White Arrow Express Ltd. v. Lamey's Distribution Ltd* [1996] Trading Law Reports 69. The right to price reduction and termination, at least in theory, are subordinate to the right to specific performance in AUSTRIA, cf. CC art. 932 para. 4.
No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND, SPAIN and SWEDEN.

2. *Damages*
The client is entitled to damages if the storehouse has negligently caused the damage in AUSTRIA, cf. CC art. 933a para. 1; in effect also ENGLAND, cf. E. McKendrick, Contract Law, p. 383; FRANCE, CC art. 1142, 1147. In GERMANY (cf. CC art. 280 para. 1), THE NETHERLANDS (cf. CC art. 6:74-75) and, in the case of a consumer contract, SWEDEN (cf. art. 31 KTjL) negligence is not required, as long as the non-performance can be 'attributed' to the storehouse, i. e. unless the storehouse proves *force majeure*. In AUSTRIA, a claim for damages can only be made within 30 days after the good is returned to the client, cf. CC art. 967; Rummel [*-Schubert*], Kommentar ABGB, art. 967 no. 3; Koziol and Welser, Bürgerliches Recht II, p. 184.
No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SPAIN.

National Notes

1. *Price reduction and termination*
AUSTRIA The client is entitled to price reduction and, insofar as the defect is not minor, termination, cf. CC art. 932 para. 1 and 4. These rights are, however, subordinate to the right to specific performance, cf. CC art. 932 para. 4.
ENGLAND A right to terminate the contract only exists if the debtor has breached an obligation that may be qualified as a condition of the contract. An implied term, such as the requirement to exercise reasonable care and skill (cf. Supply of Goods and Services Act 1982 s. 13), is a condition of the contract, cf. McKendrick, Contract Law, pp. 208-209. A right to price reduction on the grounds that only a part of the service was rendered, is debated, but so far has not been accepted in ENGLISH law, cf. *White*

Arrow Express Ltd. V Lamey's Distribution Ltd [1996] Trading Law Reports 69; the client would have to claim damages in stead.

FRANCE The client may choose between all remedies available to him; however, termination for non-performance requires a decision by the court, cf. CC art. 1184.

GERMANY The client is entitled to termination of the contract under CC art. 323; given the type of contract, it is not likely that the storehouse be given a chance to repair, cf. CC art. 323 para. 3.

THE NETHERLANDS The client may terminate the contract for non-performance of the requirements of CC art. 6:265 have been met, *i. e.* if the storehouse's non-performance can't be undone and is serious enough to justify termination. Such will often be the case, especially if damage has resulted from the storehouse's non-performance. Price reduction takes the form of partial termination, cf. CC art. 6:270.

POLAND In such case CC art. 493 applies, which refers to the effects of non-performance of obligations resulting from mutual contracts. According to para. 1 if one of the performances became impossible as a result of the circumstances for which the party obliged is liable, the other party may, according to its choice, either demand the redress of the damage resulting from the non-performance of the obligation or to renounce the contract. In case of partial non-performance the other party may renounce the contract if partial performance would have no significance for it in view of the intended purpose of the contract, known to the party whose performance become partly impossible (CC art. 493 para. 2).

2. *Damages*

AUSTRIA The client is entitled to damages if the storehouse has negligently caused the damage, CC art. 933a para. 1. However, a claim for damages can only be made within 30 days after the good is returned to the client, cf. CC art. 967; Rummel [*-Schubert*], Kommentar ABGB, art. 967 no. 3; Koziol and Welser, Bürgerliches Recht II, p. 184.

ENGLAND Every breach of an obligation under the contract gives the creditor to that obligation the right to recover damages, unless the liability for breach has been effectively excluded by a valid and appropriately drafted exclusion clause, cf. E. McKendrick, Contract Law, p. 383. The client can claim the actual value of the good that was lost; further damages (e. g. to compensate consequential loss) may be claimed only if it was within the reasonable expectations of the parties at the time of the conclusion of the storage contract, cf. Chitty on Contracts (McKendrick), no. 33-047.

FRANCE The client is entitled to claim damages according to general contract law. See also art. 1933 CC *a contrario*. If the storehouse can't return the good, he must indemnify the client by paying the value of the good, cf. Huet, Les principaux contrats spéciaux, no. 33152.

GERMANY The processor is required to compensate personal injury and or damage to goods of the client or of third parties caused by a breach of a contractual obligation, unless the breach can't be attributed to the storehouse (CC art. 280 para. 1). Damages for delayed performance may be demanded if the storehouse is in default with the performance of the contract, CC art. 286.

THE NETHERLANDS The client has the right to compensation of the damage caused by the storehouse's non-performance, cf. CC art. 6:74 ff. Negligence is not required, it is sufficient that the contractual breach leading to the damage can be 'attributed' to

the storehouse according to common opinion; it is up to the storehouse to prove it cannot be attributed (cf. CC art. 6:74-75).
POLAND According the general rule of the POLISH CC the debtor is obliged to redress the damage resulting from the non-performance or improper performance of the obligation unless the non-performance or improper performance were due to the circumstances for which the debtor is not liable (CC art. 471).
SWEDEN The consumer can claim damages under art. 31 KTjL, unless the service provider can show that there was an obstacle outside his control hindering him from performing correctly, which he could not reasonable have been expected to take into account at the conclusion of the contract and which consequences he could not reasonably have avoided or overcome.

Article 4:112: Limitation of Liability

In contracts between two parties that both act in the course of their business, a term restricting the storer's liability for non-performance to the value of the thing is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability), unless the damage was caused intentionally or by way of grossly negligent behaviour on the part of the storer or any person for whose actions the storer is responsible.

A. General Idea

The present Article creates a relatively safe 'haven' for a specific type of limitation clauses in storage contracts: if in a contract between two professional parties the storer's liability is limited to the value of the thing before storage, that clause is presumed to be fair and reasonable within the meaning of the general Article 1:114(2) (Limitation of Liability).

Illustration 1
A company specialised in improving foodstuffs harvested 15,000 kilograms of genetically modified grain. As the company lacks storage capacity, the grain is stored in a huge silo operated by a professional storer of grain. At the time of storage, genetically modified grain is not approved for consumption or distribution in the food chain. Due to the somewhat negligent behaviour of an employee of the storer, the grain is accidentally mixed with normal grain and sold as seed for new crop. When the error is noticed, the harvest of 2,000 farmers is destroyed; the farmers claim damages from the producer of the genetically modified grain on the basis of public regulations, which state that the producer of grain is strictly liable for any damage caused by the grain before approval for distribution in the food chain. When the producer claims damages from the storer, the storer invokes a limitation clause restricting his liability to the market value of the grain at the time it was stored.

As both the producer of the grain and the storer act in the course of their business, the limitation clause is presumed to be fair and reasonable.

The presumption can only apply if the damage sustained by the client is larger then the value of the stored thing. When the damage is less, the validity of a term limiting or excluding damages is to be determined under Article 1:114(2) (Limitation of Liability). However, as the damage is even less than the value of the thing, such a clause will, at least in commercial cases, usually be considered fair and reasonable within the meaning of that Article.

Illustration 2
A large oil company lacks storage capacity and therefore has 10,000 barrels of oil temporarily stored at a storage location, owned by a commercial refinery. In their contracts the parties included a clause limiting the refinery's liability to the value of the oil at the time of storage and excluding liability if there is damage that amounts to less than the original value of the oil. An employee of the refinery accidentally misplaces the oil. As a result of the employee's error, the refinery cannot deliver the oil, as agreed, within four hours after having been requested to return the oil, and only succeeds in doing so 72 hours later. In the meantime, due to fluctuations in the market price, the value of the stored oil has dropped considerably, resulting in a significant loss for the oil company.

As the damage is less than the original value of the oil, the presumption of the present Article does not apply; whether the clause is valid or not, is to be determined under Article 1:114(2) (Limitation of Liability). It seems, however, likely that the exclusion will be upheld by a court.

The presumption of fairness does in any case not apply if the damage was caused intentionally or by way of grossly negligent behaviour on the part of the storer or any person for whose actions he is responsible. Clauses limiting liability even in those cases are always subject to the normal test of Article 1:114(2) (Limitation of Liability); moreover, one may doubt whether such a clause would withstand that test.

Illustration 3
A large oil company has 10,000 barrels of oil temporarily stored at a storage location, owned by a commercial refinery. In their contract, the parties included a clause limiting the refinery's liability to the value of the oil at the time of storage. An employee of the refinery, against regulations, smokes a cigarette and carelessly throws away the stub. The stub causes the oil barrels to explode, leading to an inferno at the refinery.

As in this case the employee's actions may be considered to constitute gross negligent behaviour, the presumption of the present Article does not apply; whether the clause is valid or not, is to be determined under Article 1:114(2) (Limitation of Liability). Given the seriousness of the employee's conduct, the clause will probably not be upheld by a court.

B. Interests at Stake and Policy Considerations

Article 1:114(1) (Limitation of Liability) bans all clauses in which the liability of the storer for death or personal injury caused by the performance of the service is limited or excluded. Article 1:114(2) (Limitation of Liability) states that the storer may limit or exclude his liability for other damage if, at the time of conclusion of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case. This does, however, lead to case-by-case appreciation of exemption and liability clauses, causing great uncertainty for legal practice as to the validity of such clauses. As a result, parties will have an interest in litigating the question whether or not the clause can be invoked. It would certainly benefit commercial practice if more guidance could be given in this matter. The question then arises whether the present Chapter should contain a specification of the general provision, indicating that particular clauses are deemed or presumed to be fair and reasonable in a storage contract. A further question would be whether such a clause would also be upheld in a case where damage was caused intentionally or by way of grossly negligent conduct. On the other hand, introducing such a general rule would take away much of the flexibility an open text such as Article 1:114(2) (Limitation of Liability) provides to find an appropriate solution for the case at hand. Moreover, one could argue that one should distinguish between commercial contracts and consumer contracts, in the sense that a general rule is more acceptable in commercial contracts than in consumer contracts.

C. Comparative Overview

Exemption or limitation of liability of the contracting party himself or his managerial staff is generally considered to be void if the damage was caused intentionally or by way of grossly negligent behaviour. In a consumer case, exemption or limitation of liability is not valid in ENGLAND, SPAIN, and SWEDEN, but may very well be valid in AUSTRIA and THE NETHERLANDS. In some legal systems, e. g. GERMANY, ITALY and probably PORTUGAL, exclusion clauses in standard contract terms are considered void even in a commercial case, and limitation clauses are at least viewed with suspicion. In other legal systems, e. g. FRANCE and possibly BELGIUM and PORTUGAL, it is even thought that any exclusion clause is to be considered void, and limitation clauses are viewed with suspicion. By contrast, in other legal systems, e. g. AUSTRIA, ENGLAND, THE NETHERLANDS and SWEDEN, exclusion or limitation of liability is normally allowed, albeit that some legal systems insist on careful scrutiny of such a clause if storage is for a price.

D. Preferred Option

At present, the legal systems are divided as to the acceptability of limitation clauses. In this Chapter, an in-between solution is followed by the introduction of so-called 'safe havens' for commercial storage contracts. In such contracts, a clause restricting the storer's liability for non-performance to the value the thing had before storage is *presumed* to be fair and reasonable. The presumption, however, is not generally applied.

Firstly, it does not apply in cases where damage was caused intentionally or by way of grossly negligent conduct. In this respect, it is remarked that, even though one might argue that a clause excluding or limiting liability could sometimes be fair and needed, it cannot be argued convincingly that a clause limiting or excluding liability even in those cases should *always* or even *normally* be considered to be 'fair and reasonable'. Therefore, clauses excluding liability for damage caused intentionally or by way of grossly negligent conduct must be excluded from the present Article. Whether such clauses are valid or not is to be determined on the basis of Article 1:114(2) (Limitation of Liability). It should be noted that, given the fact that such a clause is not allowed in most legal systems and is met with strong reservations in most other legal systems, it is not very likely that such a clause would be considered 'fair and reasonable' under that provision.

Secondly, the client may prove that, despite the presumption in this Article, in the case at hand the clause cannot be considered fair and reasonable. It should be noted that the proof thereof will also be difficult, as the present Article aims at providing practice with hard and fast rules for one of the most important types of exclusion or limitation clauses in storing contracts. That goal cannot be achieved if proof of the opposite were easily accepted.

Thirdly, the presumption only applies to *commercial* cases. In consumer cases, the damage inflicted by a non-performance on the part of the storer is normally fairly limited. Usually, both the extent of the damage and the risk of its occurrence are not so extreme that they cannot be borne by the storer. There is, therefore, insufficient reason to introduce a 'safe haven' for consumer cases. This does not mean that a clause limiting liability in a consumer case cannot be accepted; whether the clause is valid is to be determined in accordance with the test of Article 1:114(2) (Limitation of Liability). It should, however, be noted that, as many legal systems are very suspicious of limitation or exemption clauses in consumer storage contracts, it is far from certain that such a clause would pass that test.

E. Relation to PECL and Other Parts of the Principles

Article 1:114(1) (Limitation of Liability) states that clauses that limit or exclude liability for death or personal injury caused during the performance of the service are not allowed. Paragraph (2) adds that other exemption or limitation clauses are allowed if, at the time of conclusion of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case. The present Article contains a specification of that rule. It provides that an important type of limitation clauses, which is used frequently in storage contracts, is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability). The rule facilitates commercial practice by giving a relatively hard and fast rule, making clear which party to the contract be required to insure the thing. For other clauses – as well as for the same clause if it is used in a consumer contract – the general provision of Article 1:114(2) (Limitation of Liability) applies as to the determination of their validity. In determining so, the court will generally take into account, among other things, the nature, extent and foreseeability of the risk involved in the storage, the frequency of materialisation of

the risk and the possibility of preventing the materialisation of the risk and the costs thereof, the extent of the remuneration in relation to the risk, the possibility and costs of insurance coverage by the storer and by the client, the capacity and experience of the storer and that of the client, and whether or not the term was individually negotiated.

The present Article only deals with clauses limiting or excluding liability in a commercial storage contract. Clauses limiting or excluding liability are also frequent in consumer contracts. Again, whether such clauses are valid or not is to be determined on the basis of Article 1:114(2) (Limitation of Liability). It should be reiterated that Article 1:114(2) (Limitation of Liability) calls for a case-by-case appreciation of exemption and liability clauses, taking into account all the circumstances of the case that are known to the parties at the time the contract is concluded.

Illustration 4
A consumer wearing an expensive fur coat enters a local pub. The consumer has his coat stored in the guarded cloakroom for the price of € 0.50. When the pub is about to close, the coat appears to have been mistakenly given to another client who had a similar, yet fake fur coat stored in the same cloakroom.

In this case, the consumer, when handing over his fur coat, must have realised that even though the cloakroom was guarded there was a possibility that the pub would not have taken many precautionary measures to prevent damage to or loss of the coat. A court may, therefore, find that it is fair and reasonable to limit or exclude liability, provided that the client could reasonably have been aware of the limited liability. To that extent, a clearly visible sign at the place of storage would suffice.

In this respect, it should be noted that if limitation or exclusion clauses were never accepted, this might lead to either the service of storage of coats no longer being offered clients, in which case all clients would run the risk of damage to or loss of their coats during their visit to the pub, or the pub refusing to store expensive coats and only accepting ordinary coats for storage.

Illustration 5
A consumer wearing an expensive fur coat enters the local opera house. The coat is stored in the guarded cloakroom for free. After the performance, the coat appears to have been mistakenly given to another client.

In this case, the client may reasonably have expected the opera house to take sufficient precautionary measures to prevent the occurrence of such an event. For that reason, and given the fact that storing pertains to the storer's main obligation, a court may find that it is not fair and reasonable to limit or exclude the storer's liability.

F. Burden of Proof

The burden of proof that a limitation or exemption clause falls within the scope of the present Article is on the storer. In principle, this would mean that the storer would have

to show that the damage was not caused intentionally or by way of grossly negligent behaviour, although the court may, on the basis of the circumstances of the case, choose to place that burden on the client or to give at least prima facie evidence that the damage was in fact caused by such conduct.

G. Character of the Rule

The Article contains a default rule, which only applies if both parties act in the course of their business. The parties may agree upon a stricter regime for liability.

H. Remedies

If a clause is not valid under this Article, the storer is liable to pay damages under Article 9:501 PECL (Right to Damages), without prejudice to other remedies the client may be entitled to under Chapter 9 PECL (Particular Remedies for Non-Performance), as Article 4:111 states.

Comparative Notes

1. *Limitation of liability in case of damage caused intentionally or grossly negligent*
   Exemption or limitation of liability of the contracting party itself or its managerial staff is generally considered to be void if the damage was caused intentionally or by grossly negligent behaviour, cf. AUSTRIA, CC art. 879 para. 1; BELGIUM, Herbots 1980, p. 275; FRANCE, Huet, Les principaux contrats spéciaux, no. 33158; GERMANY, Palandt [*-Sprau*], BGB, art. 688 no. 7; GREECE, CC art. 332; ITALY, CC art. 1229; THE NETHERLANDS, HR 30 September 1994, *NJ* 1995, 45 (Diepop/Nouwens); PORTUGAL, CC art. 809; SPAIN, CC art. 1102 and 1103; SWEDEN, Bernitz, Standardsavtalsrätt, p. 88.
   No information from DENMARK, FINLAND, IRELAND, LUXEMBURG and SCOTLAND.

2. *Limitation in commercial cases*
   In some legal systems, exclusion clauses in standard contract terms are considered void even in a commercial case, and limitation clauses are at least viewed with suspicion, cf. GERMANY, CC art. 307 para. 2; ITALY, CC art. 1469-bis; PORTUGAL, art. 18 sub d DL no. 446/85. In other legal systems, it is even thought that any exclusion clause is to be considered void, and limitation clauses are viewed with suspicion, cf. FRANCE, Huet, Les principaux contrats spéciaux, no. 33158; possibly also BELGIUM, Herbots 1980, p. 275; PORTUGAL, Appeal Court Oporto 6 October 1987, CJ 1987, IV, p. 231. By contrast, in AUSTRIA, ENGLAND and SWEDEN, exclusion or limitation of liability is normally allowed, cf. AUSTRIA, Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 3; ENGLAND, *Alderslade v Hendo Laundry Ltd* [1945] KB 189; SWEDEN, Bernitz, Standardsavtalsrätt, p. 88. Yet, in ENGLAND the clause may be invoked only if the storehouse can prove all the circumstances known to him in which the loss or

damage occurred, cf. *Levison v Patent Steam Carpet Cleaning Co Ltd*. [1977] 3 AllER 498, [1978] QB 69 (Court of Appeal). In THE NETHERLANDS, it is thought that such clauses have to be scrutinised carefully if storage is for a price, but that they may be justified by specific risks attached to the storage, for instance storage of a vulnerable good in which the storehouse is not specialised, cf. Pitlo-Croes [*-Du Perron*], Het Nederlands burgerlijk recht VI, p. 296. This is even true if the clause is included in a contract concluded with a consumer, cf. Hof Den Bosch 12 November 1990, NJ 1991, 537, TvC 1991, p. 128 (Herrny/Hubertushuis).
No information from DENMARK, FINLAND, IRELAND, LUXEMBURG and SCOTLAND.

3. *Limitation in consumer cases*
In a consumer case, exemption or limitation of liability is not valid in ENGLAND, cf. s. 3(2)a Unfair Contract Terms Act 1977; SPAIN, cf. art. 10, 1, under c 6 of the General Law on Consumers and Users (*Ley General de Consumidores y Usuarios*, LGCU); SWEDEN, cf. art. 9, 31 KTjL; ARN 1991-5176 of 25 May 1992. Such a clause may very well be valid in THE NETHERLANDS, cf. Hof Den Bosch 12 November 1990, *NJ* 1991, 537, TvC 1991, p. 128 (Herrny/Hubertushuis); and in AUSTRIA, as KSchG, art. 6 para. 2 no. 5 only bans limitation clauses that were not the object of negotiations between the parties.
No information from DENMARK, FINLAND, IRELAND, LUXEMBURG and SCOTLAND.

National Notes

1. *Limitation of liability?*
AUSTRIA Exemption or limitation of liability is void in the case of intentionally caused damage and in the case of severe cases of gross negligence, cf. CC art. 879 para. 1; Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 3. Exclusion or limitation of liability in standard contract terms for mere negligence is allowed, unless this would constitute an unfair contract term under CC art. 879 para. 3, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 964 no. 3. In a consumer case, KSchG art. 6 para. 1 no. 9 provides that a limitation clause is deemed to be void if it includes intentional and gross-negligent behavior or exclusion or limitation of liability in case of personal injury. Exemption or limitation in cases of mere negligence, in a consumer case, is valid only if the storehouse proves that such an agreement has been the object of negotiations between the parties, cf. KSchG art. 6 para. 2 no. 5; Koziol and Welser, Bürgerliches Recht II, p. 388.
BELGIUM The client is entitled to full compensation for the damage he has sustained, cf. Herbots, Bijzondere overeenkomsten, p. 275. Limitation of liability is not allowed.
ENGLAND As against a consumer, liability cannot be excluded or limited; cf. s. 3(2)a Unfair Contract Terms Act 1977. In a commercial case, the storehouse may exempt himself from liability, provided that he does so expressly, unambiguously and – in all the circumstances – adequately, cf. *Alderslade v Hendo Laundry Ltd* [1945] KB 189; Chitty on Contracts (McKendrick), no. 33-049. In order to be able to invoke the exemption clause, he will need to be able to prove all the circumstances known to him

in which the loss or damage occurred, cf. *Levison v Patent Steam Carpet Cleaning Co Ltd.* [1977] 3 All ER 498, [1978] QB 69 (Court of Appeal).

FRANCE In the case of a gratuitous storage contract, an exemption or limitation clause is valid, unless it applies to damage caused intentionally or gross negligently, cf. Huet, Les principaux contrats spéciaux, no. 33158. In the case of a remunerated storage contract, the validity of a limitation or exemption clause is arguable, as it pertains to the storehouse's main obligation. Yet, clauses *limiting* liability to a reasonable amount, may be considered valid; cf. Huet, Les principaux contrats spéciaux, no. 33158.

GERMANY Where storage is a main obligation, exoneration in standard contract terms is not allowed, cf. CC art. 307 para. 2. Exoneration in the case of intentional of gross negligent behaviour is never allowed in standard contract terms, cf. CC art. 307 para. 2 no. 2. Most authors tend to forbid it in individual contracts as well; cf. also art. 7 *Verordnung über das Bewachungswesen* (regulation on custody, BGBl I 1995, p. 1602-1608), which is also applicable to individual contracts and only allows limitation clauses to the extent of the insured amount. Cf. Palandt [*-Sprau*], BGB, art. 688 no. 7.

GREECE The parties may exclude liability for negligence, though any agreement that limits or excludes liability for intention or gross negligence is null (CC art. 332). Thus, limitation is envisaged only with regard to the degree of fault and not with reference to the fees or otherwise. Nevertheless, freedom of contract prevails and the parties may limit the ceiling of liability accordingly.

ITALY Parties cannot derogate from the principle established in CC art. 1229: any agreement which excludes or beforehand limits liability if the debtor in case of fraud or grave fault is null. Furthermore, under CC art. 1469-bis, clauses limiting or restricting the storehouse's liability or the consequences of the non-performance are presumed to be unfair.

THE NETHERLANDS Exemption or limitation of liability in the case of damage caused by intentional or gross negligent behaviour of the storehouse or of its managerial staff is considered to be null and void since such a clause is against *bono mores*, cf. CC art. 3:40, para. 1, HR 30 September 1994, NJ 1995, 45 (Diepop/Nouwens). Whether limitation in other cases is possible, is under debate. A nuanced approach is taken by Pitlo-Croes [*-Du Perron*], Het Nederlands burgerlijk recht VI, p. 296, stating that such clauses have to be scrutinised carefully if the storage is for a price, but that they may be justified by specific risks attached to the storage, for instance storage of a vulnerable good in which the storehouse is not specialised. This seems to be the majority view nowadays, cf. Bijzondere overeenkomsten/De Boer, to CC, art. 7:602 note 5; in effect also Paquay 1994, p. 503; cf. also – in a consumer case – Hof Den Bosch 12 November 1990, NJ 1991, 537, TvC 1991, p. 128 (Herrny/Hubertushuis).

POLAND Under POLISH law there is no possibility to exclude liability for a damage caused intentionally (CC art. 473 para. 2), however, it is possible to exclude liability for a damage resulting from a gross negligence (judgement of the Supreme Court of 6. 10. 1953, II C 1141/53, OSN 1955, nr 1, poz. 5). Moreover, the POLISH CC perceives as unfair clauses which: exclude liability for death or personal injury (CC art. 385^3 para. 1), or which exclude or limit in a significant way the liability of the professional for non-performance or improper performance of the contract (CC art. 385^3 para. 2).

PORTUGAL Liability limitations are certainly void in case of *dolus* or gross negligence, according to CC art. 809. Doctrine is divided on the issue of limitation in case of

negligence. The same goes in the case of standard contracts: DL art. 18 sub d no. 446/85. Case law is divided. Limitation of liability is most times not upheld regardless of intensity of fault. Cf. judgement of 6 October 1987 of the Appeal Court Oporto, CJ 1987, IV, p. 231: a contractual clause where the creditor forfeits any of his rights provided by law in case of non-performance or *mora debitoris* is void, regardless of the intensity of the debtor's fault.

SPAIN Limitations are void in case of *dolus* on the part of the storehouse or its staff or when the storehouse or its staff failed to warn the client of the defects arising from the nature of the good in storage, cf. CC arts. 1102 and 1103. Doctrine extends the effects of these provisions to negligent behaviour. In the case of a consumer contract, any exemption clause is void, as are limitation clauses that relate to the use or essential purpose of the service provided, cf. art. 10, 1, under c 6 of the General Law on Consumers and Users (*Ley General de Consumidores y Usuarios*, LGCU). For small business entities, a similar protection against unfair standard contract terms may be awarded under the general provision of the Statute on General Conditions of contracts (*Ley de Condiciones Generales de la Contratación*).

SWEDEN Limitation clauses are common in commercial contexts and there generally allowed, with the exception that a party cannot exclude liability for intentional breach and gross negligence, cf. Bernitz, Standardsavtalsrätt, p. 88. Otherwise, the validity of such clauses is only limited through general rules of contract law, such as the general clause in AvtL art. 36. Normally, such limitation clauses are not considered unreasonable, as long as the client has access to other remedies. In a consumer case, this is different, as provisions that derogate to the detriment of the consumer from the provisions in the Consumer Services Act are void, cf. arts. 9, 31 KTjL; ARN 1991-5176 of 25 May 1992.

Article 4:113: Liability of the Hotel-Keeper

(1) This Article does not apply if and to the extent that a separate storage contract is concluded between the hotel-keeper and any guest for any thing brought to the hotel. A separate storage contract is deemed to have been concluded if a thing is handed over for the storage to the hotel-keeper. Article 4:101(3) does not apply.

(2) A hotel-keeper is liable as a storer for any damage to or destruction or loss of a thing brought to the hotel by any guest who stays at the hotel and has sleeping accommodation there.

(3) Any thing:

(a) which is at the hotel during the time when the guest has the use of sleeping accommodation there; or

(b) of which the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge outside the hotel during the period for which the guest has the use of the sleeping accommodation at the hotel; or

(c) of which the hotel-keeper or a person for whose actions the hotel-keeper is responsible takes charge whether at the hotel or outside it during a reasonable period preceding or following the time when the guest has the use of sleeping accommodation at the hotel;

shall be deemed to be a thing brought to the hotel.

(4) The hotel-keeper is not liable insofar as the damage, destruction or loss is due to:
  (a) a guest or any person accompanying, employed by or visiting the guest; or
  (b) an impediment beyond the hotel-keeper's control under Article 8:108 PECL (Excuse Due to an Impediment); or
  (c) the nature of the thing.
(5) A term excluding or limiting the liability of the hotel-keeper is deemed not to be fair and reasonable under Article 1:114(2) (Limitation of Liability) if it excludes or limits liability in a case where the hotel-keeper, or a person for whose actions the hotel-keeper is responsible, causes the damage, destruction or loss intentionally or by way of grossly negligent conduct.
(6) Except where the damage, destruction or loss is caused intentionally or by way of grossly negligent conduct of the hotel-keeper or a person for whose actions the hotel-keeper is responsible, the guest must inform the hotel-keeper of the damage, destruction or loss without undue delay. If the guest fails to inform the hotel-keeper without undue delay, the hotel-keeper will not be held liable.
(7) The hotel-keeper has the right to withhold any thing referred to in paragraph (2) until the guest has met any claim the hotel-keeper has against the guest with respect to accommodation, food, drink and solicited services performed for the guest in the hotel-keeper's professional capacity.

Comments

A. General Idea

A guest staying at a hotel may conclude a storage contract with the hotel-keeper (who is often represented by his staff) by handing over a thing for storage. This basically occurs in two distinct cases.

> *Illustration 1*
> A Viennese hotel offers its guests the possibility of storing valuables in the hotel safe. A hotel guest hands over his passport, money and airplane ticket to the hotel-keeper for safekeeping in the hotel safe.

> *Illustration 2*
> A hotel guest stays in a hotel in Rome for three nights. As, on the day of his departure, his plane does not leave until 18.00 hrs., he asks the hotel-keeper whether he can leave his luggage at the hotel. The hotel-keeper offers to store the luggage in a special room.

According to paragraph (1), the two cases described above do not fall within the scope of the present Article, but under the rest of this Chapter. This also applies for the storage of money in the hotel safe, as follows from the last sentence of the paragraph.

A separate storage contract normally is not concluded for things stored in a hotel room, even if the thing is locked into a safe contained in the room, as the hotel is not in a position to supervise the contents of such a safe. The present Article nevertheless provides that the hotel-keeper is to be treated as if he were a storer as regards the

things the guest has brought to the hotel. This means that the duties mentioned in the previous Articles apply insofar as is possible. Treating the hotel-keeper as a storer only applies insofar as it concerns a thing 'brought to the hotel' by the hotel guest. Paragraph (3) clarifies that a thing is always considered to have been brought to the hotel if it is brought by a guest to his hotel room or if it is outside the hotel, but the hotel-keeper otherwise accepted responsibility for the thing.

Illustration 3
A hotel guest has brought a suitcase into his room and has left his car, with the permission of the hotel-keeper, in the hotel's secured parking place. Both the suitcase and the car have been brought to the hotel. Had the car been parked in the public street, the hotel-keeper would have been responsible for the car and its contents.

Moreover, the hotel-keeper is also responsible for the guest being able to take things from and bring things to his room. Therefore, things are also considered to have been brought to the hotel in the period that precedes or follows the moment the client has checked in and gone to his room, and has checked out and left.

Illustration 4
A guest wants to check into a hotel. A pickpocket steals his wallet in the hotel lobby. The hotel-keeper is liable if he did not take appropriate measures to prevent such theft in his hotel.

The hotel-keeper is, of course, only liable if he could or should have prevented anything occurring to a thing brought to the hotel.

Illustration 5
A wallet is stolen from the room of a guest. The hotel-keeper is not liable if the wallet was stolen by a visitor who had entered the room with the guest's consent, but he is liable if a chambermaid took the wallet.

Illustration 6
A fire breaks out in a hotel. The hotel staff quickly extinguishes the fire, but one room is completely destroyed, together with the things brought into it by the guest. Unless the damage can somehow be attributed to a failure on behalf of the hotel-keeper (e. g. because not enough fire-preventing measures were taken), the hotel-keeper is not liable for damages.

Illustration 7
A hotel guest brought overripe bananas to his room. The fact that the bananas will rot unless the guest immediately eats them follows from the nature of the thing brought to the hotel. The hotel-keeper will not be liable if the bananas indeed rot, nor if that causes damage to other things belonging to the guest.

B. Interests at Stake and Policy Considerations

The present Chapter primarily deals with contracts where storage is the main object of the contract. Often, storage goes together with the performance of another service. Article 4:101(2) then states that the rules of this Chapter apply to the part of the contract that involves storage, albeit with appropriate modifications. A typical situation in which a combination of services exist, is when valuables are stored in a hotel safe or when luggage is temporarily stored in a special room after the guest has checked out. One could argue that the storage rules could be applied, though modified to take into account that storage is only an ancillary obligation under the contract, which has the provision of accommodation as its main obligation. On the other hand, one could also argue that in such a case, the parties have in fact concluded two separate contracts: one for accommodation – a contract, which is governed by Chapter 1 (General Provisions) only – and a storage contract as to the storage of the valuables or the luggage. One could, however, doubt whether the storage rules should apply to the hotel-keeper who upon the guest's request stores the guest's money in the hotel safe, as Article 4:101(3) excludes the applicability of the present Chapter to the storage of money (and securities and rights). On the other hand, the reason for the non-applicability of the storage rules to the storage of money is that normally specific regulations apply to such contracts. These rules, however, do not apply to the situation where, in the course of a contract with a hotel-keeper, money is stored in the hotel safe.

In the contracts with a hotel-keeper, a second issue may arise: is the hotel-keeper responsible for damage to the guest's things while the guest is staying at the hotel? The question is difficult to answer as regards the things the guest brought into his room: as the hotel-keeper does not have free access to the room, he has no control over the things that are kept in the room. From this it follows that for such things the hotel-keeper does not act as a storer. One could, therefore, argue that the present Chapter should not govern the liability of a hotel-keeper. On the other hand, the hotel-keeper's liability for things brought to the hotel by his guest has traditionally been regulated in the same or a very similar manner as the liability of a storer. Moreover, as the hotel-keeper normally provides cleaning services and therefore does have access to the room, even if the guest has locked it, there is a serious chance that any damage that is inflicted on a thing brought to the hotel is in fact inflicted by the hotel-keeper or his staff. The situation, therefore, is not so different from real storage. One could therefore argue that the present Chapter should contain a provision on the liability of a hotel-keeper, regulating the matter in a manner similar to the storer's liability.

If a specific provision were to be included, one could argue that a hotel-keeper should only be liable for damage to the things brought to the hotel if the guest informed the hotel-keeper of the damage timely after discovery of the damage: if the guest does so only after his return, it is far more difficult for the hotel-keeper to prove that the damage was caused by somebody for whose actions the guest was responsible; moreover, the guest also deprives the hotel-keeper of the possibility of reducing the damage. This would imply that the guest would lose his right to claim damages when the hotel-keeper is not informed in good time. However, such an exclusion of liability clearly derogates from

the normal rules under the Principles of European Contract Law, where the client may lose the right to claim specific performance and termination, but not the right to damages.

Another question could be whether the hotel-keeper should be able to limit or exclude his liability in the same manner as a storer could have, or that he should have more or less possibilities of limiting or excluding liability. An argument in favour of a more stringent liability would be that the amount of damages that might have to be paid is almost always relatively low – especially if one would hold a guest to be contributory negligent if he does not keep valuables in the hotel safe when he is offered the possibility of doing so. An argument in favour of a less stringent liability is that a hotel-keeper, unlike a storer, does not have the thing in his possession and there is thus little he can do to prevent damage, deterioration or loss of the thing.

C. Comparative Overview

On 17 December 1962, under the auspices of the Council of Europe, the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests was adopted. The Convention has been ratified by twelve of the present 25 EU Member States (BELGIUM, CYPRUS, FRANCE, GERMANY, IRELAND, ITALY, LITHUANIA, LUXEMBURG, MALTA, POLAND, SLOVENIA and the UNITED KINGDOM). The Convention has been signed, but not or not yet ratified by three countries (AUSTRIA, GREECE and THE NETHERLANDS). A total of ten countries (the CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, HUNGARY, LATVIA, PORTUGAL, SLOVAKIA, SPAIN and SWEDEN) have neither signed nor ratified the Convention (status at 1 June 2004).

As the Convention has been ratified by many of the reported legal systems, it is not surprising that the rules on the liability of hotel-keepers are more or less the same in many legal systems in the European Union. Even in countries such as AUSTRIA and THE NETHERLANDS, where ratification did not take place, the rules are more or less the same. As a result of the Convention, in many of the existing codifications, hotel- and innkeepers are by statutory provision considered to be storers as regards the luggage, clothes and other objects brought to the hotel or inn by the client. In the case of damage to or loss of such things, the hotel-keeper can escape liability only if he proves that the damage was not caused by himself or his staff or another person who came to the hotel.

Things handed over to the hotel-keeper or his staff are considered to have been brought to the hotel. The Convention leaves it up to the national systems how to treat the hotel-keeper's liability for the client's car and its contents, and for animals brought to the hotel: Article 7 of the Annex to the Convention excludes these from the scope of the hotel-keeper's liability and, Article 2 (e) of the Convention allows the parties to the Convention to decide differently. In BELGIUM, Article 7 of the Annex is followed; in ENGLAND, only the liability for the client's car and its contents is excluded. By contrast, if the car is parked in a designated area, the hotel-keeper is liable in AUSTRIA, GERMANY and THE NETHERLANDS.

In THE NETHERLANDS, all rules governing the hotel-keeper's liability are default rules and no statutory limitations exist. In other legal systems, the hotel-keeper may not limit his liability if he or his staff is the cause of the damage or the thing has been handed over into the care of the hotel-keeper. In other cases, the hotel-keeper's liability is limited: in AUSTRIA to € 1,100 for most objects and to € 550 in the case of precious objects, money or securities. In ENGLAND, under the Hotel Proprietors Act 1956, the hotel-keeper is liable for an amount no greater than £ 50 for one thing or a total of £ 100 per guest. In BELGIUM, FRANCE and ITALY, the ceiling is set at 100 times the amount of the price of accommodation for one night. In GERMANY, the same ceiling exists, with a minimum of € 600 and a maximum of € 3,500; in the case of money, securities and other precious things such as fur not used as clothes, a maximum of € 800 applies. In FRANCE, liability for damage to or loss of objects placed in the client's car, parked in a closed parking place belonging to the hotel, is limited to 50 times the amount of the daily accommodation. Further exclusions or limitations of liability are normally considered to be void in AUSTRIA, BELGIUM and ITALY.

Probably as a counterbalance to the hotel-keeper's liability, in AUSTRIA, ENGLAND, FRANCE, GERMANY, THE NETHERLANDS and SPAIN the hotel-keeper is awarded a specific right of retention of the thing brought to the hotel until all charges have been paid by the client and for which he would be held liable in the case of damage; a similar right exists in SWEDEN, where specific legislation regarding the hotel-keeper's liability otherwise does not exist.

D. Preferred Option

For those things that actually *are* taken into the hotel-keeper's custody, there is no reason to deviate from the rules on storage at all. Therefore, in such a situation, the present Article does not apply, but a separate storage contract is deemed to have been concluded. As specific legislation regulating the storage of money does not apply to the storage of money in a hotel safe during the guest's stay at the hotel, the present Chapter should apply to such storage as well. The present Article therefore explicitly states that its rules do apply to the storage of such things. This is in conformity with the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests, which contains provisions on the liability of hotel-keepers for theft of money brought into their hotels or a limitation thereof.

Such a specific contract is not concluded concerning the things brought into the guest's room. Yet, even though hotel-keepers are, as regards the luggage a client leaves in his hotel room, not storers in the actual sense of the word, there is a close resemblance to the issues at stake in storage contracts and those in the present situation. The reason for the application of the storage rules is that because of the 'open character' of these places – implying that not only the staff, but also other guests and third parties may enter and leave the hotel – the client runs the risk of theft of or damage to his things, while he is not in a position to establish who is responsible for the theft or the damaging act. To remedy that, hotel-keepers are urged to take precautionary measures to prevent theft or damage, the aim of the rules being that hotel-keepers have to assure the safety of the

things their clients bring into their establishments. This implies that the present Chapter should indeed regulate the liability of hotel-keepers in a manner similar to storage contracts.

The hotel-keeper has a legitimate interest in being informed about damage in time, but there is no particular incentive for the guest to speedily inform the hotel-keeper. To provide such an incentive for the guest, the present Article states that the guest loses the right to damages if he does not timely inform the hotel-keeper.

Illustration 8
A guest's suitcase is stolen in the hotel lobby; the hotel-keeper did not take sufficient precautions and can therefore be held liable. The guest decides not to tell the hotel-keeper immediately, as he does not want to cause a scene before he has received the contents of his safety deposit box, where his passport and plane ticket are stored. Three hours later, when these are returned to the guest, he complains about the missing suitcase. Had the guest promptly informed the hotel-keeper, the hotel-keeper might have tried to catch the thief. The guest's failure to inform the hotel-keeper promptly brings about that the hotel-keeper cannot any longer be held liable.

This is different, however, if damage was caused intentionally or by way of grossly negligent behaviour on the part of the hotel-keeper or his staff: in such a case, the guest must of course inform the hotel-keeper of his claim, but there is insufficient reason to protect the interests of the hotel-keeper to the detriment of interests of the guest.

Illustration 9
A guest succeeds in proving that a chambermaid has stolen his wallet. The fact that the guest told the hotel-keeper about the theft only at the time when he was able to prove the chambermaid had taken the wallet does not deprive him of his right to damages.

The hotel-keeper may limit or exclude his liability in the same manner as a storer may. This means that the hotel-keeper may not limit or exclude liability where a guest sustained personal injury, as Article 1:114(1) (Limitation of Liability) bans such clauses in all services contracts. Under Article 1:114(2) (Limitation of Liability), other clauses may be valid if they can be considered fair and reasonable under the circumstances. It is in theory possible that a clause limiting or excluding liability even in a case where the damage is caused intentionally or by way of grossly negligent behaviour is nevertheless considered fair and reasonable, and therefore valid. However, in a contract with a hotel-keeper, the relevant damage almost always pertains to the personal belongings of the guest, even if the guest is a travelling salesman. Given the fact that, for the reasons set out in Comment B, the amount of damages that would have to be paid is almost always relatively low anyway, limitation or exclusion of the hotel-keeper's liability should not be possible if the damage was caused intentionally or by way of grossly negligent behaviour of the hotel-keeper or his staff. Article 4:113(5) therefore provides that a clause excluding or limiting the liability of the hotel-keeper even in such cases is deemed to be unfair and unreasonable.

E. Relation to PECL and Other Parts of the Principles

As is explained in Comment D, contrary to the exclusion of the storage of money in Article 4:101(3), the present Chapter as such applies if, next to a contract for accommodation to be provided by a hotel-keeper, money is handed over to the hotel-keeper for safekeeping. In other words, Article 4:113(1) derogates from Article 4:101(3).

The present Article further provides that the hotel-keeper is liable as if he were a storer concerning the things that the guest has brought to the hotel. This means that the rules of the present Chapter – as well as Chapter 1 (General Provisions) and the Principles of European Contract Law – are to be applied, even though there is no storage in the proper sense of the word. The present Article does contain some specificities, however.

Firstly, under the Principles of European Contract Law, if the client fails to inform the other party timely of a non-performance, he loses the right to claim specific performance and termination, but not the right to damages. In practice, the right to damages is the only remedy that is of interest to a hotel guest who claims that during his stay at the hotel, damage was inflicted to a thing brought to the hotel. The potential loss of his right to claim specific performance or termination will, therefore, not entice him to inform the hotel-keeper in time about the damage he discovered. To provide an incentive for the guest to inform the hotel-keeper in time, the present Article provides that the guest does lose the right to damages if he does not inform the hotel-keeper in time. The reason for this is that by not promptly informing the hotel-keeper, it is far more difficult for the hotel-keeper to prove that the damage was caused by somebody for whose actions the guest was responsible; moreover, the guest thus also deprived the hotel-keeper of the possibility of reducing the damage, see above, *Illustration 8*.

This is different, however, if the damage was caused intentionally or by way of grossly negligent behaviour on the part of the hotel-keeper or his staff: in such a case, the guest must of course inform the hotel-keeper of his claim, but he need not do so immediately, see above, *Illustration 9*.

As the rules on storage apply, the hotel-keeper may withhold any of the things that fall within the scope of his liability under paragraph (2) until the client has paid the price for accommodation, food, drinks and other solicited services provided by the storer for the client in his professional capacity. In practice, this means that, under Article 4:108(2) and Article 9:201 PECL (Right to Withhold Performance), the hotel-keeper may actively prevent the guest from taking his belongings if he has not paid what he is due. Given the practical importance of the hotel-keeper's right to withhold the things the client has brought to the hotel, and for reasons of clarity, Article 4:113(7) confirms this explicitly.

F. Relation to the Convention on the Liability of Hotel-Keepers concerning the Property of Their Guests

The present Article closely follows the Convention by copying the annex to that Convention, except the provisions on the limitation of liability. As to that exception: on the one hand, the Convention allows parties to the Convention to impose different limitations; on the other hand, the provisions in Article 4:110 PECL (Unfair Terms not Individually Negotiated) and Article 1:114 (Limitation of Liability) seem sufficient, provided that a specific provision is included to ban limitation and exclusion clauses that apply to damage caused intentionally or by way of grossly negligent behaviour on the part of the hotel-keeper or his staff. Paragraph (5) of the present Article is included to that extent.

Transition table:

Annex to Convention	Topic	PELSC or PECL
Art. 1(1)	Main rule	Art. 4:113(2)
Art. 1(2)	Description of 'movable good brought to hotel'	Art. 4:113(3)
Art. 1, paras. 3-4	Ceiling of liability	Art. 4:113(5); Art. 1:114 Chapter 1 (General Provisions); Art. 4:110 PECL
Art. 2	No ceiling of liability	Art. 4:113(5); Art. 1:114 Chapter 1 (General Provisions); Art. 4:110 PECL
Art. 3	Excuses hotel-keeper	Art. 4:113(4)
Art. 4 (and Art. 2 lit. (c) of the Convention)	Damage caused intentionally or negligently by hotel-keeper or staff	Art. 4:113(5)
Art. 5	Notification	Art. 4:113(6)
Art. 6	Limitation and exclusion clauses	Art. 4:113(5); Art. 1:114 Chapter 1 (General Provisions); Art. 4:110 PECL
Art. 7	Scope	–

G. Burden of Proof

The burden of proof as to the applicability of paragraphs (1), (2) and (5) is on the client; the burden of proof as to the applicability of paragraphs (3), (4), (6) and (7) is on the hotel-keeper.

H. Character of the Rule

The rules in this Article are default rules, except for the rules in paragraph (5), which are mandatory.

I. Remedies

The normal remedies for non-performance under Chapter 9 PECL (Particular Remedies for Non-Performance) apply, including the client's right to damages. Paragraph (7) contains a remedy for the storer in the event the client does not pay what he is due under the contract.

Comparative Notes

1. *Application of storage rules to hotel-keepers*
   In some legal systems, the rules on storage contracts are applied by statutory provision to the liability of hotel-keepers. Cf. AUSTRIA, CC art. 970 para. 1, BELGIUM, CC art. 1952 ff., FRANCE, CC art. 1952; GERMANY, CC arts. 701 ff.; ITALY, CC art. 1783-1786; THE NETHERLANDS, CC art. 7:609; SPAIN, CC art. 1783. The hotel-keeper can escape liability only if he proves the damage is not caused by himself or his staff or another person who has come to the hotel, cf. AUSTRIA, Rummel [*-Schubert*], Kommentar ABGB, art. 970 no. 13; ENGLAND, *Shacklock v Elthorpe Ltd* [1939] 3 AllER 372; SPAIN, CC art 1784. In AUSTRIA, the liability of the hotel-keeper is extended to the proprietor of a swimming pool (CC art. 970 para. 3) and to rental contracts regarding private rooms or guesthouses, provided that the risk of an 'open house' exists, but not to hospitals, restaurants, boarding schools etc.; cf. Rummel [*-Schubert*], Kommentar ABGB, art. 970 no. 2. In ITALY, the rules applicable to hotel-keepers similarly apply to nursing homes, bathing establishments, boards *(pensioni)*, trattorias, sleeping carriages and others, cf. CC art. 1786. Goods handed over to the hotel-keeper or his staff are considered to have been brought into the hotel, cf. AUSTRIA, CC art. 970 para. 2; ENGLAND, Charlesworth's Business Law [*-Kidner*], p. 551-552. The same holds true for cars and their contents if they are parked in a designated area in AUSTRIA, CC art. 970 para. 2; FRANCE, CC art. 1953 para. 3; THE NETHERLANDS, Reehuis, Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, Boek 7, 1991, p. 411; but not in ENGLAND, Charlesworth's Business Law (Kidner), p. 551-552; BELGIUM, CC art. 1954quater; in BELGIUM, the same provision excludes the hotel-keeper's liability for the animals brought to the hotel.

In BELGIUM, the client must report the damage immediately after he has become aware of it, otherwise all rights will be lost unless the damage has been caused negligently by the hotel-keeper or his staff, cf. CC art. 1954bis. The same holds true for AUSTRIA, where in addition to that a formal claim must be brought before the court within 30 days, cf. CC art. 967; Koziol and Welser, Bürgerliches Recht II, p. 189.
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

2. *Specific limitations to the hotel-keeper's liability*
When the hotel-keeper or his staff is the cause of the damage or the good has been handed over into the care of the hotel-keeper, the hotel-keeper cannot limit his liability in AUSTRIA, cf. OGH, SZ 55/7; BELGIUM,, cf. CC art. 1953 para. 2; FRANCE, CC art. 1953 para. 2; GERMANY, CC art. 702; ITALY, CC art. 1784; possibly also ENGLAND, Charlesworth's Business Law [*-Kidner*], p. 552. The hotel may require valuable objects to be handed over and to decline liability otherwise in AUSTRIA, OGH, EvBl 1977/245. In other cases, the hotel-keeper's liability is limited in AUSTRIA to € 1.100 for most objects and to € 550 in the case of precious objects, money or securities, cf. CC art. 970a. In ENGLAND, under the Hotel Proprietors Act 1956, the hotel-keeper is liable for no greater amount than £ 50 for one article or a total of £ 100 per guest. In BELGIUM, FRANCE, ITALY, the ceiling is set at 100 times the amount of the daily accommodation, cf. CC art. 1953 para. 3, CC art. 1953 para. 3, CC art. 1783 para. 3. In GERMANY, the same ceiling exists, with a minimum of € 600 and a maximum of € 3.500; in the case of money, securities and other precious things such as fur not used as clothes, a maximum of € 800 applies, cf. CC art. 702. In FRANCE, liability for damage to or loss of objects placed in the client's car, parked at a closed parking place belonging to the hotel, is limited to 50 times the amount of the daily accommodation, cf. CC art. 1953 para. 3. Further exclusions or limitations of liability is are void; cf. AUSTRIA, CC art. 970a; BELGIUM, CC art. 1954ter; ITALY, CC art. 1785.
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

3. *Specific right to withhold return of goods for hotel-keeper*
As a counterbalance to the hotel-keeper's liability, the hotel-keeper is awarded a specific right of retention of the goods brought to the hotel until all charges have been paid by the client and for which he would be held liable in case of damage, cf. AUSTRIA, CC art. 970c; ENGLAND, Charlesworth's Business Law [*-Kidner*], p. 552; FRANCE, CC art. 2102 para. 3; GERMANY, CC art. 704; THE NETHERLANDS, CC art. 7:609 para. 3; SPAIN, CC art. 1782.
No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND and SWEDEN.

National Notes

1. *Application to hotel-keepers and other providers of places of temporary private residence*
AUSTRIA CC art. 970 para. 1 provides that a hotel-keeper is liable as a storehouse for damage to or loss of any goods brought to that hotel by the client. He can escape

liability only if he proves the damage is not caused by himself or his staff or another person who has come into the hotel, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 970 no. 13. Goods handed over to the hotel-keeper or his staff or that are placed or parked in a designated area are considered to have been brought into the hotel, cf. CC art. 970 para. 2. The notion of hotel-keeper in para. 1 includes all kinds of lodging, but not hospitals, restaurants, boarding schools etc. In the case of rent of private rooms or guesthouses, only when the risk of an 'open house' exists, CC art. 970 applies, cf. Rummel [*-Schubert*], Kommentar ABGB, art. 970 no. 2. CC, art. 970 para. 3 extends the reach of the provision to the proprietor of a swimming pool. A claim for damages must be notified immediately, unless the good was taken into the hotel-keeper's care. In any case, a claim must be made in court within 30 days after the client has become aware of the damage, cf. CC art. 967; Koziol and Welser, Bürgerliches Recht II, p. 189.

BELGIUM A keeper of a hotel is considered to be a storehouse, as his services as regards the goods of clients is qualified as storage by necessity (CC art. 1952 ff). A hotel-keeper is liable for goods that are missing or damaged during a client's stay in a hotel. The client must report the damage immediately after he has become aware of it, otherwise all rights will be lost unless the damage has been caused negligently by the hotel-keeper or his staff, cf. CC art. 1954bis. The rules do not apply to cars and the objects in these cars, nor to living animals, CC art. 1954quater.

ENGLAND A hotel proprietor is strictly liable for the loss of property brought to the hotel by his guests, unless the hotel proprietor proves negligence on the part of the client, cf. *Shacklock v Elthorpe Ltd* [1939] 3 AllER 372. Property includes luggage, but not the client's car or objects left in the car, cf. Charlesworth's Business Law [*-Kidner*], p. 551-552.

FRANCE CC art. 1952 provides that hotels are considered storehouses for the luggage, clothes and other objects brought to the hotel by their clients. The liability is not extended to safeguard guests that are present in an establishment without having accommodation in that establishment, cf. Huet, Les principaux contrats spéciaux, no. 33516.

GERMANY Specific rules can be found in CC arts. 701 ff. They provide a special liability for hotels and innkeepers for lost, deteriorated or damaged goods of the guests.

ITALY Rules regarding storage in a hotel (CC 1783-1786) were modified by the Law 10 June 1978, no. 316. CC art. 1786 provides that the same provisions apply to entrepreneurs of nursing homes, bathing establishments, boards (*pensioni*), trattorias, sleeping carriages and others.

THE NETHERLANDS CC art. 7:609 contains specific provisions for the liability of hotel-keepers. Para 1 states that the hotel-keeper is liable *as a storehouse* for damage to or loss of things that have been brought to the hotel by a guest who has moved into it. The hotel-keeper is liable for damage to a parked car in the hotel's garage, cf. Reehuis, Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, Boek 7, 1991, p. 411.

POLAND Liability of hotel-keepers is regulated separately in the POLISH CC (Title XXIX Liability, right of pledge and limitation of claims of persons running hotels and similar establishments, CC arts. 846-852). The general rule (CC art. 846 para. 1) is that the persons who run hotels and similar establishments for profit are liable for the

loss of, or the damage to the things brought in by persons availing themselves of the services of the hotel or a similar establishment unless the damage resulted from the nature of the thing brought in, or *force majeure*, or was caused solely by a fault of the injured person or a person who was employed by him or visited him.
SPAIN CC art. 1783 provides that hotel-keepers are considered storehouses regarding the goods brought inside the hotel by the client, provided that the client has informed the hotel-keeper about such goods and has observed the preventive measures to protect the goods as advised by the hotel-keeper. CC art 1784 indicates that the damage referred to in CC art. 1783 refers to the damage inflicted to the goods by the staff working at the hotel and by third parties, with the exception of the damage caused by armed robbery or by *force majeure*.

2. *Specific limitations to the hotel-keeper's liability*
AUSTRIA The hotel-keeper's liability is unlimited if the damage is caused by the hotel-keeper or his staff or if the good has been handed over into the care of the hotel-keeper, cf. OGH, SZ 55/7; Koziol and Welser, Bürgerliches Recht II, p. 188; otherwise, the hotel-keeper's liability is limited to € 1.100 for most objects and to € 550 in the case of precious objects, money or securities. Exclusion of liability by way of a text on a poster or placard is void; cf. CC art. 970a. The hotel may require valuable objects to be handed over and to decline liability otherwise, cf. OGH, EvBl 1977/245; Koziol and Welser, Bürgerliches Recht II, p. 188.
BELGIUM Liability is unlimited for the deterioration or the theft of goods the hotel-keeper explicitly took into storage or that he has refused to keep in storage without justified reason, cf. CC art. 1953 para. 2. For all other situations, the liability of the hotel-keeper is limited to 100 times the amount of the daily accommodation, but again unlimited if the client proves that the damage suffered was the consequence of negligence of the hotel-keeper or one of its employees, cf. CC art. 1953 para. 3. CC art. 1953 does not apply to cars and the objects in these cars, nor to living animals, cf. CC art. 1954quater. Further limitations of liability are void, cf. CC art. 1954ter.
ENGLAND Under the Hotel Proprietors Act 1956, the hotel-keeper is liable for no greater amount than £ 50 for one article or a total of £ 100 per guest. This is different if the client proves negligence or wilful default of the hotel proprietor or his staff, or that the property has been deposited expressly for safe custody with the hotel proprietor. Cf. Charlesworth's Business Law [*Kidner*], p. 552.
FRANCE Liability is unlimited for the deterioration or the theft of goods the hotel-keeper explicitly took into storage or that he has refused to keep in storage without justified reason, cf. CC art. 1953 para. 2. For all other situations, the liability of the hotel-keeper is limited to 100 times the amount of the daily accommodation, but again unlimited if the client proves that the damage suffered was the consequence of negligence of the hotel-keeper or one of its employees, cf. CC art. 1953 para. 3. In the case of objects placed in the client's car, parked at a closed parking place belonging to the hotel, liability is limited to 50 times the amount of the daily accommodation.
GERMANY CC art. 702 provides a detailed rule on the limitation of the liability of hotel-keepers: they are liable to a maximum of 100 times the hotel price for one day, with a minimum of € 600 and a maximum of € 3.500; in the case of money, securities and other precious things such as fur not used as clothes, a maximum of € 800 applies. The liability is unlimited if the damage etc is based on negligence of the storehouse or

if the storehouse has accepted the goods for storage. The hotel-keeper is obliged to take certain goods, spelled out in CC art. 702 para. 3, in storage.
ITALY CC art. 1783 para. 3 limits the liability of the hotel-keeper for the things 'brought into the hotel' to the value of what was deteriorated, destroyed or taken away, to a maximum of 100 times the price for renting the accommodation for a day, cf. Cass.civ.sez. III, 8 March 1991, n. 2475, Societá Compagnia alberghiera Excelsior Chianciano Terme c. Fossati e altro, Giust.civ.Mass. 1991, fasc. 3. However, if the goods were handed over to the hotel-keeper, he is liable without limitation, cf. CC art. 1784. CC art. 1785 provides that agreements and declarations aimed at excluding or limiting the hotel-keeper's liability are null.
THE NETHERLANDS CC art. 7:609 para. 2 contains an exception for liability if the damage or loss is caused by a person who was brought or invited into the hotel by the guest himself, and if the damage is caused by a good that was brought into the hotel by the guest. A statutory limitation of liability does not exist, but the parties may limit or exclude liability themselves, and often do so by way of standard contract terms.
POLAND The hotel-keeper is released from the risk-based liability for the loss of, or the damage to the things brought in if the damage: (1) resulted from the nature of the thing brought in, or (2) resulted from *force majeure*, or (3) was caused solely by a fault of the injured person or a person who was employed by him or visited him (CC art. 846 para. 1). Mechanical vehicles and things left in them, as well as living animals are not classified as things brought in, and the hotel keeper may assume liability for them as a safe-keeper, if a separate contract of safe-keeping is concluded (CC art. 846 para. 4). Moreover, (CC art. 847) the claim for the redress of the loss of, or damage to the things brought into the hotel expires if the person injured after having learned about the damage failed to inform immediately the person running the establishment about the fact. This provision does not apply if the hotel keeper caused the damage or if the hotel keeper accepted the thing for safe-keeping. Liability of the hotel-keeper in the case of the loss of or damage to the things brought in is limited with respect to one guest to the amount of the value of the payment for the lodging counted for one night multiplied by hundred times, however liability for one thing cannot exceed more than fifty times the value of such payment (CC art. 849 para. 1). These limitations do not apply if the hotel-keeper accepted the things for safe-keeping or refused to accept them, although he was obliged to do so, as well as in a case, when the damage results from the intentional fault or gross negligence of the hotel-keeper or a person employed by him (CC art. 849 para. 2).
SPAIN CC art. 1783 and 1784 articulate three specific limits. The hotel-keeper escapes from liability if the client has not informed the hotel-keeper about the goods introduced in the hotel, if he has not observed the preventive measures to protect the goods as advised by the hotel-keeper and if damage is inflicted by armed robbery or by *force majeure*.

3. *Specific right to withhold return of goods for hotel-keeper*
AUSTRIA A specific right of retention until all payments have been made to the hotel exists for all goods brought into the hotel, including those that do not belong to the client, cf. CC art. 970c; Koziol/Welser, Bürgerliches Recht II, p. 189.
ENGLAND A hotel proprietor has a lien on all goods brought by the guest to his hotel for the price of the food and lodging supplied to him, with the exception of articles for

which he is not responsible in case of loss or damage (e. g. the client's car and the property left in the car), cf. Charlesworth's Business Law [*-Kidner*], p. 552.
FRANCE The hotel-keeper can invoke the privilege of CC art. 2102 5°. More generally, the general right of retention of the good provided by CC art. 1948 does apply.
GERMANY Under CC art. 704 the hotel-keeper has a specific lien on the goods brought in by the client.
THE NETHERLANDS CC art. 7:609 para. 3 contains a specific right of retention. The specific right of retention cannot be executed in order to enforce the hotel-keepers right to damages for which the guest is accountable, cf. Reehuis, Parlementaire geschiedenis van het nieuwe Burgerlijke Wetboek, boek 7, 1991, p. 410; T&C / Castermans, to CC, art. 7:609 note 5; De Boer, Bijzondere overeenkomsten, to CC, art. 6:109 note 6. Yet, it does cover the parked car in the hotel's garage, cf. Parl. Gesch. Boek 7, p. 411; T&C / Castermans, to CC, art. 7:609 note 5; De Boer, Bijzondere overeenkomsten, to CC, art. 6:109 note 6.
POLAND The POLISH CC gives a specific right in order to secure the payment of the sum due for the lodging, the board and the services supplied to the person who availed himself of the services of a hotel and also to secure the claims for expenses made for that person. According to CC art. 850 the hotel-keeper has the statutory right of pledge on the things brought in. This right is subject to the provisions on the statutory right of pledge of the lessor.
SPAIN According to CC art. 1782, the rules regarding the contract of storage of a voluntary character applies. Thus, CC art. 1780 allowing retention of the good in case the client does not pay, may apply.

Chapter 5:
Design

General Comments

A. General Idea

This Chapter applies to all services where a party (the service provider) creates a design on the basis of which another party (the client or a third party on behalf of the client) intends to carry out another service. The activity of designing may be seen as the starting point for many other, subsequent services, which are dealt with in other Chapters of this Part, particularly in Chapter 2 (Construction). Designing is meant to other service providers to realise an immovable structure or a movable or incorporeal thing. The activity of designing is very much characterised by a continuous supply of wishes and directions by the client in order to arrive at a design that fits the purpose of its actual realisation. This supply of information does not take place to the same extent in, for instance, a construction or a processing service, as the client will already have made many choices at the design stage.

The main objective of the relationship between a designer and a client is that the subsequent service can be performed properly on the basis of the design in the sense that the final outcome of the subsequent service is fit for the purposes, needs and wishes of the client. This means not only that the designer will have to collect information about the ideas and needs of the client on the basis of which he will have to make his own choices as to the design, but also that he will have to anticipate the performance of the subsequent service.

B. Scope of Application

The rules of this Chapter particularly apply to the work of designers in the construction industry such as architects and engineers. They may furthermore be applicable to all other designers, such as industrial, software and fashion designers. In all legal systems, the concept of 'architect contract' or 'engineering contract' is well known. Such contracts are governed by statute law in a few countries only. And if they are governed by law at all, this is usually done by rather abstract rules that are in fact tailored to other specific contracts. On the other hand, there are many countries where elaborate sets of standard conditions have been drawn up for architects and engineering services.

C. Basic Principles

The rules of this Chapter, in combination with the rules of Chapter 1 (General Provisions), reflect some basic principles.

I. During the design process, both the service provider and the client bear responsibility for their own choices regarding the input into the design process. This follows from the principle that each party is responsible for its own choices relating to the performance of the service. This means that the designer is responsible for the tools and materials he chooses for the design activity following from Article 1:106 (Duties of the Service Provider regarding Input) and for the manner in which these tools and materials are applied by him following from Article 1:107 (General Standard of Care for Services), which is particularised by the provisions of Article 5:104. However, when the client has determined the selection and application of tools and materials, the responsibility for those tools and materials rests on the client according to Article 1:109 (Directions of the Client).

II. The aforementioned basic principle can be linked to the mutual duty of the parties to continuously exchange information during the design process. This duty will enable both parties to keep control over the input to and the progress of the design process in order that a design is achieved that fits the wishes of the client best. This process of mutual co-operation, which falls under Article 1:104 (Duty to Co-operate) and its particularisation in Article 5:103, is generally structured by the parties themselves by means of standard forms.

III. When both parties co-operate in informing each other during the design process, they are also in a position to warn each other if failures come to light during that process. This is where the duty to warn of the designer becomes relevant; Article 1:110 (Contractual Duty of the Service Provider to Warn). The purpose of this duty is to ensure that the result that is envisaged by the client will be achieved (Article 1:108 (Result Stated or Envisaged by the Client)) and to prevent that the design will not be fit for the client's purpose (Article 5:105). A similar duty is imposed upon the client in Article 1:113 (Failure to Notify for Non-Conformity). This provision states that the client must notify the designer when he discovers that the design is not or will not be fit for his purpose. These aforesaid mutual duties to inform are not only imposed upon the parties during the contract performance stage, but also prior to the conclusion of the contract; Article 1:103 (Pre-contractual Duties to Warn) and Article 5:102.

IV. Apart form the aforementioned duties of the designer, there are some other duties the purpose of which is to prevent a dissatisfying outcome of the design process. First of all, the designer has a duty to take notice of the circumstances in which the design activity and the future materialisation of that design is to be performed, which is expressed in Article 1:105 (Circumstances in which the Service Is to Be Performed). Secondly, he is to follow the directions of the client during the design process on the basis of Article 1:109 (Directions of the Client).

V. After the contract between the service provider and the client has been concluded, there may be reasons for variation of the contract under Article 1:111 (Variation of the Service Contract). The underlying idea of the present Chapter in connection with Chapter 1 (General Provisions) is to give the client some protection as he depends on the designer regarding the consequences of variations. In such a case, the client may opt for cancellation of the contract under Article 1:115 (Cancellation of the Service Contract).

VI. The designer is not in a position to exclude liability in the case of death or personal injury; see Article 1:114(1) (Limitation of Liability). Limitation or exclusion of liability for other damage is only possible if it is fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability) and unless the damage was caused intentionally or by way of gross negligence on the part of the designer or any person for whose actions the designer is responsible. Article 5:108 particularises this rule.

VII. The system of remedies is that of the PECL, following from Article 1:112 (Remedies for Breach of Duties of the Service Provider). These principles are further explained below in the Comments to the various Articles.

D. Terminology

The term 'designer' is often used in international construction law to refer to the architect or engineer. Here, it is used in a wider sense, including design activities that are not related to building and the construction of immovable structures as described above. Likewise, the more neutral term of 'client' is preferred to 'employer'.

E. Sources of the Rules

This Chapter is based on a comparative legal analysis of European legal systems, including codes, standard conditions and case law. In most EU countries, there is no statutory law for contracts between architects or engineers and clients, but there are many standard forms in which the duties of both parties are dealt with. There is also a great deal of case law available that deals with the parties' duties as stipulated in these standard forms.

However, as is explained in the General Introduction to the Principles of European Law on Service Contracts, we have not been able to study every legal system of the Member States of the European Union. For lack of manpower, the law of the Member States that have joined the European Union on 1 May 2004 could not be taken into account, with the exception of POLAND, from which country a national reporter could be recruited. As there are no reporters form IRELAND, LUXEMBURG and SCOTLAND, these legal systems are not represented in the comparative legal study underlying this Chapter either. POLISH, DANISH, FINNISH and SWEDISH law is represented only to a certain extent in this Chapter. In the comparative and national notes to each Article it is

indicated whether or not (and to what extent) comparative legal information was collected on a particular topic. Firstly, the *comparative* notes generally indicate on which Member States information has been collected and on which country this was not possible. Secondly, if no information or no reliable information could be collected for a particular Member State, the relevant *national* note will read: 'No information'. If a national note only refers to statute law, to any other statutory instrument or to a provision taken from a national standard form of contract, it means that the information in the note is not based on a further analysis of relevant case law or legal doctrine. If, however, references to case law and/or legal doctrine have been inserted in a national note, this means that the information is based on a more thorough analysis of the topic in the relevant Member State. The Member States that joined the European Union on 1 May 2004 are not listed in the national notes, with the exception of Poland, for the reasons set out above.

Relation to Other Parts of the Principles

F. Relation to Principles of European Contract Law (PECL) in General

The obligation to supply a design is a normal contractual obligation and it is therefore governed by the PECL. In the Comments to each of the following Articles, the relationship of that Article with the PECL is explained. Most Articles are applications of the general rules in the PECL to the specific area of design. Because the Articles are attuned to the typical circumstances of design contract cases, they are easier to apply than the more abstract rules of the PECL and they provide the parties with more guidance. In the rules presented here, there is no explicit deviation from the PECL.

G. Relation to Chapter 1 of the Principles of European Law on Service Contracts (PELSC) in General

The rules of Chapter 1 are also applicable to design contracts; see Article 1:101(2) (Scope of Application). The Articles of Chapter 1 that have no counterpart in the black-letter rules of the present Chapter will be discussed briefly in the following General Comments, in order to explain the application of these Articles to design services. For those Articles of Chapter 1 that have been particularised in the present Chapter, the application of the general rules will be explained in the Specific Comments to the relevant Articles on design services.

H. Relation to Article 1:102 (Price)

The present Chapter does not contain a specific Article determining the way in which the price of a design is to be calculated, which means that Article 1:102 (Price) applies. According to paragraph (1) of that Article, the service provider who has entered into the contract in the course of his profession or business is entitled to a price for the design. According to paragraph (2), when the parties do not fix the price or the method

of determining it, the price is the market price that is generally charged at the time of the conclusion of the contract.

The calculation of the price is an important issue where design contracts are concerned. The methods of determining the price are very different and complex in the legal systems studied. Many countries have standardised rules on how the fees of architects and engineers are to be calculated, such as the *Honorarordnung für Architekten und Ingenieure* (HOAI) (GERMANY), *Standard Form of Agreement for the Appointment of an Architect* (SFA/99) (ENGLAND), *Standaardvoorwaarden 1997 Rechtsverhouding opdrachtgever-architect* (SR 1997), *Regeling van de verhouding tussen opdrachtgever en adviserend ingenieursbureau* (RVOI 2001) and *De Nieuwe Regeling 2005, Rechtsverhouding opdrachtgever-architect* (DNR 2005) (THE NETHERLANDS). Sometimes the contracting parties need to agree on the applicability of these standardised rules to their contract, as is the case in THE NETHERLANDS.

Although usually parties will agree on the method of determining the price, it is generally accepted that when they failed to do so, a customary and reasonable price has to be paid, e. g. a percentage of the costs of the work. The burden of proof of what is a reasonable price is on the designer.

Illustration 1
A designer contractually agrees to design a sports club on behalf of a client. The designer and the client do not fix a price for the work to be undertaken. The client will have to pay the designer a customary and reasonable price.

I. Relation to Article 1:105 (Circumstances in which the Service Is to Be Performed)

The duty of the traditional designer under Article 1:105 involves, among other things, collecting and analysing the information on the location where the immovable structure to be designed will be constructed and to advise the client about the suitability of the site for the construction of the structure that is to be designed.

In order to be able to create a design that is fit for its purpose and to prevent mistakes in the construction process, the designer will have to examine the situation before he starts the actual design activity. Although it will be the client who approaches the designer and who gives the order to create a design for the realisation of a specific purpose, the designer will have to further investigate the specific needs and wishes of the client. This Article applies equally during the entire designing process. Any time the client gives the designer new directions, further analysis will have to be carried out by the designer.

Illustration 2
A client and a designer agree on a contract to design a four-storey complex. The designer is obliged to examine the conditions of the soil on which the apartment complex will be constructed. When the client later requires the apartment com-

plex to become a ten-storey complex, the soil analysis will have to be done again by the designer.

Sometimes experts are needed for this part of the job. A further circumstance to be analysed is the information about the time and money that are available for the construction of the design. Likewise, the specific public and private rules that may cause problems for the construction of the building to be designed will have to be analysed during the design process. The rule of Article 1:105 may be considered superfluous because the designer is bound to supply a design that meets the requirements stipulated in Article 5:105. However, the rule stimulates the designer to devote attention to circumstances that may lead to his not achieving the result envisaged by the client. This means that the service provider is to examine the existing circumstances as a starting point of the design activity. The earlier the parties are aware of the possibility of problems occurring, the better and cheaper such problems may be resolved.

Considering the duty of the designer to stay within the cost frame of the client, as is provided for in Article 5:104(e), it should be taken into account that if the client wants to take profit from specific tax incentives, the designer will have to become acquainted with the necessary preconditions on the basis of Article 1:105. The designer is to perform the design accordingly. However, the designer is not under a duty to inform or advise the client about tax aspects in advance.

J. Relation to Article 1:106 (Duties of the Service Provider regarding Input)

This Article concerns the designer's input into the design process. For example, it provides rules on the quality of the tools and materials needed for the design. In the context of design, one may think of technical software to draw designs or to make calculations. It is also relevant in the context of subcontracting to specialist designers. The underlying principle is that the designer is responsible for the quality of such input. If the design is not fit for its purpose as a consequence of insufficient quality of the input, the designer will be liable under Article 1:106. This duty leads to liability of the designer, which can only be relieved under Article 8:108 PECL (Excuse Due to an Impediment). The client may also claim on the basis of Article 5:105, subject to the rule of Article 5:101(4).

It may be questioned whether a separate provision is needed for this duty, given the fact that, in the law of many countries, this duty is implied in the main obligation of the designer, namely the duty to achieve the result envisaged by the client. However, it is still useful to regulate the quality of the input into the design process because it provides the designer with an extra incentive to achieve the result envisaged by the client. Precautionary measures are attached to this Article as is explained in Comments B and H to Article 1:106 (Duties of the Service Provider regarding Input).

Illustration 3
For the design of a ski lift, a designer makes use of an advanced computer program. This computer program is the designer's input into the design process. Therefore,

the designer is responsible for its quality and will be liable if the design is not fit for its purpose as a result of the insufficient quality of the computer program.

K. Relation to Article 1:109 (Directions of the Client)

Instructions by the client are the starting point of the design process and have to be observed during the contract period. The designer collects information about the needs and wishes of the client and transfers them into a design. The process of designing is characterised by frequent directions and notifications by the client, and by new analyses of every new situation and potential warnings by the designer. The directions of the client may deal with all aspects of the input, the process and the final result of the design process. The client may instruct the designer to take into account in the design that particular materials or work processes are to be applied when the design is to be realised, or to subcontract specialised designers for particular parts of the design work. These directions may be given either explicitly or impliedly.

The possibility of giving directions is essential to the client. These directions will cause the wishes and needs of the client to be included in the contract. By giving directions, the client is able to determine and clarify the purpose of the design to the designer. Practice shows that parties to a design contract are used to developing specific procedures for directions in those situations where this is appropriate in view of the size of the project and other circumstances that may influence the success of the project.

On the other hand, directions may conflict with measures taken by the designer or with his artistic ideas. The designer will have organised his work in accordance with the contract and with a reasonable interpretation of what is needed to accomplish the agreed purpose. This means that a direction issued by the client may trigger the duty to warn of the designer under Article 1:110 (Contractual Duty of the Service Provider to Warn). The designer will have to warn the client when he feels that the directions fall outside the scope of the service initially agreed upon.

According to Article 1:109(1) (Directions of the Client), the client is entitled to give the designer timely directions during the design activity, provided that the directions are part of the contract or specified in any document referred to in the contract (subparagraph a), or result from the realisation of choices left open at the time the contract was concluded (subparagraphs b and c). If directions change the content of the original contract but are still reasonable, they have to be observed by the designer. It follows from paragraph (3) that if the designer perceives a direction of the client as a variation of the contract under Article 1:111 (Variation of the Service Contract), he is to warn the client. When the client does not revoke his direction, the designer is to follow it, and the direction is considered to be a variation of the contract.

Paragraph (2) of Article 1:109 (Directions of the Client) establishes that if the non-performance of an obligation of the designer under Article 1:107 (General Standard of Care for Services) or 1:108 (Result Stated or Envisaged by the Client) is due to a direction of the client, the designer is not liable if he warned the client against the

relevant risk under Article 1:110 (Contractual Duty of the Service Provider to Warn) before carrying out the directions.

Usually, in practice, it will be unclear whether or not the direction of the client fits into the contractual framework. The borderline will often be vague. The designer has to warn the client under paragraph (3) if he feels that the direction does not fall within the scope of the contract and that following the direction may cause the design service to become more expensive or take more time.

> *Illustration 4*
> Directions concerning the purpose of a software program are given to a software designer. The choices regarding the design of the desktop are left to be decided later. This kind of direction falls within the scope of Article 1:109 paragraph (1) (c), for it is a choice initially left open by the parties. In this case, the client is entitled to give the designer further directions and the designer is to follow them if they are given timely.

According to Article 1:109(1) (Directions of the Client), when giving directions, the client is to take into account the time reasonably available for the performance of the service by the designer. This means that directions may only be given when they are made known to the designer before he has taken reasonable steps to perform his duties under the initial design contract and such steps are irreversible without substantial additional costs to the designer. Again, according to Article 1:109(3), the designer is under a duty to warn if the directions requested will take more time than reasonably expected by the client. Such directions may be considered a variation under Article 1:109(3) in connection with Article 1:111. The designer is to follow the directions, unless the client revokes them.

> *Illustration 5*
> A client requests a designer to design a house with two floors on the basis of which an architect is to make a geotechnical report. Later, the client changes his mind and wants a house with five floors. This kind of direction falls within the scope of Article 1:109(3): it is a variation of the contract under Article 1:111 (Variation of the Service Contract). The designer is to warn the client against this, but he is to follow the direction if the client does not revoke it.

L. Relation to Article 1:110 (Contractual Duty of the Service Provider to Warn)

According to Article 1:110(1) (Duty of the Service Provider to Warn), the designer is under a duty to warn the client when he discovers imperfections in the directions given by the client or obtains other information that will endanger the final result envisaged by the client having regard to Article 5:105. The designer has no duty to check actively whether the directions contain mistakes, but the designer should be normally attentive. Insofar as the designer has a duty to warn the client, he is to take reasonable measures to ensure that the client understands the contents of the warning; see paragraph (2). The designer may not disregard his duty to warn because he assumes that his client or

another person involved in the design process will discover the imperfection. Only when he knows the client is actually aware or should be aware of the imperfection, a warning is not necessary, given the provisions of paragraphs (3) and (6) of Article 1:110.

Illustration 6
During the designing process of a day nursery, the designer is instructed by the client to take into account the construction of a floor made of a particular material. The client informs the designer that his choice of this type of material is induced by the advice he asked and received from a company that specialises in the construction of floors. The designer, however, knows that the floor will be too slippery for playing children and may thus cause accidents. The designer will have to warn the client against this risk.

M. Relation to Article 1:111 (Variation of the Service Contract)

As described in Article 1:109(3) (Directions of the Client), a direction given by a client to the designer may also be considered a variation when the direction changes earlier choices i. e. when they change the content of the agreement. Article 1:109 also imposes a duty upon the designer to warn the client against the fact that a direction may take the design project outside the scope of the original contractual agreement between the parties. The client is allowed to leave this framework, but he will have to bear the consequences of the changes he ordered.

Illustration 7
A client requests a designer to design a train tunnel that is to allow the passage of trains of a particular height. After the designer calculated the most important elements, the client changes his mind and instructs the designer to design a tunnel for double-stack trains. The designer's calculations are thus turned invalid. This is a variation of the design contract.

Article 1:111(1) (Variation of the Service Contract) states that a party has no ground to a change if the change is reasonable. It follows from this provision that the result of the design service that is to be achieved, the interests of both parties and the circumstances at the time of the change of the service have to be taken into account in determining whether or not a change is reasonable. Some changes are deemed to be reasonable, as is shown in Article 1:111(2) (Variation of the Service Contract). Here it is stated that a change of the contract is reasonable if that change is (a) 'necessary in order to enable the service provider to act in accordance with Article 1:107 or, as the case may be, Article 1:108', (b) 'the consequence of a direction that is given in accordance with Article 1:109(1)' or (c) 'a reasonable response to a warning from the designer under Article 1:110'.

Illustration 8
The government orders a designer to design a simple, cheap bridge that is to connect two villages. After the designer examined the soil conditions he warns the client against the swampy soil. As a result, the client changes the contract and

requests the designer to design an expensive type of bridge. This variation is a reasonable response to a warning from the designer under Article 1:110 (Contractual Duty of the Service Provider to Warn).

The other paragraphs of Article 1:111 (Variation of the Service Contract) are relevant to design contracts to the extent that they give guidelines for dealing with changes in the price and the time considering the change of the design service.

Variations do not commonly occur in design contracts. The reason is that most 'changes' in design processes are mere particularisations of choices initially left open by the parties. Hence they will fall within the scope of Article 1:109(1) (Directions of the Client) and not under Article 1:109(3) in connection with Article 1:111(2) (b) (Variation of the Service Contract). However, if they occur and if the designer already invested a great deal in the design and the directions of the client are to change this, it will have to be established whether a variation of the service will be in the interest of both parties or not. The variation will enable the client to adjust the design in a way that will be in accordance with the result he envisages. However, the designer has already done a great deal of work and he will probably need more time and money to incorporate the new directions. Negotiating the variation may just be left to the parties themselves. In many countries, however, specific rules regarding variations exist, as there are several problems to be dealt with whenever variations in the context of design contracts occur.

In the first place, the parties may disagree on the issue whether particular functional, technical or aesthetical requirements either were already part of the original design contract or became part of the contract through a variation. The position of the client can be problematic in this respect. The client usually has no choice but to stay with this designer, because the costs of switching to another designer are just too high. The other designer will have to charge costs as regards the collection and analysis of information that the current designer already has available. Moreover, he will have to charge other negotiating costs. This shows the client's dependence on the original designer, which clarifies why rules on variations are essential in the design practice. However, the position of the designer needs to be considered as well. Substantial extra work may lead to problems with regard to the availability of personnel and other resources. Likewise, it may affect the execution of other assignments. The agreed time schedule may have to be changed. A variation leading to less work may cause the designer to use his resources sub-optimally. The designer may not be able to use these resources for other assignments.

N. Relation to Article 1:112 (Remedies for Breach of Duties of the Service Provider)

Article 1:112 is relevant in the sense that it establishes additional rules on the remedies that are available in the case of breach of any duty of the designer. Paragraph (1) states that the damage to which the client is entitled in such a situation involves the costs that are made to prove the breach of duty by the designer and the costs to prevent the

result envisaged from not being achieved. It follows from paragraph (2) that the client may withhold performance if this is reasonable according to Article 9:201 PECL (Right to Withhold Performance). Paragraph (3) establishes the right of the client to terminate the design contract under Article 9:304 PECL (Anticipatory Non-Performance) if it is clear that the breach of duty by the designer will result in a fundamental non-performance of an obligation under Article 8:103 PECL (Fundamental Non-Performance).

Following Article 8:104 PECL (Cure by Non-Performing Party), the designer is entitled to cure the non-conformity if it can be remedied by correcting or modifying the design or by replacing the design by a new one. Repair of design defects by the designer is generally in the interest of both parties. The client will want the repair to be swift and reliable. Sometimes, however, the sheer facts of defects will make the client hesitate whether the designer is the right person to deal with the defects. The client will have to make a choice between the risk of remaining quality problems and the extra costs involved in hiring a new designer. From the perspective of the designer, continued efforts to repair the defects are costly and may prove to be unsuccessful, but allowing the client to switch to another designer may lead to the loss of future business.

Illustration 9
A client hires a designer to design a cottage following the client's strict guidelines to give the cottage an old-English look. During the design process, the consumer finds out that the cottage is not going to look old-English at all. Since the designer already has done a lot of work and the client wants the design to be finished as soon as possible, so that the construction work can be started, the client wants the designer to modify the design under Article 8:104 PECL (Cure by Non-Performing Party).

O. Relation to Article 1:113 (Failure to Notify for Non-Conformity)

This Article places a duty upon the client to notify the designer if he becomes aware, or if a comparable client in the same situation has reason to know, that the designer will not achieve the result envisaged by the client. Both the client and the designer have an interest in complaints about defects being notified in time, for this will save costs and will decrease the probability of further quality problems.

What are the typical situations, in the context of a design contract, for which Article 1:113 (Failure to Notify for Non-Conformity) was drafted? The first situation is the one in which the designer has already completed the design, but the design is not what the client had in mind. Another situation occurs when the client, during the design process, discovers that the result he has in mind will not be achieved by the designer. Article 1:113 (Failure to Notify for Non-Conformity) does not impose a duty on the client to examine the design process thoroughly.

When the client fails to notify the designer of non-conformity, the designer is entitled to damages for the losses due to the failure to notify; he may also claim an adjustment of the time of performance that is required for the design service as result of the failure to

notify. The client's right to claim damages for the design defects, however, is not affected by his failure to notify.

Illustration 10
A software designer is requested to design a webpage for a well-known company. After the completion of the design, it turns out that it does not satisfy the client's expectations. The client, however, failed to notify the designer of this non-conformity of the design, although he knew about the non-conformity before the design was completed. The client may resort to normal remedies under the PECL, but the designer may counterclaim for any damages due to the client's failure to notify.

P. Relation to Article 1:115 (Cancellation of the Service Contract)

The principle of *pacta sunt servanda* implies that a design contract is to be performed fully by both parties, i. e. that the designer must perform his service and that the client must pay for that service. However, there may be circumstances where it is better to cancel the contract before it is fully performed, even in situations where breach of contract does not occur.

The relevance of Article 1:115 (Cancellation of the Service Contract) for design services is that it regulates the situation in which a design contract may be cancelled before the service is completed and what the financial consequences will be. The Article basically states that the client may cancel the design contract at any time, provided that he fully compensates the designer for the premature ending of the contract. This provision stems from the general idea that a service – or any obligation – may not be enforced upon a party against its will. However, this does not mean that the client may decide whether or not he wishes to be bound by the contract. He will have to compensate the designer for the services rendered and for the profit the designer would have received if the contract had been performed completely. Article 1:115(3) (b) refers to the usual way in which designers are paid; the designer's compensation for loss of profit will be dealt with by calculating the number of hours the designer would reasonably have to spend on the cancelled part of the service and by multiplying that number by a profit rate that can reasonably be considered to be part of his hourly fee.

Illustration 11
A small clothing company requests a well-known fashion designer to design its new summer collection for both men and women, which will have to be glamorous and extravagant. After the fashion designer has finished the collection for women, the clothing company decides to cancel the summer collection due to bad economic prospects. Thus, the clothing company cancels its contract with the fashion designer. The company will have to pay for the completed design for the women's collection and compensate the designer for the profit he would have had designing the men's collection as well.

Q. Relation to other Chapters of the Principles of European Law on Service Contracts (PELSC) in General

The present Chapter is related to other Chapters on specific services, in particular to Construction. Although, in theory, any service can be 'designed', in practice design and construction are considered to be quite close to one another. Design is a precondition to construction. The choices that are made during the design process will be used to carry out the construction process and to complete a structure. During the construction process, however, further choices will have to be made and the process of planning these is also a matter of designing. One of the purposes of the design activity is to make adequate choices in order to ensure that the construction process will lead to a structure that is in conformity with the client's expectations. Furthermore, the design enables the client to make his expectations (on paper) clear to the constructor.

Apart from the construction of immovable structures, design is also related to the activity of processing of movable or incorporeal things, for example, the design of a technical procedure that is to be followed for the processing of a particular object.

> *Illustration 12*
> An industrial designer of cars supplies a car manufacturing company with guidelines for car assembly. These guidelines are the result of a design service; thus the provisions of this Chapter apply to the contract between the industrial designer and the car manufacturing company.

R. Character of the Rules

Except for Article 5:101, all the rules in this Chapter are default rules. Article 5:101 is a mandatory rule, which means that the contracting parties cannot influence the qualification of a contract.

Article 5:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the designer, is to design for another party, the client, an immovable structure that is to be constructed by or on behalf of the client.
(2) This Chapter applies to contracts whereby the designer is to design a movable or incorporeal thing or service that is to be constructed or performed by or on behalf of the client.
(3) When, under a contract, a party is bound to design and to supply another service, this Chapter applies to the parts of the contract that involve design, with appropriate modifications.
(4) If the other service mentioned in paragraph (3) consists of carrying out the design, the rules governing the supply of the subsequent service prevail. However, Articles 5:105 and 5:108 do not apply.

Comments

A. General Idea

The act of designing can be described as the initial stage of a process in which conceptual or detailed (technical) ideas are put on paper by one party (the designer) for another party (the client). The second stage of the process consists in the realisation of these ideas, usually by a constructor under a separate construction contract. However, design does not only apply to construction projects, but can also deal with, e. g., industrial projects, software, fashion or logistics schemes. The present Chapter basically applies to the design of new immovable structures (paragraph (1)), but can also be applied to the design of movable or incorporeal things and to the design of a service (paragraph (2)).

Illustration 1
A well-known brewery requests a designer to design a drinking glass for a new type of beer. The present Chapter applies.

According to paragraph (3), the rules of this Chapter also apply to contracts under which the designer, apart from the design activity, has to carry out other services. In that situation, this Chapter only applies to the design part of the contract and appropriate modifications for other parts are required. Moreover, if this 'other service' implies that the designer has to carry out his design as well, for instance by constructing a new structure or by processing an existing movable or intangible thing, the rules governing the subsequent construction or processing service prevail (paragraph (4)), unless they do not deal with the particular issue at stake. In that case, the rules of design may be applied. Neither Articles 5:105 nor Article 5:108, however, are to be applied in the event of mixed services.

Illustration 2
A designer and a client concluded a contract under which the designer is to design and construct a building. The rules of the present Chapter do not apply if and in so far as its rules conflict with the provisions of Chapter 2 (Construction). If the latter Chapter is silent on a particular issue, the rules of this Chapter apply, with the exception of Articles 5:105 and 5:108 for it concerns a mixed service.

B. Interests at Stake and Policy Considerations

The scope of application of the present Chapter can be considered in a limited or extensive sense. The main question here is whether application should only concern the 'traditional' design contracts (in the field of construction) or also other types of design activity, such as software design, fashion design and, more generally, the design of any type of movable things.

Another issue is whether the rules of this Chapter should only apply to design contracts or also to design contracts in combination with another service contract (e. g. con-

struction and processing). The extensive approach by which the rules of the present Chapter are applicable to the design part of a mixed contract would have the advantage of providing for a similar regulation for two rather similar activities. Indeed, in a certain aspect, the design activity on the one hand and the carrying out of the design on the other hand are not very different for these activities are both oriented towards creating a structure.

On the other hand, the limited approach – by which a mixed contract involving the activity of designing is entirely governed by the provisions for the subsequent activity – has the advantage of avoiding borderline issues and will probably limit litigation. This may also be justified by the fact that, in practice, the quality of the design – and therefore the liability of the designer – is assessed after the design has been carried out. The rules on the subsequent service, carried out by the author of the design, will then suffice.

C. Comparative Overview

In most of the European legal systems, there is no specific statutory law on design contracts. Usually, design contracts are dealt with in rules on more general contracts, such as service contracts (or contracts for work), construction contracts or assignment contracts. However, the design contract is also extensively dealt with in standard terms, which are frequently used in most European countries. In BELGIUM and FRANCE, standard terms are of no substantial importance (due to mandatory statutory law dealing with the legal status and defects liability of architects), but in THE NETHERLANDS, ENGLAND, GERMANY and SWEDEN the standard contract terms are of greater significance than the rather general rules in the countries' civil codes (though only to the extent that the contracting parties actually agreed on the standard contract terms). Furthermore, particularly in BELGIUM and FRANCE important deontological rules may be applicable to design services.

D. Preferred Option

As regards the issue of the concept of design itself, according to paragraph (1) the design concerns mainly the construction of an immovable structure. However, the rules of this Chapter may also apply to other design activities, such as the design of movable or incorporeal things: fashion, websites or art design. This is provided for in paragraph (2). The underlying idea of this extensive scope of application is that all design activities involve rather similar processes and can therefore be governed by the same rules.

As regards the scope of application concerning mixed contracts involving design and another service, paragraph (3) in principle provides for the applicability of the provisions of this Chapter. The rules of this Chapter apply to the design part of such mixed contracts and the rules applicable to the other service (e. g. supervision of the actual carrying out of the design by another service provider, marketing and publicity services) will apply to the other part of the contract. This 'distributive' application of the rules

governing each service may require appropriate modifications. By exception to paragraph (3), and in the event that the other service consists of the carrying out of the design, paragraph (4) excludes the distributive application of the provisions governing each service individually and opts for exclusive application of the provisions governing the subsequent service to the whole contract. The provisions for design will only apply in the event that the provisions for the other service do not contain rules concerning a particular issue. Articles 5:105 and 5:108, however, never apply in the event that a design service is mixed with a service to carry out that design.

Illustration 3
A new cooling system for the production of flat screens for televisions is being designed and applied by a service provider under a single contract. The provisions of Chapter 3 (Processing) also apply to the design activity.

If, in the example given above, the parties agreed on a provision restricting the service provider's liability, that provision is subject to Article 3:112 (Limitation of Liability), not to Article 5:108. Article 5:107, however, is applicable since the rules on processing do not provide for keeping records of design documents. Article 5:105, on the other hand, is set aside by Article 3:105 (Conformity) even though this provision is a repetition of the general provision of Article 1:108 (Result Stated or Envisaged by the Client).

E. Relation to PECL and Other Parts of the Principles

Apart from the specific rules in this Chapter, design contracts are governed by the general rules on contract law provided by the PECL and by the general provisions on services contracts in Chapter 1.

F. Design and Construction

This Chapter has been developed from the idea that the designer and the constructor are two persons, each having a different task. This means that the designer designs what is to be constructed by the constructor. The coherence of these tasks is dealt with in the contractual relationship between the constructor and the client, in the sense that the client bears the risk of any design defects, while a duty to warn as regards such defects may be imposed upon the constructor. These principles follow from Articles 1:109(2) (Directions of the Client), 1:103(1) (Pre-contractual Duties to Warn) and 1:110(1) (Contractual Duty of the Service Provider to Warn).

In the situation where the designer not only designs but also constructs the structure, the provisions of Chapter 2 (Construction) prevail, following the rule in Article 5:101(4); thus the duty of the designer under Article 5:105 is replaced by the fitness-for-purpose duty under Article 2:104 (Conformity). However, if the rules on Construction do not deal with a particular issue, the rules on Design apply.

G. Design and Supervision

The contractual duties of a designer often include supervision of the service to be undertaken subsequently. This is, of course, especially the case with an architect or engineer who undertakes to supervise the building or construction work carried out on the basis of a design made by him. However, this may also apply to a software designer who supervises the actual production of a software program designed by him. The rules in this Chapter are, however, not based on the presumption that the duty to supervise is implied in the duty to design. Although it is true that supervision can be performed in connection with a design service, in practice supervision is also supplied as a separate service. This is the reason why this Chapter does not contain rules on supervision. Possibly, rules on supervision contracts may be provided for in a separate Chapter, to be inserted into this Part in the near future. However, for the time being, supervision services will be subject to the rules of Chapter 1 (General Provisions).

H. Character of the Rule

The present Article is a mandatory rule. The contracting parties cannot influence the qualification of the contract.

I. Remedies

As this Article only deals with the scope of the present Chapter and does not impose duties on the contracting parties, the issue of remedies is of no relevance here.

Comparative Notes

1. *Regulation of design contracts in the existing codes/laws*
   In most of the legal systems there is a regulation on design contracts. However this is not always codified in a national Civil Code, nor is it always explicitly stated. It can implicitly follow from legal terms or derive from other kind of regulation. The countries that have regulated the design contract in their Civil Code are the following, AUSTRIA, BELGIUM, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, POLAND, PORTUGAL and SPAIN. In AUSTRIA and BELGIUM the design contract is being qualified as a service contract (respectively *Dienstvertrag* and *dienstenovereenkomst*). In BELGIUM however, the design contract can also be defined as a building contract *(aannemingsovereenkomst)*. In FRANCE the design contract is called *contrat d'entreprise* or *louage d'ouvrage* (and sometimes *mandat*). This also goes for PORTUGAL, where the *empreidata* is similar to *le contrat d'entreprise*. POLISH and DUTCH contract law have the similarity that the design contract is qualified as an assignment contract, or *overeenkomst van opdracht*. In some other countries the design contract belongs to the contracts for work, see GERMANY and GREECE. In GERMAN law a distinction has been made in case law between the regulation for a design and an architect contract. In ITALY the definition on design contracts is rather literal, it is

called *prestazione d'opera intellettuale*, which means the contract for an intellectual service. SPANISH law does not know a specific rule or definition for the design contract; there it falls under the scope of the general construction contract, *contratos de obra*, for which the Spanish Building Act is of great importance. Besides the Civil Code regulation, in BELGIUM and FRANCE the deontological rules are significant, codified in the *Déontologische Norm* no. 2 and le *Code de Déontologie des Architectes*. Thus, in most of the legal systems the design contract is embedded in the Civil Code. In some other countries this is different. Here ENGLAND and SWEDEN can be mentioned. In ENGLAND the regulation on design & build contracts is rather extensive, but a separate legislation on design contracts does not exist. However there are a large number of acts applicable to design contracts as the Building Act, Defective Premises Act, the Limitation Act, the Damages Act and the Supply of goods and services Act. A Civil Code regulation however misses. In SWEDEN the rules for design contracts is governed by general contract law; thus there is no specific design/construction law.

No information from DENMARK, FINLAND, GREECE, IRELAND, and LUXEMBURG.

2. *Standard conditions on design contracts*

In general, in the field of construction law, standard conditions are of great importance. These conditions are only valid when both the contracting parties have agreed on them while concluding the contract. In international construction contracts the FIDIC (Fédération Internationale Des Ingenieurs-Conseils) conditions are commonly used. Besides that most of the national systems know standard contract terms. To start with THE NETHERLANDS, Dutch construction and architect law knows many standard conditions on design contracts. Even more, these standard conditions are far more important than the Dutch Civil Code. For design contracts, especially the SR 1997 (Standaardvoorwaarden 1997 Rechtsverhouding opdrachtgever-architect), RVOI 2001 (Regeling van de verhouding tussen opdrachtgever en adviserend ingenieursbureau) and DNR 2005 (De Nieuwe Regeling 2005, Rechtsverhouding opdrachtgever-architect, ingenieur en adviseur) are applicable. This significance of standard conditions in THE NETHERLANDS is also found in ENGLAND, where architect law is mainly based on standard contract terms as the Standard Forms of JCT (Joint Contracts Tribunal) Contract (for building contracts), the SFA/99 (Standard Form of Agreement for the Appointment of an Architect) and the ICE (Institution of Civil Engineers) Form of Contract. Concerning health and safety regulations, the Construction (Design and Management) Regulations 1994 are applicable. SWEDEN too makes use of many standard conditions on design contracts. Here the ABK 96 (Allmänna Bestämmelser för Konsultuppdrag inom arkitekt och ingenjörsverksamhet av år 1996), the AB 04 (the Swedish general conditions of contract for building and civil engineering works and building services), the BKR Regulations and the Building Regulations (BRR) can be applied. In GERMANY the Honorarordnung für Architekten und Ingenieure (HOAI) is applicable on architect contracts. In AUSTRIA the *O-Norm* is used as a standard contract term and in SPAIN for the design contracts the *Basic Norms on Construction* can be used as well. On the other hand, in POLAND and PORTUGAL national standard conditions on design contracts do not exist. In POLAND the contracting parties themselves have the ability to make use of self-regulation and in

PORTUGAL sometimes the ICE Form of Contract are used. In FRANCE and BELGIUM the mandatory statutory laws on the liability of the designer are far more important that the usage of standard contract terms. In DENMARK the *standard condition of sale, work and delivery* and the FIDIC are being used. In GREECE the Consumer Protection Act 2251/1994 is being used. And in FINLAND the Consumer Protection Act is used as a standard contract term.
No information from IRELAND, ITALY, LUXEMBURG and SCOTLAND.

National Notes

1. *Regulation of design contracts in the existing codes/laws*
AUSTRIA The paradigm for design is the Architektenvertrag, which is the common architect contract, and falls under construction contracts *(Dienstvertrag)* or mandate *(Bevollmächtigungsvertrag)*. The *Dienstvertrag* is regulated in the CC art. 1151 para. 1, in which a design contract is qualified as an achievement of a specific service. Furthermore, CC arts. 1151-1164 provide rules on the *Dienstvertrag*. There is no definition of design, but it can be translated in *Planung, Entwurf oder Konstruktion*, which demonstrates the ambiguity of the word design.
BELGIUM In Belgian law the design contract is qualified as an *aannemingsovereenkomst*, according to CC art. 1787, which is a specification of the more general *huur van werk*, stated in CC art. 1710. This *aannemingsovereenkomst* is described as being a mutual contract among which the designer has to perform certain works of an intellectual character and the client in return will have to compensate him (K. Deketelaere, M. Schoups, A. Verbeke, Handboek Bouwrecht, 2004, p. 417). CC art. 1710 provides that the contract with an independent designer has to be qualified as a building contract with an intellectual character. The *aannemingsovereenkomst* is further qualified as being a *dienstenovereenkomst*, in which the client contracts the service provider to do 'something', that is not related to material work but might contain several services (G. Baert, Privaatrechtelijk Bouwrecht, begrippen van het rechtssysteem, zakenrecht en contractenrecht, 1989, p. 460). The contractual alliance between architect and client is completed by the Reglement van Beroepsplichten (1985). Besides this, contracting parties have the possibility to make contractual agreements concerning the tasks of the designer. According to Belgian CC arts. 1108 and 1129, the design contract must contain a certain program and budget which can be determined on reasonable grounds. Furthermore, in BELGIUM the deontological rules are of great importance (Wet van 20 februari 1939 and the Deontologische norm no. 2) in order to protect the designer's profession (P. Rigaux, Le droit de l'architecte. Evolution des 20 dernières années, 1993, pp. 13-14).
ENGLAND The design and build contracts are well known in ENGLAND, but a specific design contract is not. Design is the task of the engineer or architect and is taken to be excluded from the contractor's function. The word 'design' has no precise meaning in building contracts. (J. Uff, Construction Law, 2002, p. 275). It certainly encompasses the planning of the form of the finished works. The ICE conditions distinguish between design of permanent and temporary works. Temporary works are entirely the contractor's responsibility. The ENGLISH legislation that is important for design contracts consists of The Supply of Goods and Services Act 1982, the Defective Premises Act 197, the Building Act 1984 and the Damages Act 1996. In the Con-

struction (Design and Management) Regulations 1994 some obligations have been imposed on the designer concerning health and safety.

FRANCE There is no common definition to be found of a design contract as a design falls under the scope of the more general *contrat d'entreprise (louage d'ouvrage)*, which is codified in CC arts. 1710 and 1787. Sometimes a design contract is described as a *mandat*, as stated in CC art. 1984. The FRENCH court has preferred the *louage d'ouvrage* (Cass.civ. I, 21 January 1963, JCP 1963.II.13185, annotation P. E.). For the *louage d'ouvrage* there is a common definition. It is described as a contract on a work/service, that is ordered by one person to another, and for which the service provider most of the time is entitled to remuneration. This contract covers material services and intellectual ones as well (Cass.civ. III, 28 February 1984, Bull.civ. III, no. 51). The *mandat* is, in contradiction to the *louage d'ouvrage*, a contract that is based on free performance of the provider. Sometimes a design contract contains a combination of the *louage d'ouvrage* and the *mandat*. But the two contract types in FRANCE differ in the sense that the *louage d'ouvrage* fits the material or intellectual services and the *mandat* fits the more juridical works of representation. Further in FRANCE deontological rules exist, such as the *Code de Déontologie des Architectes* (Decree no. 80-217 of 25 March 1980).

GERMANY Design contracts in general fall under the scope of the *Schuldverhältnisse* art. 241 CC *(Allgemeinen Geschäftsbedingungen Gesetz)*. In this Article is stated that the creditor (client) is able to claim performance of the debtor (designer). Furthermore, design contracts (architect contracts as well) are regulated by the Bürgerliches Gesetzbuch, Titel 9, *Werkvertrag* (H. Locher, Das private Baurecht, 1993, p. 13). In this *Werkvertrag* both design contracts and architect contracts are represented, as in the Werkvertrag the *normative Leistungsbilder* has been described. A common definition of design contracts does not exist in GERMANY. The applicable regulation on design contracts is especially written down in the German CC and further the standard contract terms have a great influence.

GREECE Design is regulated by the general law of obligations and in specific by the provisions on a contract for work, which can be found in CC arts. 681-702. This separate Chapter in the Civil Code is applicable to construction contracts and sets forth certain standards regarding performance, defects and terminations. The contract for work is a contract by which the contractor undertakes the obligation to carry out a work, and the other contracting party is obliged to pay the agreed remuneration (art. 681). It is an obligation of result. The service can be of a material or immaterial nature. The contract for work differs from the contract for service, in which the performance is important regardless the result. There is no specific definition for design.

ITALY Design falls within the regime of autonomous work and furthermore, it is considered to be an intellectual work. This is stated in the CC art. 2230 *(Prestazione d'opera intellettuale)*. Therefore, the regulation offered in CC arts. 2229-2238 applies. Still, there is no commonly used definition of design.

NETHERLANDS In THE NETHERLANDS a legal definition of the activity of design does not exist. Furthermore, it is still not clear which qualification covers the design contract (M. A. van Wijngaarden, M. A. B. Chao-Duivis, Hoofdstukken Bouwrecht, dl. 8, 2001, p. 1). However, there seems to be preference for the *overeenkomst van opdracht* that is covered by CC art. 7:400. It says that the *overeenkomst van opdracht* (in case of a design contract) is a contract by which the designer commits himself to the client, not

by way of a labour contract, to perform work that is different than the accomplishment of a material work, the storage of work, the distribution of work or the transport of persons or things. For design is an intellectual work, it fits in the definition of art. 7:400. The regulation that is important for the design contract particularly consists of the CC, Chapter 6 and 7. Besides that, the standard contract terms are of great importance (M. A. M. C. Van den Berg, Bouwrecht in kort bestek, 2000, p. 297.).

POLAND In the POLISH CC there is no separate category of a design contract. The design contract is normally classified as a contract of specific work (CC art. 627), the typical obligation of result, or as innominate contract with elements of the contract of specific work.

PORTUGAL Design contracts are regarded as service contracts, either unclassified or '*empreitada*', because it concerns intellectual property (art. 157 C. D. A. D.C Código do Direito de Autor e dos direitos conexos). The latter is similar to the FRENCH *contrat d'entreprise*. CC art. 1154 gives general rules for service contracts and CC art. 1156 provides rules for the '*empreitada*'. These are the most likely to be applied.

SCOTLAND The Housing Grants, Construction and Regeneration Act 1996 is applicable, of which Part III contains rules on architects. Furthermore, the Architects Act 1997 and The Architects' Qualifications (EC Recognition) Order 1988 provide deontological rules for architects. In the Building Act 2003 general rules are established for the architect as well.

SPAIN Under Spanish law there is no specific regulation dealing with the topic of design as a separate legal concept. However, the new Spanish Ley 39/1999 *de 15 noviembre de Ordenación de la Edificación*, which regulates the obligations and responsibilities of the agents who participate in the construction process, provides some Articles on the activity of design. Design is considered as the project (a joint of documents, which define and determine the technical requirements of a construction work) used in a construction process. The designer is considered as the agent (architect or engineer) who designs this project. Another definition used is that the activity of designing is constructing a tangible or intangible structure that is intended as a model or guideline for the construction of another structure by somebody else. The design has to follow the specifications given by the applicable technical regulation (Ley 39/1999 *de 15 noviembre de Ordenación de la Edificación*, art. 4). Furthermore, under Spanish law design contracts are not considered to be service contracts, instead they belong to the construction contracts *(contratos de obra)*. However, the CC does not differentiate between service contracts and design contracts. Both are regulated in Book IV, Title VI, Chapter III, art. 1583 to art. 1603. The Spanish Civil Code inserts these contracts in the category of renting/hiring contracts (art. 1544). Section 1 of this Chapter deals with the service contract and section 2 with the construction contract. The latter only refers to the construction work in the sense of building up structures. However, the design activity could be a construction work as well. Furthermore, the Technical Code of Construction *(Código Técnico de la Edificación)* is important legislation. This Code will be the legal framework providing the basic quality requirements for construction.

SWEDEN Swedish law has no direct legislation concerning contracts for construction, as well as design contracts. Thus this area is governed by general contract law. Further rules can be found by analogy to the Sales Act as well as Tort Law. There is also no definition of design as it falls under immaterial services. Architecture and design is a

fairly unregulated area in Swedish law (J. Hellner and J. Ramberg, Speciell Avtalsrätt, Stockholm, Juristforlaget, 1991, p. 122).

2. *Standard conditions on design contracts*

AUSTRIA In AUSTRIA the Austrian Standards Institute (ON) offers by means of AUSTRIAN Standards (Önormen) and ON-Rules a body of regulations (www.on-norm.at;). In particular, Önorm A 2060 (Allgemeine Vertragsbestimmungen für Leistungen/ General conditions for contracts – Works Contract) and Önorm B 2110 (Allgemeine Vertragsbestimmungen für Bauleistungen / General conditions of contracts for work of building and civil engineering construction) apply on design contracts.

BELGIUM Standard conditions on design contracts do hardly exist. And in case they do, they have relatively no meaning, given the importance of mandatory statutory law dealing with the architect's liability.

DENMARK Danish law knows standard conditions for design contracts, such as the standard condition of sale, work and delivery. There is also the Memorandum of Agreement of 8th February 2003. Most of the design issues are a matter for the parties to decide in their agreement. There is no mandatory regulation of the issue.

ENGLAND There are many standard contract terms in ENGLISH law, among which the Standard Forms of JCT (Joint Contracts Tribunal) Contract (formerly known as the RIBA forms), the SFA/99 (Standard Form of Agreement for the Appointment of an Architect) and the ICE (Institution of Civil Engineers) Form of Contract are the most important ones. (J. Uff, Construction Law, 2002, p. 278; M. A. May, Keating on Building Contracts, 1995, pp. 520 and 962). The standard forms provide in their conditions an elaborate code of private law, which deals with most of the problems that might arise. The general law becomes of importance only in so far as it assists in the solution of problems or fills the gaps left unfilled by the standard conditions. In practice many ad hoc forms are in circulation, often drafted for individual projects or clients. Furthermore the Construction (Design and Management) Regulations 1994 impose requirements and prohibitions with respect to design and management aspects of 'construction work', to give effect to the EC Directive on the implementation of minimum health and safety requirements (M. F. James, Construction law. Liability for the Construction of Defective Buildings, 2002, p. 152).

FINLAND There is the Consumer Protection Act that is used as a standard contract term.

FRANCE Standard contract terms concerning design contracts are of almost no relevance in FRENCH law. This is because of the mandatory statutory law dealing with the liability of the architect.

GERMANY In GERMANY the application of standard conditions on design contracts is somewhat different. A well-known standard condition seems to be the HOAI (Honorarodnung für Architekten und Ingenieure). However, in case law it is decided that this standard condition does not apply on activities, which mainly belong to the work of a designer (OLG Frankfürt, NJW-RR 1993, 1305). The activity of designer is to be seen as art, more that the work of an architect. The creativity of the idea to be performed is more important than the Leistungen, which are described in para. 15 HOAI, Leistungsbilder. For this reason the HOAI is fully applicable on architect contracts but, due to case law, not on design contracts (P. Löffelmann, G. Fleischmann, Architektenrecht, 2000, pp. 16-17). Paragraph 15 of this standard condition is the most

important one, as there the Objektplanung is the central issue. (M. Schmalzl, Die Haftung des Architekten und des Bauunternehmers, 1980, p. 4)
GREECE In the area of construction law, the use of standard conditions is rather common. Besides rules in the CC, the Consumer Protection Act 2251/1994 is applicable to contracts for work and concerns provisions on product liability and safety and liability for the supply of services as well. Further many construction contracts are governed by the Public Works Act, Law 1418/1984. The PWA regulates contracts with the public sector and sets forth requirements for contract administration and dispute resolution.
NETHERLANDS In practice, standard contract terms are far more important than the CC. Especially the SR 1997 (Standaardvoorwaarden 1997 Rechtsverhouding opdrachtgever-architect), RVOI 2001 (Regeling van de verhouding tussen opdrachtgever en adviserend ingenieursbureau) and DNR 2005 (De Nieuwe Regeling 2005, Rechtsverhouding opdrachtgever-architect, ingenieur en adviseur) provide rules on the design and the relationship between client and advising engineer.
POLAND Standard conditions exist only as a result developed by the practice.
PORTUGAL Standard contract terms are not common in Portugal. Sometimes, ICE conditions of contract are used. The Regulamento Geral das Edificaçóes Urbanas (General Regulation on Urban Building) is the main source of technical standards for construction. Issues such as endurance, safety, habitability and hygiene requirements are dealt with in this statutory instrument. Designers of buildings must act in accordance with these technical standards. Another interesting statute is the Statute of the Architect's Order (*Estatuto da Ordem dos Arquitectos, Decreto-Lei* no. 176/98). Most private construction contracts use clauses withdrawn form the Regime geral das empreitadas de obras públicas, Decreto-Lei n 59/99 (Public Construction Act). Here too the regulation of the ICE conditions can be applicable (P. Romano Martinez, Direito des Obrigações, parte especial-contratos, 2001, p. 296).
SPAIN The Basic Norms on Construction (Normas Básicas de la Edificación) together with some regulations on specific topics regarding construction are the ones applicable on design contracts. The Technical Building Code (Código Técnico de la Edificación) is the legal framework providing the basic quality requirements for construction.
SWEDEN There are many standard contract terms for work by architect- and engineer consultants. For instance the ABK 96 *(Allmänna Bestämmelser för Konsultuppdrag inom arkitekt och ingenjörsverksamhet av år 1996)*. There is also the AB 04 (the Swedish general conditions of contract for building and civil engineering works and building services), an agreed document prepared in cooperation between several Swedish organisations. But not only the stipulations in AB 04 must be taken into account, but also a number of Swedish Acts and Statutes published in the Swedish Code of Statutes. The AB 04 is intended for use in connection with procurement and agreements concerning contract work when the employer (client) provides the projecting work as basis for the work to be performed by the contractor (designer). Methods and design solutions set out in European Standards adopted as Swedish Standards (SS-EN), and in European Pre-Standards (SS-ENV) are approved as alternatives to the methods and design solutions set out in this Statute, subject to the limitations and other conditions which may be specifies in the BKR Regulations. When designing an individual structural element or interacting element, either BKR or SS-EN (or SS-ENV) shall be applied. There is also the Building Regulations (BRR) in which some general rules on the design activity are given, concerning the building of dwellings, from the point of view of construction.

Furthermore, the Swedish society of craft and design (SIR, KIF) makes references to four model contracts. First, there is the SIRs avtal för designuppdrag (contract concerning design-consultations), secondly the SIRs avtal för upplåtelse av rättigheter (contract concerning property rights), thirdly the KIFs avtal angående formgivning (contract concerning design and crafts) and finally the AB SID 1996 (Allmänna bestämmelser för industriuppdrag) (General provisions for industry-consultations).

Article 5:102: Pre-contractual Duty of the Designer to Warn

The duties under Article 1:103 (Pre-contractual Duties to Warn) require 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.

Comments

A. General Idea

This Article imposes a specific duty on the designer to inform and to warn the client before the contract is concluded. This duty is a particularisation of the pre-contractual duty of any service provider to warn under Article 1:103(1) (Pre-contractual Duties to Warn), which states that both contracting parties are to exchange information about the service to be provided. Because the designer will base the performance of the design service upon the wishes and needs of the client, he will have to warn the client in time when he notices any failures or inconsistencies. This means that the designer will have to point out to the client which additional experts may be needed in order to carry out the design optimally. As the designer may not have all the expertise that is required to achieve the result the client has in mind, the designer will have to warn the client if such expertise is needed. Failure to warn may lead to the result envisaged by the client not being achieved by the designer.

Illustration 1
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.

B. Interests at Stake and Policy Considerations

The question which can be raised here is whether, apart form this general pre-contractual duty to warn under Article 1:103, the designer is to inform the client when he lacks the special expertise to deal with problems that require the involvement of specialists. Design is a very complex activity because it requires knowledge about the service that is to be carried out on the basis of the design.

Illustration 2
In order to design the body of a car, the designer needs to be knowledgeable not only about aesthetics and aerodynamics, but also about the functioning of the engine and legal requirements concerning safety. If he does not have all this expertise, the designer is to warn the client of the necessity to hire specialists before the contract is concluded.

On the other hand, one may argue that, if at the time of the conclusion of the contract the designer does not have all the expertise necessary, he can simply hire specialists himself during the performance of the contract. This will in any case be required in order to supply a design fit for its purpose. However, the client may want to know before he decides to enter into the contract whether the designer has the necessary expertise himself, as this will probably save time and costs.

C. Comparative Overview

The pre-contractual duty of the designer to warn is not commonly accepted in the European legal systems. An express rule on this duty could not be found. The pre-contractual duty to warn is usually derived from other general duties such as good faith, the contractual duty to inform and the contractual duty to warn the client (BELGIUM, FRANCE, GERMANY and SPAIN). Sometimes it is also established in case law, but it has not been found in enacted law (THE NETHERLANDS and PORTUGAL).

D. Preferred Option

It would be preferable to oblige the designer to inform the client in so far as the designer lacks special expertise regarding specific problems that require the involvement of specialists. Exchange of information needs to take place before the conclusion of the contract. This will allow the client to make an informed decision about the designer. Furthermore, it will allow both contracting parties to decide whether any specialists needed will be engaged by the client or by the designer.

E. Relation to PECL and Other Parts of the Principles

The duty of the designer to warn – whether pre-contractual or contractual – has become one of the central issues in general construction law and related areas. Many disputes regarding quality are eventually dealt with by deciding whether the designer was under a duty to warn the client or not. The PECL do not contain rules on the pre-contractual duty of designers to warn in particular. The link between the PECL and the duty of service providers to warn in general is explained in Comment E to Article 1:103 (Pre-contractual Duties to Warn). Not only paragraph (1) of Article 1:103 – of which Article 5:102 is a particularisation – but also the other paragraphs of Article 1:103 are relevant to design services. Paragraph (6) clarifies the criterion that needs to be met in order to

determine whether or not a designer has reason to know of a risk that might trigger his pre-contractual duty to warn under paragraph (1) of Article 1:103 and under Article 5:102. Paragraphs (2) and (6) are relevant in the sense that the designer is not under a duty to warn if the client already knows or has reason to know of such a risk.

Illustration 3
A fashion designer is requested to design a wedding dress. The designer proposes white linen for parts of the dress. The fashion designer does not warn the client of the specific property of linen, which is that it creases easily. However, the client is aware of this property, but keeps silent about it. The fashion designer is not under a pre-contractual duty to warn the client.

Not only the designer can be under a pre-contractual duty to warn, but also the client, as is explained in paragraph (4) in connection with paragraph (7) of Article 1:103. This is the case when the client becomes aware, or should have become aware, of unusual facts that might become a risk for the supply of the service.

Illustration 4
A designer has been requested to design an indoor ski run, which has to be operational by a particular date. Because of the special climatic conditions in a ski centre, the client informed the designer that the use of extra thermal insulation materials was to be taken into account in the design. The construction of the ski run according to a design that is based on the application of such materials will take extra time. This is acknowledged by the designer in the preparation of the design. The client should have known, however, that recent regulations concerning environmental protection require extra protection measures in the application of thermal insulation materials. As the designer is not informed about these extra protection measures, they are not being taken into account in the design. As a result, the construction of the indoor ski run cannot be completed in time.

At first sight one would argue that the client has reason to know of the risks that the service may become more expensive given that the risk would be obvious to a comparable client in the same situation. However, the circumstances underlying the possible occurrence of the risk are not *unusual* in the sense that they should be discovered by any average designer after a basic inquiry. Hence, the client is not under a pre-contractual duty to warn.

F. Character of the Rule

The rules of this Article are default rules.

G. Remedies

When the designer did not warn the client before the conclusion of the contract about the need for additional specialists in order to duly perform the service, the designer has failed to perform his duty under the present Article. As a consequence, in order to complete the design according to the client's wishes and needs, specialists will have to be hired after all. This may lead to the design becoming more expensive than the client expected. If such is the case, the disappointed client may try to avoid the design contract on the basis of Article 4:103 PECL (Fundamental Mistake as to Facts or Law). This option will, however, usually be hypothetical, given that it will not always be practical or even unprofitable to halt a design process and invoke Article 4:115 PECL (Effects of Avoidance). Other options are available, depending on the party that hires the required specialists. If the client, despite the failure of the designer to warn, decides to hire the specialist, he will have to pay the specialist himself, but he can recover these costs from the designer under Article 1:103(3) (b) (Pre-contractual Duties to Warn). If the designer, however, decides to hire the specialist and subsequently tries to claim the additional costs from the client, that claim will be blocked on the basis of Article 1:103(3)(a) (Pre-contractual Duties to Warn).

Comparative Notes

1. *Pre-contractual duty to warn*

   The outcome of the research for a pre-contractual duty to warn of the designer is rather diverse. Some countries have no regulation, some have an implicit regulation and in other legal systems similar rules were found which didn't cover the pre-contractual duty to warn though. In AUSTRIAN architect law a pre-contractual duty of the designer to warn does not exist. In BELGIUM and FRANCE the designer is under a duty to contractual inform (and warn in BELGIUM) the client, but there is no such pre-contractual duty. Both GERMANY and SPAIN know a general rule based on equity that covers the pre-contractual phase in contract law. Thus a rather implicit pre-contractual duty to warn might be established hereupon. In ENGLAND the duty to warn of the designer is accepted even in the pre-contractual stage of the parties' relationship. There are some countries in which the pre-contractual duty to warn might be established from their general principle of good faith. So in GREECE, ITALY and PORTUGAL the pre-contractual duty to warn is implicitly covered by good faith. In ITALY pre-contractual liability as well follows from this good faith. And in PORTUGAL case law has explicitly acknowledged the principle of good faith in the pre-contractual phase in design contracts. This is the same in THE NETHERLANDS where in case law a pre-contractual phase between contracting parties has been established. The pre-contractual duty to warn has not been explicitly described in the existing codes and regulations in Dutch law.

   No information from DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND and SWEDEN.

National Notes

1. *Pre-contractual duty to warn*

AUSTRIA No pre-contractual duty to warn of the designer has been found in AUSTRIAN architect law.

BELGIUM In BELGIUM both contracting parties are obliged to sufficient inform each other during the pre-contractual stage preceding the actual design contract. For that duty the architect has to keep an eye on the common interests as well as the client's interests. Among others the designer must inform the client about the technical feasibility of the design project. Thus a pre-contractual duty to inform is very common in BELGIUM, a pre-contractual duty to warn however cannot be found. (K. Deketelaere, M. Schoups, A. Verbeke, Handboek Bouwrecht, 2004, p. 418).

ENGLAND A contractor, such as a designer, is under a duty to warn, even in the pre-contractual stage of the parties' relationship. The designer will be in breach of contract when he does not warn in suitable circumstances, such as when he knows the original design was likely to prove unsuitable (D. Wallace, Hudson's building and engineering contracts: including the duties and liabilities of architects, engineers and surveyors, 1995, p. 542, no. 4-100). This is mostly established in case law (e. g. *Sanson Floor Company* v. *Forst's Ltd.* (1942).

FRANCE The designer is under a duty to warn and inform the non-competent client. The architect must notice an inadequate choice made by the client. However, a pre-contractual duty to warn does not exist.

GERMANY In German contract law in CC art. 241 para. 2 and art. 311 para. 2 a rule of equity has been established. This is a general rule that controls the pre-contractual phase in contract law, including the pre-contractual duty to warn of the client.

GREECE A pre-contractual duty to warn is not covered by an explicit rule but may be covered though by the 'good faith' in CC art. 200, which says that all contracts will be interpreted according to the requirements of good faith. This means, following CC art. 228 that the designer has to perform the obligations under the contract in accordance with the good faith.

ITALY In ITALIAN contract law a preliminary or preparatory phase of negotiations (CC art. 1337) is necessary to arrive at the conclusion of the contract. Further contracting parties shall behave, either in the pre-contractual negotiations as during the formation of the contract, according to good faith (CC art. 1337). A breach of that duty will lead to pre-contractual liability. Following CC art. 1338, the designer is pre-contractual liable if he during the course of the negotiations knows of some impediment which would make the contract void and does not inform the client.

THE NETHERLANDS There is no pre-contractual duty to warn of the designer in the existing codes or in the mentioned standard contract terms, but in case law the HR has established in HR 18th June 1982 *(Plas/Valburg)* NJ 1983, 723 that also before concluding a contract a pre-contractual stage exists, in which both contracting parties have the duty to act with justified interest to each other. However, a pre-contractual duty to warn has not been explicitly established in this matter.

POLAND Pre-contractual duty to warn is not expressis verbis established in the POLISH CC, one could however try to deduct it from the duty of a loyal contracting (CC art. 354).

PORTUGAL In Portuguese contract law the pre-contractual duty to warn of the designer emerges from the important general principle that is established in CC art. 227 para. 1. Here is aimed at the pre-contractual good faith and fair dealing: co-operation, information and loyalty in general contract law. In particular, regarding design contracts, this principle of good faith in the pre-contractual phase has been applied by STJ 17 June 1998, BolMinJus 1978, 351.
SPAIN In Spanish law a general rule has been established that provides for a rule of equity during the pre-contractual stage of an agreement. This includes the pre-contractual duty to warn of the client, but a more specific rule has not been found in Spanish contract law.

Article 5:103: Duty to Co-operate of the Client

In so far as the designer has warned the client under Article 1:103 (Pre-contractual Duties to Warn) and Article 5:102 that further expertise is required to enable the designer to perform the contract, the duties under Article 1:202 PECL (Duty to Co-operate) and Article 1:104 (Duty to Co-operate) require in particular the client to employ such expertise.

Comments

A. General Idea

This Article imposes a specific duty on the client to co-operate with the designer. As will be explained in Comment E below, this duty is a particularisation of the duty of any client to co-operate under Article 1:104 (Duty to Co-operate). The Article states that the client is not under a duty to co-operate until the designer and the client have concluded the contract. When, under Article 5:102, the client has been warned by the designer that further expertise is required to deal with specific problems, the client is to employ such specialists subject to explicit agreement by the parties on the matter. In practice, after the client has been given such a warning, the parties will often agree on who is to employ the specialists required. This Article provides a default rule for the case in which the contracting parties failed to agree on this point or to provide for this situation in the contract. If such is the case, it is up to the client to employ a specialist.

Illustration 1
A designer is requested to design a museum for the exhibition of ancient Egyptian sarcophagus containing mummified people. The designer needs the views of an expert on the much specialised issue of the required indoor climate of the museum. The designer warns the client according to Article 5:102, whereupon the parties enter into a design contract without making provisions for this issue. The client will have to employ the expert to enable the designer to perform the contract.

B. Interests at Stake and Policy Considerations

This kind of provision is required since Article 5:102 imposes on the designer a pre-contractual duty to warn about lack of expertise. Normally, if the parties do enter into a design contract after such a warning, they will agree on who is to hire the specialists required. It was necessary to draft a default rule to deal with the case in which the parties failed to agree on this point or to provide for this situation in the contract. The question arises what such a default rule should contain. In particular it is to be determined which party will be required to employ the specialists.

It can be argued that such a duty should be imposed on the designer. As he will have to work with the specialist, he will be the person best placed to select such a specialist. The designer will know the design process best.

On the other hand, nothing prevents the client from suggesting specialists to the designer. The main question is with whom the specialist is to have a contractual relationship – the designer or the client. The advantage of obliging the client to hire the specialist directly is that the activity of the specialist is not included in the offer of the designer. Including it in that offer would require a change of the terms of the offer and, often, finding a specialist before the conclusion of the contract. Indeed, if the specialist becomes the designer's subcontractor, the designer will need to know about the contractual conditions of the specialist before concluding the main contract with the client. However, if it is up to the client to employ the specialist, the contract with the designer can be more rapidly concluded and the specialist can be selected at a later stage.

C. Comparative Overview

In most of the European legal systems a duty to co-operate of the client exists, but this often concerns an implicit rule and not one explicitly incorporated in statutory law. Apparently, in some countries the duty of the designer to employ additional experts during the design process falls within the scope of this general duty to co-operate of the client, for in many legal systems no specific rule on this topic has been found. In other countries, however, it is a contractual duty of the designer to inform the client's about whether additional experts are needed, such as in BELGIUM, where this is statutory law. In FRANCE, such a duty has been established in case law. In most systems it is established that the designer himself is liable for possible mistakes due to the expert's (or the subcontractor's) work, as is the case in THE NETHERLANDS, ENGLAND (mainly case law) and BELGIUM.

D. Preferred Option

Reference was given to having a separate Article in this Chapter on the duty of the client to employ additional expertise whenever the designer has informed the client that he lacks the expertise to deal with specific problems, and thus the involvement of

specialists is required. It is up to the client to employ the specialists. It is noted that this Article only provides a rule in the case of absence of agreement between the parties. It will probably find application only rarely because in practice parties, after their pre-contractual exchange of information, will agree on whom is to employ the specialist required. This agreement can be explicit, but also implied in the terms of the contract, because all depends on the fact whether or not the activity of the specialist has been included in the offer of the designer.

E. Relation to PECL and Other Parts of the Principles

The duty to co-operate of the client in general is dealt with extensively in Article 1:104 (Duty to Co-operate). The duties established in paragraph (1) are directly derived from Article 1:202 PECL (Duty to Co-operate), where it is stated that 'each party owes to the other a duty to co-operate in order to give full effect to the contract'. In Article 1:104 (Duty to Co-operate), some instances of the co-operation that can be expected from parties are established. Most of the duties stated in the other paragraphs of Article 1:104 are not repeated in Article 5:103, but those 'silent' paragraphs are definitely applicable to design contracts as well.

Apart from granting reasonable requests for specific expertise, the client also has the duty to give directions regarding the design under subparagraph (1) (b) of Article 1:104 (Duty to Co-operate). The client's duty to obtain permits and licenses under subparagraph (1)(c) will probably be less relevant in the case of design contracts, given that the performance of design services is generally possible without prior receipt of such permits by the client. However, the receipt of the permits and licenses necessary for the carrying out of the design may be a duty of the designer under the design contract (see also Article 5:104(d) below). According to subparagraph (1)(d) of Article 1:104 (Duty to Co-operate), the designer is to grant the client the opportunity to follow and check the design process in order to determine whether the designer is performing the design according to the contract.

> *Illustration 2*
> An aged couple contracted with an architect to design the reconstruction of their mansion, which is to enable them to live and sleep downstairs. The architect will present his ideas and plans to the couple on a regular basis during the design process.

This latter duty serves two functions. Firstly, in this way the client can determine whether the designer has fulfilled his contractual obligations and the stage the designer is in with his work. Secondly, it enables the client to determine whether there is need for a variation of the design. Given that the designer is an expert and that he carries out the design activity himself, he is generally in a much better position to select and provide the information the client needs in order to determine whether the designer has fulfilled his obligations under the contract. But there is a limit to what can be expected from the designer in this respect, because explaining to the client what has been done has its costs. The relevant interests are then very similar: it is a matter of the relative

costs of having the client search for information and having the designer provide the information. In general, the designer has to give this information at the request of the client. The designer is not under the duty to give information spontaneously on the performance of his obligations outside the scope of Article 1:110 (Contractual Duty of the Service Provider to Warn) and on his task to present alternatives so that choices can be made by the client. The co-ordination of the efforts of the client and the designer, finally, should be reasonably necessary; see subparagraph (1) (e) of Article 1:104.

F. Character of the Rule

This Article contains default rules.

G. Remedies

When the client does not or does not duly perform his duty to co-operate despite the designer's warning that he lacks the expertise to deal with particular problems, the designer will not be able to perform the design as it was envisaged by the client. The client should have employed the specialists required, and he did not. The consequence will be that the design cannot be performed in conformity with the contract. In this case, the designer will probably seek resort to Article 9:201 PECL (Right to Withhold Performance). This means that the designer will withhold performance of the contract as long as the client does not employ the specific experts needed.

Comparative Notes

1. *Duty to co-operate of the client in design contracts*
   In the European legal systems a duty to co-operate of the client is not always explicitly established. Most of the time it is hidden among general duties on good faith or performing the concluded contract well. In some countries however, the client has an expressly described duty to co-operate with the designer. For example in THE NETHERLANDS, art. 12 SR 1997 describes that the client has to behave like a competent and caring client, providing all the necessary information in order to enable the client to reach the result envisaged by the client. These duties are also laid down in the DNR 2005, art. 12. In BELGIUM as well an explicit duty exists in the CC art. 1999. Accordingly the client must co-operate with the designer to enable the latter to fulfil the contract. In CC art. 642 as well a duty to co-operate of the client has been established (GERMANY). Furthermore in the German *Architektenvertrag* an implicit rule is known, according to which the client must take care of the needed subcontractors by the designer. In PORTUGUESE law an explicit as well as an implicit rule can be found, the explicit stating that the client has a duty to co-operate in contract law (CC art. 1167) and the implicit describing the client must co-operate derived from the general principle of good faith (CC arts. 227 and 762 para. 2). As said, many countries only know an implicit regulation of the duty of the client to co-operate with

the designer during the design process. Here ENGLAND can be mentioned. According to this legal system the client must in general do whatever is needed to enable the designer to perform well. In FRANCE is considered that the design contract presupposes the co-operation of both the contracting parties to reach the result envisaged and furthermore the duty to co-operate of the client might be derived from the good faith (CC art. 1134 para. 2). In ITALY as well an implicit duty to co-operate does exist in the way that a contract should be performed correctly (CC art. 1175) and following the good faith principle (CC arts. 1337 and 1376). In SPAIN is explicitly stated that the client should give the designer the necessary information for performing the design contract (LOE art. 9 para. 2 b), from which a duty to co-operate might be derived and also the principle of good faith exists (CC art. 1258). For SWEDEN, AUSTRIA and GREECE the duty to co-operate has not been found in the existing regulations.
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, and SCOTLAND.

2. *Specific regulation on the employment of experts*
In some of the legal systems analysed, a specific duty of the employment of additional experts during the design service could not be found (AUSTRIA, SPAIN and SWEDEN). In other countries this duty of the designer (or client) is regulated as well in the codes or other legislation as in case law. Especially in ENGLISH law, it is extensively regulated that the designer may appeal to experts, but that the designer himself is still liable in that case for any defects. According to BELGIAN law it is the designer's contractual duty to hire extra specialists, but the client as well is in the position to do so. Following FRENCH case law, the designer should bring to the client's attention whether experts are needed. However, any codified rules on this issue have not been found. Another kind of rule is found in GERMAN architect law, where the client is the one to employ any additional experts; the designer only has to co-ordinate his work with the expert's one. And in the Dutch standard conditions and case law, it is established that the architect should employ specialists when he lacks the required skill and knowledge during the design activity. However, the designer still remains liable.
No information from DENMARK, FINLAND, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL and SCOTLAND.

National Notes

1. *Duty to co-operate of the client in design contracts*
AUSTRIA The regulation on the *Dienstvertrag* does not establish a duty of the client to co-operate. However, under the *Werkvertrag* (art. 1168 para. 2 German CC) the client is obliged to co-operate *(Mitwirkung)*, but this seems to be not fully applicable on design contracts.
BELGIUM The client has to make sure that the designer is in the ability to fulfil his duties according to the design contract following CC art. 1999. In this way, the client has a duty to co-operate with the architect in order to reach the results he envisages. (K. Deketelaere, M. Schoups, A. Verbeke, Handboek Bouwrecht, 2004, p. 429). This duty to co-operate can be divided in some sub duties. The client has to provide the designer in due time with the needed information to perform the design activity well.

And the client must make the necessary choices during the design process to enable the designer to fulfil his duties.

ENGLAND The designer has the duty to consult with and advise the client among others as to obtaining materials, employing specialist and obtaining tenders. However a duty of the client to co-operate thereafter to enable the architect to perform the contract has not been found. In implicit terms the client is obliged to do whatever is needed to enable the designer to perform well (D. Wallace, Hudson's building and engineering contracts: including the duties and liabilities of architects, engineers and surveyors, 1995, nos. 2-086 to 2-098; Chitty on Contracts, 2004, no. 37-067).

FRANCE Both the designer as well as the client is under a duty to co-operate, in the sense that every contract concluded presupposes cooperation of the contracting parties in order to reach their common goal and the result envisaged. According to CC art. 1134 para. 2, the client is under a duty of good faith, which might implicitly mean that the client must enable the designer to fulfil his performance. However, an explicit rule is missing.

GERMANY In the Architektenvertrag is described that the service provider has to inform and warn the client about all necessary matters during the design activity. Hence, the client has the duty to take care of the needed subcontractors, which the service provider asked for. Furthermore CC art. 642 contains a general duty to co-operate and contribute to the work for the client. Following CC arts. 642 and 643 the architect is entitled to terminate the contract when the client does not perform his duty to co-operate in the sense that he does not accept the design when he should do so (H. Niestrate, Die Architektenhaftung, 2002, p. 220). Some of the client's duties in order to perform his duty to co-operate are the following. The client should make a choice between several designs presented by the architect, the client should employ the specialists needed according to the architects' opinion and the client should determinate what materials will be used (H. Niestrate, Die Architektenhaftung, 2002, p. 220).

ITALY In CC art. 1175 a general rule of correctness in the performance of a contract is established. In both art. 1337 and 1375 the principle of good faith is described, which can be considered to establish a duty to co-operate for the both contracting parties. The first Article concerns the pre-contractual stage and the latter the contractual.

THE NETHERLANDS According to SR 1997 art. 12 para. 1, the client has to act towards the designer as a competent and caring client. Para 2 describes that the client has to observe the designers' duties under art. 11. So the client will have to make sure he co-operates in the sense that the designer is able to fulfil his duty to safeguard the clients' interest to the best and to properly perform the design contract. Following para. 3 the client supplies the designer with the necessary requirements for an appropriate fulfilment of the designer's performance. This duty is also established in the DNR 2005 art. 12 para. 1.

POLAND The general duty to co-operate encumbers the client on the basis of CC art. 354 para. 2. The client should take into account the justified interest of the other party and restrain himself form doing anything, which could complicate, stop or frustrate the performance of the contract (Bieniek, Komentarz do kodeksu cywilnego, tom I, p. 21). Additionally, the rules on the contract of specific work contain direct references to the duty to co-operate, which rests on the client. If the co-operation on the part of the client is required for the making of the work and such co-operation is lacking, the service provider may set the client an appropriate time limit with the

sanction that after an ineffective lapse of that time limit he will be entitled to renounce the contract (CC art. 640).

PORTUGAL The duty to co-operate is generally established in CC arts. 227 and 762 para. 2, which states that there is a pre-contractual duty of good faith and fair dealing which implies the co-operation of the contracting parties. Furthermore, in art. 1167 para a, the duty of the client to co-operate is described. The client will have to co-operate with the service provider and enable him with the means necessary to adequately fulfil the mandate. This is in conformity with the judgement of STJ 17 June 1998, BolMinJus 1978, 351.

SPAIN According to the LOE the client has the obligation to provide the designer with the necessary information to elaborate the design, see art. 9, para. 2, under b. In general a duty of the client to co-operate is implicitly derived from the good faith, usages and the law, see CC art. 1258.

SWEDEN Unless otherwise stipulated the client shall be responsible for the coordination of his own work with the works of the contractor and of other contractors (AB 04, art. 3:9). Perhaps this may be regarded as a duty of the client to co-operate. Moreover, under ABK 96 art. 1:3, upon demand from the designer, the client shall provide the information, data and documents at his disposal, that are necessary for the designer in order to fulfil his commission. Also art. 4:2 obliges the parties to inform each other of circumstances which may be of relevance to the commission.

2. *Specific regulation on the employment of experts*

AUSTRIA The codified rules on the Dienstvertrag in the AUSTRIAN CC do not regulate anything on this topic.

BELGIUM In art. 24 para. 3 Reglement van Beroepsplichten the relation between the designer and the experts is being regulated. According to Baert, the architect and the client should discuss whether or not other technicians and advisors are needed. The architect should take the initiative in this issue for it belongs to his contractual duty (G. Baert, Privaatrechtelijk Bouwrecht, begrippen van het rechtssysteem, zakenrecht en contractenrecht, 1989, p. 433). The co-operation between the architect and these experts does not mean that the architect abandons his privileges. The client may call for specialists as well, as for the construction of elevators and electrics. (G. Baert, Privaatrechtelijk Bouwrecht, begrippen van het rechtssysteem, zakenrecht en contractenrecht, 1989, p. 448).

ENGLAND In case of specialist processes, the designer may delegate (a part of) the design to such an expert. It frequently happens that subcontractors are chosen for nomination because they can carry out specialist designs (J. Uff, Construction Law, 2002, p. 396-397). In that case, the architect is held liable under his general design responsibility, for failing to remedy a possible defect. This was established in *Merton L. B. C. v. Lowe* [1982] 18 B. L. R. 130. In that case, an architect delegated a part of the design activity to a specialist in swimming pool ceilings. The specialist should use reasonable care as to the architect. The architect was not held liable for damages to the ceiling, because 'he was entitled to rely on the specialist's expertise'. In the case of *Moresk Cleaners v. Hicks* [1966] 2 Loyd's Rep. 338 an architect delegated the whole task of design of a concrete structure to a subcontractor. The design proved to be defective. The architect was found liable, for he could not escape responsibility for the work, which he was supposed to do by handing it over to another. (J. Uff, Construction Law,

2002, p. 264-265) Clauses 19.1 and 19.2 JCT and clauses 3, 4, 58, 59 and 60 ICE deal with this subcontracting by the designer. They mainly deal with the parties' rights in regard to default by the subcontractor.

FRANCE In FRENCH architect law a codified rule on the employment of experts by the designer or the client is not commonly established. In case law, it has been decided that the architect has to guide his client's choices, and that he must bring to the client's attention whether there is need of additional experts. (CA Paris 23e Ch., 29 September 1989, Juris-data no. 024763)

GERMANY Following German architect law, the employment of Sonderfachleuten falls within the duty of the designer to co-ordinate the technical, financial and time-aspects of the design activity. Mostly, the designer already knows what specialists the client requires for the performance of the design when the designer is still drafting a preparatory design. The designer has no duty to check the work of these specialists, but he will have to co-ordinate their work with his own. (H. Niestrate, Die Architektenhaftung, 2002, pp. 34-35). When the designer does not fulfil his duty to point out to the client that specialists are needed, than the designer is in negligence. He cannot avoid liability by referring to his lack of specialisation in this matter. (H. Locher, Das private Baurecht, 1993, p. 105).

THE NETHERLANDS According to art. 5 DNR 2005, the architect (or advisor) may – under his supervision – employ specialists (such as a designer to make detailed drafts), unless the architect himself performs his duty to design with due care. This is also regulated by Article 5 SR 1997. Thus, when the employed expert is negligent, the architect himself remains liable for the damage. The architect may claim the employed experts of course. This liability in case of the employment of experts is being regulated in art. 13 para. 2 and 14 para. 5 DNR 2005. In case law, this problem has been addressed as well. The architect should consider his own ability and experience when he accepts the duty to render a design service. When he lacks special competence, he should employ this competence with professionals. The architect is fully liable however. (CvG-KIVI 20 July 2000, BR 2001, p. 166) Following art. 6 DNR 2005, sub-advisors may be consulted during the design activity.

POLAND No specific regulation, the general rules apply.

SPAIN No specific rule found.

SWEDEN Besides the general rule mentioned above (AB 04, art. 3:9), a more specific rule on the employment of additional experts has not been found.

Article 5:104: Duty of Care of the Designer

The duties under Article 1:107 (General Standard of Care for Services) require in particular the designer to:

(a) attune the design work to the work of other designers who contracted with the client, in order to enable an efficient performance of all services involved;

(b) integrate the work of other designers, which is necessary to ensure that the design will be in accordance with Article 5:105;

(c) include any information for the interpretation of the design that is necessary for a user of the design of average competence or of a specific user made known to the designer at the conclusion of the contract to give effect to the design;
(d) enable the user of the design to give effect to the design without violation of public law rules or interference based on justified third-party rights of which the designer knows or could reasonably be expected to know; and
(e) provide a design that allows economic and technically efficient realisation.

Comments

A. General Idea

The present Article is a specification for design contracts of the general duty of care that is imposed upon any service provider under Article 1:107 (General Standard of Care for Services). According to paragraph (a), the designer is to attune the design to the work of other service providers to achieve the design envisaged by the client.

> *Illustration 1*
> An aesthetic designer is engaged to design a new type of sports car for a well-known car manufacturer. While doing his work, the designer will have to attune his work to the technical design for the car, which is supplied by another designer hired by the client.

According to paragraph (b), attuning of the design to the work of other service providers may include integrating the work of other service providers as well.

> *Illustration 2*
> While designing a new sports centre, the main construction designer will have to integrate into his design the design work done by other designers such as the design of the air conditioning system and that of the floor coating.

According to paragraph (c), the designer is to include the necessary information for the interpretation of the design that is needed to perform the subsequent service.

> *Illustration 3*
> A fashion designer is requested to design a new men's clothes fashion line. After completion of the design, the designer will have to give all the information to the client, which is reasonably necessary to enable the client, or another party on his behalf, to start producing the clothes.

The designer must either focus on a user of average competence or on a specific user made known to the designer at the time of conclusion of the design contract. If special needs of a particular user of the design are made known after the conclusion of the contract, the rules of Article 1:109 (Directions of the Client) apply, i. e. such a direction would probably have to be accepted by the designer, but additional costs would have to

be borne by the client under Article 1:109(3) (Directions of the Client) in conjunction with Article 1:111 (Variation of the Service Contract).

In order that the design is fit for its purpose as is contained in Article 5:105, the design has to be in accordance with public law provisions, as established in paragraph (d) of the present Article.

Illustration 4
A timetable for public transport is being designed. The designer has to take into account the fact that buses are not to exceed speed limits.

Illustration 5
An architect is requested to design a house which is to be built on land that is encumbered with an easement. The architect will have to take this fact into account when designing the house.

The designer is to have reasonable knowledge of public law rules as well as of third-party rights. It is not the designer's responsibility to obtain permits or licences, unless agreed otherwise, but he has to make the design in accordance with public law provisions. There is, of course, some uncertainty about whether the design will be granted permission. Especially political decisions cannot be foreseen. These cases would fall under the defence of Article 8:108 PECL (Excuse Due to an Impediment) of the designer.

A very important issue in design concerns economical and technically efficient planning. A corresponding duty is stated in paragraph (e). This provision implies the duty to stay within the cost estimate of the client, not to make any mistakes in the calculation of the costs and not to include any parts or steps in the process of the subsequent service that are unnecessary.

Illustration 6
A municipality wants to have a low-cost bus station to be designed. The designer, who prefers to include modern and high-tech materials in his design, is to pay extra attention to not exceeding his client's cost limits.

B. Interests at Stake and Policy Considerations

The designer is – like any other service provider – under the general duty of care established in Article 1:107 (General Standard of Care for Services). One may question, however, whether additional, specific duties are needed for design contracts.

In order to make a design that is in conformity with the expectations of the client, the designer is to take into consideration what other designers might be needed during the design process. Designers with other specialities might be needed to co-operate with, in order to be able to make the design envisaged by the client. These various design services will have to be attuned to during the design process for the final design to be in conformity with the contract.

Illustration 7
While drafting a building plan for the construction of a railway station, the designer of the structural works is to attune his design to that of the designer of the electrical system and vice versa.

Another issue is whether the design itself is understandable and clear enough for the client or the subsequent service provider, so that the design can be realised. Therefore, a rule on the interpretation of the design by the client may be helpful.

The client or anther service provider should be able to carry out the design. A design that is in violation with laws and regulations or that, according to technical standards, cannot be carried out is of no use. A rule dealing with this issue would be useful here.

The design process is the starting point for the construction process. A designer is under some essential duties. When those duties are breached during the initial stage of the design process, difficulties will be encountered during the construction process due to the defective design. Therefore, it would be desirable to have a checklist of the most important duties of the designer regarding the care and skill required. This means a particularised duty of care of the designer specified in this Chapter in addition to the general provisions of Article 1:107 (General Standard of Care for Services). Performance of these particularised duties may simplify the construction process, as many defects will have been discovered and corrected beforehand. Furthermore, these said duties could induce the designer to create a design in conformity with the result the client has in mind. On the other hand, the general duty of care of Article 1:107 (General Standard of Care for Services) could be seen as sufficient, for it is already rather detailed as well.

C. Comparative Overview

The general duty of care of the service provider is specified in several national rules for designers. One of these specific duties that frequently occur is the duty to take account of the public and private legal rules that are relevant to the carrying out of the design. Furthermore, the design is to be technically and financially feasible. Examination of the circumstances such as the conditions of the soil and the surroundings is generally recognised as a duty of care of the designer in the European legal systems. Sometimes there are lists of specific duties, such as the *Honorarordnung für Architekten und Ingenieure* (HOAI), in which the specific duties of the architect are described in detail. In any case, it can be concluded that in all legal systems researched the general duty of care of the designer has been particularised in one or more of the specific duties of care listed in the present Article.

D. Preferred Option

Although a general rule for the required care for service providers already exists, this Article is needed because it adds some necessary elements, which are typical for the duty of care that may be expected from designers. The present Article, in connection

with the general rule of Article 1:107 (General Standard of Care for Services), underlines what is needed to increase the chances that a design is in conformity with the contract. The particular duties imposed by the present Article will induce the designer to make a design which meets the wishes and needs of the client. The paragraphs of this Article describe the most important tasks a designer has to carry out during the design process. One idea behind this Article is to encourage a very close relationship between the client and the designer (co-operation). They are dependent on each other for the creation of a design that is in conformity with the contract according to Article 5:105.

E. Relation to the PECL and Other Parts of the Principles

Article 5:104 is a particularisation of Article 1:107(1) (a) (General Standard of Care for Services) in the sense that it makes the general duty of care more concrete in the context of design services. However, the other paragraphs of Article 1:107 are also relevant to design contracts. Subparagraph (1) (b) provides that the service provider is to observe the requirements in the contract and perform his service in conformity with statutory or other binding legal rules that are applicable to the service.

Illustration 8
While designing a new runway for the national airport, the designer is to take into account the applicable regulations regarding noise pollution.

When the designer professes to perform the design work with a higher standard of care and skill than is required, the higher standard is the one to be observed (Article 1:107(2)). The application of this provision is of relevance for design contracts even if the designer is under an obligation to achieve a result stated or envisaged by the client. Indeed, if it is noticed in the course of the service process that the latter duty may not be performed, and if it is still possible to achieve the result required, the client will have to involve the breach of Article 1:107 before the contract has been performed and force the designer to perform the contract correctly (cf. Articles 1:105 (Circumstances in which the Service Is to Be Performed), 1:106 (Duties of the Service Provider regarding Input) and 1:107 (General Standard of Care for Services), Comments B and D).

Illustration 9
An architect's firm is specialised in designing bridges; it is the firm's only field of business. The firm has a good reputation among architect firms. The architect's firm can perform the design of a bridge with a higher standard of care and skill than which would normally be required. The firm is to observe this higher standard.

Illustration 10
A software designer is commissioned the design of software for an accountancy firm for the production of annual accounts, which is a very specific performance. The software designer is a specialist in this area. He is to observe a higher standard of care than normally required.

If the designer belongs to a group of professionals, the standard of care used by that group is to be adhered to, having regard to paragraph (3) of Article 1:107. Paragraph (4) of that Article provides criteria for the determination of the standard of care and skill required. According to paragraph (5), the designer is to take reasonable precautions to prevent damages as a consequence of performing the design service.

F. Character of the Rules

This Article contains default rules.

G. Remedies

If the designer does not perform one or more of the duties stated in this Article, the client may resort to the normal remedies of Chapter 8 PECL (Non-Performance and Remedies in General) and 9 (Particular Remedies for Non-Performance) PECL. How these remedies operate in the context of non-performance of the duty of care for services providers in general is further clarified in Comment I to Article 1:107 (General Standard of Care for Services).

Comparative Notes

1. *Duty of care of the designer*
   In all European legal systems a general duty of care of the designer has been established. Mostly this duty does not only concern the designer but every contracting party. So in ENGLAND it is required that the service is being performed according to professional workmanship, which means reasonable care and skill. This is established in the standard conditions (JCT, ICE, SFA99 and the Supply of goods and services Act) and in case law as well. The Defective Premises Act 1972 in clause 1 as well provides for such a general duty. And in FRANCE the designer is in principle under an obligation of result, therefore the duty of care is of no relevance in principle. The architect must furthermore apply *les règles de l'art* (Malinvaud (ed.), Dalloz Action Construction, no. 36). Therefore in general FRENCH contract law the *garantie de bonne exécution* has been established. In GERMAN contract law the duty of care is based on the Treu und Glauben (CC art. 242). Besides that the allgemein anerkannten Regeln der Baukunst und Technik have to be followed by the designer. According to the CC art. 355 para. 1 (POLAND), the designer as a professional is considered to perform according to due diligence. Sometimes the principle of good faith and usages imply the duty of care of the designer, as is the case in SPAIN. Spanish law however also contains an explicit standard of care in CC art. 1104. In PORTUGUESE CC art. 762 para. 2 this good faith is embedded as well as the basis of the duty of care. In AUSTRIA (CC arts. 1279 and 1299), GREECE (CC art. 330), ITALY (CC art. 1176 para. 2), THE NETHERLANDS (CC art. 7:401, SR 1997 art. 13 para. 4, DNR 2005 art. 11 para. 1a and 2) and PORTUGAL (CC art. 1208) such a general standard of care is also included in their regulation. The standard of care of a designer must comply

with the skills of a reasonably competent representative of that profession. In BELGIUM a general duty of care of the designer is not established in their CC, but in the *Reglement van Beroepsplichten*. Art. 1 para. 3 requires that the designer performs his service with due competence and efficiency and according to the state of the art. In SWEDEN the standard conditions provide for a good professional practice (ABK 1996 art. 4:1, AB 04 art. 2:1 (2) and BSF 1998:39). The general duty of care is usually based on the same principle of due diligence and performance in accordance with the *leges artis*. The requirements of the design being in conformity with the state of the art are accepted in every legal system researched. Each country however has its own specifications. In SPAIN the service must be performed conform the *leges artis* and in a professional way. The duty of care in the specific profession of a designer is commonly measured up to a reasonably competent representative.
No information from DENMARK, FINLAND, IRELAND, LUXEMBURG and SCOTLAND.

2. *Specific rules on the duty of care*
There are some specific rules on the duty of care which occur in most of the legal systems. These are the duty to make a design that is in compliance with the public and private legal and regulatory rules. Thus the designer will have to take account of the legislation applicable on his design activity. Aforementioned specific duty of care is established in the legislation of BELGIUM (Reglement van Beroepsplichten art. 17), FRANCE (implicitly follows from general contract law), ENGLAND (JCT clause 6.1), ITALY (according to the disciplinary rules), THE NETHERLANDS (SR 1997 art. 11 and DNR 2005 art. 11) and SPAIN (LOE art. 10 and 11 para. 2). Subsequently, the duty of the designer to make a design that is technical, financial and professional feasible is mostly established. So in FRANCE the designer has to take into account the available budget and in ITALY the disciplinary rules require the technical and professional preparation of the design. The SR 1997 and DNR 2005 (THE NETHERLANDS), both art. 11, prescribe the designer to make a technically and financially feasible design, and that the designer must have full competence to perform the service. And in the PORTUGUESE Architect's Order Statutes (*Estatuo da Ordem dos Arquitectos,* Decreto-Lei n 176/98), art. 49 para. 1, the designer is required to perform his service with due professionalism, efficiency, loyalty, knowledge, creativity and talent. Following Spanish Building Code art. 10 para. 2 (SPAIN), the designer has to obey academic and professional degrees. The ITALIAN disciplinary rules require that the designer has no conditions of incompatibility. Another duty that is common in some European countries is the duty of the designer to examine the existing circumstances, surrounding and the condition of the soil. In BELGIUM and FRANCE this too stems from general contract law. Further some singular specific duties of care of the designer can be mentioned. In BELGIUM the Reglement van Beroepsplichten describes in art. 17 a duty of the designer to regard his professional secrecy. The Supply of Goods and Services Act (ENGLAND) establishes that the designer must take into account a good and workmanlike manner and he has to use materials of good quality. The duty may normally be discharged by following established practice. GERMANY has its Honorarordnung fur Architekten und Ingenieure (HOAI) in which art. 15 describes a very specific regulation on several fields.

No information from AUSTRIA, DENMARK, FINLAND, IRELAND, LUXEMBURG, SCOTLAND and SWEDEN.

National Notes

1. *Duty of care of the designer*

AUSTRIA In the AUSTRIAN CC art. 1297 and 1299 the standard of care to be observed during the design activity is described. The criterion of establishing fault is a comparison between the actual behaviour and the hypothetical standards of a reasonable and diligent expert. Aspects of the standard of care are the state of the art (Kunstfehler) and liability for malperformance. According to AUSTRIAN CC art. 1299, the standard level of diligence has to be measured following the usual degree of care and attention that is necessary for the performance in question.

BELGIUM In the Belgian CC a general rule is not explicitly established. According to the Reglement van Beroepsplichten art. 1 sub 3, the designer has to perform his profession with professional skill and efficiency and with respect to the professional standards. The performance of the architect to design also contains the producing of plans. This must be performed according to the state of the art; the design has to be of sufficient steadiness, isolation and waterproof. The designer's plans shall allow the building of an enduring construction, which may serve its purpose (G. Baert, Aanneming van werk, 2001, pp. 390-391) (K. Deketelaere, M. Schoups, A. Verbeke, Handboek Bouwrecht, 2004, p. 399).

ENGLAND In ENGLISH standard contracts, the duty of care exists as well in implied rules as in expressed (JCT and ICE) ones. (M. A. May, Keating on Building Contracts, 1995, p. 347) The implied duty of the designer is to carry out his express duties with the reasonable care and skill. This means 'the standard required of the ordinary skilled and competent practitioner in the profession concerned' (M. F. James, Construction law. Liability for the Construction of Defective Buildings, 2002, pp. 148-149; *Bolam v. Friern Barnet Hospital Management Committee* [1957] 2 AllER 118, at 121). This duty is usually laid down in standard contract terms. See for example the Standard Form of Agreement for the Appointment of an Architect and the Supply of Goods and Services Act 1982, s.13. Concerning the quality of the design, liability for breach of warranties is strict; it is no defence for the designer to say that he took all reasonable care. The designer is contractually liable only if he has failed to exercise reasonable care and skill (M. F. James, Construction law. Liability for the Construction of Defective Buildings, 2002, p. 148). It is a general rule according to the implied terms of a construction or design contract that the contractor must carry out his work with proper skill and care, or in a workmanlike manner. This is established in *Young & Marten v. McManus Childs* [1969] 1 AC 454.

FRANCE The designer is in principle under an obligation of result, therefore the duty of care is of no relevance in principle. The architect must furthermore apply *les règles de l'art* (Malinvaud (ed.), Dalloz Action Construction, no. 36).

GERMANY The designer has to perform his duties nach Treu und Glauben (CC art. 242), which can be considered to be a rather general duty of care of the designer. Further the designer must obey the allgemein anerkannten Regeln der Baukunst und Technik. The latter duty is considered to be a minimum standard for the care to be performed by the designer (H. Niestrate, Die Architektenhaftung, 2002, p. 14). For

determining the standard of technique that is required the DIN-Normen and the VDI-Richtlinien are important. Especially when new materials and techniques will have to be used in the design or construction, the architect should be extra careful and he should therefore be in full conformity with the client on this matter (H. Niestrate, Die Architektenhaftung, 2002, pp. 14-15).

GREECE There is a general provision in CC art. 330. This Article stipulates that the standard of care can be determined only by reference to the degree of fault. The debtor conduct is negligent if it does not live up to the care expected in everyday life. According to the general rule, the standard of care is objective in the sense that it does not measure up to the specific abilities or inabilities of a specific person but it abstractedly refers to expectations of diligence exercised by an ordinary man. The standard of care of a designer will be measured up according to the skills of a reasonably competent representative of that profession. This has to be further qualified by specific guidelines on quality norms. Case law and the code of conducts would be a valuable guideline. CC art. 686 furthermore describes that the one who carries out a contract for work has to perform his duties with care.

ITALY The standard of care to be met is the one specified in CC art. 1176, para. 1. It says that the designer must use the care of a reasonable man; he must show the skill, caution and care of an ordinary person. The higher standard is the care and skill of a professional man, laid down in para. 2. When the service provider's duties are of a professional or business nature, the standard of care is not that of the reasonable man, but that of the reasonable profession. And that will depend upon the rules governing that profession. Therefore an intellectual professional avoids incurring liability by performing with the *exacta diligentia* expected with regard to the nature of his activity. It will be measured according to the skills expected by a competent professional (designer). The quality norms in ITALY are rather detailed. Some disciplinary rules to be mentioned are to carry out the duty in conformity with existing regulation and with the contract, with respect to the general interest of the society, technical and professional preparation, no performance in case of incompatibility and to safeguard the clients' best interests.

THE NETHERLANDS The general rule on the standard of care is laid down in CC art. 7:401, which is also described in SR 1997 art. 13 para. 4. Concerning the required care, it describes that the architect must exercise his profession with normal attention and a normal way of exercising his duties. In De Nieuwe Regeling 2005 it is stated that the adviser (designer) will have to perform the contract with due care (art. 11, sub 1a and 2).

POLAND The designer is required to act with diligence generally required in the relations of a given kind (CC art. 355 para. 1). The due diligence of professional is assessed with the consideration of a professional nature of that activity (CC art. 355 para. 2). The Supreme Court has clarified (Judgement of the Supreme Court of 25. 9. 2002, I CKN 971/100, Lex nr 56902) that the due diligence of the professional debtor does not mean any exceptional diligence, but it should be adjusted to the acting party, the subject and the circumstances in which obligations are to be performed.

PORTUGAL The standard of care is embedded in CC art. 1208. The main duty of the designer is the accomplishment of a work; obtaining a result in conformity with the requirements in the contract without defects (obligation of result). Architects should comply with the *leges artis* (state of the art) of their profession and with technical

standards. Furthermore several specific duties of care are derived from the good faith in CC art. 762 para. 2, such as the duty to inform, the duty of secrecy, and the duty of security (P. Romano Martinez, Direito des Obrigações, parte especial-contratos, 2001, p. 350).

SPAIN The contracting parties do not expressly agree on terms regarding the standard of care to be observed by the designer. In construction contracts, such as design contracts, reference to good faith and usages must be done in order to give the proper qualification to the contract. The client expects the designer to elaborate the design in a professional way, acting in accordance with the *lex artis* which regulates the development of the design activity. The contract for work is qualified as an obligation of result. Thus, not the standard of care as is regulated in general contract law is important, but the one which corresponds to the profession of an architect. The general rule on the standard of care in the fulfilment of the obligations is embodied in CC art. 1104.

SWEDEN The designer shall carry out his work according to good professional practice, following from the ABK 1996, art 4:1 and AB 04 art. 2:1. He will be liable for negligence that he has shown while exercising his commission. A structure shall be designed by competent personal in a workmanlike manner in accordance with the provision of sections 4-9 so that a good standard of workmanship is made possible and that the stipulated maintenance can be carried out (BSF 1998:39). The designer shall carry out his work carefully *(med omsorg)*.

2. *Specific rules on the duty of care*

BELGIUM According to art. 17 of the Reglement van Beroepsplichten, the designer has to take account of the legal and regulatory provisions that are applicable on his task. Thus the architect must know all the legal issues that are of particular importance to the design activity. Following the Hof van Beroep Gent the designer has the duty to inform the client about the obligations which arise from the law and regulations; hence he should point out the risks when the client does not take these rules into account (Gent, 3 May 1996, RW 1999-2000, 223). Furthermore, the designer must also obey the professional secrecy according to the Reglement van Beroepsplichten art. 18. The designer is expected to examine the surroundings and condition of the soil, the materials prescribed and the method of construction (K. Deketelaere, M. Schoups, A. Verbeke, Handboek Bouwrecht, 2004, p. 436). Some other duties mentioned are the duty of the architect to advise on the materials to be used in the construction process, the duty to advise on obtaining licenses for the construction and the duty to advise on the best price and quality to be taken into account (G. Baert, Privaatrechtelijk Bouwrecht, begrippen van het rechtssysteem, zakenrecht en contractenrecht, 1989, p. 433-436). As mentioned, the designer is bound to deontological rules, which means he has to comply with the deontological rules while performing the design contract.

ENGLAND The specific duty of care of the service provider in design contracts may be described as the preparation of a skilful and economic design for the future construction works. What constitutes reasonable care and skill following the general duty in the design of work depends upon the circumstances of each case (*Lusty v. Finsbury Securities* [1991] 58 B.L.R. 66). The duty may normally be discharged by following established practice. Regarding the liability of the designer in case of the breach of his duty of care, the criterion normally is whether there is loss or damage caused. However, this does not necessarily imply that the required skill and care was not sufficient.

Designers are subject to the Defective Premises Act 1972 as well, which established in section 1 that the designer owes a duty to any present or future owner of a dwelling to see that his work is done in a professional manner. The JCT standard conditions describe in art. 8.1.1 the duty of care of the designer, being in short good workmanship. Further the work must comply with various statutory requirements according to art. 6.1. The contractor's liability for defects is limited to those, which are 'due to materials, workmanship not in accordance with the contract, or frost'. More detailed duties of care are established such as to examine the site, soil and surroundings, to advise and to consult with the client and to comply with the law (concerning this law, the architect has the duty to general rules applicable according to *Jenkins v. Bentham* (1855) 15 CB 168) (M. A. May, Keating on Building Contracts, 1995, p. 344). In regulation 13(2) of the *Construction (Design and Management) Regulations 1994*, a specific duty of care for the designer is laid down, considering health and safety requirements (M. F. James, Construction law. Liability for the Construction of Defective Buildings, 2002, p. 152).

FRANCE The architect is responsible for the quality of his design project. He has to obey the règles de l'art. Further the designer must perform his design activity with respect to applicable regulations (Auby, Périnet-Marquet, Droit de l'urbanisme et de la construction, no. 1163) (Malinvaud, Dalloz Action Construction, no. 36). Some more detailed duties are the following. The designer must take into account the relevant public rule, the available budget and the condition of the soil, surroundings and environment (Auby, Périnet-Marquet, Droit de l'urbanisme et de la construction, nos. 1157-1158).

GERMANY In HOAI art. 15, some very detailed duties of the designer are described (H. Locher, Das private Baurecht, 1993, pp. 181-185). Therefore, this Article can be considered as a prescription of what has to be done to perform the design activity with the care required. Besides rules on the remuneration of the designer, there it is also described which the specific duties of the architect are concerning his preparations of the design activity and his cooperation during the putting out to tender of the design. Some of the specific duties mentioned are the choice of specialists to be made by the architect, the duty to inform the client on new materials to be used in the construction, the duty to inform on the needed licences for the construction, and the duty to inform on financial and fiscal aspects of the design (H. Niestrate, Die Architektenhaftung, 2002, pp. 103-113).

GREECE Greek contract law knows no specific quality norms concerning design. CC art. 686 only describes that the one who carries out a contract for work has to perform his duties with care.

ITALY Following the architect's disciplinary code, the professional designer has to perform in conformity with the existing regulations (art. 3) and must base his professional behaviour on assumption of liability for his acts, on technical and professional preparation etc. (art. 4) and to perform his obligations only where there are no conditions of incompatibility (art. 5). According to CC art. 2236, the service provider is only liable for intentional wrongdoing or gross negligence. If he has satisfied that standard of care, he will not be liable even if the result is useless or even harmful. This guarantees the professional man a certain freedom in creativity that necessarily entails a certain risk for the client.

THE NETHERLANDS Art. 11 SR 1997 consists of a specific rule on the designer's duty of care. It describes what can be expected of a good and careful architect (para. 1 and 2). Here as well detailed duties can be mentioned, such as a technically and financially feasible design (aesthetic value not to be taken into account), and for the designer only to accept the design activity if he is capable of utilising the knowledge, skill and experience necessary (M. A. M. C. Van den Berg, Bouwrecht in kort bestek, 2000, p. 299). He must safeguard the clients' interests to the best. Further the architect must take into account the public and private rules, relevant for the design and construction thereof according to para. 4. In De Nieuwe Regeling 2005 similar rules are found in art. 11.
POLAND If there are any circumstances, which may prevent the proper making of the work, the designer shall immediately notify the client about these facts (CC art. 634).
PORTUGAL In the Architect's Order Statutes (*Estatuo da Ordem dos Arquitectos*, Decreto-Lei n 176/98) in Article 49 the standard of care of the architect is embedded. Paragraph 1 says that the architect shall act professionally with efficiency and loyalty, using all of his knowledge, creativity and talent, in best regard of the interests of their clients. In para. 2 some detailed obligations are described as well.
SPAIN The new Spanish Ley 38/1999 de 15 noviembre de Ordenación de la Edificación (LOE) includes the regulation of the activity of designers. Article 10 of the statute, establishes the obligations of the designer, among which is the obligation to elaborate the construction project in accordance with the technical and town planning norms, applicable to the type of construction and to what has been agreed in the contract. According to art. 11 para. 2, the service provider has to execute the design activity according to the construction project, the applicable legislation and the guidelines given by the client. The designer must act in accordance with good faith and due diligence. The standard of care required in carrying out the obligation of design in a construction process is regulated by the norms on the profession *(leges artis)*. The architect will be liable if he does not carry out his obligations in accordance with the current techniques on construction (STS 22 February 1978; STS 26 May 1986). In the Spanish Building Code art. 10 para. 2, is described that the designer should 'hold the pertinent academic and professional degrees in architecture and engineering, whichever applies, and meeting the conditions established for practising the profession in question.' Further the designer should prepare the project in accordance with the legislation in force and under the terms of the contract and submitting the project with all approvals as required.

Article 5:105: Conformity

(1) Except where the parties have agreed otherwise, the design does not conform to the contract unless it enables the user of the design to achieve a specific result by carrying out the design following the required standard of care with regard to the carrying out of the design.
(2) The client is not entitled to invoke a remedy for non-conformity if a direction provided by the client pursuant to Article 1:109 (Directions of the Client) is the cause of the non-conformity and the designer did not breach the duty to warn pursuant to Article 1:110 (Contractual Duty of the Service Provider to Warn).

Comments

A. General Idea

Conformity of the design is one of the central objectives of the rules on design contracts. The present Article states that the design has to be fit for its purpose. Design is to be seen as the starting point for a subsequent service, such as construction or processing. If the design is not fit for its purpose, the subsequent service cannot be carried out in a way that its outcome will meet the client's expectations.

This Article specifies Article 1:108 (Result Stated or Envisaged by the Client) in the context of design services. The reasonable client may expect a designer to achieve the particular result through the performance of the service requested. Paragraph (1) of the present Article states that the design is in conformity with the contract when it enables the client to achieve a specific result by carrying out the design, according to the standard of care required.

Illustration 1
An architect's firm has been requested to make a design for the restoration of a historical building. The facade with its fabulous step gable is to be integrated in the design. However, the step gable is not included, and thus renders the subsequent service of the constructor will not be in conformity with the client's wishes. The designer did not meet his obligation under the present Article.

Illustration 2
In the same example, the design turns out to have perfectly integrated the step gabled facade of the building, but the constructor does not renovate the facade in the way it was drafted in the design. Here, the designer did meet his obligation under the present Article, even though the result envisaged by the client has not been achieved.

If the design is defective, as a result of which the subsequent service cannot be carried out in conformity with the requirements of the subsequent contract, the designer and the subsequent service provider may become jointly and severally liable. This means that the client can claim damages from both, according to Article 10:102 PECL (When

Solidary Obligations Arise), and provided that the subsequent service provider was under a duty to warn and failed to perform that duty either under Article 1:103 (Pre-contractual Duties to Warn) or under Article 1:110 (Contractual Duty of the Service Provider to Warn).

When the design is not in conformity with the contract due to a direction of the client and the designer did not breach his duty to warn under Article 1:110 (Contractual Duty of the Service Provider to Warn), the client is not entitled to invoke a remedy for the non-conformity. This follows from paragraph (2).

Illustration 3
An architect is requested by a housing company to design a new apartment building in the centre of the city, with sufficient parking facility in the basement of the building. During the design process the client instructs the designer to change the initial design of the basement so as to ensure that the residents will have more room for storage. The designer warns the client that this will result in fewer parking spaces, but the client is determined. When the design is completed, it appears that there is not enough room for all the residents' cars. Since the designer warned the client thereof, the client is not entitled to invoke a remedy for this non-conformity of the design.

B. Interests at Stake and Policy Considerations

Design liability is an important issue for both parties. It concerns the difficult question on what basis the liability of the designer should be established. This may either be his failure to exercise the design activity with the care and skill required, or the fact that the design service did not achieve the result that was expected by the client.

When liability for the defective design is established on the latter basis, the designer will have to remedy defects even when he met every relevant quality requirement regarding the assessment of the existing situation (see Article 1:105 (Circumstances in which the Service Is to Be Performed)), the input of tools and materials in the design process (see Article 1:106 (Duties of the Service Provider regarding Input)), as well as the skilful and careful application of these tools and materials during that process (see Article 1:107 (General Standard of Care for Services) in conjunction with Article 5:104). His only escape would be to show that one of the specific defences should apply. This is called the 'FRENCH approach', or the fitness-for-purpose test. When there is no fitness-for-purpose liability, the basic question will be whether the designer met the aforesaid quality requirements in the course of the design process. In the first instance, one might argue that these two approaches are each other's opposites and that the designer's interests are best protected in the second approach. In practice, the differences may not be too big, however, especially when the burden of proving that all design process requirements have been met, is put on the designer. In that case, the question would rather be which defences are allowed under both regimes. This question would be particularly relevant to those design defects the occurrence of which is difficult to prevent and to control by the designer. The FRENCH approach would seem

more client-friendly as leaves the choice of suing one of the service providers of the whole service project.

Problems may arise when the fitness-for-purpose test does not apply. It would seem to be inconsistent to hold the designer liable for more than the subsequent service provider. Choosing the FRENCH approach would then raise the question whether the scope of application of the present Article should be limited to contracts for designs to be realised by subsequent service providers that are under a similar fitness-for-purpose obligation.

An advantage of the FRENCH approach would be that the quality of the outcome of the design activity might be easier to establish and to discuss than the quality of the overall design process itself that leads to such an outcome. It may, for instance, be hard to establish which inadequate choices in the design process preceded the occurrence of the apparent defect in the outcome of that process. Likewise, it will be difficult to establish the amount of care the designer showed whilst making these choices. Hence, it appears that the legal and other administrative costs of the liability system that is based on the FRENCH approach will probably be lower.

One might argue that the FRENCH approach may work better in connection with a compulsory insurance system, as the designer would have to pre-finance the whole amount of compensation if he is held liable by the client. In addition, it would seem appropriate to ensure that the subsequent service provider participates in the insurance system as well. However, the costs of that liability and/or insurance may increase the price the client has to pay for the design service. Under the alternative liability system, where the designer is under a duty of care and skill only, the client will in many cases allow the designer to remedy the design defects anyhow because he wishes to obtain a structure that is fit for its purpose. This means that the client will also pay an extra price for the remedying, be it under the heading of a price for extra work and not under the heading of an element of the initial price destined for the coverage of the strict liability.

The choice of an acceptable designer's liability system will also depend on the frequency with which the designer is not able to achieve the result the client has in mind. Normally, where it will be relatively easy for the designer to create a design that is fit for its purpose, rather stringent liability is more acceptable than in situations where it is uncertain whether a design fit for its purpose will be accomplished.

> *Illustration 4*
> An architect has been engaged by a municipality to design an underground station. As solid soil conditions are needed for such a construction the designer has thoroughly examined the subsoil. The subsoil turns out to be too swampy. In this situation, it will be difficult for the designer to create a design that will be fit for its purpose. Therefore stringent liability is not appropriate.

Taking normal precautions may under most circumstances prevent major defects. This may not be the case for innovative structures, where the occurrence of design defects is difficult to prevent and control beforehand. One might argue that for such situations,

provided that the liability rule is of a default nature, parties can modulate their duties and obligations and come up with special contractual arrangements adjusting the liability regime to their specific needs.

C. Comparative Overview

The European legal systems turn out to be rather divided on the issue of conformity. Some countries follow the FRENCH approach of a fitness-for-purpose liability system; others have a liability system based on negligence based on the duty of care. BELGIUM, GERMANY, GREECE and FRANCE have a fitness-for-purpose liability system. The BELGIAN system of liability, however, is not fully based on fitness for purpose, given that the architect is under a duty of care as regards the production of plans and the duty to inform and to advise the client. The reason is that these duties are not considered to be essential elements of the design work. AUSTRIA, DENMARK, ENGLAND, POLAND, SPAIN, SWEDEN, PORTUGAL and THE NETHERLANDS have a liability system based on the duty of care, implying that the designer's fault needs to be established.

D. Preferred Option

As described under Comment B, there are two very different approaches for determining the liability of the designer for non-conformity of the design. One may either opt for the fitness-for-purpose test, which focuses on the quality of the outcome of the design process and provides for rather 'strict' liability. One may also opt for a liability system that is based on the duty of care of the designer. That system focuses on the quality of the design process itself, which is much more difficult to establish. The present Article takes the former approach.

The reason for this choice is that it is easier for the client to prove that the outcome of the design process is not in conformity with the result envisaged by him, than to prove that the designer made inadequate choices in the course of the design process, as a result of which a defect occurred. It will be hard to reconstruct what occurred during the design process and what went wrong. Furthermore, if the design is not fit for its purpose, the designer will be in the best position to correct the failure in the design (in order to arrive at an improved version of the defective design), so that the constructor is able to repair the defective building. Improvement of the design can best be done by the original designer.

Given that, in general, the designer is expected to be able to create a design that is fit for its purpose, the FRENCH approach is the more acceptable one. However, it may also occur that this rather stringent system of liability creates problems for the designer. For instance, when the client instructs the designer to use rather innovative structures for the design, the risk of defects in the design cannot be prevented or controlled beforehand. It may also be difficult for the designer to determine how the subsoil conditions, on the basis of which the building that is to be designed will be constructed, will be

influenced by the actual construction of the building. This means that the designer is not always able to establish beforehand how the design and the conditions of the soil are to be attuned to one another. If the designer has conducted a state-of-the-art investigation and nevertheless overlooks something, his design will be defective and he will be liable under the present Article. In these difficult cases, the fitness-for-purpose test is a heavy burden on the designer, for he will be held liable for the outcome of the design even though he has done everything in his power to control that outcome. In this case, parties may safeguard the interests of the designer by explicitly deviating in the contract from the stringent liability system under Article 5:105. This Article explicitly provides for that possibility. The designer may also insert a limitation clause in the contract with the client, as stated in Article 5:108. This choice of the FRENCH approach may have as a consequence that a compulsory insurance system is needed to cover the main risks of the designing process.

E. Relation to PECL and Other Parts of the Principles

Firstly, Article 5:105 is to be regarded as a particularisation of Article 1:108 (Result Stated or Envisaged by the Client). Article 5:105 explains what is to be considered the result envisaged according to Article 1:108. It shows that for design contracts the criteria that follow from Article 1:108 are generally considered to be fulfilled. Thus, the designer is to achieve the result envisaged by the client.

Article 5:105 is also related to Articles 1:109 (Directions of the Client) and 1:110 (Contractual Duty of the Service Provider to Warn). The link between Articles 5:105(2) and 1:109 (Directions of the Client) is that the client is not entitled to invoke a remedy for the non-conformity of the design if this non-conformity was due to a direction of the client. According to Article 1:110 (Contractual Duty of the Service Provider to Warn), the designer is to warn the client when he becomes aware of the risk that the design will not achieve the result envisaged by the client as a result of an inadequate direction given by the client. By the same token, when the client gives an inadequate direction against which the designer does not have to warn and the design turns out to be defective as a result of that direction, the designer did not breach his duty under Article 5:105(1).

There is a link between this Article and the normal rules of Chapter 14 PECL (Prescription). When the design turns out not to be not in conformity with what the client had envisaged, any claim based on non-conformity is possible. In this respect, it is relevant when the prescription period starts running. According to Article 14:201 PECL (General Period) the prescription period in general amounts to three years for a remedy of non-conformity of the design. This general period runs from the time of the handing over of the design (or acceptance of the design) according to Article 14:203(1) PECL (Commencement), in conjunction with Article 5:106. However, an exception has been made for hidden defects in the design, which come to light more than three years after acceptance of the design. In that case, only damages claims are allowed for a period of ten years. Other remedies such as specific performance or termination of the contract are no longer allowed. In any case, after ten years after handing over the design all

claims are cut off following Article 14:202(1) PECL (Period for a Claim Established by Legal Proceedings) PECL. This is thirty years in the case of claims for personal injuries (Article 14:307 PECL (Maximum Length of Period)).

F. Burden of Proof

The burden of proof with regard to the design not being fit for its purpose, as defined in Article 5:105, is on the client. The client has to prove that the design does not enable, or has not, enabled him to achieve the specific result he envisaged. The client is expected to prove that the parties expressly or impliedly agreed on that specific purpose.

G. Character of the Rule

This is a default rule. However, the contracting parties are free to make other arrangements. This is explicitly stated in paragraph (1): 'Except where the parties have agreed otherwise'.

H. Remedies

The remedies for the breach of the duty to deliver a design that is in conformity with the contract will be the normal remedies for non-performance as stated in Chapter 8 PECL (Non-Performance and Remedies in General) and Chapter 9 PECL (Particular Remedies for Non-Performance). When the design is not in conformity with the contract, the designer is in the best position to improve (or repair) the design. In this case, specific performance is an important remedy for the client.

Comparative Notes

1. *Conformity of the design*
   The duty to perform the designing service in conformity with the client's expectations and the contract seems to be a frequently occurring rule in the legal systems of contract law. In some countries it is even established in the national Civil Code. So FRANCE (CC art. 1792) has a codification that requires the design to be in accordance with the needs and wishes of the client. The designer has the duty to render a design in conformity with the result envisaged by the client while concluding the underlying contract. Thus in FRANCE the fitness for purpose system is being used to establish the designer's liability. A similar rule can be found in ITALY (CC art. 1176 para. 2), POLAND (CC arts. 556, 568, 737 and 638) and PORTUGAL (CC art. 1208), where it is required as well that the design is in conformity with the contract. Considering PORTUGUESE law, the principle of *pacta sunt servanda* is established in CC art. 406, which means the contract will have to be performed thoroughly. The liability of the designer is based on fault. In GREECE it is general contract law that the design has to be conform the expectations of the client, bearing the required quality as well, which is

an obligation of result. When the required result is not met, this presupposes liability. In SWEDEN, ENGLAND and THE NETHERLANDS the rules on conformity of the design are established in standard contract terms. According to the AB 04 art. 2:1 (SWEDEN), the design has to be conform the contract, and is under an obligation of means. In the SR 1997 art. 11 and DNR 2005 art. 11 (THE NETHERLANDS) the designer too is under an obligation of means to meet the requirements of the client. In ENGLISH law both the RIBA conditions and the Supply of Goods and Services Act provide rules on the conformity of the design. Following the RIBA, the design must be suitable for its purpose and following the Supply of Goods and Services Act section 2-5, the design as well as the materials have to be suitable for purpose. However, in general the design should be conform to the standard of the ordinary skilled man exercising and professing to have that special skill, as has been set out above in the notes to Article 5:104. This is liability based on negligence. Besides this, the conformity can also stem from the contractual agreements in the underlying contract, in which parties may agree on a stricter liability as fitness for purpose. BELGIUM has its rules on conformity of the design described in the Déontologische norm no. 2 art. 9, which states – in relation to the construction activity – that the design must be in conformity with the client's construction program and that the design must enable the constructor to perform his job well. However, a contractual agreement on the conformity of the design with the contract is possible as well. SPAIN knows a system of liability based on negligence, in which the prove of the designer's fault is needed in order to establish his liability.
No information from FINLAND, IRELAND, LUXEMBURG, and SCOTLAND.

National Notes

1. *Conformity of the design*
AUSTRIA In CC art. 922 some general rules on Gewährleistung are described, which are applicable to all types of contract. Here is stated that the designer is liable when his fault is established.
BELGIUM Regarding the producing of plans, the duty to inform and advise the client, and the supervision of the works, the architect is under an obligation of means. It will have to be proved that the architect has not made all the necessary efforts that a similar architect in the same circumstances would have. Regarding the requirements of solidity, waterproof and isolation (the essential elements of the design) the designer has an obligation of result. The only fact that the design does not suit these essentials, presupposes the architect's liability. In the Deontologische norm no. 2 is stated that the architect's final design has to enable the constructor to perform his construction activity in good competence (art. 9). Further the design needs to be in conformity with the client's construction program and all the technical requirements. It depends upon the underlying contract whether the design is in conformity or not.
DENMARK According to the Standard conditions of sale, work and delivery, the liability of designers is based on the principle of negligence. In order to avoid liability, the designer will have to present a work in conformity with the state of the art. When the designer has made sure that the client's choice was an informed one, he will be exempted from liability, even if it turns out that the design chosen was less suitable.

ENGLAND According to the RIBA standards, a design must be suitable for its purpose. The architect is liable if he has expressly guaranteed that result; the person giving a guarantee is termed a surety. Concerning fitness for purpose, a liability for breach of warranties is strict. Thus the conformity of the design is mostly dependent upon the concluded contract. According to the Supply of Goods and Services Act, it may be implied that the architect has warranted that his design will be suitable for the purpose required by his client. Warranties (ICE, JCT) sometimes require a promise that the work will be reasonably fit for its purpose, going beyond the ordinary duty of reasonable care and skill. Mostly there also will be an implied term in the design contract that the work and materials will be reasonably fit for their purpose. Thus, the contractor should be responsible for elements of design left to him (*Young & Marten v. McManus Childs* [1969] 1 AC 454). However, this may be limited by the form of contract. Sometimes the liability therefore is base on the principle of fitness for purpose, sometimes on the reasonably skill and care, depending upon the standard conditions applicable and on what has been agreed by the contracting parties in the underlying contract (considering the surrounding circumstances). However, in case of the designer delegating a part of the design work and when necessary according to the surrounding circumstances, a stricter obligation than reasonable care and skill may be implied, thus fitness for purpose (M. F. James, Construction law. Liability for the Construction of Defective Buildings, 2002, p. 153).

FRANCE In FRANCE a distinction has been made between *obligation de résultat* and *obligation de moyens*. The former duty implies non-performance of the contract in case of failure of the service provider. The latter implies only non-performance when the obligor has not made those efforts, which would have been made by a reasonable person in the same position. The designer must perform his design activity in accordance to the needs and wishes of the client. The design must be fit for purpose. The used materials and the activity of designing have to render a design in conformity with the result envisaged by the client (CC art. 1792). This liability is a severe one according to the FRENCH jurisdiction. Only in case of a *cause étrangère* the architect is released form liability (G. Liet-Veaux, A. Thuillier, Droit de la construction, 1994, p. 401).

GERMANY The fitness for purpose of the design in established in CC art. 633.

GREECE The Greek contract for work is based on an obligation of result of the designer. This means that the designer is obliged to deliver a work with the required quality and that he is liable for defects upon CC arts. 688, 689.

ITALY Implicit from CC art. 1176 para. 2 follows the duty of the designer to carry out the duty in conformity with existing regulation and with the contract. Furthermore, the principle of *pacta sunt servanda* is the basis of contractual liability in ITALIAN contract law, when the contract is not performed as agreed upon.

THE NETHERLANDS Neither in the Civil Code nor in the standard contract terms, a specific rule on conformity of the design has been established. In implied terms however this rule can be extracted from other ones. However, it is required that the design meets the level of quality that is established in the underlying contract. According to the standard contract terms established in SR 1997 art. 11 and DNR 2005 art. 11, the designer has the duty to meet the requirements of the client (obligation of means). For the judgement of the conformity of the design to the result envisaged by the client, the DNR 2005 art. 8 and the SR 1997 art. 9 establish that the esthetical value of the design will

not be taken into account. This does not mean that the design must be conform reasonable standards. Following art. 7:402 para. 1 Civil Code, the designer has to obey the client's sensible directions concerning the contract which have been given in time.
POLAND Design should be perform according to the contract, and in a manner complying with the socioeconomic purpose and the principles of community life (CC art. 354 para. 1). Also, the design should be defect-free (appropriate application of the sales rules).
PORTUGAL The extent of the designer's liability will depend upon his degree of specialisation. As the obligation is one of result, he is obliged to accomplish the work in conformity with the contents of the contract, and in obedience to the state of art. Liability of the architect depends on fault (breaching the standard of care). Being the architect's one an obligation of result he bears the burden of proof of his lack of fault (J. P. Moitinho de Almeida, A responsabilidade civil do projectista e o seu seguro, 1973, pp. 10 ff.). Thus, according to CC arts. 789, 799 the establishment of fault is presumed. According to CC art. 406, the contract should be thoroughly fulfilled.
SPAIN The liability of the designer is regulated in LOE art. 17 para. 5, which says that the designer is liable for damages caused by deficiencies of the design process, even if he has received the wrong information to elaborate the design. Furthermore the designer is liable if he does not apply the required expertise as a diligent expert in the field would do in the same case (STS 22 February 1978; STS 26 May 1986). The establishment of a fault is necessary for the liability of the designer.
SWEDEN According to AB 04, there is a general rule that stipulates that the work performed shall be according to what has been agreed upon in the contractual documents and other documents and instructions submitted before the ending of the contracting time aimed at specifying and clarifying the contract documents. When a specific rule on conformity is missing, the design shall be performed following this general rule (AB 04 art. 2:1). Thus the designer's liability is based on negligence.

Article 5:106: Handing over of the Design

In so far as the designer regards the design, or a part of it that is fit for carrying out independently from the completion of the rest of the design, as sufficiently completed and wishes to transfer the design to the client, the client must accept it within a reasonable time after being notified. The client may refuse to accept the design when it, or the relevant part of it, does not conform to the contract and such non-conformity amounts to a fundamental non-performance within the meaning of Article 8:103 PECL (Fundamental Non-Performance).

Comments

A. General Idea

This Article is based on the idea that the designer takes the initiative for the transfer of the design and that the client should accept the design unless there are serious design

defects. This act of acceptance implies that the client confirms that the designer has performed his obligations in accordance with the contract. This may either be done explicitly by means of a statement or implicitly by actually taking of the design by the client. Minor defects and defects that can be remedied in a short period of time do not allow the client to refuse acceptance of the design. Only when the design amounts to a fundamental non-performance according to Article 8:103 PECL (Fundamental Non-Performance), the client is allowed to refuse to accept the design.

Illustration 1
An architect has been engaged to design an underground car park. After the design has been finalised, the architect offers the design to his client. By accepting the design, the client confirms that the architect has performed his obligations under the contract.

B. Interests at Stake and Policy Considerations

With respect to the handing over of the design, an important issue is whether the client should be allowed to reject the design in all cases. Acceptance of the design by the client is a confirmation of the fact that the design has been performed according to the contract. This is an important event for the designer; the transfer of the design to the client implies that the designer – in general – will be paid for his service. At least a substantial part of the price to be paid according to the contract will be due. This may be the reason for a specific regulation on this topic.

The handing over of the design furthermore enables the client to check whether the design is in conformity with his expectations. The client may not reject the design, unless when a situation occurs such as mentioned in the present Article and the non-conformity of the design is a fundamental non-performance according to Article 8:103 PECL (Fundamental Non-Performance). Repair of the design may take some time and will raise costs, but the sooner defects are discovered, the easier it will be for the designer to repair them. Therefore, a regulation on the issue of handing over the design seems helpful.

However, it could be argued that a rule on acceptance of the design is not necessary. It might be better to have the contracting parties regulate themselves how and when the design is to be handed over to the client.

C. Comparative Overview

In every legal system researched, there is statutory law on the handing over of the design by the designer and acceptance thereof by the client. Sometimes this process is covered by the term *completion* (ENGLAND and THE NETHERLANDS), but the terms *réception* (FRANCE and SPAIN), *aanvaarding* (BELGIUM) and *Abnahme* (GERMANY) have also been found. Mainly, all these regulations contain some basic rules. Thus acceptance of the design implies approval of the design work by the client, which furthermore means

the end of the design contract. Moreover, payment is due when the design has been handed over to the client. And in most systems the prescription period starts when the client has accepted the design.

D. Preferred Option

It is preferred to have a specific provision on acceptance of the design. The client is to accept it within a reasonable period, when it is fit for carrying out according to the designer's opinion. This does not have to concern the design in total but may also apply to a part of the design that has already been finalised. As the designer knows the design best, he is to take the initiative to decide whether the design is ready for acceptance by the client. This choice is based on the general idea of co-operation between the parties. The co-operation of the client to accept the design or a part thereof is essential to the performance of the contract concluded. This acceptance of the design has an important meaning, as it is an act of approval that the design has been performed in conformity with the contract. However, the client is allowed to reject the design, though only in some cases. There is only room for rejection by the client when the design or a part of the design does not conform to fundamental requirements in the contract, which constitutes a fundamental non-performance. Acceptance of the design by the client enables him to check whether the designer has performed the contract well. The designer too has a duty to co-operate, in the sense that he hands over the design when, in his opinion, it is fit to be carried out.

E. Relation to PECL and Other Parts of the Principles

The present Article has no counterpart in Chapter 1 of the present Part of the Principles, but is very much linked to Article 8:103 PECL (Fundamental Non-Performance). That Article states the situations in which the non-performance of the designer's obligation is considered to be fundamental. Three situations are mentioned. Firstly, the obligation that is not adequately performed is of the essence of the contract. Secondly, the non-performance deprives the client of what he was entitled to expect under the contract. Thirdly, the non-performance is intentional and the client cannot be expected to rely on the designer's performance in future. This means that, in short, and following Article 5:106, in these three situations the client is entitled to refuse to accept the design or parts thereof.

Besides the link with the PECL, there is also a link between this Article and Article 1:104 (Duty to Co-operate). Following the present Article, the design or a part of it is to be handed over to the client when it is ready. The client, however, has a duty in this as well, namely to accept the design within a reasonable period, unless the design is not in conformity with the contract. Here is a link with the general duty to co-operate of the client. The client who refuses to accept the design without any reason is in breach of his duty to co-operate.

Furthermore, Article 5:106 relates to Article 1:106(4) (Duties of the Service Provider regarding Input). Handing over of the design implies the transfer of ownership of the design from the designer to the client. Article 1:106(4) only deals with the duty of the designer to the extent that infringement of third-party rights is concerned. As regards the designer's transfer of intellectual property rights on the design, neither this Article, nor other parts of PELSC provide rules. This means that the parties, given their probably differing objectives, must agree on this in the contract and thus consult relevant national rules.

Both Articles 2:106 (Handing Over of the Structure) and 3:107 (Return of the Thing) also deal with handing over the result of a service. However, in this Article, acceptance of the design is stressed, in contrast to the transfer of control in Articles 2:106 and 3:107.

The provision in this Article also marks the starting point of the prescription period according to Chapter 14 PECL (Prescription). After the design has been handed over by the designer and accepted by the client, a general prescription period of three years for any remedy for non-conformity starts running; see Article 14:201 PECL (General Period) in conjunction with Article 14:203(1) PECL (Commencement). If any hidden defects come to light after these three years, only damage claims are allowed. In Comment E to Article 5:105 the issue of prescription has been discussed in detail.

Illustration 2
An architect has made a design of an underground car park, and his design has been accepted by his client. During the construction of the underground car park, the client notices that the entrance to the car park is too narrow, which means that the design will have to be adjusted by the designer. The time of handing over of the design by the client and its acceptance by the designer is the starting point of the prescription period of three years.

Finally, the present Article has similarities with the Principles of European Law on Sales, in particular Article 3:201 PELS (Taking Delivery).

F. Burden of Proof

The burden of proof as regards acceptance of the design by the client is imposed on the designer. This means that it is upon the designer to prove that the client accepted the design, if this is doubted. Apart from this, the designer benefits from handing over the design because he will be paid after the client's acceptance.

G. Character of the Rule

This Article contains default rules, which means that parties may formulate different rules on the handing over of the design.

H. Remedies

This Article imposes a duty to co-operate on the client, in the sense that the client has to accept the design or a part of the design when it is fit to be carried out according to the designer. If the client fails to perform that duty, this will amount to non-performance. The remedial consequences of such non-performance are described in Comment H to Article 1:104.

If this non-performance of the client is not excused under Article 8:108 (Excuse Due to an Impediment), the designer may resort to the remedies under Chapter 9 PECL (Particular Remedies for Non-Performance), except for Article 8:101(3) (PECL) (Remedies Available). In practice, the designer will want to resort to Article 9:102 (PECL) (Non-Monetary Obligations) and claim specific performance of the client's duty to accept the design. It may also occur that the designer claims damages under Article 9:501 (PECL) (Right to Damages). Article 7:110 (PECL) (Property Not Accepted) may also apply to the client's refusal to accept the design.

Comparative Notes

1. *Handing over of the design*
   A rule on handing over the design is not very common in Europe. In any case, a more specific rule is not codified at all. Mostly some general rules on contract law provide some regulation on the handing over of the design, but that is not explicit regulation. A problem that occurs here is that there are many rules on handing over the structure in case of a construction process, but that the handing over of the design cannot be seen similar to this and specific rules do hardly exist. Though, in GERMANY a rather hard regulation has been established, which says that the design is not ready for handing over to the client until all of the *Leistungen* that follow from HOAI art. 15 are fulfilled (see Absatz 1, Satz 2 GERMAN CC art. 638). In GERMANY the handing over is called '*Abnahme*', which requires the design to be completed. In BELGIUM it is regulated that when the design is in the state of handing over, the client must accept it, which is called '*aanvaarding*'. Only when the design is fully handed over, the design contract comes to an end (CC art. 1234), which activates the ten-year liability period of the designer. In ENGLAND as well the design has to be partially or fully handed over when it is in compliance with the contract. In PORTUGAL handing over of the design implies for the client that he may accept the work, which frees the designer from liability. Further rules on this handing over may be agreed upon by the contracting parties. In that case the service provider is obliged to follow the client's instructions (CC art. 1161 para a). In SPAIN a general rule is codified. According to LOE art. 6 (SPAIN), the '*reçepcion de la obra*' involves the client to accept the design with its characteristics and qualities at that moment. In FRANCE the handing over of the design and the acceptance of the design by the client is called '*réception*', which means that the liability period of ten years starts running. In the CC art. 1792-6 it is provided that the client should accept the design. According to DUTCH law the '*overeenkomst van opdracht*' ends when the design activity is completed (SR 1997 art. 19 para. 1 and 2). The client's approval is needed to continue the process. At that time the liability

period begins. In the GREEK CC the handing over is only mentioned in art. 694 which provides that payment is due.
No information from AUSTRIA, DENMARK, FINLAND, IRELAND, ITALY, LUXEMBURG, and SCOTLAND.

National Notes

1. *Handing over of the design*
BELGIUM When the design is in state of handing over according to the designer, the client is obliged to accept the design. (K. Deketelaere, M. Schoups, A. Verbeke, Handboek Bouwrecht, 2004, p. 434). The design contract ends when the designer has fully performed the contract and the client has paid the designer's fee according to Belgian CC art. 1234. From this time on the ten-year guarantee period starts running. The handing over of the design in BELGIUM is called '*aanvaarding*'. The acceptance of the work by the client and herewith the acknowledgement of the designer's well performance frees the designer of his contractual liability.
ENGLAND Completion of the work is the description of handing over the design in ENGLAND, this may concern the design in total or partially. It covers the time period within which the design must be carried out as well as the consequences of delay. This is in most contracts further specified. The purpose of completion is to permit the employer to take possession of the works. Generally, full and complete performance is required to discharge contractual obligations. The term 'acceptance' is not commonly to be used when dealing with construction (or design) contracts (D. Wallace, Hudson's building and engineering contracts: including the duties and liabilities of architects, engineers and surveyors, 1995, pp. 682-683).
FRANCE In FRENCH law the handing over of the design to the client is described as *réception* (G. Liet-Veaux, A. Thuillier, Droit de la construction, 1994, p. 286). From that time the liability of the architect starts running. Both contracting parties have to be present at handing over the design, for the client declares to accept the design with or without reservation. This is laid down in CC art. 1792-6. Visible defects must be pointed out at the time of the handing over. Hidden defects (concerning the design) may become manifest in the one-year period of guarantee and the architect will be liable to remedy them.
GERMANY The liability of the designer for his work starts from the handing over of the design, which is called '*Abnahme*' in GERMANY (CC art. 640) (H. Niestrate, Die Architektenhaftung, 2002, p. 51). Intellectual work such as designing is according to the case law of the Bundesgerichtshof capable for the literally 'handing over'. That concerns in specific the design according to HOAI art. 15 (Leistungsbild) (H. Locher, Das private Baurecht, 1993, pp. 192 and 193). The '*Abnahme*' is the reception of the design, combined with the statement that the client acknowledges the performance of the designer as being in conformity with the contract. The reception requires the completion of the work. According to the HOAI, the design is not completed until all the duties following the Leistungsbild have been fulfilled. The '*Abnahme*' of the design implies that the time of performance for the architect comes to an end (CC art. 640 and H. Niestrate, Die Architektenhaftung, 2002, p. 51). When the client does not accept the design when he should, the architect is entitled to terminate the contract

according to German CC arts. 642 and 643 (H. Niestrate, Die Architektenhaftung, 2002, p. 220).

GREECE In the CC the delivery of the design is not explicitly mentioned. According to art. 694, payment of the client is due after delivery of the design, after completion of the work. At that time the prescription period starts running.

THE NETHERLANDS The overeenkomst van opdracht ends when the design activity is completed by the architect according to SR 1997 art. 19 para. 1 and 2. From the time of completion, the period of liability of the designer starts running for five years. In Article 47, para. 2 and 3 SR 1997, is described that the client will have to give his approval to the architect's design, before the successive stage in the construction process may start.

POLAND The client is obliged to receive the design, which was released to him by the designer in accordance with his obligation (CC art. 643). It means that the work has to be done according to the contract and offered at the place and time as indicated in the contract or by the default rules of CC arts. 454 and 455. If these conditions are not met, the client is not obliged to accept the work. Claims of the client may be based on the general rules on the non-performance or on the rules concerning warranty for defects in the sales contract (Brzozowski in: Rajski System Prawa Prywatnego, Tom 7, p. 341).

PORTUGAL In Portugal the designer's liability ceases if the client accepted the work without any reserves, having taken knowledge of the existing defects. However, there is no specific rule on handing over the design. The contracting parties have the ability to fill in this duty in the underlying contract themselves. In that case, the service provider must follow the instructions of the client according to CC art. 1161 para a.

SPAIN Acceptance of the work is called the reçepcion de la obra and means that the client accepts the design with its characteristics and qualities present. See further art. 6 LOE.

SWEDEN In the AB 04 art. 7:12 is established that the construction is delivered after acceptance of the client at the final inspection. Under ABK 96 however, art. 5 (5) establishes that the commission ends, if not otherwise agreed upon, when the result has been accounted for the way agreed. Moreover, art. 4 (4) provides that the clients approval or notice in connection with inspection does not free the designer from responsibility.

Article 5:107: Duty of the Designer to Keep Records

After performance of both parties' contractual obligations, the client may ask the designer to hand over all relevant documents at least in copy. The designer must store these documents for a reasonable time. Before the destruction of the documents, the designer must re-offer them to the client.

Comments

A. General Idea

The designer is under an obligation to hand over all the documents concerning the design to the client, at least in copy. This obligation normally comes into existence after the performance of all contractual duties, i. e. after the client accepted the final design under Article 5:106 and the designer received full payment. To withhold the documents on the basis of Article 9:201 PECL (Right to Withhold Performance) is quite common in practice when the client fails to perform his obligation to pay the designer.

> *Illustration*
> An architect, who designed an advanced shopping arcade and performed all his contractual duties, withholds the relevant documents on the design as the client has not yet accepted his design. After acceptance by the client, the designer will offer the documents to the client.

If the client does not claim the documents after he has paid the designer, the designer is to store them for a reasonable time. It is unclear how long this duty should exist and what is meant by 'reasonable time'. It may either be left to the court to decide or to an additional agreement between the parties. In this respect, it is noted that some standard forms of design contracts mention a period of ten years, whereas a part of legal doctrine states that the duty exists until all claims have been prescribed, which is three years, according to the general period for a remedy for non-conformity (Article 14:201 PECL (General Period)). After ten years, all claims are cut off (also the claims for hidden defects) following Article 14:202(1) PECL (Period for a Claim Established by Legal Proceedings). In the case of personal injury, however, the prescription period amounts to thirty years according to Article 14:307 PECL (Maximum Length of Period). In any case, when the designer no longer wishes to keep the information, he must reoffer it to the client beforehand.

The documents that are to be handed over to the client include the detailed design, designs that have been used to receive permission from a public authority, certificates, expert opinions, etc. thus all documents that are of relevance to the client.

B. Interests at Stake and Policy Considerations

The question is whether the designer should be obliged to keep the documents used and resulting from the performance of the contract for a particular period.

An obvious argument that may be brought to the fore is that such a provision would safeguard the interests of the client; he has an interest in the storage of the documents that are relevant to the design itself. From a practical point of view, he might need the documents in order to enable a subsequent service provider – usually a constructor – to realise the design or alter the thing or structure at a later stage. However, it may also be important for the client to have the documents for the transfer of the structure or thing

resulting from the realisation of the design, e. g. for the sale of the building that was constructed on the basis of the design. On the other hand, it might also be in the interest of the designer to keep the design information himself, for instance to protect himself against violation of his intellectual property rights. However, when the designer has finished his work for the client, the documents may have no practical importance for him any longer, so there would be no reason for him not to hand over the documents. Moreover, he may keep the original documents, if they are vital to him, as long as the client receives copies of the information.

C. Comparative Overview

Most of the legal systems analysed have no laws or regulations concerning a duty of the designer to keep records of the design. Some of the countries seem to have left this to the contracting parties themselves, to agree upon in the contract, such as BELGIUM and ENGLAND. Only in the legal systems of THE NETHERLANDS, GERMANY and PORTUGAL, a rule on the duty to keep records has been enacted.

D. Preferred Option

Article 5:107 imposes an obligation upon the designer to keep records for a reasonable time after the performance of the contract and to supply them to the client when he is so requested, and in any event to offer them before they are destroyed.

The reason for this are the interests of the client, which are more important here than those of the designer. The designer hardly suffers any disadvantage when he is forced to store a document or documents for a particular period. The client has greater benefit from obtaining the records of the design, than the designer has from keeping them for himself. Furthermore, the designer will only have to supply the client with copies of the original records, so that the designer can use the originals for the purpose of future assignments or for the purpose of intellectual property issues.

E. Relation to PECL and Other Parts of the Principles

The rules of the PECL do not include a duty to keep records, nor do the other parts of the Principles.

F. Character of the Rule

This Article contains a default rule. The parties may opt for a more limited period to store the documentation, i. e. more limited than a 'reasonable time'. The contracting parties may agree that the documents do not have to be kept, but in practice the contract will be silent on this matter. In such a case, the present Article fills this gap.

G. Remedies

The normal remedies for not complying with the rule stated in the present Article will be, as the case may be, specific performance (Article 9:102(1) PECL (Right to Performance)) and/or damages (Article 9:501 PECL (Right to Damages)). Specific performance is probably the most suitable remedy for the client when the designer refuses to hand over the relevant design documents. On the other hand, when the designer did not offer the documents to the client and already destroyed them, the client has the right to claim damages. Here, it would not be reasonable to force the designer to specific performance, which would imply that he has to do the work all over again.

Comparative Notes

1. *Duty to keep records*
   The duty to keep records in almost no legal system has been explicitly found. Only in GERMANY and PORTUGAL a duty of the designer to keep records is codified. And in THE NETHERLANDS the standard conditions explicitly provide for a duty of the designer store the relevant data concerning the design. In the Dutch Civil Code this implicitly is stated as well. In BELGIUM and ENGLAND such a duty does not exist, but there it seems to be possible to contractually agree on keeping records of the design. In FRANCE, GREECE, SPAIN and SWEDEN a duty to keep records does not exist.
   No information from AUSTRIA, DENMARK, FINLAND, IRELAND, ITALY, LUXEMBURG and SCOTLAND.

National Notes

1. *Duty to keep records*
   BELGIUM No duty of the designer to keep records found. However, both contracting parties can agree on further obligations concerning the designer's tasks, which might be the storing of records on the design.
   ENGLAND No duty to keep records found, but a contractual agreement may be possible.
   FRANCE The architect does not have a duty to keep records.
   GERMANY According to CC art. 195, the duty of the architect to offer the design documents to the client becomes prescribed in 3 years. During this period the designer is under a duty to keep records of the design. (H. Locher, Das private Baurecht, 1993, p. 243). Following HOAI art. 15-9 the designer is under a duty of Dokumentation des Gesamtergebnisses, which means to document the final results of the contract concluded.
   GREECE No duty to keep records found.
   THE NETHERLANDS In the Standard Conditions of SR 1997 art. 42 it is established that the designer has a duty to store. This concerns the data that relate to the contract and of which the interest requires a certain period of storage during ten years of the day on which the contract is fully performed. If the client wishes so, the designer can place duplicates of these stored data at the client's disposal (para. 3). Following para. 4 the

designer is freed from this duty to store data, when he offers the documentation to the client, who accepts it. In De Nieuwe Regeling 2005, art. 11 sub 11, 12 and 13 a similar rule is described. Furthermore, in CC art. 7:412 is described that the client shall have to claim his records belonging to the assignment within five years (prescription period).
POLAND No specific duty to keep records rests on the architect.
PORTUGAL In Portuguese contract law there is a duty of the designer to keep records on the design. It is provided for by CC art. 1161 para d and is called the duty to give account of the service provider.
SPAIN No duty to keep records found in the existing codes.
SWEDEN There is no explicit duty to keep records. However, according to ABK 96 art. 3 (8), it is established that meetings shall be held and records be kept and adjusted to the extent the parties agree upon. AB 04 art. 3 (3) contains a similar provision.

Article 5:108: Limitation of Liability

In contracts between two parties that both act in the course of their business, a term restricting the designer's liability for non-performance to the value of the structure, thing or service that is to be constructed or performed by or on behalf of the client following the design, is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability) unless the damage was caused intentionally or by way of grossly negligent behaviour on the part of the designer or any person for whose actions the designer is responsible.

Comments

A. General Idea

During the design process much can go wrong. If, as a result, the design becomes defective, the client may as a consequence suffer damage, often exceeding the price agreed for the designer. The designer will want to anticipate this by limiting or excluding his liability. According to Article 1:114(2) (Limitation of Liability), the service provider may, unless provided otherwise in the specific Chapters, limit or exclude his liability for damage caused by the performance of the service other than death or personal injury if, at the time of the conclusion of the contract, a term to that extent can be considered fair and reasonable. Article 1:114(2) (Limitation of Liability) normally applies to limitation clauses in any service contract. Article 5:108 is a particularisation of that rule and provides more clarity on the limitation of design contracts by establishing that a limitation clause is presumed to be fair and reasonable if it is used in a commercial contract, unless the damage was caused intentionally or by way of gross negligence on the part of the designer.

Illustration 1
An architect is engaged by a private company to design a new air terminal for the national airport. As this is an enormous assignment and the risk of damage is high owing to the public function of an air terminal, the architect manages to achieve a contractual limitation of his liability to an amount less than the value of the air terminal once it has been constructed. After the air terminal has been built and has been in use for several months, a part of the roof collapses, causing huge damage, the costs of which exceed the designer's limitation of liability. Although it concerns a commercial contract (both parties acted in the course of their business), the agreed limitation of liability is presumed not to be fair and reasonable.

In this example, the architect may, however, be allowed to counter the presumption by delivering proof that the agreed limitation of liability is fair and reasonable given the circumstances of the case.

B. Interests at Stake and Policy Considerations

The designer is allowed – like any service provider under a service contract – to limit his liability for damage, other than death or personal injury, caused by the performance of the service, if at the time of the conclusion of the contract a term to that extent can be considered fair and reasonable in the circumstances of the case. This rule follows from Article 1:114(2) (Limitation of Liability). It may be questioned whether this general rule is sufficient and whether a specific regulation for design contracts is needed. In general, whether or not clauses excluding or limiting liability should be considered fair and reasonable is to be determined on the basis of Article 1:114(2) (Limitation of Liability). However, a specific rule for design contracts might be needed, indicating that particular limitation clauses are deemed or presumed to be fair and reasonable in a design contract, particularly if the contract is agreed upon by commercial parties.

C. Comparative Overview

Clauses excluding or limiting liability if the damage was caused intentionally or by way of grossly negligent behaviour, are generally considered to be void. In several legal systems, clauses can be found in standard contract forms, which limit the liability of the designer to a certain extent. In SWEDEN, the maximum liability to which a designer is exposed amounts to 15 per cent of his design fee and in THE NETHERLANDS a percentage of the construction sum (depending on an entire order or another order) is regarded as the limitation degree. Under GERMAN law, the architect's fee functions as a limit to the architect's liability, namely three times the architect's fee and at least EUR 300,000. In the FRENCH, SPANISH and BELGIAN legal systems, limitation of the designer's liability is forbidden. In FRANCE and BELGIUM, the rather stringent liability of the designer is covered by a compulsory public insurance system. In ENGLAND, PORTUGAL, DENMARK and BELGIUM, exclusion of the designer's liability is possible.

Under ENGLISH, DANISH and PORTUGUESE law and regulations the designer is not allowed to limit his liability.

D. Preferred Option

It is preferred to have a separate Article on the limitation of liability for design contracts, in addition to Article 1:114(2) (Limitation of Liability). Since this issue has been regulated in different ways in the European legal systems, the provision on the limitation of liability in this Chapter only concerns a specific type of limitation clauses in design contracts, which is needed to give handles. It only concerns commercial contracts between two professional contracting parties, limiting the designer's liability to an amount that is less than the value of the structure, thing or service to be designed. In the field of commercial contracts hard and fast rules are required. In other situations – i. e. when at least one of the contracting parties is not a professional (especially when the client is a consumer) – the limitation of liability for damage other than death or personal injury remains possible within the boundaries set by Article 1:114(2) (Limitation of Liability).

A clause restricting the designer's liability for non-performance to the value of the structure (service or thing) is presumed to be fair and reasonable. However, this presumption does not hold in the case of intentional damage or damage due to gross negligence. Whether or not such clauses are valid must be determined on the basis of Article 1:114(2) (Limitation of Liability).

E. Relation to PECL and Other Parts of the Principles

This Article is a particularisation of Article 1:114(2) (Limitation of Liability). It confirms that an important type of limitation clauses, frequently used in design contracts, is presumed to be fair and reasonable within the meaning of Article 1:114(2) (Limitation of Liability). However, Article 1:114(2) (Limitation of Liability) applies to those limitation clauses that are not within the scope of the present Article, as to the determination of their validity and their fairness and reasonableness. It is noted here that Article 1:114(1) (Limitation of Liability) is also of importance for design contracts, in the sense that the designer is not allowed to limit or exclude his liability for death or personal injury caused by the performance of the design service.

Furthermore, Article 5:108 is drafted along the same lines as Articles 3:112 (Limitation of Liability) and 4:112 (Limitation of Liability). Considering the rules of the PECL, this Article is related to Article 4:110 PECL (Unfair Terms not Individually Negotiated). However, the present Article has a broader scope, for under Article 4:110 PECL (Unfair Terms not Individually Negotiated) all clauses that limit or exclude liability for damage caused intentionally or gross negligently are invalid. There is also a link with Article 8:109 PECL (Clause Excluding or Restricting Remedies), which contains a good faith and fair dealing test for contractual exclusion or restriction of a remedy. This implies that when a limitation clause in a design contract is valid under Article 5:108, it may be

blocked by Article 8:109 PECL (Clause Excluding or Restricting Remedies) if it is not in conformity with good faith and fair dealing.

F. Burden of Proof

The burden of proof that a limitation or exemption clause falls within the scope of Article 5:108 is on the designer. The designer will have to show that the damage was not caused intentionally or by way of grossly negligent behaviour, although the court may, on the basis of the circumstances of the case, choose to place that burden on the client to give at least prima facie evidence that the damage was in fact caused by such conduct.

G. Character of the Rule

This Article contains a default rule, which only applies if both parties act in the course of their business. The parties may agree on a stricter regime for liability or on a more lenient one.

H. Remedies

If the designer's limitation of liability clause is not valid under the present Article, the designer is liable to pay damages under Article 9:501 PECL (Right to Damages), without prejudice to other remedies the client may have under Chapter 9 PECL (Particular Remedies for Non-Performance), as Article 4:111 (Remedies for Non-Conformity) clarifies.

Comparative Notes

1. *Limitation of the designer's liability*
   In every legal system analyzed, the national doctrine is extensive among the liability of the service provider (designer) and the possibility of limiting or even excluding this limitation. This does not mean the possibility does really exist, but in most countries some provision on this topic has been provided for. So in DENMARK the liability (based on negligence) of the designer may be limited regarding the kind of damage, following Standard conditions of sale, work and delivery, clause 14.3. Thus in DENMARK limiting (or excluding) the liability of the designer is valid, unless gross negligence or intentionally damage of the designer occurs. In BELGIUM and FRANCE the designer's liability is primarily regulated by the CC, which establishes a *responsabilité décennale* in arts. 1792 and 2270. According to FRENCH law, clauses limiting or excluding the designer's liability are void. Therefore, it is covered by a compelled public insurance. In BELGIUM as well limitation of the service provider's liability is not accepted. Service contracts in ENGLAND in general contain exclusion clauses, which can be agreed upon in the contract unless they are reasonable (Unfair Contract

Terms Act 1977 and Draft Directive on liability of suppliers for services). Here upon much case law is available. For the limitation of the designer's liability, the RIBA Code of Conduct and the Limitation Act 1980 are most important. In GERMANY '*unmittelbarkeitsklauseln*' (exclusion clauses) are prohibited, but limitation clauses are possible, unless in case of gross negligence or fault. Limitations may however not interfere with good faith or the standard conditions. The limitation of the service provider is compulsory covered by insurance. Specific amounts of the architect's fee are mentioned as a borderline for this limitation of liability. The limitation of the designer's liability in THE NETHERLANDS is regulated in the SR 1997 and the DNR 2005. According to SR 1997 art. 18 and DNR 2005 art. 15, limitation of the designer regarding the amount of money concerning the construction sum is possible. In SWEDEN as well the designer's liability can be limited to a certain amount of the total compensation, which is there 15 per cent regarding the AB 04 art. 5:11. This is not allowed however within an international breach of contract. A limitation can also be agreed upon in the underlying design contract, cf. ABK 96 art. 6 (3). In PORTUGAL doctrine is still divided on the possible limitation of liability. When limitation is possible, the extent to what the aggrieved party may limit his liability depends on the court's decision. An exclusion of liability is a possibility as well, if the work is impossible to fulfil and when the client accepted the work having taken knowledge of the defects. In SPAIN limitation or exclusion clauses are not common.

No information from AUSTRIA, FINLAND, IRELAND, ITALY, LUXEMBURG, and SCOTLAND.

National Notes

1. *Limitation of the designer's liability*

BELGIUM According to the Reglement van Beroepsplichten art. 15, every designer is liable for his profession, which is covered by a ten-year insurance. This ten-year period means that, according Belgian CC art. 1792, the architect remains liable for a defect in the construction or the unsuitability of the yielding, which might (partially) destroy the construction. After ten years the designer's liability ceases to exist (CC art. 2270). The designer is not allowed to contractual limit this liability, for the regulation is of public order. Furthermore it is not possible to suspend or stop the ten-year period (K. Deketelaere, M. Schoups, A. Verbeke, Handboek Bouwrecht, 2004, p. 850). *Vis-à-vis* this clause of warranty, Belgian law knows exoneration clauses, which are void in case of intentional damages or deception. As a result of these clauses the architect may be guarded from financial compensation (G. Baert, Aanneming van werk, 2001, pp. 395-396).

DENMARK Danish law on the liability of designers is based on the principle of negligence according to the Standard conditions of sale, work and delivery. The designer's liability may be reduced according to clause 14.3, which says that the designer is not liable for consequential loss, loss of profit or other indirect loss. It seems that the liability is a maximum liability for all claims under the contract. Provisions regarding the limitation of liability as well as provisions that there is no liability are generally valid under Danish law, unless the client proves that the designer has caused the damage intentionally or through acting grossly negligent.

ENGLAND In general, service contracts (such as design contracts) contain exclusion or limitation clauses. The Architect's Standard Contract provides for a blank fixed limit, to be completed in each individual contract. These limitation clauses are sometimes upheld in case law. Following the Unfair Contract Terms Act 1977, the exclusion clauses relating to liability in tort and contract are generally only valid as far as they are reasonable, which means in contemplation with both contracting parties at the time of contracting (art. 11(1)). According to art. 11(4), a party that seeks to restrict its liability to a certain sum of money, has to take into account the resources available to the party to meet a potential liability and how far the designer could have insured himself. An exclusion clause must be carefully drafted since it will be construed against the party seeking to rely upon it (*Curtis v. Chemical Cleaning Co* [1951] 1 KB 805). One of the most important standard form agreements for the limitation of the architect's liability is the RIBA Code of Conduct (arts. 3.2.2, 4.1.7 and 4.2.5). According to the Draft directive on liability of suppliers for services (1990) liability can be excluded (art. 7). Many insurers will not cover duties beyond reasonable care and skill. Following the Limitation Act 1980, the architects' liability can be contractually limited in years.

FRANCE Following CC art. 1792-5, every clause in a contract that limits or excludes the liability of CC art. 1792 is void. Besides this *responsabilité décennale* there are two other liability terms. First, CC art. 1792-6 provides a one-year guaranty for any defects, in order to aim for a perfect fulfilment of the contractual duties. This concerns visible defects. Second, CC art. 1792-3 describes a *garantie de bon fonctionnement*, which implies a 2-year liability for good usage. Any exclusion or limitation of these liabilities are forbidden in CC art. 1792-5 as well.

GERMANY The designer has to perform his design activity under the duty of German CC art. 633-1, which means that the design is free from Sach- und Rechtsmangel. Following HOAI art. 15 the architect is liable when he does not perform his contractual duties. This is called ‚*positive Vertragsverletzung*' (positive breach of contract). An exclusion of liability (‚*Unmittelbarkeitsklauseln*') in code law or by contract is not permitted. However, limitation of liability is yet possible, which is often linked to insurance. Especially in the Architektenvertrag the damages to be paid by the designer are being limited. The limitation may be limited to the insured amount, unless gross negligence or fault. Further limitation clauses to damages at the building itself are prohibited according CC art. 309 para. 8. Clauses limiting the liability of the architect subsidiarily to the one of the constructors are void, following CC art. 309 para. 7. If the limitation clauses that are permitted, do not contradict the principle of good faith or the law of standard contracts, they are upheld in case law. (H. Niestrate, Die Architektenhaftung, 2002, p. 184). For personal injuries the architect – in case of negligence – is responsible up to the highest amount of 2.000.000 euros. In case of a construction defect the architect is liable up to the concluded insurance amount; when this insurance lacks, however, the architect is liable up to three times his fee, which is at least up to 300.000 euros. And finally in case of other financial damages, the architect is liable up to three times the amount of his fee, which is at least up to 300.000 euro. (P. Löffelmann, G. Fleischmann, Architektenrecht, 2000, pp. 698-699)

GREECE In the Consumer Protection Act 2251/1994 rules on liability for the supply of services are regulated.

THE NETHERLANDS The SR 1997 art. 13 para. 1 says the designer is liable towards the client for damages, which are the direct consequence of a fault by the designer. However, this liability can be limited in different ways. Art. 18 describes that in case of contracts for an entire construction project, the damages for which the designer is liable are limited to the amount of € 68.067. In case of other contracts the amount of money is limited to € 680.670 (M. A. M. C. Van den Berg, Bouwrecht in kort bestek, 2000, p. 304). According to De Nieuwe Regeling 2005 art. 15, the liability is limited to a certain amount of money. This means a maximum of € 1.000.000 or the amount that is similar to the costs of advice (sub 1). In case of a consumer and the costs of advice are less then € 75.000, the remuneration will be at most € 75.000 (sub 2).
POLAND The general rule of CC art. 473 para. 2 applies, according to which there is no possibility to exclude liability for a damage caused intentionally, however, it is possible to exclude liability for a damage resulting from a gross negligence (judgement of the Supreme Court of 6. 10. 1953, II C 1141/53, OSN 1955, nr 1, poz. 5).
PORTUGAL In the standard contract terms, limitation of liability concerning damages to life, to pecuniary torts and to definitive non-performance in case of fraud or recklessness and gross negligence (Decr.-Lei n. 446/85 art. 18) are considered to be void. However the designers' liability can be excluded, if according to the state of art and technology, the work is impossible to fulfil and when the client accepted the work having taken knowledge of the defects. Doctrine is divided on the issue of limitation in case of negligence (Varela, 1995, p. 134). Limitation of liability is most of the times not upheld regardless of intensity of fault (CA Oporto, 6 October 1987, CJ 1987, IV, p. 231). Following CC art. 570, the designer's liability may be limited (or excluded) 'when a faulty act of the grieving party has contributed to the occurrence or aggravation of the damage, it's up to the court to determine, weighing the gravity of both parties' fault and its consequences, if compensation is to be given in full, limited or even reduced'.
SPAIN The designer is fully responsible for damages caused by a defective design. There are no agreed limitations to the liability of the designer. In practice, designers conclude a civil liability insurance contract, which will attend the claims of the clients in extra-judicial proceedings. The designer has the subsequent right to claim against the client, as the agent within the construction process who provides the information to elaborate the design (STS 20 December 1986).
SWEDEN Standard contract terms contain limitation clauses, limiting the liability for damages to a certain percentage of the total amount of compensation for the work, for example 15 per cent in art. 5:11 AB 04 (Allmänna bestämmelser för byggnads, anläggnings- och installationsentreprenader; standard contract terms for construction works). The designer will only be liable for a higher amount of money if he has acted grossly negligent or if his insurance covers a higher amount of compensation. A party cannot exclude liability for intentional breach and gross negligence. The designer shall have an all-risk insurance against damage caused to the total works, AB 04 art. 5:22. Also under ABK 96 the liability of the designer is limited to 120 basic amounts *(basbelopp)*, art. 6:3. Most standard agreements do not rule out the right to damages all together, but limit the amount of damages in relation to the contractual consideration, except for damage due to gross negligence.

Chapter 6:
Information

General Comments

A. General Idea

In the last decades, the increasing complexity of our society involved the fast development of contracts relating to the exchange of information. Information often provides the basis for important decisions people make. For example, in commercial relations information about customers is very often researched. Contracts for the provision of information about the creditworthiness of commercial partners are very frequent. Information about the law and its consequences is indispensable. Some companies carry out such investigations by themselves, while others request the services of external, specialised agencies to collect such information. Other examples are the supply of the weather forecast to farmers, of the prices at the stock market to traders, of the value of an estate, etc. Besides contracts related to the supply of information, contracting parties may also contract about giving advice. People rely on the advice of their lawyers, management consultants, financial consultants and insurance advisers for many important decisions. Advice is used to make informed choices in almost all areas of human activity and often forms the basis for major business and personal decisions.

The contract for the provision of information has a feature that is not commonly present in service contracts. It consists in the fact that the service provided, unlike other services, is of an essentially intellectual nature. In general the provision of information requires no material performance on the side of the provider. As a consequence, the relations between the parties and the duties of the information provider are different from these of other service providers.

B. Scope of Application

Information is here understood in a broad sense. Information is generally defined by legal doctrine as knowledge concerning persons or facts. Thus the provision of information could be defined as the communication of knowledge, lacking an express or implied proposal to act. However, the objective of an information contract not only consists in the supply of factual information, but also in the supply of information involving a particular subjective judgement on the side of the provider and an evaluation of facts. This Chapter not only applies to information contracts in the narrow sense but also to contracts whose objective it is to evaluate factual information as well as to contracts for the provision of advice. Advice can be considered to be a particular kind of information. Moreover, the provision of advice involves the supply of facts as well as a recommendation.

Illustration 1
According to the circumstances, a lawyer can provide factual information, e.g. the solution given by case law on a particular issue, evaluative information, e.g. his opinion on the validity of a contract, or a recommendation, e.g. whether to bring a claim or not.

C. Basic Principles

The main purpose of this Chapter is to determine precisely the duties of an information provider and the conditions for liability. The basic principles of this Chapter can be summarised as follows:

I. In performing a service, the information provider owes to his client his best efforts; in exceptional cases, he is liable because the information provided was incorrect. Since information is an intellectual activity, the proof of fault on the part of the provider is required in principle. However, when the information provider only provides purely factual information that it is easy to collect and to verify, he is under the obligation to guarantee the correctness of the information provided. In other words, while the information provider is in principle merely under an obligation of best efforts, he is under an obligation of result when the information that is to be provided under the contract is purely factual.

II. In order to fulfil his obligations, the information provider has to perform several activities. First of all, he has to gather information about the preferences, aims and situation of the client. He also has to collect the necessary professional information. Secondly, he has to inform the client about the risks involved in the decision the client is expected to take on the basis of the information provided. Thirdly, sometimes he has to inform the client about alternatives and recommend a course of action. Finally, in some situations the information provider has to disclose a situation of conflict of interest.

III. Like in any other contract, in the case of breach of contract the information provider is liable only if there is a causal link between the breach and the damage suffered. However, unlike in other contracts it is often difficult for the injured party to substantiate the existence of such a causal link. Indeed, the client is to prove that, if he had been informed correctly, the damage would not have occurred. This Chapter alleviates the burden of proof with regard to the causal link by introducing a partial modification of the object of proof. As a result of this, the client only has to prove that, if he had been informed correctly, he would have hesitated to take a decision. It is then up to the information provider to prove that the damage would have occurred anyway.

IV. In this Chapter, the defences available to the information provider in order to be relieved of liability are restricted. In particular, the competence of the client is not a defence for the information provider. The fact that the client is competent in the field in which the service has been provided does not allow the information

provider to limit the amount of information to be supplied. The information provider has a defence only if he proves that the client already had knowledge of the information omitted.

D. Terminology

The party that is under an obligation to inform or to advise is called 'information provider'. The term 'information' is understood in a broad sense and encompasses the supply of factual information, of evaluative information and also of a recommendation.

E. Sources of the Rules

None of the studied Civil Codes studied has a specific set of rules designed for the regulation of the service of providing information or advice. The provisions of this Chapter were mainly derived from case law that applied the existing general rules for service contracts to this particular intellectual activity. The case law of many European legal systems has been analysed. Particular attention has been paid to AUSTRIA, ENGLAND, FRANCE, GERMANY, ITALY and SPAIN. Specific regulations do exist for the provision of particular information in European legal systems, both at a national level and at the level of the European Union.

As is explained in the General Introduction to the Principles of European Law on Services Contracts, not every legal system of the Member States of the European Union could be studied. For lack of manpower, the laws of the Member States that joined the European Union on 1 May 2004 could not be taken into account, with the exception of POLAND, from which country a national reporter could be recruited. Moreover, as no reporters from BELGIUM, DENMARK, IRELAND, LUXEMBURG and SCOTLAND could be found, these legal systems are not represented in the comparative legal study underlying this Chapter.

In the comparative and national notes for each Article it is indicated whether and, if so, to what extent comparative legal information was collected as regards a particular topic. Firstly, the comparative notes generally make clear for which Member States information has been collected and for which this was not possible. Additionally, if no information of no reliable information was collected as regards a particular Member State, the relevant national note will read: 'No information'. If a national note only refers to statutory law, to any other statutory instrument or to a provision taken from a national standard form of contract, it means that the information in the note is not based on a further analysis of relevant case law or legal doctrine. If, however, references to case law and/or legal doctrine have been inserted in a national note, it means that the information is based on a more thorough analysis of the topic in the relevant Member State. In the national notes, the Member States that joined the European Union on 1 May 2004 are not listed, with the exception of POLAND, as explained above.

Relation to Other Parts of the Principles

F. Relation to the Principles of European Contract Law (PECL) in General

The information contract is primarily governed by the PECL, like any other contract. The relation between the particular provisions in this Chapter and the general provisions of the PECL are explained in the Comments to the Articles. In some cases, application of the general provisions of the PECL is particularised to the service of information supply. In other cases, exceptions to the provisions of the PECL can be found.

G. Relation to Chapter 1 (General Provisions): General Remark

According to Article 1:101(2) (Scope of Application), the provisions of Chapter 1 (General Provisions) apply to information contracts. In the following paragraphs, the provisions of Chapter 1 that have no equivalents in the present Chapter will be discussed. The provisions that do have equivalents in this Chapter will be discussed in the Comments to each Article.

H. Relation to Article 1:102 (Price)

The Article on price applies to information contracts. This provision is very important for information contracts because often in practice parties do not agree on a price for the service or on the method to determine it. The client often receives an invoice from the information provider and is supposed to pay the price stated without being able to discuss it.

> *Illustration 2*
> A company requests a lawyer to render legal advice. The lawyer will send a bill together with the legal advice. The price he decides to charge can be determined by several criteria such as the hours spent on the advice, the importance and the difficulty of the case, the outcome of the advice (positive, negative) and the financial situation of the client.

Like in all service contracts, stipulation of the price is not a mandatory requirement for the conclusion of the contract. This means that the agreement between the parties is enforceable even if the price has not been determined. Such a rule is necessary since in practice it is often difficult for an information provider to know the exact amount of effort needed to perform the service. However, in the absence of a particular contractual stipulation, unilateral determination of the price by the information provider cannot be regulated by Article 6:105 PECL (Unilateral Determination by a Party). Such a unilateral determination is enforceable only if the client agrees to leave the price to be determined unilaterally by the other party. Such a stipulation is seldom included. In the absence of a contractual clause leaving the price at the discretion of the information provider, the contract is to be integrated according to Article 1:102(2) (Price). This

Article provides that 'when the contract does not fix the price or the method of determining it, the price is the market price generally charged at the time of the conclusion of the contract'. This provision is a clarification of Article 6:104 PECL (Determination of the Price), which merely refers to a reasonable price. The practical question of the burden of proof as to what is the market price is so far unresolved. General principles on the burden of proof therefore apply. Since the practical situation that Courts will have to solve is that of the information provider claiming payment and since his unilateral determination of the price is considered to be ineffective, the information provider is required to prove that the amount contained in the invoice sent corresponds to the market price.

I. Relation to Article 1:103 (Pre-contractual Duties to Warn)

The provision on pre-contractual duties to warn of Chapter 1 (General Provisions) applies to the period prior to the conclusion of an information contract. This means that the parties have to exchange information before the conclusion of the contract. First of all, the information provider is under a duty to warn the client if he is not able to achieve the result stated or envisaged by the client (Article 1:103(1)(a) (Pre-contractual Duties to Warn)).

> *Illustration 3*
> A client wishes to receive information about the creditworthiness of a company incorporated under the law of the Isle of Jersey. The information provider will probably have difficulties to collect reliable information. He must warn the client about this particular circumstance before the contract is concluded.

Secondly, the information provider must warn the client that the performance of the service may damage other interests of the client (Article 1:103(1)(b) (Pre-contractual Duties to Warn)). Such a risk is unlikely to occur in purely intellectual services, such as information contracts. Thirdly, the information provider has to warn the client that the service requested will be more expensive or take more time than expected by the client (Article 1:103(1)(c) (Pre-contractual Duties to Warn)).

> *Illustration 4*
> A client wishes to receive information about the creditworthiness of a company incorporated under the law of the Isle of Jersey. Contrary to the previous illustration, reliable information can be collected, but involves lengthy and expensive investigation. The information provider is to warn the client about this.

The client also is under a duty to warn. According to Article 1:103(4) (Pre-contractual Duties to Warn), the client is to warn the information provider about facts that are likely to cause the service to become more expensive or take more time than expected by the service provider when the former is aware of these facts or has reason to know them. In practice, this provision rarely seems to apply to information contracts.

Illustration 5
A civil law notary engages a genealogist in order to complete the family tree of a deceased person up to the sixth degree for inheritance purposes. The civil law notary knows from the correspondence he received that relatives of the deceased are leaving in many foreign countries. Such a circumstance may cause the service to take more time than expected. The civil law notary will have to warn the genealogist hereof.

According to paragraph (5), subparagraphs (a) and (b), in the case of a client's breach of the duty to warn, the information provider is entitled to damages for the loss suffered and to additional time for performance.

J. Relation to Article 1:104 (Duty to Co-operate)

Article 6:102 provides that, in so far as the information provider is to obtain information from the client, he must explain what the client is required to provide. If the existence of a duty of the client to co-operate is only implied in this provision, Article 1:104 (Duty to Co-operate) determines the content of the duty to co-operate of the client. From the combination of Articles 1:104 (Duty to Co-operate) and 6:102 it becomes clear that the information provider should not wait for the client to give him the necessary information; he needs to collect that information actively. He is therefore under a duty to ask his client for the information, making clear to his client that he needs the information in order to be able to perform the contract adequately.

Illustration 6
A client engages a tax adviser to determine the amount of yearly income tax he has to pay and to fill in his income a tax declaration form. The tax adviser is obliged to collect the relevant information about the particular situation of the client in order to perform the service: annual income, indebtedness, marital status, maintenances paid and any other determinant variables.

If the information provider fails to collect the information he needs, it follows from this provision that he is under a duty to inform his client thereof and to make sure his client understands the potential consequences. If, having done so, the client still fails to provide the necessary information as required under Article 1:104(2), the information has three options:

1. to base his service upon the information he has gathered, be that only the professional information he has collected himself or including the information he received from his client;

2. to base his service upon the needs a person in the same circumstances as his client can be considered to have;

3. to refrain from providing information altogether.

If the information provider chooses the first or the second option, he must make that explicit in his advice or in the information provided. In that case, he is exempt from liability if the 'defectiveness' of the performance stems from the failure of the client to provide the necessary information. In other words, the information provider did not breach his duty and therefore cannot be held liable. If, on the other hand, the information provider chooses the last option, the client can be regarded as having failed to perform his duty to co-operate, as stated in Article 1:202 PECL (Duty to Co-operate) and Article 1:104 (Duty to Co-operate). It will be clear that the client will have to be warned against these possible consequences of his failure to provide the necessary information.

In all three options, the information provider preserves the right to payment for the work he performed. The right to choose between the three options, however, is subject to the standard of care that can be expected from the information provider according to Articles 6:104 and 6:105. This reservation implies that the standard of care may force the information provider to choose one particular option.

K. Relation to Article 1:109 (Directions of the Client)

According to this provision, the information provider is to follow the directions given by the client, also when they are expressed after the conclusion of the contract or even after the beginning of performance of the service. Article 1:109 (Directions of the Client) details the situations in which the service provider must follow the directions of the client. However, contrary to contracts concerning non-intellectual services, directions given by the client are uncommon in practice. The client only rarely has control over intermediate stages in the work: only the final result will be presented to him. When directions are given, i.e. when results are presented before the end of the project, Article 1:109 (Directions of the Client) applies and the information provider will have to follow the directions of the client.

> *Illustration 7*
> A management consultants coaches his client in the reorganisation of his business. During the period of co-operation, the client can give directions and expresses his preferences to the consultant. These directions and preferences will have to be followed if they were included in the scope of intervention initially agreed.

When the directions given by the client may result in a breach of duty on the part of the information provider under Articles 6:104 or 6:105, the information provider is obliged to warn the client against this. The information provider has to inform his client that the aims he wants to achieve are impossible.

When a direction of the client is not part of the contract or specified in any document that the contract refers to, as is stated in Article 1:109(1)(a) (Directions of the Client), it is considered to be a variation according to Article 1:111 (Variation of the Service

Contract). This is the case when the client changes his aims after the conclusion of the contract. The consequences of a variation and, especially, the modification of the price apply.

L. Relation to Article 1:110 (Contractual Duty of the Service Provider to Warn)

Article 1:110 (Contractual Duty of the Service Provider to Warn) introduces a provision very similar to the one of Article 1:103 (Pre-contractual Duties to Warn) as it concerns the duty to warn of the service provider; cf. Comment I.

It is important to stress that in many information contracts it is often difficult to distinguish the pre-contractual stage from the contractual stage. For example, in the case of legal advice it is not always clear whether the first contacts between the lawyer and the client and the first information given about the legal question are part of the contractual relationship or of the negotiations prior to the conclusion of the contract. Moreover, it is often after he has begun performing the contract that the information provider becomes aware of the necessity to warn the client. When such is the case, not Article 1:103 (Pre-contractual Duties to Warn) but Article 1:110 (Contractual Duty of the Service Provider to Warn) applies instead. Since the provisions of these two Articles are identical concerning the determination of the conditions that trigger a duty to warn, it does not make much difference whether the duty is a pre-contractual or a contractual one.

The combination of these two Articles leads to the fact that the information provider has to warn the client as soon as he becomes aware of the necessity to warn the client. Therefore, the difficulties in determining whether a contract has already been formed or not are at least partially prevented by the fact that an exchange of information between the parties is needed from the earliest stage possible. The question whether a contract has been formed or not only arises with regard to the attitude of the client after the warning. If the duty is pre-contractual, the client is still free to enter the contract or not. On the other hand, if the duty was performed contractually, the client does not does not have that freedom. However, Article 1:110(4) (Contractual Duty of the Service Provider to Warn) provides that when the service provider is in breach of his duty to warn, he is not in a position to invoke a change of contract and obtain a modification of the service under of Article 1:111 (Variation of the Service Contract). Regarding information contracts, the information provider is not entitled to an adjustment of the price, taking into account the circumstances that were discovered after the conclusion of the contract, but were not disclosed to the client. This means that the price of the contract when determined by the parties, especially when it is a lump sum, cannot be changed.

Illustration 8
A lawyer agrees to give legal advice for a fixed price. During the performance of the contract, the applicable law has changed, which requires additional work and research. If the lawyer does not inform the client of this circumstance, he is not allowed to request additional remuneration.

When the parties did not determine a price or a method of price determination, e.g. on an hourly basis, the price to be paid is determined taking into account the situation as expected by the client and not the one after materialisation of the event that should have been the object of the duty to warn.

Illustration 9
A lawyer agrees to give legal advice on an hourly basis. During the performance of the contract, the applicable law has changed, which requires additional work and research. If the lawyer does not inform the client of this circumstance, his remuneration is calculated on the basis of the time needed to prepare his legal advice on the basis the law in force at the time of the conclusion of the contract.

M. Relation to Article 1:111 (Variation of the Service Contract)

In contrast to non-intellectual service contracts, variations do not seem to occur so often in the practice of information contracts. If variation of the service contract is reasonable in view of the criteria of Article 1:111 (Variation of the Service Contract), the information provider has to modify his performance.

When it occurs in information contracts, a variation generally has few consequences when the price is determined after the performance of the contract. If the variation is expected to have an influence on the price, the information provider will take the variation into account unilaterally when preparing his invoice. This means that the variation will be transparent for the client. On the other hand, when the price is determined before the performance of the contract, Article 1:111 (Variation of the Service Contract) will apply. As a result, the price that is due has to be reasonable and is to be determined by means of the same method of calculation as was used to establish the original price for the service.

Illustration 10
A management consultant coaches his client in the reorganisation of his business. The client wishes to extend the scope of the service of the management consultant to another department of his company. This is a variation of the contract under Article 1:111 (Variation of the Service Contract).

N. Relation to Article 1:112 (Remedies for Breach of Duties of the Service Provider)

General provisions on remedies apply in the area of information contracts. Article 1:112 (Remedies for Breach of Duties of the Service Provider) and Chapter 9 PECL (Particular Remedies for Non-Performance) apply without modification. However, in the area of information, the most frequent remedy is damages. The measure of damages may raise particular issues with regard to information contracts. According to Article 9:502 PECL (General Measure of Damages), the aggrieved party's damages are equal to a sum that will put him as nearly as possible in the position in which he would have been if the

contract had been duly performed. The amount of expectation damages in information contracts is very often equal to reliance damages. Since information is provided for the client to take a subsequent decision, correct information would sometimes have prevented the client from taking the decision he did take. If the client, correctly informed, would not have taken the decision he did taken, the measure of damages aims at putting the aggrieved party in the situation in which he would have been if he had not taken any subsequent decision at all. In such a case, damages are determined in such a way that the aggrieved party is not worse off than if he had not taken the decision. This way of calculating damages is the same as that in case of reliance damages.

Illustration 11
A company engages a firm of auditors to give advice in connection with a takeover. The auditors advise the client to acquire the company targeted. The advice turns out to be wrong, and the client suffers a considerable financial loss. If the advice had been given with the required care and skill, the client would not have acquired the company. Damages are therefore calculated comparing the situation of the client after the acquisition and the situation in which he would have been if he had not acquired the company.

In other words, this Article aims at reaching the *status quo ante* the client's decision. Sometimes, when the situation can be reversed the best way to achieve this result is simply to force the breaching party to do just that instead of paying damages.

Illustration 12
Same facts as previous illustration. Instead of damages, an alternative remedy could consist in obliging the adviser to buy the shares of the company at the price paid by the client. (see Cass.civ I, 28 April 1986, Bull. civ. I, no. 107).

This particular remedy is however not available; neither the provisions of the PECL nor those of Chapter 1 (General Provisions) mention such a remedy. The reason is that, in such cases, damages seem to be the proper remedy for the damage suffered by the injured party.

This measure of damages can be attuned taking into account the loss of opportunity of the client to enter into another contract than the one actually concluded. In other situations, the aggrieved party is compensated on the basis of expectation damages. This can be noticed when the aggrieved party would have taken a similar subsequent decision though under different conditions.

Illustration 13
Same situation as illustration 11. The difference is that if the advice had been given with the required care and skill, the client would have acquired the company targeted, though at a much lower price. The firm of auditors is to compensate the client for the difference between the price actually paid and the price he would have paid if the advice had been given with the required care and skill.

Other remedies than damages may be available as well, though are not likely to be invoked in information contracts. One of these is withholding performance, often invoked by the client to justify his refusal to fulfil the monetary obligation. Withholding performance by the client is possible when the monetary obligation is not to be performed before the obligation of the information provider. In such a case, this remedy is possible only if the information provider has breached his duty and the breach is sufficiently important. In most cases, it is not possible the information provider to withhold performance, as his obligation has to be performed before that of the client.

Termination of the contract is also a conceivable remedy, especially when the client is aware of a fundamental breach before the performance of the contract has been completed. However, the client will often be in a position in which termination of the contract for anticipatory non-performance cannot be invoked. In practice the client is not kept informed during the performance of an information contract and he can evaluate the performance of the service only after having received it. This means that termination of the contract will not occur during its performance. Termination of the contract after the client received the information or the advice is of practical use only to receive restitution of the price already paid.

Illustration 14
A publisher wishes to publish the biography of a famous film star. Since the book relates details of many people's private lives, the publisher engages a lawyer to give pre-publication advice, viz. to determine whether the book contains items that may lead to claims for defamation or breach of privacy. Before starting, the lawyer requests 50 per cent of the price stipulated on account. The advice turns out to be incomplete and useless for the client because the lawyer did not give a sufficiently detailed and motivated answer to the question concerning risks. The client is entitled to terminate the contract and to claim restitution of the amount paid in advance.

Finally, specific performance is only rarely possible. This is the case when the client is confronted with the contracting party's refusal to supply the information agreed on. The conditions of specific performance are determined by Article 9:102 PECL (Non-Monetary Obligations). According to this Article, the client is not entitled to specific performance when the performance is unlawful, impossible or too expensive for the other party. Specific performance is also excluded when the client can obtain information from other sources or when the performance consists in the provision of services of a personal character. An information contract can often be analysed as a service of a personal character. This is the case when the information provider is required to analyse and process the information.

Illustration 15
A professor of law has accepted to prepare a piece of legal advice. After having studied the case, he refuses to give the advice for personal reasons. The client cannot claim specific performance. In this case, the client has probably suffered no damages. He can therefore only terminate the contract and claim restitution of the amount of money that may already have been paid.

In other information contracts, specific performance is perfectly conceivable. This is the case when the information provider refuses to disclose the information after the conclusion of the contract. Here an additional condition has to be fulfilled, namely that the information cannot reasonably be obtained from another source. The client is able to claim specific performance only for the supply of information that only the information provider has.

> *Illustration 16*
> A contract for the transfer of technical know-how is concluded. After the conclusion of the contract, the owner of the know-how refuses to supply the information to the client because he is negotiating for the exclusive transfer of this know-how with a third party for a higher price. The buyer of the know-how can claim specific performance.

The information for which specific performance is an available remedy will in practice be factual information. When the information requires specific personal and intellectual involvement of the information provider, e.g. for giving advice, specific performance is not available because performance consists in the provision of a service of a personal character and depends upon a personal relationship; see Article 9:102(2)(c) (Non-Monetary Obligations).

O. Relation to Article 1:113 (Failure to Notify for Non-Conformity)

After the discovery of a non-conformity, the client must promptly notify to the information provider of that non-conformity. This rule is necessary as often the client only notices the breach of contract after some time. In information contracts, the client uses the information to determine his course of action. The damage is often the result of the course of action chosen and the breach of contract may show up after a relatively long period.

> *Illustration 17*
> A tax adviser incorrectly recommends his client to deduct particular expenses from a declaration of plus value on reselling of an estate. The tax authorities become aware of this one year later, and the client incurs a financial penalty. The client is to notify the tax adviser of the non-conformity as soon as he is informed about the decision by the tax authorities.

The duty to notify exists also when the client has reason to know – before the end of the performance of the service – that the service will not meet the requirements of conformity.

Failing to notify the information provider of the non-conformity will result in remedies for the information provider when the performance of the service turns out to be more expensive or takes more time as a consequence of the client's failure to notify. The remedies consist in damages for the loss suffered and additional time for performance.

P. Relation to Article 1:114 (Limitation of Liability)

Limitation of liability clauses are in principle valid in information contracts, as they are in any other contract. The information provider may limit or exclude his liability for damage that is caused by the performance of the service, though not for death or personal injury. Such a stipulation is valid if, at the time of conclusion of the contract, a term to that extent can be considered fair and reasonable in the circumstances of the case.

Exclusions and limitations of liability are frequent in information contracts. For example, in contracts regarding the creditworthiness of third parties such information usually comes with the complete exclusion of liability if the information is incorrect. This term could be considered invalid, because it is unfair and unreasonable according to Article 1:114 (Limitation of Liability). This may often be the case, because exclusions or limitations of liability may in practice offer the information provider the choice of whether to perform the contract or not.

> *Illustration 18*
> Information about the creditworthiness of a debtor comes with a disclaimer: 'for your private use and without responsibility on the part of the bank or its officials'. Such an exclusion of liability will probably not be fair and reasonable. The way of applying the reasonableness test to the provision of advice is sometimes determined by case law. These elements are: the bargaining power of the parties, the availability of the advice from other sources, the difficulty of the task undertaken and the practical consequences of the decision on reasonableness (*Smith v. Eric S. Bush* [1990] A.C. 831, at 859-860).

Q. Relation to Article 1:115 (Cancellation of the Service Contract)

This provision applies without modification: the client may cancel the contract at any time. If the contract is cancelled, the information provider is entitled to the agreed remuneration. This remuneration is somehow reduced taking into account the costs avoided, i.e. the expenses that have been saved or that should reasonably have been saved. Since the activity is purely intellectual, it is sometimes difficult to calculate the costs avoided. These costs correspond with the amount of money necessary for the performance of the contract, for example the costs required for researching, collecting and processing the information. When the information provider is a company or an organised structure, it is technically possible to determine the costs avoided by reference to the overhead expenses, i.e. the fixed costs of the company. When the information provider is a private person, the costs avoided are more difficult to determine.

> *Illustration 19*
> A professor of law is engaged to give legal advice. Before he starts work, the client cancels the contract. The costs are very difficult to calculate and might in some circumstances equal zero.

In addition to the costs avoided, according to this Article, the agreed remuneration may be reduced by the 'loss avoided', i.e. the profit that the information provider has been able to receive by concluding another contract after the cancellation of the first one. However, since the provision of information is an intellectual service, it is in practice difficult to notice cases of loss avoided after cancellation of the contract. Often it is impossible for the service provider to find a new client for the same service, particularly when the information is tailor-made for the needs of the client. More generally, even if the information is not tailor-made for the needs of a particular client, the information provider might have supplied both services at the same time. In other words, in case of information contracts cancellation of the contract by the client leads to a loss of volume for the information provider.

R. Character of the Rules

The rules in this Chapter are all default rules, with the exception of Articles 6:101 and 6:107(1).

Article 6:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the information provider, is to supply information, such as factual information, evaluative information or a recommendation to another party, the client.
(2) When, under a contract, a party is bound to supply information and to supply another service, this Chapter applies to the parts of the contract that involve the supply of information, with appropriate modifications.

Comments

A. General Idea

This Article determines the scope of application of the rules on information. This Chapter covers services that have the supply of information as a goal. The concept of information in this Chapter encompasses factual information, evaluative information as well recommendations. Information is considered factual when it concerns material facts and the provision of the service thus merely involves the description of an observable situation. Information is evaluative when it involves a subjective judgement on the side of the provider and the evaluation of material facts. A recommendation involves the provision of advice, i.e. the suggestion to take a particular decision or, more generally, to embark on a particular course of action.

This threefold classification of information is not only necessary because it helps in determining the scope of application of the rules of this Chapter; since providing

information involves heterogeneous activities, the regimes governing the types of information vary in some respects. As will be seen in the following Articles, there are specific provisions to regulate these different situations. Moreover, the performance of information contracts frequently requires the provision of a combination of different types of information. If such is the case, each type of information is governed by their specific rules.

Illustration 1
A lawyer giving legal advice will generally provide factual information about statutes and case law, an evaluation of these facts, such as a personal interpretation and their application to the situation at hand and, finally, formulate a recommendation. The rules on factual information will apply to the information about statutes and case law; the rules on evaluative information will apply to the lawyer's personal interpretation of the facts; the rules on recommendations will apply to the formulation of the advice itself.

As a principle, the provisions of this Chapter apply to contracts whose main objective it is to provide information. Paragraph (1) explicitly states this. However, according to paragraph (2), the provisions of this Chapter also apply to obligations to inform that arise from contracts whose objective it is not only to provide information, but also to provide another service. Such an obligation to inform can be either a main obligation or an ancillary one. The provisions of this Chapter do not regulate the entire contract, but are only applicable to the part of the contract that is related to the supply of information and advice.

Illustration 2
A service contract is concluded between a bank and a client. According to the contract, the bank is to provide a considerable variety of services to the client, among which investment advice. The provisions of this chapter only regulate the obligations relating to information and not to the other services provided by the bank.

The provisions of this Chapter may, in some situations, be modified in order to be applied to the obligation to inform.

B. Interests at Stake and Policy Considerations

Establishing the scope of application of the rules on information contracts requires the solution of several policy issues. The first policy issue is whether it is necessary to have specific rules governing information contracts. In other words, it is to be ascertained whether the provisions of Chapter 1 (General Provisions) are sufficient to regulate such contracts. The traditional approach is to include information contracts in the general regulation of service contracts. The modern approach, however, takes into account the specificity of contracts related to information and, more generally, intellectual services. The peculiarity of intellectual services, compared with material services, is often stressed. Thus it appears necessary to have special regulations.

The second issue is whether it is possible to include advice activities in the category of information contracts. The diversity of the concept of providing information might require a stricter definition of information. The main argument in favour of a broad definition of information is that, in practice, the formulation of a recommendation, which is characteristic of the work of an adviser, very often involves the supply of information as well. This aspect might allow us to consider advice as a particular kind of information.

The third issue is whether it is desirable to broaden the scope of application of the provisions on information contracts also to complex contracts involving the provision of another service besides the provision of information. The question is probably less disputed in the case of a mixed contract involving the provision of information as a main activity. In this case, this Chapter opts for a 'distributive qualification' of the contract. The contract is considered to be partly an information contract and partly a contract for the provision of another service. An exclusive qualification system is often impossible to apply as regards such mixed contracts, because it is difficult to determine which of the obligations is the preponderant one. The problem is much more difficult to solve when the obligation to inform is not a main obligation arising out of the contract, but merely an ancillary one. The traditional solution is to distinguish ancillary obligations to inform from main obligations characterising a contract for the supply of information. This solution is justified by the fact that the legal provisions applicable to these obligations are different. Therefore, the grounds and the remedies for the breach of ancillary obligations are different from those of main obligations. One could very well argue that it is difficult to see why a different regime should be applied merely because the obligation to inform is not the main obligation of the contract. Indeed, both main and ancillary obligations raise the same issues in practice.

C. Comparative Overview

Contracts for the provision of information are generally regarded as service contracts. In European legal systems, provisions regarding work contracts or service contracts regulate this activity. In general, there are no specific provisions that govern information contracts. There is no codification tradition in this area and particular solutions can be found in case law, which became, in the last decades, abundant. Nowadays, common European principles can be derived from case law, especially with regard to information supplied by doctors, lawyers, banks, investment advisers and insurance advisers. The exception to this approach can be found in ITALIAN law, which regulates, beside services in general, also intellectual services. However, this category is broader and does not only include information contracts.

The regulation of the provision of information and that of advice is very similar according to positive law in several European jurisdictions. With the exception of some particular rules, the European legal systems do not distinguish between the two concepts.

D. Preferred Option

This Chapter links up with the modern approach to intellectual services, which started the particularisation of information contracts. Adopting a broad definition of information, this Chapter regulates any kind of provision of information and also advice contracts. Most provisions apply to all kinds of information. As will be seen in the following Articles, some particular provisions are designed to govern specific types of information.

This Chapter aims to regulate primarily contracts for providing information. It also regulates the obligations to inform arising from mixed contracts and also ancillary obligations arising from other kinds of contract. Therefore, ancillary obligations to inform will generally not be under a different regime than contracts having the same objective.

E. Relation to PECL and Other Parts of the Principles

This Chapter concerns specific kind of service, and therefore the general rules on services in Chapter 1 (General Provisions) are applicable only if the provisions in this Chapter do not specify a different regulation. According to Article 1:101(2) (Scope of Application), the provisions of Chapter 1 apply unless provided otherwise in Chapters 2 to 7. Moreover, the provisions of the PECL are generally applicable if they are not incompatible with the Articles contained in the specific Part on services contracts.

A provision on the damage caused by the provision of incorrect advice or on incorrect information is included in Article 2:207 (Loss upon Detrimental Reliance on Incorrect Advice or Information) of the Principles of European Law on Non-Contractual Liability Arising out of a Damage Caused to Another (PEL Liab.Dam.). This Article provides that:

'Loss caused to a person as a result of making a decision in reasonable reliance on incorrect advice or information is legally relevant damage if:

(a) the advice or information is provided by a person in pursuit of a profession or in the course of trade; and

(b) the provider knew or ought to have known that the recipient would rely on the advice or information in making a decision of the kind made.'

This Article states that damage as a result of incorrect advice or information is legally relevant damage when the advice or information was provided in the course of trade and when the provider was aware or ought to have been aware of the fact that the recipient would rely on the advice or information to take a subsequent decision. In that case, the damage suffered can be compensated. In other cases, the damage suffered by the recipient cannot be compensated. This provision is primarily applicable to the situation of information and advice provided outside a contractual relationship and aims at protecting third parties that relied on it. The consequences of information or advice for parties other

than the contractual counterpart are left to non-contractual liability (see also the General Comments to Chapter 1 under V). Article 2:207 PEL Liab.Dam. is therefore not applicable to the situation considered in this Chapter, which applies to information and advice provided on the basis of a contract concluded between the parties. The rules of this Chapter are also applicable when the information is provided for free on the condition that there is a contract between the parties; under Article 1:101(6) (Scope of Application), a service contract can be concluded even if the service provider is to supply a service to a client otherwise than for remuneration. In such a case, the Principles of European Law on Service Contracts apply with appropriate modifications.

Illustration 3
A bank provides information about the creditworthiness of a third party to one of its clients for no remuneration. It turns out that the bank provided outdated information. The liability of the bank and its consequences are assessed in application of the provisions of this Chapter.

F. Relation to Other Chapters of the Principles of European Law on Service Contracts in General

Every service provider is under duties to inform. A general duty to warn can be found in Article 1:110 (Contractual Duty of the Service Provider to Warn). There are also other provisions that place an obligation on the service provider to inform the other party; for example Article 7:105 (Duty to Inform of the Treatment Provider). Chapter 7 (Treatment) regulates such an obligation of the service provider, especially with regard to the content of the information that is to be provided to the patient in order to allow him to give informed consent to the treatment proposed. However, the regime of the obligation to inform is not entirely regulated by Chapter 7 (Treatment). Paragraph (2) of Article 7:105 (Duty to Inform of the Treatment Provider) states that, unless provided otherwise by Chapter 7, the duty to inform of the treatment provider is subject to the provisions of Chapter 6. Such is, for example, the case for the application of Articles 6:104, 6:105, 6:107, 6:108 and 6:109.

Illustration 4
A doctor failed to inform his patient of a risk of the treatment suggested, disclosure of which had to be made according to Article 7:105 (Duty to Inform of the Treatment Provider). The patient claims damages and has to prove that the breach of the duty to inform caused the damage suffered. The causation can be proven following the provisions of Article 6:109: the patient only has to substantiate that, in the absence of the breach of duty, a reasonable patient in the same situation would seriously have considered taking an alternative subsequent decision.

In his activity of informing the patient, the treatment provider is regarded as an information provider. However, since the treatment provider is not only bound to supply information, but also to supply another service, the rules of Chapter 6 apply with appropriate modifications according Article 6:101 (2).

G. The Distinction between Information and Advice

Many people consider information and advice to be similar, or as points of a continuum. Advice can be seen as a specific type of information. Essential to the concept of advice is that it contains a recommendation to the client on a specific course of action. The aim of advice is to enable the other person to make a reasoned choice from among alternatives. To that extent, advice aims at providing a person with the information he reasonably needs to make a decision and entails the possible alternatives and the risks thereof.

Another way of looking at the difference is that in a relationship where there is an obligation to advise, the responsibility for the quality of the choice is in a sense shifted to the adviser. The relationship between an adviser and his client is no longer a normal relationship 'at arm's length', but a closer relationship in which the adviser is bound to serve the interests of his client, even in the presence of conflicting interests of himself or another client. In common law countries, a contract for advice is sometimes qualified as a fiduciary relationship implying fiduciary duties on the side of the provider. This is not the case when the provider is merely under the obligation to supply factual information.

Advice is information organised and limited in a specific way, normally by the needs of the customer who wants to solve a problem. In order to find the best solution for this problem, the recipient needs information about possible solutions, especially about their advantages and disadvantages. The information is therefore organised around the alternatives that possibly meet the needs of the customer and are also limited by these alternatives and needs. Moreover, in order to establish the needs of the customer, the adviser has to explore them. This may be stated somewhat differently by saying that an adviser is not only undertaking to give information, but also to help the other party with taking a decision. These elements are not always present in the cases where the parties agree that one party informs the other party.

In this Chapter, the main criterion of distinction between information and advice is whether a recommendation is to be given or not. When no recommendation is to be given the service is to be considered mere information, either factual or evaluative. Moreover, when the information provider is to recommend a specific course of action, the service is considered to be advice. In this Chapter, contracts are considered to be advice contracts 'when the information provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision.' The criterion is important since Articles 6:104(2) and 6:107 state specific obligations that bind the adviser only.

However, in some cases where no recommendation is given expressly, the service provided may still be qualified as advice; for example, when the information supplied is sufficiently detailed and involves the mentioning of alternatives that each possible course of action leads to, even in the absence of an explicit formulation of a recommendation.

Illustration 5
A professor of law gives legal advice to a client, explaining the possible legal arguments to raise in a lawsuit, without advising a specific course of action. The professor only explains the possible alternatives and the risks involved. Even if no explicit recommendation is given, such a legal consultation constitutes advice and the contract concluded between the parties is an advice contract. The adviser is under the specific duties arising from this contract (Articles 6:104(2) and 6:107).

In other cases, a recommendation cannot be seen as advice. This is the case, for example, when a recommendation is given to the public in general and is therefore not tailor-made to the needs of a specific client.

H. Character of the Rule

The provision of Article 6:101 is mandatory; contracting parties are not to deviate from it. Because this is a definition Article, the fact that it is mandatory implies that contracting parties do not have any influence on its qualification. Therefore, if their contract falls within the scope of this Chapter, its provisions apply even if the parties qualified the contract differently. The parties cannot contractually determine the legal qualification of their relation. If they cannot escape from the application of this Chapter as a whole, they can, however, rule out the provisions of this Chapter that are not mandatory. Such particular exclusions must be clearly expressed by the parties.

I. Remedies

As this Article merely indicates the scope of application of the Principles of European Law on Service Contracts, it does not impose duties on either of the parties. Therefore, this Article does not provide a party with a remedy under Chapter 9 PECL (Particular Remedies for Non-Performance).

Comparative Notes

1. *Definition of information and advice*
There is in general no legal definition of information or advice. Legal doctrine is used to distinguish the two concepts. Information is often defined as the statement of a factual situation. It differs from advice which includes an express or implied proposal to act. This can be noticed in AUSTRIA (Koziol, Österreichisches Haftpflichtrecht, 2nd edn., II, 186 ff.), ENGLAND, FRANCE, THE NETHERLANDS (Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999), POLAND, PORTUGAL (Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 15) and SPAIN (M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 246). In GERMANY a threefold classification is often given (Palandt [-*Sprau*], BGB, 60th edn., art. 675, no. 33). In GREECE, ITALY and SWEDEN there seems to be no accepted definition of information or advice.

No information from BELGIUM, DENMARK, FINLAND, IRELAND, LUXEMBOURG, SCOTLAND

2. *Regulation of information and advice*
In no legal systems there are particular regulation of contracts for information and advice. GERMANY (art 675 II CC), AUSTRIA (art 1300 CC), GREECE (art 729 CC) and PORTUGAL (art 485 CC) know of a provision excluding liability for information and/or advice, but this provision is not applicable when information has to be delivered contractually.
The contract for the provision of information or advice is generally qualified as a contract for service, BELGIUM (Civ. Brussels, 6 February 1991, JT 1991, 661) ENGLAND (Supply of Goods and Services Act, Section 13, same solution under the common law), FRANCE (*louage d'ouvrage*, arts 1779-1799 CC) GERMANY (*Dienstvertrag*, art 611 CC), THE NETHERLANDS (arts 7:400 ff. CC), PORTUGAL (art 1154 CC). In ITALY there is a particular regulation for intellectual services as opposed to material services (arts 2229-2238 CC). In SWEDEN there is no general legislation in this area. However, at least in consumer contracts, guidance can be found in different Acts with a more limited scope, such as the Act on Financial Advice to Consumers *(Lag (2003:862) om finansiell rådgivning till konsumenter)* or in art. 16 of the Real Estate Agents Act *(fastighetsmäklarlagen)* and in art. 13 of the Insurance Agents Act *(försäkringsmäklarlagen)*.
No information from DENMARK, FINLAND, IRELAND, LUXEMBOURG, SCOTLAND.

National Notes

1. *Definition of information and advice*
AUSTRIA Although art 1300 CC deals with liability for wrong advice and not information, no legal definition of information and advice can be found in AUSTRIAN Law. Now information has been equated to advice and is now considered to fall within the ambit of art. 1300 as well. Rummel [*-Reischauer*] ABGB Kommentar, art. 1300, no. 1; EvBl 1962/160; JBl 1979, 88); despite of all this evidence of treating *Rat* and *Auskunft* alike Koziol is of the opinion that *Auskunft* is to be subjected to an even stricter liability than *Rat*, for line of argumentation see Koziol, Österreichisches Haftpflichtrecht, 2nd edn., II, p. 186; But see Klang [*-Wolff*], VI, arts.1299, 1300), who argues that advice is not at all the same as mere information. Koziol gives a brief description of advice when attempting to delimit it from information. Accordingly, he who gives an advice *(Rat)* communicates to the other how he would handle such as situation. Thus, he renders a judgement *(Beurteilung)* and conveys his view (Koziol, Österreichisches Haftpflichtrecht, 2nd ed., II, 186ff).
ENGLAND There seems to be no definition, which has any general legal relevance. Courts have sometimes drawn a distinction between advice and information. In three recent ENGLISH cases concerning liability for negligently giving information, the House of Lords did attempt to draw a distinction between the extent of liability for providing advice and liability for merely giving information. (*South Australia Asset Management Corporation v. York Montague; United Bank of Kuwait plc v. Prudential Property Services Ltd.; Nykredit Mortgage Bank plc v. Edward Erdman Group Ltd.*,

[1996] 3 AllER 365. In *South Australia*, the question was whether valuers were liable for all losses stemming from a negligent valuation or only for the difference between the true value and the stated value. The facts were that a bank had employed valuers to value a property on which they were to advance a loan. In 1990 the bank obtained a valuation of commercial premises to the amount of £15 million. They gave a loan of £11 million on the security of these premises. In 1994, the property was sold for £2.5 million. The House of Lords held that the valuer was not liable for the part of the loss attributable to the fall of prices in the property market (£15 million – £2.5 million = £12,5 million). The valuer is liable only for the difference of value at the moment of the wrong valuation. The valuer was indeed engaged to provide a valuation of the property, therefore providing mere information upon which a lender was to base a decision. The valuer was not advising the lender whether or not to offer the loan. As a result of this case, it is necessary to distinguish between the valuer providing information and the one also providing advice on whether or not to enter into a contract. This distinction is mainly made by reference to particular stipulations of each contract with valuers. The consequence of it has to be found, especially with regard to damages.

FRANCE Most of the authors who wrote on the information and advice did not even give a definition (see for example Delebecque, Contrat de renseignement, J.-Cl. Contrats et Distribution, Fasc. 795, 1991). There is not a legal definition of the obligation to advise. However according to legal doctrine, the obligation to advise is the duty to enlighten the other party on the opportunity, the advantages and the disadvantages of a contract, a decision or more generally a behaviour (Terré, Simler, Lequette, Les obligations, 2002, no. 258). The most famous law vocabulary defines advice as a recommendation on what is opportune to do: «*un avis sur ce qu'il convient de faire*» (Cornu, Vocabulaire Juridique, V° conseil). FRENCH law sometimes distinguishes advice from simple information. The obligation to inform concerns an objective fact that is easy to check. On the other hand the obligation to advise involves a subjective judgement (opportunity, advantages, disadvantages) of those objectives facts. The advice can be defined as a recommendation of what is suitable to do. Therefore the contract of providing information can be distinguished from the contract of advice (The Juris-Classeur has an Article for each contract: Veaux, Contrat de conseil (J.-Cl. Contrats et Distribution, Fasc. 430, 1992), for the advice contract; Delebecque, Contrat de renseignement (J.-Cl. Contrats et Distribution, Fasc. 795, 1991), for the information contract). An author considered that the advice is «*directif*», while the information in by definition neutral (Savatier, Les contrats de conseil professionnel en droit privé, D. 1972, chr. 157). The consequences of this distinction can be seen in some cases regarding the standard of care required and the criterion of determination of the liability. (See *infra* notes under Article 604). The same opinion is expressed by several other authors (*ex plurimis*, Fabre-Magnan, De l'obligation d'information dans les contrats, no. 496; Veaux, Contrat de conseil, J.-Cl. Contrats et Distribution, Fasc. 430, 1992, no. 116.). However, the *Cour de cassation* is still reticent in adopting clearly this distinction. Especially when the obligation is ancillary the distinction between information and advice is not always made and the *Cour de cassation* uses the general expression «*obligation d'information et de conseil*». However, sometimes, the *Cour de cassation* makes the distinction either. For example the bank that has informed the client of the features of the loan is liable for not having awarded the borrower of the huge debts in comparison with his annual income and not having advised the borrower

against concluding the loan (Cass.civ. I, 27 May 1995, Bull.civ. I, no. 287; D. 1995, 621, with note Piedelièvre; Defr. 1995, 1416, obs. Mazeaud; CCC 1995, no. 211 with note Raymond; RTD civ 1996, 384 obs. Mestre). In this case the information required by the law have been supplied.
GERMANY There is no legal definition of information, as a contract for providing information is self-evident. According to Palandt [*-Sprau*], BGB, 60th, art. 675 no. 33, the information provider presents facts on the request of the inquirer. The same authors (Palandt [*-Sprau*], BGB, 60th, art. 675 no. 33) even distinguish between advice and recommendation: While advice respectively counselling only includes the explanation of facts comprising the presentation and evaluation of the facts, a recommendation makes a proposition for certain behaviour as positive. The difference is sometimes seen in case law, where it has been held that for a pure obligation of information there is not always a duty to investigate (BGH WM 64, 118).
GREECE The Civil Code, though it deals with advice in art 279 GCC, does not provide a definition of the notion of advice.
ITALY There is no legal definition of information and advice.
THE NETHERLANDS The contract to provide information has as such not been the subject of much discussion in THE NETHERLANDS. A definition could be deducted from Barendrecht and van den Akker's description of advice (Informatieplichten van dienstverleners, 1999, nos. 78-79). A contract for (only) information could be described as a contract by which the information provider undertakes to supply the client with information without explicitly or impliedly advising the client to take a specific course of action. Barendrecht and van den Akker (Informatieplichten van dienstverleners, 1999, no. 314) describe advice as a reasoned recommendation to make a certain choice. A contract for advice could then be described as a contract by which the adviser undertakes to supply the client with a reasoned recommendation to take a specific course of action. In Dutch case law, the distinction between information and advice is hardly ever made. Barendrecht and van den Akker (no. 82) argue it could be useful to make such a distinction between all kinds of obligations to inform – of which the obligation to advice is but one –, for it might help in weighing the parties' interests. In their opinion, an obligation to advice also includes the obligation to do the research that is necessary to the giving of advice.
POLAND No definition of the information exists in the law. The legal writing (B. Lewaszkiewicz-Petrykowska: Uwagi o zawodowym obowiązku udzielania informacji, in Zagadnienia Współczesnego Prawa Cywilnego. Księga Pamiątkowa ku Czci prof. Tomasza Dybowskiego, (ed) Jan Błeszyłski, Marek Safjan, Jerzy Rajski, Elżbieta Skowrołska-Bocian, Studia Iuridica, 1994 no. 21, pp. 47-54) characterises informing as providing a reliable and true information on existing situation. The explanations (forming the information) shall in a neutral and objective manner present the thing, product, service etc. Advice is defined as information provided by professional that gives non-professional grounds to make his/her decisions. The adviser must provide alternatives and their consequences and has to be constructed with taking into account interests of the person for whom it is constructed.
PORTUGAL Information (*informação)* can be defined as "the statement of a factual situation, concerning persons, facts or any other relationship. It differs from advice: raw information is only the communication of objective facts, lacking an express or implied proposal to act" cf. Sinde Monteiro, Responsabilidade por conselhos recomen-

dações ou informações, p. 15. There are two types of advice in Portuguese law: *conselho* and *recomendação*. In the first "one person is shown what the other would do in such a situation, which is the best or more advantageous situation, while persuading that party (who is not bound by it) to act (or abstain from action) in conformity. The *conselho* is therefore a evaluative judgement of a future action of the advised, usually linked to an explanation" (Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 14). *Recomendação* is not as intense as *conselho:* it means "the communication of the good qualities of a person or thing, in order to determine the advised thing to something" (Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 14). Although it is possible to theoretically distinguish between the concepts, it is frequently difficult to know whether only raw information was provided, or a proposed conduct existed as well. Both information and advice are frequently interlinked, and usually when an obligation to inform or advice exists, the final output usually contains both information and advice. "The fact that those categories are close relatives (the common aspect residing in the possibility of influencing the will of the informed person) justifies the similar traditional treatment that they receive" (Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 16).

SPAIN There is no legal definition of information and advice as an obligation for a service provider. A definition could be deducted from the book of Cervilla (M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 247): the obligation to inform consists in providing the client with data regarding the service activity, in an objective and neutral manner; obligation which may be issued towards an individual client or towards a group of clients and that does not necessarily require a direct communication between parties. The obligation to advise consists in providing the client with data regarding the service activity, not in a objective and neutral manner but indicating the existing alternatives and recommending the best option; it is addressed to an individual client and requires generally the direct communication between service provider and client. The boundaries between both obligations are not clear in services contracts. (M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 246). The Supreme Court refers indistinctly to the obligation for the provider of services to give information and advice. There is no express differentiation made. In a decision of the SAP Zaragoza of 11 December 1998 it is stated that art. 13 of the General Statute on Consumers has a main impact on the contract of services since it implies that the provider of the service is obliged to provide his client with a special information, which consists sometimes in providing a recommendation.

SWEDEN There is no legal definition for the duty to provide information and advice under Swedish law. The reason for this is that it is a widely unregulated area. Even in the more limited Acts dealing with this area, such as the new Act on Financial Advice to Consumers, the notion of advice is not further specified.

2. Regulation of information and advice

AUSTRIA The CC contains only one reference to advice in art. 1300, according to which an expert is liable when he gives, for a consideration, negligently bad advice in matters of his arts or science. In other cases, a person giving advice is liable only for damage which he has knowingly caused to another by giving advice. Art 1300 deals with

liability for giving a bad advice. Besides, this provision is not only said to cover advice but providing information *(Auskunft)* as well (Rummel [*-Reischauer*] ABGB Kommentar, art. 1300, No. 1). The term advice are used to comprise both concepts of information and advice; OGH, SZ 34/167; OGH, EvBl 1962/160; OGH, JBl 1979, 88).

BELGIUM In BELGIUM, an important doctrinal discussion took place with regard to the characterisation of an advice contract. Especially concerning the relation between a lawyer and his client in giving legal advice, some courts ruled that this relation is not covered by any specific contract regulated in the Civil Code and that therefore it is a *sui generis* contract (CA Brussels, 28 March 1961, Pas belge 1962, II, p. 181; Mons, 22 October 1980, RGAR 1981 no. 10350). This qualification was criticised by several authors considering that the appropriate classification for advice by a lawyer is a *contrat d'entreprise* (R.-O. Dalcq, La responsabilité de l'avocat. Evolution récente de la jurisprudence et de la doctrine, in La responsabilité des avocats, Brussels, Editions du Jeune Barreau, 1992, p. 100; B. Troiani, La responsabilité de l'avocat dans la consultation et la négociation, in Ann. Dr. Louvain 1996, no. 4, pp. 363ff., at p. 366). Recent cases seem to follow this opinion (Civ. Brussels, 6 February 1991, JT 1991, p. 661).

ENGLAND Information and advice contracts are not subject to any special regulation in ENGLISH private law. The liability of the information provider and of the adviser can be based on contract (obligation to act with reasonable care and skill under the Supply of Goods and Services Act 1982, s.13) Same solution under the common law. Such obligations may also exist in tort (concurrent liability is possible: *Henderson v Merritt* [1995] 2 AC 145, House of Lords, discussed below), and are important in particular where there is no contract because of a lack of consideration (see e.g. *Hedley Byrne v Heller* [1964) AC 465, House of Lords), or because prescription bars any action in contract (see e.g. *Henderson*). In *Henderson,* the defendant insurance experts in the Lloyd's insurance market were held liable for negligent misstatements made to those who backed insurance policies in that market. Negligence is one source of tortious liability for negligent information or advice. Recovery for loss pursuant to damage to the claimant's person or property following negligent information or advice is possible under general negligence law, it is pure economic loss which causes most difficulty. Recovery for pure economic loss pursuant to negligently-given advice or information is subject to the "*Hedley Byrne*" test for liability, namely that there must be a close relationship between the parties. Liability is generally restricted to professional advisers and those claiming special skills (Winfield and Jolowicz on Tort [*-Rogers*], 2002, p. 368). Deceit is a further possible cause of action, available where the defendant knowingly or recklessly makes a false representation to the claimant, intending him to act on the representation, and the claimant does so act to his detriment: *Pasley v Freeman* (1789) D & E 51, 3 T.R. 51, see Winfield and Jolowicz on Tort [*-Rogers*], 2002, p. 354. The Misrepresentation Act 1967 art. 2(1) allows recovery where a fraudulent or negligent misrepresentation induces a party to enter into a contract and thereby causes him loss. To escape liability the defendant must prove that he had reasonable grounds to believe and did believe up to the time the contract was made that the representation was true. Damages are assessed under tort principles. In some cases of negligent advice or information an action might lie for breach of fiduciary duty. It would seem that the requirements of causation are lower in cases of breach of fiduciary duty than in tort, in the Privy Council case of *London Loan* 1933 (3 Dominion Law Reports 161), it was held that where the breach is a non-disclosure of material information then burden

of proof as to causation is reversed (see also *Ferris* 1983 9 DLR 183, solicitor breached his fiduciary duty in advising a lender when already acting for the borrower). Financial services advisers are under special informational duties pursuant to the Financial Services and Markets Act 2000 (in particular telling consumers whether they are independent or "tied" (to a particular company) and giving them a "Key Features" document before selling them a product).

FRANCE Both contracts for advice and for information are qualified as *contrat d'entreprise*, formerly called *louage d'ouvrage*. The FRENCH *Cour de cassation* said clearly that intellectual services are not excluded from the definition of the *contrat d'entreprise* (Cass.civ. III, 28 February 1984, Bull.civ. III, no. 51). Therefore the general rules regarding this contract are applicable (arts. 1710-1711, arts. 1779-1799 CC). The *contrat d'entreprise* is a very general contract, art 1710 CC gives an extremely wide definition of this contract: the *louage d'ouvrage* is the contract by which one party agrees to do something for another party, for a price determined by them. On the other hand there are no special rules dedicated to these contracts. Even special statutes concerning professional advisers and information providers are silent on the regime of the obligation. For example the law of 31 December 1971, which concerns the legal advice does not deal with the issues of liability and standard of care, but only set the condition required for being allowed to provide legal advice.

GERMANY The general provision of art. 675 II CC states that there is no (specific) ground for liability if an advice (or recommendation) (*Rat* or *Empfehlung*) is given and the recipient of that advice sustains damage as a consequence of following the advice. art. 675 CC states, however, that this does not exclude liability based on a contractual or tortious responsibility. The German CC expressly only deals with advice and recommendation, but the legislator's intent were to include information as well (Musilak, Haftung für Rat, Auskunft und Gutachten, p. 6). Therefore, jurisdiction was developing contractual or similar to contractual *(vertragsähnlich)* grounds for liability. Liability based on tort is rare: the courts try to extend the contractual liability as far as possible (Müssig, Falsche Auskunftserteilung und Haftung, NJW 1989, p. 1702). It is generally accepted that this provision only excludes liability for advice given in a relationship based on mere courtesy, where the advice is given as a favour (M. Arends, Die Haftung für fehlerhafte Anlageberatung, JuS 1994, p. 915-919). The CC does not contain other specific provisions on information and advice. The contract is usually regarded as a service contract (*Dienstvertrag* art. 611 CC) if the service of advising or providing information is the key element of the contract, or a work contract (*Werkvertrag* art. 631 CC) if the advice or the information itself is the key element of the contract (BGH NJW 1999, 1540; cf. Palandt [*-Thomas*], BGB, 60th, art. 676, no. 29). *Dienstvertrag* is the contract by which one party is obliged to perform a service and the other party is obliged to pay the agreed remuneration. Although according to art. 611 CC all kinds of services can be the object of the contracts, in practice the provisions in the Code on *Dienstvertrag* (arts. 611-630 CC) are mostly seen as forming a general part of the labour law. A *Werkvertrag* (art. 631 CC) is the contract by which an entrepreneur undertakes the production of the promised work and the other party to pay for the agreed remuneration. According to para. 2, the object of the contract can be the production or mutation of a good or the creation of another result by means of labour or service. The provisions on *Werkvertrag* (arts. 631-651 CC) are mainly intended to facilitate traditional manufacturing contracts and building contracts. The right for

solicitors (Anwälte) to give advice in legal matters is explicitly recognised in art. 3, para. 1, of the *Bundesrechtsanwaltsordnung (BRAO)*. According to art. 24, para. 1 of the *Bundenotarordnung (BNotO)*, the notary public is required to advise his clients. Furthermore, specific laws exist on tax consultancy (Steuerberatungsgesetz, StBerG) and legal consultancy (Rechtsberatungsgesetz, RBerG). However, neither the StBerG nor the RBerG deals with the contents of the contract. A special problem concerns the liability for information and advice towards third parties. These cases often occur when an accountant or tax consultant is providing information on the financial status of an enterprise, which the proprietor uses for the bank in order to prove its solvency (Schmitz DB 1989, 1909ff.; BGH, DB 1985, 1464, JZ 1985, 951ff.). There are different models used to solve these liability-problems, but neither jurisdiction nor doctrine has opted for one specific. Contractual liability in these cases can either be based on a contract in favour of a third party (*Vertrag mit Schutzwirkung zugunsten Dritter)*(e.g. Müssig, NJW 1989, 1698), *culpa in contrahendo* (the applicability of this legal concept has developed a protection in favour of a third party in 1976, BGHZ, 66,51), tacitly concluded contract for advice (OLG-Köln NJW-RR 1988, 335). Furthermore, doctrine developed a contract with the one, for whom it concerns *(Geschäft für den, den es angeht)* (Locher, NJW, 1969, 1567; Musielak: Haftung fuer Rat Auskunft und Gutachten, 1974, p. 38ff.; critical: Honsell, Probleme der Haftung für Auskunft und Gutachten, JuS 1976, 621, 626; Schindhelm/Grothe DStR 1989, 445, 448ff.).

GREECE The Greek Civil Code does not contain any provision directly relevant to advice, except for art 729 CC: "Advice or recommendation: If a person has given an advice or has made a recommendation he shall not be liable for any loss resulting therefrom except if he had assumed responsibility by contract or acted fraudulently. The contract, which holds the obligation to provide advice as a main obligation, may be either contract for work, hire of work/contract for services or a *sui generis* contract."

ITALY Under ITALIAN law, the obligation to provide information or advice falls within the scope of the regulation on intellectual professions. The civil code devotes the *Capo II/Titolo III/Libro V* to the contract of intellectual services *(contratto d'opera intellettuale)*. This contract represents a type of "autonomous work". The general *Titolo III* may be divided into two parts: on the one part there are the provisions on the *contratto d'opera* (arts 2222-2228 CC) and on the other the provisions on intellectual professions (arts 2229-2238). In relation to a particular intellectual service, the first group of provisions *(Capo I)* may find application as long as compatible with the ones provided in the second part *(Capo II)*. On this contract, see A. Perulli, Il lavoro autonomo, 1996.

THE NETHERLANDS There are no specific rules on contracts for information or advice in THE NETHERLANDS. Therefore, the rules on the *overeenkomst van opdracht* (services in general, arts. 7:400 ff CC) apply. The rules on the treatment contract do provide specific rules regarding ancillary obligations to inform: art. 7:448 CC imposes on the doctor a duty to inform the patient of the intended investigation, the proposed treatment and the medical condition of the patient; however, a duty to advise whether or not to treat a patient in a certain way, has not been regulated.

POLAND Contract to provide information or advice, depending on the content of the contract may be qualified as a contract of specific work (CC art. 627), a contract of mandate (CC art. 734) or a mix or an innominate contract.

PORTUGAL A contract whereby one party provides the other with information or advice is a contract for services *(prestação de serviços)*, art. 1154 CC. Rules on mandate

(arts. 1157 CC ff.) apply, as a contract for services either follow the rules on contract for work (when there is an obligation of result) or mandate (when the obligation is of means). Cf. STJ 17 June 1998, BolMinJus, 478, 351, Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, 385. Art. 485 CC deals with liability for information and advice. According to this provision, mere advice or information do not hold their provider liable, even if he was negligent and the obligation to indemnify exists though when the liability for damages was assumed by the provider, when there was a duty to inform or advise and the provider acted with negligence or fraud or when the conduct of the person is a criminal action.

SPAIN Before any codification of the duty to inform, the existence of such contractual obligation for the provider of a service to inform his clients was recognised in several Supreme Court decisions (STS, 14 June 1976, RJ 1976/2753; STS 27 January 1977, RJ 1977/121; STS 14 November 1984, RJ 1984/5554). It is commonly accepted by case law and doctrine that the obligation to inform has its basis in the principle of good faith ("integrative function") as stated in art 1258 CC. The obligation has been in some cases codified.

SWEDEN This is generally an unregulated area under Swedish law. Information and advice will be qualified as immaterial services *(immateriella tjänster)*, cf. Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p 211ff. Although there is no general legislation in this area, there is however some more limited regulation to be found in different Acts. For instance, in 2003 a new Act on Financial Advice to Consumers *(Lag (2003:862) om finansiell rådgivning till konsumenter)* was enacted. Before that there was only a criminal Act from 1985 *(lag om förbud mot yrkesmässig rådgivning i vissa fall)* which prohibits giving professional advice in some situations. This Act concerns professional advice in legal or economical matters. Moreover, there is also specific legislation concerning advice from real estate and insurance agents. These can be found in particular in art. 16 of the Real Estate Agents Act *(fastighetsmäklarlagen)* and in art. 13 of the Insurance Agents Act *(försäkringsmäklarlagen)*.

Article 6:102: Circumstances in which the Service Is to Be Performed

(1) The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the information provider, in so far as this is reasonably necessary for the performance of the service, to collect information about:
  (a) the particular purpose for which the client requires the information;
  (b) the client's preferences and priorities in relation to the information;
  (c) the decision the client can be expected to make on the basis of the information; and
  (d) the personal situation of the client.

(2) In case the information is intended to be passed on to a group of persons, the information to be collected must relate to the purposes, preferences, priorities and personal situations that can reasonably be expected from individuals within such a group.

(3) In so far as the information provider must obtain information from the client, the information provider must explain what the client is required to provide.

Comments

A. General Idea

The supply of information involves a large number of actions on the side of the information provider. An information contract entails several duties. Before the supply of information, the provider is to know what kind of information the client needs. The first duty of the information provider is to ascertain the needs of the client. Article 6:102 provides a particular regulation of this duty, which in practice is very important for the provision of the service at hand. In so far as is reasonably necessary for the performance of the service, the information provider is to know about the purposes of the client, and his preferences and priorities. Moreover, according to paragraph (1) subparagraph (d) the information provider will have to ascertain the situation of the client if this is necessary for the performance of the contract.

Paragraph (2) limits the obligation of the information provider to collecting information about the purposes, preferences, priorities and the specific situation of the client if the service is offered to a group of people. If such is the case, the information provider will be able to determine the purposes, priorities and preferences of the clients objectively, by reference to the standard of the normal member of the group. This paragraph also concerns standardised information, whose content is determined in advance by the provider. In such a case, the information provider has a more limited obligation to investigate the needs of the clients and can base his information on the situation of the group of potential clients that will need the information he provides.

> *Illustration 1*
> A company offers an SMS mobile telephone service that provides the weather forecast, weather reports and a warning system for skiers and climbers in the FRENCH Alps. The service is not provided for the AUSTRIAN, ITALIAN and Swiss Alps. Thus, the information provider is only under the obligation to collect information about the circumstances that apply to climbers and alpinists in the FRENCH Alps.

Paragraph (3) imposes on the provider the obligation to explain what kind of information he needs from the client.

> *Illustration 2*
> An international publisher request a lawyer to give pre-publication advice, viz. to determine whether biography he intends to publish contains items that may lead to claims for breach of privacy. The lawyer needs to know the citizenship and domicile of the persons involved and the countries in which the book will be distributed. Determination of the applicable law is essential since legal systems may diverge on the definition of privacy and the criteria for its breach. The lawyer is to inform the publisher what kind of information he needs and the publisher is obliged to give that information on the basis of his duty to co-operate.

B. Interests at Stake and Policy Considerations

Like many other services, the determination of the needs of the client is essential for the correct performance of the contract. The information provider needs to know about the purposes of the client and his particular situation. Supply of information prior to the performance of the contract is needed. In particular, the information provider needs to know the purpose of the information needed and, more precisely, the way in which it will be used.

The first question to answer is the extent of the information to be collected by the information provider about the purposes, preferences and priorities of the client. It is not equally determined in all cases. This depends on the kind of service offered and on the type of clients involved. It is in the interest of both parties to have a complete exchange of information before beginning the performance of the contract, in order to allow its correct performance. However, having to supply too much information may increase the costs for the client. Limiting the extent of information may reduce some of these extra costs.

The second question to answer is whether the information provider is to assess the circumstances under which the contract is to be performed *in concreto*, i.e. by reference to each particular client, or *in abstracto*, i.e. by reference to a reasonable client in the same situation. There is little doubt concerning information that is meant to be tailor-made to the needs of a particular client. However, the duty contained in this Article may lead to problems with regard to standardised information and, more generally, with regard to information to be provided to a group of persons. Often, the information to be supplied is determined in advance by the provider, who does not take into account the needs of a particular client. Standardised information is very frequent in non-contractual relationships. However, people often enter into contracts in order to receive services which are socially desirable. In such a case, the obligation for the information provider to collect information about the purposes, the priorities and the preferences of the clients shall be more limited. Moreover, when a duty exists with regard to standardised information, it is desirable that the information provider assess the circumstances in which the service is to be performed objectively, not subjectively. In other words, the more the information is supposed to be tailor-made to the needs of a particular client, the more the circumstances in which the service is to be performed need to be assessed *in concreto*. In contrast, the more the information is standardised, the more such circumstances can be efficiently assessed *in abstracto*.

C. Comparative Overview

The obligation to assess the circumstances in which the service is to be performed is widely accepted in the European legal systems. When the information to be provided is not standardised, the information provider has to deliver information that is tailored to the specific needs and situation of the client. This obligation involves the duty for the information provider to research such a piece of information before providing the service.

This duty is generally deduced from the general provisions on the standard of care. The supply of a service that is not tailored to the need and situation of the particular client is, in such a case, not given in conformity with the standard of care.

D. Preferred Option

Article 6:102 limits the amount of information to be collected by the information provider to what is necessary for the proper performance of the service. This criterion allows the parties and the judge, in assessing liability, to determine the amount of information to be collected by the information provider or to be exchanged by the parties on a case-by-case basis. In doing this, one will need to turn to a subjective standard when the object of the contract is to supply tailor-made information and to an objective standard with regard to standardised information, i.e. information whose content is determined in advance by the provider.

As a consequence, with regard to standardised information it is up to the client to choose the service provider that offers a service that corresponds with his needs. Providers of this kind of information are not under the obligation to collect information about the needs of each particular client before performing the service. They offer to the public a specific service and it is up to the client to determine his needs, before requesting the service. Thus, the information to be collected relates to the purposes, preferences, priorities and personal situations of persons in the same situation.

E. Relation to PECL and Other Parts of the Principles

Article 6:102 is a particularisation of Article 1:105 (Circumstances in which the Service Is to Be Performed). The main idea behind the Article is the same. The link is made with the decision the client is expected to make after receiving the service. Therefore, the link is made with the use the client intends to make of the information he requested. This element is essential to determine the kind of service the information provider has to provide.

> *Illustration 3*
> Legal advice on the same topic will differ according to the need of the client, e.g. whether he needs a subjective opinion to be presented in arbitration proceedings in favour of the position of one party, whether the client needs advice on the strategy to deal with a case or whether he needs advice to prove the substance of a foreign law in courts (advice *pro veritate* or witness's expert opinion).

Article 1:105 (Circumstances in which the Service Is to Be Performed) does not provide any rule for the case in which the service is meant to be provided to a group of persons whose features are determined in advance by the provider. Article 6:102(2) contains a particular provision in the field of standardised information. The duty to collect the needs of the client and to be aware of his particular situation involves the exchange of information and requires the collaboration of the client. Since there is no particular

provision on the duty to co-operate in this Chapter, Article 1:104 (Duty to Co-operate) applies (see above, General Comment J).

F. Character of the Rule

This Article contains default rules.

G. Remedies

In the case of breach of the obligation to collect information about the needs and the particular situation of the client, the latter will claim damages (see General Comments above, under N). Other remedies are also available, though are not often used in practice. Preventive remedies, such as termination, may be of relevance when the client becomes aware of a breach of the duties covered in this Article before the service has been completely performed.

Comparative Notes

1. *Duty of the information provider to ascertain the needs of the client and duty to co-operate of the client*
   In ITALY and SPAIN, the duty to ascertain the needs of the client and the duty of the client to co-operate can be derived from the general principles of good faith and fait dealing. In other legal systems such as AUSTRIA, ENGLAND, FRANCE, GERMANY and SWEDEN the obligation to ascertain the needs of the client derives from the main obligation to carefully perform the service. In some jurisdictions a specific provision can be found in this respect. For PORTUGAL, CC Article 1167 a) introduces a specific obligation to co-operate on the side of the client. The consequence of non-fulfilling the duty to co-operate renders the client contributory negligent in AUSTRIA, GERMANY, FRANCE, PORTUGAL. The consequence of this is a share of liability between the two parties if the information provider did not fulfil his obligations.
   No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND.

National Notes

1. *Duty of the information provider to ascertain the needs of the client and duty to co-operate of the client*
   AUSTRIA There seems to be a duty for the provider to ask the client for information about his situation. On the other hand, the client is also under a duty to co-operate. If the client fails his duty to co-operate the damages due are reduced pursuant to Art 1304 CC (contributory negligence).
   ENGLAND A contract for advice, at least, would usually be considered to contain an implied term that the client will answer such questions as might reasonably be put to him or her by the adviser.

FRANCE In principle it is up to the information provider to collect information (Cass.com. 1 December 1992, Bull. no. 391, a professional salesman must collect information about the needs of the client; Cass.civ. I, 7 April 1998, Bull.civ. I, no. 150; CCC 1998, no. 97 with note L. Leveneur; Cass.civ. I, 17 February 1998, Bull.civ. I, no. 61 for the fitter). Then it is up to him to ask the client for appropriate information. The client also must inform the information provider and if he concealed essential elements, he can be contributory negligent (Cass.civ. I, 27 June 1995, JCP N. 1996.II, p. 1213, with note Sanséau). The solution is very general, since the C*our de cassation* decided that every fault of the principal could limit the damages due by the adviser (Cass.civ. I, 30 January 1996, Defr. 1996, p. 361, obs. J.-L. Aubert).
GERMANY The rules on contributory negligence apply in the case that the client fails to do something that is part of his own responsibility (BGH 17 October 1991 – IX ZR 255/90, WM 1992, 62, 66; BGH 17 November 1994 – IX ZR 208/93, WM 1995, 212, 214), especially if he fails to inform the adviser of all necessary facts (BGH 20 June 1996 – IX ZR 106/95, WM 1996, 1832, 1835ff.).
ITALY Such a duties may be deduced from a variety of Articles: art 1175 CC requiring a correct behaviour from both parties in performing; art 1337 CC on good faith in a pre-contractual stage, and art 1375 CC on good faith in a contractual stage.
THE NETHERLANDS As a rule, a duty for the client to inform the information provider does not exist (Cf. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 61). This obligation is sometimes acknowledged in patient-doctor relationship (CMT 31 October 1996, Stcrt. 1996, 221.) However, failure to give the necessary information may lead to *mora creditoris* if the failure to give the information can be imputed to the client. If the client does give information, the adviser may, in principle, rely upon that information insofar as the client does an announcement of a factual nature, unless the information given is superficial or incomplete, in which case he is obliged to do further research (i.e. to put new questions to his clients) (Cf. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 126, 343).
POLAND The duty to ascertain the needs of the client may be deducted from the general rules on the performance of obligations, which require loyal contracting (CC art. 354 para. 1). The duty to co-operate on the side of the client arises from CC art. 354 para. 2. More specifically, in the case of a contract of specific work the client's duty to co-operate is confirmed by CC arts. 639 and 640.
PORTUGAL The client is obliged to supply the information provider all necessary means to be able to formulate the advice/information (CC art. 1667 a)). This is a default rule. If the information was insufficient, the information provider will be entitled the defence of contributory negligence (CC art. 570), but he bears the burden of proof thereof (CC art. 572).
SPAIN The obligation for the client to co-operate in informing the service provider may be deducted from the principle of good faith in its objective variant: Ccom art. 57 and CC arts. 7, 1258. The obligation to inform for the client is however codified for those contracts where utmost good faith is required. In case of insurance relationships the client is compelled (art. 16 Insurance Act) to inform the service provider regarding the existing situation at the time the contract is concluded and of any other situation arising during the contract which may have an impact on the agreement, although in

case of conflict it is for the provider of the service to prove that it was not properly informed (STS 5 July 1990, RJ 1990/5776).
SWEDEN The information provider has a general duty to fulfil his commission carefully *(visa omsorg)* (See Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 217). Within this general duty, he normally has a duty to collect information from the client, as far as this concerns his ability to fulfil his commission carefully. This is also the case for the different special Acts, for example, art. 13 of the Act on Insurance Brokers, requires from the insurance agent to clarify the client's need of insurance. In the Act on financial advice to consumers, art. 5 (1), the adviser shall take the client's interest duly into account. Moreover, the advisor must adjust the advice after the wishes and needs of the client, and only recommend solutions suitable to the consumer. The client has a general duty of loyalty *(lojalitetsplikt)* towards the information provider (See Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 225). This may possibly include a duty to give the information necessary for the information provider in order to perform the contract.

Article 6:103: Duties of the Information Provider regarding Input

Unless agreed otherwise, the information provider is required in particular to collect and use the expert knowledge to which the information provider has or should have access as a professional information provider, in so far as reasonably necessary for the performance of the service.

Comments

A. General Idea

It is up to the information provider to collect and use the expert knowledge necessary for the proper performance of the contract.

Illustration 1
A rich businessman, who has financial interests in various countries and members of his family living abroad, requests the advice of an estate planning lawyer with a view to minimising taxes for his heirs. In order to be able to give the advice, the lawyer must be knowledgeable and collect information about inheritance tax law, marital law, succession law and international private law in the jurisdictions connected with the case.

The phrase 'reasonably necessary for the performance of the service' primarily refers to the result expected by the client and agreed upon by the parties. In other words, the input necessary depends on the output agreed upon. As a consequence, defective input will in the scope of this Article generally leads to defective output, and thus to liability of the information provider on the basis of the provisions regulating the output. However, the collection and use of particular expert knowledge is a duty in itself. Breach of

the duties of the information provider regarding input is sanctioned independently of breach of the duties under the following Articles.

The main goal of this provision is therefore to allow the client to react as soon as he becomes aware of the information provider's use of improper, incomplete or defective expert knowledge; the client does not have to wait until the performance of the contract has been completed.

B. Interests at Stake and Policy Considerations

There is no doubt that a professional information provider needs to have, collect and make use of the expert knowledge necessary for the performance of the service. The main issue is to determine the amount of knowledge he needs to have in order to live up to the standard of care required from him. What should be the extent of the duty? What criterion do we use to determine that extent?

Requiring too much expertise from all information providers will lead to costs that will often be unnecessary to provide a good service. In some cases, this may even discourage providers from performing the service requested, because it may become too risky for them: they may too easily be held liable. On the other hand, if information providers are allowed to provide services regarding matters in which they are not sufficiently competent, the client will be inconvenienced. A middle course thus needs to be found.

The way to establish the extent of expert knowledge information providers need to have and to apply can be difficult to determine. In the sciences, the reference to the state of the art of the discipline at the moment of the provision of the service can be considered to be a guideline. This is probably not possible for other fields or practices. In such cases, reference may be made to the prevailing opinions in the community in which the information provider works or to deontological principles.

C. Comparative Overview

In ITALIAN law, the professional has to be aware of the solutions provided by the science that are accepted in practice. According to FRENCH law, the information provider is in breach of his duty if he does not carry out the research necessary for the security of the clients. For example, a legal adviser must know the current law, even the recent developments in case law, but he is not expected to foresee a reversal of the line of the case law. In any case, legal uncertainty does not relieve the information provider of his duties; he has to inform his client about that circumstance. A lawyer is liable for not having advised the client against suing when it is certain in advance that his claim will be rejected.

GERMAN law concerning legal advisers seems to be much more demanding than the other legal systems. It has been decided that a legal adviser is to conform to the case law of the Supreme Courts, even if these rulings are fiercely criticised in professional

doctrinal works and it cannot be ruled out that the line of case law will be changed. The legal adviser is also expected to keep his knowledge up to date and study the decisions of the Supreme Courts, which are published in legal journals, as soon as they are published. The *Bundesgerichtshof* held an attorney liable for an incorrect legal opinion, even if a three-person panel of professional judges had followed that opinion. Even the invocation of an expert legal opinion – the one of a university professor – is sufficient to release the lawyer from liability. The *Bundesgerichtshof* has been very demanding *vis-à-vis* legal advisers; for example, it held a lawyer liable because he relied on an old decision of the Court, without considering the possibility of a reversal of the line of the case law. This solution exceeds the standard of care normally required by other European countries and must be rejected if there are no signs of an imminent shift in the line of the case law.

No common European position can be found with regard to the extent of the influence of minority views on the standard of care. In ENGLISH law, a doctor who acts in accordance with a respectable school of thought in medical literature – even if this a minority view – does not breach his duty of care. Therefore, the ENGLISH position is relatively friendly towards the doctor.

On the other hand, under GERMAN law serious opinions in medical literature, even if they represent a minority view, are sufficient to accept a duty to inform the client of possible problems. The GERMAN view thus leads to higher level of liability. The GERMAN standpoint seems to be the better one. For example, under a duty to inform and advise the doctor will have to mention all the risks and alternatives, even those that he and or most of his colleagues would not take too seriously, since it is not he, but his patient who ultimately has to decide. In order to do so, the patient needs to have all the information available.

D. Preferred Option

There is no overall solution in Europe. However, the analysis of case law shows that the solution rather depends on the particular circumstances of the case than on the application of pre-established principles. Article 6:103 does not limit the possibility for courts to take into account the particular circumstances on the basis of which they have to decide. Reference can therefore be made to the general standard of care required from any service provider as stated in Article 1:107 (General Standard of Care for Services) and the particular standard of care stated in Article 6:104(1)(b) as well as the requirement of conformity for factual information stated in Article 6:105(2).

Since expert knowledge often consist of factual information, the conformity test will apply in many cases. This means that the duty of the information provider regarding input is not performed when the expert knowledge is incomplete or incorrect, regardless of the fact that the provider has acted with reasonable care and skill in researching expert knowledge.

Illustration 2
A client requests a law firm to make an inventory of the current law on employer liability. The law firm consults the LEXIS database. If some relevant cases are lacking in that database, due to which the information provided to the client is not correct or simply incomplete, the information provider has not lived up to his duties, regardless of the fact that he acted with reasonable care and skill in collecting expert knowledge and in deciding to consult the LEXIS database.

E. Relation to PECL and Other Parts of the Principles

Article 1:106 (Duties of the Service Provider regarding Input) states the general duties of a service provider regarding input. Article 6:103 is a particularisation of the provision of Article 1:106(3). To fulfil his obligation, the information provider, like other service providers may have to use materials. Contrary to the situation envisaged in Article 1:106, the input here is intellectual. The issue arises whether the liability for defective input is a strict liability or a fault-based liability. It depends on whether the expert knowledge consists in evaluative or in factual information. If the former is the case, reference is to be made to Article 6:104(1)(b), which sets the general standard of care of the information provider, and Article 1:107 (General Standard of Care for Services). If the latter is the case, reference is to be made to Article 6:105(2). The latter will apply more frequently since expert knowledge is generally factual information.

Article 6:103 is only a partial particularisation of Article 1:103 (Pre-contractual Duties to Warn). Some of the provisions of this Article have not been modified with regard to information contracts. Such is the case for the regime of subcontracting, which can be found in paragraphs (1), (2) and (6). It is very likely that for the majority of information contracts the personal performance is of the essence of the contract.

Illustration 3
A famous law professor specialised in the law of arbitration is engaged by a law firm to give his advice in the framework of an ICC arbitration procedure. The professor's personal performance is of the essence of the contract, which means that the professor cannot subcontract the performance of the legal advice without the client's consent.

Article 1:103(5) (Pre-contractual Duties to Warn) introduces the obligation to plan the performance of the service. This rule applies without modifications. However, application of paragraph (4) may lead to difficult issues. According to this provision, if the information provider is to transfer ownership to the client, transfer must be free of any right or claim of a third party. The question arises whether the information provider is to transfer to the client intellectual property rights on the information provided. Of course, information in itself is not subject to copyright according to the general principle that one cannot have an individual intellectual right on an idea. However, the way in which the idea is expressed, e.g. the document containing a recommendation and explaining the reasons thereof, can be subject to the exclusive intellectual rights of the author. The author is not bound to transfer this intellectual right to the client.

Unless there is a particular stipulation, generally required in writing, transferring the intellectual property rights in the information contract, such rights remain with the author. Article 1:103(5) (Pre-contractual Duties to Warn) does not contain an obligation for the information provider to transfer such rights because it only mentions 'third party' rights and the information provider is not a third party.

F. Character of the Rule

This Article contains default rules.

G. Remedies

General remedies apply. In this field, the obvious remedy is damages. However, if the client becomes aware of a lack of professional knowledge on the part of the information provider before the contract has been fully performed, he may terminate the contract according to Article 1:112(3) (Remedies for Breach of Duties of the Service Provider); see General Comments above, under N.

Comparative Notes

1. *Duty to have and to collect expert knowledge*
   This duty is generally derives from the application of the general provisions on standard of care of the information provider (Explicitly stated in ENGLAND, House of Lords in, *Sidaway v. Bethlem Royal Hospital Governors* [1985] 1 AllER 643 the standard of disclosure is based on the *Bolam* test). However, legal systems do not agree on how much expert knowledge is necessary to perform the contract in conformity with the standard of care. If in BELGIUM, ENGLAND, FRANCE, THE NETHERLANDS, ITALY and SWEDEN courts are demanding towards the information provider only with regard to the factual and established expert knowledge, GERMANY imposes sometimes an obligation on the provider to foresee a future evolution and therefore the probable incorrectness of the state of the art (BGH 30 September 1993, IX ZR 211/92; NJW 1993, 3323, legal adviser).
   No information from AUSTRIA, DENMARK, GREECE, FINLAND, IRELAND, LUXEMBOURG, SCOTLAND.

National Notes

1. *Duty to have and to collect expert knowledge*
   BELGIUM The district Court of Brussels stated that if a lawyer has to carefully collect professional information he is not liable when interpreting a legal provision differently from the judge if such a provision is ambiguous (Civ. Brussels, 21 February 1963, RGAR 1963, no. 7135).
   ENGLAND The professional knowledge a physician shall have is the one of a reasonably skilled professional (*Sidaway v. Bethlem Royal Hospital Governors* (1985) 1 AllER

643 House of Lords). The standard of disclosure is based on the *Bolam* test. In other words, the physician must have expert knowledge accordingly.
FRANCE The information provider is under the obligation to collect expert knowledge. For example a legal adviser must know the current law at the moment of the provision of the service (Cass.civ. I, 15 October 1985, Bull. no. 257; RTD civ 1986, 759 Huet). The provider must ascertain that the information is not out-of-date (Cass.com. 30 January 1974, D. 1974, 428 with note Tendler). The debtor is in breach of his duty if he does not accomplish the researches necessary for the security of the clients (Cass.-civ. I, 3 May 1983, D. 1983, 559, note J.-L. Aubert, for a notary). A legal adviser is not obliged to foresee a reversal of the case law (Cass.civ. I, 25 November 1997, Bull.civ. I, no. 328; Defr. 1998, 354 obs. J.-L. Aubert; RTD civ 1998, 367, obs. J. Mestre (notary). Already ruled by Cass.com. 12 July 1993, Bull.civ. IV, no. 298). In any case, legal uncertainty does not relieve the provider from his duty to advise; therefore he has to inform his client of that circumstance (Trib. civ. Seine, 22 April 1953, JCP N 1953.II.7656; CA Amiens, 29 January 1959, JCP N 1959.II.11212; Cass.civ. I, 9 December 1997, Bull.civ. I, no. 362; Defr. 1998, p. 354, obs. J.-L. Aubert, notary). A lawyer is liable for not having advised the client against suing when the claim will certainly be dismissed (Cass.civ. I, 29 April 1997, Bull.civ. I, no. 132; JCP 1997.II.22948 with note R. Martin; CCC 1997, no. 111, with obs. L. Leveneur).
GERMANY The information provider must have the expert knowledge expected by a professional of the same type. A legal adviser must know the positive law, even the solution of cases criticised by legal doctrine (BGH 29 March 1983, NJW 1983, 1665, solicitor) He is also under the obligation to keep himself up to date and study the decision of the BGH as soon as they are published in legal journals (BGH 20 December 1978, NJW 1978, 887). In assessing the extent of knowledge a legal adviser should have, German case law are more demanding than other legal systems. A legal adviser must conform to the case law of the Supreme Court, even if these rulings are fiercely criticised in the professional doctrinal works and it cannot be ruled out that case law will be changed (BGH 29 March 1983, VI ZR 172/81, NJW 1983, 1665 (solicitor); BGH VersR 1993, 1413, tax consultant; BGH 27 October 1994, IX ZR 12/94, VersR 1995, 303, NJW 1995, 330, notary public). He also has to keep himself up to date and study the decisions of the Supreme Court, which are published in legal journals as soon as they are published (BGH 20 December 1978, IV ZB 115/78 NJW 1979, 877). The *Bundesgerichtshof* held a lawyer liable for an incorrect legal opinion, even though a three-person panel of professional judges had followed that opinion (BGH NJW 1983, 820). Even the invocation of an expert legal opinion – the one of a university professor – is not sufficient to release the lawyer from liability (BGH NJW 1993, 1179). The *Bundesgerichtshof* has also held a lawyer liable because he relied on an old case of the court, without considering the possibility of the reversal of the line of the case law (BGH 30 September 1993, IX ZR 211/92; NJW 1993, 3323).
ITALY In order to perform, the information provider has to keep up with the 'state of the art'. He has to be aware of solutions studied by the official science and unanimously accepted in the practice. Knowledge of such solutions is indispensable for professionals that want to be active in a particular intellectual field (Cass. 18 June 1975, no. 2439, Giur. It., 1976, I, 1, 953; Cass. 29 March 1976, no. 1132, Giur. It., 1977, I, 1, 1980). This principle is valid for every single professional category. A lawyer, for instance, is liable in case of ignorance of the rules of law to be applied and in general,

when negligence and incompetence compromise the good outcome of a trial. Only in those situations in which interpretation of the case is arguable or the rules to apply are under discussion, then liability may be excluded, to the extent that there is no fraud or a serious fault (CC arts 2236 and 1176).

THE NETHERLANDS The provider of a service must apply the care of a *reasonably skilled* and reasonably acting provider of such a service. This criterion was explicitly accepted in HR 9 November 1990, NJ 1991, 26 (*Speeckaert/Gradener,* liability of a doctor), and applies to all providers of services. Cf. also HR 26 April 1991, NJ 1991, 455 (*Benjaddi/Neve,* liability of a bailiff for bad advice). Since the provider is liable if it does not act with the 'reasonable skill' of a provider of that service, it must make sure that it possesses or obtains the professional knowledge it may be expected to have. (I.P. Michiels van Kessenich-Hoogendam, Beroepsfouten, 1995, no. 18). A recent Dutch case shows the practical consequences of the obligation for a legal adviser to have professional knowledge. In this case, a firm had paid a former employee a large amount of money by way of a "golden handshake" in order to have the employee consent to the termination of his employment contract. Later it became known that the former employee, while employed, had accepted payments from an important supplier of the employer, without his employer's knowledge. The client, who had engaged a lawyer to assist him in a criminal case against the former employee, asked the lawyer how to claim back the money he had paid to the former employee. The lawyer advised his client to wait, for tactical reasons, until the former employee was criminally charged with the case and then to initiate legal proceedings alongside the criminal lawsuit. The client followed the advice and waited for the criminal charges to be brought to court. However, when the criminal charges were finally brought to court, the time limits for claiming the money paid by the employer had already lapsed, and the claim was dismissed. The employer then sued the lawyer on the grounds that he was liable for bad advice. The lawyer defended his position by arguing that he had acted as the employer's criminal lawyer only and that he, as a criminal lawyer, could not have known that the money was only to be claimed back through a specific procedure. The District Court of Leeuwarden found that the advice itself was wrong (Rb. Leeuwarden, 14 August 2002, case number HAZA 01-728). Moreover, the Court found that if the lawyer's argument that he was only employed as a criminal lawyer and that he could not have known of the specific procedure were true, the lawyer should have refrained from giving advice altogether and should have referred the client to a civil lawyer. This case shows that a lawyer is always under the obligation to have or to collect professional knowledge in order to give legal advice. Ignorance of legal matters is never an excuse for a lawyer. If he is aware that he does not have sufficient knowledge in a specific area, he must abstain from acting and refer the client to a competent lawyer. It still remains to be determined, however, how much knowledge the lawyer should have.

POLAND The duty to have and collect expert knowledge may be derived from the obligation to act with due diligence (CC art. 355) and the obligation of loyal contracting (CC art. 354). The level of knowledge to be expected in a given contract depends on the qualifications and professional experience of the service provider, the case, and the circumstances in which obligations are to be performed (judgement of the Supreme Court of 25. 9. 2002, I CKN 971/00, Lex nr 56902). In case of professionals the standard of knowledge and experience is set higher (CC art. 355 para. 2).

For example, in its decision of 14. 08. 1997 (II CZ 88/97, OSNC 1998/3/40) the Supreme Court has stated that the party contracting with an advocate may expect that the advocate will act with a full knowledge of the law.

SPAIN The updated knowledge on the profession is of paramount importance in case the service is provided by the so-called "liberal professionals" *(profesionales liberales)*. The professional is to be aware of the "state of science" *(estado de la ciencia)* at the time the service is provided. With regard to this obligation for medical providers, see the SAP Zaragoza 24 April 2000, AC 2000/1292. The general standard of care test apply in order to determine this.

SWEDEN Some professions have a special high standard of care of their own, for instance accountancies (*god revisorssed)* and practising lawyers (*god advokatsed)*. The professional must comply with these standards. For instance, a lawyer can be expected not to overlook rules and easily found cases (NJA 1957 p. 621). A specialist has however normally a higher standard of care than the generalist (cf. NJA 1981 p. 1091).

Article 6:104: Duty of Care of the Information Provider

(1) The duties under Article 1:107 (General Standard of Care for Services) require in particular the information provider to:
  (a) take reasonable measures to ensure that the client understands the content of the information;
  (b) act with the care and skill that a reasonable information provider would demonstrate under the circumstances when providing evaluative information; and
  (c) in any case where the client is expected to make a decision on the basis of the information, inform the client of the risks involved, in so far as such risks could reasonably influence the client's decision.

(2) When the information provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the information provider must:
  (a) base the recommendation upon a skilful analysis of the expert knowledge to be collected in relation to the purposes, priorities, preferences and personal situation of the client;
  (b) inform the client of alternatives the information provider can personally provide relating to the subsequent decision and of their advantages and risks, as compared with those of the recommended decision; and
  (c) inform the client of other alternatives the information provider cannot personally provide, unless the information provider expressly informs the client that only a limited range of alternatives is offered or this is apparent from the situation.

Comments

A. General Idea

This Article further details the duties of the information provider. The first two duties have been introduced by Articles 6:102 and 6:103. According to these, the information provider is to ascertain the needs of the client and collect the information he needs after which he is to perform the service agreed in the contract as stated in Article 6:103. Article 6:104 has been drafted with the purpose of detailing the other duties of the information provider. This provision is the core of the regulation of information contracts and specifies the standard of care of the information provider.

In particular, the information provider is under the obligation to provide clear and understandable information, the obligation to act with reasonable care and skill with regard to evaluative information and the obligation to inform the client about risks. Moreover, the information provider who provides the client with a recommendation, i.e. the adviser, is under the obligation to mention alternatives.

Since the purpose of the information provided is to enable the client to make an enlightened subsequent choice, the information must be understandable and, if in writing, legible. According to paragraph (1) subparagraph (a), the provider is to take reasonable measures to ensure the client understands the information. The more the provider gives the client the impression that the information is expressly tailored to the client's individual needs, the heavier the duty that lies upon him. If, however, only a very limited service is given, especially if the information is given in a standardised form without actual contact between the parties, the provider's duty to make sure a particular client understands the information is more limited. However, in either case the information provider has to disclose on the basis of which information he has based his service. The client needs such disclosure to be able to evaluate it. Moreover, it may help the provider to avoid liability since, in doing so, he indicates the scope of the service provided. For, if the client takes a damaging decision on the basis of information he did not understand, the provider is considered to be in breach of duty.

Paragraph (1) subparagraph (b) is the core of Article 6:104. This subparagraph states that the information provider is to 'act with the care and skill that a reasonable information provider would demonstrate under the circumstances when providing evaluative information'.

> *Illustration 1*
> An adviser advises his client to make a particular long-term investment. After ten years, it turns out that another investment would have been more profitable for the client. The adviser is not liable, unless it is substantiated that he did not act with reasonable care and skill.

According to paragraph (1) subparagraph (c), the information provider is to inform the client about the risks involved in the various courses of action available. The duty to inform about risks exists when the client is expected to make a subsequent decision on

the basis of the information received. It is generally accepted that the information provider has to inform his client about the risks involved in the latter's subsequent decision. This is considered to be one of the essential features of the obligation to inform.

When the information provider provides the client with a recommendation, i.e. in the case of advice contracts, special provisions are to be found in Article 6:104(2). The adviser's main duty is to recommend the client a specific course of action from among the alternatives available. In order to do so, subparagraph (a) states that the adviser is to make a skilful analysis of the information gathered and, on the basis of that analysis, recommend a particular course of action to his client. In his analysis, the adviser must take into account all the alternatives at hand and the risks thereof. These alternatives may include not doing anything at all.

Illustration 2
A patient can decide not to undergo treatment; a client of a lawyer can decide not to sue; an adviser on company strategy can advise against the merger with another company. If not doing anything is the best alternative for the client, the adviser should so advise his client.

Subparagraphs (b) and (c) impose on the adviser the obligation to inform the client of the alternatives available. However, as a rule the information provider is not under the obligation to mention alternatives to the client. Even when the adviser is in the position to personally provide one of the alternatives at hand, he must also inform the client about the alternatives he cannot provide himself, unless the information provider expressly informs the client that only a limited range of alternatives is offered or this is apparent from the situation.

Illustration 3
An insurance broker does business with only a limited number of insurance companies, and recommends to his client the best alternative from among the insurance policies offered by those companies. He is obliged to disclose this situation to the client. This is also the solution of the EU Directive on insurance brokerage.

B. Interests at Stake and Policy Considerations

Several issues arise from this provision. If the existence of the duty to mention clear and understandable information is not debated, the other obligations of the information provider involve difficult choices and the conciliation of conflicting interests.

With regard to the standard of care of paragraph (1) subparagraph (b), the issue is to determine whether the information provider is under an obligation of best efforts only or whether he is to guarantee the result as envisaged by the parties by providing evaluative information (for discussion of the issue regarding factual information, see Comment B to Article 6:105). It is in principle difficult for the information provider to

guarantee the exactness of evaluative information. This is usually the case when the information is not yet available or concerns a future event. For every kind of forecast or prediction it is difficult for the information provider to guarantee the exactness of the information.

Illustration 4
A weather forecast agency predicts sunshine for the next day. However, a storm rages that day. The agency is not liable if it acted with the care of a professional of the same profession.

Illustration 5
A bank willing to lend money to a company requires a mortgage on a building belonging to the debtor. The bank requests the valuation of the building. The real estate valuer is not under the obligation to guarantee the bank that it will effectively receive the valuation amount in case of enforcement of the guarantee. The risks of market developments burden on the bank. The valuer is only under the obligation to perform a valuation with reasonable care and skill.

Besides the supply of information about future and unknown events, i.e. predictions, more generally the question arises whether the information provider ought to be under an obligation of best efforts in all cases in which he provides information that is not factual, but evaluative. When information has to be processed by the provider in order to perform the contract, it is usually unfair to impose on the provider that he guarantees the correctness of the information.

Illustration 6
An estate agent is requested to provide information about the value of a villa. In order to do so, the estate agent has to process many factual information (surface, neighbourhood, recent sale prices of similar estates in the area …). This involves several hazards, and the provider cannot guarantee that the client will find a buyer at the valuation price given. He is under an obligation of best efforts, and he is liable only if he did not meet the standard of care.

As in the case of the provision of evaluative information, the adviser cannot guarantee that the result expected by the client will be achieved if the client acts on the recommendation. In other words, it is not possible to require from a professional adviser that the course of action advised is the best one for the client.

With regard to the obligation to mention the risks, the main issue is to assess precisely the extent of the risks that the information provider is to disclose. Since the information is provided in order to allow its recipient to take a subsequent decision, it seems logical to link the risks directly with the subsequent decision of the client in such a way that only the risks that may influence the client's decisions are to be disclosed. This solution may generate some important criticism. Since the information provider not necessarily knows what kind of risk might influence the decision of his client, he is in a position of uncertainty. Clear determination a priori of the risks are to be disclosed may prevent such a situation. However, this solution is only applicable to the provision of

some types of information; for example medical treatment risks, where clear statistics exists and it is possible to introduce a provision imposing the disclosure of those risks that turn up in statistics with a particular frequency. The solution is, on the other hand, difficult to apply to other areas where such a calculation of frequency cannot be made and where it is impossible to regulate any particular situation. For this reason, it may be preferable to have a more general provision.

The question whether the adviser is under an obligation to mention alternatives is not really an issue, as the principle of this obligation is widely accepted. The main question is to determine whether the adviser shall be bound to mention alternatives he cannot provide himself. This situation occurs when the adviser also provides other kinds of services. This is frequently the case in the field of insurance advice. An argument in favour of such a duty would be the faith placed in the adviser by the client, who may not know the adviser may not the best qualified person to execute the service. For this reason an adviser is, in principle, obliged to mention alternatives. This may in particular be the case if a specialisation has been developed within a particular profession. It is generally accepted that the standard of care a doctor has to meet may require him (e.g. a general practitioner) to refer patients to another doctor (e.g. a specialist). On the other hand, in some situations the provider of a good or service is not obliged to refer to a competitor who can deliver better goods or services.

C. Comparative Overview

The duty to provide clear and understandable information is generally accepted in all European legal systems as part of the general standard of care required from the information provider.

With regard to the duty of care, the provision of this Article is generally followed by European jurisdictions. According to case law, the information provider is merely under an obligation to make the best efforts to provide correct information. Strict liability or obligations of result are generally not found in this area.

Several techniques are used in European jurisdictions to determine the risks to be disclosed: a priori determination, causation reasoning and standard-of-care reasoning. Apart from the type of legal reasoning applied, legal systems also diverge with regard to the determination of the extent of the risks that have to be mentioned. Especially concerning medical treatment, some legal systems impose on the provider the duty to inform the other party about all possible risks, even those that materialise exceptionally. This is, for example, the case for FRENCH law. In other legal systems there, is not an a priori limitation of the risks that have to be disclosed. The determination is made following causation reasoning: the risks to be disclosed are those that may influence the decision of the client (GERMANY, AUSTRIA). On the other hand, the determination is made by applying a normal standard-of-care reasoning; the risks to be disclosed are the ones that a reasonably competent and skilful professional would have disclosed (ENGLAND). Reference is made to professional literature and codes of ethics to determine what a reasonable professional would have disclosed.

No common position is to be found in European legal systems with regard to the obligation for the information provider to mention alternatives. If the principle of this duty seems to be widely accepted for the adviser, there is divergence with regard to the information provider who does not provide his client with a recommendation. The most important divergence probably concerns the duty of the adviser to mention alternatives that he is not able to provide himself.

D. Preferred Option

With regard to evaluative information, in this Article the obligation of best efforts is opted for. The information provider meets the standard of care when he provides his service with reasonable care and skill.

In paragraph (1) subparagraph (c), a causation reasoning was followed in order to determine the extent of the risk to be disclosed. The information provider only has to mention risks the awareness of which could reasonably influence the other party's choice. Specific provisions exist with regard to information about risks in the treatment Chapter (Article 7:105 (Duty to Inform of the Treatment Provider)). However, according to paragraph (2) of this Article, the regime of the duty of the service provider to inform about therapeutic risks is governed by the provisions in the present Chapter.

The duty to mention alternatives is only imposed on the adviser, not on the information provider who does not give a recommendation to his client. Concerning alternatives the adviser cannot personally provide, paragraph (2) subparagraph (c) states an in-between solution, providing that in principle the adviser is to mention alternatives that he cannot personally provide. However, the adviser can exclude the obligation to mention alternatives he cannot provide himself by explicitly stating that he gives advice only concerning alternatives he can personally provide or a limited range of alternatives provided by others. This statement must be given, as soon as he comes into contact with the client. Moreover, sometimes it is obvious that the professional will only advise the client about alternatives he can personally provide. If this is the case, there is no need to make the statement mentioned above.

> *Illustration 7*
> A private individual requests a loan for the acquisition of a piece of an estate. The bank will only advise the potential client on the various types of loans it can offer him. The bank is not obliged to advise in favour of loan contracts offered by other banking institutions.

E. Relation to PECL and Other Parts of the Principles

This provision is related to the provisions in Article 1:107 (General Standard of Care for Services). It is a particularisation of this provision because it introduces particular duties of the information provider. However, first and foremost the information provider

is under the obligation to act with reasonable care and skill. The definition of reasonable care and skill is give by this Article, which is of course applicable to information contracts.

F. Character of the Rule

This Article contains default rules. The information provider is under an obligation of means when he provides evaluative information. Such a rule is applicable when contracting parties do not expressly regulate this issue. Parties may deviate from this solution and the information provider can be bound to guarantee the exactness of the information even in providing evaluative information or advice. The standard of care can also be lowered by contractual stipulation.

Additional remarks are required as regards the duty to provide clear and understandable information. Although this provision is not mandatory, it is difficult to find in practice contractual clauses excluding liability for unclear information. However, a general clause of limitation or exclusion of liability may encompass the breach of the duty of paragraph (1). Its validity will be assessed according to the conditions stated in Article 1:114 (Limitation of Liability). Such a stipulation may be useful in the case of the provision of very technical information that requires special knowledge for it to be understood. In some cases, it might become very costly for the information provider to explain the information to the other party. In such a situation, the intervention of a third-party expert in charge of its interpretation and explanation may be useful.

> *Illustration 8*
> In a joint-venture agreement between a company and a venture capital firm concerning the acquisition of a target company by means of leveraged buyout, it is stated that the parties agreed to exchange financial information about the target company. The venture capital firm is thus not under the obligation to ascertain that the manager of the partner company understands the information or to explain it to him.

Paragraph (1) subparagraph (c) is not mandatory. Frequently a client chooses not to be informed about the risks of a specific course of action.

> *Illustration 9*
> A patient decides not to be informed about the risks and the alternatives of the treatment recommended. In other words, the patient entirely trusts the physician and, in fact, asks the latter to take the decision in his place. This wish must be followed by the treatment provider and, as a consequence, his duty to inform is alleviated.

G. Remedies

The natural remedy in the case of breach of an information contract is damages. Other remedies are available, such as withholding performance and termination of the contract (see General Comments, under N). In any case, the provisions of Chapter 9 PECL (Particular Remedies for Non-Performance) do apply. In practice, however, the breach of this type of contract will lead to a claim for damages. This is the case for the breach of all the particular obligations in this Chapter.

Comparative Notes

1. *Obligation of means or obligation of result*
   As a principle, in ENGLAND, FRANCE, GERMANY, THE NETHERLANDS, PORTUGAL, SPAIN and SWEDEN, the obligation of the information provider is an obligation of means. According to this the mere fact that the information provided is wrong or turns to be wrong does not lead to the liability of the provider. It is necessary to prove that the information provider did not act with reasonable care and skill. As an exception in FRANCE some cases (e.g. CA Paris, 22 November 1996, Juris-Data no. 024274) and authors (Delebecque, Contrat de renseignement, J.-Cl. Contrats et Distribution, Fasc. 795, 1991, no. 83; Veaux, Contrat de conseil, J.-Cl. Contrats et Distribution, Fasc. 430, 1992, no. 116) are of the opinion that the provider is under an obligation of result in providing factual and verifiable information. In GERMANY such is the case when the information contract is qualified as a *Werkvertrag*. For a comparative analysis of this issue, A. Pinna, The Obligations to Inform and to Advise, nos. 107-123.
   No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND.

2. *Determination of the standard of care*
   When the obligation is of means, the standard of case is generally the one of the reasonably skilled and cared professional. This depends on the circumstances of the case and the nature of the information provided. Reference to the standards of the profession is made. In ITALY, a further alleviation of the obligation is to be found when the performance of the service is of particular difficulty (arts 1176 paragraph 2 and 2236 CC). If such is the case the information provider is only liable in case of fraud or gross negligence. In SWEDEN, the degree of specialisation of the provider is taken into account to modulate the standard of care.
   No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND.

3. *Obligation to mention risks and alternatives*
   Although the existence of the obligation for the information provider to disclose risks is generally accepted, the nature and the extent of the risks to be disclosed led to an important dispute in doctrine and case law. In determining this, the solutions adopted by European legal systems diverge substantially. They diverge both with regard to the method followed in solving the issue and with regard to the final solution, i.e. the

extent of risks that have to be disclosed. For a comparative analysis of this issue, A. Pinna, The Obligations to Inform and to Advise, nos. 180-197.
The obligation to mention alternatives is generally accepted in some fields of practice, especially in medical information.
No information from DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND

4. *Alternatives the service provider cannot provide himself*
The obligation to mention alternatives that the service provider cannot provide himself is generally acknowledged in medical field, with the exception of GERMANY (BGH, 22 September 1987, IV ZR 238/86). In other fields of practice, the main solution takes into account the role played by the information provider. Especially if he presents himself as an independent adviser or if he gives the impression he acts independently he has to mention alternatives he cannot provide himself. If he does not intend to do so, he has to disclose his lack of independency. Most legal systems analyse this issue as one of conflict of interest (see *infra*, notes under 607).
No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND.

National Notes

1. *Obligation of means or obligation of result*
ENGLAND The nature of the obligation stemming from the contract depends upon the construction of the contract itself. Although the general starting-point is that it is an obligation of means ("reasonable skill and care" under SoGaSA 1982, art. 13), given the nature of the contract it will often be interpreted as containing a warranty that the information is correct, so that the obligation is in practice one of result. Information providers who wish to avoid such an obligation can exclude it (as long as reasonable under Unfair Contract Terms Act 1977). In the case of advice the courts will be far more reluctant to read any warranty as to result into the contract, see e.g. *Thake v Maurice* (1986) QB 644 in which the court held that a doctor performing a sterilisation operation had not given a contractual warranty that the patient would become permanently sterile, although he did demonstrate to the claimants (husband and wife) how the ends of the vas were to be cut and tied back that (Court of Appeal, note that the claimant did recover on the basis of the doctor's failure to warn of reversal was a breach of the contractual duty of care).
FRANCE Some cases stated that the obligation to inform is an obligation of result and the obligation to advise is an obligation of means. The consequence of this is that wrong information is sufficient to lead to the liability of the provider. The Court of appeal of Paris has very clearly explained why the standard of care required from an information provider and an adviser differs: "The adviser in under a mere obligation of means, in the case in point the one to make the better efforts to fulfil his mission. However, the adviser is liable if the result expected by the recipient is not reached only if the performance of the provider consist in collecting information without any uncertainty" (CA Paris, 22 November 1996, Juris-Data no. 024274). In spite of this clear statement of the Court of appeal of Paris the main line of the case law is in favour of the characterisation of obligation of means also when information is provided, i.e. wrong information must be

the consequence of a faulty performance of the contract to lead to liability of the provider (Delebecque, Contrat de renseignement, J.-Cl. Contrats et Distribution, Fasc. 795, 1991, no. 72). The *Cour de cassation* ruled that the client must establish that the provider did not act with the required diligence to collect exact information. (Cass.com. 30 January 1974, D. 1974, 428 with note Tendler. For the appeal case, CA Lyon 27 October 1971, JCP 1972.II.17012, with note R. Savatier; D. 1972,327 with note Tendler. For other cases, see CA Rennes, 21 May 1974, Rev. Banque 1974, 848; RTD com 1974, 566 obs. Cabrillac, Rives-Lange). In a case of 1988 the *Cour de cassation* stated as a general principle that a bank is under a mere obligation of means in providing information (Cass.com. 10 October 1988, Bull. Joly, 1988, 931, no. 303; RD banc 1989, no. 12, p. 66, obs. Crédot, Gérard). In the case in question a client, desiring acquiring shares of a company, asked to his bank documents about such company and its creditworthiness. Following such information he did buy the shares and few months later the company went bankrupt. The client could never be reimbursed of his investment by the bank, because a fault of the latter could not be established in spite of the wrong information provided. (For other cases see Delebecque, Contrat de renseignement, J.-Cl. Contrats et Distribution, Fasc. 795, 1991, nos. 75 ff.). However, in other cases for the *Cour de cassation* wrong information is sufficient to characterise the fault of the provider (Cass.com. 14 March 1978, D. 1979, 549 with note Tendler). In another case concerning the information exchanged between two banking institutions, the *Cour de cassation* ruled that providing wrong information was sufficient to lead to liability. (Cass.com. 9 January 1978, D. 1978 IR 308, obs. Vasseur; Cass.com. 9 June 1980, D. 1981 IR 192 obs. Vasseur; Cass.com. 24 November 1983, D. 1984 IR 707 obs. Vasseur). In legal doctrine it is considered that, concerning information accessible to everyone, the provision of wrong information leads directly to the liability of the provider (Delebecque, Contrat de renseignement, J.-Cl. Contrats et Distribution, Fasc. 795, 1991, no. 83). In other words in such cases the provider of information is under an obligation of result. More generally a part of the doctrine considers that the obligation to provide information, which is verifiable should be in principle an obligation of result (Veaux, Contrat de conseil, J.-Cl. Contrats et Distribution, Fasc. 430, 1992, no. 116). The reason of this is that there is no hazard in the performance of such obligation and its debtor should guarantee a result. This is the general criterion of the determination of the obligation of result in FRENCH law (See especially, Tunc 1945, and generally, Terré, Simler, Lequette, Les obligations, 2002, no. 586). In any case it is easier for the client to establish the fault of an information provider that the one of the adviser. Indeed it is easy to know when the information is wrong, while the judgement of the quality of an advice is always subjective. Finally the recent case law of the *Cour de cassation* concerning ancillary obligation to inform and especially the burden of proof seems to go in the direction of the recognition of an obligation of result (see *infra*). On the other hand, for the obligation to advise, the general rule is that a bad advice is not the one which, once followed, does not end up at the result expected by the recipient. The *Cour de cassation* ruled that the adviser is under an obligation of means and not of result (Cass.com. 14 March 1978, D. 1979, 549 with note Tendler – for a commercial information office). The comparison between the advice expressed by the adviser and the result obtained in practice is not the criterion of the liability of the adviser (Cass.civ. III, 30 March 1982, Bull.civ. III, no. 67. A construction engineer in construction who advised a client on the possibility of having a building permit is not liable only because the permission is not allowed: CA Paris, 18

November 1988, D. 1989. IR 11. A legal consultant, who advises his client in favour of suing, does not give a bad advice only if the client does not win the trial). The second consequence of this principle is that the adviser can ask for the remuneration of the work done even if the result is not obtained (Cass.com. 12 April 1988, Bull.civ. IV, no. 125. A consulting engineer in patents (patent rights) can ask for fees even if during his researches he found a similar patent already registered). On the other hand the adviser is liable for breach of the contract if he has committed a fault (Cass.civ. I, 21 December 1964, Bull.civ. I, no. 585 – organisational adviser. CA Paris, 22 November 1988, JCP 1989.II.21330 with note G. Raymond – recruitment adviser). In some exceptional cases the adviser has to guarantee the efficiency of his advice (obligation of result). This is the case when the adviser is at the same time a building constructor in the meaning of arts. 1792 and 1792-1 CC and if the advice leads to a defect in the construction. In this situation the adviser-constructor is under an obligation of result, because art 1792, which introduces a strict liability, is applicable (See for example, CA Paris, 29 January 1987, D. 1988, somm. 115; RGAT 1987, 233 obs. J. Bigot. For a construction technical control agency who did not report the inadequacy of the roof, in spite of his diligence.

GERMANY Contracts for information can fall both under the contract for services – *Dienstvertrag* (obligation of means) or contract for work *Werkvertrag* (obligation of result). Normally a contract for information can be considered as *Dienstvertrag* (see e.g for accountants: BGHZ 54, 106, 107 f.; BGH, 1 July 1971 – VII ZR 295/69, WM 1971, 1206, BGH 6 December 1979 – VII ZR 19/79, VersR 1980, 264, 265; BGH 3 February 1988 – IVa ZR 196/86, WM 1988, 763, 764; Palandt [*-Thomas*], BGB, 60th, art. 631 no. 18; Gräfe/Lenzen/Rainer, Steuerberaterhaftung 2nd ed. nos. 123ff., 127ff.; BGH, 6 November 1980 – VII ZR 237/79, WM 1981, 92). The latter is only rarely the case, i.e. a concrete work is to be carried out by the service provider – e.g. an attorney writing a legal opinion (BGH NJW 1965, 106), or if an accountant has to give advice regarding the most advantageous tax-model for an enterprise and draft a contract as a consequence of it (OLG Köln OLGZ 80 no. 105). In some German cases regarding liability for incorrect information one can notice that the basis for liability are CC arts 276 and 278 which are the general grounds for contractual liability caused by negligence (BGH 12 February 1979, WM 1979, 548; NJW 1979, 1595. Contractual liability of a bank for wrong information regarding the creditworthiness of a client.). The motivation of this case is however ambiguous because the *Bundesgerichtshof* asserted that, in application of these arts, the bank was under the obligation "to supply objectively correct information". That could mean that, like in some FRENCH creditworthiness cases, a fault is present as soon as the information delivered is incorrect. In other words, the practical consequence of this is that the obligation of means has become an obligation of result. Finally, according to case law, a *Werkvertrag* is very rarely found in exchange of information obligations. This is the case only when a concrete work is to be carried out by the service provider.

THE NETHERLANDS The mere fact that the analysis on which the advice is based is wrong does not mean that the adviser is liable. The adviser is in that sense not under an obligation of result. Cf. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 347.

POLAND In a case, when the contract may be classified as one of the nominate contract, the distinction line is easy to draw: the contact of specific work is classified as an obligation of result, while the mandate contract is an obligation of means. In a case of mix contract or innominate contract classification of a given contract as

embodying obligations of means or obligation of results depends on the contents of the contract and qualifications of the service provider.

PORTUGAL The obligation to inform and to advise is an obligation of means. If the information is incorrect, but the standard of care was not breached, the adviser is not liable. (Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, 387, Código Civil Anotado I, ad art. 485.)

SPAIN In principle, in performing such obligations the service provider must act with the care and skill of a reasonable professional in the same situation. Because the service provider is under an obligation of means, it is in principle up to the party claiming non-performance of the obligation to inform, in this case the client, to prove that the service provider did not act according to the standard of care required. The Spanish Supreme Court regards that obligation for the medical service provider to inform as an essential requirement of the *lex artis ad hoc* (STS 2 October 1997, RJ 1997/7405; STS 13 April 1999 RJ 1999/2583). In other decisions the *Tribunal Supremo* considered the obligation to be part of the obligation of means assumed by the professional (STS 25 April 1994, AC 1994/3; STS 11 February 1997, RJ 1997/940). However, when the information regards objective facts a higher standard of care is to be observed since the professional is under the obligation to provide truthful and correct information and to verify such information, the obligation being a real obligation of result (See the opinion of M. Casals and J. Feliu, note under STS 7 June 2002, www.asociacionabogadosrcs.org/doctrina/).

SWEDEN The mere fact that the analysis on which the advice is based is wrong does not mean that the adviser is liable. The adviser is in that sense not under an obligation of result. Normally, one can distinguish between the result of the commission as a whole, where only significant discrepancy from the expected standard is considered as a lack of conformity, and special measures where the requirements are much higher (See Hellner/Hager/Persson, Speciell avtalsrätt II, first book, p. 217ff). As an example you can expect a lawyer not to overlook rules and easily found cases, but he will not be liable if he loses the case due to the fact that he is not as skilled as you had hoped (Cf. NJA 1957 p. 621, where a lawyer had overlooked a case which was referred to in a well known legal book and was found liable for damages). In many cases the result of the commission can vary considerably since the advice given is always subjective, for example a stockbroker's investment advice or an official valuer's estimation of the value of a real estate (Kleineman, SvJT 1998, p. 190). In those cases the liability for the result will only arise in extreme cases and the adviser has a wide margin when it comes to the result, (cf. NJA 1987 p. 692 concerning evaluation of the market price of real estate).

2. *Determination of the standard of care*

AUSTRIA What exactly the standards of care are depends on the circumstances of the case, mainly the contractual relationship and the necessary diligence according to objective standard set out in art. 1299 (Koziol, Österreichisches Haftpflichtrecht, 2nd edn., II, p. 183; SZ 49/47; ÖRZ 1981/15; JBl 1982, 534, EvBl 1982/3).

ENGLAND Objective standard, of a reasonable information/advice-giver. (SoGaSA 1982, art. 13, and in common law, 'Bolam test', *Bolam v. Friern Hospital Management Committee*, (1957) 2 AllER 118.)

FRANCE If the obligation of the provider is an obligation of means, the standard of care is the one of the «*bon père de famille*» (art. 1137 CC). The behaviour of the debtor

in performing the contract is compared to the one of the *bon père de famille*. In case of professional, comparison is made with a reasonably cared and skilled professional.
GERMANY In theory, no special rules for the liability exist. In determining whether or not the adviser is liable, first of all it needs to be established that the advice was incorrect. This implies the client (or the third party that relied on the advice) needs to show the facts were misrepresented. This objective judgement is to be followed by a subjective criterion: the court has to be convinced the adviser knew or should have known the incorrectness of his advice (Cf. Müssig, Falsche Auskunftserteilung und Haftung, NJW 1989, p. 1698). The criterion whether or not the information provider is liable, does not differ upon the service provided: he is liable if he did not live up to the standard of care that could be expected of him *(die im Verkehr erforderlichen Sorgfalt)*. However, what 'the standard of care that could be expected' is, is to be determined primarily according to the standards of his profession (Cf. BGH 29 November 1994, VI ZR 189/93, VersR 1995, 659). If it results from the contract that the advice ought to protect the principal from certain risks and these risks materialise as a consequence of the poor quality of the advice, then the adviser is liable for the damages (Cf. BGH 26 June 1997, IX ZR 233/96, VersR 1997, 1489). For a legal adviser, this implies that he conforms to the case law of the supreme courts, even if these rulings are fiercely criticised in the professional doctrinal works and it cannot be ruled out this case law will be changed (Cf. BGH 29 March 1983, VI ZR 172/81, NJW 1983, 1665 (solicitor); BGH, VersR 1993, 1413 (tax consultant); BGH 27 October 1994, IX ZR 12/94, VersR 1995, 303, NJW 1995, 330 (notary public)). An advice on possible investments needs to be correct, complete, understandable and careful (BGH 6 July 1993, XI ZR 12/93, NJW 1993, 2433, MDR 1993, 861, BB 1993, 1903, ZIP 1993, 1148).
ITALY The standard of care to be met is the one specified in art 1176, para. 2, of the ITALIAN Civil Code, according to which the professional care and skill has to be evaluated with regard to the kind of activity performed. The intellectual professional avoids incurring liability by performing his profession with *exacta diligentia*, that is to say, the diligence required by his art. The care and skill required by this provision are of a high standard because of the particular interests involved, and, more generally, because the client has to rely on the professional's knowledge and skills. It still remains to be determined what is the content of professional diligence. The professional has to be aware of solutions studied and accepted by the science and in the practice; knowledge of these solutions is indispensable for professionals who want to be active in a particular profession (Cass. 18 June 1975, no. 2439, Giur. It., 1976, I, 1, 953; Cass. 29 March 1976, no. 1132, Giur. It., 1977, I, 1, 1980). This principle is valid for every single professional category. The ITALIAN Civil Code contains an exception to the provision of art 1176 paragraph 2, regarding professionals providing intellectual services. When the performance of the service is of particular difficulty *(speciale difficoltà)*, the provider is liable only in the case of fraud or gross negligence *(dolo o colpa grave)* according to art 2236 of the ITALIAN Civil Code. The ITALIAN *Corte di cassazione* states explicitly that art 2236 of the ITALIAN Civil Code is an exception to the general rule determining the standard of care (Cass. 11 August 1990, no. 8218). The doctrinal interpretation of this provision goes in the direction of the limitation of its scope of application only to the performance of services that require a greater expertise than normally required by the same category of professionals (C.M. Bianca, Diritto civile, t. V, la responsabilità, Giuffrè, Milano, 1994, no. 18; G. Cattaneo, La responsabilità del professionista, Milano, Giuffrè, 1958,

p. 72; A. Perulli, Il lavoro autonomo – Contratto d'opera e professioni intellettuali, in Trattato di diritto civile e commerciale diretto da A. Cicu e F. Messineo, Vol. XXVII, Milano, Giuffrè, 1996, pp. 611ff.). Therefore, a reduction of the standard of care exists only in rare situations. The discussions during the drafting of the ITALIAN Civil Code showed the interest involved of such a provision. It has been asserted that its purpose was to reconcile two opposite needs: firstly, not to reduce the initiative of the professional because of a liability too easily engaged; secondly, not to allow the professional not to be diligent just because the performance of the service in question is particularly difficult. The ITALIAN Supreme Court continues to reconcile these two purposes in the assessment of the serious fault by deciding that the non-compliance with basic knowledge of the profession is a serious fault (Cass. 26 March 1990, no. 2428, concerning medical liability. There could be particular difficulty in the opinion of the *Corte di cassazione* only in the presence of new clinical cases not yet treated by practice.). Every professional has to ascertain the particular difficulty of a case and if necessary he has to inform the client of this situation and advise him to consult a specialist (See, e.g., Cass. 26 March 1990, cit).

THE NETHERLANDS The standard of care is whether or not a reasonably skilled and reasonably acting professional, in the given circumstances – including the information that has or should have been collected –, could not have given the information or the advice as in fact has been given. Cf. HR 26 April 1991, NJ 1991, 455 (Benjaddi/Neve). Unless he has made clear – preferably in advance – his level of expertise is substandard, the adviser must at least provide an advice of 'good average quality', meaning he has to provide the quality that can reasonably be expected of a reasonably skilled and reasonably acting professional. Cf. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 349. The above is clear for advice, but I see no good reason to judge differently for contracts to provide (plain) information.

POLAND The rule, which sets the standard of the duty of care, is CC art. 355. It requires (CC art. 355 para. 1) acting with diligence generally required in the relationship of a given kind. The due diligence of the professional debtor shall be assessed with the consideration of the professional nature of that activity (CC art. 355 para. 2). The Supreme Court has clarified (Judgement of the Supreme Court of 25. 9. 2002, I CKN 971/100, Lex no. 56902) that the due diligence of the professional debtor does not mean any exceptional diligence, but it should be adjusted to the acting party, the subject and the circumstances in which the obligations are to be performed.

PORTUGAL The adviser shall act with the diligence of a good *paterfamilias* (art. 487/2 CC). As the adviser in this case is a professional, he is bound by the standard of care of a good professional: cf. The Portuguese "Bolam"-test: CA Lisboa, 27 July 1998, CJ, 1998, 4, 130. He has a duty to follow directions of the client as well as a duty to give account (art. 1161 CC). "The adviser shall inform himself of the facts needed to formulate an opinion, and operate an accurate technical application of them, in conformity with the *leges artis*, to be appreciated in light of the time it was issued according tho the most recent available information. If the reasoning is incorrect, then the error must be blunt, in order to engage liability" Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 388. Standard of care of attorneys: art. 83/1c) d) *Estatuto da Ordem dos Advogados*. Standard of care of doctors: 26 *Código Deontológico*.

SPAIN The due diligence to be observed by the provider of a service is that imposed by the "lex artis" which regulates the service provider's profession. In giving both infor-

mation and advice, the provider of the service must comply with the *lex artis ad hoc*, that is to say, it must act with the care and skill that a reasonable information provider would demonstrate under the given circumstances in accordance with the *lex artis* of the profession. It is a qualified standard of care if compared with the general diligence of the good father (1104, para. 2 CC) as a result of the relationship of confidence arising in services contracts where the client relies on the expertise of the professional and expects it to execute the service as to comply with the client's interests under the contract. In accordance to art. 1104, para. 1, the due diligence required by the nature of the obligation is also modulated by the circumstances of the parties, time and place in the concrete situation. The "*lex artis ad hoc*" is the criterion to determine the required standard of care. The diligence required by the *lex artis* is the average skill that a competent professional would observe in a similar case in accordance with the rules of the profession, although taking into consideration the specific circumstances surrounding the case (nature of the obligation, time and place where the obligations are to be fulfilled, characteristics of the provider). (STS 11 March 1991, RJ 1991, 2209; SAP Segovia 13 April 2000, AC 2000/1005, concerning a solicitor.

SWEDEN There is no fixed standard of care; this will depend on the situation and the parties. However, some professions however have a special standard of care of their own, for instance accountancies (*god revisorssed)* and practising lawyers (*god advokatsed)*. In the new Act on Financial Advise to Consumers, also a standard of care for sound advice practice, (*god rådgivningssed)*, is introduced, see art. 5 (1). The meaning of this standard shall be decided through a general assessment at each time of trade organisations agreements, directions, general advice, case law etc. (Lycke/Runesson/Swahn, Ansvar vid finansiell rådgivning, p. 106). In other cases it must firstly be established which norm the professional has breached. Secondly, it must be decided whether the breach was so serious that the deviation should be considered as negligent (Kleineman, Rådgivares informationsansvar- en probleminventering, SvJT 1998, p. 189). A specialist has however normally a higher standard of care than the generalist, which is shown in NJA 1981 p. 1091, where a lawyer in a case regarding expropriation had only claimed that the compensation should be index-bound to a certain date. However, it would have been possible to makes this claim until a later date, which would have been more favourable to the client. The HD found that the lawyer had acted negligently since he was regarded as a specialist in this field, and he was found liable for damages (See Kersby, Due Diligence särskilt om advokats ansvar vid dess genomförande, JT 1997/98, p. 157).

3. *Obligation to mention risks and alternatives*

AUSTRIA It has been established by case law that the adviser is under a duty to mention alternatives and risks (OGH 23 February 1999, 4 Ob 335/98p, JBl 1999, 531, physician).

BELGIUM In medical advice, the physician has to inform the patient about risks of the operation that are relevant for the patient choice (art 8 of the act of 22 August 2002 on the rights of the patient).

ENGLAND In principle there is an obligation to mention risks that the ordinary client might reasonably regard as relevant, (*Sidaway v. Bethlem Royal Hospital Governors* (1985) 1 AllER 643 House of Lords; for a physician) As to alternatives, generally not. In doctrine, see R. Hodgin (ed.), Professional Liability: Law and Insurance, LLP, 1996, p. 516 (risks which the ordinary client might reasonably regard as relevant).

FRANCE Is a part of the information provider obligation to inform the client about risks. For example a notary must inform his client of the uncertainty of the case law (Cass.civ. I, 9 December 1997, Defr. 1998, p. 353, obs. J.-L. Aubert). The notary must inform as well the buyer of the risk that the tax administration will exercise its pre-emptive right (Cass.civ. I, 8 January 1986, Bull.civ. I, no. 104). A construction engineer must inform the client of the risks involved with the construction process (Cass.civ. III, 4 May 1976, no. 184; D. 1977, 34, annotation J. Mazeaud). The doctor who has a secondary obligation to advise must aware the patient of the risks, even exceptional, of the operation (Cass.civ. I, 7 October 1998, JCP 1998.II.10179 with concl. Sainte Rose and annotation P. Sargos; CCC 1998, no. 160, annotation Leveneur; D. 1999, 145; RTD civ 1999, 111 obs. Jourdain). (Nowadays art L. 1111-2 Code de la santé publique). When the risks are too important compared to the necessity of the operation he has the obligation to refuse to perform it. This special obligation, which is very different from the obligation of advice/information, has been discovered by the Cour de cassation in application of the Code of medical ethics (Cass.civ. I, 27 May 1998, Bull.civ. I, no. 187; Resp. civ. et assur. 1998, no. 276; D. 1998, 530 note Laroche-Gisserot). This is included in the definition of the advice itself that the adviser has to mention the alternatives. The object of the obligation of the provider is to inform the recipient about the opportunity of one specific action. Then the adviser must guide his client to take a decision and explain why (confirmed for medical information, art L. 1111-2 *Code de la santé publique*).

GERMANY As a general rule, the information provider is obliged to inform the client both of the risks involved and the alternatives at hand. Failure to inform amounts to a non-performance of either primary or secondary obligations and may lead to liability. However, liability may be reduced if the client culpably neglects to mention information he knows or should have known are relevant to the advice (Cf. BGH 11 February 1999, IX ZR 14/98, MDR 1999, 571, VersR 1999, 1417). The content and the extent of the obligation to inform depend on a number of circumstances, some of which bear on the person of the client, others on the object of the advice. According to the BGH, the circumstances of the case at hand are decisive (Cf. BGH 6 July 1993, XI ZR 12/93, NJW 1993, 2433, MDR 1993, 861, BB 1993, 1903, ZIP 1993, 1148). In general, circumstances bearing on the person of the client that are almost always considered to be relevant are the client's knowledge and experience of the object of advice and his willingness to take risks. With regard to the object of the advice, the relevant circumstances tend to differ according to the object at hand. In the doctor-patient-relationship, the right to self-determination is thought to form the basis of the obligation to inform the patient of the risks involved, of the necessity of the advised procedure and of the (non-) existence of alternatives. (See for instance H.J. Kullmann, Schadensersatzpflicht bei Verletzung der ärztlichen Aufklärungspflicht bzw. des Selbstbestimmungsrechts des Patienten ohne Entstehung eines Eingriffsschadens, VersR 1999, p. 1190.) Information on possible detrimental consequences is not necessary if these consequences only occur in very rare cases and it is unlikely that a reasonable patient would seriously take them into account in deciding whether or not to consent to the treatment (Cf BGH 9 December 1958, VI ZR 203/57, BGHZ 29, 46). However, exceptions to this rule exist, a major one being the obligation to inform on rare risks which, if materialised, would heavily burden the patient (Cf. BGH 7 July 1992, VI ZR 211/91, VersR 1993, 228). If the procedure is not considered to be of absolute medical

necessity, but merely to reassure the patient's mind, the doctor needs to make that clear to his patient. When alternatives to the advised treatment exist, the obligation to inform the patient includes the mentioning of risks that have been argued by a respectable school of thought *(ernsthafte Stimmen in der medizinischen Wissenschaft)* but have not yet lead to an established scientific opinion (Cf. BGH 21 November 1995, VI ZR 329/94, NJW 1996, 776). A doctor is not obliged to inform the patient on risks that could only occur in case of errors in the treatment (Cf. BGH 20 October 1961, VI ZR 39/61, VersR 1962, 155; BGH 19 March 1985, VI ZR 227/83, NJW 1985, 2193, VersR 1985, 736). An attorney is obliged to inform his client about the risk involved by the litigation (BGH NJW 1984, 791; BGH 6 February 1992, NJW 1992, 1159). On the other hand, a bank is not obliged at the sale of stock options, to inform the client of alternatives or risks, if the client is familiar with the market (BGH, 04 February 1992, quoted by Canaris, Bankvertragsrecht 2nd ed, no. 1881).

ITALY In many situations the obligation to inform about risks has been acknowledged. The amount of information about risks depends on the mental conditions and the education of the client (Cass. 6 December 1968, no. 3906, Giust.civ.Mass. 1968, 2051, medical information). In case of aesthetic surgery, there has to be the maximum awareness of the risks of the intervention (Cass. 8 April 1997, n. 3046, in Foro It., 1997, I, col. 1801).

THE NETHERLANDS A duty to mention alternatives will probably not exist in the case of a contract for information, unless the information would not be considered 'complete' or in conformity with the contract otherwise. Such would be the case if the client explicitly asked for information regarding all available alternatives, which would imply a rather sophisticated contract, closely resembling an advice contract. With regard to advice, the following could be mentioned. The adviser needs to make clear that all the options have been examined, but it is, in the end, the client who has to make the choice whether or not he will follow the advice. In order to do so, he will need all the information on risks and alternatives the adviser can give him. Therefore, the duty to mention alternatives and risks seems to be a logical consequence of the obligation to advice, since the client is to know why the recommended course of action is in fact recommended. Cf. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 354. Michiels van Kessenich (1995), no. 16, states the client is entitled to an honest, complete and clear description of the state of affairs. It is not disputed that risks should be mentioned. Cf. I.P. Michiels van Kessenich-Hoogendam, Beroepsfouten, 1995, no. 17. Insofar as the mentioning of alternatives adds to the clarity of the risks at stake, it is generally accepted there is such a duty as well. Cf. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 355. One 'alternative' should always be mentioned: what will happen if the client chooses to do nothing at all. This is clear for a doctor's advice to his patient, since the patient's right to self-determination is at stake, but also applies to other obligations to advise. Cf. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, nos. 354-356.

POLAND Obligation to mention risk and alternatives can be deducted from the obligation to act with the due diligence (CC art. 355) and the general rules on the performance of obligations (CC art. 355).

PORTUGAL The information provider is bound to cover broadly the several problems posed by the service, especially regarding disputed questions, while employing the

sources available, so that the client will be able to safely take his decision based on the information and the advice provided. Cf. Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 388. This duty covers the risks and alternatives regarding the topic. Cf. Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 393. See also the conduct codes for Attorneys *(Estatuto da Ordem dos Advogados)*, art. 83.1.c) and for physicians *(Código deontológico)* art. 38.

SPAIN Contrary to the obligation to inform, the obligation to advice obliges the debtor to mention alternatives. According to Gomez Calle (E. Gomez Calle, Los deberes precontractuales de informacion, Madrid, 1994, p. 120), for an advice obligation to exist the provider must have undertaken expressly such obligation or the obligation must be deemed implied because of the relationship of confidence, which arises between the parties. In other cases, it is the nature of the client's interests (health, freedom), which imposes the obligation on the provider to disclose all alternatives and make a recommendation. The bank is under the obligation to provide his client with updated information concerning the different possibilities to invest, but it does not seem appropriate to require the bank to indicate which of the possibilities is the better one. Requiring the bank as a professional to do so would result in imposing the bank the obligation to carry out a deep research on the needs and patrimonial circumstances of the client (E. Gomez Calle, op. cit. loc. cit.).

SWEDEN Normally the information provider should at least to a certain extent inform about alternatives and risk. This would however also depend upon whether or not the other party is a consumer. Normally at least the scope of the duty to mention risks is limited through the competence and knowledge of the buyer. In NJA 1994 p. 598 (concerning a bank acting as a tax adviser), the Supreme Court stated that the duty to mention risks must always be judged depending on the situation and especially on the knowledge of the buyer.

4. *Alternatives the service provider cannot provide himself*

ENGLAND The duty of advisers to mention alternatives that they cannot provide themselves does not concern all categories of advisers. Indeed, some advisers are independent or must be independent, and some are not. This difference has been explicitly made in several cases, especially in ENGLAND. In the above-mentioned *Gorham* case, the Court of Appeal made such a difference concerning insurance brokers: in insurance services there are tied-agents and independent advisers. In the case in question, the agent was a company representative who was required not to recommend other companies' products. The Court ruled that the agent only was under the duty to advise his client against buying the products of the company he represents; his duty did not extend to recommending other companies' products (*Gorham v. British Telecommunications plc*. [2000] AllER (D) 1079.). The position of an independent adviser would certainly have been different, as is shown by the motivation of the case.

FRANCE It has been ruled that a professional seller is not obliged to carry out a comparative advertisement in favour of his competitors (Cass.com., 12 November 1992, D. 1993, somm., p. 237, obs. Tournafond; RTD civ 1993, p. 116, obs. Mestre). But if the adviser presents himself as an independent adviser, he must mention also the alternatives he cannot provide himself. It is a rule concerning conflict of interest.

GERMANY In the case of medical treatment there is no duty to mention alternatives of better personnel or better means as long as the own treatment is according to the necessary medical standard (BGH, 22 September 1987, IV ZR 238/86).
ITALY This issue is closely related to the issue of the influence of personal interests of the service provider in the case at hand (see infra). In general, the information provider is not asked to inform about alternatives he cannot provide himself. However, as soon as he introduces himself as an independent adviser, he must then mention also such alternatives. This is for instance the case for an independent broker. He cannot 'hide' behind such a surface the activity of promoting contracts with some specific insurance companies.
THE NETHERLANDS In his book on the position of the solicitor, Sanders (D. Sanders, De advocaat met raad en daad, 1962, p. 29) clearly states that the solicitor's interest in carrying out the recommended course of action should in any case not play any role in the advice. More generally, I.P. Michiels van Kessenich-Hoogendam, Beroepsfouten, 1995, no. 18, states the adviser is not allowed to be lead by his own interests. It is debated whether or not the adviser has the duty to advise his client to turn to a more specialised colleague. For a doctor, this is generally accepted, cf. I.P. Michiels van Kessenich-Hoogendam, Beroepsfouten, 1995, no. 23; Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 392. However, for providers of other kinds of advice, it is doubted whether it would be wise to impose such a duty. An argument in favour of such a duty would be the faith entrusted in the adviser by the client, who might not know the adviser is not the best qualified person to execute the advice. On the other hand, a provider of a service usually does not have the obligation to point out a competitor can perform the service better than he can. Imposing a duty to include this in his advice might therefore be considered odd. See for hesitations both I.P. Michiels van Kessenich-Hoogendam, Beroepsfouten, 1995, no. 23; Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, nos. 392-393. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 394, recommend an in-between position, stating such a duty ought to be imposed if within the group of professionals executing the service, the service usually is performed by specialised professionals. This is to be assumed, they argue, if within the service, specialisms exist.
POLAND Obligation to mention alternatives the service provider cannot provide himself can be deducted from the obligation to act with the due diligence (CC art. 355) and the general rules on the performance of obligations (CC art. 355). Moreover, in the case of the contract of specific work, if there any circumstances, which may prevent its proper making, the person receiving the order is obliged to immediately notify the service provider about that fact (CC art. 634).
PORTUGAL Duties of referral exist for professionals if their skills fall under the expected standard of care. Codes of conduct will usually be the source of such obligations: e.g. doctors have a duty of referral if specialised skills are demanded (art. 29 and 112 *Código deontológico*).
SPAIN Doctors must inform according to STS of 24 April 1994 regarding the means (material, instruments or tools) which are to be used to provide the service when these means may turn out to be insufficient, in a way to allow the patient or his family to have recourse to other medical provider" (also in STS 7 May 1997, RAC 808/1997. The obligation to refer to other professionals sets out a conflict of interests: the interests of

the client (which expects to be provided with the best alternative) versus the interests of the professional (which does not want to give clients to competitors in the market). When the interests of the client deserve higher protection (health, freedom) the information provider is obliged to recommend another professional (SAP Segovia 13 April 2000, AC 2000/1005) where the Court of appeal expressly argues that the sickness of the lawyer is not a defence since the professional should have referred his clients to another lawyer).

SWEDEN Probably the adviser is only bound to inform about his own alternatives, not about services provided by others. Where banks are acting as financial advisers, it is common practise only to promote alternatives provided by the bank in question. The financial adviser here seems to have as primary task to sell the alternatives provided by the bank, (A.-M. Pålsson and P. Samuelsson, Banks ansvar för ekonomisk rådgivning, SvJT 1999 p. 554). However, according to the new Act on Financial Advise for Consumers, art. 5 (1), the adviser shall be obliged to take duly care of the interests of the client, which includes informing the consumer if he can only recommend the products of one provider or if he can give a broader picture of the products supplied at the market as a whole and sometimes even pointing out to the consumer that he may need more advise from another source, SOU 2002:41, p. 122.

Article 6:105: Conformity

(1) The information provider must provide information that is of quantity, quality and description required by the contract.
(2) The factual information provided by the information provider to the client must be a correct description of the actual situation described.

Comments

A. General Idea

The information provider is under the obligation to act in conformity with the standard of care as stated in Article 6:104; this is an obligation of best efforts. The information provider is also under the obligation to perform the contract; this is an obligation of result. This duty is stated in paragraph (1), which requires the information provider to perform the contract by rendering the service requested. However, paragraph (1) not only imposes on the provider the duty to provide information, but also states that that information is to be of 'the quantity, quality and description required by the contract'.

As a consequence, in the case of bad performance the liability of the information provider will be determined in accordance with Article 6:104. In the case of absence of performance or incomplete performance, Article 6:105 applies.

Illustration 1
A publisher requests a lawyer to give pre-publication advice concerning two manuscripts. The lawyer is under the obligation to supply the service requested, viz. to determine whether the books contain items that may lead to claims for breach of privacy. This is an obligation of result. The lawyer is liable if he does not perform the contract or if he performs it only partially, e.g. by providing advice regarding only one of the manuscripts. On the other hand, after the service has been provided the way in which it was provided is assessed according to the standard of care due.

Paragraph (2) introduces a particular provision with regard to factual information as opposed to evaluative information. In the case of factual information, the information provider guarantees, on principle, the correctness of the information provided. Under Article 6:104, the information provider is under an obligation of means with regard to the quality of the information provided. This obligation of means becomes an obligation of result when the information is merely factual.

Illustration 2
An attorney is requested to provide information about the latest case law of the Supreme Court on a particular issue. If the information is wrong, e.g. if a recent reversal of the line of the case law is not mentioned, the provider is in breach of contract, whether the incorrectness of the information is the consequence of the negligence of the information provider in collecting or supplying that factual information or not.

B. Interests at Stake and Policy Considerations

The main issue here is whether the provider who supplies factual information is to guarantee its correctness or will be liable only if it is substantiated that he acted negligently. In Comment B to Article 6:104, the difficulty to accept that the information provider who supplies evaluative information is liable merely because the information is incorrect was explained. One reason may be that evaluative information may amount to a prediction, which in itself means uncertainty. Moreover, evaluative information, when it is not a prediction, is in itself an opinion, whose correctness is not verifiable. It is also arguable that the correctness check cannot be applied to an opinion. These arguments do not apply when the information provider is to supply information of a purely factual nature, i.e. when the service concerns facts that can be collected and verified with certainty. If the information is factual, it is generally easy for it to be checked and its provision does not involve any uncertainty. In such a case, the client will expect to receive correct information, not being supplied with wrong and misleading information.

C. Comparative Overview

European legal systems do not expressly follow the distinction that is made in this Chapter between factual and evaluative information. However, in many jurisdictions it appears that a breach of the standard of care is admitted easier in Court when objective

information in provided. Moreover, in situations concerning the mere provision of factual information, an important trend in legal literature is of the opinion that the information provider should guarantee a result.

Under FRENCH law, only in a minority of cases it was held that the obligation to inform is an obligation of result. The Court of Appeal of Paris has very clearly explained why the standard of care required from an information provider and that required from an adviser differ. According to this Court, the adviser is under a simple obligation of means, in the case in point the one to make the best efforts to fulfil his mission. However, when the result expected by the recipient is not reached he is liable only if the performance of the provider consists in collecting information without any uncertainty. However, the main line of the case law is in favour of characterisation as an obligation of means, meaning that the incorrect information must be the consequence of faulty performance of the contract to lead to liability of the provider. Courts consider that the client must establish that the provider did not act with the required diligence to collect exact information. However, in many Court cases the mere fact that the information was wrong was sufficient to establish the fault of the provider.

Under GERMAN law, the content and the extent of the obligation to inform depend on a number of circumstances, some of which are related to the person of the client, others to the object of the information. According to the *Bundesgerichtshof*, the circumstances of the case at hand are decisive. In general, circumstances related to the person of the client that are almost always considered to be relevant are the client's knowledge and experience of the object of information to be provided and his willingness to take risks. In ITALIAN law, the issue seems to have been studied only in respect of the liability of the bank as a financial intermediary for wrong information about a company whose shares are issued or about the financial instruments themselves. The obligation of the bank is considered to be one of result, since the mere fact that the information provided is wrong leads to liability of the bank. On this particular point, the solution of GERMAN law is different.

D. Preferred Option

In this Article, the obligation of result is opted for. The Article states that in the case of factual information the information provider is to guarantee the correctness of the information. The reason is that there is no uncertainty involved in the performance of such an obligation, and the information is easy to check. The contracting parties can expect achievement of the result expected. Indeed, when factual information is obtained contractually, the customer will generally rely on his exactness. As a consequence, the information provider is liable when the client proves that the factual information provided is incorrect. The information provider can be relieved of his liability only if he substantiates that the incorrectness of the information is due to an impediment beyond his control; Article 8:108 PECL (Excuse Due to an Impediment). The information provider, on the other hand, is not excused by proving that he did act with reasonable care and skill.

E. Relation to PECL and Other Parts of the Principles

This Article is a particularisation of Article 1:108 (Result Stated or Envisaged by the Client), because a reasonable client requesting objective information would have no reason to believe that there is a substantial risk that the information provided is incorrect. The distinction between obligation of best efforts and obligation of result, which is made in Chapter 1 (General Provisions) is applied. When the information to be provided is evaluative, the provider is under a duty of reasonable care and skill. When information is purely factual, the provider is under an obligation of result. This provision establishes the criterion to determine whether the obligation of the information provider is an obligation of best efforts or an obligation of result.

F. Distinction between Evaluative and Factual Information

The question may arise whether the information to be provided is factual and when it is evaluative.

> *Illustration 3*
> Information exchanged between banks on the creditworthiness of clients is a delicate issue. When creditworthiness only concerns the financial situation of the debtor at the time of the provision of the information, the information provider guarantees the correctness of that information: it is considered to be factual. However, when future creditworthiness is concerned, the information is considered to be evaluative, i.e. it concerns the processing of actual information to predict the future situation of the debtor and its capacity to reimburse his debts. In such a case, the information provider is merely under the obligation to act with reasonable care and skill.

Even if the information provided is factual, that information may not always give a precise answer to the client's problem. An example is a lawyer's knowledge of positive law. If there are uncertainties about the interpretation of a court case or of a statute, the information provider must inform the client thereof. This is a direct consequence of Article 6:105; in facts difficulties in interpretation are in themselves facts that must be disclosed.

> *Illustration 4*
> A tax adviser is requested to explain the criteria for exemption from plus-value taxes on the resell of houses by non-residents. It appears that both the doctrine of tax authorities and the courts do not treat the improvements made to houses in the same way. The tax adviser in answering must make this difference in opinion clear to his client.

However, even if purely factual information was to be provided it is sometimes impossible for the provider to guarantee its correctness. Even if the information requested by the client exists, it cannot always be collected in its entirety or be verified. If this is the case, the provider is to notify his client that he cannot guarantee the exactness of the

information. The provider is to notify his client as soon as he becomes aware of this circumstance. Sometimes the provider is in the position to inform the client before the conclusion or the performance of the service. In other situations, the uncertainty about the reliability of the information collected is known only after verification, and therefore after the performance of the contract has started. Such is the case concerning information about the creditworthiness of a merchant. The provider is relieved of this obligation to notify only when it is self-evident that the exactness of the information cannot be guaranteed. Here Articles 1:103 (Pre-contractual Duties to Warn) and 1:110 (Contractual Duty of the Service Provider to Warn) apply.

Illustration 5
A detective is engaged by a woman to assess the fidelity of his husband. After several weeks of surveillance and investigation, the detective does not find any evidence of infidelity. Even if this is the provision of factual information, it is evident that the detective is not liable merely because it did not discover the truth. The betrayed woman must prove that the detective acted negligently.

G. Character of the Rule

Article 6:105 contains default rules. This means that it introduces a mere presumption for the case in which the contracting parties do not decide precisely on the nature and the content of their obligations. The existence of such a default rule is of relevance in information contracts, because in practice such contracts are generally concluded orally and therefore the parties do not precisely describe the duties expected from the information provider. However, the issue arises whether the information provider may, in supplying factual information, unilaterally state that he will only guarantee his best efforts to achieve the result, and not the result itself. If, on principle, contracting parties can modulate their obligations and choose to guarantee result or only best efforts to achieve the result expected by the client, there must be an agreement between them. This means that a unilateral disclaimer by the information provider stating that he will not guarantee the correctness of the information is inefficient without the consent of the client. An exception to this exists when the information provider is not able to verify the exactness of the information. In such a case, alleviation of his duties is the result of the unilateral duty to warn provided by Articles 1:103 (Pre-contractual Duties to Warn) and 1:110 (Contractual Duty of the Service Provider to Warn).

The contractually agreed reduction in the extent of the obligation of the information provider is qualified as an exclusion or restriction of remedies in favour of the service provider. In such cases, the validity of this stipulation is assessed by applying the directions given in Article 1:114 (Limitation of Liability).

H. Remedies

General remedies will apply. As stated above, the general remedy in the area of information contracts is damages. In particular situations, however, other remedies are available to the client (see General Comments, under N).

Notes

See Notes, under Article 6:104.

Article 6:106: Duty to Give Account

In so far as reasonably necessary, having regard to the interest of the client, the information provider must give account regarding the information provided in accordance with this Chapter.

Comments

A. General Idea

The purpose of the rule is two-fold. The first purpose is to give the client the opportunity to check what the information provider has done under the contract and, more precisely, which steps he has taken in performing the contract. In order to evaluate the way the service has been performed, the client may need to know the way in which the information provider organised the performance of the contract.

> *Illustration 1*
> The managing director of a company engages an auditors' firm to make a valuation of a target company for the purpose of its acquisition. Since there are several methods in corporate finance for determining the value of a company, the client is entitled to request the auditors to disclose the method applied to determine the value of the company and the elements taken into account.

The second purpose of this Article derives from the consideration that, when dealing with liability for breach of a duty to inform and to advise, the burden of proof is of great importance. This Article is an attempt to solve the issue of burden of proof on breach of duty. With regard to the breach of duty, the allocation of the burden of proof is not stated explicitly in this Article, but can be derived from it. Since the information provider is under a duty to give account for what has been done, he has to prove that he did perform the contract and the way in which the contract was performed. Such a duty may also become relevant in the case of litigation. At this stage, the information provider is bound to supply evidence of the way he performed the contract. In particular, the information provider is to show that he actually performed the contract and the way

in which this was done. On the other hand, this provision does not impose on the information provider the duty to substantiate that he did not breach any duty arising from the contract; he is merely bound to provide the elements necessary to assess this.

Illustration 2
The managing director of a company engages an auditors' firm to make a valuation of a target company for the purpose of its acquisition. On the basis of this valuation, the target company is purchased. Shortly after the acquisition, the value of the company turns out to be much lower than the price paid and the value assessed by the auditors. In the litigation between the client and the auditor, the latter is to inform the court about the elements of the valuation and the method applied.

B. Interests at Stake and Policy Considerations

The issue whether or not to shift the burden of proof is a controversial one. Placing that burden on the client without further consideration will result in a situation in which clients will want to file claims they cannot substantiate. It will indeed be very difficult for a client to prove that he did not receive the information requested. Very often the information is delivered orally and no written evidence exists. Even if the information was supposed to be supplied in writing, it may still be problematic for the client to substantiate that the contract was not performed. On the other hand, even if the client received the information or the advice in writing, it may be difficult for him to prove a breach of duty if he does not have information on how the information provider carried out his task.

On the basis of these arguments, one may argue that the burden of proof should be imposed upon the information provider. However, this would not justify a complete reversal of the burden of proof. The negative proof *(probatio diabolica)* argument supports a shift of the burden of proof with regard to effective performance of the contract and with regard to the way the contract has been carried out. This argumentation does not justify a reversal of the burden of proof on the breach of duty. In fact, as soon as the client has information on all the elements he needs to evaluate the performance of the service, the burden of proving that the information provider did not meet with the standard of care may be on the client. Moreover, placing the burden of proof entirely on the information provider may place him in a very unfavourable situation and, as a consequence, may lead to refusal of performance of the service requested. This is the case especially if the burden of proof is completely shifted and the provider is under the obligation to prove he acted in conformity with the standard of care.

Finally, there is also an argument of legislative policy that might favour the shift of the burden of proof. This is related to the preventive role this may have when the provider has to prove he fulfilled his obligation. Facilitating the assessment of the liability of the information provider is a tool to force the information provider to effectively supply the information the client needs to make up his mind. Legal systems have been very sensitive to this argument especially with regard to medical information and advice, to force physicians to effectively allow a patient's informed consent.

C. Comparative Overview

It is not surprising that the situation on the burden of proof is regarded differently in the Member States of the European Union. In ENGLISH law, the burden of proof on principle remains on the client. However, with regard to the burden of proof of the performance of informative duties most European legal systems shift the burden of proof to the provider in the case of non-performance, especially with regard to ancillary obligations. This is the solution to be found in AUSTRIA, SPAIN, GERMANY (limited to some professionals) and FRANCE. In these legal systems, the burden of proof has therefore been reversed, i.e. it is up to the information provider to prove that he did not breach his duty. Under DUTCH law, an intermediate solution is followed.

D. Preferred Option

For the reasons given above, Article 6:106 imposes on the information provider a duty to give account. The result of application of this provision is that the information provider is under the obligation to give account for the performance of the service. In particular, it is up to the provider to prove that he delivered the information and to make clear how the information provided was collected and processed. The proof of incorrect performance of the service, i.e. a breach of contract, remains on the client.

E. Main and Ancillary Obligations to Inform

Article 6:106 can be applied differently depending on whether the informational duty is the main object of the contract or merely an ancillary duty. The duty to give account does not generally involve extra efforts when the provision of information is the main obligation. If this is the case, the provider will give account simultaneously with providing the service. More precisely, the provision of the service itself consists in the performance of this duty. When the information is to be provided in writing, all the provider has to do to fulfil his duty to give account is to perform his main obligation. The client will then have to prove that the information was provided in breach of the standard of care stated in previous Articles.

> *Illustration 3*
> A client receives legal advice from a lawyer. It is a written document of 50 pages. It turns out that the course of action recommended is not the best one for the client and leads to a substantial loss of money. To recover damages, the client will have to prove that the advice was not based on a skilful analysis of the information gathered.

In this case, the client has all the elements he needs to try to substantiate that the provider did breach the standard of care in fulfilling his obligation.

On the other hand, with regard to ancillary duties the performance of the duty to give account more often requires a particular action on the side of the information provider.

In such a case, the client usually receives only the outcome of a complex effort on the part of the provider, i.e. information or a recommendation, without details about the reasons and the elements considered in the process up to the conclusion. Moreover, ancillary obligations to inform are usually fulfilled orally.

Illustration 4
A patient claims he did not receive adequate information from his physician and that, as a consequence, his consent to the treatment cannot be classified as 'informed consent'. Since it is impossible for him to to indicate what information he did receive as it was delivered orally and since he cannot explain why he was advised to undergo that treatment, the physician has to prove what information was delivered and why. The latter will probably refer to medical records in order to substantiate this.

Because the burden of proof is placed on the information provider, written confirmations or communications will in most cases easily provide proof of the way the obligation was fulfilled. This seems to be in conformity with the actual practice of many providers of such services. Article 6:106 will probably have the practical consequence of inducing information providers to pre-establish a written document. This written document will prevent disputes concerning the fulfilment of such obligations and litigation on proof issues.

Illustration 5
A civil-law notary, after having provided advice for the drafting of a contract that the client does not wish to follow, requires from his client a letter of confirmation stating that he received the information and the advice from the civil-law notary and he decided to choose a different course of action. Doing this the civil-law notary has proof of the fulfilment of his obligation to inform and to advise his client.

F. Character of the Rule

Article 6:106 contains default rules. Contracting parties may agree to relieve the information provider of the duty to give account. This stipulation may be of use in cae of confidentiality, such as when the information provided includes particular know-how.

G. Remedies

In the case of breach of the duty to give account, the client may invoke the available remedies. Specific performance may, in some instances be an effective remedy, e.g. when the information provider refuses to explain how the service has been carried out. If it is impossible for the provider to give account, courts may take this element into account to decide that the information provider did not supply the information or that he did not act with reasonable care and skill.

Illustration 6
A patient claims he did not receive adequate information from his physician and that, as a consequence, his consent to the treatment cannot be classified as 'informed consent'. The physician is unable to prove what information he supplied to the patient. On the basis of this fact, courts may decide that the physician was in breach of the contract.

Comparative Notes

1. *Burden of proof on breach of duty*
According to the general law of obligations and civil procedural law, it is up to the client-plaintiff to prove that the provider of a service did not perform his duties under the contract with reasonable care and skill. With regard to information duties this solution is disputed. while some legal systems tend to follow the traditional solution, obliging the creditor to prove the correct fulfilment of such obligation (ENGLAND), other legal systems, using different techniques and different grounds, reverse the burden of proof on breach of duty at least in some cases (FRANCE, GERMANY, ITALY, THE NETHERLANDS, SPAIN). In some European directives regarding consumer protection there is a particular provisions reversing the burden of proof of informational duties. A comparative panorama can be found in A. Pinna, The Obligations to Inform and to Advise, nos. 152-167.
No information from BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND.

National Notes

1. *Burden of proof on breach of duty*
AUSTRIA Under AUSTRIAN law the issue is dealt with by interpreting the provisions of the CC concerning the issue of the burden of proof in the performance of contractual and legal obligations (On this issue, see, especially, R. Welser, Schadenersatz statt Gewährleistung, 1994, pp. 52-74). The interpretation of these Articles originated a very important doctrinal debate, the outcome of which for our topic is that the burden of proof in the case of breach of duty remains with the creditor of the obligation to inform and to advise. The most general of all rules is that the plaintiff has to substantiate all the prerequisites of his claim and, especially, he has to prove the fault (art 1296 CC). In the field of claims arising from the breach of a contractual or legal obligation, art 1298 CC introduces an important exception to that rule. According to this Article, "a person who asserts that he has been prevented from the performance of a contractual or legal obligation without any fault on his part must bear the burden of proof thereof […]". In other words, this provision contains a reversal of the burden of proof *(Beweislastumkehr)*. Only the question of fault *(Verschulden)* is affected; the plaintiff still has to substantiate the damage itself, especially the degree or amount, and the causation thereof. The issue was raised whether this provision, reversing the burden of proof on breach of duty, had to be applied only to obligations of result or also to obligations of means. Since the duty of the information provider and the adviser are mainly qualified as obligations of means in AUSTRIAN law, the answer to this question is crucial to the allocation of the burden of

proof in informational duties. Doctrine was not unanimous on the answer to be given (Restricting the application of art 1298 to obligations of result *(Erfolgsverbindlichkeiten)*, see Rummel [*-Reischauer*] ABGB Kommentar, art. 1298, nos. 2, 3. In favour of the large application of this Article, including obligations of means (*Sorgfaltsverbindlichkeiten)*, see H. Koziol, Österreichisches Haftpflichtrecht, 2nd edn., I, 1980, p. 334). Case law did not take a clear position on this issue, and in 1990 the *Oberster Gerichtshof* ruled that art 1298 does not apply in cases of obligations of means (OGH 15 February 1990, 8 Ob 700/89). Two years later, concerning the liability of a notary public, the same Court ruled the exact opposite (OGH, 10 December 1992 8 Ob 664/92). This new line of the case law has been confirmed with regard to informational duties in a case regarding the pre-contractual duty of a lawyer to inform his client (OGH 18 December 1996, 6 Ob 2174/96. *Adde* for the liability of a bank, OGH 8 November 2000, 9 Ob 219/00).

ENGLAND In line with general law, client retains the burden, (*Whitehouse v. Jordan*, [1981] 1 AllER 267 at 270). Very few scholarly works can be found in ENGLISH law on the determination of the burden of proof. This is not surprising since the way the trial is organised leads the judge to make up his mind on the basis of the evidence before him, regardless of the allocation of burden of proof. Therefore, "risk of proof" is a concept almost unknown in ENGLISH law and, more generally, in Common Law countries (See P. Murphy, Murphy on Evidence, 1997, pp. 95-96). Some statutory provisions introducing burden of proof regulations can be found. Such is the case for the Misrepresentation Act 1967, Section 2(1) that provides that in the case of innocent misrepresentation, it is up to the author of the statement to prove that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

FRANCE Since 1997, FRENCH law explicitly states that it is up to the provider of the service to prove that he did not breach any duty and, positively, that he supplied the information and advice required to the other party. This solution has been applied to professionals under ancillary obligations to inform and advice; this has been the case so far for doctors (The leading case of the new line of the case law is, Cass.civ. I, 25 February 1997, Bull.civ. I, no. 75; Defr. 1997, p. 751; CCC 1997 no. 76, with obs. L. Leveneur, RTD civ 1997, p. 924 observations J. Mestre. Now codified, art L. 1111-2 Code santé publique), lawyers (Cass.civ. I, 29 April 1997, Bull.civ. I, no. 132; JCP 1997.II.22948 with note R. Martin; CCC 1997, no. 111, with obs. L. Leveneur), notaries (Cass.civ. I, 3 February 1998, Bull.civ. I, no. 44; JCP N, 1998, 701 with note Pillebout; Defr. 1988, 743 with note Aubert; RTD civ 1998, 381 with obs. Jourdain), insurers (Cass.civ. I, 9 December 1997, Bull.civ. I, no. 356.), bailiffs (Cass.civ. I, 15 December 1998, Bull.civ. I, no. 364; GazPal 1999, 1, 208 with note Loyer), and even professional sellers (Cass.civ. I, 15 May 2002, Bull.civ. I, no. 132). The burden of proof has been reversed and is not allocated according to the general principle *actori incumbit probatio*. According to the *Cour de cassation*, the party who is legally or contractually under a particular obligation to inform has to substantiate the performance of this obligation. In FRANCE, a purely legal argument was put forward in favour of this solution. This argument can be found in the interpretation of art 1315 of the FRENCH Civil Code. M. Fabre-Magnan asserted that the ancillary obligation to inform is an obligation of result (M. Fabre-Magnan, De l'obligation d'information dans les contrats, nos. 541ff).

GERMANY In principle it is the client on whom burden of proof rests as regard to whether or not the information he needs to make up is mind, is given and whether or

not the information he has received, was correct. Proof that information has *not* been given, is almost impossible to provide. The courts therefore insist the adviser has to substantiate his claim he has given the necessary information. The client needs only to prove the incorrectness of that substantiation (Cf. BGH 21 January 1986, IVa ZR 105/84, NJW 1986, 2570 (tax consultant); BGH 5 February 1987, IX ZR 65/86, NJW 1987, 1322 (solicitor); Haug, Die Amtshaftung des Notars, 1997, nos. 827-828, p. 259 (notary public)). As regard to the medical cases, the *doctor* has to prove he has received informed consent (Cf. BGH 26 June 1990, VI ZR 289/89, VersR 1990, 1238), allowing him only limited space to prove the consent would have been given if the information had been given (BGH 16 April 1994, VI ZR 260/93, NJW 1994, 2414). In other cases, the burden of proof might even the client might even rely on the rule of *res ipsa loquitor,* reversing the burden of proof altogether (Cf. BGH 19 December 1996, IX ZR 327/95, NJW 1997, 1235, VersR 1997, 588 (tax consultant)). It must be noted, however, that these alleviating procedural rules especially apply to secondary obligations as the obligation to inform completely and on time.

ITALY According to ITALIAN case law, the burden of proof concerning the non-performance of ancillary obligations to inform and to advise rests with the client who claims compensation of the damage from the professional (CA Milano, 30 April 1991, Foro it. 1991, I, 2855). Several authors, however, strongly criticised this solution especially concerning medical treatment. The argument is that it is up to the physician to prove that the patient accepted the contract and the treatment. Since it is considered that the information has an influence on the essential prerequisites for the consent of the patient, the physician, proving the existence of this consent, has to prove that he supplied the information that was required (U.G. Nannini, Il consenso al trattamento medico, Milano, 1989, p. 468; A. Perulli, Il lavoro autonomo, 1996, p. 486).

THE NETHERLANDS In principle, the burden of proof lies on the client. In cases where the client is to prove a negative fact – he claims he did not receive certain information, the courts may decide the provider of the service is under a duty to substantiate his claim that he has given the information. The client can than invalidate the presumption of conformity by proving the substantiation is in fact incorrect (Cf. I. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, pp. 21-24. Giesen then argues this may lead to the making of notes by the provider of the service, and criticises the conclusions that may be deducted from the absence or presence of such notes).

POLAND According to a general rule, the burden of proof relating to a fact rests on the person who attributes legal effects to that fact (CC art. 6). The client must prove that the damage was caused by the service provider (the factual circumstances due to which the damage occurred) and the amount of the damage (Rudnicki, Komentarz Ksiega Pierwsza, p. 30).). The client does not have to prove fault of the service provider, as according to CC art. 471 it is the service provider who must prove that the non-performance or improper performance is due to the circumstances for which he is not liable.

PORTUGAL As an obligation of means, the burden of proof lies with the client (art. 487 CC), though *prima facie* evidence *(res ipsa loquitur)* may shift the burden of proof to the adviser in some circumstances.

SPAIN With regard to the obligation to inform and to advise under Spanish law, even if this is analysed as an obligation of means, courts have accepted a reversal of the burden of proof. It is very difficult for the client, who does not have access to the

information held by the provider of the service, to prove the opposite, that is to say, that he did not receive the information *(prueba diabólica)* (For medical information, see R. de Ángel Yágüez, Responsabilitad civil por actos medicos. Problemas de prueba, Madrid, 1999, pp. 69ff. In general, see Yzquierdo Tolsada, La responsabilidad civil del profesional liberal, Buenos Aires, 1998, pp. 400ff). Courts have settled that it is for the service provider to prove that the information has been given (STS 31 November 1992, RTC 1982/71; SAP Zaragoza 11 December 1998, AC 1998/2449). According to the Court of Appeal of Las Palmas, the client would be required to do the impossible if he is compelled to demonstrate the inadequacy of the service provided because the client has access neither to the archives of the service provider nor to any other technical means to reach that information (SAP Las Palmas, 1 September 1998, AC 1998/1774). This is especially the case regarding medical services. The medical treatment provider must prove that he has complied with the obligation to inform (See STS 28 December 1998, RJ 1998/10164; STS 13 April 1999, RJ 1999/2583; STS 19 April 1999, RJ 1999/2588.). The treatment provider possesses the information, thus it is easier for him to prove that the information was given than it is for the patient to give negative evidence. According to the *Tribunale Supremo,* if the treatment recommended could engender the realisation of important risks, the patient should have been informed of such risks and should have given consent to the treatment in an explicit and clear manner (which was not proven by the physician) in order to exempt the physician from liability. The medical treatment provider is thus liable if he cannot substantiate that he provided the information required to the patient (STS 31 July 1996, La ley 1986, 8976, RJA 6084). Despite rare cases in which the Courts decided the opposite (See, e.g., STS 12 July 1994, Aranzadi Civil, 6730), Spanish law accepts the reversal of the burden of proof on the performance of the obligation to inform. The solution found by courts is now generally implemented by the law itself. The recent Spanish law on civil procedure obliges courts to have regard for the difficulty in proving when they assess the burden of proof (art 217, Ley de Enjuiciamiento Civil 1/2000, 7 January 2000).

SWEDEN The burden of proof is not regulated, but it is to assume that it will generally rest on the client as in sales law. However, this is up to the court to decide depending upon the circumstances of the case and the burden of proof will often rest upon the party who most easily can bring the evidence (See J. Ramberg and J. Herre, Köplagen, 1995, p. 115 ff.). Through case-law it has therefore been established that it is mostly up to the adviser to see to that the client really has understood the meaning of the advice given, and also to prove that this was actually the case (See J. Ramberg and J. Herre, Köplagen, 1995, pp. 115 ff.). In the new Act on Financial Advise to Consumers, the obligation to document the commission rests upon the adviser. In case the adviser ignores this obligation, the consumer's version of the circumstances at hand when the advice was given will be the starting point while judging possible negligence on behalf of the adviser, unless the latter in another way can demonstrate that the assertions of the client are incorrect.

Since the adviser has a duty to fulfil his commission carefully, it normally makes no difference whether he gives faulty advice or not at all, if this results in him failing to fulfil his duty. However in some cases the adviser will not be held liable for refraining from giving advice, namely when it comes to highly complicated and subjective advice. This is illustrated through NJA 1992 p. 502 where a client sued his accountant

for not having advised him to perform a complicated tax transaction which would have saved him a great deal of money. However the HD stated that there is no existing duty to advice about "problem-solving of a complicated construction or which is difficult to calculate concerning the outcome in relation to tax law."
OTHER The recent tendency of shifting the burden of proof in the matter of performance of the obligations to inform and to advise can also be noticed in the law of the European Union. The recent Directive of 23 September 2002 concerning the distance marketing of consumer financial services gives Member States the possibility, in implementing the directive into domestic law, to place the burden of the proof in the matter of performance of the obligation to inform on the provider of the financial service, i.e. the debtor of such an obligation (art 15(1) of the Directive 2002/65/EC, OJ L271, 9 October 2002, pp. 16-24). An identical provision can be found in art 11(3)a of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect to distance contracts, OJ L144, 4 June 1997 pp. 19-27.

Article 6:107: Conflict of Interest

(1) When the information provider expressly or impliedly undertakes to provide the client with a recommendation to enable the client to make a subsequent decision, the information provider must disclose any possible conflict of interest that might influence the performance of the information provider's duties.
(2) As long as the contract has not been completely performed, the information provider may not enter into a relation with another party that may amount to a possible conflict with the interests of the client, without full disclosure to the client and the client's explicit or implicit agreement.
(3) If the parties deviate from the liability rule of paragraph (2), the information provider may invoke such a clause against the client only in so far as the information provider drew the clause to the attention of the client in a way that was reasonably appropriate in the circumstances.

Comments

A. General Idea

This Article provides that the adviser – i.e. the information provider that undertakes to provide the client with a recommendation – is under an obligation of loyalty. In advising the client, the adviser is to act in the best interest of the client and in the case of a conflict between his interest and that of the client, the latter must prevail. This provision does not apply to information providers who limit themselves to providing their clients with factual or evaluative information without recommending them a particular course of action. Taking into account the obligation of loyalty, paragraph (1) of Article 6:107 imposes on the adviser the duty to disclose any conflict of interest that

might influence the performance of the contract. Conflict of interest may be defined as the situation in which the adviser is confronted with the choice between favouring his own interest or that of the client. If the adviser fails to disclose a situation of conflict of interest, the information provider is in breach of the contract, thus allowing the client to file a claim for a remedy such as damages or termination of the contract.

Illustration 1
Insurance advisers frequently advise clients in favour of products that they provide themselves or that generate a particular advantage for them, such as extra fees. For example, the insurance broker who has privileged relations with only a few insurance companies, will be very much inclined to advise in favour of products offered by these insurance companies and not by those of other companies, even if their products are more suitable to the needs of the client. Such a situation will have to be disclosed to the client.

Illustration 2
A bank advises one of its clients to invest in the shares of a company on the ground that the company is financially sound and that it would make a good investment, without disclosing that the company in question is in debt to the bank. The bank has its own interest in advising such an investment, which will financially benefit it. In this case, there is a conflict of interest that has to be disclosed. (see *Woods v. Martins Bank Ltd.*, [1958] 3 All ER 166; [1959] 1 Q.B. 55)

Paragraph (2) prevents the adviser to enter into a relation with another party that has an interest conflicting with that of the actual client. The adviser may only do so after full disclosure of the potential conflict of interest to the actual client and his agreement. Such an agreement may be explicit or implicit.

Paragraph (3) allows the parties to deviate from the obligation to disclose the situation of conflict of interest meant in paragraph 2. However, a clause excluding the obligation of disclosure and the obligation of soliciting the agreement of the actual client must be drawn to the attention to the client.

B. Interests at Stake and Policy Considerations

The question whether the information provider is bound to act in the best interest of the client and to disclose a potential conflict of interest is very controversial. The issue is twofold. First of all, we need to determine whether such duties are needed and, secondly, whether all or only some information providers are to be bound by such duties.

The consequence of the imbalance of competence and knowledge between the parties to an information contract is that the position of the client is very weak and that, usually, he is not able to verify the pertinence of the service provided. It is, therefore, necessary to prevent the information provider from not performing the contract in conformity with the interest of the client. The personal interest of the information provider should not determine the content of the service provided. The interest of the

client is to have the possibility of appreciating the service received in the light of full knowledge of the situation. Information provided by an independent provider will involve less insecurity and risk for the client than information provided by a provider in a situation of conflict of interest. In other words, imposing the obligation to disclose a potential conflict of interest allows the client to decide whether or not to run the risk to take a decision on the basis of information given by a provider in a situation of conflicting interests.

However, the risk that the client runs seems to be less important when the information provided is factual. The more the information tends to be evaluative or even leads to a recommendation, the more the risks the client runs matter. Indeed, evaluation of the quality of the information is easier in the case of factual information. However, when it concerns expressing an opinion or giving a recommendation on a particular course of action, the client is dependent on the information provider.

C. Comparative Overview

In many European legal systems, provisions exist to prevent and prohibit situations of conflict of interest in advice relationships. In lawyer – client relations, the obligation to disclose conflicts of interest is generally regulated in statutory law and codes of ethics. In other activities, specific provisions are rare, but case law filled this gap. In ENGLAND, adviser – client relationships are often qualified as fiduciary relationships, which means that the adviser is under the obligation to disclose conflicts of interest. Regarding the provision of mere information, either factual or evaluative, provisions imposing the disclosure of potential conflicts of interest on the information provider are not common.

D. Preferred Option

According to paragraph (1), the adviser is under an obligation to disclose such a situation to the client. If he fails to do so, he is in breach of duty. The motivation behind this provision is that the adviser is under a general duty to act in the best interest of the client. When personal interests of the adviser are involved, there is a risk that these affect the interests of the client. Disclosure will allow the client to evaluate the risks of letting a provider in the situation of conflict of interest perform the contract. If such interests are not disclosed, the adviser is in breach of duty and the client may resort to the remedies available. Such is the case even if it has not been proven that the adviser did not act in conformity with the standard of care. The interest of such a provision is manifest because, according to Article 6:104, the obligation of the adviser is a mere obligation of means. The client does not have to prove that the information provider gave incorrect advice; it is sufficient to prove that, at the time of the performance of the contract, the adviser was in a situation of conflict of interest and that the damage suffered is caused by the service provided.

Such a provision is considered essential with regard to contracts concerning the provision of advice. Such contractual relations are generally based on confidence and can

often be regarded as fiduciary relationships. For this reason, the line is drawn between, on the one hand, the provision of advice – where a conflict of interest must be disclosed – and, on the other hand, the provision of factual and evaluative information – where the provider is not bound to disclose a situation of conflict of interest.

E. Relation to PECL and Other Parts of the Principles

There are no provisions on conflict of interest in Chapter 1 (General Provisions), because such a provision in not generally needed for service providers.

Article 3:205 PECL (Conflict of Interest) deals with conflict of interest with regard to the agent's representative power. This provision provides a cause for avoidance of the contract concluded by an agent in a situation of conflict of interest. This provision does not apply to advice contracts, and the regulation introduced is unfit to regulate them. However, the regulation of Article 6:107 was inspired by Article 3:205 PECL (Conflict of Interest), which provides:

'(1) If a contract concluded by an agent involves the agent in a conflict of interest of which the third party knew or could not have been unaware, the principal may avoid the contract according to the provisions of Articles 4:112 to 4:116.
(2) There is presumed to be a conflict of interest where:
(a) the agent also acted as agent for the third party; or
(b) the contract was with itself in its personal capacity.
(3) However, the principal may not avoid the contract:
(a) if it had consented to, or could not have been unaware of, the agent's so acting; or
(b) if the agent had disclosed the conflict of interest to it and it had not objected within a reasonable time.'

F. Character of the Rule

The provision of paragraph (1) concerning the disclosure of conflict of interest is mandatory. The client may however, authorise the performance of the service involving a conflict of interest on the condition that he was fully informed of this situation. On the other hand, contracting parties may deviate from the obligation of disclosure of paragraph (2), on the condition that the contractual stipulation deviating from it is appropriately drawn to the attention of the client under the condition of paragraph (3).

G. Remedies

When the adviser does not disclose the situation of conflict of interest, the client may resort to the remedies available. In particular, the client is entitled to damages if he suffered a loss as a consequence. The client also has the right to terminate the contract

under Article 9:301 PECL (Right to Terminate the Contract) if the non-performance is fundamental.

When the advice leads to the conclusion of a subsequent contract, contrary to Article 3:205 PECL (Conflict of Interest) there is no need to deal with the consequences of the conflict of interest for the contract concluded with the third party and there is no need to take into account the interest of the latter. The adapted remedy for the non-disclosure of conflict of interest in advice contracts is damages, even if the advice leads to the conclusion of a subsequent contract. However, in some very particular cases, when the advice leads to the conclusion of a contract, the client may contest the validity of the subsequent contract. This is the case when the contract is concluded directly with the adviser and the general provisions on the validity of the contract apply (Articles 4:101 ff. PECL). The other case in which there may be a place for invalidity of the contract is when the third party acted in accordance with the adviser under of Articles 4:107 PECL (Fraud) and 4:111 PECL (Third Persons).

Comparative Notes

1. *Conflict of interest in advice and information contracts*
   The disclosure of conflict of interest situation can be derived from the duty of good faith and fair dealing. However very little case law is available on the issue with regard to contract for the provision of an advice or more generally evaluative information. For particular professions, statutory and deontological rules introduce such a duty: lawyers, physicians and sometimes financial service providers (Fisch, Professional services, International Encyclopedia of Comparative Law, Vol. VIII, ch. 9). However, a common solution for this type of contracts does not exist.
   No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, GERMANY, GREECE, IRELAND, LUXEMBOURG, SCOTLAND.

National Notes

1. *Conflict of interest in advice and information contracts*
   ENGLAND There is a duty to disclose conflicts of interest. A case shows this particular obligation (*Woods v. Martins Bank Ltd.*, [1958] 3 AllER 166; [1959] 1 QB 55). A bank advised one of his clients to invest in the shares of a company on the grounds that the company was financially sound and that it would make a good investment, without disclosing that the company in question had a debt to the bank. The bank had a personal interest in advising such an investment, which was financially beneficial for it. There was a conflict of interest in this case, and the bank should have disclosed this situation. More generally, in common law countries, the issue is solved by determining whether the advice contract involves fiduciary duties. In some cases, the answer was negative because the client should have known that the adviser was not independent, thus avoiding a duty to disclose conflicts of interest. The solution can be found in an ENGLISH case concerning a loan advice given by a bank (*Goldsworthy v. Brickell*, [1987] 1 Ch 378, at 405). In this case, no obligation to disclose a conflict of interest existed because the non-independence of the bank agent was evident. The Court

considered that a banker, being a person having a pre-existing and conflicting interest in any loan transaction with a customer, cannot ordinarily be trusted and confided in so as to come under an obligation to take care of the customer and give him disinterested advice.

FRANCE In FRANCE there is not an explicit general provision regarding conflict of interest of the adviser. Doctrinal works regarding advice contracts do not deal with this issue. The provisions concerning the lawyer-client relations state that the conflict of interest is forbidden unless there is a full disclosure (art. 55 law 31 December 1971; art 155 paragraph 3 Decree 27 November 1991). However no clear definition is given of what a conflict of interest is. Case law is vary rare, because such litigation are ruled by the *batônnier* of the local bar institution. The *Cour de cassation* ruled that there is a conflict of interest when the lawyer is not independent (Cass.civ. I, 18 March 1997, Bull.civ. I, no. 95). The same can be said for the financial adviser, art L. 533-4 6° Code monétaire et financier that these providers of service must avoid conflicts of interest, be loyal to their client and act in their best interests. (*Adde,* CA Paris, 27 September 1996, Banque et Droit 1997, no. 51, p. 38, obs. H. De Vauplane). FRENCH law does not know a general principle of prohibition of conflict of interest, neither in advice services. However, an author considers that such principle does exist whenever the contractual relation is based on confidence. This is in line with the general principles of FRENCH law and on the criterion of existence of an obligation to disclose all pertinent facts when the confidence is the ground of the relationship (Ripert, La règle morale dans les obligations civiles, 1949, no. 48).

ITALY Because of the asymmetry of knowledge between the parties, the party requiring the intellectual service has to be protected. Therefore, in case of relevant information, such as possible conflict of interests between the parties, the intellectual professional is asked to disclose them. The code of conduct of lawyers, in art. 10, deals with this issue. More in particular, in performing the lawyer is asked to maintain his independence and defend his freedom from any kind of external influence. The same holds true for any specific interest the lawyer may have related to the situation. Very much the same may be repeated in case of doctors. art. 4 of the medical deontological code states clearly that the exercise of such a profession is founded on freedom and independence. art. 6 clarifies that a doctor, in exercising his activity cannot abuse of his personal status. For instance, the doctor that is also in charge of public positions cannot use them in view of acquiring personal advantages.

THE NETHERLANDS Conflicts of interest may be caused by the fact that the provider may have a financial interest in the provision of the information or the advice (the provider's remuneration may be influenced by the content of the information or advised that is provided, or by the duration of the time necessary to provide that information or advice). Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, nos. 380-386, argue that a general duty to disclose such interests should only come into existence if the existence of that financial interest or the way it would be calculated would not be apparent to the client. In the case of advice, other conflicts of interest may appear due to the fiduciary nature of such contracts. Such may consist in the fact that the adviser would want to execute the service he advises the client to choose, or is paid by the party whose services he recommends. Such conflicts should be disclosed, Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, nos. 389 and 397, argue, but usually aren't. More strongly, they state, is

the duty to warn the client if the provider of the advice or information has an interest the client cannot reasonably be aware of and that could hinder the provider to give objective and correct information or advice to the client.
POLAND Law does not regulate this subject and the approach is suggested by the ethical principles of professional behaviour. The normal practice in the case of conflict of interest in, for example, a law firm, would be to either refer the client to another law firm (firms do co-operate in this respect) or simply reject the client's offer.
PORTUGAL Codes of conduct (e.g. 83/1 a) b) *Estatuto da Ordem dos Advogados*) and some statutes present some specific duties to disclose conflicts of interests. As a last resort, good faith (arts. 227, 762 CC) can be used to ground it.
SPAIN All codes of conduct include reference to the obligation for the provider of the service to look loyally and observing the due diligence after the interest of the client. It is contrary to this obligation to represent interests, which are contrary to the client's interest. Lawyers Code of Conduct, art. 4 (2): The lawyer is obligated not to defraud the interests of his client and not to defend interests conflicting with those of his client; art. 13 (4): the lawyer cannot defend interests which are opposed to other interests it protects or with his own interests. In case the interests of two clients are in conflict, the lawyer must renounce to represent them, unless both clients authorize the lawyer to represent one of them. However, the lawyer could intervene in interests of both clients as a mediator or in the elaboration of contractual documents, insofar as it maintains an strict objectivity. Labour consultants Code of Conduct, art. 5.8: the labour consultant is obligated to look after the interests of his clients insofar as these are not opposed to his professional duties; art. 11: The labour consultant must not contract with other clients when their interests conflict with the interests of one of his clients. In special: a) when the opposing party is represented by a consultant belonging to the same professional firm; b) when the provision of the service will probably lead to the disclosure of the obligation of secrecy regarding the information provided by a former client, or when the knowledge about such information may benefit the new client in an unfair manner. Estate agents Code of Conduct, art. 11: the agent is committed to protect and promote the interests of his client in respect of which the provider will observe an absolute fidelity; art 13 includes the obligation for the agent to inform the client when there exists a conflict of interests between the client and the agent. It refers to cases where the agent, a close relative, or the undertaking where the agent has securities wants to buy from or sell to the client. Financial and tax consultants Code of Conduct: In the performance of his professional activity and within the framework imposed by law, the tax adviser will always act in the interests of his client, trying to achieve the highest benefits for his client.
SWEDEN This question is not touched upon much in literature (concerning financial advice cf. however Lycke/Runesson/Swahn, Ansvar vid finansiell rådgivning, p. 59ff.). However, both parties have an obligation to act loyally towards each other. In the new Act on Financial Advice to Consumers, the adviser also has an obligation to act with due care in accordance with the consumer's interests, art. 5. This requirement includes an obligation to put the interests of the consumer before other, maybe conflicting, interests. The adviser shall therefore inform the consumer about the basis of which the advice is given, for instance that he may only recommend solutions from one provider.
OTHER For insurance brokerage, the recent EU Directive of 9 September 2002 includes the obligation to disclose conflicts of interest (art 12 of Directive 2002/92/EC

of 9 September 2002 on insurance mediation, OJ L9 15 January 2003, p. 3.). Indeed, an insurance broker having privileged relations with only a few insurance companies will be very much inclined to advise in favour of products offered by these insurance companies and not by others, even if their products are more suitable to the needs of the client.

A medical advice case held by the Supreme Court of California shows how conflict of interest may arise (*Moore v. Regents of the University of California*, 51 Cal. 3d 120. 793 P.2d 479 (1990), for a commentary, see Anne T. Corrigan, A Paper Tiger: Lawsuit against Doctors for Non-Disclosure of Economic Interests in Patient's Cells, Tissues and Organs, 42 Case W. Res. L.R. 565 (1992)). A physician had a patient with hairy cell leukaemia. He advised him to have his spleen removed arguing that this would slow down the progress of the disease. This advice was given with the intention, not mentioned to the patient, to carry out scientific research on the organ removed. The research was successful and led the university that employed the doctor to deposit a patent, whose commercialisation yielded important benefits. The Court held the doctor and the university liable because a patient has the right to be informed, when he gives his consent to a medical treatment, of the existence of a personal interest that could influence the doctor's medical judgement.

Article 6:108: Influence of Ability of the Client

(1) The involvement in the supply of the service of other persons on the client's behalf or the mere competence of the client does not relieve the information provider of the duties under this Chapter.
(2) The information provider is relieved of those duties if the client already has knowledge of the information or if the client has reason to know of the information.
(3) For the purpose of paragraph (2), the client has 'reason to know' if the information would be obvious to a comparable client in the same situation as this client from all the unusual facts and circumstances known to the client without investigation.

Comments

A. General Idea

This Article deals with the possibility for the information provider of invoking the client's competence as a defence for excluding or at least limiting his liability. According to this provision, the mere fact that the client has some knowledge in the field in which the information is provided is not a defence for the provider. The fact that the client is assisted by another competent professional is not a defence either.

The only defence for the information provider is to prove that the client had concrete knowledge of precisely the information that was not provided and otherwise should be provided. This defence also exists when the client would have had reason to know the

information in question. A client has reason to know the information when such information would be obvious to a client in the same situation. In other words, this defence relates to the case in which the information provider can rely on the fact that the client cannot ignore the information. However, the presumed knowledge of the client only refers to information the knowledge of which would be obvious without investigation to a comparable client.

> *Illustration 1*
> An experienced CEO of a multinational group requests the advice of his lawyers with regard to the plan to acquire the shares of companies negotiated on foreign markets. The advisers do not inform his client about the obligation to pay higher plus-value taxes on reselling abroad. The fact that the client is an experienced businessman, also in stock market operations, is not a defence relieving the adviser of his liability. The latter is to substantiate that his client effectively knew of this fact or that a client in a comparable position would know of such information without investigation.

The reference to the absence of investigation stresses the fact that the duties of the information provider are not modulated according to the existence of a duty of the client to inform himself. The existence of such an obligation may involve contributory negligence, as will be explained in Comment E.

B. Interests at Stake and Policy Considerations

If the client himself is competent or there are other information providers assisting him, the question arises whether that assumed competence influences the information that is to be provided.

Assuming that the obligation of the information provider is not alleviated by the competence of the client or the assistance of another information provider would have the advantage of legal certainty and clarity: the information provider would know he always has to inform his client fully. Such a rule may also be regarded as very client-orientated. Several other arguments may be put forward in favour of this option. First of all, even a partly competent client may not always be the best judge of his own affairs. The client, appreciating that problem, might even have asked for the service for exactly that reason. Secondly, the contrary solution would incite the information provider to be passive in the presence of a professional or assisted client. A third argument, which primarily relates to the situation in which the information is the main object of the contract, is that if the client had wanted less than 'full' information, he would most likely have contracted to that extent. A fourth argument rather relates to the situation in which the obligation to inform and to advise is an ancillary obligation. In such a situation, with regard to the 'borrowed' knowledge of the third information provider, it should be mentioned that the client runs the risk of the two information providers pointing to each other; both stating they thought the other information provider had already given the information.

However, on the other hand the modulation of the content of the obligation according to the competence of the client seems more economical. Gathering and supplying information adds to the costs of the service, whereas – if the client is competent himself – these extra costs are probably made unnecessarily.

C. Comparative Overview

The solutions adopted in the Member States of the European Union seem to clash at this point. Under FRENCH law, case law since 1995 has taken the position of not allowing the obligation of the information provider, neither when the client is being or has been informed by a third information provider, nor when the client is competent himself, unless it is proven that the client had the knowledge of the concrete information. FRENCH doctrine summarises this line of the case law stating that the obligation to inform and to advise is not relative, according to the competence of the client, but absolute. GERMAN case law has consistently ruled that an information provider does not need to inform his client about what that client already knows. But here and in other countries, it is less clear whether the mere competence of the client or the presence of other information providers influences the duties of the information provider.

Case law can be found especially in the field of financial information. According to the traditional line of the case law in many European legal systems, the supplier of financial services is not bound to inform the competent client, especially the one who is experienced in operations on the stock exchange market. This solution will probably partially change as a consequence of the future implementation of EU Directive 2002/65 on distance marketing of consumer financial services, which introduces informational duties. The Directive follows the traditional definition of the consumer, i.e. the natural person who acts for purposes outside his trade, business or profession. By rejecting a definition of 'consumer' containing reference to the criterion of competence in the field of the contract at hand, the Directive excludes defences on the basis of the client's competence, thus implying that informational duties arising from the Directive are to be performed regardless of this fact.

D. Preferred Option

An intermediary position is preferred. In principle, the information provider has to provide full information even if the client is assisted by a third information provider or has some degree of competence himself.

Illustration 2
A solicitor consults a civil-law notary concerning a personal inheritance matter. The civil-law notary, in charge of the formalities of the settlement of the estate does not inform the solicitor, heir, of the time limit of decision of acceptance or refusal of the succession. The time limits elapses without decision of the heir, who is then considered to have renounced the succession. The fact that the client is a

lawyer is no defence for the civil-law notary.

As a rule, the obligation to inform and to advise remains unaffected by the presumed competence of the client or by the fact that information is provided by others. However, the economical argument in favour of limiting the obligation is taken into account if the client does not have merely theoretical, but also concrete knowledge of the information the provider is to supply, or the information provider could reasonably expect the client to have such concrete knowledge.

Illustration 3
A lawyer, acting for his private purpose, requests a civil-law notary to draft a contract for the purchase of an apartment along lines suggested by him, stating that he already sorted out all the issues concerning tax law and civil law. In this case, the civil-law notary can reasonably rely on the lawyer's statement and the lawyer cannot claim damages for not having been fully informed and advised not to choose such a course of action. The reason is that the civil-law notary can assume his party has the concrete knowledge mentioned above.

In such a case, none of the parties is served with demanding the information provider to collect the information anyway and to supply that information to the client, which costs both time and money. As the alleviation of the duty to inform is the exception to the rule, it is up to the information provider to prove the exception applies. Merely the client's competence or the presence of another information provider is not sufficient reason to assume that the client was aware of the concrete information. If he fails to prove this, the information provider is not excused for not having carried out his duties, described in previous Articles, and is therefore liable.

E. Relation to PECL and Other Parts of the Principles

Article 1:103 (Pre-contractual Duties to Warn) introduces a rule on the influence of the ability of the client with regard to the duty to warn only. The scope of this provision has been extended as regards information contracts.

The PECL do not provide rules on the influence of the ability and the competence of the client on the duty of the other party. The only Articles that have a relation with the provision in question are the general provisions on remedies. Article 8:101(2) (Remedies Available) provides:

'(2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.'

Articles 8:108 PECL (Excuse Due to an Impediment), 9:504 PECL (Loss Attributable to Aggrieved Party) and 9:505 PECL (Reduction of Loss) deal with contributory negligence. The question arises whether the rules of PECL still apply and whether there is room for contributory negligence of the client in information contracts. Article 6:108

provides that the information provider is not relieved of his duties by proving the competence of the client or the involvement of another professional. Contributory negligence can be cumulated with this Article 6:108. The two techniques work in different ways. Article 6:108 limits the modulation of the information provider's duty according to the ability of the client. This provision therefore deals with the existence of a duty on the side of the information provider. Contributory negligence, however, does not influence the strength of the obligation of the information provider but implies the existence of a duty on the part of the client. Such a duty of the client may be a duty to research and collect the information himself or a duty to co-operate, which imposes on him to exchange information with the information provider. There is contributory negligence and, as a consequence, shared liability when the breach of the duties of each party was the cause of the damage suffered by the client. Contributory negligence is therefore a partial defence for the information provider.

F. Character of the Rule

This provision is not mandatory. However, it is uncommon in practice to draft a particular stipulation organising these defences. More frequently, the contract will only indirectly affect the application of this provision by stating the knowledge the client already has and limiting the duties of the provider as described in Illustration 3 above.

G. Remedies

Article 6:108 does not trigger the application of a particular remedy. This provision establishes the conditions of application of remedies and in particular the possibility of claiming damages.

Comparative Notes

1. *Influence of the ability of the client on the service to be provided*
   Very little information is available for this issue. The reason is that the answer to this question depends on the way the content of the main duty of the information provider is assessed. For legal systems that limits to an objective assessment of the information that has to be provided the ability has no influence. Such is the case in FRANCE. On the other hand, legal systems that determine the extent of information to be provided on the concrete situation of the recipient, the ability of the client has a great influence on the standard of care and therefore give a defence to the information provider. Such solution is more generally accepted in GERMANY, ITALY, THE NETHERLANDS, PORTUGAL, SPAIN and SWEDEN. However, most of the solutions in case law concern financial services. In this field also in FRANCE the ability of the client is a defence for the provider.
   On the issue of the technique of assessment of the extent of information to be provided, see above, notes under art 604.

No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND.

National Notes

1. *Influence of the ability of the client on the service to be provided*

FRANCE The *Cour de cassation* was used to take into consideration the competence of the client to modulate the intensity of the obligation of the adviser (Cass.civ. I, 7 February 1990, Bull.civ. I, no. 37; Cass.civ. I, 2 July 1991, Bull.civ. I, no. 228; Defr. 1991, p. 1272, obs. crit. J.-L. Aubert). The obligation to advise was said to be relative, depending on those circumstances. From 1995 on the Supreme Court has changed the line of the case law and the obligation to advice has become absolute. The obligation of the adviser is no more lighten because the client has already a third adviser (Cass.-civ. I, 10 July 1995, Bull.civ. I, no. 312; Defr. 1995, p. 1413, obs. J.-L. Aubert) or because he has the competence in the field of the advice (Cass.civ. I, 28 November 1995 and 30 January 1996, Defr. 1996, p. 361, obs. J.-L. Aubert). The reversal of the line of the case law started with notaries, but now also solicitors and legal advisers are concerned (Cass.civ. I, 29 January 1997 (second part of the case), Bull.civ. I, no. 132; JCP 1997.II.22948 with note R. Martin; CCC 1997, no. 111, with obs. L. Leveneur; Cass.civ. I, 24 June 1997, Bull.civ. I, no. 214; JCP 1997.II.22970, with note E. du Rusquec; CCC 1997, no. 162, with obs. L. Leveneur). This is however not the case for the seller when the buyer is a professional (Cass.civ. I, 3 June 1998, RTD civ 1999, p. 89, obs. J. Mestre), nor for stock market operations (Cass.com. 18 February 1997, Bull.civ. IV, no. 51).

GERMANY A bank is not obliged at the sale of stock options, to inform the client of alternatives or risks, if the client is familiar with the market (BGH, 4 February 1992, quoted by Canaris, Bankvertragsrecht 2nd ed., no. 1881).

THE NETHERLANDS If the client himself is competent or has other advisers, it cannot be excluded the adviser has and could have relied upon the appearance the client already knew the risks and/or alternatives. In that case, the absence of information from the adviser might be excused (Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 364-367). On the background plays a role that the gathering and giving of information adds to the costs of the service, whereas – if the client is indeed competent himself – these extra costs are made unnecessarily.

POLAND The service provider should evaluate the ability of the client and adjust the service provided to it. This requirement can be deducted form the rules, which set the standard of the due diligence (CC art. 355), and the general rules on performance of obligations, which require co-operation of the parties (CC art. 354).

PORTUGAL According to legal doctrine, the less the "layman" can determine himself, the more thorough should the information provider's diligence (Sinde Monteiro, Responsabilidade por conselhos recomendações ou informações, p. 387).

SPAIN There is a specific pronouncement on this issue regarding the obligation to inform for a medical provider: the medical provider may be exempted from the obligation to inform his patient only when the latter has already received the same treatment for the same sickness or when it is an specialist *(perito)* in the field. The protection specifically granted to consumers under art 13 of the Statute on Consumers which states that the client is to be informed by the provider of the service will not

apply when provider and client are specialists in the same field (M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 255).
SWEDEN Normally the scope of the adviser's duty to provide information and mention risks is limited by the competence and knowledge of the client. (NJA 1994 p. 598, the HD ruled that the duty to mention risks must always be judged depending on the factual circumstances and especially on the knowledge of the client, in a case of a bank acting as tax adviser.) (NJA 1995 p. 693 absence of obligation for a stockbroker to inform the client about the risks involved with the trade with index options, when the client is a businessman with good knowledge of financial markets and stock trading).

Article 6:109: Causation

If the information provider knows or should be aware that a subsequent decision will be based on the information to be provided, the breach of duty of the information provider is presumed to have caused the damage if the client substantiates that, if the provider had provided all information required, a reasonable client in the same situation as this client would have seriously considered taking an alternative subsequent decision.

Comments

A. General Idea

The existence of a causal link between a breach of duty and the damage to the client is an essential element of the liability of the information provider and the availability of the remedy of damages to the client. The determination of a causal link involves specific issues with regard to contracts for the provision of information. It is often difficult for the client to substantiate the existence of a causal link between the breach of duty of the information provider and the damage suffered. In order to enable the client to substantiate a causal link, Article 6:109 introduces a modification of the object of proof. The client can prove the existence of a causal link between the breach of duty and the damage by substantiating that, in the absence of the breach of contract, a reasonable client in the same situation as the client would have seriously considered taking an alternative subsequent decision than the one actually taken.

The phrase 'alternative subsequent decision' is to be interpreted broadly. It includes not only the fact of taking a completely different decision, but also the hypothesis of a subsequent decision having the same nature, though different conditions.

Illustration 1
A client acquires company A on the basis of wrong advice of a market analysist. In order to claim damages, the client does not have to prove that he would not have taken the decision he took nor that he would have taken the same decision

though on different financial terms. The existence of a causal link between the wrong advice and the damage is presumed by the proof that a reasonable investor would have seriously considered either not investing in or acquiring another company or acquiring company A at a lower price.

This Article introduces two presumptions. The first operates a modification of the object of proof. The client is not required to prove causation on the basis of the particular client test – i.e. what he would have done himself – but on the basis of the reasonable client test – i.e. what a reasonable person in the same position would have done if correctly informed. The second alleviates the object of proof. The client is not required to prove that a reasonable client would have taken a different decision; it is sufficient that a reasonable client would have seriously considered taking another decision.

The information provider can rebut the two presumptions in the same way. In order to establish the absence of the causal link, the information provider is to substantiate that, even in the absence of a breach of contract, the client would have taken the same decision he actually took.

B. Interests at Stake and Policy Considerations

The requirement of causation is frequently a key issue in claims for damages for breach of information contract and, more generally, for breach of informational duties. The main issue is to determine whether the basic principles of causation are still to be applied or whether it is necessary to alleviate the requirement in favour of the client.

The argument in favour of alleviation of the usual burden of proof allocation with regard to causation can be explained as follows. The client requested for information or advice to make a sound decision. It is therefore likely that he will base his decision on the information supplied and that he will follow the advice given. For the same reason why he followed the advice or relied on the information provided, it may be assumed that he would have relied on correct information or that he would have followed correct advice or at least he would have hesitated to take the decision he – on recommendation of the provider – actually took. The result of this reasoning is that, in such a case, the information provider has to prove it would not have mattered if the information or the advice had been correct because the client's decision would have been the same as the one he took. If he cannot prove that, the causal link between the breach of duty and the damage the client suffered is proven.

More practically, leaving the burden of proof of the existence of a causal link on the client would lead to a very difficult situation for the client. He would be required to prove that, if the provider had fulfilled his obligation correctly, the damage would not have occurred, which is usually impossible.

However, reversing or considerably alleviating the burden of proof on the part of the client will place the information provider in an unfavourable position. It will be very

difficult indeed to prove that the client, properly informed or advised, would have taken the same course of action. Thus, according to the solution chosen each party will face difficulties in establishing evidence.

Finally, the solution depends on a policy decision with regard to compensation for the client. The fact that professional information providers are often insured – which is sometimes a mandatory requirement – might justify alleviation of the causation requirement to allow speedy compensation of the damage suffered by the client, who is generally not insured against the consequences of such a breach.

C. Comparative Overview

Alleviation of some sort of the burden of proof concerning a causal link between the breach of duty by the information provider and the damage suffered by the client can be found in several legal systems. The techniques used to achieve this result, however, differ. In GERMANY and AUSTRIA, especially with regard to medical information and advice, there is a partial modification of the object of proof in the application of the *Entscheidungskonflikt* ('conflict of decision') theory. In FRANCE, BELGIUM and SPAIN, courts turn to an unorthodox application of the loss-of-a-chance theory. In other words, courts consider that the client has lost the chance to take a decision on the basis of all the information needed.

D. Preferred Option

Article 6:109 provides an alleviation of the client's burden of proof with regard to causation. If, on principle, the burden of proof is still on the client, this Article facilitates the substantiation of causation by the client. It introduces a modification of the object of proof. More precisely, this Article addresses the situation in which it has been proven that the provider is in breach and the client has to substantiate that he might have decided differently had he received the correct information or advice. In such a case, the client establishes causation. As a consequence, he does not have to prove that he would have taken a different decision if correctly informed, but merely that in such a case he would have seriously considered to take another decision than the one he actually took, thus avoiding the damage. Such a solution is very similar to the German *Entscheidungskonflikt* theory.

This Article applies the standard-client test, not the particular-client test. The existence of causation is assessed objectively, with particular regard to the situation of a reasonable client, not the one of the client in question. Following the standard-client test further facilitates the assessment of a causal link between the breach of duty and the damage.

Illustration 2
A company engages a firm of auditors to give advice in connection with a takeover. The auditors advise the client in favour of takeover not noticing and there-

fore not mentioning in their advice considerable risk of refusal by antitrust authorities to approve the acquisition due to the future monopolistic place on the market of the company. After the acquisition, it turns out that the European Commission is willing to approve the acquisition on the condition that the buyer resells 60 per cent of the assets of the target company. In order to receive compensation of the damage suffered, the client only has to prove that, if correctly informed of the risk that materialised, the company would have hesitated to go ahead with the takeover. It is then up to the adviser to prove that his client would have acquired the target company even if correctly informed.

By introducing a presumption with regard to the proof on causation, Article 6:109 implicitly excludes the application of the theory of the loss of a chance, applied in some legal systems to facilitate the assessment of the causal link in the case of breach of an information duty and, therefore, compensation for the damage suffered. In applying the loss-of-a-chance theory as a surrogate for the proof of causation, courts compensate for the fact that the client lost the chance to take a decision on the basis of all the information needed. The consequence of this is that the client cannot be awarded compensation corresponding with the entire damage suffered. Damages correspond only to a percentage of the entire damage suffered. The percentage is determined according to the existence of chances to take a different decision and avoid the detrimental consequences of the decision actually taken. In practice, this leads to complex assessments of damages, which often require the appointment of experts.

The system of Article 6:109 leads to full compensation for the damage suffered or to no compensation at all. Partial compensation – as following the loss-of-a-chance theory – is avoided. In other words, this Article is based on the consideration that breach on the part of the provider is either the cause of the entire damage or not the cause of the damage.

E. Relation to PECL and Other Parts of the Principles

This Article is a particularisation of the general principles on the proof of causation. The PECL have only one provision dealing with causation, Article 9:501(1) (Right to Damages), which provides:

'The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108.'

This Article only states that the causal link is a condition for claiming damages. The consequence of the application of the general rules on the burden of proof is that the existence of a causal link has to be established by the plaintiff, i.e. the client who claims damages. Article 6:109 states what the client, party to an information contract, is to prove in order to establish a causal link.

F. Character of the Rule

The provision of Article 6:109 is a default rule. Contracting parties can reallocate the burden of proof concerning causation. This does not seem to occur frequently in practice.

G. Remedies

In itself, the provision does not trigger the application of a specific remedy. This provision regulates the condition for claiming a remedy, especially damages. If the causal link between the breach of duty and the damage suffered by the client is not proven, the client cannot claim damages.

Comparative Notes

1. *Burden of proof on causation*
   If the principle remains that the plaintiff has to prove the existence of a causal link between the breach of contract and the damage suffered (ENGLAND, FRANCE, GERMANY, ITALY, THE NETHERLANDS, PORTUGAL, SPAIN, SWEDEN), many of these legal systems, at least in some areas, have alleviated the burden of proof, having recourse to different techniques. In FRANCE, the theory of the loss of a chance *(perte d'une chance)* is used to palliate the absence of proof on causation. In GERMANY, the theory of *Entscheidungskonflikt* requires a limited proof on the side of a patient in case of incorrect or incomplete information or advice.
   No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBOURG, SCOTLAND

National Notes

1. *Burden of proof on causation*
   ENGLAND Generally client retains burden. When the claim is based on negligence, the plaintiff must prove not only the breach of the duty to inform but also had the duty been broken he would not have chosen to have the operation (*Chatterton v. Gerson*, [1981] QB 432.). This implies that the client must prove that had he been informed or advised properly, he would have made another decision. In cases of breach of fiduciary duty the burden of proof seems to be reversed. In an old Privy Council case, it was held that where the breach is a non-disclosure of material information, the burden of proof as to causation is reversed *(Brickenden v. London Loan and Savings Co.* [1934] 3 DLR 465 at 469. See also *Ferris* [1983] 9 DLR 183; a solicitor breached his fiduciary duty in advising a lender when already acting for the borrower). In *Brickenden*, Lord Thankerton said that "when a party, holding a fiduciary relationship, commits a breach of his duty by non-disclosure of material facts, which his constituent is entitled to know in connection with the transaction, he cannot be heard to maintain that disclosure would not have altered the decision to proceed with the transaction, because the constituent's action would be solely determined by some other factor. Once the court

has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant." This solution, however, finds its ground in the specificity of a fiduciary relationship. The reversal of the burden of proof on causation is consistent with the draconian nature of the fiduciary duty. In determining the issue of liability, it is irrelevant to consider the issue of causation between the breach of duty and the alleged loss. Liability will be imposed where the fiduciary has placed himself or herself in a position of conflict or potential conflict. It is immaterial that the breach did not cause any loss.

FRANCE Causation between the breach of a duty to inform or to advise and the damage must in principle be proven by the client (Cass.civ. I, 10 July 2001 Resp. civ. et assur. 2001 no. 321; with regard to the bad tax advice given by a lawyer, the client must prove that the damage suffered is the consequence of the breach of duty.) Court adopts the *équivalence des conditions* theory, which means that the breach of duty to inform or advise is the cause of the damage if the client proves that, correctly informed or advised, he would have decided himself in favour of another course of action. This means that the client has to prove beyond doubt that the damage suffered would not have occurred. The client, victim, cannot most of the time bring this proof. For this reason a part of the case law found another way to allow compensation to the client, turning to the loos of a chance theory. The client is entitled to compensation for having loss the chance to take a decision with sufficiently enlightened (Cass.civ. I, 7 February 1990, Bull.civ. I, no. 39; RTD civ 1991, p. 112 with obs. P. Jourdain; CE 5 January 2000, *Consorts Telle*; 5 January 2000, *Assistance Publique-Hôpitaux de Paris*, JCP 2000.II.10271, with note J. Moreau). The consequence of this reasoning is that the doubt about the decision of the client taking another decision is sufficient to find a connection between the breach of duty of the provider and the damage. This solution is criticised by a part of the doctrine and the case law. Quoting a case of 1982 some author assert that the loss of a chance can only be of use for the determination of the *quantum* of the damage and not as a surrogate of the causation (Cass.civ. I, 17 November 1982, Bull.civ. I, no. 333; JCP 1983.II.20056 with note Saluden; D. 1984, p. 305 with note Dorsner-Dolivet. See also, Fabre-Magnan, De l'obligation d'information dans les contrats, nos. 605 ff.). There are however dissident opinions (Huet, RTD civ 1986, 119; G. Durry, RTD civ 1967, 181; 1969, 797). It is disputed whether this solution is applicable also to information and advice duties. According to the cases of 1990 and 2000 quoted above it seems that the loss of a chance theory remains applicable and could lead to the establishment of a partial causation. The consequence of such a partial causation leads to a partial compensation of the damage as well. For example the damage compensated to a student victim of an accident that cannot attend an examination does not coincide with the benefits of succeeding the examination, because the success of it is not certain (Cass.civ. II, 17 February 1961, GazPal 1961, 1, 400). The same can be said for the situations in question. Since it is not certain that, correctly informed or advised, the client would have taken the best solution for him, it is impossible to compensate the loss of benefit that such course of action would have bring about. Knowing the amount of damage compensated is very difficult and there are no clear directions how to proceed in doing so. This is certainly the major inconvenient of the loss of a chance theory. Very often in practice Courts appoint experts to determine the amount of damage to be compensated.

GERMANY In medical law, if it has been proven that the provider breached a duty and the client substantiates that he might have decided differently if he had received the correct information or advice, the burden of proof is shifted. This solution is standing case law for medical information and advice in GERMANY (Fixed case law, BGH 26 June 1990, NJW 1990, 2928; VersR 1990, 1238; BGH 11 December 1990, NJW 1991, 1543; JZ 1991, 673; BGH 7 April 1992, VersR 1992, 960; NJW 1992, 2351; BGH 14 June 1994, VersR 1994, 1302; NJW 1994, 2414; BGH 17 March 1998, VI ZR 74/97, NJW 1998, 2734.). It is the so-called *Entscheidungskonflikt* ('conflict of decision'). The reason for this reversal can be explained as follows. The client called for information and/or advice to make a sound decision. It is therefore likely that he will base his decision on the information supplied and that he will follow the advice given. In this particular case, the advice received proved later to be incorrect. For the same reason as he followed the advice actually provided and relied on the information, it may be assumed that he would have relied on correct information or would have followed the correct advice, or at least would hesitate to choose the option he – at the recommendation of the provider – actually chose. Liability is in any case excluded if the doctor convincingly indicates that, if he had given the necessary information, the patient would have given his consent to the procedure advised and the patient cannot make it plausible that he would have been in doubt whether or not to consent (See, e.g., BGH 17 March 1998, VI ZR 74/97, NJW 1998, 2734). In such a case, the provider proves it would not have mattered for the client's decision if the information or the advice had been correct, which would have been the same anyway. If he cannot prove that, the causal link between the breach of duty and the damage the client has sustained, is proven. The technique of the *Entscheidungskonflikt* is of interest when the consequences of the lack of information or advice about risks that, if materialised, would have serious effects on the situation of the other party. If such is not the case even if a breach of duty is present, the causal link cannot be established. Indeed, if the chance the risk materialises and the effects thereof would not be serious, providing the information could hardly influence the client's decision, for he would probably have taken the risk anyway. As a consequence of this there is no *Entscheidungskonflikt*. The opposite is also true. In some cases, it is not necessary to partially reverse the burden of proof on causation in application of the theory of the *Entscheidungskonflikt*, because it is clear that the patient correctly informed of the risks would have taken another decision and avoided the damage. BGH 30 January 2001, NJW 2001, 2798. In this case the physician did not inform the patient about the risk of impotence. The *Bundesgerichtshof* first asserted that the patient would have found himself in a real conflict of decision if sufficiently informed, but it also asserted that the patient would have decided against the operation if he had known of the risk of impotence. There is no need to argue of the hesitation of a correctly informed patient, while there is the certainty that he would have taken another decision. Outside medical law, the theory of *Entscheidungskonflikt* is generally not applied and the client still has to substantiate how he would have reacted if the right advice or information would have been provided (BGH 16 February 1995, NJW-RR 1995, 619, for a case of liability for wrong information provided by an accountant).

ITALY According to the general rules on contractual and tortious professional liability, the proof of the causal link between the breach of duty and the damage rests in

principle on the client (Cass. 18 June 1975, no. 2439, Foro it. 1976, I, 745; Cass. 8 May 1993, no. 5325).

THE NETHERLANDS In principle, the burden of proof lies on the client. Cf. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 49; Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 446-447. This implies that the client must prove that had he been informed or advised properly, he would have made another decision. However, it is hardly ever possible to prove this unconditionally, since there remains almost always a possibility that the client would not have acted upon the information or advice, and would have decided otherwise. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 49, concludes that this division of the burden of proof leads to a structural problem for the client to prove his case. Especially for medical cases, it is more or less accepted that the client/patient would have acted upon the information or advice, especially if the illness the client/patient suffered from was life-threathening and an effective cure is available. The German doctrine of '*Entscheidungskonflikt*' more or less is copied in THE NETHERLANDS. Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 449-450, argue that this doctrine could be extended outside medical situations, starting from the presumption that a reasonably acting and informed client would have followed the information or advice. This is even stronger in those situations where the client especially asked to be informed or advised, as is the case where a contract for the provision of information or advice has been concluded. In the case of safety measures, the causal link between the breach of such measures and the damage that occurred is presumed to exist, leading to a shift of the burden of proof. Cf. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 66ff, 79 ff. The *Hoge Raad* seems to be inclined to extend this rule to other situations where an act – including an omission, such as the failure to inform or advise [properly] – brings a risk into being and that risk materialises. Cf. HR 26 January 1996, NJ 1996, 607 (Dicky Trading II), a case in which a notary was held liable for a failure to warn for the risks involved in a transaction. The causal link was deemed to be given since the failure to warn had increased the risk of damage and that risk had materialised. Cf. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 67; Barendrecht, van den Akker, Informatieplichten van dienstverleners, 1999, no. 447. Yet, the HR recently explicitly denied in general and broad terms to extend this rule to cases where a duty to inform a patient of a risk was breached and that risk subsequently materialised. The Hoge Raad argued that the duty to inform is meant to enable the patient to make an informed decision on whether or not to consent to the suggested treatment. A breach of that duty calls into being the risk that the patient can't exercise his right to self-determination in the manner he chooses, *i.e.* the risk that he makes a choice he would not have made otherwise. The duty to inform is therefore not as such meant to protect the patient from the occurrence of a medical risk, but (only) to prevent the risk of the loss of the opportunity to properly choose. Cf. HR 23 November 2001, case C99/259HR.

POLAND According to a general rule, the burden of proof relating to a fact rests on the person who attributes legal effects to that fact (CC art. 6). The client must prove that the damage was caused by the service provider (the factual circumstances due to which the damage occurred) and the amount of the damage (Rudnicki, Komentarz Księga Pierwsza, p. 30).

PORTUGAL The client bears the burden of proof of causation. The most followed criterion in case law is the adequate causation, in the negative formulation of Enneccerus-Lehmann (STJ, 3 December 1992, BolMinJus, 422, 365; STA 21 April 1994, BolMinJus 436, 421).

SPAIN It is in principle up to the client to prove that the provider of the service has not acted with the due diligence (lack of information), that it has suffered damages, and that there is a causation link between the lack of due diligence and the damage suffered. Courts have shifted the burden of proof on breach of the obligation to inform/advice to the provider of the service since it is easier to prove the positive (that the information has been provided) than for the client to prove the negative (that the information has not been provided). However, the client retains the burden of prove on causation and thus it has to give evidence that the non observance of the standard of care regarding the obligation to inform constituted the cause of the damage suffered because being it informed or advised it would have taken another decision or done otherwise. Regarding medical services, the lack of information makes the medical provider liable for the damage inflicted. STS 31 July 1996 (La Ley 1986,8976,RJA 6084) reads as follows: "if treatment was to be considered a high risk obligation, with foreseeable negative results, the patient should have been informed regarding such risks and should have consented to the treatment in an explicit and clear manner, in order to exempt the doctor from liability. The medical treatment provider is thus liable for the damage inflicted". Therefore, only when the patient gives an informed consent based on the information/advice given by the professional, the risks shift to the patient. The situation varies with regard to the risks to be disclosed concerning curative and non-curative medicine. In the latter case, also atypical risks must be disclosed.

SWEDEN Principally it is up to the client to prove that he would have acted differently if he had received correct information. In NJA 1991 p. 625 a real estate agent had given the client incorrect information concerning taxation on capital gain. The question was now if the client had suffered economical damage and how the damages should be calculated. The HD stated: "If incorrect information concerning the possibility to postpone tax for capital gain shall lead to a right to compensation in damages, principally the client has to show that he would not have sold the real estate at this point in time if he had received correct information." (See Jan J. Kleineman, Rådgivares informationsansvar- en probleminventering, SvJT 1998, p. 199). The loss of a chance theory is not accepted under Swedish law.

OTHER The solution held in *Brickenden* has been adopted in several common law countries. For Australia, see, e.g., *Commonwealth Bank of Australia v. Smith* (1991) 102 A.L.R. 453; *Wan v. McDonald* (1992) 33 FCR 491.

Chapter 7:
Treatment

General Introduction

A. General Idea

Treatment is the activity whereby one party (the treatment provider) agrees to take all necessary steps in order to change or maintain the physical or mental condition of a person. Treatment usually encompasses the phases of anamnesis (receiving information from the patient on his symptoms and other personal information), diagnosis (procedures aiming at establishing a probability judgment on the health of the patient), therapy (procedures aiming at curing or providing relief to the patient) and prognosis (a probability judgment on the development of the patient's health in future).

Throughout these phases, the treatment provider must consciously perform his duty to treat the patient according to a reasonable professional standard of care and in a humane fashion, respecting the patient's individuality and autonomy. He needs adequate equipment, installations (premises where medical treatment is carried out) and personnel while performing his duty. The typical situation of a treatment contract is that of a patient consulting a general practitioner. The treatment provider listens to the patient's information about symptoms and previous clinical history. This is the first phase, called anamnesis. The second step will be the doctor's assessment of the health condition of the patient, in order to identify the patient's ailment and its cause. This phase is called diagnosis. Then, treatment proper, therapy, is administered and, finally, the general practitioner will make a prognosis, an assessment of the way in which the ailment will probably develop and what further treatment, if any, is needed and/or will be administered.

B. Scope of Application

The normal scope of treatment contracts regards medical treatment, i.e. treatment performed according to sound, accepted medicine.

> *Illustration 1*
> A patient consults a physician, as he has been experiencing a cold and a fever. The physician diagnoses flu, and prescribes antibiotics. This situation is within the scope of this Chapter, as treatment is administered according to conventional medicine.

In principle, the Chapter applies only insofar as there is a contractual relationship between a treatment provider and a patient; see Article 7:101(1). This is the most

common situation: the patient who consults a doctor in his practice or a patient who is admitted to a hospital. In some legal systems, however, treatment provided in some institutional frameworks such as public hospitals are subject to specific public law regulations, so in such cases the specific rules apply, not the provisions of the present Chapter.

It also applies when treatment is provided on behalf of a person who is not a contractual party, for example an insurance or corporation doctor (Article 7:101(3)). In such circumstances, a treatment contract is a two-layered relationship: in one layer, there is the relationship between the contractual party and the treatment provider, in the other, the relationship between the treatment provider and the patient.

> *Illustration 2*
> A nuclear power station employs a physician to perform regular checkups on employees with the aim of enabling early diagnosis of potential health conditions as a result of exposure to radiation. In this case, the physician has a contractual relationship with the employer and the employee is the patient. The rules of this Chapter apply, and the patient may demand performance of the obligations of the treatment provider.

In situations where a service is provided in order to change the physical or mental health condition of a person outside the scope of medical treatment or is performed by a service provider other than a medical health-care provider, this Chapter applies by way of analogy. For more details, see the Comments to Article 7:101.

C. Basic Principles

I. Liability resulting from treatment-related personal injury is usually a fairly complex issue: often several facts contribute to the materialisation of 'iatrogenic', i.e. treatment-related injury. A good example of this 'multiple factor' problem is the New Zealand case of *R v Yogasakaran* [1990] 1 NZLR 399. In this case, several circumstances led to the death of a patient: the normal risk of the administration of anaesthetics, the fact that the entire surgery team had already left the operating theatre, a drug that was placed in the wrong drawer in the theatre. Finally, there was a tired anaesthetist who faced a sudden and unexpected reaction of the patient and had to take a crucial decision under pressure. All these circumstances led to the death of the patient and to a delicate liability problem.
Both active errors (errors that are made by the health-care professional) and latent errors (errors that are made at the organisational or institutional level) may lead to non-performance of the service. As such, a superficial catch-all approach to treatment-related damage is not viable. Thus, this Chapter attempts to distinguish the several risks present in treatment. One may distinguish between risks concerned with the way in which treatment is provided and risks related to defective input: the equipment, instruments, support staff and installations. The rules spread the risks over health-care providers, patients and treatment-providing organisations.

II. This Chapter distinguishes four types of risks related to the administration of treatment. The first category consists of the normal risks of the proposed treatment, which are disclosed to the patient and in the knowledge of which he has given his informed consent. Under the rules of this Chapter, these risks are borne by the patient. In developed countries, all or most of these expenses will be covered by welfare. Welfare or social insurance will cover, entirely or partially, the expenses incurred by the patient for further injury-related treatment. Welfare also pays for sickness, handicap or early retirement pensions. Damage deriving from the materialisation of such risks need only be compensated insofar as consent was lacking or imperfect; cf. Articles 7:105, 7:106 and 7:107. See also the liability deriving from the applicability of Chapter 6 (Information) to treatment contracts.

Illustration 3
A patient is informed that a particular type of prostate operation involves a 10 per cent chance of impotence. The patient weighs the risks and decides to undergo the operation. The risk materialises. As the patient, having acknowledged, understood and weighed the risk, decided to undergo the operation, he is to bear the consequences under this Chapter.

III. The second type of risks are risks whose existence is known of, but whose materialisation is exceptional; thus, the uncertainty regarding unpredictable reactions of the patient's body or unavoidable circumstances do not put at stake the technique or skill of the treatment provider. This category can be called 'treatment accidents'. In some countries (notably France, Sweden, Finland and Denmark), the patient is sometimes compensated. The Comments to Article 7:104 elaborate on these risks.

Illustration 4
A patient undergoes a diagnostic examination called arteriography: iodine contrast liquid is injected into his arteries. Although the examination was carried out perfectly from a technical point of view, an obstruction occurred, leaving the patient tetraplegic; the risk of an obstruction is inherent to this type of examination, but its materialisation is exceptional. Under this Chapter, liability is not imposed on the treatment provider if a risk of this type materialises.

IV. The third type consists in unpredictable risks that have materialised. This is often the case with new therapeutic techniques that, albeit not experimental, have not fully been tested. In France, the patient is sometimes compensated. Under the present Chapter, the patient bears the risk, provided that he was informed of the novelty of the treatment. This issue is discussed in the Comments to Article 7:104.

Illustration 5
After having undergone a spine correction operation, a young patient wakes up as a paraplegic. The operation was performed correctly, but the paraplegia was the materialisation of an unknown risk of a new therapy whose consequences were not fully known. No liability is imposed on the treatment provider under the provisions of this Chapter.

V. The fourth type of risk related to the administration of treatment consists in damage caused by breach of the duty of care of the treatment provider (Article 7:104), the care exercised by a reasonable treatment provider under the given circumstances, in conformity with the accepted practice *(lex artis)* and statutory rules in his profession. The burden of proof of the breach of the duty of care lies with the patient. This is the traditional negligence approach.

VI. Apart from the aforementioned inherent risks related to the administration of the treatment, there are other risks that are external to the performance of the contract. Some grounds for strict liability are included (Article 7:103), namely those linked to the use of inadequate input (staff, instruments, installations and organisation). It is considered an obligation of result of the treatment provider to assure that this input does not harm the patient.
According to the rules of this Chapter, the treatment provider is strictly liable regarding the choice of auxiliary staff. However, he may have an action of recourse against his staff irrespective of labour law.
A very common breach of the duty of care concerns the use of defective instruments, tools and products. In fact, owing to the complexity of treatment and the inherent risks, strict liability seems to be adequate.
The buildings where treatment is carried out may also lead to breach of the duty of care due to defective input. Good examples are nosocomial infections, which are drug-resistant infections endemic in hospital premises and which affect debilitated patients, usually after invasive diagnostic methods or surgery. These risks can be reduced, but can never be eliminated.

VII. Many difficulties may arise concerning a treatment contract when treatment is performed within the framework of a complex treatment-providing organisation, such as a hospital or an asylum. Health-care professionals who are not employees of such an organisation very often administer treatment on the premises of such an organisation, and uncertainties may arise for the patient as to his contractual counterparty: whether it is the health-care professional acting independently on the hospital's premises or the hospital itself. Also, non-performance of the treatment contract is often caused by problems in the administration and organisation of such institutions: latent errors, caused by underlying institutional and structural faults such as bad management, faulty maintenance, poor structure, bad management of human and other resources, etc.
Thus, limited central liability of treatment-providing organisations is included (Article 7:111), meaning that, either if the contract was concluded with the organisation or if it was performed on its premises, that organisation will be held liable insofar as the individual health-care professional or professionals working on the premises of the treatment-providing organisation cannot be identified. Moreover, the organisation has an obligation to disclose to the patient that it is not the contractual party.

VIII. The treatment provider is under an obligation to keep records of the treatment procedure (Article 7:109) as well as to provide reasonable additional information when questions arise concerning the interpretation of those records. Failure to act

in conformity with that obligation will call forth the presumption of breach of the duty of care.

IX. The treatment provider is under an obligation of secrecy regarding the treatment of the patient (Article 7:109(6)). Breach of that obligation leads to liability of the treatment provider for damages or losses deriving from the disclosure of that information to third parties.

D. Terminology

The abstract level of rules and the need to bring this Chapter in line with the other Chapters of the PELSC bring forth the necessity to avoid the traditional terminology of medical law in the black-letter rules, although they are sometimes used in the Comments, such as 'physician', 'proxy consent', 'nosocomial infection', 'iatrogenic injury', 'therapy', 'vulnerable patient', etc. On the other hand, private law terms like 'client', 'principal' and 'service provider' do not seem to suit this Chapter either. Thus, throughout this Chapter, the following terms are used.

Treatment provider: the person or organisation providing health care. This term can be understood either as the professional or professionals providing treatment or as the contractual party providing treatment. Sometimes treatment is physically performed by health-care professionals employed by a health-care provider or organisation, which is the contractual party. This is the case when, for instance, a patient is treated by a team consisting of one doctor, one anaesthetist and two nurses employed by a hospital; the hospital is one of the contractual parties. Both the health-care professionals and the hospital are referred to as 'treatment providers'. The exact meaning depends on the context.

Patient: the person who receives treatment. The patient usually is a contractual party as well. In cases where the patient is not a contractual party, the provisions of Article 7:101(3) apply.

Third party entitled to take decisions on behalf of the patient: in some circumstances, the patient cannot decide because he is physically or legally unable to decide and give consent. Thus, the law provides for a sort of proxy representative to take those decisions on the patient's behalf. That representative may be the custodial parent or custodian of an underage patient, the guardian of a handicapped patient or, in some circumstances, a court.

Treatment-providing organisation: an organisation (usually a hospital) that administers treatment to a significant number of patients simultaneously, combining the input of health-care professionals and of materials, instruments, devices, products and installations required for those tasks.

E. Sources and Scope of Application of the Rules

The sources of the rules of this Chapter are very heterogeneous. Rules on medical services have their origins in contract law, tort law, the health-care system, public law, international law instruments, ethical codes and even criminal law.

This Chapter is based on the laws, case law and literature of AUSTRIA, ENGLAND, ITALY, FRANCE, GERMANY, THE NETHERLANDS, PORTUGAL, SPAIN and SWEDEN. In some cases, it was possible to have access to information from other sources. Special attention is paid to the 1997 Council of Europe Oviedo Convention on Human Rights and Biomedicine (hereinafter referred to as CHRB), the most important international instrument on medical law in Europe, which has been signed and ratified by the majority of EU members and candidates for EU membership. Although it lacks direct binding effect, this Convention has had a great impact on the law of European countries that signed and ratified it.

As is explained in the General Introduction to the Principles of European Law on Services Contracts, not every legal system of the Member States of the European Union could be studied. For lack of manpower, the laws of the Member States that joined the European Union on 1 May 2004 could not be taken into account, with the exception of POLAND, from which country a national reporter could be recruited. Moreover, as no reporters from BELGIUM, DENMARK, IRELAND, LUXEMBURG and SCOTLAND could be found, these legal systems are not systematically represented in the comparative legal study underlying this Chapter.

In the comparative and national notes for each Article it is indicated whether and, if so, to what extent comparative legal information was collected as regards a particular topic. Firstly, the comparative notes generally make clear for which Member States information has been collected and for which this was not possible. Additionally, if no information of no reliable information was collected as regards a particular Member State, the relevant national note will read: 'No information'. If a national note only refers to statutory law, to any other statutory instrument or to a provision taken from a national standard form of contract, it means that the information in the note is not based on a further analysis of relevant case law or legal doctrine. If, however, references to case law and/or legal doctrine have been inserted in a national note, it means that the information is based on a more thorough analysis of the topic in the relevant Member State. In the national notes, the Member States that joined the European Union on 1 May 2004 are not listed, with the exception of POLAND, as explained above.

Relation to Other Parts of the Principles

F. Relation to the Principles of European Contract Law (PECL) in General

Although the PECL is more geared to commercial contracts, it is generally applicable to treatment contracts. The next section discusses the specific rules of the PECL that are pertinent to this Chapter.

G. Relation to Other Parts of the Principles

As regards some issues, this Chapter is closely related to the Principles of European Law on Non-Contractual Liability Arising out of a Damage Caused to Another (PEL Liab.-Dam.) and as regards other issues to the Principles of European Law on Benevolent Intervention in Another's Affairs (hereinafter referred to as PEL Ben. Int.). The link to the PEL Liab.Dam. is relevant, as its rules may apply to liability for treatment-related injury, either in situations where a contractual relationship does not exist or in spite of the contractual relationship, a case in which the two regimes may conflict. Different legal systems address this conflict in different ways: tort rules apply only if there is no contract, the two regimes apply together or only the more favourable regime applies. The provisions of this Chapter apply insofar as a contractual relationship is established, although they may apply by way of analogy to non-contractual treatment relationships.

The PEL Ben. Int. regime concerns circumstances where a contract could not be formed owing to exceptional circumstances (e.g. emergency treatment of an unconscious patient) and treatment is administered in the best interest of the patient. The PEL Ben. Int. apply, but it should be noted that the end result of its application would be very similar to the end result after application of the rules of this Chapter. If need be, in interpreting the PEL Ben. Int. as regards the treatment of a patient, the present Chapter may be applied by analogy.

H. Relation to the Principles of European Law on Benevolent Intervention in Another's Affairs (PEL Ben. Int.)

In the situation described in Articles 7:107(2) and 7:108(7), the PEL Ben. Int. applies as of its Chapter 1 (Scope of Application).

The duty of care is laid down in Article 2:101 PEL Ben. Int. (Duties during Intervention) and the duty to give account in Article 2:102 PEL Ben. Int. (Duties after Intervention). The rights of the treatment provider are those granted under Chapter 3 PEL Ben. Int. (Rights and Authority of the Intervener).

I. Relation to Article 1:102 (Price)

This Article applies to treatment contracts as no specific issues are raised by treatment services. If the parties did not agree on a price, Article 1:102(1) (Price) is applicable; the market price is generally charged or the price set by the organisation regulating the health-care profession.

Illustration 6
A patient consults a physician. They agree on a price for the consultation and that price is due. If they do not agree on a price, the price generally charged in the market is due.

J. Relation to Article 1:103 (Pre-contractual Duties to Warn)

The treatment provider must warn the patient in the pre-contractual phase of circumstances that might render the treatment required by the patient risky, that might go against the interests of the patient or render treatment more onerous than may reasonably expected by the patient.

Illustration 7
A patient wishes to have a transgender operation. The plastic surgeon that he consults warns him that such an operation may be very risky for his health and may affect his identity, that a broad team of physicians will have to be created and that the costs will be very high.

K. Relation to Article 1:104 (Duty to Co-operate)

This duty is very important in treatment contracts: the patient is obliged to co-operate; he has to comply with the instructions given by the treatment provider as well as supply him with all the information he needs to adequately apply his professional skills. If the patient does not co-operate with the treatment provider, treatment may be less effective.

Illustration 8
A physician attends to a patient. The patient has a high risk of suffering a heart attack. The doctor suggests a particular treatment, but the patient must follow a reasonable diet, stop smoking and drinking coffee, and avoid salt. If the patient does not co-operate with the treatment provider by following his instructions, he is in breach of this duty.

L. Relation to Article 1:106 (Duties of the Service Provider regarding Input)

Article 7:103 particularises this duty for treatment contracts as regards material input, that is, equipment, devices, instruments, installations, premises or materials employed in the administration of treatment. Article 7:103 states that this input must conform to applicable statutory rules and to sound professional practice. In the Comments to Article 7:103, quite some specific problems are covered, such as the technological risks inherent in such equipment or the risk of infections in hospital settings. Also, problems related to the supply of materials by the client, on a general level, are not raised in treatment contracts.

Illustration 9
A patient is admitted to a hospital in order to undergo an appendectomy. The surgery team will employ machines to monitor the vital functions of the patient and surgical instruments to perform the operation. The operation takes place in an operation theatre. All these installations, instruments and the premises must conform to applicable statutory provisions of a quality demanded by sound pro-

fessional practice and be fit for performing surgery; if not, the duties of the treatment provider regarding input are breached.

Provisions concerning personal input (paragraphs (1) and (2) of Article 1:106 (Duties of the Service Provider regarding Input)) are not detailed in this Chapter, but apply to treatment contracts with one adjustment: the term 'subcontractor' is understood as 'health-care professional'. A treatment provider must employ health-care professionals of adequate competence. Paragraph (5) is of great importance when it comes to addressing organisational liability issues.

Illustration 10
In the case of the appendectomy referred to in Illustration 9, the treatment provider assembled a team to perform the operation. Only competent doctors and nurses are to be employed; if not, the treatment provider breaches his duties under Article 1:106(2) (Duties of the Service Provider regarding Input). The treatment provider must also adequately plan the execution of the operation, according to Article 1:106(5) (Duties of the Service Provider regarding Input), by issuing guidelines to the members of the team, supervising their actions and coordinating their tasks.

M. Relation to Article 1:107 (General Standard of Care for Services)

The general standard of care of Article 7:104(1) is restated in order to be able to insert specific Comments on the standard of care in treatment contracts. The treatment provider must administer treatment according to the care and skill of a reasonable service provider (Article 1:107(1), according to the standards of commonly accepted medical practice (Article 1:107(3)).

Article 1:107(4) lists a number of circumstances that determine the standard of care a client is entitled to expect. A higher standard is demanded from a specialised treatment provider (Article 1:107(2)).

Article 7:104(2) presents a specific duty of referral connected to the acknowledgement of inability of the treatment provider to meet the standard of care.

Illustration 11
A patient consults an ophthalmologist concerning laser eye surgery. The ophthalmologist has never performed such an operation alone. Thus, he refers the patient to a colleague who is experienced in that particular type of surgery, according to the obligation imposed in Article 7:104(2). The patient has the operation performed by the other ophthalmologist, who must act with the care and skill of a reasonable treatment provider under the circumstances, as under the combined application of Articles 7:104(1), 1:107(1) and 1:107(3) (General Standard of Care for Services). If the ophthalmologist is a renowned expert in the field of eye surgery, the care and skill demanded from him will be higher, as under Article 1:107(2).

N. Relation to Article 1:108 (Result Stated or Envisaged by the Client).

Normally, the obligations of the treatment provider are not to achieve a certain result, but rather to provide treatment according to the standard of care set by the combined application of Articles 1:107 (General Standard of Care for Services) and 7:104. However, application can be considered regarding some treatment activities where it is possible to achieve a certain result (e.g. prosthesis, an injection).

Illustration 12
A client consults an optician because of his bad eyesight. The optician prescribes glasses with a correction for astigmatism. However, when the client returns to the shop for his new glasses, it appears that the left and right lenses have been switched. In this case, the result of adequate glasses was not achieved, hence the duty under Article 108 (Result Stated or Envisaged by the Client) was breached.

O. Relation to Article 1:109 (Directions of the Client)

This Article may be relevant in treatment contracts in two ways. On the one hand, the patient may request a specific treatment to be provided according to specific preferences. This is usually the case with treatment that is not vital from a strictly medical point of view *(opérations d'agrément)* such as plastic surgery, transsexuality surgery, sterilisation, etc. On the other hand, this Article is linked to informed consent, more precisely to informed choice of treatment (Articles 7:105 to 7:108), as after the treatment provider's information about the risks of and alternatives to a particular treatment, the patient will be able to choose from different therapeutic alternatives.

Illustration 13
A patient has a severe cold and a fever. He asks his doctor for antibiotics, because he has to go to a meeting in London. The doctor has to follow the patient's directions in respect of the patient's autonomy, but has a duty to warn him (for instance against the risk of contracting pneumonia) and perhaps even an obligation to refrain from treating the patient when the risk is too high (the risk of contracting SARS if the patient flies to Hong Kong in a weak condition).

P. Relation to Article 1:110 (Contractual Duty of the Service Provider to Warn)

Article 7:105(1)(f) particularises this provision in the context of treatment contracts. The treatment provider must inform the patient about the risks of abstaining from or not following through the treatment.

Q. Relation to Article 1:111 (Variation of the Service Contract) and Article 1:113 (Failure to Notify for Non-Conformity)

These Articles will not be very relevant in practice, although there may be cases in which they are applicable.

Illustration 14
An agreed, conventional eye surgery treatment is not performed, but a modern laser technology treatment.

R. Relation to Article 1:112 (Remedies for Breach of Duties of the Service Provider)

Article 1:112 (Remedies for Breach of Duties of the Service Provider) is particularised as regards treatment contracts by means of Article 7:110, in particular the fact that the treatment provider is not allowed to terminate the contract or withhold performance if such would endanger the health of the patient, unless the patient breached his duty to co-operate under Article 1:104 (Duty to Co-operate). If the treatment provider is in a position to terminate the contract or withhold performance, he is under the obligation to refer the patient to another health-care professional under Article 7:110(b).

Illustration 15
A patient persists in refusing to pay the price due for medical care received. As his illness poses no serious threat to the patient's health, the treatment provider wishes to terminate the contract and refers the patient to a colleague for further treatment.

S. Relation to Article 114 (Limitation of Liability)

Article 114 applies to treatment contracts. It is of particular relevance the provision of Article 114 (1) stating that damage for death or personal injury can neither be limited nor excluded. This category of damage is by far the most common in case of non-performance of a treatment contract.

In case of limitation or exclusion of liability for damage other than death or personal injury, Article 114 (2) applies, and exceptionally such terms may be accepted.

Illustration 16
A patient is admitted to a hospital and signs a form. In this form the hospital introduces a clause limiting to 10,000 Euro its liability for any personal injury sustained by the patient during his stay at the hospital, and excluding any liability for damage or loss of personal belongings. During his stay at the hospital, the patient sustains injury for an adverse event caused by sub-standard treatment, causing her damage amounting to 300,000 Euro. In addition, while severely ill, the patient's personal belongings (clothes, books, cell phone) with a value of 500

Euro disappeared. The hospital invokes the limitation clause and offers to settle for 10, 000. Clearly, the clause limiting liability for personal injury must be held null and void, though the exclusion of liability for the personal belongings could, in light of the specific circumstances, be accepted.

T. Relation to Article 115 (Cancellation of the Service Contract)

This Article applies to treatment contracts as no specifications are needed. Damages due should cover the losses incurred by the treatment provider under Article 1:115(2) (Cancellation of the Service Contract) and are calculated according to the criteria set by Article 1:115(3) (Cancellation of the Service Contract).

Illustration 17
A patient with mental problems is undergoing therapy. The agreement with the psychiatrist is that the price is due for each therapy session. The patient decides she does not need any more therapy sessions, and has already paid the previous sessions. She must also pay the psychiatrist for the sessions already scheduled.

U. Relation to Chapter 6 (Information)

Some Articles deal with the subject matter of the duty of the treatment provider to inform the patient, in order to enable the patient to make an informed choice prior to consent, rendering the duty to inform in Chapter 6 (Information) more concrete in the case of treatment contracts. By force of Article 6:101(2) (Scope of Application), that Chapter applies with adaptations concerning to ancillary obligations to inform, insofar as the present Chapter does not provide otherwise.

Article 6:104 (Duty of Care of the Information Provider) contains important rules on the duty of the treatment provider to make sure that the patient understands the content of the information (subparagraph (1)(a), supporting the option for personalised, tailor-made information, and that the risks of the treatment are disclosed and information is provided on alternatives the patient cannot personally provide (paragraph (2)).

Article 6:106 (Duty to Give Account) establishes the regime of burden of proof of the duty to inform. Further, Article 6:109 (Causation) provides the rules on the causation of damage. These Articles apply accordingly to the duty to give account under Article 7:109; cf. the Comments to that Chapter.

Article 7:101: Scope of Application

(1) This Chapter applies to contracts whereby one party, the treatment provider, is to provide medical treatment to another party, the patient.
(2) This Chapter applies with appropriate modifications to contracts whereby the treatment provider is to provide any other service in order to change the physical or mental condition of a person.
(3) Where the patient is not the contracting party, the patient may require performance of the duties of the treatment provider imposed by this Chapter in accordance with Article 6:110 PECL (Stipulation in Favour of a Third Party).
(4) When, under a contract, a party is bound to provide treatment and to supply another service, this Chapter applies to the parts of the contract that involve treatment, with appropriate modifications.

Comments

A. General Idea

This Article presents the notion of a treatment contract. The treatment activity consists in all the processes applied to a person in order to change his physical or mental health.

> *Illustration 1*
> A patient suffering from the flu goes to a doctor. The doctor takes the various steps in the treatment procedure and prescribes her drugs that may cure the illness, i.e. change the physical condition of the patient.

An obligation to treat will usually exist whenever a health-care professional takes the necessary steps to effectively change or maintain the condition of a patient or – where such treatment is not or no longer possible – to mitigate the effects of chronic or incurable ailments.

> *Illustration 2*
> A patient who has incurable, terminal cancer is given palliative care. This treatment mitigates the pain suffered by the patient and comes within the scope of Article 7:101(2).

Treatment may consist in the treatment provider's best efforts to cure a certain ailment, his taking steps to prevent ailments from materialising in the future (preventive medicine) or administering painkillers in the case of a deadly disease. It may also consist in changing the physical or mental condition of a person where there is no need from a strictly medical point of view (aesthetic surgery, sterilisation, etc.).

Illustration 3
A person who is planning to travel to an area where malaria is prevalent has an appointment with a health-care provider well before his departure. He is given appropriate medication. This situation concerns preventive medicine, and this Chapter applies.

The present Chapter also applies, with appropriate modifications, in situations where the treatment provider performs another service in order to change the physical or mental condition of the patient, such as providing him with information regarding treatment, referring him to another health-care provider or institution, etc. (paragraph (2)).

Paragraph (3) states that the provisions of this Chapter also apply to contracts concluded by a third party on behalf of a patient and that that patient has the right to demand performance of the contract by the treatment provider. Although usually the patient is the contractual party, it may happen that the patient is *not* the contractual party. This is, for instance, the case when a treatment provider is employed by a party that has some legal connection with the patient, such as treatment providers employed by the patient's employer or by an insurance company.

Illustration 4
A woman applying for a life insurance policy gets a checkup in a clinic contracted by the insurer. The woman is contractually protected vis-à-vis the clinic under this Chapter.

Paragraph (4) extends the application of these rules, by way of analogy, to some borderline situations where the provider of another service provides treatment to a person.

Illustration 5
A person goes to the hairdresser's to have his hair cut. This is a process that changes a person's physical (aesthetic) condition (though not his health). Although this Chapter does not cover such a situation, the provisions may apply by way of analogy.

Illustration 6
The hairdresser notices that the client has a severe case of dandruff (diagnosis) and recommends a special shampoo (therapy) to cure it. Although this Chapter does not cover such a situation, the provisions may apply by way of analogy.

B. Interests at Stake and Policy Considerations

This Article covers the scope of application of the rules in this Chapter. The most common application will be that of a patient entering into a contract with a treatment provider in order to receive treatment. However, an important policy issue is whether the Chapter should apply to situations where a clear contractual link is lacking. On the one hand, it may be argued that, for conceptual reasons, only treatment provided after a

treatment provider and a patient concluded a contract should fall within the scope of this Article. On the other hand, not broadening the scope of these rules to the aforementioned situations would amount to discrimination, not treating identical situations alike, without any practical reason. In fact, it often happens that the patient and the person or entity concluding the treatment contract are not the same. This is the case when treatment is provided to minors or incompetent adults. It is also the case when an employer, an insurance company, a hotel or a similar organisation enters into a contract with a treatment provider in order to provide treatment for employees, insured persons and hotel guests. In such a situation, there are two levels: the 'client'-treatment provider relationship and the patient-treatment provider relationship.

> *Illustration 7*
> A passenger of a cruise ship feels ill during the cruise. The ship's doctor, employed by the company, treats the passenger. In this situation, the passenger/patient was treated by a doctor whose contractual relationship is with the company, not with the patient. The present Chapter applies nevertheless; cf. Article 7:101(3).

Another question to be answered is whether there can be a contractual relationship between a patient and a public hospital. Such a contractual relationship would contribute to a unified legal regime of the obligation to treat, bringing out the advantages of clarity, certainty and protection of the patient as a consumer. However, from a political and economic point of view, such an option would meet with heavy resistance in many countries, as many hospitals are public hospitals, and as such ruled by administrative law.

Besides, some conceptual arguments tend to classify relationships between hospitals and patients as different from contracts, rather as 'mass factual relationships'. Tort law or administrative law deals with liability as regards the liability of public entities. This situation is often disadvantageous for patients, because a) in a contractual regime the rights of patients are better protected; b) rights of patients in an administrative law regime will be balanced against public interest; c) compensation will often be lower, if awarded at all.

Another policy issue concerns the scope of the rules on treatment, especially with regard to borderline situations. In fact, improving the physical or mental health of a person is a broad definition of the activity, likely to cover treatment activities such as grooming, hairdressing and body piercing as well. Apart from fitting the normal scope of treatment, broadening the scope of this Chapter to such activities would result in an increase in the quality of those services as well as in the extended protection of the client of such services. This may especially be relevant in situations where performance of such services may have similar consequences for the health of the patient as medical treatment. On the other hand, restricting the scope of the Chapter entails that treatment can be narrowed down to standard medical practice. This would be more in line with what traditionally is regarded as treatment, and has the advantage of focusing on the main issue, medical treatment, or at least the issue that has the greatest impact on society and the economy. Besides, incorporating the aforementioned services would result in fierce resistance from the medical community.

C. Comparative Overview

In most European countries, the contract for treatment falls into the existing categories of contract for services (GERMANY, SPAIN, PORTUGAL), contract for work (FRANCE). In some legal systems it is not clear if treatment is qualified as a contract for work, services or if it is a specific innominate *sui generis* contract (AUSTRIA and GREECE). The only country regulating the contract for treatment as a nominate contract is THE NETHERLANDS, that regulates it in the CC.

In ENGLAND, the relationship between a patient and a public hospital is regarded as non-contractual, rather disciplined by tort law. In FINLAND and SWEDEN the relationship is not contractual and specific regulation for medical healthcare, in particular the no-fault patient insurance scheme applies.

D. Preferred Option

In principle, the Chapter applies only insofar as there is a contractual relationship between a treatment provider and the patient; see Article 7:101(1). However, if under national law the relationship cannot be qualified as a private law contract, the present Chapter does not apply; administrative courts may, irrespective of its private law nature and of their own accord, apply the rules of this Chapter by analogy.

The scope of application is extended to treatment provided on behalf of a person who is not a contractual party; see Article 7:101(3). The underlying reason is the protection of patients and treating like situations alike. In exceptional circumstances, where treatment must be performed immediately to serve the best interests of the patient and the patient cannot express his agreement to the contract (Article 7:108(4)), the PEL Ben. Int. apply.

In situations where a service is provided in order to change the physical or mental health of a person outside the scope of medical treatment, this Chapter applies by way of analogy; see Article 7:101(2); The underlying reasoning relates to the functional character of the PELSC and to the provision of normative guidelines for adjudicating legal problems emerging from the sector of unconventional medicine, which is becoming more and more important from an economic point of view. Likewise, this Article serves the objectives of patient protection and public interest in the quality of health care.

E. Relation to PECL and Other Parts of the Principles

Pursuant to Article 1:101 (Scope of Application), this Article particularises the scope of the rules on treatment contracts.

If no contractual relationship can be established, liability issues related to faulty treatment are addressed by the PEL Liab.Dam. and PEL Ben. Int.

There is also a link to the PEL Liab.Dam., as its rules may apply to liability for treatment-related injury, either in situations where a contractual relationship does not exist or where, in spite of a contractual relationship, the two regimes may conflict. Different legal systems address this conflict in different ways: application of tort rules only if there is no contract or application of the two regimes or of the more favourable regime only. The provisions of this Chapter apply insofar as a contractual relationship has been established, although they may apply by way of analogy to non-contractual treatment relationships.

In exceptional circumstances, where treatment must be performed immediately to serve the best interests of the patient and the patient cannot express his agreement to the contract, the principles of PEL Ben. Int. apply.

If treatment is to be administered to a third party, that third party is entitled to performance of the treatment contract pursuant to Article 6:110 PECL (Stipulation in Favour of a Third Party). Article 7:101(3) establishes this link.

F. Character of the Rule

This provision, as it deals with the scope and qualification of the contract, is mandatory. The qualification given by parties to the contract is irrelevant.

G. Remedies

This Article has no consequences as regards remedies as it merely deals with scope and qualification.

Comparative Notes

1. *Scope of the rules on treatment in the national laws*
   With the exception of THE NETHERLANDS, none of the other legal systems has a specific regulation of treatment contracts in its civil code (sec. CC art. 7.7.5). The contractual nature of the duties inherent to the obligation to treat is accepted in AUSTRIA, FRANCE, GERMANY, ITALY, SPAIN and PORTUGAL, though the duties of the treatment provider may also derive from tort law. In these countries the nature of the contract varies: in AUSTRIA and GREECE it is debated whether it should be qualified as a contract for work, a contract for services or an innominate contract (*sui generis)*. In GERMANY, SPAIN, PORTUGAL it is considered to be a contract for services. In ENGLAND, though the obligations related to treatment can be qualified as a contract, in practice, as most medical treatment is performed in the framework of public hospitals where the breach of the obligations of treatment providers is regulated by tort law and specific public regulation. In FINLAND and in SWEDEN medical treatment is not considered to be a contractual relationship, and public law regulations apply. Separate administrative courts entertain jurisdiction over disputes related to medical treatment carried out in public hospitals in FRANCE, ITALY, SPAIN and

PORTUGAL. In addition to private law sources, medical treatment is also regulated by public law, medical ethics and conduct codes and standards in all countries. The impact of consumer law regulation is reported in ENGLAND, GREECE and SPAIN. In most countries the legal regime of medical treatment derives from the general principles of contract, tort and public regulation. Though not much information is available from the analysed countries, services similar to medical treatment, such as non-conventional medicine, and other services whereby the physical on mental condition of a person is changed outside the framework of medical treatment, appear to be addressed by the general principles of services law.
No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Scope of the rules on treatment in the national laws*
AUSTRIA Law of Doctors (Ärztegesetz 1998); Law of hospitals (Krankenanstaltengesetz 1954). The prevailing opinion understands the Behandlungsvertrag as a so-called free employment contract (freier Dienstvertrag) cf. (Völkl-Torggler, Die Rechtsnatur des ärztlichen Behandlungsvertrages in Österreich, JBl 1984, p. 74). Others classify it as a mere contract of work *(Werkvertrag)*. Yet a slightly different definition can be found in recent case law. 'The treatment contract has to be qualified as an agreement – not defined in the Code – pursuant to which a doctor owes the patient a professional treatment, living up to the objective standards of a certain branch, but without guaranteeing for a certain success/result.'(Diettrich *[-Tades]*, "Kapfer"[35], 1999, art. 1151 E 25 referring to SZ 57/98, RdW 1992, 8=EvBl 1993/3). The ABGB starts from a clear-cut division between contracts of work and contracts of employment under the heading of 'contracts for services'. Art. 1151 sets forth a short definition of both notions, followed by the rules regarding the employment contract (art. 1153 ff); the contract for work is dealt with in arts. 1165 ff. The advocates of the so-called free employment contract (freier Dienstvertrag) argue that a doctor cannot owe a result, the healing that is. He rather owes an effort *(Bemühen)* just like an employee. But since the position of doctors is not entirely the same as the one of employees not all rules on employment contracts *(Dienstvertrag)* are to apply. Foremost, doctors are not dependent on their clients in the sense that are part of a hierarchical organisation; they rather work autonomously. However, other elements are the same. For those reasons the treatment contract is classified as a free employment contract indicating that this is not exactly the same as a regular employment contract (Völkl-Torggler, Die Rechtsnatur des ärztlichen Behandlungsvertrages in Österreich, JBl 1984, p. 74), the prevailing opinion argues that treatment differs from the contract of work in a few substantial items and contains elements of the employment contract. The thus resulting so-called free employment contract is not regulated in the CC, the author calls it a *contractus sui generis* created by doctrine). Basically, all the provisions designed at protecting the employee do not apply. Nonetheless, there is some uncertainty left as to which rules of the employment contract apply (Völkl-Torggler, Die Rechtsnatur des ärztlichen Behandlungsvertrages in Österreich, JBl 1984, p. 74, points out the legal uncertainty and therefore opts for adopting the contract of work approach (p. 83). Irrespective of the regime to be applied rules tackling the specific issues arising in the context of treatment are somewhat missing. Since

treatment contracts neither really fit in the codified rules on *Werkvertrag* nor *(freier) Dienstvertrag* recourse to case law can often provide the only satisfactory solution.
ENGLAND Treatment is not subject to special regulation. The duties of treatment-providers to their clients may derive from contract or tort, the duties in each are co-extensive. In contract, those who provide a service in the course of a business have an obligation both under the common law and under statute to exercise reasonable care and skill in performance, Supply of Goods and Services Act 1982, s.13. In tort the same duty is derived from case-law on negligence, see e.g. *Bolam v Friern Management Committee* [1957] 1 WLR 582, 586, Court of Appeal, (fractured hip during electro-convulsive therapy, some doctors would have used muscle relaxant to guard against such risk, some not, doctor not liable as acted according to a responsible body of professional opinion, thus with 'reasonable care and skill'). Cases on medical liability are generally framed in tort and legal writing deals with the issues largely in texts on tort, the main reason being that medical services are typically provided within a public framework which does not include a contractual relationship.
FINLAND Act on the Status of Patients (no. 785/1992); *Potilasvakuutuskeskusyhdistyksen säänöt* [Patient Injury Act (no. 585/1986)]. The cardinal ideas in the Finnish system are: strengthening of the patients' freedom rights, procedural guarantees of their legal protection and enhancement of the individuals' social rights. (Cf. Lahti, Towards a comprehensive legislation governing the rights of patients"Patient": the Finnish experience. In Westerhäll, L. and Phillips, C., editors, Patients rights: informed consent, access and equality, p. 208; Pahlman et. al., Three years in force: has the Finnish act on the status and rights of the patients materialized? Medicine and Law, p. 1).
FRANCE The most important act regarding treatment is Code de la Santé Publique (herein after CSP), as recently amended by the law of 4 March 2002 on the rights of patients and the quality of health system. Other applicable rules are the general rules of the CC on contract and the one of the service contract *(contrat d'entreprise)*, arts. 1779 ff. Regarding informed consent, provisions can also be found in the Civil Code, art. 16-3. The Code of medical ethics (decree 6 November 1995) is also applicable, not only by disciplinary Courts, but also by judicial jurisdictions (See Cass.civ I, 27 May 1998, Bull.civ. I, no. 187; Resp.civ. et assur. 1998, no. 276; D. 1998, 530 note Laroche-Gisserot, in which the Court applied this Code determining the duties of a surgeon. In the situation in question held that the surgeon was under the obligation to refuse the treatment asked by the patient.) There is however still place for Judge-originated regulation of a treatment contract. Many of the most important rules governing a treatment contract have been "discovered" by the *Cour de cassation* and the *Conseil d'Etat*, in applying the very general provisions on service contract, especially the determination of the standard of care (see infra). Most of these rules are now codified by the law in the Code de la Santé Publique.
GERMANY The contract for medical treatment *(Arztvertrag)* is considered as a contract for services *(Dienstvertrag)* regulated by CC arts. 611-630, according to the overwhelming majority of doctrine and case law: BGHZ 63,306,309 = NJW 1975,305; BGHZ 76, 249, 261 = NJW 1980, 1452, 1453; BGH NJW 1981,613; BGH NJW 1981, 2002; BGHZ 97, 273; OLG Düsseldorf NJW 1975, 595) OLG Zweibrücken NJW 1983, 2094; OLG Köln VersR 1988, 1049; OLG Braunschweig VersR 1980,853,854; OLG Koblenz VersR 1981, 689; OLG Köln VersR 1980,434; OLG München VersR. 1981,757,758; OLG Kö1n VersR 1988, 1049; OLG Koblenz NJW-RR 1994, 52; LG Köln VersR 180, 491; Laufs and

Uhlenbrück, Handbuch des Arztrechts, no. 39; Staudinger/Richardi BGB art. 611; Palandt [*-Putzo*] BGB art. 611; Müller/Glöge, BGB art. 611 and Münchener [*-Soergel*], BGB art. 631. The treatment provider's main obligation does not consist of achieving a certain healing or treatment result (BGH NJW 1981, 2002; 1981, 613; 1980, 1452; 1975, 305; Cf. Gehrlein, Leitfaden zur Arzthaftpflicht, p. 3, rather of providing conscious and dutiful treatment according to the standards of accepted, approved and up to date medical science (Gehrlein, Leitfaden zur Arzthaftpflicht, p. 3). However, according to the Federal Court, the relationship between a treatment provider and the patient is not to be considered as a normal private law contract, as the dignity of the human being, its independence as well as the special trust relationship so demands: BGHZ 29, 46, 52, 53 = NJW 1959, 811, 813; BGHZ 32, 367, 379 = NJW 1984, 2639. As such, in some aspects, treatment contracts deviate from the regime of services contracts. It must be also noted, that the nature of liability for treatment is always one of private law, not public law if a public hospital is involved, and as such common courts entertain jurisdiction over such claims: Gehrlein, Leitfaden zur Arzthaftpflicht, p. 2.

GREECE Liability with regard to the supply of medical services may be either contractual or tortious. The provisions on the liability of the service supplier in the Consumer Act are also applicable. There is no indication to what extent standard contract terms are being used in the practise of treatment contracts. The supply of medical services is not dealt with as such in the civil code. The latter provides only for service contracts in abstract terms. The code provisions that may be applicable to the agreement between patient and doctor are those with regard to the employment contract (CC arts. 648-680) and the contract for work (CC arts. 681-792). It is maintained that the employment contract provides the most adequate legislative framework to cover the usual agreement between patient and doctor, though there are instances in which the contract of work provisions are deemed to be more appropriate [Ismini Androulidaki-Dimitriadi, pp. 106 ff]. However, it has been argued that the employment contract and the contract for work fall short of meeting all the particularities of the contract for the provision of medical treatment. Therefore, it is argued that the agreement between patient and doctor does not fall squarely into an employment contract or a contract for work framework. Instead, it is rather a *sui generis* contract for the provision of medical services, to which the provisions of the previous two set of contracts shall apply by analogy, alongside with other rules such as code of ethics (I. Androulidaki-Dimitriadi, The duty to inform the patient, p. 110). From 1994 a new liability regime applies to the provision of medical services. The Act 2251/94 on Consumer Protection provides in article 8 rules concerning the liability of the service supplier. The suitability of the provisions on the liability of the service supplier to regulate the medical profession has been subjected to criticism. However, it still does not seem to have triggered significant case law to justify such concerns (A.K. Georgiadis, The liability of service supplier, pp. 143-155); for doctors particularly at pp. 151-152; (K. Foundedaki, Medical liability in civil law after the Act 2251/94, Kritiki Epitherosi, 1996, p. 179-204). According to the above provision, the supplier of services is liable for all damage caused due to the service. The consumer needs to prove the damage and the causal link between damage and the provision of the service, whereas the professional supplier of the service needs to prove that he was not at fault in providing the service. Thus, the doctor will have to prove not only that he was not negligent but also that his services were lawful, i.e. that it was according to the rules,

the contract and the duty of care (K. Foundedaki, Medical liability in civil law after the Act 2251/94, Kritiki Epitherosi, 1996, p. 188). On the other hand, the client needs to prove the causal link between the provision of medical services and the damage. It is however well known proof of causal link in cases of medical negligence is particularly difficult (K. Foundedaki, Medical liability in civil law after the Act 2251/94, Kritiki Epitherosi, 1996, p. 191). However, in practice a patient is less prone to claim liability of the treatment provider on the basis of contract, whereas more often a case is discussed on the basis of tort law (CC arts. 914 ff.) [A.P. 1270/1989 EllDik 1991, 765; Court of Appeals of Athens 197/1988 EllDik 1988, 1239]. Finally, some aspects of the provision of medical services and the exercise of the medical profession are regulated in a code of conduct and ethics of the medical profession (25.5/6/7/1955 and a code for the exercise of the medical profession (1565/1939) (K. Foundedaki, Medical liability in civil law after the Act 2251/94, Kritiki Epitherosi, 1996, p. 183).

ITALY The contract for treatment is mainly regulated by provisions on intellectual professions (CC arts. 2229-2238) together with provisions on autonomous work (CC arts. 2222-2228), where there is compatibility. Moreover, the medical deontological code provides for disciplinary rules, sources of disciplinary measures.

THE NETHERLANDS The most important rules on treatment are codified in *Wet op de geneeskundige behandelingsovereenkomst*, WGBO (the Law on the Medical Treatment Contract), which is included in the CC art. 7.7.5. [Note that the term WGBO is still frequented, especially by specialists in health law.] This implies that the treatment contract is treated as a *species* of the contract of services in general, meant in CC art. 7. 7. 1. The rules on the contract of services in general often are elaborated in CC art. 7.7.5. Cf. B. Sluyters, M.C.I.H. Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, pp. 1-2; Tekst & Commentaar Gezondheidsrecht, Kluwer, Deventer, Introductory note 5 to CC art. 7.7.5. Insofar as the rules of the treatment contract do not directly apply to para-medical treatment, the rules on services in general are to be applied. The rules on treatment might, however be applied by way of analogy (B. Sluyters, M.C.I.H. Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, series Praktijkhandelingen, Tjeenk Willink, Zwolle, 1995, p. 6).

POLAND The treatment contract is normally classified as a civil law contract similar to the contract of mandate (CC art. 750), which indicates obligation of means. The civil code establishes only a frame for construction of such contract, as most of the obligations arising from such contract are regulated in special acts, for example: the act on the profession of a doctor and dentist of 5. 12. 1996 (Dz. U. of 2002, nr 21, poz. 204 with changes, the act of 19. 8. 1994 on protection of mental health (Dz. U. of 1994, nr 111, poz. 535 with changes), or the act on the medical care institutions of 30. 8. 1991 (Dz. U. 1991, nr 91, poz. 408 with changes). To the civil law liability of the treatment provider rules of the civil code apply.

PORTUGAL Article 64 of the Constitution grants the universal access of citizens to healthcare and sets the framework for the organisation of the national healthcare system, which is regulated by Lei 48/90 of 21/08. In addition, Portugal is a party to the CHRM, which produces direct effects in Portuguese law. Treatment contracts are not specifically regulated by the law. If treatment is performed in a public hospital of the National Healthcare System (the main treatment providers), administrative law applies. If it is carried out in private hospitals or by private practitioners, civil law applies (services contract and tort law).

SPAIN The provision of treatment is classified as a service contract, regulated in the CC arts. 1583-1587. The Spanish Supreme Court has established the main obligations for the treatment provider. In the already mentioned STS of 24 April 1994 (RAC 879/1994) the court gives content to the obligation of means: A) Apply all available means according to the medical science in the concrete situation in a way that the treatment provider complies with the *lex artis ad hoc* (STS 7 May 1989, RAC 808/1997); B) Inform the patient, or if applicable his family, about the diagnosis, proposed treatment, prognoses, risks which may materialize and finally about the means (material, instruments or tools) used to provide the service; and when these means may turn out to be insufficient, inform the patient to allow him to recourse to another medical provider…; C) continue with the treatment service until the patient is allowed to leave the medical centre and inform the patient on the risks which may materialize…; D) In case of a chronic illness, inform the patient about the necessary care to be observed in order to prevent the deterioration of the health situation or its repetition. The most important rules on treatment are codified in the General Act on Healthcare of April 25th 1986 *(Ley General de Sanidad)*. There are many other statutory regulations on specific medical fields and administrative rules to develop such statutory provisions.
SWEDEN The rules on medical treatment can be found in the Act on Medical care, *Hälso-och sjukvårdslag* (1982:763), HSL. According to art. 1:2, first para, the goal is to provide good health and medical care to the same conditions for the whole population. Furthermore the health care shall be provided with respect for the equal value of all humans and for the dignity of the individual and the one who has the greatest need shall be given priority to the medical care, HSL art. 1:2, second para. Concerning the professionals providing medical care, the Act on exercising a profession within the area of health service and medical care, *Lag (1998:531) om yrkesverksamhet på hälso-och sjukvårdens område,* applies. The general rule in art. 2:1 provides that the medical personnel shall perform their work in accordance with science and reliable experience. A patient shall be given competent and careful health service and medical care, fulfilling these requirements. The treatment shall as far as is possible be designed and executed in consultation with the patient. The patient shall be treated with consideration and respect. Similar rules are also to be found in the Act on dental care, *tandvårdslagen* (1985: 125). The medical Deontological Code of 1990 includes the obligations for the medical service provider.

Article 7:102: Circumstances in which the Service Is to Be Performed

The duties under Article 1:105 (Circumstances in which the Service Is to Be Performed) require in particular the treatment provider, in so far as reasonably necessary for the performance of the service, to:

(a) interview the patient about the patient's health condition, symptoms, previous illnesses, allergies, previous or other current treatment and the patient's preferences and priorities in relation to the treatment;
(b) carry out the examinations necessary to diagnose the health condition of the patient; and
(c) consult with any other treatment providers involved in the treatment of the patient.

Comments

A. General Idea

This Article states the steps the treatment provider is to take in order to assess the condition of the patient and to determine adequately the phases of treatment. In order to be able to meet its core obligation to treat, the treatment provider is required to investigate the health status of the patient. This will typically consist of *anamnesis* (information received from the patient), requiring the co-operation of the patient, and of *diagnosis*, i.e. the interpretation of the symptoms of the patient, possibly involving analyses or examinations that the patient has undergone.

During diagnosis, the symptoms and the data gathered by the treatment provider will be interpreted according to his technical knowledge and experience, and the result will be the identification of the cause of the ailment. This is the first step in the treatment provider's obligation to treat.

> *Illustration 1*
> A patient is admitted to a hospital after an accident. The patient explains to the doctor that an hour ago his bicycle slipped and he fell on his left leg. The patient complains of severe pain in the leg and shows his concern as he sustained a fracture of that leg two years ago in a skiing accident. This information given by the patient is essential to the doctor's anamnesis.

After having received the information, the treatment provider needs to diagnose the ailment.

> *Illustration 2*
> After having received the information about the fracture, the doctor has an idea of what is causing the patient's pain. The doctor will then examine the leg by means of palpation. Next, he will order an X-ray examination of the leg. When studying the developed X-ray film, the doctor notices that the bone is fractured at the same level as the previous fracture. He thus diagnoses that a) this is a fracture of the femur and b) it is of a complex nature, as there has been a previous fracture. This diagnosis will influence the entire course of treatment.

B. Interests at Stake and Policy Considerations

A correct diagnosis is crucial for the success of treatment. A diagnosis which is based on the assessment of the existing health situation, i.e. a probability judgment of the condition of the patient, will provide the basis for the development of an adequate treatment strategy. The diagnosis itself is based on data gathered, followed by an analysis of that data. Medicine can never be 100 per cent exact, and a diagnosis is but a judgment based on scientific probability. Assessment of the existing physical condition of a patient and the subsequent diagnosis must thus conform to the standard of care of the average competent treatment provider.

It is debated, however, whether an incorrect diagnosis can be a ground for liability. It is widely held that an incorrect diagnosis does not constitute a breach of the standard of care, as it would be an error of judgment due to the existence of several possible causes of the ailment. It is often argued that only a blunt mistake in appreciating simple medical data and in interpreting that data, constitutes a breach of the standard of care.

Another issue is how far-reaching this obligation should be. A thorough diagnosis demands time and resources. Overdiagnosis will be lengthy, expensive, unnecessary and risky. Many diagnostic techniques, in particular invasive diagnostic procedures, present risks. They may also be a waste of limited health-care resources.

> *Illustration 3*
> During the process of diagnosis, physicians conclude that the patient most probably suffers from tuberculosis. There is, however, a very slight chance that he suffers from Hodgkin's disease, a malignancy of lymph tissue. The physicians decide that the patient should undergo an invasive diagnostic technique, mediastinoscopy, which presents the risk of injury to the vocal cords. The risk materialises in this case. The patient, apart from arguing the fact that he did not consent to the examination, argues that the diagnostic examination was disproportionate to the condition he was in.

On the other hand, incomplete diagnosis will very often contribute to a defective performance of treatment, as not enough data was available in order to enable a standard quality treatment.

C. Comparative Overview

A duty to inquire upon the circumstances in which treatment will be carried out exists in all the analysed legal systems, though the thoroughness of said duty varies in the different systems. As a general principle, the treatment provider must fulfil this duty according to the standard of care of an average, dutiful treatment provider. However, in DENMARK, FINLAND and SWEDEN this standard of care is set higher, at the level of a specialist treatment provider. In ENGLAND, THE NETHERLANDS and PORTUGAL the standard is less stringent due to the evaluative nature of diagnosis and its high degree of uncertainty. Finally in GERMANY, a fundamental mistake in diagnosis may trigger the shift of burden of proof of the breach of the standard of care.

D. Preferred Option

A reasonability test is the criterion to benchmark how thoroughly must the treatment provider execute the diagnosis. The quality of diagnosis follows the normal standard-of-care criterion of Article 7:104. The treatment provider must, in so far as is reasonably necessary, interview the patient, carry out examinations and consult with other treatment providers in order to assess the underlying health status of the patient. Arguments excluding or limiting the establishment of liability for a defective diagnosis do not seem

to be persuasive. Liability exists insofar as the treatment provider failed to carry out the examinations deemed reasonably necessary, or its diagnosis judgment was sub-standard.

This reasonability test of Article 1:104 (Duty to Co-operate) is the most adequate approach to how thorough the diagnosis should be and consists in balancing the following factors: a) standards and guidelines of approved, sound medical practice; b) economic efficiency in healthcare resources allocation; c) risk–benefit analysis.

Under this Article, the treatment provider, insofar as necessary, is to consult with other treatment providers involved in the treatment or previous treatment of the patient, in order to obtain important information on clinical history, allergies, medication, other treatment the patient is receiving, etc., so as to acquire more data relevant to the diagnosis.

E. Relation to PECL and Other Parts of the Principles

This Article renders more concrete, in light of treatment contracts, the obligation of the service provider described under Article 1:104 (Existing Conditions). It describes in detail the activities to be carried out by the treatment provider in order to fulfil this obligation. Observance of this obligation will be measured according to the standard of care of Articles 1:107 (General Standard of Care for Services) and 7:104.

In order to correctly assess the existing situation, information and co-operation from the patient is expected, as stated in Articles 1:103(2) (Pre-contractual Duties to Warn) and 1:105 (Circumstances in which the Service Is to Be Performed).

F. Character of the Rule

This rule is a default rule.

G. Remedies

Two situations may be distinguished. One consists of the breach of this obligation contributing to the eventual non-performance of the contract (e.g. a flawed diagnosis leading to wrong treatment). The other consists of a breach of this obligation that leads autonomously to non-performance of the contract (e.g. injury is caused directly by the diagnosis technique, either because it was not conform to the standard of care or because it was unnecessary; or if the patient notices the breach of the obligation upon diagnosis).

The remedies are those of Article 1:112 (Remedies for Breach of Duties of the Service Provider) interpreted in light of Article 7:110. The latter Article particularises some aspects of the rules on remedies in regards treatment contracts.

Comparative Notes

1. *Liability for a defective diagnosis*
   A duty to perform an adequate diagnosis exists in all countries analysed, though the strictness of the standard of care that the treatment provider must employ in the diagnosis varies. In ENGLAND, FRANCE, GERMANY, ITALY, SPAIN, the NETHERLANDS and PORTUGAL diagnosis must be carried out according to the standard of care of an average, dutiful treatment-provider. In DENMARK, FINLAND and SWEDEN, the standard of care of diagnosis is higher: in FINLAND the standard is that of an experienced treatment-provider and in DENMARK and SWEDEN that of a specialist treatment-provider. In ENGLAND, THE NETHERLANDS, and PORTUGAL, the treatment-provider enjoys a large discretion in the choice of the diagnostic methods. In these countries, due to the evaluative nature and uncertainty of diagnosis, it is considered that there are only liability consequences for an imperfect diagnosis if the treatment-provider deviated from acceptable medical standards or respectable medical opinion. In GERMANY, a fundamental mistake in diagnosis may have as a consequence the shift of the burden of proof to the treatment-provider.
   No information from AUSTRIA, BELGIUM, IRELAND, LUXEMBURG, POLAND, SCOTLAND. Insufficient information from GREECE.

National Notes

1. *Liability for a defective diagnosis*
   DENMARK Provided that the treatment was carried out in a public hospital, the patient can be compensated irrespective of any diagnosis fault committed by the treatment provider. According to art. 2(1) the Patient Insurance scheme, avoidable *(oundgåelig)* injury caused by diagnosis can be compensated by applying either one of two rules: the specialist rule *(specialistregeln)* or the equipment rule *(apparaturregeln)*. According to the first rule, injury is deemed avoidable if the optimal care of the best specialist skill had been employed would have prevented the materialisation of the injury. According to the second one, any failure of medical equipment, used to perform diagnosis or treatment objectively triggers compensation of the injury suffered. Cf. Erichsen The Danish patient insurance system. Medicine and Law, p. 359; Von Eyben Domstols afgørelser after patientforsikringsloven. In de første 10 år. I anledning af Patientsforsikringens 10 år jubilæum i, 31; Grünfeld, De nordiske patientforsikrings ordninger-ligheder og forskelle, p. 70.
   ENGLAND The doctor would be liable for a defective diagnosis where such diagnosis is a failure to exercise reasonable care and skill. In *Maynard v. Western Midlands RHA* [1985] 1 AllER 635 (HL) the court considered that the doctrine of *Bolam v. Friern Hospital Management Committee* [1957] 2 AllER 118 was the criterion to use in order to adjudicate liability emerging from wrong diagnosis.
   FINLAND Injury sustained caused by diagnosis is compensated by art. 2(1) of the Finnish Patient Injury Law, if an experienced treatment provider could have conducted diagnosis in such a way that the injury would have been avoided. Cf. Lahti, Towards a comprehensive legislation governing the rights of patients: the Finnish experience. In Westerhäll, L. and Phillips, C., editors, Patients rights: informed consent, access and equality, 211.

GERMANY A treatment provider can be held liable in case of a mistake in diagnosis *(Diagnoseirrtum)*. The standard of care in diagnosis is influenced by the diagnosis media available (BGHZ 72, 132; BGH NJW 1982, 697; 1994, 801; Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 50 III; Gehrlein, Leitfaden zur Arzthaftpflicht, p. 38). Due to the fact that the patient must proof causation, normal diagnosis mistakes are irrelevant in practice (Gehrlein, Leitfaden zur Arzthaftpflicht, p. 38). However, in case of a fundamental mistake in diagnosis *(Fundamentaler Diagnosefehler)*, the burden of proof shifts to the treatment provider *(Beweislastumkehr)*. Cf. Gehrlein, Leitfaden zur Arzthaftpflicht. BGH NJW 1996, 1589; 1992, 2962; 1988, 1513; VersR 1981, 1033; Saarl. OLG NJW-RR 1999,176. A fundamental mistake in diagnosis is one that shows a serious disconformity with sound, accepted medical practice. One example of fundamental diagnosis mistake is that of a physician who failed to understand the patient's need of urgent cancer therapy from a histologic examination (BGH NJW 1989, 2318. In another case, the doctor failed to diagnose a bacterial infection despite the manifestation of obvious symptoms (OLG Karlsruhe VersR 1989, 195). Long distance diagnosis is forbidden (Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 50 VI; BGH VersR 1959, 589; 1961, 1039; 1971, 1123; 1975, 283; BGH DMW 1983, 1571; OLG Hamm VersR 1980, 291.) unless in emergency or other exceptional circumstances (Gehrlein 2000, 39; BGH NJW 1979, 1248). Excessive diagnosis is addressed the same way as a mistake in diagnosis (Cf. Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 50 III; OLG Zweibrücken VersR 1991, 427), as it brings accrued risks for the patient.

GREECE If a patient suffers damage to health due a defective diagnosis, on the basis of which the patient acted or did not act, then the provider of medical services shall be liable for that damage (for omission to diagnose see, A.P. 1063/2000).

FRANCE If diagnosis is not in conformity with the treatment provider's obligation to provide attentive, diligent care, according to accepted sound medical practice, the treatment provider can be liable, cf. CA Paris, 13 December 1996, GazPal 1998, 1, somm, 69, note H. Vray.

ITALY A surgeon activity also includes a preliminary diagnostic and prognostic phase, aimed at ascertaining the opportunity or non-opportunity of treatment. In fact, the first obligation a treatment provider has to fulfil is collecting the information about the existing health situation of the patient in order to outline his anamnesis (G. Alpa, La responsabilità medica, in Riv.it.med.leg., 1999, fasc. 1 (February), p. 26). For this, he needs collaboration on the side of the patient. Therefore, in those cases in which the patient is in a state of natural incapacity, the doctor will have to refer to the help of the family, tutors, etc. and in any case to the family doctor. Since this is the beginning of the performance of a treatment contract, in case the treatment provider does not perform a correct diagnosis, he will be liable for non-performance of his obligations.

THE NETHERLANDS A diagnosis must be based on adequate research *('anamneses)* and adequate information. A failure to adequately research cannot be justified by external factors such as a bad organisation of the unit, lack of staff etc. The doctor may restrict his research to those examinations that are reasonably required. If the patients have serious complaints or symptoms a duty to examine more scrupously may arise as long and insofar as there is no sufficient explanation for these complaints or symptoms available. The doctor is not required to investigate the presence of an improbable risk without indications of such a risk manifesting itself. An incorrect

diagnosis may amount to a non-performance even if it was based on sufficient research. Such will be the case if the doctor has not taken the possibility of a danger seriously enough. However, the mere fact that, with the benefit of hindsight, the diagnosis turns out to have been wrong, does not lead to liability. Such would, for instance, not be the case if the doctor's conclusions were scientifically sound, which may be the case with very rare disorders or disorders that are difficult to diagnose. Moreover, any diagnosis – as does the *anamnesis* – calls for a certain element of evaluation: in order to be absolutely certain about a diagnosis, it may be necessary to perform certain operations that may be risky or otherwise unwelcome. In such a case, a certain degree of incertitude is to be accepted, as long as the risk that comes along with the incertitude is acceptable, taking all circumstances into account. With regard to the choice of diagnostic methods, a large discretion is awarded to the doctor, insofar as his actions are in compliance with generally accepted medical-technical views. Cf. HR 9 November 1990, NJ 1991, 26, Speeckaert/Gradener; J.K.M. Gevers, De rechter en het medisch handelen, 3rd ed., p. 18.

POLAND A diagnosis is listed as one of the activities of the doctor (The act on the profession of a doctor, art. 2 para. 1). The diagnosis should be given in accordance with the current medical knowledge, available methods of diagnosing, rules of the professional ethics and due diligence (The act on the profession of doctor, art. 4). Therefore if the diagnosis is defective the doctor may be held liable.

PORTUGAL The treatment provider can be held liable in case of defective diagnosis: CA Coimbra, 4 April 1995; CJ XX-1995, II, 31; STA 17 June 1997; AD XXXVII-1998, 436, 435; Sinde Monteiro, Veloso, Cases on Medical Malpractice in a Comparative Perspective, p. 175 if the *leges artis* are not met. Esperança Pina, A Responsabilidade dos Médicos, 1991, p. 102, suggests that the standard of care in this case is not that of the average competent doctor, rather consisting of the evaluation of the methods employed in the given circumstances.

SPAIN Interpreting the symptoms of the patient is one of the activities provided for in the provision of the service by the treatment provider and must be fulfilled in accordance with the requirements of the "*lex artis ad hoc*". Therefore, when a diagnosis is provided without observing due diligence, the doctor may be held liable.

SWEDEN Compensation is granted according to The Act on Compensation for damage to patients, *Patientskadelagen* (hereinafter PL), if it is predominantly probable that the damage was caused by wrong diagnosis, art. 6 at 3. This is the case if factually recognisable signs of disease or damage are ignored or incorrectly interpreted, resulting in that treatment does not take place or goes in the wrong direction. A prerequisite is however, that an experienced specialist would have come to the right conclusion if he or she would have had the same foundation for his diagnosis, see Sverne, Patientens rätt, pp. 91 ff.

Article 7:103: Duties of the Treatment Provider regarding Input

The duties under Article 1:106 (Duties of the Service Provider regarding Input) require in particular the treatment provider to use instruments, medication, materials, installations and premises of at least the quality demanded by accepted and sound professional practice, that conform to applicable statutory rules, and that are fit to achieve the particular purpose for which they are to be used.

Comments

A. General Idea

This Article addresses the duties of the treatment provider regarding the input, especially regarding the 'instruments, medication, materials, installations and premises' used to perform treatment. Usually while carrying out a treatment procedure, the health professional will use certain materials, tools, drugs and instruments, as well as auxiliary staff. In fact, one of the characteristics of contemporary medical practice is technology evolution. Medical science and practice is more and more dependant on sophisticated technological devices, presenting specific risks. Although the efficiency of treatment has significantly improved, the chance that an unpredictable adverse event happens has increased (cf. G. Viney, (ed.), *L'indemnisation des accidents médicaux*, L.G.D.J., Paris, 1997, p. 108).

The following illustration shows the dependence of contemporary medicine on devices, instruments and other material input.

> *Illustration 1*
> A person is admitted to a hospital after a car accident. He appears to have several fractures and thus has to undergo an X-ray examination. A CT scan is also performed in order to diagnose potential internal organ injury. Next, he is taken to the intensive care unit, where he is monitored by means of ECG and EEG devices and receives parenteral nutrition by means of a cannula. This Article applies to the duties of the treatment provider regarding this type of input.
>
> The medical products used, i.e. devices, instruments and drugs, must conform to the approved professional practices, i.e. the *leges artis*. Treatment providers must avoid using obsolete devices, materials and installations, and should adequately inspect, monitor and maintain them.

B. Interests at Stake and Policy Considerations

The materials, instruments, devices, installations and products used during treatment are essential for the performance of the treatment contract. They must be of at least standard quality, and must be adequately maintained and operated in order to insure the

safety of patients. This input presents, especially in modern high-technology based medicine, an increase in the potential benefits of treatment, but an increase in the risks associated with the complexity or inherent hazardousness of such input.

Defective input is, according to statistical data, a common cause of non-fulfilment of the obligation to treat. Quite often in hospital settings, such defective input media and organisation are latent causes to errors waiting to be triggered.

> *Illustration 2*
> A patient undergoes an X-ray examination. Radiation exposure should be between 50 and 200 millirem, but due to a defect in the X-ray machine, the patient was exposed to 1 rem, a very high and potentially harmful dose of radiation. In this case, a medical device malfunctioned, and the patient may have sustained injury resulting from the examination.

The installations where treatment is carried out can also contribute towards non-performance due to defective input: a good example is 'nosocomial' infections, infections endemic in hospital premises that affect patients. Some of these pathogenic agents are drug resistant. Usually, patients who are subject to invasive diagnosis or treatment as well as prolonged hospitalisation tend to contract such infections. Measures can be taken in order to reduce the impact of nosocomial diseases in a hospital, but never be eliminated: minimising time between admission and surgical procedures, choosing appropriate surgical prophylaxis, isolation facilities, screening procedures, effective hospital cleaning and disinfection. In Britain, approximately 15 per cent of all patients admitted to hospitals contract hospital-related infections. In FRANCE, the probability of contracting a serious infection after complex surgery is 33 per cent; in DENMARK, however, only 2 per cent.

> *Illustration 3*
> A patient who underwent heart surgery contracts a nosocomial, drug-resistant infection in spite of all the aseptic measures taken. The patient sustains an illness as a consequence of the defectiveness of the installations used for the performance of the treatment contract.

The main policy question that emerges from this Article relates to the intensity of the duty of care of the treatment provider while employing this sort of input. On the one hand, it can be argued that the treatment provider is only liable if he breached his duty of care while employing this kind of input, i.e. by operating, servicing or maintaining the input in conformity with applicable regulations, equipment instructions or approved practise, or by not meeting the standard of care. This is the traditional view on medical malpractice, which stresses the importance of the deterrence effect of fault-based liability.

On the other hand, it is sometimes held that the treatment provider should be strictly liable, as it has an obligation of security *vis-à-vis* the patient. According to this position, the treatment provider has an obligation of result regarding the safety of the patient, meaning that it must shield the patient from harm the risks emerging from defective or

insufficient choice, servicing, maintenance, operation or design of medical equipment, devices and installations.

An in-between position establishes a presumption of fault of the treatment provider, allowing it to prove that it has acted according to standard of care and applicable regulations or approved medical practice in order to avoid harm from befalling on the patient.

C. Comparative Overview

The duty of the treatment provider concerning the use of adequate input such as instruments, medication and materials exists in all analysed legal systems, though the consequences of the breach of this duty varies. In THE NETHERLANDS and PORTUGAL the treatment provider is held liable insofar as it breached the standard of care while using or administering this input. The same is true in FRANCE, GERMANY and SPAIN, though the burden of proof of breach of this duty may shift to the treatment provider. In DENMARK, FINLAND and SWEDEN, liability is strict.

The duty of the treatment provider to use adequate installations is also recognised in all countries, and is of particular importance in case of hospital-acquired infections. However, in GERMANY, FRANCE and SPAIN the burden of proof of breach of the duty may shift to the treatment provider. In DENMARK, FINLAND and SWEDEN injury caused by preventable infections is compensated.

D. Preferred Option

The study group favours a strict liability of the treatment provider regarding the materials, instruments, devices, products and installations it uses while performing the treatment contract. This input must be fit for its purpose.

Given the complexity and inherent risk associated to that input, a strict liability seems adequate. The complexity of such devices and the possibility of a technical or human malfunction while operating them render such a strong liability a necessity. There is also a significant risk of an unexpected random failure of the equipment, especially if it is very sophisticated or complex: technological risk.

This approach is patient friendly, as it makes it easier to obtain compensation from treatment injury, once no fault of the treatment provider must be established. To some extent, it is also healthcare professional friendly as, under strict liability, it would have to be established whether the medical injury was caused unnecessarily and due to inadequate conduct; thus, there is no need to establish whether the treatment provider is to be 'blamed' for the occurrence of the injury. This relates to the fact that the presence of defective equipment in a treatment providing institution is a latent error that can only be adequately controlled and prevented at the system/institution level. This is a shift from personal to collective/organisational liability.

Moreover, empirical studies suggest that the deterrent effect of fault-based liability at the individual level in regards defective input is ineffective. Studies point out that integrated proactive measures (surveillance and checking of material, equipment, devices and products) are more suitable to prevent such medical accidents. This may be achieved at the organisational/institutional level, according to a systems approach.

In the aftermath of several tragedies related to defective input in treatment (HIV and Hepatitis B / C contaminated blood; Thalidomide-related handicaps, etc.) as well as the high statistical incidence and impact of the materialisation of some input risks (e.g. in FRANCE more people are affected by nosocomial infections than by car accidents), public opinion became very sensitive regarding the issue. Understandably, policy-makers are very keen on this approach as it is more adequate means of achieving efficient compensation of such injuries and prevent mass litigation and the difficult financial consequences that can emerge therefrom.

E. Relation to PECL and Other Parts of the Principles

This Article particularises the provisions of Article 1:106 (Duties of the Service Provider regarding Input).

If the treatment provider employs other healthcare professionals while performing the treatment contract, he must employ professionals of adequate competence; See Article 1:106(2). The treatment provider may also be held liable when failing to plan the performance of the service adequately; see Article 1:106(5). Quite often, liability emerging from treatment contracts is linked to flawed planning and organisation in the institution providing treatment. Flawed organisation can lead to latent errors (defective equipment, ineffective surveillance of materials, installations, etc.) as well as psychological precursors (flawed management of staff or inventory, leading for instance to very long shifts causing healthcare professionals to become overtired and overworked, or leading them to burnout) that can contribute to non-performance of the treatment contract.

F. Character of the Rule

The provision of this Article is mandatory. It protects patients from personal injury caused by defective input by a strict liability.

G. Remedies

This Article streamlines the duties of the service provider regarding input (Article 1:106), and the remedies described in Comment H to that Article apply. Remedies available consist of damages as follows from Article 1:112(1) (Remedies for Breach of Duties of the Service Provider); assurance of performance under Article 8:105(1) PECL (Assurance of Performance); termination for anticipatory non-performance of the contract as follows from Articles 1:112(3) (Remedies for Breach of Duties of the Service

Provider) and 8:103 PECL (Fundamental Non-Performance), and right to withhold performance as follows from Articles 1:112(2) and 9:201 PECL (Right to Withhold Performance). The limitations set by Article 7:110 regarding termination and right to withhold performance must be observed.

In practice, application of this Article will work *a posteriori*, after a treatment accident related to defective input occurred, and the aggrieved patient seeks damages according to Article 1:112(1) (Remedies for Breach of Duties of the Service Provider).

Comparative Notes

1. *Materials, instruments and tools*
   In all countries the treatment provider has a duty to use adequate material, instruments, devices, products and premises while carrying out treatment on patients, though the consequences of the use of defective input media by treatment providers differs significantly in the different countries. In THE NETHERLANDS, the healthcare provider is liable if it breaches its standard of care while using defective materials and instruments. The regime is similar in PORTUGAL, though the burden of proof that due care was used shifts to the treatment provider insofar as high-risk equipment is employed. In GERMANY, the treatment provider can be held liable if it used defective input. In addition, in this country if the injury could have been prevented, the burden of proof shifts to the treatment provider. In FRANCE and in SPAIN the law moved towards imposing a shift of the burden of proof to the treatment provider, who will have to prove that it took due care in the use of medical devices, instruments and input. This shift was consolidated in FRENCH law, though in SPAIN the law is still not defined regarding this aspect. Finally, in DENMARK, FINLAND and SWEDEN, if defective equipment is used, the treatment provider is strictly responsible (the *Equipment Rule*). In DENMARK, the underlying causes of the defectiveness are not relevant.
   Other specific objective liability regimes exist in several countries concerning vaccine accidents, use of contaminated blood and blood products and hospital-acquired infections. Concerning this category of infections, in DENMARK, FINLAND and SWEDEN preventable infections are compensated. In GERMANY the burden of proof that all hygienic measures were taken shifts to the treatment provider. The burden of proof is also shifted to the treatment provider in FRANCE and in SPAIN, though the only valid defence of the treatment provider is the endogenous origin of the infection, i.e., that the patient carried the pathogenic agent, a difficult burden to discharge.
   No information from AUSTRIA, BELGIUM, GREECE, IRELAND, ITALY, LUXEMBURG, SCOTLAND.

National Notes

1. *Materials, instruments and tools*
   DENMARK In the public sector, any injury caused by defective equipment is compensated under the "equipment rule" of art. 2(1)(b) Patient Insurance Act. The criterion is totally objective, and the underlying causes of the defectiveness are not relevant to compensation. Cf. Grünfeld, De nordiske patientforsikrings ordninger-ligheder og for-

skelle. In De første 10 år. I anledning af Patientsforsikringens 10 år jubilæum i 2002; Erichsen, The Danish patient"Patient" insurance system. Medicine and Law, p. 362. Avoidable infections can be compensated according to the specialist rule of art. 2(1)(a) PIA or the alternative treatment rule of art. 2(1)(c). Unavoidable, unendurable infections that the patient cannot be expected to tolerate are compensated according to the "reasonableness rule" *(rimelighedsregeln)* of art. 2(1)(d). Cf. Grünfeld, De nordiske patientforsikrings ordninger-ligheder og forskelle. In De første 10 år. I anledning af Patientsforsikringens 10 år jubilæum i 2002.

ENGLAND Treatment providers can be held liable for the use of medical products and devices under section 2 of the Consumer Protection Act 1987. A special vaccine damage scheme (Vaccine Damage Payments Act 1979) imposes strict liability to the entity, administering the vaccine.

FRANCE In FRANCE, the use of medical devices and products is considered as an *obligation de sécurité de résultat*, which results in an irrebuttable presumption of fault of the treatment provider (strict liability). Regarding the use of defective medical devices: Cass.civ. I, 9 November 1999: D. 2000, 117, note P. Jourdain; JCP 2000.II.10251, note P Bruin; Cf. Lambert-Faivre, Droit du dommage corporel. Systèmes d'indemnisation, nos. 594 ff.; Castelletta, Responsabilité Médicale. Droits des Malades, p. 108); (Tabouteau, La securité sanitaire, p. 257. Art. L.1142-1 CSP. There are some doubts whether the *obligations de résultat de sécurité* developed by case law regarding the use of defective equipment are still valid after the changes in the law operated by the law of 4 March 2002. Cf. (Jourdain, La réforme de iindemnisation des dommages médicaux et la place de la responsabilité médicale. in P. Jourdain et alii (ed.), Le nouveau droit des malades, p. 92. Same solution regarding products used, such as pharmaceutical products (Cass.civ. I, 7 November 2000, Bull.civ. I, no. 279; JCP 2001.I.340 no. 23 G. Viney). The FRENCH system is very sensible to the problem of compensation of nosocomial infections. The awareness and surveillance of the national healthcare system, as well as the fact that such infections cause more accidental deaths than vehicle, working and domestic accidents certainly contribute to that sensibility. Hence, case law in FRANCE tended to impose a presumption of fault in case of nosocomial infections based on an *obligation de résultat* (Cass.civ., 29 June 1999, Staphilocoques dorés, JCP 1999.II.10138 rapport Sargos: «*Attendu qu'un médecin est tenu, vis-à-vis de son patient, en matière d'infection nosocomiales, d'une obligation de sécurité de résultat, dont il ne peut se libérer qu'en rapportant la preuve d'une cause étrangère.*»; Cass.civ. I, 21 May 1996, D. 1997, Somm. P. 287 (arrêt Bonicci); CE 9 December 1988, arrêt Cohen; CE 1 mars 1989, arrêt Bailly; CE 14 juin 1991, arrêt Maalem. Cf. (Lambert-Faivre, Droit du dommage corporel. Systèmes d'indemnisation, no. 723); (Castelletta, Responsabilité Médicale. Droits des Malades, p. 109); (Jourdain, La réforme de iindemnisation des dommages médicaux et la place de la responsabilité médicale. in P. Jourdain et alii (ed.), Le nouveau droit des malades, p. 90)). The only defence that the treatment provider can oppose is the endogenous character of the infection, i.e., that the infective pathogenic agent was carried by the patient, which is quite difficult to prove. After the law of 4 March 2002, this case law has been confirmed art. L. 1142-1 CSP. The only difference is that the responsible person can only be a hospital or a clinic and not the individual physician.

FINLAND Injury caused by the use of defective equipment is compensated according to art. 2 (1,2) PSL and infections according to art. 2 (1,3) FPL. Cf. Mikkonen, The

Nordic model: Finnish experience of the patient injury act in practice. Medicine and Law, p. 347.

GERMANY In case of injuries caused by the use of defective input, the treatment provider can be held liable. If that injury could have been prevented, the burden of proof shifts to the treatment provider (BGH NJW 1978, 584; OLG Hamm NJW 1999, 1787; Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 109; Gehrlein, Leitfaden zur Arzthaftpflicht, p. 52). In case of injury caused by nosocomial infections, the burden of proof shifts to the treatment provider, who must prove that it employed all the hygienic measures to prevent such infections in the premises (BGH NJW 1991, 1541; 1999, 3408).

THE NETHERLANDS The health provider is responsible for the adequacy of the materials, instruments and tools used for the performance of the contract. This was first accepted by the *Hoge Raad* in the case of Cadix/Aluminium (HR 13 December 1968, NJ 1969, 174) and has been codified in CC art. 6:77. If the inadequacy of the materials, instruments and tools lead to a non-performance, the health provider is liable for that.

POLAND The average quality of equipment in hospitals must be observed generally. It does not mean however, that the average quality is always sufficient, and in some cases requirements concerning quality should be set on a higher level. Non-fulfilment of these requirements constitutes fault of the hospital or fault of the doctor. In the case of doctor a lack of sufficient knowledge is also considered as a fault (M. Nesterowicz, Glosa do wyroku SN z dnia 1 grudnia 1998r, II CKN 741/98, Prawo i Medycyna, 2000, nr 6-7, 163).

SPAIN The *lex artis ad hoc* indicates that the average quality of the means used to provide medical services: materials of average quality in accordance with the current status of the medical science, and appropriate to the specific circumstances of the case. STS 26 May 1997 (RAC 879/1997): the medical institution is under the obligation to maintain the medical instruments and installations in good condition. In STS of 1 July 1997 (Europa de derecho, N. 1997461409) and STS 21 July 1997 (Europa de derecho, N. 1997603109) the Supreme Court imposes an objective liability. It considers the medical institution as objectively liable in accordance with the General Consumers Act because the patient was a consumer (art. 1 LCU) who was provided with a medical service (arts. 26 and 28.2 LCU) and he suffered damage which gave rise to objective liability (art. 25 and ff LCU). When the products or services provided to patients by treatment providers do not comply with the levels of purity presumed in the General Consumers Act, the risks are to be assumed by the medical institution. STS 25 April 1994 (AC 94-3): in the case that the materials, tools or instruments could turn out to be insufficient to provide the treatment, the medical provider must inform the patient to allow him or his family to recourse to another medical provider.

SWEDEN The patient may obtain compensation according to PL art. 6, first para, art. 2, if it is predominantly probable that the injury was caused by defects in a medical technical product or hospital equipment used for examination, care, treatment or other similar measure or the improper use thereof.

According to HSL art. 2e, the personnel, location and equipment necessary to enable good health care shall be at hand where health- and medical care is carried out.

PORTUGAL An obligation of security exists if the materials, instruments and tools are dangerous by their very nature. The treatment provider is presumed liable unless it proves that all care was used to prevent injury (CC art. 493 para. 2; Figueiredo Dias, Sinde Monteiro, Responsabilidade médica na europa ocidental. Considerações de lege ferenda. Scientia Ivridica, 1984, p. 38; Sinde Monteiro, Veloso, Cases on Medical Malpractice in a Comparative Perspective, p. 176).

Article 7:104: Duty of Care of the Treatment Provider

(1) The duties under Article 1:107 (General Standard of Care for Services) require in particular the treatment provider to provide the patient with the care and skill that a reasonable treatment provider exercising and professing care and skill would demonstrate under the given circumstances.
(2) If the treatment provider lacks the experience or skill to treat the patient in accordance with Article 1:107 (General Standard of Care for Services), the treatment provider must refer the patient to a treatment provider that can meet the standard set in these rules.

Comments

A. General Idea

The treatment provider is under a duty of care benchmarked by a certain standard of care, usually defined as the care a reasonable professional would apply to the task. This is an adaptation of the classical Roman doctrine of *bonus pater familias*, or the average reasonable and prudent citizen.

This Article defines the standard of care expected from the treatment provider while executing treatment. It is the key for establishing non-performance of the treatment contract. As was stated in the General Introduction to this Chapter, one of the risk categories that are related to the provision of treatment consists in damage caused by breach of standard of care of the treatment provider, i.e. the care exercised reasonable treatment provider under the given circumstances, in conformity with the accepted practice *(lex artis)* and statutory rules of its profession. Non-conformity with the standard of care results in non-performance of the treatment contract.

This objective/abstract standard of care can be modulated by specific subjective/concrete factors, such as specialisation of the treatment provider, circumstances or agreement of the parties. Thus, the criterion for assessment of standard of care is that of the reasonably competent professional, acting in conformity with the guidelines, directives and protocols set by the current state of the medical science, under the concrete circumstances in which treatment must be performed *(lex artis ad hoc)*.

Illustration 1
A patient has broken her leg when she fell during a hike. She is treated at a hospital. The doctor, a general practitioner attached to the hospital, is to treat the patient with the skill and care of a reasonable general practitioner. He treats the patient, after having judged the data from an X-ray examination, by putting on a splint.

Illustration 2
The same doctor is called later at night to accompany ambulance personnel and to help the victim of a car crash on the spot. No X-ray device is available. In this case, the circumstances (time, place, lack of means) significantly decrease the demands as regards skill and care required from the doctor.

Specialised medical skills and experience will raise the standard of care required from the health-care professional. The more specialised or experienced a health-care professional is, the greater skill he is expected to demonstrate. Inexperience is no defence, as even a starting health-care professional is expected to have at least average skill and competence.

Illustration 3
A patient, whose particular type of skin rash was wrongly diagnosed by a general practitioner, receives inadequate treatment. After some time, she decides to consult a dermatologist, who diagnoses a rare skin disease and prescribes adequate therapy. This specific knowledge of skin diseases may not be expected from a general practitioner, but it would be expected from a dermatologist.

The treatment provider must meet the standard of the average reasonable health-care professional. Whenever a treatment provider acknowledges that he is not skilled enough, or does not have the specialised skill fit for the treatment of the concrete ailment of the patient, he is under an obligation to refer the patient to a specialist in that field, or alternatively, to consult with one such professional.

An 'unconventional' health professional (e.g. an acupuncturist) has to live up to the normal standard of care expected from its art, what may reasonably be expected of the treatment provider given the normal care that the patient may expect and what care he could have expected in regular medicine.

B. Interests at Stake and Policy Considerations

This is a key provision in establishing liability for non-performance of the treatment contract. There are two contrasting approaches to this problem in Europe. On one side the traditional negligence approach only holds the treatment provider liable insofar as it did not observe the duty of care. According to the second approach, the obligation of the treatment provider to compensate the patient does not demand a breach of the duty of care, and compensation is backed by a special compensation scheme.

In the case of negligence, several interests are at stake while defining and interpreting the standard of care. A very stringent standard of care will trigger lower activity levels, as the treatment provider will perform treatment more thoroughly, as well as the engagement of treatment providers in defensive medicine, avoiding the use of any risky techniques, even if, after a cost–benefit balance these seem more adequate in light of the interests of the patient. Another economical consequence is the inflation of insurance premiums that are eventually spread to the final costs of health care. On the other hand, a less stringent standard of care would make it more difficult for a patient to obtain compensation, a fact that could result in unfairness, professional impunity as well as the repercussion of the costs of injury to the patient or the welfare system. Besides, the overall quality of health care might potentially decrease, unless other accountability mechanisms (disciplinary or penal) are reinforced.

Another important discussion relates to the modulation of the standard of care when inexperienced health professionals are concerned. It is traditionally held that the standard of care is an objective threshold that cannot be lowered. If a healthcare professional cannot comply with the minimum standard of care due to inexperience, he should refer the patient to an experienced health professional. On the other hand, it is held that, in the field of medicine, experience only comes with practice, and as the formation of health-care professionals benefits society at large, society should internalise the risks inherent to their training.

Extending liability beyond fault, namely in situations where treatment accidents (cf. General Introduction, D. Basic Principles of Liability) are concerned, presents many problems (of both a legal and economical character) that only with difficulty can be solved in the field of traditional liability law. A system can be developed in which such treatment accidents can be compensated, shifting the treatment risks away from the patient or welfare system. However, it would not be reasonable or fair to impose them on the treatment providers. Though comparative research shows that several countries have successfully implemented compensation of treatment accidents independent of breach of duty of care, the said compensation schemes are implemented either through insurance law or through administrative law, sometimes replacing *de facto* liability law.

C. Comparative Overview

In AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, SPAIN, PORTUGAL the treatment provider owes the patient the care and skill of a reasonable averagely competent treatment provider. This is an objective standard of care. In DENMARK, FINLAND and SWEDEN, where no-fault patient insurance schemes operate, the standard of care is more stringent: patients will obtain compensation if the injury sustained could have been prevented had the patient been treated by a specialist treatment provider.

It is unanimous opinion that the standard of care is not lowered below the general standard if the treatment provider is inexperient. If the treatment provider is a specialist, the standard of care is raised in AUSTRIA, ENGLAND, GERMANY, THE NETHERLANDS,

SPAIN and PORTUGAL, but not in FRANCE and ITALY. In DENMARK, FINLAND and SWEDEN the general standard of care is already that of a specialist treatment provider.

In medical experimentation, the standard of care does not change in FRANCE, GERMANY, ITALY, THE NETHERLANDS, SPAIN and SWEDEN. The standard of care is, in practice, more stringent in AUSTRIA, ENGLAND and GREECE, and strict liability exists in PORTUGAL. In case of unconventional treatment, the treatment provider appears to be bound by the general standard of care.

The patient bears the burden of proof of the breach of this duty in AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, PORTUGAL and SPAIN. In ITALY, GERMANY, GREECE, THE NETHERLANDS, PORTUGAL and SPAIN the burden of proof can be alleviated or shifted to the treatment provider in exceptional circumstances. In DENMARK, FINLAND and SWEDEN, due to the non-adversarial nature of the no-fault patient insurance schemes, the circumstances concerning the injury sustained by the patient are investigated *ex officio* by the patient insurance consortium.

D. Preferred Option

This Article establishes, as a general principle, a fault-based liability system for treatment contracts, apart from the duties under Article 7:103. The reason underlying this provision is the fact that the European health-care systems differ greatly and thus to be brought into line. In addition, it demands complex political decision-making and a financial mechanism to back it. A system compensating treatment accidents regardless of breach of duty of care, where the costs of accidents could be spread and reduced, can only be reasonably addressed by specific insurance or social solidarity fund schemes, beyond the scope of liability law.

This does not preclude the implementation of voluntary or statutory insurance or social schemes in order to compensate some treatment accidents on a strict liability or no-fault basis. Additionally, specific statutes or regulations of the national healthcare systems may impose a different approach beyond this general principle.

Fault thus consists in non-conformity with the standard of care. The standard of care set by this provision is a carefully balanced objective/abstract standard, though it can be modulated by some subjective/concrete factors, such as experience, circumstances and magnitude of the risks involved.

The standard of care required from an experienced health-care professional should not be below that required from an average competent health-care professional. This introduces more certainty and a higher level of patient protection. It should be noticed, however, that, although inexperienced health-care professionals are not exempted from abiding by the general standard of care, society as a whole benefits from the imminent risks emerging from their training, and as such, society and the healthcare system must internalise the consequences of mishaps caused by those inexperienced healthcare

professionals. Instead of lowering the benchmark, the problem is shifted to the duties of the treatment provider regarding input (Articles 7:103 and 1:106 (Duties of the Service Provider regarding Input)) as well as the central liability of treatment providing organisations (Article 7:111) in the framework of collective and organisational liability instead of personal liability. Likewise, paragraph (2) of this Article provides that, should the treatment provider lack the experience or specialised skill necessary to perform treatment needed by the specific circumstances of the ailment afflicting the patient, it should disclose that fact to the patient. He should also refer the patient to a treatment provider having the necessary experience or specialised skill to perform the necessary treatment on the patient and who can meet the modulated standard of care required.

Conventional modulation of the standard of care is allowed insofar as it does not set the standard below the established threshold. The justification for this is the protection of the patients and the quality of the health-care system.

E. Relation to PECL and Other Parts of the Principles

This Article develops the general standard of care for services of Article 1:107 (General Standard of Care for Services). The standard of care found in this provision is used to benchmark the duties of the treatment provider of Articles 7:102, 7:105, 7:106, 7:107, and 7:109.

Paragraph (2) of this Article imposes a specific obligation to Inform (Article 7:105) to the treatment provider, insofar as it lacks the experience or specialised skill needed in order to adequately perform treatment according to the standard of care set by paragraph (1) of this Article and Article 1:107.

In the circumstances described by Article 7:107(2) and 7:108(7), the standard of care is that provided by Article 2:101 PEL Ben. Int. (Duties during Intervention).

F. Character of the Rule

The rule sets a threshold for the Standard of Care, below which treatment cannot be performed. The underlying reasons behind this rule are protection of patients and quality of the health-care system. The Article, while establishing the minimum level of care demanded from the treatment provider, is mandatory. Of course, this does not mean that parties are not free to agree on a higher, more stringent standard of care.

G. Remedies

This Article is a particularisation of Article 1:107 (General Standard of Care for Services), and Comment E to this Article explains in depth the remedial consequences of breach of the standard of care. The limitations set by Article 7:110 regarding termination and right to withhold performance must be observed.

In practice, this Article will be applied *a posteriori*, after a treatment accident related to breach of standard of care took place and the aggrieved patient seeks damages according to Article 1:112(1) (Remedies for Breach of Duties of the Service Provider).

Comparative Notes

1. *General standard of care*
   In AUSTRIA, ENGLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, SPAIN, PORTUGAL, the treatment provider is held liable insofar as it breached its duty of care *vis-à-vis* the patient. This duty of care is benchmarked by an objective standard set by the law. The Standard of care consists of the care that a reasonable averagely skilled healthcare provider would employ in that circumstance. In addition, the healthcare provider is bound to respect the standards of medical practice (*leges artis*). While in ENGLAND compliance with the standard of care is benchmarked by the execution of the treatment in a fashion that could be accepted by a respectable body of medical opinion (even though minoritary), in AUSTRIA, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, it is benchmarked by the compliance with medical standards and regulations. In a contrasting way, in DENMARK, FINLAND, SWEDEN, *no-fault* patient insurance schemes set up the compensation regime, which will compensate injured patients insofar as the treatment was carried out below the care that would be expected from a specialist treatment provider, or in DENMARK and SWEDEN if, in hindsight, an alternative treatment technique existed, and had it been employed, would not have probably caused the injury to the patient.
   No information from BELGIUM, IRELAND, LUXEMBURG, SCOTLAND.

2. *Modulation of the standard of care*
   It is unanimously considered that the standard of care cannot be lowered below the level of the average treatment provider.
   Regarding the increase of the standard in case of specialised medical treatment, there are several solutions given by the different legal systems. In AUSTRIA, ENGLAND, GERMANY, THE NETHERLANDS, SPAIN, PORTUGAL, the standard of care is raised if the treatment provider is a specialist. It is raised to the standard of a reasonable averagely skilled specialist treatment provider. On the other hand, in FRANCE and ITALY, the standard of care is not raised by expertise. It is unclear if expertise raises the standard of care in GREECE. In DENMARK, SWEDEN the standard for all medical treatment is that of a specialist treatment provider, and in FINLAND that of an experienced treatment provider.
   No information from BELGIUM, IRELAND, LUXEMBURG, SCOTLAND.

3. *Standard of care in medical experimentation*
   In the different countries analysed, the law provides different solutions to the standard of care in medical experimentation. In FRANCE, ITALY, SPAIN and SWEDEN the standard of care set by the law does not change. In THE NETHERLANDS the standard is the same, though the treatment provider would not be responsible for the materialisation of an unforeseen risk. In AUSTRIA, ENGLAND and GREECE, especially due

to the influence of ethics committees, the standard of care is, in practice, more stringent. In GERMANY the standard of care is not raised, though a cost-benefit analysis must be carried out and have a positive outcome so that the clinical trial is allowed. In addition, insurance is compulsory. Finally, in PORTUGAL there is strict liability and compulsory insurance in case of experimental treatment.
No information from BELGIUM, DENMARK, FINLAND, ITALY, LUXEMBURG, SCOTLAND.

4. *Burden of proof allocation*
In AUSTRIA, ENGLAND, FRANCE, GREECE, ITALY, THE NETHERLANDS, PORTUGAL, SPAIN, the patient bears the burden of proof of the breach of standard of care by the treatment provider, the link of causation between the treatment and the injury in damages. In ENGLAND, the patient must discharge his burden of proof even if the treatment provider deviated from approved medical practice. In ITALY, GERMANY, GREECE, PORTUGAL and SPAIN the burden of proof can be facilitated or shifted in exceptional circumstances. In THE NETHERLANDS the treatment provider has a duty to help the patient to substantiate her claim in a court of law. In DENMARK, FINLAND and SWEDEN the patient insurance consortium investigates and handles claims of its own motion.
No information from BELGIUM, GERMANY, IRELAND, LUXEMBURG, SCOTLAND.

5. *Standard of care in unconventional treatment*
Though information on this issue is scarce, in FRANCE, THE NETHERLANDS and PORTUGAL, the standard of care expected from an unconventional treatment provider is the general standard of care of a conventional medical treatment provider.
No information from: AUSTRIA, BELGIUM, DENMARK, FINLAND, IRELAND, GERMANY, GREECE, ITALY, LUXEMBURG, SCOTLAND, SPAIN, SWEDEN.

6. *No-fault compensation/strict liability regarding medical accidents. Development prospects, case law, law commissions, literature, medical/patient/insurance lobbies, etc.*
DENMARK, FINLAND, ICELAND and NORWAY operate no-fault patient insurance schemes. In FRANCE, there is strict liability in some cases, and there is a compensation mechanism of serious treatment accidents, irrespective of fault, under the principle of solidarity. In SPAIN there is an ongoing shift towards objective liability regarding medical injury in hospitals. In ITALY there is an almost strict liability for routine treatment. In PORTUGAL liability is strict if high-risk equipment is used, or in case of experimental treatment. In ENGLAND and THE NETHERLANDS the adoption of a no-fault compensation system has been debated by the competent public authorities, though in ENGLAND the decision was not to adopt it.
No information: AUSTRIA, BELGIUM, GERMANY, GREECE, IRELAND, LUXEMBURG, SCOTLAND.

National Notes

1. *General standard of care*

AUSTRIA The law on doctors enshrouds the standard of care in wide and vague terms. Art. 49(1) refers to a diligent treatment whereby the doctor has to act according to the insights of science, experience, and existing regulation in order to protect both the sick and the healthy. The following paragraphs state that a doctor has to practice his profession personally and directly, however, allowing for the possibility of assistance under his directions or transfer to specialists. In general, everyone has to comply with the ordinary degree of care and attention (CC art. 1297). Now CC art. 1299 raises that (standard) level of diligence up to the usual degree of care and attention that is necessary for the task/job in question. The criterion for establishing what amounts to a bad treatment consists of a comparison of the actual behaviour and the course of action of a reasonable and diligent expert *(massgerechter Fachmann)*. In other words, the treatment in question is assessed against the background of (hypothetical) standards of a profession *(Leistungsstandard der betreffenden Berufsgruppe)*. What exactly these standards were depends on the circumstances of the case, mainly the contractual relationship and the necessary diligence according to art. 1299. Nonetheless, one can establish beyond feasible doubt that a doctor is not obliged to live up to the highest standards of his profession. He merely has to possess the knowledge of an average expert in his field. Case law, Codes of Conduct *(Standesregeln)*, and expertise can help in assessing the skills and expertise required by the medical profession.

DENMARK In public medical practice, the patient is entitled compensation for treatment injury regardless of fault, according to art. 2 PIA, provided that injury was avoidable. There are two main rules to ascertain avoidability *(oundviklighetskriteriet)*: the "Specialist Rule" *(specialistregeln)* and the "Alternative Rule" *(alternativregeln)*. According to the first rule, injury is eligible for compensation if, had the patient been treated by best specialist care. In Vestre Landsrets dom af 7 November 2001 (7 afd, B-2023-98), a patient underwent surgery in a provincial hospital and suffered paralysis in a foot. It was acknowledged that, had the patient been operated in a neurosurgery department of a central hospital, specialist care would have presumably avoided the injury. According to the "Alternative Rule", if 1) in hindsight *(facitræresonementet)* it is acknowledged that if another existing equivalent alternative treatment was available, and had the alternative treatment be performed instead of that causing the injury, the patient would not have suffered said injury. Cf. Eyben, Domstols afgørelser efter patientforsikringsloven. In De første 10 år. I anledning af Patientsforsikringens 10 år jubilæum i 2002, 29; Erichsen, The Danish patient insurance system. Medicine and Law, p. 360; Grünfeld, De nordiske patientforsikrings ordninger-ligheder og forskelle. In De første 10 år. I anledning af Patientsforsikringens 10 år jubilæum i 2002, 76.

ENGLAND In England this is an objective standard (Lord MacMillan at 457 in *Glasgow Corporation v. Muir* [1943] AC 448: 'The standard of care is objective and impersonal in the sense that it eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question). Breach of duty is tested by the 'standard of the ordinary skilled man exercising and professing to have that special skill' (McNair J. in *Bolam v. Friern* H.M.C. [1957] 1 WLR 582, 586.) This test does not demand an optimal level of care from the professional, just the ordinary skill of an average practitioner. Thus the treatment provider will not be held

liable insofar as he acted 'in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular area (…) a men is not negligent merely because there is a body of opinion who would take a contrary view' (*Bolam v. Friern* H.M.C. [1957] 1 WLR 582, 586). The doctrine of *Bolam* was confirmed by further case law: *Whitehouse v. Jordan* [1981] 1 AllER 267, [1981] 1 WLR 246 (HL); *Maynard v West Midlands RHA* [1985] 1 AllER 635. Cf. (Kennedy and Grubb, Medical Law, p. 416); (Brazier, Medicine, patients and the Law, p. 71); (Grubb in Markesinis and Deakin, Tort Law, 1999, p. 268). The conformity with the standard of care, the generally accepted medical practice, is evaluated by healthcare professionals. This is criticised, as 'experts may blind themselves with expertise'. Cf. (Montrose, Is negligence an ethical or a sociological concept?, p. 259). This author considers that treatment providers should be held liable for failure to take precautions against risks known to the profession, or reasonable risks. *Since Bolitho v. City and Hackney* HA (1993) 13 BMLR 111(CA), expertise can be overruled if the court decides that treatment, in spite of being executed according to generally accepted practice, unreasonably and unnecessarily puts the patient to risk. Cf. Kennedy and Grubb, Medical Law, p. 441.

FINLAND According to art. 2(1) PIA, compensation is allowed to a patient suffering from an avoidable injury, providing that an experienced healthcare provider would have examined, treated or taken other similar action in respect of the patient in another manner and would thereby probably avoided the injury. Cf. Pichler, Arzthaftungsdynamik versus alternative, verschuldensunabhängige Entschädigungssysteme. in Laufs et al. (eds.), Die Entwicklung der Arzthaftung, p. 338.

FRANCE Since 1936 the *Cour de cassation* considers that a doctor is in principle under an obligation of means, Cass.civ 20 May 1936, *arrêt Mercier,* D.P. 1936 1, 88 concl. P. Matter; rapp. L. Josserand; note E.P.; S. 1937, 1, 321, note A. Breton: "the contract between the doctor and his patient involves] for the doctor, the obligation, not to cure the patient, but to give him a treatment, not ordinary but conscientious, scrupulous and, if there are no exceptional circumstances, conform to the knowledge of the science". Since that date the case law used always the same expression to describe the obligation of the doctor. Recently the "knowledge of the science" has become "the actual knowledge of the science". It seems that this has no consequences: the *Cour de cassation* only stresses on the obligation for the doctor to keep himself informed of the evolution of the medical science.

ITALY The criterion to judge the activity of the treatment provider is the professional diligence (CC art. 1176 para. 2). The doctor has to exercise a diligence, which is superior to the one of the ordinary family father (CC art. 1176 para. 1). Therefore, his performance will be compared to the one of a professional with a medium preparation and attention. As all professional, the treatment provider will have to be updated and therefore follow a continuous professional formation. He has in fact to adapt his knowledge to the scientific clinical progress. The criterion of this higher standard of diligence is however mitigated by CC art. 2236, which, in relation to problems of difficult solution, requires the professional only to respond for fraud or grave fault. Moreover, a restriction derives from the identification of an obligation of means (and not of result) upon the provider. The distinction between an obligation of means and an obligation of result regards the 'measure' of the liability (G. Alpa, La responsabilità medica, in Riv.it.med.leg., 1999, fasc. 1 (February), p. 19). The question is whether it is sufficient to have employed the necessary means required by the professional diligence,

or if in any case there has to be the integral satisfaction of the interest of the creditor. Briefly, the question is whether the criterion of evaluation of the behaviour is represented by the best endeavours or by a specific result. While doctrine has refused such a distinction, introduced upon influence of the FRENCH doctrine and FRENCH case law (Giorgianni, V° Obbligazioni (teoria gen.), Nov.Dig.it., XI, Torino, 1965, pp. 581), case law has accepted it in relation to specific cases, such as doctors. While some doctrine continues to repudiate such distinction (C.Vincenzo, Sviluppi ed orientamenti della responsabilità professionale medica nei confronti dell'embrione, in Danno e responsabilità, 2000, fasc. 12 (December), pp. 1173-1175; Carusi, Responsabilità del medico e obbligazioni di mezzi, in Rass.dir.civ., 1991, pp. 485 ff.; Fortino, La responsabilità civile del professionista, Milano, p. 42 ff), some part of the scholarship considers the distinction useful in relation to the burden of proof.

GERMANY Liability for treatment injury can be either contractual, as the contract for medical treatment *(Arztvertrag)* is considered as a contract for services *(Dienstvertrag)* regulated by CC arts. 611-630) or tortious *(Rechtswidrige Körperverletzung)* as of CC art. 823 I. Cf. Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 97. A treatment provider is held liable insofar as it committed a treatment error *(Behandlungsfehler)*. A treatment error is equivalent to breach of standard of care which is objective *(Gruppenfahrlässigkeit)*. According to this standard, the treatment provider must act according to the care expected from the skills and abilities expected from its profession. The standard is thus that of an average treatment provider of its profession, acting according to accepted medical practice *(Stand der medizinischen Wissenschaft)*. Cf. Gehrlein, Leitfaden zur Arzthaftpflicht, p. 32; Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 99. Standard of care is set in court with the help of medical expertise (BGH NJW 1999,1778; 1999,863; 1995,776).

GREECE The standard of care is defined with reference to the qualities that a reasonably skilled representative of the profession is expected to possess. Medical treatment must abide by the generally accepted rules of medical science and medical practice. A doctor must provide a *lege artis* treatment, though in most cases the obligation is not one of result, but rather one of means Katerina Foundedaki, 182, 185-6; for general standard of care in contract and tort law see CC arts. 330 and 914; also article 8 Consumer Protection Law 2251/1994; in addition, article 24 code for the exercise of the medical profession (1565/1939)].

THE NETHERLANDS The leading case on the determination of the standard of care is the case of Speeckaert/Gradener, HR 9 November 1990, NJ 1991, 26. In this case it was established as a deciding criterion "the care that may be expected of a reasonably skilled and reasonably acting specialist". CC art. 7:453 is to the same extent. The article reads as follows: 'The provider of the service, in the execution of his business, has to comply with the care of a good provider of the service, and acts in accordance with the responsibility he bears, arising from his professional standard.' From the wording of the article, it may appear that not the care of a *reasonably* skilled professional, but the (higher) skill of a *good* professional is the criterion. However, according to parliamentary history, introduction of the criterion 'good provider of the service' is not meant to change standing case law at this point. Cf. H.TK. 1989-1990, 21 561, no. 3, p. 33. See also Sluyters and Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, 1995, p. 57. However, if the present standard of the profession is deemed below what is acceptable, the court may impose a higher stan-

dard. The standard of care is influenced by the protocols, guidelines, standards and codes of conduct that have been drafted by organisations of providers of the service. The *Hoge Raad* recently decided that when a doctor ignores the procedures introduced in a protocol that was agreed upon by the group of doctors to which the doctor in question belongs, whereas the derogation of the protocol was not based on a concrete evaluation of the patient's best interests, the doctor has in fact breached the standard of care. Cf. HR 2 March 2001, NJ 2001, p. 649 note F.C.B. van Wijmen and JMBV (Medisch Centrum Leeuwarden e.a./H.)

POLAND The standard of care for doctors is set according to CC art. 355 para. 2. It is very much underlined that due to the subject of their performance, which is a human being, and the possible irreversible consequences of the defective treatment, a higher standard of care should be required. (Nesterowicz, Glosa do wyroku SN z dnia 1 grudnia 1998 r, II CKN 741/98, Prawo i Medycyna, 2000, nr 6-7, 163). On the other hand the Appeal Court in Warsaw, in its judgement of 3. 3. 1998 (1 Aca 14/98, Wokanda 10/1998, stated that the general high standard of care required from doctors does not equal to imposing obligations which are practically impossible to perform and accepting a risk-based liability.

PORTUGAL Liability is fault-based (Tort: CC art. 483; Contract: CC art. 798 ff). The treatment provider must act like a competent, wise and sensible qualified treatment provider (objective/abstract criterion) according to the circumstances (subjective/concrete criterion): *lex artis ad hoc*. Cf. CC art. 487 para. 2; CA Lisboa, 27 October 1998; STA 13 July 1993; Sinde Monteiro, Veloso, Cases on Medical Malpractice in a Comparative Perspective, p. 176; Sinde Monteiro, Figueiredo Dias, Responsabilidade médica na europa ocidental. Considerações de lege ferenda. Scientia Ivridica, 1984 p. 23; Dias, Procriação Assistida e Responsabilidade Médica 1996, 29.

SPAIN The "*lex artis ad hoc*" is the criterion to determine the required standard of care for the medical service provider. The diligence required by the *lex artis* is the average skill that a competent medical treatment provider would observe in a similar case in accordance with the rules of the profession, although taking into consideration the specific circumstances surrounding the case (nature of the obligation, time and place where the obligations are to be fulfilled, characteristics of the provider). (STS 11 March 1991, RJ 1991, 2209). All medical service providers must act with the average skill and competence as determined by the "*lex artis ad hoc*". The majority of the doctrine defends that the obligation of due diligence is to be established with minimum terms of generality, flexibility and objectivity and not in an individualized manner (Martín J.M. Martín Bernal, Responsabilidad médica y derechos de los pacientes, Madrid, 1998, p. 285). The general standard of care required in the provision of medical treatments (lex artis) is to be considered in accordance with the specific circumstances of the case (lex artis ad hoc): nature of the obligation, means available to carry out the treatment, time and place where the obligations are to be fulfilled, characteristics of the provider. The same approach is taken by CC art. 1104 regarding the diligence of the good father.

SWEDEN According to PL art. 6, compensation from the Patient damage insurance cover personal injury on a patient if it is predominantly probable that the injury was caused by: examination, care, treatment or other similar measure, if the injury could have been avoided either through another execution of the chosen measure or through the choice of another available procedure that according to a later judgement from a

medical point of view would have satisfied the need of medical care in a less risky way; defects in a medical technical product or hospital equipment used for examination, care, treatment or other similar measure or the improper use thereof; wrong diagnosis; the transfer of contagion leading to infection, connected to examination, care, treatment or other similar measures; accidents connected to examination, care, treatment or other similar measures or during the transportation of the patient or connected to fire or other damage to the premises or equipment or prescription or distribution of medicines against regulations and instructions. As for the first and the third situations, the standard of care of an experienced specialist or other experienced practitioner shall be applicable. PL art. 7 contains some exceptions to the general rule, namely that no compensation will be given if the injury was a consequence of a necessary procedure for diagnosing or treating a disease or injury that without treatment would be directly life threatening or would lead to a major disability, or if the injury was caused by medicine in other cases than mentioned in art. 6 (6). Such injury caused by medicine is covered by the medicine insurance, *läkemedelsförsäkringen*, the counterpart to the PL when it comes to compensation of damage caused by medicines.

2. *Modulation of the standard of care*

AUSTRIA It is interesting to notice that art. 1299 introduces an objective standard as regards the question of fault whereas – basically – on has to judge upon the subjective skills of a person. As a result an expert might be held liable even if he is not to blame for he did not possess the knowledge necessary for the task/job. The reasoning behind that G*arantiehaftung* can be described as follows: everybody should be able to confide in the fact that an expert has the skills and expertise his task/profession requires. Against that background it becomes clear that the standard of care cannot simply be lowered just because the patient knew of that factor (and as an implied requirement, consented to the treatment). As soon as a doctor fails to live up to the standard of care that is required from his respective branch of the medical profession he is liable.

DENMARK The standard set up by the PIA in the "specialist rule" is that of the best specialist medical care.

ENGLAND A Specialist physician is bound by a more stringent duty of care, i.e. it must act with the diligence of an average competent specialist in that field of medicine (Lord Scarman in *Maynard v. West Midlands* RHA [1985] 1 AllER 635; *De Freitas v. O'Brien* [1985], 6 Med LR 108). On the other hand, normally inexperience is not a valid defence (*Nettleship v Weston* [1971] 2 QB 730, [1986] 3 AllER 801; *Wilsher v. Essex AHA* [1987] QB 730, [1986] 3 AllER 801). In the latter case, Glidewell LJ pointed out that inexperienced junior doctors must seek the help of more experienced colleagues. However, often injury to patients occours because of problems in supervision of intern doctors (*R. v Prentice and another, R. v. Adomako, R. v. Holloway* [1993] 4 AllER 935). Cf. Kennedy and Grubb, Medical Law, p. 418.

FINLAND The standard set is that of an experienced treatment provider.

FRANCE The standard of care is always the same in spite of the difference of competence of the doctor. The criterion established in 1936 is always applied in the same way. The contracting parties can however agree on a different standard of care. If it can hardly lowered because of the prohibition of limitation terms, they can raise the standard of care or even promise a result. But it seems that such terms are not stipulated in practice.

GERMANY The general practitioner, the specialist physician and the hospital physician must each follow the standard set for their respective areas (Gehrlein, Leitfaden zur Arzthaftpflicht, p. 33; BGH NJW 1998, 814; BGH NJW 1991,1535; BGH NJW 1996, 779; BGH NJW 1987, 1479; BGH NJW 1984, 655; BGH NJW 1997,3090; BGH NJW 1991, 1535).

GREECE The average skilled doctor sets the standard of care required. For obvious reasons, in the medical services a standard of care below that level is unacceptable. The standard of care is not lowered in case of an inexperienced doctor despite the fact that the patient may be aware of that fact. Further on, the standard of care may not be lowered in case of experimental treatment. The latter only imposes heavier duty upon the doctor to inform extensively the patient about the nature of the treatment and the risks associated with it and to obtain a fully informed consent. Also, in case a doctor may possess exceptional skills or be an authority in his field the standard of care seems not to be raised to the height of exceptional individual standards. In such case the standard of care will remain that of a reasonably skilled representative who might be an expert or a specialist in a particular field, depending on the circumstances.

ITALY The same standard of care, the minimum set forth in CC art. 1176 applies.

PORTUGAL The standard of care may be increased if a doctor is a specialist. Cf. Sinde Monteiro, Veloso, Cases on Medical Malpractice in a Comparative Perspective, p. 176; CA Évora, 3 October 1996.

THE NETHERLANDS Inexperience is not an excuse: each doctor has to live up to the standard of care of his profession. Cf. Asser [*-Hartkamp*], Verbintenissenrecht, I, no. 336; Parl. Gesch. Boek 6, p. 618 ff; Stolker approvingly cites a decision by the German *Bundesgerichtshof,* in which the BGH states: 'Immer muss der Standard eines erfahrenen Chirurgen gewährleistet sein.' (BGH 27 September 1983, BGHZ 88, 248. Stolker proceeds by remarking that from an inexperienced doctor one might even expect a *higher* degree of care when compared with an experienced doctor who performs an operation that (to him) is somewhat routine. Cf. C.J.J.M. Stolker, Aansprakelijkheid van de arts voor mislukte sterilisaties, 1988, p. 54. On the other hand, if a *more* experienced doctor is involved, occasionally the standard of care may be raised if because of his experience, the doctor must be considered as a specialist. In that case, the criterion is 'the reasonably acting and reasonably skilled *specialist*', as follows from HR 9 November 1990, NJ 1991, 26 (Speeckaert/Gradener).

POLAND The general standard of care is not rigid, and is specification in a given case depends on the qualifications of the doctor (a general practitioner or a high class specialist), and on the hospital (a small hospital in a countryside or a highly specialized clinic). However, certain minimum standard must be observed by all the treatment providers (Nesterowicz, Prawo Medyczne p. 47).

SPAIN Courts and doctrine coincide in qualifying the obligation to provide treatment as an obligation of means (STS 24 April 1994, RAC 879/1994). The diligence required is the diligence imposed by the norms which regulate the medical profession *(lex artis)*, adapting them to the concrete circumstances of the person involved, time and place where the obligation is to be performed, means to execute the service and so on (situation *ad hoc*). Therefore, the medical service provider has to comply with the "*lex artis ad hoc*".

SWEDEN The standard of care applicable to obtain compensation from the PL is objective and hence the patient's knowledge of the inexperience is irrelevant.

3. *Standard of care in medical experimentation*

AUSTRIA On the one hand an experiment denotes that new techniques or untested medication is used. Such a situation 'lowers' the standard of care simply by taking into account unexpected risks, complications, or results. Therefore experiments are pioneer works that cannot be compared to previous conduct. On the other hand one can narrow down the risk inherent in an experiment by setting down strict 'rules of procedure'. Accordingly, a set of severe criteria has to be met in order to get permission to test on human material. Ethic commissions make sure that the research clinics in AUSTRIA are abiding by the rules and that other aspects of the treatment are discussed as well. In that regard the standard of care is somewhat 'raised' since controls are tough. These days, state-of-the-art issues are overshadowed by the obligation to inform *(Aufklärungspflicht)*.

ENGLAND The standard of care is the normal standard, though in practice regulation is stricter due to the influence of Ethics committees. Though the Royal Commission on Civil Liability and Compensation for Personal Injury [1978], sections 1339-1341, recommended strict liability for experimental treatment, no progress was observed in the law. The normal procedure in such claims is an *ex gratia* payment to the patient. Cf. Kennedy and Grubb, Medical Law, p. 1736.

FRANCE The standard of care is always the same in spite of the difference of competence of the doctor. The criterion established in 1936 is always applied in the same way. The contracting parties can however agree on a different standard of care. If it can hardly lowered because of the prohibition of limitation terms, they can raise the standard of care. But it seems that such terms are not stipulated in practice.

GERMANY Art. 40 *ArzneiMittelGesetz* provides for compulsory insurance for experimental treatment. Besides the normal standard of care, the treatment provider must perform a positive cost-benefit balance. The hospital is liable if it fails to control and monitor the experiment. Cf. Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 130.

GREECE The standard of care may not be lowered in case of experimental treatment. The latter only imposes heavier duty upon the doctor to inform extensively the patient about the nature of the treatment and the risks associated with it and to obtain a fully informed consent.

THE NETHERLANDS The doctor would still be bound to perform as a 'reasonably skilled and reasonable acting' doctor. This would mean that the decision to use an experimental treatment would be scrupulously considered. However, it is not impossible that the standard of care *in effect* is to some extent *lowered* if the decision to go ahead with the procedure was sound, since a 'reasonably skilled and reasonable acting' doctor would not know all the dangers related to the treatment either and might, therefore, not be able to foresee and prevent a risk to the treatment from materialising.

POLAND Only doctors with relevantly high qualifications may direct a medical experimentation (The act on the profession of a doctor, art. 23); hence the standard of care in the case of medical experimentation is set on a higher level than the standard of care in a normal treatment.

PORTUGAL Strict liability is imposed in case of experimental treatment, covered by compulsory insurance (art. 14/1, DL 97/94, 9/4). Cf. Oliveira, Temas de Direito da Medicina, p. 199.

SPAIN The *lex artis* ad hoc regarding experimental treatment will indicate the required standard of care. Therefore, current regulations on experimental treatments such us the General Medicines Act are to be complied with.
SWEDEN The medical personnel must perform the treatment in accordance with science and reliable experience, which means that they in some cases could be punished in a disciplinary ruling if this criteria is not fulfilled. However, as for compensation according to the PL, the standard of care is the same in all cases. As stated in PL art. 1:4 the patient can receive compensation if there was another method of treatment, in this case not experimental, that could have been used to avoid the damage. If however there is no established treatment, experimental treatment will probably be accepted.

4. *Burden of proof allocation*
AUSTRIA According to general rules of evidence the patient has to prove both the existence of a defective treatment (resulting in a damage) and the causal link between damage suffered and the doctor's conduct. In other words, the patient as plaintiff has to establish that the coming into being of damage to his health was caused predominantly by the doctor's conduct (*mit überwiegender Wahrscheinlichkeit*). The doctor can then prove the element of fault that is to say that he did not act with fault.
DENMARK The insurance consortium investigates the claim of its own motion. art. 14(8) PFL; Grünfeld, De nordiske patientforsikrings ordninger-ligheder og forskelle. In De første 10 år. I anledning af Patientsforsikringens 10 år jubilæum i 2002, 65, 67.
ENGLAND The patient bears the burden of proof of breach of duty of care (*Hunter v Hanley* 1955 SC 200 (Court of Session), even if the treatment provider deviated from approved practice, though in the latter case the patient's case will be much stronger. Cf. Kennedy and Grubb, p. 453.
FINLAND The insurance consortium investigates the claim of its own motion. Cf. art. 11(b) PSL; Lahti, Towards a comprehensive legislation governing the rights of patients: the Finnish experience. In Westerhäll, L. and Phillips, C., editors, Patients rights: informed consent, access and equality, p. 210.
FRANCE It is, in principle, up to the patient to prove the fault of the doctor. When the obligation of the provider is characterised as an obligation of result, the burden of proof is always on the patient, but the object of the proof is lighter. It is up to the patient to prove the damage he endured, but in practice this does no lead to serious problems, in contrast to the question of causation. It is up to the patient to prove the causation. But, in practice the issue is very complicated and very often an expert is appointed to establish this.
ITALY Case law tends to render the prove of the medical negligence easier by means of presumptions (Trib. Roma, 10 October 1992, in Giur.it., 1992, I, 2, c. 337; Cass. 16 November 1988, no. 6220, in Rep.Giur.it., 1988, V° Professioni intellettuali, no. 49; Cass. 21 December 1978, no. 6141, in Foro it., 1979, I, c.4). In fact, when the treatment is easy to perform, in order to prove the non-performance, the patient only has to outline the (worsening) outcome and the causality link. Therefore also a minor fault is relevant. Such a fault is presumed each time a negative result of the conditions of the patient is ascertained. It is up to the treatment provider to prove the contrary, namely of having adequately and diligently performed and that the outcome is the result of an event, which was unforeseen and unforeseeable by using the normal standard of care

(G. Ferrando, Consenso informato del paziente e responsabilità del medico, principi, problemi e linee di tendenza, in Riv.crit.dir.priv., 1-2 (June) 1998, p. 86). When the performance is of particular difficulty, CC art. 2236 avoids an automatic charge in case of an unsatisfactory result. In fact, the treatment provider will have to prove the complex nature of the treatment, while the patient will have to prove which modalities of the treatment were not the suitable ones. From what just stated, it appears that in relation to the burden of proof as regards the professional diligence of the treatment provider, case law accepts a different solution than what affirmed in the case of proving the defectiveness of the information given (see above). Following come scholarship, the liability of the treatment provider still has to find a definitive framing in doctrine and case law (M. Grazia, Danni da carenza strutturali ed organizzative e accertamento della causalità nella responsabilità medica, in Giur.it., 2000, fasc. 10 (October), pp. 1817-1819, note to Cass. 21 January 2000, no. 632).

GREECE In case the basis of liability is tortious the patient will have to prove the fault of the doctor. However, given a prima facie medical error, the fault -as the subjective element of the subjective error- is presumed. In case of serious medical error it will be significantly difficult for the doctor to rebut this presumption. It is also suggested that in case contractual and tortious liability are concurrent, in both cases the most beneficial contractual rule of reversal of the burden of proof must apply. In case of contractual liability the burden of proof of fault is reversed. That means that the doctor will have to prove the absence of fault. In effect, both in contractual and tortious liability the patient will have to prove the unlawful act, the damage and the causal link between damage and unlawful act, whereas the doctor will have to prove the absence of fault. Though, it seems that the Consumer Act restates the allocation of the burden of proof as described above, in effect a closer look reveals that there is more to it than it seems on first instance. According to paragraphs 3 and 4 of article 8 of the Act, the patient will have to prove the damage and the causal link between damage and the provision of service, whereas the doctor would have to prove the absence of fault. According to the theoretical criticism, the deficiency of the provision is twofold: first, it imposes a very onerous obligation upon the doctor, since the latter will have to prove not only the absence of fault as personal guilt but also that the service was not unlawful, that a duty was not breach. On the other hand, the patient will need to prove the causal link between the provision of the service and the damage caused. Apart from any other complications that may arise from the fact that the rule does not focus on the adequate cause of the damage which is the medical error but on the provision of the medical service and the different interpretations this may cause, the duty of the patient as such to prove the causal link is extremely onerous due to the intrinsic difficulties such a proof presents in case of medical errors.

THE NETHERLANDS First of all, claims regarding facts that have not been disputed by the other party are deemed proven. Cf. I. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 22, referring to art. 149 (ex art. 176) Rome Treaty. Hence, if the doctor 'forgets' to dispute any of these elements, they 'are' proven. If a claim is disputed, art. 150 (ex art. 177) Rome Treaty applies, according to which he who claims, bears the burden of proof to sustain his claim, unless another distribution of the burden of proof follows from the law or is dictated by the requirements of reasonableness and equity. However, the doctor has to supply sufficient information to substantiate his dispute of the patient's claim, in order to provide the patient with a starting-point to prove his claim. Cf. HR 20

November 1987, NJ 1988, 500, note WLH (Timmer/Deutman); HR 7 September 2001, NJ 2001, 615 (R. and B./Stichting Ignatius Ziekenhuis). In order to fulfill this 'duty to substantiate', the doctor must – as precise as possible – give account of what has happened during the treatment, and hand over the data of which, as a doctor, he has the possession. The patient can then prove his claim by proving or making plausible that the facts stated or data provided by the doctor are incorrect. Cf. HR 7 September 2001, NJ 2001, 615 (R. and B./Stichting Ignatius Ziekenhuis). This principle could also apply to the question of causation. Cf. I. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, pp. 49 and 110. What and how much data and detail the doctor must provide, is also depending upon the time that has passed since the treatment: the doctor cannot be expected to remember every detail of an operation that took place years ago. This has been recognised as well by the Hoge Raad in its ruling of 7 September 2001, NJ 2001, 615 (R. and B. v. Stichting Ignatius Ziekenhuis).

POLAND The patient must prove the basis of its claim, including the fault of the doctor. The doctor should prove that he fulfilled his obligations properly and that he acted according to the rules of the medical knowledge (Nesterowicz, Prawo Medyczne p. 51-52)

PORTUGAL In Tort, the treatment provider bears the burden of proof of fault and causation (CC 487 para. 1). In Contract, while the debtor's fault is in principle presumed CC art. 799 para. 2), an obligation to treat is usually considered to be an obligation of means, and as such the presumption of fault of the debtor does not apply, cf. CA Coimbra, 4 April 1995; CJ XX-1995,II, 31. The obligation to treat may be considered as an obligation of result in the following circumstances: by agreement of the parties; by operation of a legal provision or depending upon the nature of the obligation (prosthesis, routine surgery, aesthetic interventions. There is an obligation of result in case of organisational fault of hospital (STA 17 June 1997; AD XXXVII-1998). *Res ipsa loquitur* may shift burden of proof to the treatment provider (CC arts. 349 ff). Cf. Sinde Monteiro, Figueiredo Dias, Responsabilidade médica na europa ocidental. consideracões de lege ferenda. Scientia Ivridica, 1984, p. 23; Sinde Monteiro, Veloso, Cases on Medical Malpractice in a Comparative Perspective, p. 176.

SPAIN The patient-plaintiff has to prove the negligent behaviour of the treatment provider and the causation link between the medical act and the damage suffered. The patient has to prove the damage, the causal link between the medical act and the damage and the negligence by the medical provider. It has shown to be very difficult for the patient to prove such extremes, since the information of the treatment is maintained and kept by the medical provider *(prueba diabólica)*. On a case by case basis, courts have applied less strict evidence requirements by accepting mere circumstantial evidence or apply judicial presumptions of facts cf. SAP Madrid 5 October 1995, RACa 421/1996. The General Consumers Act 26/1984 of July 19th (*Ley General de Consumidores*, LCU) provides a more objective system. The patient has recourse to the actions contained in arts. 25 and 26 LCU. In art. 25 the client *(usuario)* has the right to be indemnified for the proven damages caused by the service provider, unless the damage is caused exclusively by the client or third persons under its responsibility. Through art. 26, actions or omissions by service providers which cause damage to the clients, will give raise to liability of the provider, unless it is proven that the provider has complied with the regulatory provisions and with the diligence required for the type of activity provided. These issues are often very difficult for the patient to prove

since he lacks the technical knowledge and the medical records are in the hands of the medical provider. This has led courts in some cases to accept indications of evidence to held the medical provider responsible. The medical provider is obligated furthermore to provide all medical records for the patient to be able to support his claim, and when such is not the case, the courts presume that there is negligence and causation link and it is for the medical service provider to prove the contrary (A. E. Vilalta, R.M. Méndez, Responsabilidad Médica, Barcelona, 1999, p. 18).

SWEDEN As for the PL, it is the duty of the insurance consortium to investigate the case. While establishing the causal link between the treatment and the damage, it is sufficient that it is more probable that the damage was caused by the treatment than by something else, Hedman, Ansvar och ersättning vid medicinsk verksamhet, p. 85. However, when it comes to fulfilling the requirements for compensation, the patient bears the risk, and in this aspect the burden of proof rests upon the patient. Finally, it is important to remember that the PL does not require a breach of the standard of care for the patient to obtain compensation. It is for example sufficient that the damage could have been avoided through the choice of another method of treatment, even if the treatment actually chosen was performed perfectly. As for claiming damages according to the SkL, the patient has the burden of proof for all categories mentioned above.

5. *Standard of care in unconventional treatment*

FRANCE A differentiation is generally not made.

THE NETHERLANDS The *Hoge Raad* ruled that patients that turn to a regular doctor who also provides 'alternative' medicine, may expect that such a doctor does not neglect what is necessary for a medically sound diagnosis and treatment. The 'alternative doctor' therefore has to live up to the normal standard of care. HR 6 December 1996, NJ 1998, 543, note F.C.B. van Wijmen (B./Inspecteur Gezondheidszorg Utrecht en Flevoland). See also H.D.C. Roscam Abbing, Alternatieve beroepsuitoefening: een gezondheidsrechtelijke plaatsbepaling, Nederlands Tijdschrift voor Geneeskunde, p. 287, with references to case law of disciplinary courts. For providers of other medical services, the notion of 'a reasonably acting and reasonably competent' provider does apply, either on the basis of CC art. 7:453 if the contract is to be qualified as a treatment contract, or on the basis of CC art. 7:401 insofar as not the specific rules on treatment, but the more general rules on services in general apply. In essence, the notion in both articles amount to the same. Still, in principle, the criterion is the reasonably acting and reasonably competent of that specific service.

POLAND Assuming that the unconventional treatment is provided by a doctor, the same standard of care applies. In such case, if the risks associated with the treatment are higher, the doctor is obliged to inform the patient about it and obtain a written consent of the patient for the treatment.

PORTUGAL As unconventional treatment is not regulated by law, there is a risk that the standard of care would be appreciated by courts in light of sound conventional medical practice. However, Law proposal (Projecto de Lei no 27/IX, 23 May 2002, BE, not approved), art. 11/4 mentioned that standard of care ought to be assessed within the *leges artis* of the concrete unconventional treatment discipline.

6. *No-fault compensation/strict liability regarding medical accidents. Development prospects, case law, law commissions, literature, medical/patient/insurance lobbies, etc.*

DENMARK The PF establishes a no fault system for treatment performed in public hospitals.

ENGLAND The Pearson Commission (Royal Commission on Civil Liability and Compensation for Personal Injury [1978]), arts. 1325 ff concluded in art. 1370 for not recommending the introduction of a no-fault compensation system in the UK for the time being, notwithstanding the consideration that such a decision could be reviewed in the future, if such systems overseas prove to be successful and introduceable in the UK.

FINLAND The PSL establishes a no-fault system.

FRANCE A part of the legal doctrine is in favour of imposing an obligation of result to the doctor in particular situations at least (Mellenec, Le responsabilité médicale doit être fondée sur la notion de risque, Rev.dr.sanit.soc, 271. Especially, J. Penneau, Faute et erreur en matière de responsabilité médicale, diss., no. 392). The arguments taken into consideration are the progress of the medical science, the use of sophisticated devices and the need of compensation of the victims. These arguments lead the case law to impose in some situations a doctor or a hospital an obligation of result. An obligation of result exists in three situations: analysis (Cass.civ I, 4 January 1974, Bull.civ. no. 4; RTD civ. 1974, 822 obs. Durry) and easy operations very often performed, such as an injection (Cass.civ I, 17 June 1980, Bull.civ. I no. 187, RTD civ. 1981, 165 obs. Durry; CE 23 February 1962, *Meier,* Leb. p. 122; CE 22 December 1976, *Dame Derridj,* JCP 1978.II.18792, note J.-M. Auby). Diseases contracted in the hospital (see above). The quality of a prosthesis (Cass.civ I, 15 November 1972, D. 1973, 342; RTD civ. 1974, 160, obs. Durry; Cass.civ I, 22 November 1994, RTD civ. 1995, 375 obs. Jourdain; for a denture). A very large debate is taking place in the very recent time in FRANCE to determine whether or not it is desirable to compensate the "*aléa thérapeutique*". This can be defined as a foreseeable damage, but the realisation of it is uncertain and cannot be prevented by the doctor. For example there is always a (tiny) chance to contract AIDS in spite of the efforts of screening of the centre of blood transfusion, there is always a chance that the anaesthesia goes wrong in the absence of the fault of the doctor… Is it, in these situations in which the doctor committed no fault, desirable to compensate the damage endured by the patient? The legal doctrine is divided and the positive law do not have a general approach of this issue. If the "*aléa thérapeutique*" is compensable in the occasion of transmission of AIDS by blood products (Cass.civ I, 12 April 1995, JCP 1995.II.22467, note P. Jourdain; CCC 1995, chr. no. 9, L. Leveneur; D. 1996, 610, note Lambert-Faivre; CE 26. 05. 1995, N'Guyen, Jouan, cons. Pavan, JCP 1995.II.22468, note J. Moreau; RFDA 1995, 748, concl. S. Daël.), the other situations are less clear. More generally, the *Conseil d'Etat* (the supreme administrative Court) ruled in 1993: "When a medical act, necessary to the diagnosis or the treatment of the patient involves a risk which existence is known but the realisation is exceptional and if no reasons allow to consider that the patient is particularly exposed, the hospital public service is liable if the performance of the medical act is the direct cause of the damage which has no connection with the initial situation of the patient or the foreseeable evolution of it and is of an extreme seriousness" (CE, Ass., 9 April 1993, *Bianchi,* D. 1993, 313, concl. H. Legal; JCP 1993.II.22061, note J. Moreau). By that case the *Conseil d'Etat* established the conditions of compensation of the *aléa thérapeutique*. Those conditions are quite restrictive. The *Cour de*

cassation has rejected this same position (Cass.civ I, 8 November 2000, Bull.civ. I, no. 287; JCP 2001.II.10493, rapp. Sargos, note Chabas), Even if lower civil Courts did follow the position of the *Conseil d'Etat* (CA Paris, 15 January 1999, JCP 1999.II.10068, note L. Boy). The solution is now to be found in article L. 1142-1 II of the Code de la santé publique. In the hypothesis of the *Bianchi* case, the damage is compensated not by the treatment provider but by health insurance *(réparation du préjudice au titre de la solidarité nationale)*.

ITALY In no case one can configure an objective liability of the doctor (G. Alpa, La responsabilità medica, in Riv.it.med.leg., 1999, fasc. 1 (February), p. 24), although in case of routine medical situations the liability is very close to the objective one.

ICELAND: A no-fault system exists: Act on Patient Insurance no. 111/2000

THE NETHERLANDS The Swedish 'no-fault-system' has been in the picture of Dutch law for quite some time. In 1989, the then National council for public health *(Nationale raad voor de Volksgezondheid)* advised against introducing such a system in THE NETHERLANDS because it was considered too costly and that it could lead to a lesser commitment of the health provider if claims were made not against the health provider, but against a public authority. Moreover, it was argued that such a system led to standardised compensations in stead of full damages, whereas one would normally prefer a real compensation that covers all of the sustained damage. Cf. Bijl. H.TK. 2001-2002, no. 14 (Parliamentary proceedings regarding the governmental discussion paper 'Choosing with care' *(Met zorg kiezen)*, pp. 26-27. Since then, the opinion has slow become more favourable towards the no-fault system. In 1990, W.R. Aerts, De Zweedse no-fault verzekering ter vergoeding van medische schade, in: M. Van Delft-Baas and E.H. Hondius (eds.), Jaarboek Konsumentenrecht, pp. 271-272, considered the advantages attached to a no-fault-system to be evident, since it gives patients easier access to damages and it leads to a simple, orderly and speedy procedure, as well as cost-efficient system. In 1994, in the course of the parliamentary proceedings regarding the *Wet klachtrecht cliënten zorgsector* (Law on the right to complain for clients in the caresector), it was agreed that research regarding the consequences of a no-fault-system was needed. In a 1995-report from the National Ombudsman on the contagion of haemophiliac patients with HIV, a no-fault-compensation-system was held appropriate for defective blood products. The Minister for Public Health, supported by a 1997 report from the then Board on Blood transfusion *(College voor de Bloedtransfusie)*, announced in 1999 that she did not think that there was justification on principle to introduce a no-fault-system only for the victims of defective blood products. She therefore requested *ZorgOnderzoek Nederland* (ZON) to do comparative legal research on the advantages and disadvantages of such a system and of the existing system. Cf. Bijl. H.TK. 2000-2001, 27 436, no. 1, pp. 13-14. The report of ZON has not yet been published. On 26 March 2002, the Second Chamber of Parliament therefore accepted a motion, claiming that such a system could lead to a fairer and affordable system of compensation, that requested the government to examine various variants of a no-fault-system and to report back to Parliament before the summer of 2002. Cf. Bijl. H.TK. 2001-2002, 27 807, no. 8 and H.TK. 60-4082.

NORWAY: In Norway a no-fault compensation system is due to enter in force by January 1, 2003 (Lov 15 juni 2001 no. 53 om erstatning ved pasientskader).

POLAND Until 2001 (when the Constitutional Tribunal repealed CC art. 419) compensation regarding medical accidents in a situation when there was no possibility to

attribute fault to the doctor or to the hospital could be granted on the basis of rightness. At the moment it is uncertain whether the new CC art. 417^2 could be used as the basis for liability for medical accidents on the basis of rightness (Filar, Odpowiedzialność lekarzy i zakładów opieki zdrowotnej, p. 57).

PORTUGAL There is strict liability in case of experimental treatment (art. 14/1, DL 97/94, 9/4). Cf. Oliveira, Temas de Direito da Medicina, p. 199; use of equipment hazardous by nature (e.g. X-Ray equipment).

SPAIN The current tendency moves towards imposing objective liability in accordance with the General Consumers Act. However, this approach is quasi exclusively accepted when there is a medical institution involved, in order to guarantee that the patient is indemnified. The majority of the doctrine rejects such objectivity when the claim goes against the doctor or medical treatment provider. SAP Cantabria 3 June 1992 (RAC 433/1992): "an objective liability may be imposed to an Institution belonging to the Medical Public System because it guarantees that the victim will be indemnified, but not to a concrete professional because it has an impact of the legal rights of the medical provider".

SWEDEN The Scandinavian system is in principle a no-fault system. The PL does not require a breach of the standard of care for the patient to obtain compensation. It is for example sufficient that the damage could have been avoided through the choice of another method of treatment, even if the treatment actually chosen was performed perfectly.

Article 7:105: Duty to Inform of the Treatment Provider

(1) The treatment provider must, in order to give the patient a free choice regarding treatment, and in a way understandable to the patient, in particular inform the patient about:
  (a) the patient's health status;
  (b) the nature of the proposed treatment;
  (c) the advantages of the proposed treatment;
  (d) the risks of the proposed treatment;
  (e) the alternatives to the proposed treatment as well as their advantages and risks as compared to those of the proposed treatment; and
  (f) the consequences of abstaining from any treatment.

(2) The treatment provider must, in any case, inform the patient about any risk or alternative that may reasonably influence the patient's decision on whether to give consent to the proposed treatment or not. A risk is presumed to be capable of influencing that decision if its materialisation leads to serious detriment to a patient in that situation. Unless otherwise provided, the duty to inform is subject to the provisions of Chapter 6 (Information).

Comments

A. General Idea

This Article deals with the duty that the treatment provider has to inform the patient (or whoever takes decisions on his behalf in some circumstances). Information is to be disclosed in order to allow the patient an informed choice regarding treatment and obtain its informed consent.

With regard to the patient's autonomy, the treatment provider is under an obligation to disclose, in a clear and understandable way, all the information regarding the patient's health status and his illness as well as the proposed treatment. The information about the proposed treatment that must be disclosed to the patient consists of several elements. The patient must be informed of the risks of the proposed treatment, about alternative treatment techniques as well as the risks thereof and, finally, the prognosis of the patient's health if the patient decides to agree with the proposed treatment, to abstain from it or to abstain from any treatment. More in particular, the consequences of abstaining from treatment, as well as the potential benefits to be expected from it must be made very clear to the patient. Thus, the patient will be in a position to make an informed choice as regards the treatment strategy.

> *Illustration 1*
> A patient considers undergoing laser eye surgery in order to correct myopia. The ophthalmologist informs her of the risks and potential benefits of having surgery performed, in particular the (low but existent) risks of blindness, as well as those of refraining from surgery (myopia will gradually advance, lenses will be thicker, risk of eventual total loss of sight). He explains the patient of alternative treatment, like traditional eye surgery, but points out that the risks are higher and the post-surgery period more difficult. The patient is now in the condition of making an informed choice on whether or not to undergo surgery.

B. Interests at Stake and Policy Considerations

The patient has a right to be informed, to make an informed choice in regard to treatment, and to consent in regard to his bodily security and right to self-determination. The treatment provider has an obligation to inform, but how thorough must the information be? A very thorough obligation to inform is costly, as its performance takes more time, fewer patients can be treated and expenses rebound against the patient or the healthcare system. A cost/benefit analysis of how broad the contents of information to be disclosed needs to be made.

It can be argued that all risks must be disclosed, however slight the chance of their materialisation. However, it might be overkill to demand the treatment provider to inform very far-fetched risk probabilities. In any treatment, there exist known risks the materialisation of which is rare. Disclosing them to the patient might deter the patient from undergoing a treatment which would be far more beneficial to him than not. Too

much information that the patient cannot reasonably process may lead to situations where he cannot reach an informed choice or make an unreasonable decision.

Illustration 2
The medical literature mentions only one case where the use of a certain drug in combination with another specific drug resulted in toxic delirium. As this is a very rare adverse reaction, there is no need to inform the patient thereof.

Another rule of thumb regarding the extent of the information to be disclosed is the criterion of urgency. The more urgent the treatment is, the less information needs to be provided. When a patient needs immediate treatment, information will be scarce in the pre-treatment phase; when immediate treatment is not required, the extent of the information to be disclosed will be greater. Another criterion, the necessity criterion, requires that the duty to inform will be more stringent when (from a purely medical point of view) treatment is less necessary.

Another debate concerns the scope of the alternatives provided, in particular as to the mentioning of unconventional treatment alternatives. Unconventional treatment (such as acupuncture, homeopathy, osteopathy, Chinese traditional medicine, etc.) is becoming more and more popular, presenting in some circumstances effective alternatives that conventional medicine cannot offer. The question is whether the traditional healthcare provider is under a duty to inform the patient about unconventional treatment alternatives. It may be argued that the duty to inform only applies to alternatives offered by the same scientific field, and that an MD cannot be expected to know the therapies existent in other treatment techniques. On the other hand, as a healthcare professional is not he expected to have a broad knowledge of all sound treatment techniques? Then again, what constitutes a *sound* treatment technique if it is not accepted in medical practice?

A related issue concerns the form in which information is to be provided. It is common hospital practice to provide a patient with a form containing general information, in correct medical jargon, and space for the patient's signature, who thus gives his consent. However, should the information not be tailored to the specific patient and be conveyed personally by the treatment provider in a way that the patient can understand it?

Illustration 3
A virtuoso opera singer is informed that a certain treatment entails a 0,1 per cent possibility that the vocal cords will slightly be injured, thus causing the loss of the ability to sing in the correct pitch in some octaves. A manual worker needing the same treatment is not informed of that risk. If provided with a form explaining the most significant risks of the treatment, stated in medical jargon, the patient would probably not understand exactly the stakes involved. Also, such standardized information would not point out a risk that would not be relevant to a normal patient, but whose materialisation would be detrimental to this opera singer.

C. Comparative Overview

The duty of the treatment provider to inform the patient is recognised in all of the legal systems analysed. The treatment provider is in particular under a duty to disclose to the patient the potential risks emerging from treatment. This is recognised in all of the legal systems, though different solutions exist concerning which risks must be disclosed. In ENGLAND the treatment provider must disclose the risks that a reasonable, averagely competent treatment provider would disclose under those circumstances. In FRANCE all risks must be disclosed, while in ITALY, THE NETHERLANDS, PORTUGAL and SPAIN only foreseeable and serious risks must be disclosed. Finally, in GERMANY, the treatment provider must inform about frequent risks, as well as those rare risks whose materialisation would seriously affect that specific patient.

In addition, the treatment provider is in all legal systems obliged to inform the patient about alternatives to the proposed treatment. Only realistic alternatives must be disclosed in AUSTRIA, THE NETHERLANDS and SWEDEN, while in GERMANY the urgency of treatment determines the detail of the information to be disclosed.

The burden of proof of disclosure of information lies with the treatment provider in AUSTRIA, FRANCE, GERMANY, ITALY, PORTUGAL and SPAIN and with the patient in ENGLAND in the tort of negligence. In THE NETHERLANDS, though as a general principle the patient must discharge the burden of proof, this burden can shift, through interpretation of the law, to the treatment provider. In DENMARK, FINLAND and SWEDEN, due to the particularities of the no-fault patient insurance schemes, the breach of the duty to inform is not relevant for compensation.

D. Preferred Option

Only risks that may reasonably influence the patient's decision on treatment must be disclosed. It is presumed that such risks will influence the patient's decision if their materialisation leads to serious detriment to the patient (death, disfigurement, permanent disability). His presumption does not exclude other criteria for the determination of the relevant information to be disclosed, such as the rate of the risk's materialisation, subject to standard rules regarding the burden of proof. Thus, the duty to inform consists in telling the patient what he reasonably needs to know in order to make an informed choice. Also, the less urgent treatment is, the more detailed the information must be, as some time can be allocated for the exploration of alternatives and weighing the risks and benefits.

The patient's interests regarding autonomy are safeguarded, as well as the hospital's and the professional's interests regarding organisation of time. This also reduces the risk that a patient is deterred from undergoing treatment owing to information overload.

Serious and sound relevant alternatives, even if offered by unconventional medicine, are to be disclosed to the patient insofar as the standard of care requires the professional briefing the patient to do so. This approach gives patients the possibility of choosing

between different alternatives available and makes a cost-benefit analysis of the alternatives.

The treatment provider is to present the information in a personalised, direct way. This information must be tailor made for that specific patient and expressed in a way that is understandable to the patient. If information is provided through a form stated in medical jargon, however thorough the content of the information may be an average patient will not be able to understand it. On the other hand, if tailor-made information is disclosed personally, by a health-care professional, in a briefing session and in language understandable to the patient, then that patient will be adequately informed. The treatment provider must make a reasonable effort to help the patient understand the information. This is the best way of approaching a patient with respect for his autonomy as regards the choice whether or not to undergo treatment.

E. Relation to PECL and Other Parts of the Principles

This Article particularises the duty to inform of Chapter 6 (Information) in the light of treatment contracts. Through article 6:101(2) (Scope of Application), that Chapter applies with appropriate modifications to ancillary obligations to inform.

Article 6:104 (Duty of Care of the Information Provider) states important rules on the duty of the treatment provider, which also apply to the treatment provider, viz. to make sure that the client/patient understands the content of the information which supports the provision of personalised, tailor-made information (subparagraph (1)(a), to disclose the risks involved (subparagraph (1)(c)) and to provide information on alternatives the treatment provider cannot provide himself (subparagraph (2)(c)).

Article 6:106 (Duty to Give Account) establishes the burden of proof concerning the duty to inform. Further, article 6:109 (Causation) provides the rules on the causes of damage when the duty to inform was breached.

A link can be established with Article 1:103 (Pre-Contractual Duties to Warn), a rule requiring some important information to be provided in the pre-contractual stage of treatment (though the borderline between the pre-contractual and contractual phase can be murky in treatment).

Within this Chapter, this Article relates to Article 7:104. The standard of care defined in article 7:104 is used to assess whether the treatment provider performed his duty to inform. Article 7:106 particularises some treatment situations where the rationale behind the norm differs to some extent. Article 7:107 states the rules for exceptions to the duty to inform. The next step after information disclosure is consent (or refusal) by the patient (Article 7:108).

Article 7:109 states a static aspect of the duty to inform. The treatment provider must create records of the treatment and give account therefore by disclosing that information to the patient.

F. Character of the Rule

To some extent, the rule is a default rule as the patient may state that he does not wish to be informed (cf. Article 7:107 (1)(b)). However, the issue cannot be regarded from a negotiation point of view due to considerations of *ordre public:* the treatment provider is not allowed to exert his influence to make the patient waive his right to be informed.

G. Remedies

The remedies are damages, as can be derived from Article 1:112(1) (Remedies for Breach of Duties of the Service Provider) or assurance of performance eventually leading to termination, as follows from Articles 1:112(3) (Remedies for Breach of Duties of the Service Provider) and 8:103 PECL (Fundamental Non-Performance). For more details, see the Comments to Article 1:112 (Remedies for Breach of Duties of the Service Provider) and Comment F to Article 6:104 (Duty of Care of the Information Provider).

Comparative Notes

1. *Duty to inform in general*
   The duty of the treatment provider to inform the patients about their health status, the nature of necessary treatment, its potential benefits, risks, alternatives and the consequences of refraining from any treatment. The purpose of this duty consists of enabling patients to take an informed decision concerning treatment is consensually recognised in all of the analysed countries: AUSTRIA, ENGLAND, FINLAND, FRANCE, GERMANY, GREECE, ITALY, THE NETHERLANDS, PORTUGAL, SPAIN AND SWEDEN.
   No information from BELGIUM, DENMARK, IRELAND, LUXEMBURG, SCOTLAND.

2. *Duty to inform about risks*
   In all analysed countries the treatment provider is under a duty to inform the patient of the risks posed by the treatment. However, there are different solutions in the several legal systems about which risks must be disclosed. In ENGLAND the treatment provider is traditionally bound to disclose the information that an average, reasonable physician should disclose, though after *Bolitho v. City and Hackney HA* [1997] the treatment provider is considered to be bound to inform the patient about all significant risks. In FRANCE all risks must be disclosed. In ITALY, THE NETHERLANDS, PORTUGAL, SPAIN the treatment provider must inform the patient of foreseeable and serious risks. In GERMANY the treatment provider must inform the patient of frequent risks, as well as of rare risks that, if they would materialise, they would seriously affect that specific patient.
   No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, IRELAND, GREECE, LUXEMBURG, SCOTLAND. Insufficient information from SWEDEN.

3. *Duty to inform about alternatives*
There is a duty of the treatment provider to inform the patient of alternative treatment techniques. In AUSTRIA THE NETHERLANDS, and SWEDEN the treatment provider is under a duty to inform about all realistic alternatives. In GERMANY the treatment provider enjoys a freedom of choice of the treatment, and the scope of the duty to inform about alternatives to the proposed treatment depends upon the urgency of starting the execution of the treatment.
No information from BELGIUM, DENMARK, FINLAND, IRELAND, GREECE, LUXEMBURG, SCOTLAND.

4. *Burden of proof*
The burden of proof of having informed the patient falls on the treatment provider in AUSTRIA, FRANCE, GERMANY, ITALY, PORTUGAL and SPAIN. In ENGLAND the burden of proof falls upon the patient if the claim is brought on grounds of the tort of negligence, though it is unclear who bears the burden of proof if the claim is brought on grounds of the tort of battery. In THE NETHERLANDS, though as a general principle the patient bears the burden of proof, through interpretation the burden of proof can be shifted. In addition, the treatment provider is under a duty to help the patient substantiate his claim. In DENMARK, FINLAND and SWEDEN, due to the facilitated access to compensation under the no-fault patient insurance schemes, a breach of the duty to inform the patient is not of much relevance. In addition, in the no-fault schemes, the case is investigated by the patient insurance consortium. Finally, as seen before in the notes to article 7:104, in DENMARK and SWEDEN, if an alternative treatment existed, and had it been carried out instead of the one that caused the injury, the patient is entitled to compensation, irrespective of having been informed or not of the risks of the chosen treatment.
No information from BELGIUM, DENMARK, FINLAND, IRELAND, GREECE, LUXEMBURG, SCOTLAND.

National Notes

1. *Duty to inform in general*
AUSTRIA The duty to inform *(Aufklärungspflicht)* plays an important role in the area of medical treatment. The trend sketched by Courts as regards medical treatment points to an increasingly stricter liability for failing to inform the patients: the Supreme Court ruled that doctors could be held liable despite of a state-of-the-art treatment if they did not inform their patients about all risks inherent in such a procedure under de doctine of *Entscheidungskonflikt* (6 Ob 126/98f.).
ENGLAND Within negligence the duty to inform is considered as part of the general standard of care, which can be reduced to the *Bolam* test as to whether a responsible body of doctors would have informed. See for example, *Sidaway v Bethlem Royal Hospital* [1985] AC 871, House of Lords. In order to avoid liability on grounds of the tort of battery (see below), the doctor must inform only about the *nature* of the treatment. It is thus not necessary to inform about attendant risks. In the tort of negligence, the duty to inform is a part of the general standard of care, to be ascertained according to the Bolam test: whether or not a responsible body of doctors would have informed the patient of the risks of treatment. Cf. *Sidaway v Bethlem Royal*

Hospital [1985] AC 871. Liability under the tort of battery can be avoided just by informing about the nature of treatment.
FINLAND Art. 6 of the Constitution assures the right to self-determination. The patient has a right to be informed about her state of health, the significance of the treatment, as well as alternatives to it. Cf. Section 5 of the Act on the Status and Rights of Patients (no. 785, 17 August 1992). Cf. Pahlmann et al., Three years in force: has the Finnish act on the status and rights of the patients materialized? Medicine and Law, 3; Lahti, Towards a comprehensive legislation governing the rights of patients: the Finnish experience. In Westerhäll, L. and Phillips, C., editors, Patients rights: informed consent, access and equality, 207. Information must be provided in a way that the patient can understand it. The breach of a duty to inform is not relevant in compensation claims, as avoidable injury is compensated regardless.
FRANCE The treatment provider must inform the patient about his healthcare condition, proposed examination, treatment, its advantages, consequences and normally predictable frequent or serious risks, alternatives and consequences of abstaining from treatment. Cf. Art. L. 1111-2 CSP. Such obligation was discovered by case law before its codification. It is generally admitted that the codification simply implement the solutions found in case law (On this issue, Pinna, The Obligations to Inform and to Advise, no. 194; Pinna, Le nouveau droit français de l'obligation d'information sur les risques médicaux, Lex Medicinae, 2004, p. 83).
GERMANY The duty to inform is one of the pillars of the German medical liability system. This liability can emerge from tort as of CC art. 823 *(Rechtswidrige Körperverletzung)* (BGH NJW 1980, 1905) or from breach of a contractual duty to inform (BGH NJW 1990, 2929). The patient must be informed about the illness, its seriousness, the process of treatment, its risks and side effects, so that the patient can decide whether or not to undergo the proposed treatment (Gehrlein, Leitfaden zur Arzthaftpflicht, p. 125; Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 63; BGH NJW 1972, 335; BGH StV 1998, 199.)
GREECE There is a duty to inform the patient of risks and alternatives so that the latter provides his informed consent to the treatment in question. This is of paramount importance in the contract for the provision of medical services because such services invariably lead to a significant involvement with the personality and physical integrity of a human being. Failure of the doctor to comply with this obligation does not render the provision of the treatment service faulty, but it rather creates an independent source of liability (I. Androulidaki-Dimitriadi, The duty to inform the patient, 1993, p. 119 and 131). The issue whether the obligation to inform is a primary obligation or a secondary obligation of the treatment contract does not seem to have been dealt with in the practice in any significant way. To some length only in academic writing seems to have been discussed (Ismini Androulidaki-Dimitriadi, The duty to inform the patient, 1993, p. 130). Failure to comply with the duty to inform indicates that the treatment lacks the necessary informed consent. Disregarding whether the patient would have or would have not consented to the treatment, in case the treatment has been performed in a state of the art manner, a claim for damages for failing to inform the patient arises independently and separately. Notwithstanding that the patient may lack cause of action on the basis of a medical error, the breach of the duty to inform forms an independent claim. In effect, the successful medical treatment does not mend the breach of the duty to inform. But also the opposite, failure to inform does not seem

to render the provision of state of the art medical treatment wrongful. If on the other hand the medical treatment did not live up to the required standards, the patient shall claim damages for breach of both duties, namely duty of care and duty to inform.

ITALY Autonomous and specific obligation of the treatment provider. Its violation is per se source of liability (A. Santuosso, Sentenze e rappotro tra medici e pazienti: il punto, in Professione, 1997, 4, 53). The duty to inform plays a fundamental role in doctor-patient relationships, having it a direct impact on the consent of one of the parties. The patient (normally devoid of technical knowledge relating to the object of the obligation), cannot control the activity of the professional to whom he entrusts delicate personal interests. Therefore, the Treatment provider has to inform the patient about the treatment, the connected difficulties, the consequences, the possible risks, as to enable the patient to decide whether to proceed or not, by balancing advantages and disadvantages. Information must be tailored to the patient and the nature of the ailment (L. De Caprio et al., Consenso informato e decadimento cognitivo, in Riv.it.med.leg, 1998, fasc. 6 (December), I, p. 922; A. Fiori, Per un riequilibrio tra dovere di globale beneficialità nella prassi medica ed esigenze del diritto in tema di consenso informato, p. 1150, note to Trib. Milano, 4 December 1997, in Riv.it.med.leg, 1998, fasc. 6 (December), I).

THE NETHERLANDS CC art. 7:448, para. 1, 1st sentence, obliges the doctor to inform the patient in a clear manner and, if requested, in writing. The duty to inform bears on the intended examination, the proposed treatment and the developments in the examination, the treatment and the medical condition of the patient. This general duty to inform is elaborated in para. 2: 'In exercising the duty, mentioned in para. 1, the provider of the service is led by what the patient reasonably needs to know with regard to: the nature and the purpose of the examination or treatment he deems necessary and the activities that are required to that extent; the consequences and risks that can be expected thereof with regard to patient's health; other methods of examination or treatment that need to be considered and the state of and the prospects for his health as far as the examination or treatment are concerned' (unofficial translation by the reporter). As such, it is clear the doctor is obliged to inform the patient both of the risks of the treatment and the alternatives to it. However, the duty is limited to what the patient 'reasonably needs to know', which differs from one individual case to another. Cf. H.D.C. Roscam Abbing, Het recht op informatie en het toestemmingsvereiste, in: J.H. Hubben (ed.), De geneeskundige behandelingsovereenkomst, p. 20; Sluyters and Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, 1995, p. 20; C.J.J.M. Stolker (ed.), Tekst & Commentaar Gezondheidsrecht, 1999, ad CC art. 7:448, note 3. The information is to be given to enable the patient to make a sound decision. The doctor will have to make sure *this* patient understands the information that is being given to him. Therefore, the information has to be tailored to the individual patient and has to be given in plain language when such is necessary to ensure the patient understands what is being said to him. Cf. Sluyters and Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, 1995, p. 18.

POLAND Generally, the patient is granted the right to information about his health condition (art. 19 of the act on the medical care institutions), which corresponds to the duty of a doctor to provide information to the patient (art. 31 of The act on the profession of a doctor). The doctor is obliged to inform the patient or his statutory

guardian in an approachable way about the patient's health condition, the diagnosis, the proposed and possible diagnostic methods, the treatment methods, the predictable consequences of their application or abandoning them, the results of the treatment and the prognosis (art. 31 para. 1). The doctor may provide the abovementioned information to other persons only with the consent of the patient (art. 31 para. 2). On the request of the patient the doctor does not have to provide the information to the patient (art. 31 para. 1.) The doctor is obliged to provide information to persons over 16 (art. 31 para. 5). If the patient is under 16 the doctor is obliged to provide information in the scope and form necessary for the correct conduct of the diagnostic and therapeutic process. In such a case the doctor should take into account opinion of the patient (art. 31 para. 7). If the patient is under 16, unconscious or incapable to understand the meaning of the information, the doctor should inform his statutory guardian, and – if the is no statutory guardian or there is no possibility to contact him – the factual guardian of the patient (art. 31 para. 6).

PORTUGAL The treatment provider must inform the patient on the objective, nature, consequences, benefits, costs, risks and alternatives of diagnosis and treatment, as well as of delay or refusal of the proposed treatment. If a recent technique is proposed, that fact must be disclosed to the patient. Information must be provided in simple and clear language tailored to the patient. Art. 5 CHRM, ratified by Decreto 1/2001 (Presidente da República), DR 2, 1 série A, 3/1; art. 157 CP; Base XIV, 1, e, Lei 48/90, 24/8; art. 38 CD. The objective is to enforce human dignity and allow the patient an informed choice regarding treatment. Cf. Dias Pereira, O consentimento para intervenções médicas prestado em formulários: uma proposta para o seu controlo jurídico. Boletim da Faculdade de Direito, 2000, p. 442; Dias Pereira, O consentimento informado na relação médico-paciente. M.Phil. thesis, Faculdade de Direito da Universidade de Coimbra, Coimbra, p. 227; Sinde Monteiro, Veloso, Cases on Medical Malpractice in a Comparative Perspective, p. 175; Oliveira, Temas de Direito da Medicina, p. 92; Costa Andrade, in: Figueiredo Diaz, et al., Comentário conimbricense do Código Penal: parte especial, tomo 1, Art. 131 a 201, 1999, ad article 157.

SPAIN A general obligation for the medical providers to inform is formulated in the General Act on Healthcare of April 25th 1986 (Ley General de Sanidad). Article 10 para. 5 states that the users of the health service and their families have the right to be provided with comprehensive, complete and continuous oral and written information about the medical situation, including diagnosis, prognoses and possible alternatives of treatment. Cf. Ley General de Sanidad, art. 10(5). This regulation is based on previous provisions of a constitutional nature: the right to healthcare (art. 43) the right to dignity (art. 10.1), the right to live, the right to physical and moral integrity (art. 15) and the right to be informed (art. 20). Related statutes on specific issues: Specific obligations to inform have been included in specific Acts and administrative provisions on different medical fields: (*Ley* 30/1979 (organ removal and transplantation), *Ley* 35/ 1989 (aided reproduction), *Ley* 42/1988 (human embryos, foetus donation, usage of tissues and organs or parts of them); *Ley* 29/1980 (clinical autopsy). According to case law, The current legislation is supported by the jurisprudence of the TS. The Supreme Court considers that the obligation for the medical service provider to inform is an essential requirement of the "*lex artis ad hoc*" (STS 2 October 1997, RJ 1997/7405; 13 April 1999, RJ 1999/2583); part of the obligation of means assumed by the professional (STS 25 April 1994, AC 94-3; STS 11 February 97, RJ 1997/940). Contents of

the information, the diagnosis, proposed treatment, prognosis, risks which may materialize and means (material, instruments or tools) used to provide the service when these may turn out to be insufficient, in a way to allow the patient or his family to have recourse to other medical provider (STS 24 April 1994 RAC 879/1994, STS 7 May 1997, RAC 808/1997). Reasoning of the duty: protection of patient's autonomy, correction of information asymmetry.

SWEDEN Patients are entitled, as soon as possible, individually adapted information about their health condition and methods available. Cf. art. 2:2 *Lag (1998:531) om yrkesverksamhet på hälso- och sjukvårdens område* and *tandvårdslag* art. 3. Compensation for a breach of the duty to inform is not possible under the PL if no compensation can be claimed from treatment. Possibilities of compensation under the Tort Act SkL are limited: cf NJA 1990, 442. Each patient turning to the health- and medical service shall as soon as possible, unless it is not evidently unnecessary, be given a judgement of his health condition, HSL art. 2a, third para, first sentence. According to art. 2:2 *Lag (1998:531) om yrkesverksamhet på hälso- och sjukvårdens område,* the one responsible for a patient's medical care shall see to that the patient is given individually adapted information about his health condition and about the methods available for examination, medical care and treatment. Identical provisions can be found in *Tandvårdslag* art. 3. A breach of the duty to inform does however not give the patient a right to compensation according to the PL, if the treatment as such does not grant a right to compensation. The patient has also very limited possibilities to obtain compensation according to the rules in *Skadeståndslagen* (SkL), the Tort Act.

2. *Duty to inform about risks*

ENGLAND Though *Sidaway* set the information, which an average, reasonable physician would disclose as the criterion on the contents of the duty to inform, Lord Bridge and Lord Templeman dissented from the majority vote, suggesting that substantial risks that could affect the decision of a reasonable patient should be disclosed. In the aftermath of the impact of *Bolitho v. City and Hackney HA* [1997] 4 AllER 771, Lord Woolf MR in *Pearce v. United Bristol Healthcare NHS Trust* [1998] 48 BMLR 118 (CA) concluded that the physician must disclose all information about significant risks needed for the patient to determine which course should she adopt. Cf. Kennedy and Grubb, Medical Law, p. 694.

GERMANY A treatment provider must inform the patient about the risks entailing complications, side effects, and the consequences of failure whose seriousness can affect the decision of the patient whether or not to undergo treatment. Frequent risks must be disclosed, as well as rare risks that can seriously affect that specific patient (BGH NJW 1980, 1333; BGHZ 77, 74, NJW 1980, 1901; BGH NJW 1992, 1241; Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 64).

FRANCE The obligation to inform concern also, and most of the time this is the essence of this obligation, the risks of the treatment. The *Cour de cassation* ruled that a doctor must mention all the risks, even if their realisation is exceptional, on the condition that the realisations of such exceptional risk involves serious consequences (Cass.civ I, 7 October 1998, JCP 1999.II.10179, concl. J. Sainte-Rose and note P. Sargos; CE Sect., 5 January 2000, *Consorts Telle*; 5 January 2000, *Assistance Publique-Hôpitaux de Paris,* JCP 2000.II.10271, with note J. Moreau). This solution has now to be found in Article L. 1111-2 CSP. (Arguing that in the light of article L. 1111-2

CSP exceptional risks shall not be disclosed, Pinna, Le nouveau droit français de l'obligation d'information sur les risques médicaux, Lex Medicinae, 2004, p. 83.
ITALY The patient is entitled to be informed about the risk, which is inherent to the therapeutic treatment offered, in relation to his own health and expectations of lifetime (Trib. Milano, 14 May 1998, in Resp.Civ. e Prev., 1998, fasc. 6 (dicembre), p. 1625, with note of B. Magliona). The patient must be informed about serious potential dangers to his life deriving both from an intervention and/or a non-intervention. The obligation embraces foreseeable risks, not anomalous outcomes, which almost constitute a fortuitous event. The treatment provider has to find a balance between the obligation to exhaustively inform and the necessity to avoid that a patient, for any remote possibility, decides not to go through the treatment. The obligation to inform includes also specific risks as regards determinate alternative choices. The patient, thanks to the technical-scientific help of the treatment provider, can opt for the one or the other, by means of a conscious evaluation of related risks and advantages (G. Alpa, La responsabilità medica, in Riv.it.med.leg., 1999, fasc. 1 (February), p. 30).
THE NETHERLANDS To be able to make a sound decision, the doctor needs to inform his patient on the normal, foreseeable risks of the treatment. Cf. C.J.J.M. Stolker, Aansprakelijkheid van de arts voor mislukte sterilisaties, diss. Leiden, Kluwer, Deventer, 1988, p. 48; Stolker (ed.), Tekst & Commentaar Gezondheidsrecht, Kluwer, 1999, ad CC art. 7:448, note 3. Generally speaking, the duty to inform is more stringent in the following situations: if the nature of the risk is more serious; if the general incidence-expectation of the risk is higher; if the intended procedure is of a lesser degree of urgency or necessity; if one or more alternatives exist; if the risk is less known to the public at large; if the materialisation of the risk can, under the given circumstances, be expected and if the treatment is experimental or irregular. Cf. F. Dekkers, De patiënt en het recht op informatie, diss. Leiden, Samson, Alphen aan den Rijn, p. 119; taken from B. Sluyters and M.C.I.H. Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, 1995, p. 22; J. Legemaate, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, p. 100. An obligation to inform does not exist with regard to risks that are public knowledge. Cf. W.R. Kastelein, Informed consent en medische aansprakelijkheid; jurisprudentie 1994-1998, Tijdschrift voor Gezondheidsrecht, p. 138. With regard to the frequency of risks, a duty to inform in any case exists if the chance the risks materialise is over 5 per cent. Cf. W.R. Kastelein, Informed consent en medische aansprakelijkheid; jurisprudentie 1994-1998, *Tijdschrift voor Gezondheidsrecht* 1998, p. 138. Stolker (Aansprakelijkheid van de arts voor mislukte sterilisaties, 1988, p. 53) mentions percentages, varying from 5 to 8 per cent. However, the percentage below which no duty to inform exists, tends to be lowered: J. Legemaate, Het recht van de patiënt op informatie, Advocatenblad 1999, pp. 197-200, mentions a percentage of only 1 per cent. Moreover, such a duty *also* exists if materialisation of the risk would have radical consequences. Cf. C.J.J.M. Stolker, Aansprakelijkheid van de arts voor mislukte sterilisaties, 1988, p. 54. If the procedure is not medically necessary or experimental, the duty to inform is far-reaching. Moreover, the duty to inform is stricter if the patient indicates he does not want to run any risks or if he puts questions to his doctor. Cf. Legemaate (1999), p. 98. In this respect, Barendrecht and Van den Akker, Informatieplichten van dienstverleners, no. 212, draw attention to the fact that most people are inclined to avert risks, even if materialisation

of the risks is relatively rare. This suggests there ought to be a duty to mention even small risks since people apparently are influenced profoundly by such information in deciding whether or not the give consent to a proposed treatment.

POLAND The doctor is obliged to inform the patient about the scale and the degree of risks connected with the treatment in an approachable way (The act on the profession of a doctor, art. 31 para. 1), in order to allow the patient to make a conscious decision as to giving his consent for the treatment (Judgement of the Supreme Court of 17. 12. 2004, II CK 303/04, OSP 2005, nr 131, poz 11). If the risks related to the treatment are higher) the doctor is obliged to obtain a written consent of the patient (art. 34 para. 1).

PORTUGAL The treatment provider must inform the patient of serious risks as well as frequent risks of the proposed diagnosis/treatment. All significant risks must be disclosed, as well as the risks of delaying or refusing treatment. A risk is deemed significant if it is serious, frequent, unnecessary from a medical point of view, or if the attitude or physical characteristics of the patient increases the magnitude of the risk (obesity, addictions, heart problems, etc.) Cf. CA Lisboa, 4 July 1973; Dias Pereira, O consentimento para intervencões médicas prestado em formulários: uma proposta para o seu controlo jurídico. Boletim da Faculdade de Direito, 2000, 446; Dias Pereira, O consentimento informado na relação médico-paciente. M.Phil. thesis, Faculdade de Direito da Universidade de Coimbra, Coimbra, p. 244; Oliveira, Temas de Direito da Medicina. Coimbra Editora, Coimbra, 67; Costa Andrade, in: Figueiredo Diaz, et al., Comentário conimbricense do Código Penal: parte especial, tomo 1, Art. 131 a 201, 1999, ad article 157, p. 397.

SPAIN Doctrine and jurisprudence differentiate between typical and atypical risks. In principle, only those risks that are foreseeable and that frequently materialize in a specific situation according to experience and current status of science (typical risks) are to be disclosed by the provider of the treatment. Those risks which are unforeseeable or exceptional (a-typical risks) are not to be disclosed. However, some criticism has been made regarding such a simplistic division. It may not be reduced to a statistical question. Some risks which are not typical may be disclosed if they may influence the decision of the patient whether to continue the treatment or not. Consequences of the lack or inappropriateness of the information: STS 23 April 1992 (RJ 1992/3323): in a highly risky operation, the mother of the minor should have been informed accordingly). The absence of disclosure implies that the medical providers assumed the risks of the operation themselves. Cf. STS 25 April 1994, AC 94-3, STS 11 February 1997, RJ 1997, 940, STS 28 December 1998, RJ 1998, 10164.

SWEDEN The provisions in this area are intentionally vague, due to the fact that medical treatment always is connected with risks, and the duty to inform can thus lead to a situation of conflict between the doctor and the patient and hinder the doctor from giving adequate treatment (Johansson and Thoren, Kirurgi och patientens samtycke, Vänbok till Carl E. Sturkell, p. 136). Therefore the duty to inform must generally, not only considering risks, be judged from case to case, considering the patient's general opinion, his health, the art and gravity of the disease. Even if the patient has not been sufficiently informed about risk, this does not automatically mean that he is entitled to compensation. It is furthermore required that he would have refused treatment if being informed about the risks cf. This is demonstrated in the following case from the appellate courts (RH 1999:115) where a patient sued the county council

district for negligently not informing him about the risks connected with an operation, (the patient's claim had first been dismissed according to the PL).

3. *Duty to inform about alternatives*

AUSTRIA The duty to inform comprises mentioning other possibilities of treatment that might prove less dangerous but maybe longer. However, there is no need to inform about all the possible alternatives; information about the adequate ways of treatment and the pros and cons of those alternatives is sufficient. Cf. (Diettrich, Tades, "Kapfer"[35], art. 1299, E 234, 236). *In praxi,* some hospitals use illustrated information leaflets to inform their patients. These brochures describe and explain the different operations in detail. Then doctors discuss the issues raised in the leaflets one by one with their patients, offering a possibility for further questions. Finally, the patient declares by signing that he has understood the information and that he has been able to ask all the questions he wanted to. Thus, the leaflets serve a twofold purpose: First, they guarantee sufficient information. Secondly, doctors might use them as evidence in possible lawsuits.

FRANCE The treatment provider is obliged to mention alternatives, specific case law on this issue was not found, but this duty is now explicitly provided by article L. 1111-2 CSP.

GERMANY In principle, the physician has the freedom of choice of the treatment (BGH NJW 1982, 2121 NJW 1988,763; BGH NJW 1988,1516). However, the less urgent the treatment is from a medical point of view, the more far-reaching the duty to inform is. In the latter case, the duty to inform may encompass alternatives to the proposed treatment. Cf. Laufs and Uhlenbrück, Handbuch des Arztrechts no. 64.

ITALY The treatment provider has to supply the patient the possible diagnostic-therapeutical alternatives (Art. 30 of the medical Deontological Code) in order to put him in a situation where he is capable of deciding what is best for his health. Even in case of grave error in the therapeutic process, the information provided to the patient has to be absolutely complete (A. Conti, Pretura Circondariale di Nuoro, 18 May 1996, no. 117, in Riv.it.med.leg, 1998, fasc. 6 (December), pt. 1, 1171). This essencial especially before taking further clinical decision which may present alternatives, which are absolutely dramatic.

THE NETHERLANDS The doctor is obliged to mention all realistic alternatives, including those he personally does not favour. Cf. J. Legemaate, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, p. 100. An obligation to inform does not exist with regard to risks that are public knowledge. Cf. W.R. Kastelein, Informed consent en medische aansprakelijkheid; jurisprudentie 1994-1998, Tijdschrift voor Gezondheidsrecht, 1998, p. 98. Barendrecht and Van den Akker, Informatieplichten van dienstverleners, nos. 223, 356, emphasise that the doctor, as a rule, should mention the consequences of abstention of treatment, since abstention often is to be considered a real alternative to treatment. Of course, this includes all the (relevant) alternatives provided by regular medicine. The duty to inform is stricter if the proposed treatment is experimental or if the doctor to perform the treatment is not very experienced in the treatment that is proposed. Cf. C.J.J.M. Stolker, Aansprakelijkheid van de arts voor mislukte sterilisaties, 1988, p. 55.

POLAND The doctor has a duty to inform about the treatment methods, the predictable consequences of their application or abandoning them (The act on the profession of a doctor, art. 31 para. 1).
PORTUGAL The treatment provider must inform the patient about the availability and comparative advantages of alternatives to the proposed diagnosis/treatment: Figueiredo Diaz, et al., Comentário conimbricense do Código Penal: parte especial, tomo 1, Art. 131 a 201, 1999, ad article 157, p. 458; Dias Pereira, O consentimento informado na relação médico-paciente. M.Phil. thesis, Faculdade de Direito da Universidade de Coimbra, Coimbra, p. 257.
SPAIN The General Statute on Health expressly includes the obligation to inform about alternative treatments (art. 10 para. 5 LGS)
SWEDEN The treatment provider must inform if there is more than one alternative for treatment in accordance with science and reliable experience (art. 3a HSL).

4. *Burden of proof*
AUSTRIA The burden of proof as regards the sufficient information of the patient is on the provider; he is the wrongdoer and thus he has to establish the justification ground (i.e. the sufficient information) Cf. (Dietrich *[-Tades]*, "Kapfer"[35], 1999, art. 1299, E 239, 240). The provider can either prove that he has informed his patient sufficiently or that his contractual partner would have consented to the treatment anyway. That demonstration is subject to quite strict requirements. However, the patient has to demonstrate that he would have been faced with a serious conflict of decisions if informed properly. It is not sufficient that he simply argues that he would have rejected the treatment.
DENMARK Breach of the duty to inform is irrelevant to compensation of injury under the PF. All relevant information and evidence is acquired *ex officio* by the Patient Insurance Consortium.
ENGLAND: In negligence the client bears the burden of proof, according to standard rules of civil procedure. In the tort of battery, the position is unclear, see Kennedy and Grubb, Medical Law, p. 582, stating that consent as a defence to battery should be proved by the defendant, supporting that view with case law from various Commonwealth countries.
FINLAND Breach of the duty to inform is irrelevant to compensation of injury under the PSL. All relevant information and evidence is acquired *ex officio* by the Patient Insurance Consortium.
FRANCE It is up to the debtor of the duty to inform to prove that he performed the duty to inform (Cass.civ I, 25 February 1997, Bull.civ. I, no. 75, Defr. 1997, p. 751, CCC 1997 no. 76, with obs. L. Leveneur, RTD civ 1997, p. 924; CE Sect., 5 January 2000, *Consorts Telle*; 5 January 2000, *Assistance Publique-Hôpitaux de Paris*, JCP 2000.II.10271, with note J. Moreau). This opinion was expressed before the jurisprudence by M. Fabre-Magnan, who, in her thesis asserted that the obligation of information is an obligation of result Cf. De l'obligation d'information dans les contrats, nos. 541 ff. The opposite solution would have obliged the patient to prove a negative fact, the lack of information, which is almost impossible for the principal to do; this solution has a very strong preventive role, instigating the doctor to effectively perform his duty to inform. It is up to the patient to prove the damage he endured, but in practice this does no lead to serious problems, in contrast to the question of causation. It is up to the patient to prove the causation. The lack of information is the cause of the damage only if the

victim proves that, had he been correctly informed, he would have refused the treatment, because the victim has to prove beyond doubt that the damage would not have occurred. Of course this fact is most of the time impossible to be proved. To protect the patient and compensate the damage he sustained, the case law appeals to the theory of the loss of a chance *(perte d'une chance)*. The *Cour de cassation* does not require the proof of the performance of the obligation to inform by a written act and says that this proof can be done by any means, even by testimony (Cass.civ I, 29 May 1984, Bull.civ. I, no. 179; Cass.civ I, 4 April 1995, D. 1995. I.R. p. 120; and after the reversal of the line of the case law concerning the burden of proof, Cass.civ I, 14 October 1997, Bull.civ. I, no. 278; JCP 1997.II.22942, rapp. Sargos; RTD civ 1998, 100, obs. J. Mestre; RD sanit. soc. 1998, 68, note Harichaux). It is obvious that in the absence of a written document it will be very difficult to the provider to prove the performance of this obligation. Such rules are now codified in Article L. 1111-2 CSP (On this issue, Pinna, The Obligations to Inform and to Advise, nos. 158-165).

GERMANY The physician bears the burden of proof that he disclosed all the relevant information to the patient, and that the patient consented to treatment (BGH NJW 1992, 2351).

ITALY The burden of proof falls on the provider of the service. The doctor has to prove that he informed the patient in a complete and exhaustive way about all risks connected to the sanitary treatment.

THE NETHERLANDS In principle, the burden of proof lies on the client. In cases where the client is to prove a negative fact – he claims he did not receive certain information, the courts may decide the provider of the service is under a duty to substantiate his claim that he has given the information. In the case of treatment contracts, the situation is slightly different. Cf. CC art. 7:466 para. 2 it follows that consent to treatment is presumed to have been given if the treatment is a 'minor procedure'. I. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 37, correctly concludes from this provision that in other situations, consent may *not* be presumed to have been given, *ergo* has to be proven. From that, it follows the burden of proof is on the *doctor:* he will have to prove the (informed) consent has been given. Distributing the burden of proof in another way would deprive CC art. 7:466, para. 2, of it's meaning, Giesen argues. However, consent may sometimes be tacitly implied, cf. Rb Rotterdam 20 August 1993, NJ 1995, 18 (Algemeen Psychiatrisch Ziekenhuis 'De Grote Rivieren'/X). With regard to causation between the breach of the duty to inform and the damage, the following needs to be mentioned. Again, in principle, the burden of proof lies on the client. Cf. I. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 49; Barendrecht, and Van den Akker, Informatieplichten van dienstverleners, nos. 446-447. For medical cases, it is, however, accepted that the patient would have acted upon the information or advice, especially if the illness the client/patient suffered from was life-threathening and an effective cure is available. In other words, the German doctrine of 'Entscheidungskonflikt' is more or less copied in THE NETHERLANDS. As regards the proof of the *damage* that is caused by the breach of the duty to inform, the Hoge Raad is more restrictive. He recently decided that the duty to inform is meant to enable the patient to make an informed decision on whether or not to consent to the suggested treatment. A breach of that duty calls into being the risk that the patient can't exercise his right to self-determination in the manner he chooses, i.e. the risk that he makes a choice he would not have made otherwise. The duty to inform is

therefore not as such meant to protect the patient from the occurrence of a medical risk, but (only) to prevent the risk of the loss of the opportunity to properly choose. Cf. HR 23 November 2001, case C99/259HR, *Landelijke Jurisprudentienummer* (LJN) AB 2737, and case C00/069HR, LJN AD 3963, published on www.rechtspraak.nl.

POLAND The burden of proof in the case of information to be provided to the patient on the basis of art. 31 para. 1 of the act on the profession of a doctor, lies on the doctor. The Supreme Court has clearly stated that in its judgement of 17. 12. 2004 (II CK 303/04, OSP 2005, nr 131, poz 11.) The doctor should prove not only that the information was given to the patient, but also that it complied with the requirements of art. 31 para. 1.

PORTUGAL The healthcare provider bears the burden of proof of information and consent CC art. 340 para. 2; Dias Pereira, O consentimento para intervenções médicas prestado em formulários: uma proposta para o seu controlo jurídico. Boletim da Faculdade de Direito, 2000, 454; Figueiredo Dias, Sinde Monteiro, Responsabilidade médica na europa ocidental. Consideracões de lege ferenda. Scientia Ivridica, 1984 p. 39; Costa Andrade, in: Figueiredo Diaz, et al., Comentário conimbricense do Código Penal: parte especial, tomo 1, Art. 131 a 201, 1999, ad article 157, p. 458).

SPAIN The medical service provider should prove that he has complied with the obligation to inform. STS 28 December 1998 (RJ 1998/10164); 13-04-99 (RJ 1999/2583) and 19 April 1999 (RJ 1999/2588). The medical provider possesses the information, thus it is easier for him to prove that the information was given than for the patient to give negative evidence. According to the reasoning of STS 31 July 1996 (La ley 1986,8976, RJA 6084), if treatment was to be considered a high risk obligation, with foreseeable negative results, the patient should have been informed regarding such risks and should have consented to the treatment in an explicit and clear manner, in order to exempt the doctor from liability; the medical treatment provider is thus liable for the damage inflicted.

SWEDEN The duty to inform is not essential for obtaining damages under Swedish law, as mentioned above. Therefore there is not much information available on this topic. However in NJA 1990 s 442 and in RH 1999:115, the courts found a breach of the duty to inform, mainly because the doctors could not say for sure that they had informed the patients sufficiently. A long time had passed and the doctors had performed many operations and could therefore not tell exactly how they had informed the patients. The courts therefore followed the patients' opinion that they had not been properly informed. However, in disciplinary rulings the patient has the burden of proof for the lack of information. In the cases where the parties have different versions of the course of events, the patient will lose, Hedman, Ansvar och ersättning vid medicinsk verksamhet, p. 58 f. The patient always has to prove his damage. See here the reasoning of the court Cf. RH 1999:115, where the court dismissed the patient's statement that he would not have gone through with the operation, considering the seriousness of his medical condition and the low probability of complications.

Article 7:106: Duty to Inform in Case of Unnecessary or Experimental Treatment

(1) If the treatment is unnecessary in respect of the patient's health condition, all known risks must be disclosed.
(2) If the treatment is experimental, all information regarding the objectives of the experiment, the nature of the treatment, its advantages and risks and its alternatives, be it only potential, must be disclosed.

Comments

A. General Idea

This Article describes the extent of the duty to inform when experimental or 'Newfoundland' or unnecessary treatment is concerned. Experimental or 'Newfoundland' treatment consists in treatment that is still in a research stage and may be of benefit to the patient, treatment that departs from approved practise and may be of benefit to the patient or treatment of a kind that has not been yet fully developed and does not meet the standard of approved medical practise. In this type of treatment, there are unexpected risks as the treatment technique is still in an experimental stage or its risks are not yet fully known.

Illustration 1
A patient suffering from an incurable illness is invited to participate in the clinical trial of a drug that has not yet been tested before on humans. This drug can potentially have a beneficial effect on the patient. This is a case of experimental treatment.

Illustration 2
A patient suffering from cancer is informed that there is a novel technique, not yet fully tested, that can potentially save its life. This is a situation of 'Newfoundland' treatment.

Unnecessary treatment is more difficult to define, and the term 'optional treatment' is perhaps more adequate. In this Chapter, 'unnecessary treatment' is defined as treatment that is not intended to improve the physical health of the patient; it is rather treatment that a patient can choose, *opérations d'agrément* (plastic surgery, sterilisation, active organ donation, etc.). This does not mean, however, that such treatment may not have therapeutic effects from a medical point of view.

Illustration 3
A 23-year-old woman had a car accident, and as a result acquired severe burns on her cheeks. Two years after the accident, the woman consults a plastic surgeon to have the burns removed. This is a case of unnecessary treatment, in the sense that there is no reason, from a strictly medical point of view, for the woman to undergo

surgery. This illustration shows how difficult it is to define the term 'unnecessary treatment', as having the burns removed may have a positive effect on a person's mental health, as the inaesthetic appearance of the burns may have caused loss of self-confidence as well as adverse social circumstances detrimental to the woman's mental health.

This Article deals with the specific issues that shape the duty to inform the patient in situations of experimental, 'Newfoundland' and optional 'unnecessary' treatment.

B. Interests at Stake and Policy Considerations

The extent of the duty to inform in general in treatment contracts – in particular in regards the risks that must be disclosed – is a debated issue (see the Comments to Article 7:105).

Particularly in experimental treatments, patients are in need of protection. Thus, there is a need of a reinforced information regime. The argument here is that two cost-benefit analyses are to be made, not just one. The first concerns the personal risk-benefit assessment, i.e. the balance between the potential benefits to the patient's health and the risks involved in the experimental treatment. The second is the 'altruistic' risk-benefit analysis, i.e. the balance between the benefits to medicine and other patients and the risks the patient will run. The patient undergoing experimental treatment has an interest in being informed about the nature of the experimental treatment, the relevance of the trial to medical science and the potential benefit, if any, to his health. It is also important for the patient to be informed about the possibility of being placed in the control group if there is once, i.e. a group that will be administered a placebo instead of the drug being tried. The patient will also be interested in being informed about risks of the experiment to his health. On the other hand, it will be in the medical researcher's interest to disclose as little information as possible for research secrecy's sake.

Illustration 4
A patient suffering from an incurable illness is invited to participate in the clinical trial of a drug that has not been tested before on humans. The patient will be interested in being informed about the nature and objective of the experiment, the risks involved in the experimental treatment, the potential benefits to his health as well as to the advance of medicine, and the chances that he will be assigned to the control group, and thus will not be exposed to the risks nor enjoy the potential benefits of the trial. On the other hand, the researcher and the promoter of the experimental treatment will not want to disclose too much information on the technical and scientific aspects of the experimental treatment.

In 'Newfoundland' treatment techniques, the patient will not only be interested in the normal information as regards the proposed treatment, but also in information on alternatives and on the risks involved in such techniques. The patient needs information to enable him to ascertain whether the benefits of the novel treatment technique

outweigh its risks compared to the risks and benefits of treatment techniques in accepted medical practice.

It is often argued that, in unnecessary treatment, the duty to inform is more stringent as there is no urgency in its performance and it differs from the risk-benefit analysis in normal medical treatment where, if all risks are disclosed and regardless of the low probability of their materialisation, there is a possibility that the patient overestimates that risk *vis-à-vis* the potential benefits of the treatment he needs. It is argued that if treatment is unnecessary from a strictly medical point of view, all risks should be disclosed as the patient may well decide not to undergo that treatment without significant detriment to his health. This is the necessity criterion, pushing for a specific, more stringent duty to inform. Likewise, according to the urgency criterion the absence of the need of immediate treatment opens the door to protracted decision making and engaging in a more thorough risk–benefit assessment.

C. Comparative Overview

In case of unnecessary or experimental treatment, in all analysed countries additional information must be disclosed to the patient, in particular the experimental nature of the treatment. In GERMANY, ITALY, FRANCE and SPAIN an exhaustive explanation of the potential risks involved, as well as information on the aims and benefits of the experiment must be given. In PORTUGAL full disclosure is necessary.

Regarding unnecessary treatment, the duty to inform is more stringent, and in FRANCE all potential risks, regardless of how minor they are, must be disclosed.

D. Relation to PECL and Other Parts of the Principles

This Article adapts the intensity of the duty to inform of Article 7:105 to circumstances where the treatment to be performed has an experimental nature, is a novel technique not yet fully tested or is unnecessary from a strictly medical point of view. The therapeutic exception provided by Article 7:107(1)(a) does not apply to these specific types of treatment. In the case of experimental treatment, this is due to the mandatory character of the rule, which is aimed at preventing abuse. In the case of unnecessary treatment, it does not apply because the treatment would in no way harm the health or endanger the life of the patient.

E. Character of the Rule

The rule of paragraph (1) is a default to the same extent as explained in Comment F to Article 7:106. Although the patient may waive his right to be informed under Article 7:107(1)(b), the treatment provider is not to influence the patient to do so.

The rule of paragraph (2) is mandatory in order to enforce the protection of vulnerable patients and to prevent abuse.

F. Remedies

The remedies are damages, as derives from Article 1:112(1) (Remedies for Breach of Duties of the Service Provider) or assurance of performance eventually leading to termination of the contract, under Articles 1:112(3) (Remedies for Breach of Duties of the Service Provider) and 8:103 PECL (Fundamental Non-Performance). For more details, see the Comments to Article 1:112 (Remedies for Breach of Duties of the Service Provider) and Comment F to Article 6:104 (Duty of Care of the Information Provider).

Comparative Notes

1. *Duty to inform in case of unnecessary and experimental treatment*
   If treatment is of an experimental nature, the patient must be informed of the experimental nature of the treatment, as well as an explanation of the potential risks. In ENGLAND, lack of information about the experimental nature of the treatment renders the treatment provider liable in the tort of battery. In GERMANY, ITALY, FRANCE and SPAIN the duty to inform is more stringent, including an exhaustive disclosure of the risks, as well as information on the aims and benefits of the clinical trial. In addition, in GERMANY the patient must be informed about the cost-benefit analysis and of the existence of compulsory insurance. In PORTUGAL, where strict liability exists, full disclosure is demanded. In FRANCE, if the treatment is unnecessary from a strictly medical point of view, the treatment provider must fully disclose to the patient all potential risks, no matter how minor they are. Similarly, in GERMANY, the less urgent or needed treatment is, the more thorough it is the extent of information to be disclosed.
   No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, GREECE, LUXEMBURG, SCOTLAND, SWEDEN.

National Notes

1. *Duty to inform in case of unnecessary and experimental treatment*
   ENGLAND: If a patient undergoes experimental treatment, she must be informed thereof, otherwise the treatment provider will be held liable under the tort of battery. Cf. Kennedy and Grubb, Medical Law, p. 1710.
   FRANCE According to article L.1122-1 CSP, the patient shall give particular consent to an experimental treatment. This article also details the particular information that the patient of such a treatment shall receive. The consent must be given in writing. Concerning unnecessary treatment, such as esthetical surgery, case law held that the patient shall receive complete disclosure of all risks involved, even if the consequence of their realisation is minor and the frequency of their realisation is exceptional. Cass.civ I, 17 February 1998, Bull.civ. I, no. 67; RTD civ. 1998, 681 Jourdain, for a

case stating that also the inconveniences of the esthetical treatment shall be disclosed.

GERMANY The patient must be informed of the experimental nature of treatment and its risks, as well as the regime of the compulsory insurance. Data on the objective of the experiment, such as its benefits to the community and a risk-benefit assessment must be disclosed (Laufs and Uhlenbrück, Handbuch des Arztrechts, nos. 65, 130). Both in experimental and unnecessary treatment, the scope of the duty to inform is more far reaching the less urgent treatment is, according to the *Kriterium der Dringlichkeit* (BGH NJW 1982, 2121; Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 64).

ITALY As regards experimental treatments, the patient has to give his consent in writing in a free and conscious way, after prior and exhaustive information not only on the aims, benefits, and connected risks, but also on the patient's right to withdraw his consent in each moment of the experimentation.

THE NETHERLANDS If the procedure is of an experimental nature, the duty to inform is more stringent than normal. Cf. J. Legemaate, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, p. 100. An obligation to inform does not exist with regard to risks that are public knowledge. Cf. W.R. Kastelein, Informed consent en medische aansprakelijkheid; jurisprudentie 1994-1998, Tijdschrift voor Gezondheidsrecht, 1998, p. 98.

POLAND There are special rules concerning the duty to inform in the case of an experimental treatment (The act on the profession of a doctor, art. 24). Before the treatment, the person who is to participate in it should be informed about the aims, the methods and the conditions of conducting the experiment, the expected benefits, the risks and about the possibility to resign from the participation in the experiment at any stage (art. 24 para. 1). The doctor is obliged to inform the patient if an immediate disruption of the experiment could cause danger for the health or life of the participant (art. 24 para. 2). Conducting an experiment requires a written consent of the participant (art. 25).

PORTUGAL Full disclosure is compulsory. Strict liability is imposed in case of experimental treatment, covered by compulsory insurance (art. 14/1, DL 97/94, 9/4). Cf. Oliveira, Temas de Direito da Medicina, p. 199.

SPAIN Act 25/1990 on Medicines *(Ley del Medicamento)*, arts. 59-69. It relates to the experimental investigation of a substance or medicine, when applied to human beings, in order to find its appropriateness for future medical treatments. Art. 60 para. 4 requires prior consent (in writing or in front of witnesses) of the patient subject to experimental treatment, after informing the patient of the nature, importance and risks of the experiment. The medical treatment provider must assure that the patient understands the information provided. Art. 60 para. 5 adds that when the experiment has no therapeutical interest for the patient, consent must always be in writing. Art. 60 para. 6 indicates that the instructions and information regarding the experiment, and the consent given by the patient, must take place before the experiment initiates. In cases of persons who are not able to consent, permission must be given by their legal representatives, although it will also be necessary to obtain the consent of the person under representation if this person is able to comprehend the importance and risks of the experiment. By Royal Decree 561/1993 the requirements for clinical testing experiments are further developed.

Article 7:107: Exceptions to the Duty to Inform

(1) The information that must be provided under Article 7:105 and 7:106 may be withheld from the patient:
  (a) if there are objective reasons to believe that it would seriously and negatively influence the patient's health or life; or
  (b) if the patient expressly states that the patient wishes not to be informed, provided that the non-disclosure of the information does not endanger the health or safety of third parties.
(2) Article 7:105 does not apply if treatment must be provided in an emergency. In such a case the treatment provider must, so far as possible, provide the information later.

Comments

A. General Idea

This Article covers the exceptions to the duty to inform as laid down in Articles 7:105 and 7:106. The first exception, in paragraph (1) subparagraph (a), is the so-called therapeutic exception. In some circumstances, disclosure to a patient may result in serious consequences for her life, health and treatment, as the truth may shock her.

> *Illustration 1*
> A patient is suffering from a severe cardiac disease. She needs to undergo bypass surgery. The situation is very delicate, and any shock or strong emotion entails the risk of a fatal stroke. The treatment provider decides to withhold information from the patient about her health status and to perform surgery. This is a situation of therapeutic exception to the duty to inform.

It should be noted that the therapeutic privilege does not apply to the situations of Article 706.

The second exception, in paragraph (1) subparagraph (b), concerns the 'right not to know'. Respect for the patient's autonomy implies that the patient has the right of not wanting to know, unless disclosure is necessary in order to protect the health status of third parties or public interest, as is often the case with genetic and infectious diseases.

> *Illustration 2*
> A patient is admitted to a hospital, suspected of having cancer. The patient states expressly that he does not want to be informed of anything; he just wants to be treated in whatever way the treatment provider finds most appropriate. The patient is entitled not to be informed.

Paragraph (2) of this Article provides for yet another exception. If, owing to an emergency or temporary mental impairment of the patient, it is impossible to inform him and if it is not possible to obtain informed consent from someone entitled to take decisions

on the patient's behalf, treatment may be carried out. However, the treatment provider must inform the patient as soon as this is possible (this duty to inform is related to Article 7:105). Subsequent treatment depends on renewed duties of the treatment provider to inform and to obtain consent.

B. Interests at Stake and Policy Considerations

The therapeutic exception is a very debated topic. According to the Hippocratic paradigm, the patient had but a passive role in treatment, being guided blindfolded as it were by the physician throughout treatment as if he were a child. No information whatsoever was provided, as it would only harm and confuse the patient. As health care became more easily accessible in developed countries and patient/consumers became better informed, this paradigm started to collapse in the twentieth century and the principle of patient autonomy came up.

It is often argued that no information should be withheld from the patient, as it enhances the patient's autonomy and self-determination. However, the role of the mind and suggestion in the success of treatment should not be underestimated; according to psychology, information can needlessly interfere with treatment or cause needless suffering. However, empirical studies suggest that treatment providers often abuse the vagueness of the therapeutic exception to shirk the duty to inform the patient. Other specialists argue that the therapeutic exception should only exist insofar as the life or health of the patient is at risk, and even then only in very serious circumstances, such as psychiatric or cardiac illnesses where the impact of the information might lead to shock causing the patient's death or serious deterioration of the patient's health status.

On the one hand, the autonomy of the patient demands that health care professionals inform patients adequately. On the other hand health-care professionals, owing to the time and effort needed to provide information, professional pride and other cultural and economic factors, are reluctant to inform the patient. This 'tug-of-war' explains the tendency of treatment providers to evade the burden of providing information by invoking the therapeutic exception freely.

The right not to know is another corollary of patient autonomy. The decision of the patient not to want to know must be respected. It is argued that the treatment provider is allowed to disclose information to the patient against his will if otherwise the health of third parties or public health would be jeopardised.

Illustration 3
A patient is diagnosed as having hepatitis B after being admitted to hospital because of a persistent flu and yellow skin. The patient declares she does not want to be informed, invoking her right not to know. As hepatitis B can be transmitted through sexual intercourse, the attending physician decides to inform the patient nevertheless in order to protect the health of the patient's sex partner or partners.

In situations where the patient is unconscious and treatment must be performed immediately, it is not possible to inform him. The literature and case law overwhelmingly agree that informing the patient can be deferred to a later time.

C. Comparative Overview

The most important exception to the duty to inform is the therapeutic exception, where the treatment provider withholds information from the patient in order to prevent the impact that the information would cause. This doctrine is not accepted in ENGLAND, where the treatment provider is allowed to exercise appropriate discretion in disclosure. In AUSTRIA, FRANCE and PORTUGAL, information that could be detrimental to the life or health of the patient can be withheld. The same is the case in GERMANY, GREECE and SWEDEN, though the control of the recourse to the exception is stricter. In THE NETHERLANDS, the treatment provider must consult with another treatment provider before deciding not to disclose, and in SPAIN if the treatment provider opts not to disclose the information, it is under a duty to inform the family of the patient.

D. Preferred Option

The therapeutic exception, paragraph (1) subparagraph (a), should only be invoked if the treatment provider has very serious and decisive arguments to support it, in situations where the information would have a negative impact on the patient's life or health. This is especially the case with cardiac or mental diseases, where the shock and emotional stress resulting from the information might entail serious risks to the life or health of the patient. It should be noted, however, that the information should not be withheld from the patient's close family or parties authorised to take decisions on the patient's behalf. Another limit to the therapeutic exception is that it no longer applies when the objective circumstances on which the decision to withhold information from the patient was based cease to exist. In this case, the patient should be informed *a posteriori*.

The right not to know – paragraph (1) subparagraph (b) – is recognised insofar as the lives, health and safety of third parties as well as public interest are not endangered by non-disclosure. The justification for this option lies in the autonomy of the patient.

Finally, if a patient is not able to consent to urgent treatment owing to unconsciousness or sensory impairment, the provision of information can be postponed until a later time when the patient is able to receive it, after treatment. People or institutions legally entitled to take decisions on behalf of the patient should be promptly informed. This is justified by practical considerations and it is a preliminary condition for condition for consent to be given, as follows from Article 7:108(3).

E. Relation with PECL and Other Parts of the Principles

In the situation referred to in paragraph (2), the rules of PEL Ben. Int. apply, in particular Article 2:102 PEL Ben. Int. (Duties after Intervention).

F. Relation with Articles 7:105, 7:106, 7:108 and 7:109

This Article is linked to Articles 7:105, 7:106 and 7:108 concerning information and consent. It covers the exceptions to the duty to inform stated in Articles 7:105 and 7:106 and to the duty to obtain consent in Article 7:108. It should be noted however, that paragraph (1) subparagraph (a) of this Article does not apply to the situations addressed by Article 7:106, and that none of the exceptions allowed by this Article apply to Article 7:106(2). These exceptions must be conveniently logged while fulfilling the obligation to give account stated in Article 7:109.

In the situation referred to in paragraph (2) the rules of PEL Ben. Int. apply, in particular Article 2:102 PEL Ben. Int. (Duties after Intervention).

G. Character of the Rule

In Paragraph (1) subparagraph (a), the rule is mandatory insofar as the treatment provider has a duty to inform the patient if there are no grounds for the therapeutic exception. On the other hand, if there are grounds for therapeutic exception, but the patient insists on being informed, regardless of the consequences, there is no counterpart duty of the treatment provider to withhold information. To this extent, it can be considered a default rule.

Paragraph (1) subparagraph (b) is clear: the general default character of the rules on information is confirmed. However, the rule is mandatory insofar as the health or safety of third parties is at stake.

Paragraph (2) is a scope provision, describing a situation in which the duty to inform does not exist. It provides that if the patient cannot be informed prior to his treatment, the duty to inform is postponed until the patient can be informed. The patient can, of course, waive this right to be informed afterwards if he is allowed not to know, in accordance with paragraph (1) subparagraph (b) of this Article.

H. Remedies

The remedies are damages, as derives from Article 1:112(1) (Remedies for Breach of Duties of the Service Provider) or assurance of performance eventually leading to termination, following Articles 1:112(3) (Remedies for Breach of Duties of the Service Provider) and 8:103 PECL (Fundamental Non-Performance). The restrictions of Article 7:105 must be observed. For more details, check the Comments to Article 1:112 (Re-

medies for Breach of Duties of the Service Provider), and section F of the Comments to Article 6:104 (Duty of Care of the Information Provider).

I. Burden of Proof

The treatment provider has to prove that exceptions to the duty to inform existed and, in the case of Article 7:107 (1)(a), to substantiate the existence of the objective conditions leading to the decision of withholding information according to the regime of therapeutic exception.

Comparative Notes

1. *Therapeutic exception*
   The doctrine of therapeutic exception is not recognized in ENGLAND, as treatment providers are allowed to exercise appropriate discretion while choosing which information to disclose, according to the information that would be disclosed by a reasonable average treatment provider. In AUSTRIA, FRANCE, PORTUGAL treatment providers can withhold information from the patients, provided that that information can be detrimental to the health or life of the patient. The same principle applies in GERMANY, GREECE and SWEDEN, though the therapeutic exception only applies in rare, exceptional cases, and is interpreted in a very strict fashion. In THE NETHERLANDS the therapeutic exception is accepted if the information would cause serious detrimental consequence to the patient, but the physician must consult with another physician in order to ascertain whether or not to disclose that information to the patient. Finally, in SPAIN, if the treatment provider invokes the therapeutic exception, the family of the patient should be informed instead of the patient.
   No information from BELGIUM, DENMARK, FINLAND, LUXEMBURG, SCOTLAND.

National Notes

1. *Therapeutic exception*
   AUSTRIA Art. 5a KAG speaks of information in a sparing way. Case law indicates that ultimate information will not be demanded in any situation as well: the extent to which a doctor has to inform his patient has to be assessed against the well-being of the patient in the first place. Only afterwards considerations as to the right to self-determination come into play. It follows from that that the doctor has to evaluate the patient's structure of personality in order to establish a possible danger of unsettling the patient. Such a risk might lead to a rejection of the treatment and ultimately result in risk way higher than the ones inherent in the treatment itself. Applying those considerations to very timid persons could even lead to minimum information of risks. The (new) understanding of the duty to inform leads to another issue worthwhile discussing: the dangers inherent in too detailed information of the patient. Even though that might sound absurd at first sight the arguments put forward do make sense. Accordingly, a patient might be made insecure by the overflow of information.

Thus, he might not be willing to consent to an operation for he fears remote consequences mentioned by the doctor. That in return burdens the doctor with a nearly impossible mission: On the one hand he has to inform about all the typical risks and on the other he has to convince his patient to consent to the treatment.
ENGLAND: The doctrine of therapeutic privilege is not necessary in ENGLAND, as according to the reliance on *Bolam/Sidaway*, the doctor is allowed to exercise appropriate discretion in choosing what information to disclose (Kennedy and Grubb, Medical Law, p. 701).
FRANCE Article 35 paras. 2 and 3 of the Code of medical ethics (decree 6 November 1995) allows the doctor to conceal a bad diagnosis or prognosis if the recovery of the patient requires it. More precisely it is ruled that in the interest of the patient and for legitimate reasons that the doctor must evaluate consciousness, a patient can be kept in the ignorance of a serious diagnosis or a prognosis, with the exception of the diseases, which involves a risk of infection. A fatal prognosis cannot be revealed without circumspection, but one of those close to him must be informed, with the exception when the patient has beforehand forbidden this information or determined the person to inform.
GERMANY The treatment provider can only withhold information on the basis of the therapeutic exception, and then exceptionally, if that information can seriously endanger the life or health of the patient. The case law of the BGH is very strict and inflexible on this issue. Cf. Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 65; BGHZ 29, 46, 56 = NJW 1959, 811 = JR 1959, 418; BGHZ 29, 176,182.
GREECE A therapeutic exception is possible depending on the particular circumstances of the case. Though there seems to be strong evidence to support an unmistakable obligation of the doctor to inform and an equivalent right of the patient to be fully informed thereof, there also seems to exist space for a therapeutic exception. This can be the case where from all circumstances it becomes clear that to inform the client would either result to a significant deterioration of the health of the client or render the treatment ineffective. This may be the case particularly in psychological treatment. In cases of physical treatment, one could envisage such an exception only in very limited circumstances.
THE NETHERLANDS The therapeutic exception is in Dutch law accepted in CC art. 7:448, para. 3. However, the exception is restricted to cases wherein and as long as distribution of information would clearly have serious detrimental effects for the patient, after consultation of another doctor: 'The provider of the service can withhold the information, meant in para. 1, from the patient only insofar as distributing that information would clearly have serious detrimental effects for the patient. If this is in the patient's interest, the provider of the service needs to give the information to person other then the patient. The information is given to the patient as soon as the detrimental effects subside. The provider of the service can only withhold the information after consulting with another provider of the service.' The latter formality has met with criticism in legal doctrine, e.g. B. Sluyters, M.C.I.H. Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, 1995, p. 28.
POLAND In exceptional situations, when the prognosis is bad for the patient, the doctor may limit the information about the patient's health and the prognosis, if according to the doctor's judgement not revealing the information is in the best interest of the patient. In such a case the doctor should inform the statutory guardian

of the patient or the person entitled by the patient to receive the information. However, on a request of the patient the doctor is obliged to give the patient the required information (art. 31 para. 4). In such a case the patient's right to information prevails over the judgement of the doctor what is beneficial for the patient.

PORTUGAL Therapeutic privilege can be invoked as a defence insofar as if the patient was informed, disclosure would have been clearly harmful for the patient (Oliveira, Temas de Direito da Medicina, p. 97). This is the case when disclosure would be a risk to the life of the patient, or would cause her serious damage to her physical or psychical health (Criminal Code, art. 157, this provision is used in the civil law). Pereira, O consentimento informado na relação médico-paciente. M.Phil. thesis, Faculdade de Direito da Universidade de Coimbra, Coimbra, 290 holds that Therapeutic Privilege should be interpreted in a restrictive way, only in case of some cardiac or psychic illnesses that could be aggravated by disclosure.

SPAIN If the information could cause grave damage to the health of the patient, the doctor is relieved from the obligation to inform him, but not from the obligation to inform his family, close friends or legal representative. In such situations, the provider is confronted with a conflict between the patient's right to health and the right to freedom. The former shall prevail (M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 49) However, such conclusion cannot be presumed when the patient is in a terminal situation (*diagnóstico fatal*). The doctor is obliged to inform the patient about his terminal situation unless the patient did expressly refuse to be informed about it or unless the information could bring a more serious damage to the health of the patient or could endanger the treatment (A. Juanes Peces, El deber médico como fuente de responsabilidad civil, Cuadernos de Derecho Judicial, 1994, T. XVIII, pag. 128; J. Sánchez Caro, El derecho a la información en la relación sanitaria: aspectos civiles, en La Ley 93-3, pp. 946 ff.).

SWEDEN In some rare cases information can be kept from the patient if it would counteract the treatment. According to the Ethical Counsel (*etiska rådet*), the right to self-determination for the patient is very important, but more important is life itself.

Article 7:108: Duty to Obtain Consent

(1) The treatment provider may not carry out treatment unless the treatment provider has obtained prior informed consent from the patient.
(2) The patient may withdraw consent at any time.
(3) In so far as the patient is incapable of giving consent, the treatment provider must:
  (a) obtain informed consent from a person or institution legally entitled to take decisions regarding the treatment on behalf of the patient; or
  (b) comply with any rules or procedures enabling treatment to be lawfully given without such consent.
(4) In the situation described in paragraph (3), the treatment provider must, in so far as possible, consider the opinion of the incapable patient, and the opinion of the patient expressed before the patient became incapable.

(5) In the situation described in paragraph (3), the treatment provider may only carry out treatment that is intended to improve the health condition of the patient.
(6) In the situation described in Article 7:106(2), consent must be given in an express and specific way.
(7) This Article does not apply if the treatment must be provided in an emergency.

Comments

A. General Idea

This Article deals with the issues concerning reality of consent, after information has been disclosed (Article 7:105) and the patient has made an informed decision. Consent is a condition to the validity of the contract as well as an instrument to protect the patient's right to self-determination.

> *Illustration 1*
> After being informed that there is a 10 per cent chance of impotence after prostate surgery, the patient consents to treatment after having weighed the benefits and risks. After obtaining the patient's consent, the treatment provider can start to treat the patient.

Another issue covered by this Article is the right of the patient to withdraw consent at any time (paragraph (2)). Even if the patient has previously provided consent for treatment, and treatment has already started, the patient can decide to withdraw it at any given time. Consent does not usually require a specific form and may be withdrawn freely at any time (Article 5 CHRB (General Rule)). This is a corollary of patient autonomy: regardless of the consequences, the directions of the patient shall be followed.

> *Illustration 2*
> After the prostate surgery, it appears that the patient has prostate cancer. He consents to radiotherapy and chemotherapy – which prove to have nasty side effects. After two months of reduced life quality due to constant discomfort because of vomiting, nausea, hair loss, etc., the patient decides to withdraw his consent to these treatments. He is free to do so.

The rule also deals with circumstances where the patient is not able to express consent (paragraph (3)); in such a case, a third party entitled to decide on behalf of the patient may give consent to the treatment. Depending upon the legal system concerned, this third party may be the parent's or a minor, a guardian, a family counsellor or an administrative or judicial body can be the parents of a minor, a tutor, a family council, an administrative or judicial entity. Specific procedures may exist in some jurisdictions. However, the will of an incapable patient must be considered insofar as possible, as well as the opinion it expressed prior to the circumstance that led it to incapacity (advanced directives). Paragraph (5) provides that, if a third party must give consent on behalf of an incompetent patient, this consent can only be given to necessary treatment, not to

optional or 'unnecessary' treatment, as discussed in the Comments to Article 7:106(1). Only treatment necessary to improve the health situation of the incompetent patient is allowed.

> *Illustration 3*
> A 12-year-old child has an illness that can be treated by surgery. There are some risks involved, but also substantial benefits. It is up to the child's parents to give consent, but at this age the child already can understand the question and decide. In some jurisdictions, it can be necessary for a court or another judicial or administrative body to make the decision on behalf of the incompetent patient. The opinion of the incompetent patient must be taken into account, though it is not binding.

Advanced directives, living wills and previously expressed wishes must be taken into account whenever the patient will no longer be able to provide consent for treatment (or withdraw from it). A patient can issue a set of instructions containing its preferences regarding its self-determination in case it loses at a later moment the capacity to decide Cf. Article 9 CHRB (Previously Expressed Wishes).

> *Illustration 4*
> Before undergoing a very delicate and high-risk operation, a patient declares that he refuses to be given life support if, as a consequence of the operation, he falls into a coma which appears to be permanent. The treatment provider must bear this preference in mind when deciding what to do.

The Article establishes a specific, more stringent regime for experimental treatment in paragraph (6), establishing that consent must be expressed and specific.

The duty to obtain consent does not apply in emergency cases (paragraph (7)) requiring immediate and prompt treatment. In emergencies, 'any medically necessary intervention may be carried out immediately for the benefit of the health of the individual concerned' (Article 8 CHRB (Emergency situation)). In such a situation, the rules of PEL Ben. Int. apply.

B. Interests at Stake and Policy Considerations

Consent fulfils two functions at the same time: that of acceptance of the contract and that of agreement of the patient to interference with his health. The patient has the right, derived from his autonomy, to have treatment performed only insofar as he consented to it. Likewise, it is in the treatment provider's best interests to obtain consent, usually in the form of a document, in order to have a defence in the case of potential malpractice claims in the future. There is no controversy regarding the necessity of consent of the patient to treatment in normal circumstances.

The interests of patients that lack the capacity, because of either a permanent or temporary impediment, to decide and give consent, should be safeguarded, as they are

considered as vulnerable subjects. From a bioethics point of view, they should earn an extended protection in order to prevent abuse or mistreatment: the treatment should be carried out only in their direct benefit (see Articles 6 CHRB (Protection of persons not able to consent) and 7 CHRB (Protection of persons who have a mental disorder). Direct benefit will consist on treatment that will, from an objective medical point of view, improve or maintain the health status of the vulnerable patient, thus excluding optional or 'unnecessary' treatment such as aesthetic surgery, sterilisation, etc. As such, treatment carried out on vulnerable patients that diminish or extinguish the health status of the patient (such as euthanasia or sterilisation) should not be allowed. This may, however, be too restrictive to end of life situations (e.g. dysthanasia), and as such the rule should be open-ended enough to encompass the state of art of bioethics.

Illustration 5
A patient has been in a coma for a long period. He is kept alive by means of an assisted life-support system. There are no reasonable prospects for recovery. Should this patient be kept on artificial life support for the rest of his life? This poses a complex ethical and legal problem. It is usually decided by the ethics committee of a hospital.

Illustration 6
A 15-year-old girl is prescribed the contraceptive pill. Such treatment can be considered unnecessary from a medical point of view.

In situations where the incompetent patient is not totally unable to understand the information provided, and to process it and decide upon its health status, bioethics recommends that his wish or opinion be taken into account. A problematic issue is, however, to what extent the opinion of these incompetent patients should be taken into account. Recordings of the patient's will before the circumstance that determined his incapacity to decide and give consent pose the same problems.

A condition from bioethics is that consent to scientific research must have been given expressly and specifically, and be documented (Article 16 (v) CHRB (Protection of Persons undergoing Research)). Consent should not be implied; it must be specific as regards that particular type of experimental treatment and be adequately documented in the clinical records, preferably in the patient's handwriting. It may, however, be argued, that the requirement of written consent is too formal from a contract-law point of view. Competent patients should be able to give their consent to clinical trials according to more stringent conditions aimed at protecting them.

Finally, there is a controversy about the right of the patient to refuse or withdraw from treatment. On the one hand, the patient's autonomy and right to self-determination should not be jeopardised. On the other hand, it is argued that the mission of the health-care provider is to heal, impose treatment on the patient, in spite of his will if treatment will benefit the patient. As such, it is often argued by health-care practitioners and some sectors in society that treatment providers should override irrational, potentially self-destructive, decisions of the patient that are against objective medical reasons.

C. Comparative Overview

The treatment provider must obtain the consent of the patient whenever possible in all legal systems analysed. If consent cannot be obtained from an incapable patient, some differences occur in several countries. Concerning minors, it is unanimous that the legal representatives of the minor, usually the parents, should give consent in normal conditions. However, in GERMANY and SWEDEN the opinion of a minor that has the ability to take an informed decision must be taken into account. In FRANCE, in this case, the minor must give consent. In THE NETHERLANDS and PORTUGAL the age of consent to medical treatment is lower than the legal age. In ENGLAND some forms of unnecessary treatment can only be authorised by a court of law.

If the incapable patient is an adult, in most countries the legal representative of the patient must give consent, and if none is appointed, the spouse or next of kin, though the law in ENGLAND is unclear on this aspect.

In an emergency situation, where the patient cannot give consent, consent is not necessary in FRANCE, ITALY and PORTUGAL, as the treatment provider is under a duty to give assistance to the patient, and it is presumed in THE NETHERLANDS and SPAIN.

Advanced directives, living wills and previously expressed wishes tend to be considered as non-binding to the treatment provider.

D. Preferred Option

Whenever capable patients are concerned, it is broadly accepted that their consent is essential for the treatment to be performed upon them. As such, the general principle in paragraph (1) establishes that the treatment provider is not allowed to perform treatment unless the patient has expressed his consent, after being provided with the necessary information under the conditions described in Articles 7:105, 7:106 and 7:107. The expression of consent is the final phase of informed consent, and establishes the informed choice of the patient regarding treatment. Consent constitutes both a condition for treatment to be performed and acceptance of the contract.

Consent does not require a specific form, and it can be withdrawn at any time (paragraph (2)) irrespective of whether, from an objective medical point of view, the decision is wrong or irrational. Although withdrawal may have a serious detrimental impact on the patient's health or life, this position is the only one coherent with the patient's right to self-determination regarding his health. This right to withdraw from or to refuse treatment can, however, be limited by *lex specialis* of a public law nature in particular situations, such as compulsory vaccination, mental health regulations, compulsory treatment of highly infectious diseases that pose a public health problem (tuberculosis, leprosy, SARS, etc.) and other circumstances where the public interest prevails over individual rights.

According to paragraph (3), if the patient is incapable of giving consent, persons or institutions legally entitled to take decisions on behalf of the patient are to act in his stead. Consent is to be given according to local rules and procedures applicable to such situations. Insofar as the incompetent patient has the limited ability to understand the circumstances in which treatment is to be performed, its opinion must be, insofar as possible, be taken into account (paragraph (4)). Although in this case the opinion of the incapable patient is not binding, it is relevant insofar as reasonable. The rule is open-ended in this aspect, as the relevance of the opinion of the patient can vary according to the concrete situation. The same reasoning applies to the decisions and preferences stated by patients before the patient became incapable.

The protection of vulnerable patients requires that the rule allows treatment to be performed on them insofar as it is presumed to be necessary for the improvement of their health status. This prevents the potential abuse or mistreatment of patients that are in especially vulnerable situations (paragraph (5)). End-of-life issues are outside the scope of the civil law, and should be dealt with by public law regulation.

Regarding paragraph (6), although consent in a case of experimental treatment must follow a more stringent regime in order to protect patients, a written form is not deemed necessary unless it is required under public law rules or regulations. Consent in these circumstances must be express, specific for that experimental treatment and carefully documented (Article 7:109).

Finally, this Article does not apply in case of an emergency where treatment must be provided imminently (paragraph (7)); treatment can thus be provided regardless of consent. However, subsequent treatment may only be performed insofar as the treatment provider has obtained consent from the patient for that treatment.

E. Relation to PECL and Other Parts of the Principles

Consent is a condition for the existence of a treatment contract (Article 2:101 PECL (Conditions for the Conclusion of a Contract), and consists in acceptance (Article 2:204 PECL (Acceptance)). Refusal to consent consists in rejection (Article 2:203 PECL) (Rejection) in the pre-contractual phase, and of cancellation (Article 1:115 (Cancellation of the Service Contract)) in the contractual phase. Both the patient and the treatment provider are bound throughout the whole to the duty to co-operate stated in Article 1:104 (Duty to Co-operate).

The duty to obtain consent logically follows from, and is connected with, the duty to inform (Articles 7:105, 7:106 and 7:107). Consent is the final step in a procedure geared to allowing the patient to make an informed choice regarding treatment. Consent thus obtained must be documented (Article 7:109). In the situation of paragraph (7), the PEL Ben. Int. applies.

F. Character of the Rule

This is a mandatory rule, as it is related to the protection of patients and validity of the contract.

G. Remedies

If consent is non-existent or invalid (Chapter 4 PECL (Validity)), the treatment contract is void, and the treatment provider must bear the consequences of avoidance (Article 4:115 PECL (Effects of Avoidance)) and following.

Apart from the remedies available under the law of contracts, the patient may be entitled to a remedy under the law of torts as his health was affected without the required consent.

Comparative Notes

1. *Consent regarding incapable patients*
   Regarding minor patients, consent must be given by their legal representative, normally the parents in all of the analysed countries. However, the opinion of an adolescent minor is taken into account, according to the minor's intellectual capacities and maturity in GERMANY, SWEDEN. In FRANCE, in the latter situation, consent must be obtained from the minor and not from the legal representative. The same applies in PORTUGAL, where the age of consent to medical treatment is 14 and in THE NETHERLANDS, where the age of consent is 16. In ENGLAND, only a court of law is competent to decide on behalf of the minor in case of some unnecessary types of treatment, such as sterilisation.
   Concerning the treatment of adult persons who cannot express consent, there is no clear solution in ENGLAND, sometimes being the treatment provider granted the status of taking decisions on behalf of the patient, and in ITALY. In FRANCE, SPAIN, THE NETHERLANDS the legal representative of the patient, or the closest of kin if none is appointed, is entitled to give consent on behalf of the patient.
   No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, LUXEMBURG, SCOTLAND. Insufficient information from GERMANY, GREECE, PORTUGAL, SWEDEN.

2. *Consent in emergency situations if consent cannot be obtained*
   In FRANCE, ITALY and PORTUGAL consent from the patient or its legal representative is not necessary in case of an emergency, as the treatment provider is under a duty to provide assistance. In THE NETHERLANDS and SPAIN consent is presumed.
   No information from AUSTRIA, BELGIUM, DENMARK, ENGLAND, FINLAND, GERMANY, LUXEMBURG, SCOTLAND.

3. *Advanced directives/living wills/previously expressed wishes*
No consensus appears to exist in the analysed countries about the validity of advanced directives, living wills and previously expressed wishes. In THE NETHERLANDS and PORTUGAL they must be taken into account, but are not binding to the treatment provider.
No information from AUSTRIA, BELGIUM, DENMARK, ENGLAND, FINLAND, GERMANY, IRELAND, LUXEMBURG, SCOTLAND, SWEDEN.

National Notes

1. *Consent regarding incapable patients*
ENGLAND In case of minors, parents can act as a proxy in the best interests of the child (Children Act 1989). Cf. *Re J (a minor) (wardship: medical treatment)* [1990] 6 BMLR 25, 29. Regarding adults, no formal proxy exists, which brings forth legal problems. In *Re F* [1990] 2 AC 1 the House of Lords granted the doctor performing treatment on an incompetent adult the status of 'quasi-proxy'. In some forms of treatment, the court has the exclusive right to decide on behalf of the incompetent (minor or adult) patient (Cf. *Re D. (a minor) (wardship: sterilisation)* [1976] 1 AllER 326).
FRANCE Regarding intellectual incompetent patients, the obligation for a treatment provider to obtain consent still exist. CC article 16-3 does not make any difference in this respect. However, the content and the presentation of the information must be adapted to the particular intellectual situation of the patient. Regarding, patients that are legally incapable to enter into a contract, such as minors, Article L. 1111-4 para. 5 provides that his consent shall be obtained if he intellectually can take a decision. If such is not the case, members of his family shall take the decision.
ITALY The treatment provider cannot act (unless in cases of extreme situations) without the consent of the patient (of full age, capable of understanding and deciding) or without the consent of the subjects that have parental authority in case of minors (for a complete overview see Santosuosso, Il consenso informato, Milano). In fact, insofar as the patient is incapable, his legal representative has to express the informed consent (Article 32 Cost.). The same principle is also expressed by the deontological code, which requires the treatment provider to obtain the consent from a person who is formally entrusted to decide. Problems arise with old people. In some situations one could argue that the patient is not in a condition to fully understand the information given, even if in principle still capable. In adopting the traditional division of the informed consent (information, understanding, capacity of understanding and deciding, freedom, conscious choice), one immediately understands that in the geriatric field problems arise in relation to various levels (L. De Caprio et al., Consenso informato e decadimento cognitivo, in Riv.it.med.leg., 1998, fasc. 6 (December), pt. 1., p. 910). It may be difficult to evaluate and take into account, in the right measure, the capacity and competence of a subject of whom one has still to respect the auto determination. This issue is strictly connected to the issue of the living will, and the possibility of giving anticipated directions (see *infra*).
GERMANY If the patient is a minor, consent is provided by its parents (CC arts. 1626 I; 1627; 1629 I) or legal proxy (CC art. 1909) Cf. BGH NJW 1984, 1807; 1989,1538; Gehrlein, Leitfaden zur Arzthaftpflicht, 153. In case of adolescents, their opinion must

be taken into account insofar as they can understand the nature, risks and consequences of treatment (BGHZ 29, 33; BGH, NJW 1972, 335; Katzenmaier, Arzthaftung, p. 339.

GREECE The normal age of consent applies. The legal representatives substitute the incapable for expressing consent. The informed consent is required for all procedure in the course of a treatment. However, in case of minor procedures that do not interfere with the physical and mental integrity of the patient and a separate procedure of consent would impede the efficiency of the doctor's task, a consent thereof may be presumed. This is reinforced by the fact that the patient has already provided the informed consent with regard to major procedures of the treatment.

THE NETHERLANDS A distinction needs to be made by *legally* incompetent patients (minors, persons under legal guardianship) and patients that are *physically* incompetent to give consent. With regard to the first category, the following can be said. According to CC art. 1:233, a person under the age of 18 who is not married nor a registered partner, and has never been married or a registered partner, is a minor. According to CC art. 1:234, a minor is not capable of concluding contracts without his legal representative's permission, unless the law states differently. With regard to treatment contracts, the law indeed states differently. According to CC art. 7:447, para. 1, a minor of 16 or 17 years old is capable of concluding a treatment contract pertaining to his own person. As a result, his consent is necessary according to the lead provision of CC art. 7:450, para. 1. Moreover, this implies that the consent of others, such as his parents, is not required. If the patient has reached the age of 12, but not the age of 16, the patient's consent is also necessary, as follows from CC art. 7:450, para. 2. However, in this case the patient's consent is in principle not enough: his legal representative needs to give his consent as well. However, the legal representative's consent is *not* necessary if the procedure is necessary to avoid serious detrimental effects for the patient, and if, even though the legal representative refuses the consent, nevertheless considerately continues to want the procedure to take place (CC art. 7:450 para. 2). If the patient has not yet reached the age of 12, his consent is not necessary, it follows *a contrario* from CC art. 7:450, para. 1 and 2. In that case, the doctor needs the consent of the legal representative (CC art. 7:450 in conjunction with art. 7:465). From a case, decided by the District court of Rotterdam (Rb Rotterdam 20 August 1993, NJ 1995, 18, Algemeen Psychiatrisch Ziekenhuis 'De Grote Rivieren' v. X), it follows that the representative's consent may be tacitly implied. The court ruled that from the fact that a minor of 15 years old voluntarily stayed for almost 4 months in a psychiatric hospital with her parents' knowledge but without their express consent, it may be deducted the parents presumably have given their consent to the treatment. If the patient is incapable of expressing his consent (the second category), the doctor needs the consent of the legal or 'mandated' representative or, if none has been appointed, the patients' partner or a member of his family (CC art. 7:450 in conjunction with art. 7:465, para. 3).

POLAND If the patient is minor or incapable of giving a conscious consent, the consent of his statutory guardian is required, and if the patient does not have the statutory guardian – the consent of the guardianship court (art. 32 para. 2) or the factual guardian (art. 32 para. 3). In the case of completely incapacitated persons the consent should be given by his statutory guardian. If the patient is able to express its opinion regarding the treatment with recognition, his consent is also required (art. 32

para. 4). If the patient is over 16 his consent is required (art. 32 para. 5). If a minor, who is over 16, an incapacitated person or a mentally handicapped person, who has sufficient recognition, disagrees with the treatment, apart from the consent of the statutory or the factual guardian or in the case when they do not want to give their consent, the consent of the guardianship court is required (art. 32 para. 6). The consent of the abovementioned persons may be given orally or by any behaviour, which beyond any doubt expresses will of undergoing the treatment (art. 32 para. 7). If the incapable patient does not have the statutory or factual guardian, or communication with them is not possible, the consent of the guardianship court is required (art. 32 para. 8).

PORTUGAL The age of consent is 14 years old (Penal Code art. 38 para. 3). The parents can provide proxy consent, as of CC arts. 1878 ff.

SPAIN Such is the case for minors (under 18 years old), persons declared legally incapable to give informed consent, or patients whose health status does not allow them to provide consent. Only in those cases, the medical provider is under the obligation to inform the patient's family or legal representative. Article 10.6 under b) LGS (M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 280).

SWEDEN For children, the consent of the parents is necessary, until the child reaches an age where it is mature enough to take responsibility for it's own situation. This is expressed in 6:11 *Föräldrabalken* (FB) the Book on Parents, which states that concurrently with the child's growing age and development more and more consideration shall be taken as to its own opinion and wishes. The parents are however responsible for the child until it becomes of age (18 years old) and shall see to that it obtains the medical treatment needed. In practice these rules operate in a way that the child, if it is developing normally and has reached it's teens, more and more takes responsibility for it's own medical care, Sverne, Patientens rätt, p. 38. A special situation arises as for teenage pregnancies. It is considered that the girl always has the right to chose abortion on her own. The medical personnel furthermore has no right to inform the parents if the girl refuses. They must however inform the girl adequatly and offer to inform the parents for her, Sverne, Patientens rätt, pp. 38 ff.

2. *Consent in emergency situations if consent cannot be obtained*

FRANCE In case of emergency and when neither the patient, nor members of his family, can promptly consent to the treatment, such a treatment can be carried out (L. 1111-4 CSP).

ITALY In case of emergency and danger for the life of a person who cannot express at the very moment a contrary will, the treatment provider has to provide the assistance and indispensable care.

The behaviour of a treatment provider that has the possibility to calmly evaluate the case, is judged in a different way than the behaviour of whom was forced by a case of emergency to take decisions (A. Conti, Pretura Circondariale di Nuoro, 18 May 1996, no. 117, in Riv.it.med.leg., 1998, fasc. 6 (December), I, 1174). In this latter case, the doctor did not have enough time to carry out all needed exams and consulting.

THE NETHERLANDS In case of emergency, consent is still necessary, but is presumed to have been given. Cf. Roscam Abbing, p. 25; E. du Perron, Opdracht, in: A. Pitlo, Het Nederlands burgerlijk recht, Deel 6: Bijzondere overeenkomsten, p. 273.

POLAND Treatment without consent of the patient is allowed if the patient requires immediate doctor's assistance and because of the health condition or the age, the patient cannot express his consent, and there is no possibility to contact his statutory or factual guardian (art. 33 para. 1). In such a case, if possible, the doctor should consult another doctor (art. 33 para. 2), and circumstances of such decision should be mentioned in the patient's records (art. 33 para. 3). If, during an operation or a medical or diagnostic treatment, certain circumstances appear, and not taking them into account may cause death, grave bodily injury or severe health disorder and there is no possibility to immediately obtain the consent of the patient or his statutory guardian, the doctor is entitled, without the consent, to change the scope of the operation, or the method of the treatment or diagnostics in a way that allows to take the new circumstances into account. If possible, the doctor should consult another doctor in such case (art. 35 para. 1). The circumstances should be mentioned in the medical record of the patient and the patient, his statutory or factual guardian and the guardianship court should be informed about them (art. 35 para. 2).

PORTUGAL In an emergency situation, if a delay in treatment is detrimental to the life of the patient, or leads to an aggravation of its health condition, consent is not necessary: Penal Code art. 156(2). From a civil law point of view, this is considered as Negotiarum Gestio: Cf. Pereira, O consentimento informado na relação médico-paciente. M.Phil. thesis, Faculdade de Direito da Universidade de Coimbra, Coimbra, p. 353.

SPAIN According to art. 10 para. 6 of the General Act on Healthcare, informed consent by the patient is required unless there is an emergency situation, which does not allow delays which may result in irreversible damages or cause death to the patient. This solution is based on the theory of the "presumed consent". According to the said doctrine, the doctor must presume that the patient, being able to do so, would have given his consent to the treatment. The right to health prevails over the right to be informed. Some authors argue that the doctor must intervene without consent when there is only one possible treatment, but not in cases where several alternatives are possible. In the latter case, the doctor must obtain informed consent by the family or legal representative of the patient on the treatment to be followed (M.D. Cervilla Garzón, La prestación de Servicios Profesionales, Valencia, 2001, p. 279). In any case, the obligation to inform the patient regarding the treatment must be fulfilled in a later stage, once the patient is able to understand the information.

SWEDEN There are some exceptions concerning the consent of the patient, especially when it comes to operations. Firstly the operation can be performed in case of emergency when the patient is very ill or hurt and cannot give his consent because he is unconscious or in a similar state. If there is time the patient's family shall be asked about the hypothetical opinion of the patient concerning the treatment, Hedman, Ansvar och ersättning vid medicinsk verksamhet, pp. 24 ff. The same applies if the patient otherwise is incapable of expressing consent, consent will then be presumed.

3. *Advanced directives/living wills/previously expressed wishes*

FRANCE The patient can designate a person (member of the family, friend, habitual treatment provider), that will be informed and able to consent to the treatment when the patient cannot express his choice (art. L. 1111-6 CSP).

ITALY There is no common view as to the value to attribute to anticipate directions of the patient. There are extreme views which deny any relevance to such documents, putting the accent on the fact that the consent has to be up to date. On the other hand there are the ones who believe that such advanced directives are indeed binding because they are the expression of the autonomy of the patient. It still seems to prevail the view that the decision of the patient, expressed in documents containing advanced directives, does not bind the treatment provider (L. De Caprio et al., Consenso informato e decadimento cognitivo, in Riv.it.med.leg., 1998, fasc. 6 (December), I, p. 914).

THE NETHERLANDS If a patient of 16 years of age or older cannot express his consent, the doctor and his legal or 'mandated' representative or his mentor have to follow the patient's written decision to refuse treatment, stemming from the time he still was capable of expressing his consent. However, the doctor can deviate from that decision if, in his opinion, good grounds to do so are present (CC art. 7:450, para. 3). From this article it follows that in principle, consent is necessary. If no written decisions is available, the consent from an 'informal representative' is required (CC art. 7:465) is necessary.

POLAND The doctor should follow advanced directives of the patient, even if that may cause death or suffering of the patient.

PORTUGAL Living wills must be taken in account by the treatment provider, but do not bind him: art. 9 CHRM.

SPAIN If the aim behind the obligation to inform is to allow the patient to consent, with complete knowledge of the facts, to any medical intervention on the patient's body, it is logical to think that any previous indications of the patient (given before becoming incapable of giving a valid consent) regarding the treatment must be taken into account. Although it could also be argued that at that moment the patient may not have had all necessary information to decide whether to give his consent or not.

Article 7:109: Duty to Give Account

(1) The treatment provider must create adequate records of the treatment. Such records must include, in particular, information collected in pursuance of Article 7:102, information regarding the consent of the patient and information regarding the treatment performed.
(2) The treatment provider must give the patient, or if the patient is incapable of giving consent, the person or institution legally entitled to take decisions on behalf of the patient, access to the records.
(3) The treatment provider must answer, in so far as reasonable, questions regarding the interpretation of the records.
(4) If the treatment provider fails to comply with paragraphs (2) and (3), breach of the duty under Article 7:104 and causation are presumed.
(5) The treatment provider must keep the records, and give information about their interpretation, during a reasonable time of at least 10 years after the treatment has ended, depending on the usefulness of these records for the patient or the patient's heirs and for future treatments. Records that can reasonably be expected to be important after the reasonable

time must be kept by the treatment provider after that time. If for any reason the treatment provider ceases activity, the records must be deposited or delivered to the patient for future consultation.

(6) The treatment provider may not disclose information about the patient or other persons involved in the patient's treatment to third parties unless disclosure is necessary in order to protect third parties or the public interest. The treatment provider may use the records in an anonymous way for statistical or scientific purposes.

Comments

A. General Idea

According to this Article, the treatment provider has the duty to create, keep and keep up to date adequate records *(Dokumentationspflicht)* concerning the clinical history of the patient. This obligation aims at securing the correct performance of treatment, securing elements that may be important as evidence and accountability instrument. Its scope consists the records on the anamnesis, the present health status of the patient, the way the illness developed, therapeutic procedures followed, medication, consent given, treatment performed, the names of the health-care professionals involved, etc. The Article covers the patient's right to have full access to the records.

Illustration 1
A patient is admitted to a hospital after a skiing accident. Upon admission, a record will be created, and the time of admission noted down. The patient is taken to a physician in the emergency ward who is responsible for the assessment of the health status of patients and who refers them to specialists if necessary. The physician makes an initial diagnosis concluding that the patient has suffered a femoral fracture. The physician makes an initial diagnosis, concluding that the patient has suffered a femoral fracture. The physician notes down this information. The patient is taken to the orthopaedic ward, where a specialist orthopaedist proceeds to make a more thorough diagnosis. The orthopaedist confirms the initial diagnosis and orders an X-Ray examination. The X-Ray examination is done, the radiation exposure is recorded and the radiologist's name noted down. Next, the orthopaedist examines the X-ray films, which are attached to the records. She informs the patient that the leg is to be immobilised by means of a splint for one month and that she will prescribe anti-inflammatory and painkilling drugs to be taken during the first three days. The splint is put on by a nurse. The patient leaves the hospital, and is to return after one month. All these data are noted down in the clinical record, which also contains an account of the materials used and their costs for the processing of the invoices.

Paragraph (3) constitutes a specific remedy for treatment contracts. If a treatment provider does not provide sufficient information to enable a patient to resort to a remedy under these rules, that treatment provider is presumed not to have performed the duty to give account.

Paragraph (4) relates to the treatment provider's obligation to answer reasonable questions from the patient regarding the interpretation of the records.

Records are to be kept for a reasonable time, according to paragraph (5), depending upon their usefulness.

The treatment provider is bound to secrecy concerning the records (paragraph (6)), except *vis-à-vis* the entities entitled to take decisions on behalf of the patient, on behalf of third parties whose life or health could otherwise be affected in a detrimental way or public interest. Likewise, anonymised data can be used for statistical, teaching or scientific purposes.

B. Interests at Stake and Policy Considerations

Records are very important in order to be able to check the adequate performance of the contract. Apart from their methodological usefulness in the provision of treatment, records serve other purposes. They are important in the process of disclosure of information to the patient, especially in circumstances where the patient will want to evaluate the provision of the treatment. It will also constitute the only source of information on which to base a lawsuit over malpractice, and it will also be of capital importance if a patient wishes to seek a second opinion or to be treated by another health-care professional.

As such, it is generally recognised that the patient has the right to have access to his medical records as well as to obtain co-operation (even in the case of a claim against the treatment provider) from the treatment provider in their interpretation, according to applicable procedural rules. The records will be very important in order for the patient to assess the quality of treatment, and if necessary, essential elements in the substantiation of legal claims in case of non-performance of the treatment contract.

It is debated whether the patient should have access to the entire record or only to the objective information included in it, thus with the exception of notes of a personal, subjective nature. The latter may be highly prejudicial to the health-care provider in the context of a lawsuit. Another debate concerns the issue whether the patient should have open access to the records or only through a physician. It is argued, on the one hand, that a normal patient will not be able to understand the records and that full disclosure may not be to the advantage of the patient. On the other hand, it is argued that the patient should be granted full disclosure of all the records regarding his treatment and that involvement of a health-care professional and suppression of subjective notes by the treatment provider derive from a lack of transparency, paternalism and corporatism in health care.

Records may also be important in the future, serving as a basis for treatment to be performed on a patient. They may even be useful for several generations into the future (e.g. as regards genetic traits presenting a risk).

The issue of the quality of the records is very important. First of all, how detailed should the records be? Secondly, how accurate should they be? It is in the interest of the patient that they be thorough and accurate. Lack of thoroughness or accuracy may lead to non-performance of the contract.

> *Illustration 2*
> A patient is diagnosed as having a severe insufficiency of the renal function; her left kidney needs to be removed. The surgeon operating the patient removes the right kidney owing to lack of clarity of the record created by the physician responsible for the diagnosis. In this case, the poor quality of the records contributed to the non-performance of the contract.

Even though accuracy is important, one should realise there is a price to pay: extensive record-keeping can be a difficult task for the treatment provider for time-management, organisational and budgetary reasons, whereas the possible gain for the patient may not always very clear.

> *Illustration 3*
> A patient is treated for a toothache. The treatment itself takes 15 minutes, recording its details will take 30 minutes if every wad of cotton used in the administering of the treatment is to be accounted for. If such were the case, the costs of the health-care provision of health care would skyrocket.

Regarding the specific remedy for breach of the duty to give account, records are *the* decisive element, particularly in the context of a claim for non-performance. In such circumstances, the treatment provider should provide the patient with sufficient information. If it does not, or if records are incomplete, breach of the duty must be presumed. The lack or incompleteness of the medical record may even justify the reversal of the burden of proof in a liability claim under the doctrine of *res ipsa loquitur*. It may be argued, however, that it is unrealistic to expect the treatment provider to act in such a way, as it would be against his interests.

A debated topic is the intensity of the obligation of the treatment provider to answer reasonable questions concerning the records. This obligation may affect the organisation of the treatment provider, turning it away from more important duties. On the other hand, such information is important for the patient.

Another issue is during what period the treatment provider is to keep the records. It would be burdensome to keep records for a very long time, and there are costs involved in keeping them as well as providing information related to the records. As such, it is not the advantage of the treatment provider to require the records to be kept for a lengthy period. On the other hand, it would be in the patient's interest that they are kept for as long as possible, in order to enable future reference or in order to judge the quality of treatment when an injury manifests itself after a long time. In some circumstances, the period would be very long indeed (as regards genetic information, for instance). A balance should be struck.

The treatment provider is under an obligation to keep the records secret. While this does not apply to third parties entitled to decide on behalf of the patient, doubts arise whether the treatment provider should be allowed to use or disclose data for statistical or scientific purposes. On the one hand, the treatment provider and society have an interest in the development of medical science; on the other the patient's privacy or the privacy of other persons involved in its treatment (e.g. data obtained from family or friends that are needed for the treatment of the patient).

It is debated whether the treatment provider should be allowed in some circumstances to breach privacy and disclose information to third parties. It is argued that where privacy could affect the life or health of third parties in a detrimental way, or in situations of public interest, those interests prevail over the patient's privacy. Such cases would consist e.g. of potential contamination of third parties with infectious diseases, or of the suspicion of a criminal act being related to treatment performed on a person.

Problems may also arise in cases where an insurance company or an employer enters into a treatment contract with a doctor on behalf of the patient. The disclosure of medical data may be seriously disadvantageous to the patient.

C. Comparative Overview

A duty to keep records of treatment is accepted in all of the analysed legal systems. Specific detailed regulation exists in AUSTRIA, ENGLAND, FRANCE and SWEDEN. If the treatment provider does not keep adequate records, it can incur in disciplinary sanctions in FRANCE, ITALY and SWEDEN, and in AUSTRIA, GERMANY, THE NETHERLANDS, PORTUGAL and SPAIN, the omission can alleviate the burden of proof to be discharged by the patient, or even shift it to the treatment provider. The right of patients to have access to their records is recognised in all analysed legal systems, though some information such as personal remarks (GERMANY and PORTUGAL), data likely to cause serious harm to the physical on mental health of the patient (ENGLAND) is exempted from the duty to disclose or information that could breach the privacy of third persons (THE NETHERLANDS) is not disclosed. In PORTUGAL patients can only have indirect access to the clinical records, through the intermediation of a physician.

The records are confidential in all analysed legal systems, though in some countries the privacy of the patient does not prevail over serious public interest (ENGLAND, GERMANY, THE NETHERLANDS, SPAIN) or a threat to the life or health of third parties (ENGLAND, THE NETHERLANDS, SPAIN, ITALY, GERMANY).

D. Preferred Option

The treatment provider is under the obligation to create adequate records, of quality and thoroughness of which conform to the standard of care of its profession. It is also under the obligation to disclose them to the patient, and enable it (or a court of law or the relevant institution investigating and deciding upon malpractice claims) to be able to interpret the records. This is the general principle.

The remedy of paragraph (3) prevents a situation where the patient would be precluded from assessing the quality of treatment, and possibly from substantiating a claim, because the treatment provider breached his obligation to keep records or withheld information. Without records, it is virtually impossible for the patient to successfully claim a remedy for non-performance under these rules. This rule also has a deterrent role, as it prevents the treatment provider from being lax as regards his obligation to keep records where it serves purposes other than securing the evidence.

The treatment provider must only answer *reasonable* questions from the patient regarding the records. This prevents wasting the treatment provider's time and effort, while providing the patient with the information it reasonably needs in order to evaluate the quality of performance of the treatment contract.

As regards the time during which the treatment provider is to keep the records, the option of paragraph (5) varies according to the circumstances. Ten years is set as the reasonable minimum period, but a treatment provider may be required to keep the records for a longer time. In exceptional circumstances, where it may be important to keep the records for a longer time, the treatment provider is obliged to keep them. It is of no importance whether their prolonged keeping is of medical interest or otherwise serves the patient's interests or the general interest.

> *Illustration 4*
> An employee of a construction company is hospitalised because of a possible exposure to asbestos. The physician examining the patient cannot find evidence of any detrimental effects at that time. However, exposure to asbestos may lead to the development of malignant mesothelioma (a specific type of lung cancer attributed solely to sustained exposure to asbestos) decades later. Thus, the employee has an interest in the records being kept for a very long period, in order for him to be able to prove that exposure took place in the past, information which he will need to file a claim against his employer.

When the treatment provider ceases its activities, the records must either be deposited with another treatment provider or competent organisation or delivered to the patient or his heirs. This solution is a balanced one, and is justified by the possible importance of that information for the patient or relevant third parties even after an eventual action is limited.

Finally, it seems reasonable to allow the treatment provider to use or disclose the information contained in the records for statistical or scientific purposes, insofar as

they are used in an anonymous way. The treatment provider can also disclose information in order to protect third parties or public interest in limited exceptional cases. The limit consists of the protection of the life or health of third parties that would otherwise potentially be endangered if disclosure did not take place. Disclosure is, however, not allowed to protect paternalistic interests of third parties, as these are not serious enough to warrant the sacrifice of secrecy, and such a breach might cause serious detriment to the patient (e.g. the loss of a job if data are disclosed to the employer).

E. Relation to PECL and Other Parts of the Principles

All the stages of the treatment must be noted down in the records: those described in Articles 7:102, 7:103, 7:105, 7:106, 7:107 and 7:108. The duty to give account can be seen as an ongoing duty to store information for current and future use. This duty is benchmarked by the standard of care referred to Article 7:104.

The duty to give account in the situation described in Articles 7:107(2) and 7:108(7) is that of Article 2:102 PEL Ben. Int. (Duties after Intervention).

F. Character of the Rule

The provisions of paragraph (1) are mandatory. Under other paragraphs, the patient or the person or the institution entitled to take decisions on behalf of the patient may opt for not exercising their right, but cannot waive that right beforehand. However, paragraph (4) contains a default rule, as the parties may agree on a different way of keeping the records, such as deposit with a competent organisation or delivery to the patient or persons or institutions entitled to make decisions on the patient's behalf. A clause to that extent, however, is subject to Article 4:110 PECL (Unfair Terms not Individually Negotiated).

G. Remedies

In general, the remedies laid down in Article 1:112 (Remedies for Breach of Duties of the Service Provider) apply.

Paragraph (3) constitutes a specific remedy for treatment contracts. If the treatment provider does not provide sufficient information which enables a patient to resort to a remedy under these rules to evaluate the quality of treatment, that treatment provider is presumed not to have performed the obligation to treat.

Violation of the obligation of secrecy involves liability of the treatment provider under Article 2:302 PECL (Breach of Confidentiality): 'The remedy for breach of this duty may include compensation for loss suffered and restitution of the benefit received by the other party.'

Comparative Notes

1. *Duty to keep records*
   It is unanimous in all the analysed countries that the treatment provider is under a duty to create and keep adequate clinical records about the treatment. It is regulated by specific public law regulations in: AUSTRIA, ENGLAND, FRANCE, SWEDEN.
   No information from BELGIUM, DENMARK, ENGLAND, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

2. *Consequence of not keeping records*
   In FRANCE, ITALY and SWEDEN, if the treatment provider does not keep records, it may incur in disciplinary sanctions. In AUSTRIA, GERMANY, THE NETHERLANDS, PORTUGAL and SPAIN, the consequence of not keeping records is the facilitation of the patient's burden of proof, or even a shift of the burden of proof to the treatment provider. In ENGLAND the treatment provider is under a procedural duty to disclose all information relevant for litigation. In GREECE it is an autonomous ground for a liability claim.
   No information from BELGIUM, DENMARK, ENGLAND, FINLAND, IRELAND, LUXEMBURG, SCOTLAND.

3. *Patient's right to have access to the records*
   In all of the analysed legal systems, the patient has a right of access to the clinical records. However, in some systems some of the information can be withheld from the patient. Evaluative information and personal remarks can be withheld from patients in GERMANY and PORTUGAL: the patient is only entitled access to objective data and facts logged on the records. In ENGLAND data likely to cause serious harm to the physical on mental health of the patient is exempted from the duty to disclose. Following a similar reasoning, in PORTUGAL patients can only have indirect access to the clinical records, through the intermediation of a physician. In THE NETHERLANDS information that could breach the privacy of third persons is not disclosed.
   No information from BELGIUM, DENMARK, ENGLAND, FINLAND, GREECE, IRELAND, LUXEMBURG, SCOTLAND.

4. *Secrecy of clinical records*
   In all analysed legal systems clinical records are considered as confidential information. In ENGLAND this duty emerges from a general duty of confidentiality existent in the common law. Also in GREECE it emerges from the general right of personality enshrined in the Constitution. In GERMANY the confidentiality in the treatment-provider/patient relationship emerges from criminal law. In FRANCE and SPAIN the secrecy of clinical records emerges from statutes regulating healthcare. In THE NETHERLANDS a specific provision exists in the CC.
   No information from AUSTRIA, BELGIUM, DENMARK, ENGLAND, FINLAND, IRELAND LUXEMBURG, PORTUGAL, SCOTLAND, SWEDEN. Insufficient Information from ITALY.

5. *Exceptions*

While in FRANCE no exceptions to the duty of confidentiality appear to exist, in other legal systems confidentiality can be waived in the following specific circumstances: a) serious public interest in disclosure outweighing the right to privacy of the patient is accepted in ENGLAND, GERMANY, THE NETHERLANDS, SPAIN; b) threat to the life or health of third parties is recognised in ENGLAND, THE NETHERLANDS, SPAIN, ITALY, GERMANY; c) disclosure to other healthcare professionals for operational reasons is accepted in GERMANY; THE NETHERLANDS, SPAIN; d) legal representatives of minors and incompetent patients in ENGLAND, ITALY, THE NETHERLANDS, SPAIN; e) anonymous use of data for medical research is recognised in GERMANY and THE NETHERLANDS, and finally f) authorisation of the patient to disclosure.

No information from AUSTRIA, BELGIUM, DENMARK, FINLAND, GREECE, IRELAND, LUXEMBURG, PORTUGAL, SCOTLAND, SWEDEN.

National Notes

1. *Duty to keep records*

AUSTRIA In the field of public hospitals the KAG regulates the duty to keep records in art. 10. Paragraph 1 Z 2 regulates what these records should contain; Z 3 imposes an obligation to keep those files at least 30 years whereby paragraph 3 states the responsibility the keeping of the records. Likewise, the law on doctors regulates that issue in art. 51, imposing a duty to keep the records for at least 10 years (para. 3). In sum, keeping written records is an important ancillary duty of the doctor which entails the patient's right to view them as well.

ENGLAND Doctors must keep records as a part of the care owed to the patient: NHS (General Medical Services) Regulations, 1992, Sch 2, para. 36. Cf. Kennedy and Grubb, Medical Law, p. 990.

FRANCE An obligation to create clinical records exists, Article R. 1112-2 CSP. This article also details the types of information that have to be included in the clinical record. The treatment providers have the possibility, with the consent of the patient, to store clinical records to trusted third parties, Art. L. 1111-8 CSP.

GERMANY According to unanimous case law and literature, the treatment provider has an ancillary duty, emerging from the treatment contract, of creating complete and dutiful records of treatment measures *(Dokumentationspflicht)*. Cf. BGHZ 72, 132, 137; Laufs and Uhlenbrück, Handbuch des Arztrechts, 443. Records must cover all of the phases of treatment: anamnesis, diagnosis, therapy, medication, information given, surgery logs.

GREECE The provider of the service is under an obligation to keep records of the medical history of the patients. It is a secondary obligation in the contract of treatment. To the obligation of the doctor corresponds a right of the patient to access these records. Recent legislation on the protection of the individual from databases –implementing a European directive- reinforces the right of the patient to have unlimited access to such records.

ITALY All medical operations, clinical data and observations on the patient have to be recorded. The informed consent is a precise moment in the relationship between a doctor and his patient. It requires as any other moment of the clinical approach, an accurate and documented procedure (A. Flores, F. Buzzi, Ancora sull'obbligo di in-

formazione nei confronti del paziente: questa volta in relatione al rischio di contagio virale da plasmaferesi, in Resp. civ. e prev., 1998, fasc. 1 (febbraio), p. 1297). It has to be configured not as an act, but as a process: it cannot be only a subscription by the patient of a form, even if irreprehensible, but not for this necessarily understandable (M. Portigliatti Barbos, Il modulo medico di consenso informato: adempimento giuridico, retorica, finzione burocratica?, in Rivista Italiana di Diritto e procedura penale, 1998, p. 894).

THE NETHERLANDS According to CC art. 7:454, para. 1, the doctor is obliged to keep records of the medical condition and the treatment of the patient – even if the patient doesn't want him to record some data. Cf. B. Sluyters, M.C.I.H. Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, series Praktijkhandelingen, 1995, p. 63. The patient does not have a right to have data corrected. However, on the patient's request, the doctor does have to record statements, made by the patient, with regard to the records, and to which procedures of a far-reaching nature the patient has given his consent. Cf. CC arts. 7:451 and 7:454 para. 2, respectively. See further F.C.B. van Wijmen, Geneeskundige behandelingsovereenkomst, in: E.H. Hondius, G.J. Rijken (eds.), Consumentenrecht, 1996, p. 168. Moreover, on request of the patient, the health provider is required to lay down in writing to which procedures of an important nature the patient has consented (CC art. 7:451). In such a document the patient or the health provider may also indicate to which procedures the patient has *not* consented. The health provider is free to include other notes in the records. The limitation of the patient's right to demand the health provider to lay down in writing to only the procedures of an important nature is meant not to formalise the relations between the health provider and the patient too much. Cf. Tekst & Commentaar Gezondheidsrecht, edited by C.J.J.M. Stolker, 1999, note to CC art. 7:451.

POLAND According to art. 41 para. 1 of the act on the profession of a doctor, the doctor is obliged to keep individual medical records of the patient. Additionally, the medical care institutions are obliged to keep records of the patients (art. 18 of the act on the medical care institutions).

PORTUGAL The doctor is under an ancillary duty to keep adequate records: CC arts. 573 and 575. Cf. Pereira, O consentimento informado na relação médico-paciente. M.Phil. thesis, Faculdade de Direito da Universidade de Coimbra, Coimbra, p. 328; Figueiredo Dias, Sinde Monteiro, Responsabilidade médica na Europa ocidental. consideracões de lege ferenda. Scientia Ivridica, 1984, p. 42.

SPAIN art. 11 LGS states the obligation for the medical service provider to keep written records regarding the patients' treatment.

SWEDEN There is an obligation for the health- and medical service as well as for the dental service to keep records, art. 1 *patientjournallagen* (1985:562), the Law on patient records. Record shall be kept over treatment and examination, and there are detailed rules as for the content.

2. *Consequence of not keeping records*

AUSTRIA If the doctor fails to keep records he violates his obligation to do so. Such conduct entails consequences as regards the question of evidence. Since the patient's position to proof that the doctor had mistreated him is deteriorated the patient will be granted a facilitation of evidence in order to re-establish the doctor-patient relation. In

addition to that the provider might face penalties of an administrative nature. Both the KAG and ÄrzteG are public law statutes and might therefore trigger sanctions in the field of public law if failing to abide by the statutory regulation.
ENGLAND The treatment provider is under a duty to disclose all relevant information to litigation: CPR rule 31, Cf. Kennedy and Grubb, Medical Law, p. 1021.
FRANCE No discussion in case law or legislative act. This is a disciplinary offence. In application of general contract law, the treatment provider is in breach of a duty. He will have to compensate the damage sustained by the patient if any. Of course, more generally the provider has to keep records of the symptoms the treatment and the evolution of the status of the patient.
ITALY The penal Code states an obligation of medical report in art. 365.
GERMANY One of the aims of the duty to keep adequate records is conservation of evidence *(Beweissicherung)*, and as a consequence, failure to comply with this duty can lead to burden of proof consequences: the burden of proof of negligence and causation may be lightened or shift to the treatment provider: BGH NJW 1972, 1520; BGH NJW 1978, 2337; BGH NJW 1983, 332; BGH NJW 1985, 2193; BGH NJW 1987, 2300; BGH NJW 1988, 762; Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 446.
GREECE The doctor is under an obligation to keep records. The breach of that obligation may give rise to a claim for damages to the party aggrieved by such a breach of duty.
THE NETHERLANDS First of all, the health provider is under a legal duty to keep records. If he fails to keep record, he breaches that duty and is subject to discipline by the disciplinary courts. Furthermore, failure to keep record (in a satisfactory way) may have consequences with regard to liability. The *Hoge Raad* decided in 1987 that the doctor has to supply sufficient information to substantiate his dispute of the patient's claim, in order to provide the patient with a starting-point to prove his claim. Cf. HR 20 November 1987, NJ 1988, 500, note WLH (Timmer/Deutman). If he has lost or destroyed the original records or simply failed to keep record in a satisfactory way, he cannot substantiate his dispute of the patient's claim. As a result thereof, the burden of proof will shift to him, which burden he cannot fulfil due to the absence of records. Hence, he will be held liable. Cf. I. Giesen, Bewijslastverdeling bij beroepsaansprakelijkheid, p. 40. However, the *mere* fact that a medical advice is not registered in the medical records does not necessarily lead to the conclusion that the advice has or has not been given. Whether the absence of the mentioning of the advice leads to negative consequences for the doctor, therefore depends on the circumstances of the case: in HR 10 April 1998, NJ 1998, 572 note F.C.B. van Wijmen, the *Hoge Raad,* following the Court of Appeal's evaluation of the situation, found there was insufficient reason to shift the burden of proof to the doctor or to have him substantiate his claim. What and how much data and detail the doctor must provide, is also depending upon the time that has passed since the treatment: the doctor cannot be expected to remember every detail of an operation that took place years ago. This has been recognised as well by the *Hoge Raad* in its ruling of 7 September 2001, NJ 2001, 615 (R. and B. v. Stichting Ignatius Ziekenhuis).
POLAND Not keeping the records may trigger the liability of the persons obliged.
PORTUGAL Lack or incompleteness of records may lead to shift of the burden of proof to the treatment provider: CC art. 344 para. 2.
SPAIN In practice, the absence of medical reports will lead courts to presume liability of the medical treatment provider because of the damage inflicted to the patient;

without detriment of the civil and administrative actions (doctor as a civil servant, institutions within the Public Health Service) for non-compliance with an obligation statutorily imposed.

SWEDEN If the medical personnel does not keep records, or as in the normal case, does not fulfil the requirements as to the content of the records, according to *patientjournallagen*, they can be subjected to disciplinary sanctions.

3. *Patient's right to have access to the records*

AUSTRIA Art. 5a Z 1 KAG provides for the right of the patient to view records corresponding to the obligation set forth in art. 10 KAG. The law on doctors regulates that issue in art. 51 together with the obligation to keep records (see above).

ENGLAND Patients are entitled access to medical records under the provisions of the Data Protection Act 1998. However, data likely to cause serious harm to the physical or mental health of the data subject is exempted from disclosure: art. 5 (1) DPA 1998. Cf. Kennedy and Grubb, Medical Law, p. 1023.

FRANCE Such a duty exists and is now regulated in detail. The key provision is article L.1111-7 CSP. The obligation to disclose such information to the patient is provided by article L. 1112-1 para. 1.

ITALY The doctor has make all avail medical reports to the patient or to the legal representatives or doctors and institutions indicated by writing (art. 21 Medical Deontological Code). Some scholarship affirms that the doctor-patient relationship is not to be seen any longer as a fiduciary relationship (G. Alpa, La responsabilità medica, in Riv.it.med.leg., 1999, fasc. 1 (February), p. 27). Especially in those cases in which the doctor works in a team, doctrine has established the de-personalisation of the relationship and therefore, there is a demand enhanced information of the client. This means that the client must have access to the information and the doctor must disclose all information necessary in order to obtain a conscious consent.

GERMANY The right of access to medical records can be based on CC arts. 259, 260, 810. Disclosure is limited to objective scientific concrete data in the records (Medication, surgery logs, examinations, ECG, EEG, etc.). Personal records or subjective evaluation recorded by the doctor are exempted from disclosure. Cf. Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 449.

THE NETHERLANDS According to CC art. 7:456, the patient has the right to view the records and to obtain a copy of the documents included in the records, unless the privacy of a third party is at stake. A therapeutic exception to the right to view the records has *not* been accepted. Cf. B. Sluyters, M.C.I.H. Biesaart, De geneeskundige behandelingsovereenkomst na invoering van de WGBO, 1995, p. 93-94; F.C.B. van Wijmen, Geneeskundige behandelingsovereenkomst, in: E.H. Hondius and G.J. Rijken (eds.), Consumentenrecht, p. 170. The access is to be provided free of charge. In principle, the treatment provider is required to co-operate with a second request for access, which normally is to be provided free of charge again, unless, in the circumstances of the case, this would be unreasonably onerous for the treatment provider, given the costs the treatment provider incurs in order to comply with the request. Cf. Rb. Eindhoven 23 May 2002, Praktijkgids 2002, 5903 (psychiatrist Van der Beek v. patient S.).

POLAND The patient or his statutory guardian has a right to access to the patient's medical records (art. 18 para. 3 (1) of the act on the medical care institutions).

PORTUGAL Access to clinical records is only possible indirectly, through the mediation of a physician, as provided by art. 11 para. 5, Lei 67/98 of 26/10 and Lei no. 94/99 of 16/7. This does not contravene art. 10 para. 3 CHRM. Only objective records must be disclosed, subjective remarks from the physician are excluded. Cf. Sinde Monteiro, Responsabilidade por Conselhos, recomendações e informações, p. 427; Pereira, O consentimento informado na relação médico-paciente. M.Phil. thesis, Faculdade de Direito da Universidade de Coimbra, Coimbra, p. 332.

SPAIN It is the right of the patient (in his default, that of his/her family, close friends or legal representatives) in accordance to art. 11 LGS to receive a clinical discharge report when the said patient is discharged from a medical centre. Royal Decree 63/95 of 20 January on the organisation of the medical services regarding the National Health System (Real Decreto sobre ordenación de prestaciones sanitarias del Sistema Nacional de Salud) appoints the "Service of medical information and documentation" to the obligation of providing a patient, upon request, with a copy of his medical records.

SWEDEN The patient has a general right to read his own records. Because of this right, the medical personnel is obliged to formulate the records clearly and to large extent as possible understandable to the patient, art. 5 patientjournallagen.

4. *Secrecy of clinical records*

ENGLAND There is a duty of confidentiality in the common law: *A-G v. Guardian Newspapers (No 2)* [1990] 1 AC 109, [1998] 3 AllER 545. Remedies may consist of an injunction or damages: *W v Egdell* [1989] 1 AllER 1089 (QB). Cf. Kennedy and Grubb, Medical Law, p. 1047.

FRANCE Clinical records are considered to be confidential information, art. L. 1112-1 para. 5 CSP.

ITALY The doctor has to protect privacy of personal data and documents in his possession regarding people even where entrusted to codes or computer systems. Health information is considered super sensible data. Only specialised institutes can collect them, with the consent of the patient, and only be disclosed upon request of a professional (usually the family doctor). In scientific publications of the clinical data and observations related to single patient, the treatment provider has to grant that they cannot be identified.

GERMANY The doctrine on confidentiality *(Schweigepflicht)* in a medical setting was developed by criminal law (StGB arts. 203, 204). The treatment provider is under a duty to keep secret the data harvested in the patient-doctor relationship. Cf. Laufs and Uhlenbrück, Handbuch des Arztrechts, no. 506.

GREECE Article 1:109 on the secrecy of the clinical records and the relevant exceptions correspond to Greek law. The right to privacy of the clinical records stems from the wider constitutionally protected right to personality (see CC art. 57).

THE NETHERLANDS The secrecy of clinical records has been recognised in CC art. 7:457. The provision orders the health provider to keep information about the patient confidential and not to give third parties access to or copies of documents included in the records, unless this has been approved by the patient. If and insofar the health provider is authorised to provide information, to give access or to give copies of documents, that right is restricted insofar is needed for the protection of the privacy of others.

POLAND The medical care institution is obliged to protect the data collected in the medical records (art. 18 para. 2 of the act on the medical care institutions). In addition, the doctor owes a duty to keep secret all the data related to the patient acquired as a result of performance of the doctor's obligations (art. 40 of the act on the profession of a doctor).

SPAIN The obligation to keep confidentiality is based upon the relation of confidence that arises between the patient and the medical treatment provider, who has access to information regarding the patient's private life. The obligation to keep secrecy is included in the Spanish medical code of conduct of 1990. According to art. 43, the obligation to keep secrecy is inherent to the medical profession and aims at guaranteeing the security of the patient. This obligation is mandatory for every doctor and covers all information that reaches the doctor while providing the treatment, not only the one directly given by the patient, but also the information the doctor could have seen or listened to. Art. 44: the doctor must be aware that his support staff knows about the obligation of secrecy and that they comply with such obligation. Confidentiality has turned into a statutory obligation when codified by the General Act on Healthcare of 1986, art. 10. Part of the doctrine defends that the obligation to keep confidentiality is a question of public order. Thus, it is not in the interest of the patient but in the interest of the society that the doctor has to keep secrecy. According to this approach, the medical secrecy is to be kept even when it goes against the will of the patient. Most of the doctrine argues that the obligation of secrecy is grounded in the protection of the right to privacy and intimacy of the patient. Thus, the patient could authorize the doctor not to keep confidentiality, insofar as such behaviour has not a negative impact on third parties. The latter is the most accepted theory because it allows the doctor not to comply with it when other interests deserve higher protection.

5. *Exceptions*

ENGLAND The duty of confidentiality is waived in certain circumstances, such as disclosure in the framework of parental responsibility in treatment of children: Re Z (a minor) (freedom of publication) [1995] 4 AllER 961 (CA); public interest in disclosure *X v Y* [1988] 2 AllER 648, (1987), 3 BMLR 1 (QBD); danger to the health of others: *W v Egdell* [1990] 1 AllER 835, (1989) 4 BMLR 96 (CA). Cf. Kennedy and Grubb, Medical Law, p. 1076.

FRANCE There seem to be no exceptions.

GERMANY There are some circumstances where the duty is waived. This can be the case of duties to notify health authorities when established by law, military doctors, anonymous data in medical research, insurance doctors, suspects of child abuse, other doctors and medical staff, or protection of other person's life or health (e.g, disclosing the sexual partner of AIDS infection: OLG Bremen MedR 1984, 112; OLG Hamburg NJW 1989, 1551).

ITALY Apart from specific law provisions (mandatory certifications, reports, notifications, etc.), a just cause of disclosure is consisty of: a) a request or authorisation of the patient, with a previous specific information on the consequences and opportunity of such a disclosure; b) the safeguard of the life or health of the patient or of third parties, in the case where the patient himself is not in a position to give his consent for a physical impossibility, for incapability to act or for incapability to understand and decide; c) the safeguard of the life or health of third parties, even in case of denial of

the patient, but with a previous authorisation of the Authority responsible for the protection of personal data.

THE NETHERLANDS The first exception is if the therapeutical exception regarding the duty to inform applies (CC art. 7:448 para. 3) and the patient's interests require the health provider to give the information to a specific third party (CC art. 7:448, para. 3, 2nd sentence and art. 457 para. 1). Secondly, persons who are directly involved in the performance of the contract and a person who replaces the health provider are not to be considered a 'third party' for whom the secrecy exists, insofar as they need the secret information in order to perform their tasks (para. 2). The health provider therefore does not need the patient's consent to provide these persons with information or to give them access to the documents or copies of documents included in the records. Para 3 contains a third exception, which applies with regard to the person(s) whose consent to the treatment is required on the basis of CC art. 7:450 (in the case of minors and legal guardians of mentally incapable persons) or CC art. 7:465 (family of a person who is not (or, more likely, no longer) able to evaluate his interests but is not represented by a legal guardian). Such persons have access to the information and/or records, unless the health provider would act contrary to the standard of care that may be expected of him by giving that access. Furthermore, in case law it is accepted that the secrecy of the records does not apply if there are sufficiently concrete indications that such secrecy would damage other weighty interests, and these interests outweigh the interest in keeping the records secret. Cf. HR 20 April 2001, NJ 2001, 600 with note W.M. Kleijn and F.C.B. van Wijmen (Adriaensen/St. Sint-Elisabethshuis). One such opposite weighty interest is the fear that the patient was not *compos mentis* when he had his testament drawn up. However, that fear must be substantiated by sufficiently concrete indications to that extent. Cf. HR 20 April 2001, NJ 2001, 600 with note W.M. Kleijn and F.C.B. van Wijmen (Adriaensen/St. Sint-Elisabethshuis). Another such opposite weighty interest is the right for a health provider or assisting person to defend himself against a claim for malpractice instigated by the patient. Yet, if such a claim has been dismissed irrevocably, the health provider or assisting person no longer has sufficient interest in viewing the medical records of the (former) patient. Cf. Hof Amsterdam 16 December 1999, KG 2000, 50. Finally, CC art. 7:458 para. 1 provides that without the patient's consent information may be provided to third parties for statistic or scientific research in the field of public health, provided that (a) it is not reasonably possible to ask for permission to do so and the patient's privacy is not disproportionately damaged by the execution of the research, or (b) it is not possible to ask for permission given the nature of the research and the health provider has taken care that the data provided cannot be traced back to the person of the patient. Moreover, para. 2 adds, the provision of information on the basis of this article is allowed only if the research is in the public interest, it cannot be executed without the required information and the patient has not explicitly objected to such provision. If information is provided in accordance with para. 1, this is to be included in the patient's records (para. 3).

POLAND The medical care institution may give access to the records only to persons indicated in art. 18 para. 3 of the act on the medical care institutions, which include for example other medical care institution if it is necessary for continuation of the treatment, courts, prosecutors, certain public offices or insurance institutions. Access to the medical records is also granted (art. 18 para. 4) to universities and research

institutions, for research purposes. In such a case however, names and other data that could allow identification of the patient should not be disclosed. The doctor is released from the duty to keep the secret (art. 40 para. 2 of the act on the profession of a doctor) if (1) the law releases him from the duty, (2) the patient or his statutory guardian agrees for the disclosure; in such a case the patient or the guardian should be informed about the negative consequences of the disclosure, (3) keeping the secrecy could cause danger for life or health of the patient or other people, (4) the medical examination was conducted on a request of certain public institutions; in such a case the doctor is allowed to inform only the institution, (5) there is a necessity to provide information to another doctor, (6) it is necessary for teaching purposes or (7) scientific purposes.

SPAIN Medical secrecy is grounded in the interest of the patient to protect his privacy and intimacy. This interest may conflict with others which in the specific circumstances deserve higher protection. On these basis, the doctor may not be under an obligation to keep confidentiality in the following circumstances: when the patient authorizes the doctor not to keep confidentiality; with regard to the family or legal representative of the patient when the patient is incapable to communicate with the doctor; with regard to medical personnel who co-operate with the doctor (nurses, support staff); when the law imposes the obligation on the doctor to disclose the information: expedition of medical certificates, obligation to give account of criminal behaviours (Penal Procedural Law art. 262), cooperation in judicial proceedings; when there are reasons of public welfare: such is the case with epidemics or contagious diseases; scientific and academic research (art. 61 LGS), with the only limitation of keeping secrecy about the identity of the patient; and when the interest of the doctor deserves higher protection, for example, when he has to prove in a judicial proceeding that he acted with the due diligence, but not when he wants to claim the price for the treatment. The Spanish medical Code of Conduct contains also reference to the exceptions to the obligation of secrecy: art. 45: the doctor could use the medical records in order to investigate and publish his observations, although in any case, it must be done in a way that the patient can not be identified. Art. 46: The doctor is not in breach of the obligation of secrecy when he is compelled to disclose the information by legal imperative, although the doctor must still be cautious and must appreciate whether there are still some particulars which must not be disclosed. Art. 48: if the doctor discovers during the treatment that a minor or any incapable person have been subject to physical or psychical assault, he should do what is in his hands to protect such persons, even by communicating the situation to the competent authorities.

Article 7:110: Remedies for Non-Performance

With regard to any non-performance, Chapters 8 (Non-Performance and Remedies in General) and 9 (Particular Remedies for Non-Performance) PECL apply, with the following modifications:

(a) the treatment provider may not withhold performance or terminate the contract in pursuance of Chapter 9, Sections 2 and 3 PECL (Withholding Performance, Termination of the Contract) if this seriously endangers the health condition of the patient;

(b) in so far as the treatment provider has the right to withhold performance or to terminate the contract and is planning to exercise that right, the treatment provider must refer the patient to another treatment provider;

(c) termination by the treatment provider is not allowed, unless the patient fails to comply with Article 104 (Duty to Co-operate).

Comments

A. General Idea

This Article particularises the contents of Article 1:112 (Remedies for Breach of Duties of the Service Provider) in the light of treatment contracts. The remedies are damages (Article 1:112(1), the right to withhold performance (Articles 1:112(2) and 9:201 PECL (Right to Withhold Performance) and termination (Article 1:112(3) and 9:304 PECL (Anticipatory Non-Performance)).

Paragraphs (a) and (b) set some limits to the general rules: the treatment provider may not terminate the contract or withhold performance if doing so would cause serious harm to the health of the patient. Even if the treatment provider exercises these rights, it is under the obligation to refer that patient to another treatment provider. The treatment provider is only allowed to terminate the contract if the patient breaches its obligation to co-operate established by Article 1:104 (Duty to co-operate).

> *Illustration 1*
> A patient systematically refuses pay the price due for medical care, the treatment provider considers. However, the patient is suffering from incurable cancer in an advanced phase, and termination of the contract or withholding performance would significantly endanger the patient's health.

B. Interests at Stake and Policy Considerations

It is debated whether the treatment provider should be allowed to terminate the contract or withhold performance if the patient breaches his duties. On the one hand, it is argued that this right should not be exercised if that fact would, from an objective point of view, seriously endanger the health situation of the patient. On the other hand, not

allowing the treatment provider to terminate the contract or to withhold performance would excessively bind the treatment provider to the contract, not even allowing termination due to fundamental breach by the patient.

C. Comparative Overview

In several legal systems, such as THE NETHERLANDS and SWEDEN, termination of the contract by the treatment provider is limited to serious reasons, such as the lack of cooperation of the patient, end of the fiduciary relationship between the patient and the treatment provider, fundamental disagreement between them, or absolute impossibility of the treatment provide. In SPAIN, the treatment provider cannot stop carrying out treatment until the patient finds a suitable replacement.

It is unanimous in the analysed systems that the patient can cancel the contract at any time and with no reason, though in SPAIN, though the cancellation has immediate effects, good faith can lead to a duty of the patient to indemnify the treatment provider if he did not give an adequate term of notice.

D. Preferred Option

The treatment provider is not allowed to terminate the contract if the health of the patient may seriously be endangered by the consequences of termination, i.e. medical care administered by that specific treatment provider. The physical integrity of the patient is considered to be more important than the contractual freedom of the treatment provider and as such prevails, according to the rule of paragraphs (a) and (b).

The treatment provider may still terminate the contract in the circumstances described in Article 1:104, paragraphs (1) and (2) (Duty to Co-operate).

E. Relation to PECL and Other Parts of the Principles

This Article complements Article 1:112 (Remedies for Breach of Duties of the Service Provider) and introduces specific remedies for treatment contracts or restricts some of the remedies available under aforementioned Article 1:112 (Remedies for Breach of Duties of the Service Provider).

In particular, paragraphs (a) and (b) restrict the remedies available to the treatment provider for breach of the duty to co-operate, Article 1:104 (Duty to Co-operate). The provision of paragraph (c) is a restriction to the remedies for breach of the duties established in Article 7:109.

F. Character of the Rule

The rule is mandatory, as it concerns remedies.

Comparative Notes

1. *Termination by the treatment provider*
   While in FRANCE general contract law adjudicates the termination by the treatment provider, in THE NETHERLANDS, and SWEDEN termination is restricted, and only allowed in case of important reasons. In SWEDEN this is the case of the lack of cooperation from the patient with the treatment provider while treatment is carried out. In addition, in THE NETHERLANDS the end of the fiduciary relationship between the treatment provider and the patient, fundamental disagreement about the treatment, geographical mobility of the patient is considered serious reasons for termination. In SPAIN termination is possible, but the treatment provider must give a term of notice to the patient, and cannot stop carrying out the treatment until the patient has found another treatment provider.
   No information from AUSTRIA, BELGIUM, DENMARK, ENGLAND, FINLAND, GERMANY, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND.

2. *Cancellation by the patient*
   All the systems analysed agree that the patient can cancel the contract at any time, not needing to justify the cancellation. In SPAIN however, though the cancellation is always effective immediately, if the patient did not give the treatment provider an adequate term of notice, good faith demands that the patient indemnifies the treatment provider.
   No information from AUSTRIA, BELGIUM, DENMARK, ENGLAND, FINLAND, GERMANY, GREECE, IRELAND, ITALY, LUXEMBURG, PORTUGAL, SCOTLAND.

National Notes

1. *Termination by the treatment provider*
   FRANCE General contract law applies.
   THE NETHERLANDS Ending of the contract by the health provider is possible only in case of 'important reasons' (CC art. 7:460). Termination is, for instance, possible if the provider of the service has developed personal feelings for the patient that hinder a proper performance of the contract, if the provider of the service ends the execution of his profession, if the patient has moved outside of the geographical are covered by the physician (especially if the physician is a General Practitioner) or if the necessary fiduciary relationship between the parties is lost due to a fundamental disagreement about the treatment. Cf. Tekst & Commentaar Gezondheidsrecht, edited by C.J.J.M. Stolker, 1999, ad art. 7:460.
   POLAND The doctor may not undertake the treatment or withdraw from providing the treatment, unless delay in providing the treatment could cause death, grave bodily injury or severe health disorder (art. 38 para. 1 of the act on the profession of a doctor). If the doctor is about to withdraw, he is obliged to inform the patient sufficiently early

about his intentions and indicate to the patient a real possibility of obtaining treatment from another doctor (art. 38 para. 2). If the doctor acts as an employee, he may refuse to treat or withdraw from providing the treatment only for important reasons, after obtaining consent of his principal. The doctor must indicate the fact of withdrawal and reasons of the withdrawal in the medical records of the patient. Based on similar principles a doctor may refuse the treatment, which is contrary to his conscience (art. 39 of the act on the profession of a doctor).

SPAIN The provisions of the CC regarding the contract of services do not provide whether the professional may cancel its relationship with the client. The rules on the contract of mandate (CC art. 1733) are deemed appropriate to apply to these cases by way of analogy. The medical service provider must notify the patient regarding his intention to bring the relationship to an end. However, he is obliged to continue providing the service until the patient is able to adapt to the new situation (e.g. finds another specialists to continue the treatment) in accordance with CC art. 1737 (mandate). Such rule derives from the type of activity carried out by medical service providers. The Spanish Medical Code of Conduct establishes in art. 10 that when the patient refuses to follow a treatment the doctor deems necessary or when the patient requires the doctor to provide a treatment deemed inadequate or unacceptable by the doctor due to scientific or ethical reasons, the latter is exempted from its obligation to provide assistance.

SWEDEN In the case where the patient refuses a certain kind of measure, for instance refusing blood transfusion at an operation, then the doctor is entitled to refuse to perform the operation (Sverne, Patientens rätt, p. 20).

2. *Cancellation by the patient*

FRANCE The consent to the treatment can be withdrawn at any time, article L. 1111-4 para. 3.

THE NETHERLANDS Ending of the contract (cancellation) by the patient is regulated in CC art. 7:408 para. 1 (in the Chapter on Services in General). It provides that the client may end the contract at any time. From this provision the parties may not derogate to the detriment of the patient, cf. art. 7:413 para. 2.

POLAND In principle, the patient is allowed to cancel the treatment at any time.

SPAIN The service contract concluded between doctor and patient is, similar to the contract of mandate (CC art. 1733), a contract where mainly the interest of the patient is protected. Therefore, if the interest of the patient in continuing the relationship disappears, he can bring it to an end. Part of the doctrine justifies this prerogative in the theory of the "prevalent interests" whilst other authors argue that it is justified in the principle of confidence (CC art. 1732 para. 1). There is no need to justify ending. The professional has to be informed about the decision to end. Notification of ending may be given both expressly or tacitly (e.g. when the patient recourses to another specialists to treat the same illness). If the professional is not aware of the ending of the contract because the patient has not given notice, and thus continues providing treatment, the patient must pay such service. The declaration of ending is always effective, with or without notification, although in some cases, good faith requires the patient to notify the doctor. Otherwise he will have to indemnify.

SWEDEN Generally the patient may cancel at any time. There are however exceptions, for instance in the case of compulsory institutional care for the mentally ill or addicts.

Article 7:111: Central Liability of Treatment Providing Organisations

(1) If, in the process of performance of the treatment contract, activities take place in a hospital or on the premises of another treatment-providing organisation, and the hospital or that other treatment-providing organisation is not a party to the treatment contract, it must make clear to the patient that it is not the contracting party.
(2) Where the treatment provider cannot be identified, the hospital or treatment-providing organisation in which the treatment took place shall be treated as the treatment provider unless the hospital or treatment-providing organisation informs the patient, within a reasonable time, of the identity of the treatment provider.

Comments

A. General Idea

The idea underlying this Article is that a treatment-providing organisation, such as a hospital or an asylum, will be held liable if a treatment provider acted within the framework of that hospital or asylum, even if the organisation itself was not a contractual party. It is common in some countries that health-care professionals without an employment contract with or a functional link to a hospital are allowed by that hospital to administer treatment on its premises. This situation may result in uncertainty about the legal rights of patients.

The rule determines that the organisation must make clear to the patient who the contractual party is, and renders it liable *vis-à-vis* the patient insofar as the individual healthcare professional that was the contractual party cannot be identified.

> *Illustration*
> A patient is submitted to light surgery in a hospital. A doctor within the premises of the hospital attends him. The surgery leaves an ugly scar. The patient seeks an explanation, but the hospital declines any responsibility as the patient did not conclude the contract with the hospital, but with an independent doctor acting within its premises. The patient demands to be informed about the identity of the doctor, but the hospital administration has no information and the patient cannot remember the doctor's name, as he was convinced that he was an employee of the hospital. This Article applies.

B. Interests at Stake and Policy Considerations

Many cases of breach of a treatment contract arise in the context of a complex treatment-providing organisation, such as a hospital or an asylum. Health-care professionals that are not employed by that organisation very often perform treatment on its premises, and uncertainties may arise because of that. Similarly, non-performance of the treatment contract is often caused by problems in the design administration and orga-

nisation of such institutions or by issues deriving from their equipment and/or premises (latent errors).

From the patient's point of view, it would be highly desirable if he was not bothered by such organisational issues that he cannot reasonably be expected to be aware of. In this view, the patient should be able to bring a claim for non-performance against the hospital or asylum regardless of whether that hospital or asylum is the contracting party itself or only the place where the independent treatment provider operates.

It is argued that such a stringent regime would have serious financial consequences for hospitals that to a great extent rely on freelance health-care professionals. Insurance premiums would probably rise. On the other hand, for the sake of certainty and patient/consumer protection it is argued that such a regime is desirable. The obstacles regarding, e.g. identification of the professional involved, his solvency and sorting out responsibilities if various causes contributed to the non-performance make it extremely difficult for the patient to bring a claim, and, as such, this rule substantially benefits the patient by requiring more transparency in the assessment of quality of health care.

Another advantage of this rule is that it enhances prevention, as the hospital or other similar institution engages itself actively in the organisation and supervision of the activities of its professionals. Besides, the financial problems posed by such a regime to small treatment providing organisations could be overcome by compensation funds pooling. Yet another position is that such a rule should not operate automatically, but only if the liable freelance professional cannot be identified in a similar way to what is provided by Article 3(3) of Directive 85/374/EEC of the European Council regarding liability for defective products.

C. Comparative Overview

In AUSTRIA and GREECE hospitals are not responsible for the actions of independent treatment providers acting within its premises if the hospital does not have a contract with the patient. On the other hand, in THE NETHERLANDS, SPAIN, and in public hospitals of FRANCE and ITALY, the hospital is always liable for any damages caused to patients within its premises. In SWEDEN the distinction it is not relevant as the entity responsible by payment of compensation is the patient insurance consortium, in addition to the fact that it is not approved practice to allow non-employees to work within the premises of a hospital.

D. Preferred Option

Implementing full-fledged central liability of treatment providing organisations is not deemed desirable; as such, central liability would have too high an (economic) impact on small hospitals. Moreover, this would lead to conceptual problems regarding the extension of liability to an institution which was not a party to the contract, albeit that

it benefited from that contract and permitted the contractual party to act within its premises.

However, balancing the interests involved properly, the patient who suffered from a non-performance under the contract is entitled to assistance from the treatment-providing organisation to bring his claim against the party that is liable for non-performance. To that extent, the treatment-providing organisation is under an obligation to indicate, at the patient's request, who is the contracting party. If it fails to provide the patient with the identity of the individual treatment provider within a reasonable time frame after being so requested, it is regarded as being the contracting party and may be held liable for non-performance.

Moreover, the patient is entitled to know who the contractual counterpart is before the contract is being performed. Para. 1 of the present Article therefore requires the treatment providing organisation make clear to the patient that it is not the contractual party, and that treatment will be performed by an independent, autonomous healthcare professional, albeit acting within the premises of the hospitals.

E. Relation to PECL and Other Parts of the Principles

Article 7:111 overrules the provisions of Chapter 3, Section 3 PECL (Indirect Representation) regarding treatment contracts. This may be considered a special rule in treatment contracts, imposing a more stringent liability regime on hospitals and other treatment-providing organisations as regards professionals acting independently on its premises.

F. Character of the Rule

This is a mandatory rule.

G. Remedies

Paragraph (2) introduces a specific remedy: if the treatment-providing organisation cannot inform the patient about the identity of the responsible treatment provider, that organisation will be held liable.

Comparative Notes

1. *Central liability of hospitals*
   In THE NETHERLANDS, a provision of the CC establishes a central liability of hospitals, i.e. if treatment is carried out in a hospital that hospital is liable for injury caused to a patient, even if that hospital is not the contractual party. If the injury is caused by an independent healthcare professional who has a contract with the patient,

the hospital in whose premises treatment is performed is liable for the damages suffered by the patient. This is also the case in SPAIN and in public hospitals in FRANCE and ITALY. In AUSTRIA and GREECE the hospital is not liable for the acts of independent practitioners working in its premises, unless in case that the institution contributed to the non-performance of the treatment contract. In SWEDEN it is not important to know who is responsible for the damage, as it is the patient insurance consortium that is in charge compensates patients. In addition, in this country, hospitals only allow their own employees to act within their premises.
No information from BELGIUM, DENMARK, ENGLAND, FINLAND, GERMANY, IRELAND, LUXEMBURG, POLAND, PORTUGAL, SCOTLAND.

National Notes

1. *Central liability of hospitals*
AUSTRIA First of all, one has to distinguish between contracts (of treatment) concluded with doctors and ones between the patient and a hospital. In the latter case, the treating doctors are employed by the hospital and in no contractual relationship with the patient themselves. Thus they are considered assistants in performing *(Erfüllungsgehilfe)* pursuant to art. 1313a. The hospital, or rather the legal entity *(Rechtsträger)* running the business is liable for any faults committed by its employees *vis-à-vis* their patients *ex contractu*. The treating person (doctor, assistant, nurse, etc.) can only be held liable *ex delictu* which will not be that relevant for the aggrieved patient since he will rather seek damages from the more powerful party, that is the legal entity behind the hospital. If the treating doctor is not employed by the hospital, the patient concludes a contract with the doctor himself who then uses the facilities of a hospital to carry out his operation. It is quite clear that due to the contractual bond the doctor is now primarily liable *ex contractu*. The interesting question is to what extent he is responsible for misconduct on part of employees of the hospital whom he needs for his task. Here, it is accepted that those persons assisting the treating doctor are to be seen as his assistants as well according to art. 1313a.
FRANCE Two situations have to be distinguished. If the doctor acts in the framework of a hospital, the latter is liable only if there is a labour contract with the doctor (Cass.crim. 5 March 1992, Bull.crim. no. 101; JCP 1993.II.22013, note F. Chabas; RTD civ 1993, 137, obs. P. Jourdain). In this situation the patient concluded a medical contract directly with the hospital. On the other hand if the doctor acts as a liberal professional, he is the only responsible, even if the medical act has been performed in a hospital. The doctor is also liable for the fault of the auxiliary he chooses (anaesthetist, nurse…). The solution is different if the treatment takes place in a public hospital. The latter is in any case liable for the malpractice of the doctors. The fault of the doctor is always a fault of the administrative service *(faute de service)* and the personal fault of the doctor is not *détachable* from his functions (For more information about these concepts of administrative law, see R. Chapus, Droit administratif général t.1, 11th ed. 1997, nos. 1523 ff).
GREECE The question whether and to what extent treatment institutions, such as hospitals and private clinics, bear the responsibility for a medical fault is not a straightforward one. A lot depends on the agreement between the parties, i.e. patient and doctor and the institution, and the relevant circumstances (K. Foundedaki, Medical

liability in civil law after Act 2251/94, Kritiki Epitherosi 1996, p. 200). If the patient concludes on a personal basis a contract for the provision of medical services with a doctor who is an external associate of the institution where the service is carried out, the institution is liable for the provision of the adequate infrastructure and paramedical care. Thus, it cannot be held liable for any medical fault. The same view is held with regard to doctors that are not just external associates but employees of the institution in question, in case the patient enters into an agreement with the doctor on a personal basis. However, case law seems inclined to acknowledge liability of the hospital for medical fault in the previous types of cases on the basis of CC art. 922 (A.P. 241/1954 EEN 21, 949; A.P. 1893/1984 NoV 33, 1955; A.P. 1270/1989, EllDik 1991, 765). On the other hand, if the patient enters into an agreement for the provision of medical services with an institution, without a personal agreement with a particular doctor, the institution undertakes the whole liability, i.e. for medical and other associated services. The institution is liable for the fault of its medical staff on a contractual (CC art. 334) as well as tortious (CC art. 922) basis. We also note that if the patient can opt for a particular doctor and the doctor accepts the treatment, then there is in addition a contractual bond between patient and doctor.

ITALY In case a patient is injured due to the fault of a treatment provider who is dependent or somehow linked to a sanitary structure; there are some issues to be considered. First of all, the question is whether there is a direct liability of the structure towards the patient. Secondly, one may wonder whether such a liability has a contractual or an extra contractual nature. Such questions are closely related. If it is a case of contractual liability, due to the contractual relationship between the patient and the hospital, it is a case of direct liability. This is true both when it is a private structure (on ground of CC art. 1228, for which the debtor responds for the fact of his auxiliaries, such as dependent professionals) and when it is a public one. In this latter case, the liability is inherent to the provision in CC art. 2049, and is related to special provisions governing the Public Administration. As regards the nature of the liability, while there is no doubt about the contractual nature in case of a private structure, there has been debate in relation to the nature of the liability in case of a public structure. The latest *revirement* of case laws has opted for bringing it into the framework of contractual liability (G. Alpa, La responsabilità medica, in Riv.it.med.leg., 1999, fasc. 1 (February), p. 40). Even in case of impossibility of identifying the doctor who should have fulfilled the duty to inform, there is a direct responsibility of the Public Administration for the illicit fact of the employee (Cass. 24 September 1997, no. 9374, in Riv.it.med.leg., 1998, fasc. 4-5 (October) I, with note of F. Introna, Consenso informato e rifiuto ragionato. L'informazione deve essere dettagliata o sommaria?, pp. 825-830). This occurs as long as a link of causality between the behaviour of the employee and the damaging event of the patient has been proved.

THE NETHERLANDS If the performance of the treatment contract takes place in a hospital (see below) the legal person on whose premises the service is executed, is liable for the faults of the person who performs the contract. Liability can be based on either of the following grounds. 1. If the hospital (the legal person) is the *contracting* party (and thus 'the provider of the service' as meant in CC art. 7:446), it is liable for faults of the person who actually performs the contract: according to CC art. 6:76, a party is responsible for the acts of a person whose services it uses in the performance of the contract. Liability is then based on the normal rules regarding non-performance,

whereas it does not matter whether the person who actually performs the contract is employed by the hospital or not. 2. If the hospital is not a party to the contract (because the contract is concluded by a doctor in person, who is then to be considered 'the provider of the service'), the hospital is liable as though it were a party to the contract. Liability of the hospital is then directly based on CC art. 7:462, para. 1, which states: "If in the process of performance of the treatment contract activities take place in a hospital that is not a party to the contract, the hospital is jointly and severally liable for a failure in the performance of the contract as if the hospital were a party to the contract". Therefore, due to CC art. 7:462, para. 1, for the patient it is not very important to know with whom he has concluded the treatment contract: in either case he can hold the hospital liable for the faults committed by a doctor. CC art. 7:462 therefore gives the patient a 'central address' to direct a liability claim to. Because of that, the hospital's liability is called the 'central liability'. Cf. E.H. Hondius, Ontwikkelingen in de civielrechtelijke aansprakelijkheid van arts en ziekenhuis, in: J.H. Hubben (ed.), De geneeskundige behandelingsovereenkomst, Tekst en analyse van het wetsvoorstel, De Tijdstroom, Lochem, pp. 64-65; Pitlo-Croes/Du Perron, pp. 278-279; B. Sluyters, De WGBO, onderdeel van het burgerlijk recht, Tijdschrift voor Gezondheidsrecht, p. 7; J. Legemaate, Verantwoordingsplicht en aansprakelijkheid in de gezondheidszorg, 1996, p, 45-46. It should be noted that the notion of 'hospital' includes a nursing home, a home for the mentally handicapped, an abortion clinic or a dental institution (CC art. 7:462, para. 2), but not a private clinic, cf. E.H. Hondius, Ontwikkelingen in de civielrechtelijke aansprakelijkheid van arts en ziekenhuis, in: J.H. Hubben (ed.), De geneeskundige behandelingsovereenkomst, Tekst en analyse van het wetsvoorstel, 1990, p. 65. Hondius rightly criticises this. In the case the hospital is the contracting party, the doctor who committed the fault may be held personally liable if his actions amount to an unlawful act as meant in CC art. 6:162 (which will probably be the case). If the doctor himself is the contracting party, his personal liability is of course based of non-performance of the contract.

SPAIN On the basis of CC art. 1903, para. 4 *(culpa in vigilando or in eligendo)*, the medical institution is responsible for the behaviour of the medical treatment providers who act in the framework of the institution, even when there is no contractual relationship patient-institution. The medical centre is directly (and not subsidiarily) liable, thus it is not necessary for the claimant to sue the medical provider. There is a presumption of fault on the institution, which may be refuted by proving that the institution acted with due diligence (STS 15 March 1993; STS 21 September 1993; STS 11 March 1995; STS 11 March 1996; STS 15 October 1996; STS 7 April 1997, RAC 713/1997; STS 6 June 1997, RAC 917/1997). The current tendency moves towards imposing an objective liability on the medical centres in order to guarantee that the victim will be indemnified.

SWEDEN Since all professional actors within the health- and medical service are obliged to be insured, art. 12 PL, it is not so important who is responsible for the damage, since in the end, it is the insurance paying. Even in the rare cases when this duty to be insured has been neglected, the patient can still get compensation from the Patient Insurance Association *(Patentförsäkrings-föreningen)*, Sverne, Patientens rätt, p. 88. Generally, concerning this problem can be said that hospitals only let their own personnel act within their premises. The hospital will always be liable for its own personnel.

Annexes

Abbreviations

AA	Ars Aequi Juridisch Studentenblad (Zwolle [later Nijmegen], 1.1951/1952 ff., cited by year and page)
AB	Wet algemeene bepalingen. Act of 15 May 1829 on the general provisions for the legislation of the kingdom (Stb. 28, Netherlands)
ABGB	Allgemeines Bürgerliches Gesetzbuch, 1 June 1811 (JGS 946) (Civil Code, Austria)
AC	Law Reports, Appeal Cases (House of Lords) (London, 1.1875/76 ff.; the older part of the collection up to 1890 cited as Appeal Cases; from 1891 the abbreviation A. C. is used; cited by year, book, and page)
AC	Actualidad Civil (Madrid 1.2004 ff., cited by year and page)
ACLR	Australian Current Law Review (Sydney, 1969-1971)
AcP	Archiv für die civilistische Praxis (Tübingen, 1.1818-50.1867; N. F. 1=51.1868-49=99.1906; 100.1906-120.1922; N. F. [= 3.F.] 1.=121.1923-29.=149.1944; 30=150.1948/49-53=173.1973; 174.1974 ff.); incorporating Archiv für bürgerliches Recht; cited by volume, year and page
A&E	Admiralty and Ecclesiastical Cases (London 1865-1875; cited by year, book, and page; see L. R.)
affd	affirmed
AfP	Archiv für Presserecht (Düsseldorf 1.1953 ff.; cited by year and page)
AG	Amtsgericht (Local Court, Germany and Austria); Aktiengesellschaft (joint-stock company, plc)
A-G	Advocaat-Generaal (Netherlands); Attorney-General (England); Avocat-Général (Belgium; France)
AGBG	Gesetz v. 9.12.1976 zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Act on General Contract Terms, 9 Dec. 1976; BGBl. 1976 I p. 3317, Germany) repealed [1.1.2002] by the Schuldrechtsmodernisierungsgesetz and inserted into the BGB
AID	Archeion Idiotiku Dikaiu (Triminiaia nomiki epitheorisis; Athens 1.1934-17.1954/59; cited by volume, year, and page)
AK	Astikos Kodikas (Civil Code, Greece, 23.2.1946 [A. N. 2250/1940; FEK A 91/1940 p. 597]); (Civil Code, Switzerland, 10.12.1907 [SR 210]); (Civil Code, former GDR, 19.6.1975 [GBl. I p. 465])
ALJR	Australian Law Journal Reports (Sydney, 1958-, cited by vol. and page)
AllER	All England Law Reports (London, 1.1936 ff.; cited by year, book, and page).
Alm.Del	Almindelig Del (general part)
ALR	Allgemeines Landrecht für die preußischen Staaten, 1 June 1794 (Civil Code, Prussia)
A. L. R.	The Australian Law Reports (Sydney 1.1973 ff.; cited by volume, year, and page)
alt.	Alternative

AMG	Arzneimittelgesetz. Gesetz zur Neurordnung des Arzneimittelrechts v. 24.08.1976 (Act on Medication Reform, 24 Aug. 1976; BGBl. 1976 I p. 2995, Germany)
AmJCompL	The American Journal of Comparative Law (Baltimore 1.1952 ff.; cited by volume, year, and page)
AN	Anagastikos Nomos (Emergency laws, Greece)
AnDerCiv.	Anuario de Derecho Civil (Madrid 1.1948 ff.; cited by volume, year, and page)
AnfO	Anfechtungsordnung v. 10.12.1914 (contesting act, RGBl 1914/337, Austria)
AngG	Angestelltengesetz v. 11.5.1921 (employees' act, BGBl 1921/292, Austria)
Annal.prop. industr.	Annales de la propriété industrielle, artistique et littéraire (Paris 1.1855 ff.; cited by year and page)
Ann.Dr.Liège	Actualités du droit: Revue de la Faculté de droit de Liège (Luik 1.1956 ff., since 1986 Brussel; until 1990 Annales de droit de Liège; cited by year and page)
Ann. Louv.	Annales de Droit de Louvain (Brussels 41.1981 ff.; previously Annales de droit et de sciences politiques; cited by year and page)
Anst	Anstruther's Exchequer Reports (145 ER) (London 1792-1797; cited by year, volume and page)
A. P.	Areios Pagos (Greek Supreme Court in Civil Matters)
AP	Audiencia Provincial (Court of Appeal, Spain)
App	Corte d'Appello (Court of Appeal, Italy)
App.Cas.	see AC
APR	Annual percentage of rate
Apygardu teismai	Regional Court, Lithuania
Apylinkiu teismai	Local Court, Lithuania
AR	Arrêté Royal (Royal decree, Belgium)
Aranzadi Civil	Repertorio Aranzadi de Jurisprudencia Civil (Navarra 1.1992 ff.; cited by year, vol., number and page)
Arch.civ.	Archivio civile (Piacenza, 4th Series 1.1958 ff.; cited by year and page)
Arch.Giur. circolaz.	Archivio Giuridico della circolazione e dei sinistri stradali (Piacenza, 4th Series 1.1955-22.1976 ff.; cited by year and page)
ArchN	Archeion Nomologicas (Athens 1.1949 ff.; cited by volume, year, and page)
Arch.resp.civ.	Archivio della responsabilità civile e dei problemi del danno (Piacenza 1.1958 ff.; cited by year and page)
ARIL	Annual Review of Irish Law (Byrne und Binchy, eds.) (Dublin und London; 1.1987 [1988])
Arm	Armenopoulos miniaia nomiki epitheorisis (Thessalonika 1.1946/47 ff.; cited by year and page)
Arr.Cass.	Arresten van het Hof van Cassatie (Brussel 1967 ff.; from 1937-1961 published as "Arresten van het Hof van Verbreking"; the collection did not appear 1962-1966)
art(s).	article(s)
ASA	Advertising Standards Authority

ASVG	Allgemeines Sozialversicherungsrecht (General Social Insurance Act) (BGBl. 1955/189, Austria)
AT	Audiencia Territorial (Court of first instance, Spain)
AtomG	Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren (Atomgesetz), 31. Oct. 1976 (BGBl I 3035) (Germany)
AtomHG	Atomhaftpflichtgesetz (Nuclear Liability Act) (BGBl. 1964/117, Austria)
A&V	Aansprakelijkheid en Verzekering (Deventer 1.1993 ff.; cited by year and page), since 2001 published as AV&S = Aansprakelijkheid, verzekering en schade
Avd	Avdeling (Part)
Avv. e proc.	Avvocato e procuratore
AWSt-A	Reference term used in the publications of the BfAI; see BfAI
B	Baron
B&Ad	Barnewall & Adolphus' King's Bench Reports (ER 109-110) (London 1.1830-11.1840; cited by volume and page)
BAG	Bundesarbeitsgericht (Federal Labour Court, Germany)
BAGE	Entscheidungen des Bundesarbeitsgericht (Decisions of the Federal Labour Court) (Berlin 1.1955 ff.; cited by volume and page)
B&Ald	Barnewall and Alderson's Reports, Kings Bench (ER 106) (London 1817-1822)
BankFin	Bank- en Financiewezen/Revue de la banque (Bruxelles, 1.1936/37 ff.)
Banque	Revue banque (Paris, 1926-1998)
BAnz	Bundesanzeiger (42.1990, 186 (5.Okt.); Köln: 1990-)
BB	Der Betriebs-Berater (Heidelberg, 1.1946 ff.; cited by year and page)
BBTC	Banca, borsa e titoli di credito = rivista di dottrina e giurisprudenza (Milano 1.1934-8.1941, 11.1948 ff.; cited by year, book, and column)
B&C	Barnewall & Cresswell's King's Bench Reports (ER 107-109) (London 1822-1830, cited by year, volume and page)
BCLC	Butterworths Company Law Cases (London 1.1983 ff.; cited by year, book, and page)
BD	Byretsdom (local court judgment, Denmark)
Beav	Beaven's Rolls Court Reports (ER 48-55) (London 1838-1866), cited by year, volume and page
BfAI	Bundesstelle für Außenhandelsinformation (Federal Information Centre on Foreign Trade Law; Köln, Germany)
BFD	Universidade de Coimbra. Boletim da Faculdade de Direito (Coimbra 1.1914/15-9.1925/26 = Nr. 1-90; 10.1926/28 –; cited by volume, year and page)
BG	Bundesgericht (Supreme Court, Switzerland); Bezirksgericht (Court of Appeal, former GDR; partly also Germany); Bezirksgericht (Court of First Instance, general jurisdiction, Austria)
BGB	Bürgerliches Gesetzbuch, 18 Aug. 1896 (RGBl. p. 195) (Civil Code, Germany)
BGBl	Bundesgesetzblatt (Official Gazette, Germany) 1950; then in parts: BGBl. part I (1951 ff.) BGBl. part II (1951 ff.) BGBl. part III = Sammlung des Bundesrechts (Collection of Federal Statutes; Köln, Bonn 1.1958 ff.)

BGE	Entscheidungen des schweizerischen Bundesgerichtes (Decisions of the Swiss Supreme Court; can also be referred to as Arrêts du Tribunal Fédéral Suisse) (Lausanne 1.1875 ff.; from 23.1897 2 books without special titles; separation from 40.1914; cited by volume, book, and page)
BGH	Bundesgerichtshof (Federal Supreme Court, Germany – before 1990 only for West Germany)
BGHR	BGH-Rechtsprechung Zivilsachen (Köln 1987, CD-ROM; cited by § and keyword)
BGHZ	Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen (decisions of the German Supreme Court in civil matters) (Köln, Berlin 1.1951 ff.; cited by volume and page)
Bing	Bingham's Reports, Common Pleas (ER 130-131) (London 1822-1834; cited by year, volume and page)
BinnSchG	Binnenschiffahrtsgesetz (Inland Waterways Act, Austria) (RGBl. 1898, 369, 868); Gesetz über den gewerblichen Binnenschiffsverkehr (Act on industrial inland waterway traffic, Germany) (as amended on 8 Jan. 1969) (BGBl. I p. 66)
BJagdG	Bundesjagdgesetz (Federal Hunting Act, Germany) (as amended on 29 Sep. 1976) (BGBl. I 2849)
BJC	Boletín de Jurisprudencia Constitucional (Bulletin of the Constitutional Court, Spain) (Madrid 1.1981 ff.; cited by volume, year, and page)
BJIB&FL	Butterworths Journal of International Banking and Financial Law (London, 1986-, cited by year and page)
Bligh NS	Bligh's Reports, New Series (ER 4-6) (London 1827-1837; cited by year, volume and page)
BOE	Boletín Oficial del Estado (Official Gazette, Spain) (Madrid 1.1936 ff.; cited by year, number, and date)
BolMinJus	Boletim do Ministério da Justiça (Bulletin of the Ministry of Justice) (Lisbon 1.1940/41 ff.; cited by volume, year, and page)
BRats-Drucks	Bundesratsdrucksachen. Verhandlungen des Bundesrates (Proceedings of the 2nd Chamber of the German Federal Parliament; Bonn 1949 ff.; cited by volume, year and, if necessary, by page)
BrB	Brottsbalk (Criminal Code of 21 Dec. 1962, SFS 1962:700, Sweden)
B. R. H.	Belgische Rechtspraak in Handelszaken/Jurisprudence commerciale de Belgique (Antwerpen, 1968-1982)
Brussels Convention	Brussels Convention. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 Sep. 1968 (OJ 1978 L304, p. 77)
B&S	Best & Smith Queen's Bench Reports (London 1.1861-5.1865; cited by year, volume and page)
BS	Belgisch Staatsblad; see Monit. belge
BT-Drucks.	Bundestagsdrucksachen. Verhandlungen des Bundestages (Proceedings of the 1st Chamber of the German Federal Parliament; Bonn 1949 ff.; cited by vol., year, and if necessary by page)
Build LR	Building Law Reports (London, 1976-1998, cited by vol. and page)
Bull.Ass.	Bulletin des Assurances (Brussels 1.1921 ff.; cited by year and page)

Bull.civ.	Bulletin des arrêts de la Cour de Cassation rendus en matière civile (Bulletin of the decisions of the Court of Cassation in civil matters, France) (Paris 12.1804/05, 128.1926 ff.; cited by year, book, and number)
Bull.com.	Bulletin des arrêts de la Cour de Cassation rendus en matière commerciale (= Book IV [formerly Book III] of Bull.civ.)
Bull.crim.	Bulletin des arrêts de la Cour de Cassation rendus en matière criminelle (Bulletin of the decisions of the Court of Cassation in criminal matters, France) (Paris 9.1804 ff.; cited by year, book and number)
BullEU	Bulletin of the European Union; (before 1993, Bulletin of the European Communities) (Luxembourg 1.1968 ff.; cited by year and number)
Burr	Burrow's King's Bench Reports tempore Mansfield (97-98 ER) (London 1757-1771; cited by year, volume and page)
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court, Germany)
BVerfGE	Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court) (Tübingen 1952 ff.; cited by volume and page)
BVerfGG	Bundesverfassungsgerichtsgesetz (Statute of the Constitutional Court of the Federal Republic of Germany) as amended on the announcement of 12 Dec. 1985 (BGBl. I p. 2229)
BW	Burgerlijk Wetboek (Civil Code of The Netherlands) (Boek 1: Stb. 1969, no. 167 in conjunction with Stb. 1969 no. 259, in force since 1 Jan. 1970; Boek 2: Stb. 1976 no. 228 in conjunction with Stb. 1976 no. 342, in force since 26 July 1976; Boek 3, 5, 6 and 7: Stb. 1991 no. 600 in conjunction with Stb. 1989 no. 616 and 290, in force since 1 Jan. 1992; Boek 4: Stb. 1999 no. 300, in force since 1 Jan. 2003; Book 7A, Stb. 1989 no. 378, in force as Book 4 of the old BW since 18 Oct. 1838; Book 8: Stb. 1991 no. 126, in force since 1 Apr. 1991)
BW (old)	Burgerlijk Wetboek, 1 Sep. 1838 (Stb. 1831 nos. 1 and 6 in conjunction with KB, 10 Apr. 1838, Stb. 1838 no. 12) (Civil Code (abrogated), Netherlands)
CA	Audiencia Provincial (Spain); Corte d'Appello (Italy); Cour d'Appel (Belgium, France); Court of Appeal (England); Efeteion (Greece); High Court (Ireland) (in its appellate jurisdiction); Hof (The Netherlands); Hovrätt (Finland, Sweden); Inner House (Court of Session, Scotland); Kammergericht (Berlin, Germany); Krajsky sùd (Slovakia); Lietuvos apeliacinis teismas (Lithuania), Megyei birosàg (Hungary); Oberlandesgericht (Austria, Germany); Østre Landsret (Denmark); Relação (Portugal); Ringkonnakohus (Estonia); Sadem pierwszej instancji (Poland) Søndre Landsret (Denmark), Vestre Landsret (Denmark); Visje Sodisce (Slovenia); Vrnchi soud (Czech Republic)
CAA	Cour d'appel administratif (France)
Cal 3d	California Reports, Third Series (San Francisco, 1974-, cited by vol., year and page)
CAP	British Code of Advertising and Sales Promotion
Cass.	Hof van Cassatie/Cour de Cassation (Belgium); Cour de Cassation (France), Corte Suprema di Cassazione (Italy, when none other specified: sezione civile) (Court of Cassation)

Cass.ass.plén.	Cour de cassation, Assemblée Plénière (France)
Cass.ch.mixte	Cour de cassation, Chambre Mixte (France)
Cass.ch.réun.	Cour de Cassation, Chambres Réunies (France)
Cass.civ.	Cour de cassation, Chambre Civile (France)
Cass.com.	Cour de cassation, Chambre Commerciale et financière (France)
Cass.crim.	Cour de cassation, Chambre criminelle (France)
Cass.pén.	Cour de cassation, Chambre pénale (France); see Cass.crim.
Cass.req.	Cour de cassation, Chambre des Requêtes (abolished) (France)
Cass.sez.lav.	Corte di Cassazione, sezione lavoro (Italy)
Cass.sez.pen.	Corte di Cassazione, sezione penale (Italy)
Cass.sez.un.	Corte di Cassazione, sezione unite (Italy)
Cass.soc.	Cour de cassation, Chambre Sociale (France)
CB	Common Bench Reports (ER 135-139) (London 1845-1856)
CB (N.S.)	Common Bench Reports, New Series (ER 140-144) (London 1857-1866)
CBR Jaarboek	Centrum voor Beroepsvervolmaking in de Rechten. Universiteit Antwerpen. Jaarboek (Antwerpen and Apeldoorn 1.1996/97 ff.; cited by year and page)
CC	Civil Code Civil Code (Malta), 22 Jan. 1874 (Ordinance VII of 1868); Code Civil (France, Luxembourg), 21 Mar. 1804; Burgerlijk Wetboek/Code Civil (Belgium); Codice Civile (Italy) (Gaz.Uff., 4 Apr. 1942, no. 79 and 79bis; edizione straordinaria); Código Civil (Spain) 24 July 1889 (Gaceta de Madrid no. 206, 25 July 1889); Código Civil (Portugal) (Decreto-Lei no. 47-344, 25 Nov. 1966) See also ABGB, AK, BGB, BW, CK, EOA/VÕS, KC, ObcZ, OZ, Ptk
CCC	Contrats, concurrence et consommation (Paris, 1.1991 ff.)
CC Introd.Act	Civil Code Introductory Act (Eisagogikos nomos, Greece; AN 2783/1941 FEK A 29/1941 p. 145) (Einführungsgesetz zum Bürgerlichen Gesetzbuch, Germany, see EGBGB)
CCLT	Canadian Cases on the Law of Torts (Toronto, 1976-, cited by vol. and page)
Ccom	Commercial Code Código comercial (Portugal), 28 June 1888 (Diário do Governo no. 203, 6 Sep. 1888); Código de comercio (Spain) 22 Aug. 1885 (Gaceta de Madrid no. 289-328, 16 Oct.-24 Nov. 1885); Code de commerce (France) 1808; Wetboek van Koophandel/Code de commerce (Belgium, 10 Sep. 1807); Handelsbalken (Sweden) 1734 See also HGB
CCP	Code on Civil Procedure Act 1/2000 on Civil Procedure (Spain), 7 January 2000 (BOE no. 7, 8 January 2000) See further Code jud.; CPC; C.proc.civ., GerW, KpolDik, Rv, ZPO
CE	Consticución Española (Constitution, Spain) 27 Dec. 1987, altered, 27 Aug. 1992 (BOE no. 311.1., 29 Dec. 1978)
cf.	confer
CFI	Court of First Instance, general jurisdiction See further AG, Apygardu teismai, Apylinkiu teismai, AT, BD, BG, Civ., Conc., Corr, HC, Helyi birosàg, JP, Kerülti birosàg, KS, Ktg, LG, Linnakohus,

	Maakohus, MPr, OH, Okj, Okz, ØL, OS, PPr, Pr, Pret., Rb, Sady grodzkie, Sad okregowny, SH, Sh.Ct., TGI, TI, Trib., Trib.com., Trib.Corr., Trib.enfants, Varosi birosàg, VL, Vred
Ch	The Law Reports. Chancery (London 1.1891 ff.; cited by year, volume and page)
chap.	chapter
ChApp	Chancery Appeals (London 1865-1875; cited by year, volume and page; see L. R.)
ChD	The Law Reports, Chancery Division (London 1.1875/76-1890; cited by year, volume and page; see L. R.)
CICR	Comitato interministeriale per il credito e il consumo (the Interministerial Committee for Credit and Savings, referred also as the Credit Committee, Italy)
CI	Contratto e Impresa (Padova 1.1985 ff.; cited by year and page)
CIM	Convention internationale concernant le transport des marchandises par chemins de fer. International agreement of 7 Feb. 1970 on rail freight (BGB1.1974 II p. 381)
Cir.	Circuit
CISG	Vienna UN-Convention on the International Sale of Goods of 11.4.1980 (http://www.uncitral.org/en-index.htm)
Civ.	Tribunal de première instance (Chambre civile, Belgium)
CJ	Colectânea de Jurisprudência (Coimbra 1.1976 ff.; cited by year, volume and page)
CJ (ST)	Colectânea de Jurisprudência. Acórdãos do Supremo Tribunal de Justiça (Coimbra 1.1993 ff.; cited by year, volume, and page)
C. J.	Lord Chief Justice (England)
CK	Lietuvos civilinis kodeksas (The Lithuanian Civil Code)
CLC	Commercial Law Cases (London, 2002 ff.)
CLJ	The Cambridge Law Journal (Cambridge 1.1921/23 ff., parts without volume numbers; cited, as far as possible, by volume, year, and page)
CLR	Commonwealth Law Reports (Melbourne 1.1903 ff.; cited by volume, year and page)
CLY	Current Law Yearbook (London 1.1947 ff.; cited by year and issue)
CMLR	Common Market Law Reports (London 1.1963 ff.; cited by volume, year and page)
Cmnd	Command Papers (London, cited by year and page)
CMR	Convention relative au Contrat de transport international de marchandises par route. Convention on the Contract for the International Carriage of Goods by Road, 19 May 1956 (UNTS vol. 399 p. 189)
Code jud.	Code judiciaire (Code of civil procedure, Belgium), 10 Oct. 1967 (Monit. belge, 31 Oct. 1967)
col	colona
Coll. Arb.	Collegio Arbitrale (Italy)
Col.Leg.Esp.	Colección Legislativa de España. First series, third part: Jurisprudencia civil (Madrid 1.1889 ff.; cited by volume, year, book, number and page)
COM	Publications of the European Commission (Brussels 1.1968 ff.)
CompLYB	Comparative Law Yearbook ('s-Gravenhage 1.1977 ff.; cited by year and page)

Conc.	Conciliatore (Justice of the Peace, Italy)
ConsC	Code de la consommation, Loi n° 93-949 du 26 juillet 1993, relative au code de la consommation (partie Législative) (Journal officiel de la République Française of 27.Juli 1993, 10538) (Consumer Code, France)
ConsCredA	Consumer Credit Act (Belgium: law of 12 June 1991 as amended in 2003 "Loi relative au crédit à la consummation/Wet op het consumentenkrediet", BS 9 July and 6 Aug. 1991; England/Scotland 1974 c. 1939; Germany: law of 17 December 1990 „Verbraucherkreditgesetz", BGBl III 402-6; Portugal: DL 359/91 of 21 September 1991 "Establece normas relatives ao credito ao consumo", DR 3,2 no. 218, Serie I-A of 21 September 1991, 4998-5003; Spain: law no. 7/1995 of 23 March 1995 "Ley de credito al consumo", BOE no.72 of 25 March and no. 113 of 12 May 1995; Sweden: "Konsumentkreditlag", SFS 1992:830)
ConsProtA	Consumer Protection Act (Austria: law of 8 March 1979 "Konsumentenschutzgesetz", as amended in 1983, 1984, 1985, 1993, 1996, 1997 and 2001, BGBl 1979 no. 140; England/Scotland: Consumer Protection Act 1987 c. 43; Finland; Greece: (former) law no. 1961/1991 and law no. 2251/1994 on Consumer Protection "Prostasia ton Katanaloton", ΦΕΚ A' 191 as amended in 1999; Luxemburg: law of 25 August 1983 "Loi relative à la protection du consommateur", Memorial 1983, 1494, as amended in 1986, 1987, 1993, 1997 and 2000; Portugal: Law no. 24/96 of 31 July 1996 "Estabelece o regime legal aplicável à defesa dos consumidores. Revoga a Lei n/ 29/81 do 22.8.1981" commonly called "Lei de Defesa do Consumidor", DR no. 176, Serie I-A of 31 July 1996, 2184-2189; Spain: law 26/1984 of 19 July 1984 "General Ley para la Defensa de los Consumidores y Usuarios", BOE no. 176 of 24 July 1984)
Const LJ	Contruction Law Journal (London, 1984-, cited by vol. and page)
Const LR	Construction Law Reports (London, 1984-, cited by vol. and page)
ContrA	Contract Act (Denmark: Aftaleloven, n. 242 of 8 May 1917, lovbekendtgørelse om aftaler og andre retshandler på formuerettens område no. 781 of 26 August 1996; Finland: Lag om rättshandlingar på förmögenhetsrättens område of 13 June 1929 no. 228; Sweden: Lag om avtal och andra rättshandlingar på förmögenhetsrättens område, SFS 1915:218)
Corr	Correctionnel (Court of First Instance in Criminal Matters, Belgium)
Corr.giur.	Corriere giuridico (Milano 1.1984 ff.; cited by year and page)
Corte Cost.	Corte Costituzionale (Constitutional Court, Italy)
Cost.	Costituzione of 27 Dec. 1947 (Constitution Italy; Gaz.Uff. no. 298, edizione straordinaria)
COTIF	Convention relative aux transports internationaux ferroviaires of 9 May 1980
Cour	Cour Supérieure de Justice (in its function as Cour d'assises, Cour de cassation or Cour d'appel, Luxembourg)
Cox Eq Cas	Cox's Equity Cases (London, 1745-1797, cited by year, vol. and page)
CP	Code Pénal (Penal Code, France, Luxembourg), 16 June 1879 (Mémorial 1879 p. 589); Code Pénal/Strafwetboek(Penal Code, Belgium), 8 June 1867 (Monit.belge 9 June 1867);

CP	Codice Penale (Penal Code, Italy), n. 1938, 19 Sep. 1930 (Gaz.Uff. no. 253 suppl. 28 Sep. 1930); Código Penal (Penal Code Spain), 14 Sep. 1973 (BOE no. 297-300, 12-15 Dec. 1973); Código Penal (Penal Code, Portugal), Decreto 16 Sep. 1886
C. P.	Common Pleas Cases (London 1865-1875; cited by year, volume and page; see L. R.)
C & P	Carrington and Payne's Reports (ER 171-173), 1823-1841
CPC	Codice di procedura civile (Italy)
CPD	Common Pleas Division (London 1875/76-1890; cited by year, volume and page; see L. R.)
CPR	Civil Procedure Rules 1998 (SI 1998/3132) (England)
C.proc.civ.	(Nouveau) Code de Procédure Civile of 1.1.1976 (Code of civil procedure, France) (décret n° 75-1123, 5.12.1975); Codice di procedura civile of 21 Apr. 1942 (Code of civil procedure, Italy) (R. D., 28 Oct. 1940, no. 1443 Gaz.Uff. no. 253, 28 Oct. 1940); Código do Processo Civil of 28.12.1961 (Code of civil procedure, Portugal) (Decreto Lei Nr. 44129)
C.proc.crim.	Code d'instruction criminelle (Wetboek van Strafvordering, Belgium) (17 Apr. 1878 [Monit.belge, 25 Apr. 1878])
C.proc.pen.	Codice di procedura civile (Italy, 1 July 1931 [RD, 19 Oct. 1930 no. 1399: Gaz.Uff. 28 Oct. 1930 no. 253 Suppl.]); Código de processo penal (Portugal [Decreto Lei no. 16489, 15 Feb. 1929 Diário do Governo]). (Code of criminal procedure)
C.proc.pén.	Code de procédure pénale (Code of Criminal Procedure, France)
CrimLR	Criminal Law Review (London 1.1954 ff.; cited by volume, year and page)
CRvB	Centrale Raad van Beroep (Administrative Court, The Netherlands)
ctr.	contra
CuadCivJur.	Cuadernos Civitas de Jurisprudencia Civil (Madrid 1.1983 ff.; cited by year and page)
CurrLegProbl.	Current Legal Problems (London 1.1948 ff.; cited by volume, year and page)
D.	Recueil de jurisprudence Dalloz (Paris; with different forms and titles: D. A. (Recueil analytique Dalloz [1941-1944]); D. C. (Recueil critique Dalloz [1941-1944]); D. H. (Recueil hebdomadaire Dalloz [1924-1940]); D. P. (Recueil périodique et critique mensuel Dalloz [1924-1940]); Recueil Dalloz, Recueil Sirey, combined since 1955; Recueil Dalloz et Recueil Sirey; from 1965: Recueil Dalloz-Sirey; appearing in sections: D. Chron./Jur. [Chronique/ Jurisprudence], D. I. R./Légis. [Informations Rapides/Législation], D. Somm.Comm. [Sommaires Commentés]; cited by year, book, and page) (older forms and titles omitted)
D	décret (decree, France)
D	Digesten
D	Dunlop's Session Cases (1838-1862)
Danske Lov	Kong Christian den Femtes Danske Lov af 15 April 1683 (Danish Code of King Christian the fifth of 15 April 1683)

Danno e resp.	Danno e responsabilità. Problemi di responsabilitá civile e assicurazioni (Milano 1.1996 ff.; cited by year and page)
DAOR	Le droit des affaires/Het ondernemingsrecht (Gent 1.2000/01 ff.)
DAR	Deutsches Autorecht (München 1.1926 ff.; cited by year and page)
DB	Der Betrieb. Wochenschrift für Betriebswirtschaft, Steuerrecht, Wirtschaftsrecht, Arbeitsrecht (Düsseldorf, 1.1948 ff.; cited by year and page)
D, B & M Rep.	Dunlop, Bell & Murray's Reports, Session Cases, Second Series (Scotland) (1838-1862)
D. C.	see D.
DCI	Diritto del commercio internationazionale (Milano 1.1987 ff.)
DDike	Dioikitiki Dike (Athens 1.1989 ff.; cited by year and page)
DEE	Dikaio Epicheiriseon kai Etairion (Enterprises and Company Law; 1.1995, Athen)
De G. F. & J.	De Gex, Fisher and Jones's Reports, Chancery (ER 45) (London 1859-1862
De Verz	Tijdschrift voor Verzekering (formerly De Verzekering)/Bulletin des Assurances (Brussels 1.1921 ff.; cited by year and page)
D. H.	see D.
DHG	Dienstnehmerhaftpflichtgesetz. Bundesgesetz v. 31.3.1965 über die Beschränkung der Schadensersatzpflicht der Dienstnehmer (Federal Law on the Limitation of Personal Liability of Employees, Austria, 31 Mar. 1965; BGBl. 1965/80)
Diário Rep	Diário da República. Portugese government gazette (Lisbon 1.1976 ff.; cited by year and number)
Dir.fam.pers.	Il diritto di famiglia e delle persone (Milano 1.1972 ff.; cited by year, and if necessary, by part and page)
Dir.inf.	Diritto dell'informazione e dell'informatica (Milano 1.1985 ff.; cited by year and page)
Dir.just.	Direito e justicia (Lisbon 1.1980 ff.; cited by year and page)
diss.	dissertation
DJ	Deutsche Justiz (Berlin 1.1933-13.1945; cited by year and page)
DJT	Deutscher Juristentag (German Lawyers' Association)
DL	Decreto legge, decreto ley (Decree-law, Greece, Italy, Portugal)
DLgs	Decreto legislativo (Legislative Decree, Italy)
DLR	Dominion Law Reports (Aurora, Ontario: First Series 1.1912-70.1922; 1923-1955; Second Series 1.1956-70.1968; Third Series: 1.1969-150.1984; Fourth Series 1.1984 ff.; cited by year, volume and page)
DNotZ	Deutsche Notarzeitschrift (München, Berlin 1.1901-33.1933 Magazine of the German Association of Public Notaries; 33.1933 ff.; cited by year and page)
Dow	Dow's Reports (England), House of Lords (ER 3), 1812-1818
Dow & RyKB	Dowling and Ryland's Reports, King's Bench (ER 171), 1822-1827
D. P.	see D.
DPR	Decreto Presidente della Repubblica (Presidential decree, Italy)
DR	Diário da República (Official Gazette, Portugal, Lisboa 1.1976 ff.)
Droit soc	Droit social (Paris 1.1938 ff.; cited by year and page)
Dr.prat.com.int.	Droit et pratique du commerce international (Paris 1975-1994; cited by year and page)
DStR	Deutsches Steuerrecht (München 1.1962/63 ff.; cited by year and page)

DTI	Department of Trade and Industry (United Kingdom)
DULJ	Dublin University Law Journal (Dublin 1976-1981. new series from 1982; cited by year, volume and page)
EAL	Erstatningsansvarsloven (Damages Liability Act, no. 228, 23 May 1984; Lovtidende A p. 742; Lovbekendtgørelse om erstatningsansvar, no. 750, 4 September 2002 Denmark)
East	East's Term Reports, King's Bench (102-104 ER) (London 1801-1812; cited by year, volume and page)
E&B	Ellis and Blackburn's Reports (ER 118-120) (London 1852-1858; cited by year, volume and page)
EC	European Community
ECE	Economic Commission for Europe
ECHR	European Court of Human Rights (Strasbourg)
ECJ	European Court of Justice (Luxembourg)
ECLR	European Competition Law Review (Oxford 1.1980 ff.; cited by volume, year and page)
ecolex	Fachzeitschrift für Wirtschaftsrecht (Wien 1.1990 ff.; cited by year and page)
ECR	European court reports. Reports of cases before the Court of Justice and the Court of First Instance / Court of Justice of the European Communities (Luxembourg 1.1954 ff.) (until 1989 Reports of cases before the Court) (cited by volume, year and page)
ed.	edition, editor(s)
Edinburgh LRev	The Edinburgh Law Review (Edinburgh 1.1997 ff.; quoted by volume, year and page)
EEC	European Economic Community
EED	Epitheorissis Egatikou Dikaiou (Review of Commercial Law) (Athens 1.1941 ff.; cited by volume, year and page)
EEN	Ephimeris Ellinon Nomikon (Journal of Greek Jurists) (Athens 1.1934 ff.; cited by volume, year and page)
Ef	Efeteion (Court of Appeals, Greece)
EFSlg	Ehe- und familienrechtliche Entscheidungen (Decisions on marriage and family law) (Wien 1.1965 ff.; cited by the number of the decision)
e. g.	exempli gratia (for example)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuche (BGB Introductory Act, 18 Aug. 1896; RGBl. p. 604;) (Germany)
Eis.	Eisagogi, introduction
EKHG	Eisenbahn- und Kraftfahrzeughaftpflicht-Gesetz (Rail and Road Traffic Liability Act of 21 Jan. 1959; BGBl. 1959/48, Austria)
El.Bl.&El.	Ellis, Blackburn & Ellis' Queen's Bench Reports (120 ER) (London 1858; cited by year, volume and page)
EllDik	Elliniki Dikeosini (Athens 1.1960 ff.; cited by volume, year and page)
EMLR	Entertainment and Media Law Reports (London 1998-, cited by year and page)
EOA	see VÕS
EPA	Employment Protection Act 1990 (United Kingdom)
EpTrD	Epitheoresis Trapeziku Dikaiou (Review of Banking Law, Greece)

EpTrAksXrD	Epitheoresis Trapeziku Aksiografiku kai Xrimatistiriakou Dikaiou (Review of Banking, Negotiable Instruments and Capital Market, Greece)
ER	The English Reports (London 1.1900-178.1932; cited by volume and page)
ErmAK	Ermineia tou Astikou Kodikos (Commentary to the Greek Civil Code)
ERPL	European Review of Private Law (Deventer 1.1994 ff.; cited by volume, year and page)
et. al.	et alii (and others)
ETS	European Treaty Series of Agreements and Conventions of the Council of Europe (Strasbourg 1.1949-3.1949, 4.1950 ff./61.1971 ff.; cited by volume and number)
EU	European Union
EuGRZ	Europäische Grundrechte-Zeitschrift (Strasbourg 1.1974 ff.; cited by year and page)
Eur.Conv. Hum.Rt	European Convention on the Protection of Human Rights, 4 Nov. 1950
Eur.Transp. L.	European Transport Law (Antwerp 1.1966 ff.; cited by volume, year and page)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (München, Frankfurt/Main 1.1990 ff.; cited by year and page)
EvBl	Evidenzblatt der Rechtsmittelentscheidungen (Wien 1.1934 ff.; included in the ÖJZ [since 1946]; see there; cited by year and page)
EWCA Civ	Approved Judgment of the Court of Appeal, Civil Division, England and Wales
EWHC	Approved Judgment of the High Court, England and Wales
EWiR	Entscheidungen zum Wirtschaftsrecht (Köln 1.1985 ff.; cited by §, number, year and page)
EWS	Europäisches Wirtschafts- und Steuerrecht (München 1.1990 ff.; cited by year and page)
Ex	Exchequer Cases (London 1865-1875; cited by volume, year and page; see L. R.)
Exchq	Court of the Exchequer
ExchqCh	Exchequer Chamber
ExD	Exchequer Division (London 1876-1880 cited by volume, year and page; see L. R.)
F	Fraser's Session Cases, 5th Series (Scotland) (1898-1906)
f(f)	following page(s)
FAL	Forsikringsaftaleloven (Denmark: Law on Insurance Contracts; no. 129, 15 Apr. 1930, lovbekendtgørelse om forsikringsaftaler n. 726 of 24 October 1986; Finland: Lag om Försäkringsavtal of 28 June 1994 no. 543; Sweden: Lag om Försäkringsavtal (Law on Insurance Contracts, SFS 1927: 77)
Fallim	Fallimento e le altre procedure concorsuali (Milano 1.1979 ff.)
Fam	The Law Reports, Family Division (London 1972 ff.; formerly: The Law Reports, Probate, Divorce and Admiralty Division 1.1865/1869 ff.; cited by year and page)
FamRZ	Zeitschrift für das gesamte Familienrecht (Bielefeld 1.1954 ff.; until 9.1962: Ehe und Familie im privaten und öffentlichen Recht [Marriage and Family within Private and Public Law]; cited by year and page)

fasc.	fascicule
FED	Forsikrings- og Erstatningsretlig Domssamling (Copenhagen 1.1994 ff.; cited by year and page)
FEK	Fyllo Ephimeridas Kyberniseos (Government Gazette, Greece; Athen 1.1833; cited by year, volume, and if necessary, book and number)
f(f)	following page(s)
F&F	Foster & Finlason's Nisi Prius Reports (ER 175-176) (London 1856-1867; cited by year, volume and page)
FFR	Försäkringsjuridiska föreningens rättsfallsamling (Stockholm 1939-1984; cited by year, volume and page)
FFS	Finlands Författningssamling (Official Gazette; Finland) (Helsingfors 1.1860 ff.; cited by year, number, and page)
Fin LR	Financial Law Reports (Brentford 1982-, cited by volume, year and page)
FL	Færdselsloven, act no. 149 on road traffic, Denmark, 20 Mar. 1918 (Lovtidende A 1918 pp. 578-592)
fn.	footnote
Foro it.	Il Foro italiano: raccolta di giurisprudenza civile, commerciale, penale, amministrativa (Roma, 1.1876 ff.; cited by year, book and column)
Foro it.Mass.	Massimario del Foro italiano (Roma 1.1930 ff.; cited by volume, year, number and column)
Foro pad.	Il Foro padano (Milano 1.1946 ff.; cited by year, book and column)
FP6	Sixth Framework Programme on Research
FS	Festschrift
FSA	Financial Services Authority
FSMA	Financial Services and Markets Act 2000 (United Kingdom)
FSR	Fleet Street Patent Law Reports (London 1.1963 ff.; cited by year and page)
FSupp	Federal Supplement (St. Paul/Minnesota 1.1932/33 ff.; cited by volume and page)
FTLR	Financial Times Law Reports (Brentford 1982, 1986-1988)
FuR	Familie und Recht (Neuwied 1.1990 ff.; cited by year and page)
GazPal	La gazette du palais: feuille officielle d'annonces légales (Paris 1.1886 ff.; cited by year, book, and page)
GazUff	Gazzetta Ufficiale della Repubblica italiana (Official Gazette; Italy) (Roma 1.1860 ff.; cited by year, number and page)
GenTG	Gentechnikgesetz. Gesetz zur Regelung der Gentechnik v. 20.06.1990 (Act on the Regulation of Genetic Engineering, 20 June 1990, Germany) (BGB1. I p. 1080)
GerW	Gerechtelijk Wetboek (Code of Civil Procedure, Belgium)
GG	Grundgesetz (Basic Law, Constitution, Germany)
GGSt	Gefahrgutbeförderungsgesetz. Bundesgesetz v. 23.2.1979 über die Beförderung gefährlicher Güter auf der Straße und über eine Änderung des Kraftfahrgesetzes 1967 und der Straßenverkehrsordnung (Federal Act on the Transportation of Dangerous Goods, 23 Feb. 1979; BGBl. no. 209/1979, Austria)
GlU	Sammlung von Civilrechtlichen Entscheidungen des kk Obersten Gerichtshofes, begründet von Glaser und Unger (Collection of Civil Law

	cases, established by Glaser and Unger) (Wien 1898-1915; cited by the number of the decision)
GlUNF	Neue Folge der Sammlung von Civilrechtlichen Entscheidungen des kk Obersten Gerichtshofes, begründet von Glaser und Unger (New collection of civil law cases, established by Glaser and Unger) (Wien 1898-1915; cited by the number of the decision)
Giff	Giffard's Chancery Reports (ER 65-66) (London, 1857-1865)
Giur. civ. comm.	La Nuova giurisprudenza civile commentata: rivista bimestrale delle nuove leggi civili commentate, Padova: Cedam, 1.1985-
Giur.cost.	Giurisprudenza costituzionale (Milano 1.1956-20.1975; then: Parte 1 = Corte costituzionale 21.1976 ff.; Parte 2 = Ordinanza di rinivio ed i ricorsi 21.1976 ff.; Parte 3 = Quaderni della giurisprudenza costituzionale 1.1964-7.1968; new series 1.1972 ff.)
Giur.it.	Giurisprudenza italiana (Torino 14.1862-25.1873; 3rd series 26.1874-32.1880, 4th series 33.1881-43.1891, 5th series 44.1892-64.1912, 110.1958 ff.; cited by year, part, and if necessary, section and column)
Giur.it.Mass.	Massimario della Giurisprudenza italiana (Torino 1.1931 ff.; cited by year, number and page)
Giur.mer.	Giurisprudenza di merito (Milano 1.1969 ff.; cited by year, book and page)
Giur.tosc.	Giurisprudenza toscana (Milano et al. 1.1950 ff.; cited by year and page)
Giust.civ.	Giustizia civile. Rivista bimestrale di giurisprudenza (Milano 1.1951 ff.; cited by year, book and page)
Giust.civ.Mass.	Massimario annotato della cassazione Milano: Giuffrè, 5.1955(1955/56)-7.1957(1957/58); [8.]1958-[31.]1981; 32.1983 – (Giustizia civile)
Giust. Pen.	Giustizia penale. Rivista critica di dottrina, giurisprudenza, legislazione (Roma 1.1895 ff.; cited by year, book and page)
GmbH	Gesellschaft mit beschränkter Haftung (private company limited by shares)
GmbHR	GmbH-Report. Gesellschafts- und Steuerrecht der GmbH und GmbH & Co (Köln 1.1963 ff., until 75.1985: GmbH-Rundschau; cited by year and page)
GRom.	Giurisprudenza Romana (Milano 1.1997 ff.)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (Weinheim 1.1896-49.1944, 50.1948 ff.; cited by year and page)
GRUR Int	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil (Weinheim 1.1980 ff.; from 1966 to 1980 Auslands- und internationaler Teil; cited by year and page)
GrW	Grondwet (Constitution, Netherlands, 17 Feb. 1983) (Stb. p. 70)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act against restrictions to competition, Germany), 27 July 1957 (BGBl. I p. 1081)
H	Danish Højesteret (Supreme Court)
HaftPflG	Haftpflichtgesetz, 4. January 1978 (BGBl I 145) (liability act, Germany)
HBl	Henry Blackstone's Common Pleas Reports (126 ER) (London 1788-96)
HC	High Court (Court of Appeal, Ireland)
HD	Redogörelser och meddelanden angående högsta domstolens avgöranden (Collection of Judgments by the Finnish Supreme Court) (Helsinki 1.1926 ff.; cited by year, number and page)

HD	Højesteretsdom (Denmark); Høyesterettsdom (Norway); Högsta domstolens domar (Sweden, Finland) (Judgment of the Supreme Court)
Hdst.	Hoofdstuk
Helyi bíróság	Local Court (Court of First Instance), Hungary
HGB	Handelsgesetzbuch (Commercial Code, Germany and Ausrtia, 10 May 1897; RGBl. p. 219, BGBl III 4100-1)
HK	Højesterets kendelse (Supreme Court Decisions, Denmark)
HKLR	Hong Kong Law Reports (1.1905/06-40.1956; 1957-1995)
HL	House of Lords (United Kingdom)
HLC	Clark's House of Lords Cases (ER 9-11) (London 1.1847-10.1866; cited by volume, year and page)
HL(Ir)	See LR
HLR	Housing Law Reports (London 1.1967 ff.; cited by year, volume, and page)
HL(Sc)	See LR
H&N	Hurlstone and Norman's Reports (ER 156-158) (London 1856-1862, cited by volume, year and page)
Hof	Gerechtshof (Court of Appeal, The Netherlands)
HovR	Hovrätt (Court of Appeal, Finland, Sweden)
HPflG	Haftpflichtgesetz (Liability Act, Germany, 4 Jan. 1978; BGBl. I p. 145)
HR	Hoge Raad (Supreme Court, Netherlands)
HRR	Höchstrichterliche Rechtsprechung (Berlin book. 4 [1928]-book. 18 [1942]; formerly: Juristische Rundschau [Suppl.], Die Rechtsprechung der Oberlandesgerichte and Höchstrichterliche Rechtsprechung auf dem Gebiet des Strafrechts; cited by year and number)
H&Tw	Hall & Twell's Chancery Reports (ER 47) (London 1849-1850; cited by volume, year and page)
ICC	International Chamber of Commerce
ICCLR	International Company and Commercial Law Review (London, 1990-, cited by year and page)
ICLQ	International and Comparative Law Quarterly (London, 1952-, cited by year, number and page)
ICR	Industrial Cases Reports (London 1.1975 ff.; cited by year and page)
ICSTIS	Independent Committee for the Supervision of Telefone Information Services (United Kingdom)
i. e.	id est (that is to say)
IECL	The International Encyclopedia of Comparative Law (Tübingen, New York 1.1970 ff.; cited by volume, chapter and margin number)
IEHC	Approved Judgment of the High Court, Republic of Ireland
Inner House	Inner House (Court of Session, Scotland)
IHR	Internationales Handelsrecht, Zeitschrift für das Recht des internationalen Warenkaufs und -vertriebs (München 1999-, cited by year and page)
ILRM	Irish Law Reports Monthly (Dublin 1.1981 ff.; cited by year and page)
ILT	Irish Law Times (New Series, Dublin 1.1983 ff.; cited by year and page)
ILTR	Irish Law Times Reports (Dublin 1.1867 ff.; cited by year, book and page)
Incoterms	International Commercial Terms

Inf AuslR	Informationsbrief Ausländerrecht (Frankfurt/Main 1.1979 ff.; cited by year and page)
Inf. prev.	Informazione e previdenziale. Rivista bimestriale dell'avvocatura dell'Istituto Nazionale delle Previdenza Sociale (Roma 1.1985 ff.; cited by year and page)
IntBusLawyer	International Business Lawyer (London 1.1973 ff.; cited by year and page)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (Bielefeld 1.1981 ff.; cited by year and page)
IPRE	IPR-Entscheidungen 1-3, Österreichische Entscheidungen zum Internationalen Privatrecht bis 1993, ed. by Schwimann
IPRG	Bundesgesetz über das Internationale Privatrecht, 15.6.1978 (BGBl 304) (Act on Private International Law, Austria)
I. R.	Informations rapides du recueil Dalloz, France; see D.
IR	The Irish Reports (Dublin 1.1894 ff.; including the sub-series Common Law Series [1.1867 (1868)-11.1877 (1878)] as well as Equity Series [1.1867 (1868) ff.]; cited by year, book and page)
IrEqR	Irish Equity Reports (Dublin 1838-1850; cited by year and page)
Ir.Jurist	Irish Jurist (Dublin 1.1935 ff.; cited by year and page)
Ir.Jurist R.	Irish Jurist Reports (Dublin 1.1935 ff.; cited by volume, year and page)
IRLR	Industrial Relations Law Reports (London 1.1972 ff.; cited by year and page)
IrLR	Irish Law Reports, 1st series (Dublin 1.1838-12.1850; cited by year, book and page)
IT-law	The law related to Information Technology
J	Juristen (Copenhagen 1.1919 ff.; cited by year and page)
J.	Judge (High Court, UK)
JA	Juristische Arbeitsblätter (Bielefeld 1.1969 ff.; cited by year and page)
Jahrb. f.ital. R.	Jahrbuch für italienisches Recht (Heidelberg 1.1988 ff.; cited by volume, year and page)
JAR	Jurisprudentie arbeidsrecht ('s-Gravenhage 1.1992 ff.; cited by year and page)
JBl	Juristische Blätter (Wien 1.1872 ff.; cited by year and page)
JbOstR	Jahrbuch für Ostrecht (München 1.1960 ff.; cited by volume, year and page)
JClCiv	Collection des Juris-Classeurs. Juris-Classeur Civil. Directeurs à partir de 1980 Pierre Catala and Philippe Simler. (Paris 1962 ff.)
JCP	Juris-Classeur périodique; see Sem.Jur.
JCP E	Semaine Juridique édition entreprise (France); see Sem.Jur.
JCP G	Semaine Juridique édition générale (France); see Sem.Jur.
JCP N	Semaine Juridique éditions nouvelles (France); see Sem.Jur.
JDI	Journal du droit international (Paris, 1874-, cited by year and page) (also known as Clunet)
J.Environ. L.	Journal of Environmental Law (New York 1.1974/75 ff.; cited by volume, year and page)
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland (Helsingfors 1.1936 ff.; cited by year and page)
JGG	Jugendgerichtsgesetz (Juvenile Court Act, Germany), 4 Aug. 1953 (BGBl. I p. 751)
JGS	Justizgesetzsammlung. Gesetze und Verordnungen in Justizsachen (Collection of Statutes, Austria) (Wien 1780-1848; cited by year and number)

JhJb	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts (Jena 1.1857-90.1943; until 37.1897 Jahrbuch für die Dogmatik des heutigen römischen Rechts und deutschen Privatrechts; cited by volume, year and page)
JIBFL	Butterworths Journal of International Banking and Financial Law, London 1986 ff.
J. Int'l Fin. Mkt.	Journal of International Financial Markets (Amsterdam, 1994-, cited by year, vol. and page)
JL	Jurisprudence de Liège (83.1978, Okt.-93.1986, afterwards published as JLMB [see JLMB])
JLMB	Revue de jurisprudence de Liège, Mons et Bruxelles (Liége, 94.1987 ff.)
JO	Journal Officiel de la République Française. Lois et Décrets. Official gazette of the French Republic. Acts and Decrees (Paris 1.1869 ff.; cited by date of issue)
JöR	Jahrbuch des öffentlichen Rechts der Gegenwart (Tübingen 1.1907-25.1938; NS 1.1951 ff.; cited by volume, year, and page)
John	Johnson's Chancery Reports (ER 70) (London 1859)
JP	Juge de Paix (Luxembourg); Juge de Paix (Belgium) (Justice of the Peace)
JR	Juristische Rundschau (Berlin 1.1947 ff.; cited by year and page)
JT	Juridisk tidskrift vid Stockholms universitet (Stockholm 1.1989/90 ff.; cited by year and page)
JT	Journal des Tribunaux (Brussel 1.1881-96.1981; 101.1982 ff.; 97-100 not produced; cited by year and page)
JT (Lausanne)	Journal des Tribunaux (Lausanne 1.1929 ff.; cited by year and page)
Jur.	Jurisprudence
Jura	Jura. Juristische Ausbildung (Berlin et al 1.1979 ff.; cited by year and page)
JuridRev	The Juridical Review (Edingburgh, London 1.1889-67.1955; new series 1.1956 ff.; cited by year and page)
JuS	Juristische Schulung (München, Frankfurt am Main 1.1961 ff.; cited by year and page)
JUS	Rivista di scienze giuridiche (Milano 1.1940-4.1943; NS 1.1950-20.1969; 21.1974 ff.; cited by year and page)
JW	Juristische Wochenschrift. Organ des Deutschen Anwaltsvereins (Bulletin of the German Lawyers' Association) (Leipzig 1.1872-68.1939, 1940 merged with Deutsches Recht as the A ed.; cited by year and page)
JZ	Juristenzeitung (Tübingen 1.1945 ff.; Continuation of the German Rechtszeitschrift and the South German Juristenzeitung, vol. 6.1951 ff.; cited by year and page)
KB	King's Bench
KB	The Law Reports. King's Bench Division (London, 1.1875/76 ff.; cited by year, book and page)
KB	Koninklijk Besluit (Royal decree, Belgium and the Netherlands)
KC	Kodeks cywilny (Civil Code, Poland)
Kerülti birosàg	District Court (Court of First Instance), Hungary
KF	Karlsruher Forum. Supplement to VersR (Karlsruhe 1.1959 ff.; cited by year and page)
KFG	Kraftfahrgesetz (Act on Road Traffic, Austria; BGBl. 1967/267)

KG	Kort Geding (from 1.1981 contained in Rechtspraak van de Week; see RvdW)
KG	Kammergericht (Berlin, Court of Appeal, Germany)
KIR	Knight's Industrial Reports (London 1.1966-10.1975; cited by year, volume and page)
KO	Konkursordnung i. d. F. v. 20.5.1898 (bankruptcy act, Austria, RGBl. p. 369)
KPD	Kodikas Pinikis Dikonomias (Code of Criminal Procedure, Greece) (Act no. 1493, 17 Aug. 1950, FEK 182/1950 pp. 1004-1074)
KPolDik	Kodikas Politikis Dikonomias (Code of Civil Procedure, Greece) (Royal Decree 657/1971 FEK 219/1 Jan. 1971 p. 75)
KritE	Kritiki Epitheorisi (Athens 1.1994, cited by year and page)
KS	Krajsky soud (District Court, Court of First Instance, Czech Republik); Krajsky sùd (District Court, Court of Appeal, Slovakia)
KSchG	Konsumentenschutzgesetz, 8. March 1979 (BGBl 1979/140) (Consumer Protection Act, Austria)
Ktg	Kantongerecht (Local Court, Netherlands)
KTS	Konkurs-, Treuhand- und Schiedsgerichtswesen (Köln et al. 1.1939-52.1991; cited by year and page)
KunstUrhG	Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie (Act on Copyright on Works of Fine Art and Photography, Germany, 9 Jan. 1907; RGBl. 1907 p. 7)
L	Loi (France); Lov (Denmark); Lag (Finland, Sweden)
LA	Legge 22 April 1941, no. 633, Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Gazz. Uff. 16 July, n. 166)
La Ley	Revista jurídica española de doctrina, jurisprudencia y bibliografía (Madrid 1.1980 ff.; cited by year, book and page)
l.fall	legge fallimentare (Italy: R. d. 16 March 1942, no. 267)
Lavoro 80	Lavoro 80 – Rivista di diritto del lavoro pubblico e privato (Milano 1.1981 ff.; cited by year and page)
Lav.prev.oggi	Lavoro e previdenza oggi (Milano 1.1974 ff.; cited by year and page)
Law Com.	Law Commission Report, England and Wales
LC	Lord Chancellor (UK)
LDepGuar	Finnish Law on Dependent Guarantees of 1999 (L om borgen och tredjemanspant 19.3.1999/361)
LEC	Ley de Enjuiciamiento Civil, act 1/2000 of 7.1.2000, put into force 1.1.2001 (Code of Civil Procedure, Spain, BOE n. 7 v. 8.1.2000 p. 575, adjusted by BOE n. 90 v. 14.4.2000 p. 15278.)
LECr	Ley de Enjuiciamiento Criminal, 14 July 1882 (Code of Criminal Procedure, Spain. Gaceta de Madrid no. 260-283, 17 Sep.-10 Oct. 1882)
Legal Studies	Legal Studies. The Journal of the Society of Public Teachers of Law (London 1.1947 ff.; cited by volume, year and page)
Legf.Bir.	Legfelsöbb birosàg (Supreme Court of Hungary)
Linnakohus	City Court, Estonia
LFZG	Lohnfortzahlungsgesetz. Gesetz über die Fortzahlung des Arbeitsentgelts im Krankheitsfalle (Act of 27 July 1969 on Continued Payment of Wages for Employees Who are off Sick; Germany, BGBl. 1969 I 946)

LG	Landgericht (Germany); Landesgericht (Court of First Instance, general jurisdiction, also Court of Appeal for Local Courts; Austria)
LGDJ	Librairie Générale de Droit et de Jurisprudence; French publishing company
LGR	Local Government Law Reports (London 1.1911 ff.; cited by volume, year and page)
Lietuvos apeliacinis teismas	Court of Appeal, Lithuania
Lietuvos Auksciausiasis Teismas	Supreme Court of Lithuania
Limb. Rechtsl.	Limburgs Rechtsleven (Beringen 1.1958 ff.; cited by year and page)
Linnakohus	County Court, Estonia
lit.	litera
L. J.	Lord Justice (Court of Appeal judge, UK)
LJAdm(NS), LJCP, LJCh(NS), LJExch(NS), LJKB(NS)	Law Journal Reports, London. Various series 1831-1946, decisions cited with indicator of competent jurisdiction: Adm (Admiralty), CP (Common Pleas), Ch (Chancery), Exch (Exchequer), KB / QB (King's or Queen's Bench) (NS: New Series)
Lloyd's List Law Rep	Lloyd's List Law Reports (London 1.1919-32.1950; cited by volume, year and page)
Lloyd's Rep	Lloyd's Law Reports (London 1.1968 ff.; cited by volume, year and page)
Lloyd's Rep Med	Lloyd's Reports: Medical (London 1.1968 ff., cited by volume, year and page)
LM	Lindenmaier-Möhring, Nachschlagwerk des Bundesgerichtshofs (in civil cases, München 1.1951 ff.; cited by act, paragraph and number)
LNTS	League of Nations Treaty Series (Geneva 1.1920-205.1944/46; cited by volume and page)
loc. cit.	loco citato (the place already cited)
LOTC	Ley Orgánica del Tribunal Consticucional, 3 Oct. 1979 (BOE no. 239, 5 Oct. 1979) (Statute of the Constitutional Court; Spain)
LQR	The Law Quaterly Review (London 1.1885 ff.; cited by volume, year and page)
LR	Law Reports. Publications of the Incorporated Council of Law Reporting (1865-1875 [the year of foundation of the High Court] in 11 series [here cited with the A&E, Ch.App., the C. P., the Eq., the Ex., the H. L., H. L. (Ir), H. L. (Sc)., P. C. and the Q. B.]; usually L. R. is put at the head of citations of decisions of the series up to 1875.1875 the 11 series were reduced to 6 [App.Cas., Ch. D., Q. B. D., C. P. D., Ex. D., P. D.]. Since 1881 the Law Reports are published in 4 series [App.Cas., Ch. D., Q. B. D., P. D.]. Since 1890 cited in a different way: the volume does not appear any more, but the year, put at the head within brackets; in case the reporting took more than one volume, the volume appears behind the year)
LREx	Law Reports, Exchequer Division (London 1.1875/76-5.1879/80; cited by year, book and page) (see L. R.)
LRIr	Law Reports, Ireland (Dublin 1878-1893; cited by year, book and page)
LT	Law Times Reports (London 1859-1947; cited by year, book and page)
Ltd	Limited

LuftVG	Luftverkehrsgesetz (Air Traffic Act) 14 Jan. 1981 (BGBl. I p.61, Germany); (RGBl. 1936 I p. 653, Austria)
M	Macpherson's Session Cases, 3rd series (Scotland) (1862-1873; cited by year, book and page)
Maakohus	County Court, Estonia
Macn&G	Macnaghten & Gordon's Chancery Reports (ER 41-42) (London 1848-1851; cited by year, book and page)
MB	Megyei birosàg (Court of Appeal, Hungary)
McGill LJ	McGill Law Journal (Montreal 1.1952/55 (1954); cited by volume, year and page)
MDR	Monatsschrift für Deutsches Recht: Zeitschrift für die Zivilrechts-Praxis (Köln, Hamburg 1.1947 ff.; cited by year and page)
MedienG	Mediengesetz (Media Act, Austria) (BGBl. 1981/314)
MJ	Maastricht Journal of European and Comparative Law (Antwerp, Baden-Baden 1.1994; cited by volume, year and page)
ML	Myndighedsloven. Act on minors and guardianship, Denmark, 30 June 1922 no. 277 (Lovtidende A p. 1379-1389)
MLR	The Modern Law Review (London 1.1937/38 ff.; cited by year and page)
M&M	Moody and Malkin's Nisi Prius Reports (173 ER) (London 1826-1830; cited by year and page)
MonC	Code monétaire (ordonnance relative à la partie législative du code monétaire et financier, France: since government act no. 2000-1223 of 14 December 2000)
Monit belge	Moniteur belge des arrêtés des secrétaires généraux: journal officiel (Official gazette; Belgium) (Brussels 1.1831 ff.; cited by date)
Mon.Trib.	Monitore dei Tribunali, giornale di legislazione e giurisprudenza civile e penale (Milano 1.1859/60-1977; cited by year and page)
Mor	Morison's Dictionary of Decisions, Court of Session (1540-1808)
Mot II	Motive. Explanatory Report on the Draft of a Civil Code for the German Reich. Vol. II: Law of Obligations (Berlin, Leipzig 1888)
MPr	Monomeles Protodikio (One-member first instance court, Greece)
MR	Master of the Rolls (Member and President of the Court of Appeal, UK)
M&S	Maule & Selwyn's King's Bench Reports (105 ER) (London 1813-1817; cited by volume and page)
MuSchG	Gesetz zum Schutz der erwerbstätigen Mutter (Act on the protection of working mothers, Germany) (18 Apr. 1968; BGBl. I p.315)
MvA	Memorie van Antwoord. Parlementaire Geschiedenis (Netherlands)
MvT, Parl. Gesch.	Memorie van Toelichting. Parlementaire Geschiedenis (Netherlands)
M&W	Meeson and Welsby's Reports, Exchequer (ER 150-153) (London 1.1836-16.1847; cited by year, volume and page)
NBW	see BW
NCP	Nuevo Código Penal, 23 November 1995 (New Penal Code, Spain) (Ley Orgánica 10/1995, 23 November 1995, BOE no. 281, 24 November 1995)
NCPC	Nouveau Code de procédure civile. French code on procedural law

ND	Neon Dikaion (New Law, Greece)
NDS	Nordisk Domssamling (Oslo 1.1958 ff.; cited by year and page; in Scandinavia the NDS is often cited by the year of the judgment, which is often one year prior to the year of publication)
NdsRpflege	Niedersächsische Rechtspflege (Celle 1.1947 ff.; cited by year and page)
NedJur	Nederlandse jurisprudentie (Zwolle 1913 ff.; until 1935 cited by year and page, then by year, number and page)
NedJur (kort)	See NedJur (supplementary collection of judgments that have not entered into effect; cited by year and number)
Ned. Rechtspraak	Nederlandsche Rechtspraak of verzameling van arresten en gewijsden van den Hoogen Raad der Nederlanden en verdere rechtscollegien ('s-Gravenhage 1.1838 ff.; cited by volume, year and page)
NedTIR	Nederlands Tijdschrift voor International Recht (Leiden 1.1953/54 with various titles; Nederlands International Law Review 22.1975 ff.; cited by volume, year and page)
New LJ	New Law Journal (London 1.1850 ff.; cited by volume, year, and page)
NFT	Nordisk forsikringstidsskrift (Danish ed.); Nordisk försäkringstidskrift (Swedish ed.) (Copenhagen 1.1921 ff.; cited by year and page)
NGCC	Nuova Giurisprudenza Civile Commentata (Padova 1.1984 ff.; cited by year, book and page)
NILQ	Northern Ireland Legal Quaterly (Belfast 1.1936/37-14.1960/61; NS 1 = 15.1964 ff.; cited by volume, year and page)
NILR	Netherlands International Law Review; see NedTIR
NJ	Nederlandse Jurisprudentie (Zwolle (later Deventer) 1.1913 ff.; cited by year and number)
NJA	Nytt Juridiskt Arkiv (Stockholm 1.1874 ff.; as of 1876 separation into two divisions: division 1: Rättsfall från högsta domstolen, cited by year and page; division 2: Tidskrift för lagstiftning, cited by year, division and page)
NJB	Nederlands Juristenblad (Zwolle 1.1926 ff.; 1936-1943; same contents as Weekblad van het recht; cited by year and page)
NJW	Neue Juristische Wochenschrift (München et al. 1.1947 ff.; previously: JW; cited by year and page)
NJW-RR	NJW-Rechtsprechungsreport (München 1.1986 ff.; cited by year and page)
NoB	Nomiko Bima; miniaion nomikon periodikon (Law Tribune; Athens 1.1953 ff.; cited by volume, year and page)
no(s).	number(s); margin number(s)
Notiziario giur. lav.	Notiziario giuridico. Diritto del lavoro, diritto civile e commerciale, diritto amministrativo e costituzionale, diritto communitario (Torino 1.1970 ff., cited by year and page)
Nov.Dig.it.	Nuovissimo Digesto italiano (Torino 1957 ff.)
NPC	New Property Cases (London 1.1998 ff.; cited by year and page)
NRt	see Rt
NS	New Series; Nejvyssi soud (Supreme Court of the Czech Republic)
NS SR	Najvyssi sùd Slovenskej Republiky (Supreme Court of the Republic of Slovakia)
NSWLR	New South Wales Law Reports (Sydney, 2001 ff.)

NTBR	Nederlands Tijdschrift voor Burgerlijk Recht (Deventer 1.1984 ff.; cited by year and page)
NuR	Natur und Recht (Hamburg, Berlin 1.1979 ff.; cited by year and page)
NVwZ	Neue Zeitschrift für Verwaltungsrecht (München, Frankfurt/Main 1.1988 ff.; cited by year and page)
NY	New York Court of Appeals Reports (Albany, NY, 1893-, cited by number, year and page)
NZLR	New Zealand Law Reports (Wellington 1.1883 ff.; cited by year, section and page)
NZV	Neue Zeitschrift für Verkehrsrecht (München and Frankfurt am Main 1.1988 ff.; cited by year and page)
ObcZ	Obcansky zakonik (Civil Code, Czech Republic)
obs.	observations
ÖBA	Österreichisches Bankarchiv (Wien 1.1953 ff.; cited by year and page)
Öbl	Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht (Wien 1.1952 ff.; cited by year and page)
ÖJZ	Österreichische Juristenzeitung (Wien 1.1946 ff.; cited by year and page)
ÖRZ	Österreichische Richterzeitung (Wien 1.1908-3.1909, 7.1914-12.1919, 19.1926-31.1938, 32.1954 ff.; cited by year and page)
OGH	Oberster Gerichtshof (Supreme Court, Austria)
OGH BritZ	Oberster Gerichtshof für die Britische Zone (Supreme Court for the British Zone, Germany)
OH	Outer House (Court of Session, Scotland)
OJ	Official Journal of the European Communities (Brussels 1.1958 ff.; from 11.1968 ff.: issue C [Communication]: Information and Notice: Issue L [Législation]: Legislation; cited by issue, number, date and page)
Okj	Okrajno sodisce (District Court, Court of First Instance, Slovenia)
Okz	Okrozno sodisce (Regional Court, Court of First Instance, Slovenia)
ØL	Østre Landsret (Eastern High Court; Denmark)
ØLD	Østre Landsrets Dom (Judgments of the Eastern High Court; Denmark)
OLG	Oberlandesgericht (Court of Appeal; Austria, Germany, Greece)
OLGR	OLG-Report. Zivilrechtsprechung der Oberlandesgerichte (Decisions of the Court of Appeal in civil matters, Köln 1.1997 ff.: cited by year and page)
OLGZ	Entscheidungen der Oberlandesgerichte in Zivilsachen einschließlich der freiwilligen Gerichtsbarkeit (Decisions of the Court of Appeal in civil matters including jurisdiction over non-contentious matters) (München, Berlin 1.1965 ff.; cited by year and page)
ØLK	Østre Landsrets Kendelse (Decisions of the Eastern High Court, Denmark)
Ont HCJ	Ontario High Court of Justice
op. cit.	opere citato (work already cited)
OR	Obligationenrecht (Bundesgesetz betreffend die Ergänzung des Schweizerischen Zivilgesetzbuches: 5th Part: Obligationenrecht, vom 30.3.1911 [SR 220]) (Code of Obligation, Switzerland, 30 Mar. 1911)
OR (2d)	Ontario Reports, Second Series (Toronto, 1882-, cited by year, number and page)

OS	Okrajno sodisce (District Court, Court of First Instance, Slovenia); Okresni soud (District Court, Court of First Instancce, Czech Republic); Okresny súd (District Court, Court of First Instance, Slovakia)
OVG	Oberverwaltungsgericht (Administrative Court of Appeal, Germany)
Ow	(Rijks-) Octrooiwet, Netherlands (Patent Act), 7 Nov. 1910 (Stb. 313) and 15 Dec. 1995 (Stb. 51)
OZ	Obcansky zakonik (Civil Code, Czech Republic and Slovakia); Obligacijski zakonik (Law of Obligations, Slovenia)
P	President (official name, United Kingdom)
P	Law Reports. Probate, Divorce and Admiralty Divison (London 1.1891 ff.; cited by year, volume, and page)
p(p).	page(s)
Pan.	See under SemJur
para(s)	paragraph(s)
Parl. St. Kamer	Parlamentaire Stukken Kamer (Publications of the committee of the chamber of the belgian parliament, Bruxelles)
Pas belge	Pasicrisie belge (Recueil général de la jurisprudence des cours et tribunaux de Belgique. I = Arrêts de la Cour de Cassation 3rd Series 1865-1924; 112.1925 ff.; II = Arrêts de la Cour d'Appel 3rd Series 1865-1924; 112.1925 ff.; III = Jugements des tribunaux 3rd Series 1865-1924; 112.1925 ff.; IV = Jurisprudence étrangère 3rd Series 1893-1924; 112.1925 ff.; V = Revue de droit belge 3rd Series 1893 ff.; cited by year, book and page)
Pasin belge	Pasinomie belge ou Collection complète des lois, décrets, arrêtés et règlements généraux qui peuvent être invoqués en Belgique (Brussels 1.1788 ff.; cited by year and page)
Pas luxemb	Pasicrisie luxembourgeoise (Recueil de la jurisprudence luxembourgeoise en matière civile, commerciale, criminale, de droit public, fiscal, administratif et notariel; Luxembourg 1.1881 ff.; cited by volume, year and page)
PC	Privy Council (United Kingdom)
PC	Privy Council Appeals (London 1865-1875; cited by year, volume and page; see LR)
PD	Probate Division (London 1875/76-1890; cited by year, volume and page; see LR)
PECL	Principles of European Contract Law. Prepared by the Commission on European Contract Law. Parts I and II. Edited by Ole Lando and Hugh Beale (The Hague 2000); Part III. Edited by Ole Lando, Eric Clive, André Prüm and Reinhard Zimmermann (The Hague 2003)
PflVG	Gesetz über die Pflichtversicherung für Kraftfahrzeughalter (Act on Compulsory Insurance for the Keeper of a Motor Vehicle, Germany, 5 Apr. 1965; BGBl. I p. 213; BGBl. III p. 925-1)
PHI	Produkthaftung International (Karlsruhe 1.1981 ff.; cited by year and page)
PK	Penikos Kodikas (Criminal Code, Greece. Act no. 1492/1950. FEK 182/1950 pp. 963-1003)
plc	public limited company
PNLR	Professional Negligence and Liability Reports (London, 1.1999 ff., cited by year and page)

Poder Judicial	Conseijo General del Poder Judicial (Madrid 1.1981 ff.; cited by year and page)
POS Regulations	The Public Offers of Securities Regulations (United Kingdom)
p(p).	page(s)
PPr	Polymeles Protodikio (Multi-member first instance court, Greece)
Pr	Protodikio (First instance court, Greece)
pr.	principium
Pret.	Pretura (Local Court, Italy)
Prg	De Praktijkgids. Tijdschrift gewijd aan de rechtspraktijk en aan de jurisprudentie van de kantongerechten (Arnhem 1.1980 ff.; cited by year and number)
ProdHG	Produkthaftungsgesetz. Gesetz über die Haftung für fehlerhafte Produkte (Product Liability Act, Germany, 15 Dec. 1989; BGBl. I p. 2198)
Prop	Proposition (Official proposal for a statute, Sweden)
Prot II	Protokolle. Reports of the Commission for the Second Reading of the Draft Civil Code. Prepared by Order of the Reich Ministry of Justice by Achilles, Gebhard and Spahn. Vol. II: Law of Obligations (Berlin 1898)
Ptk	Polgári Törvénykönyv (Civil Code, Hungary)
QB (ComCt)	Queen's Bench Division, Commercial Court
QB	The Law Reports. Queen's Bench Division (London 1.1890 ff.; cited by year, book, and page, additional L. R. cited: London 1865-1875)
QBD	Queen's Bench Division (London 1875/76-1890; cited by year, book and page); see L. R.
QC	Queen's Council
R.	Regina or Rex
R	Rettie's Session Cases (Edinburgh 1873-1898)
R.	Règlement (order, France)
RabelsZ	Zeitschrift für ausländisches und internationales Privatrecht (Berlin, Tübingen, 1.1927 ff.; from vol. 26.1961: Rabels Zeitschrift für ausländisches und internationales Privatrecht; cited by volume, year and page)
RaDC	Rassegna di diritto civile (Naples 1.1980 ff.; cited by year and page)
RAJ	Repertorio Aranzadi de Jurisprudencia (Pamplona 1.1930/31, 2.1934 ff.; cited by year, number and page)
RAJ (TSJ y AP)	Repertorio Aranzadi de Jurisprudencia. Sentencias de Tribunales Superiores de Justicia y Audiencias Provinciales y otros Tribunales (Pamplona 1.1996 ff.; cited by year, number and page)
Rass.Avv.Stato	La Rassegna mensile dell' Avvocatura dello Stato (Roma 1.1948 ff.; cited by year, book and page)
Rass.dir.civ.	Rassegna di diritto civile (Naples 1.1980 ff.; cited by year and page)
Rb	Arrondissementsrechtbank (District Court, Court of first instance, general jurisdiction, Netherlands), Rechtbank van eerste anleg (Court of First Instance, Belgium)
RCJB	Revue critique de jurisprudence belge (1.1947 ff.; cited by year and page)

RCR	Relazione della Commissione Reale al progetto del libro 'obbligazioni e contratti' (see Pandolfelli et al., Codice civile, in the Table of Literature Cited in an Abbreviated Form)
RD	Regio Decreto (Royal decree, Italy)
RdA	Recht der Arbeit (München 1.1948 ff.; cited by year and page)
RD banc	Revue de droit bancaire et de la bourse (France, 1.1987 ff.)
RDBB	Revista de derecho bancario y bursatil (Madrid, 1981 ff.)
RDE	Revista de Direito e Economia (Coimbra 1.1975 ff.; cited by volume, year and page)
RdS	Recht der Schule (Wien 1.1979 ff.; cited by year and page)
RdW	Österreichisches Recht der Wirtschaft (Wien 1.1983 ff.; cited by year and page)
recht	Recht, Zeitschrift für juristische Ausbildung (Berne 1.1983 ff.; cited by year and page)
ref.	reference
Rel.Guard.	Relazione del Guardasigilli al progetto ministeriale delle obbligazioni (see Pandolfelli et al., Codice civile, in the Table of Literature Cited in an Abbreviated Form)
RépDrCiv	Répertoire de droit civil (Paris 1.1951-5.1955; 2nd ed. 1.1970 ff.; see details in the table of literature)
Rep.Foro it.	Repertorio del Foro italiano (legislazione, bibliografia, giurisprudenza; Roma 1.1878 ff.; previously: Repertorio generale annuale di giurisprudenza, bibliografia e legislazione; cited by volume, year and column)
Rep.gen.	Repertorio generale della Giurisprudenza italiana (Torino 1.1890 ff.; previously: Repertorio generale annuale della Giurisprudenza italiana; cited by year, and column and number)
Rep.Giur.it.	Repertorio generale della giurisprudenza italiana (Torino 1.1848 ff.; cited by year, key word and number)
resp.	respectively
Resp.Civ. e Prev.	Responsabilità Civile e Previdenza (Milano 1.1930 ff.; cited by year and page)
Resp. civ. et assur.	Responsabilité civile et assurances. Revue mensuelle (Paris 1.1988 ff.; cited by year and page)
Restitution LRev	Restitution Law Review (London 1.1993 ff.; cited by year and page)
Rev.Crit. Der.Inm.	Revista Crítica de Derecho Inmobiliario (Madrid 1.1925 ff.; cited by year and page)
Rev.crit.dr.int.pr.	Revue critique de droit international privé (Paris, 1905-, cited by year and page)
Rev.crit.jur.belge	Revue critique de jurisprudence belge (Brussels 1.1947 ff.; cited by year and page)
Rev.crit.légis. et juris.	Revue critique de législation et de jurisprudence (Paris 1.1851 ff.; cited by year and page)
Rev.dr.int. dr.comp.	Revue de droit international et de droit comparé (Brussels 1.1924 ff.; 1940-48 not published; cited by volume, year and page)
Rev.dr.publ.	Revue de droit public et de la science politique en France et à l'étranger (Paris 1.1894 ff.; cited by volume, year and page)
Rev.dr.sanit.soc.	Revue de droit sanitaire et social (Paris 1.1965 ff.; cited by year and page)

Rev.dr.uniforme	Revue de droit uniforme. Uniform Law Review (Roma 1.1973 ff.; cited by year, part and page)
Rev.gén.dr.	Revue générale du droit, de la législation et de jurisprudence en France et à l'étranger (Paris 1.1877-62.1938; cited by year and page)
Rev.Hell.	Revue Hellénique de droit international (Athens 1.1948 ff.; cited by volume, year and page)
Rev.int.dr.comp.	Revue internationale de droit comparé (1.1869/72-71.1947/48; previously: Bulletin de la Société de législation comparée; Paris, 1.1949 ff.; cited by volume, year and page)
Rev.jur.pol. Ind.Coop.	Revue juridique et politique, Indépendance et Coopération (Paris NS 1.1946 ff.; cited by volume, year and page)
Rev.not. b.	Revue du notariat belge (Bruxelles 1.1896 ff.; until 1970 Revue pratique du notariat belge and Annales du notariat et de l'Enregistrement)
Rev.trim.dr.civ.	Revue trimestrielle de droit civil (Paris 1.1902-38.1939, 39/40.1940/41-78.1979 = tome 39-77, 79.1980 ff.; until 1977 by vol., then by year and page)
Rev.trim.dr.com.	Revue trimestrielle de droit commercial (Paris, 1.1948 ff.)
RFDA	Revue Française de Droit Administratif (Paris 1.1946/47 (1947) ff.; cited by year and page)
RG	Reichsgericht (Supreme Court of the German Reich, Germany)
RGAR	Révue générale des assurances et des responsabilités (Brussels 1.1927 ff.; cited by year and number)
RGBl	Reichsgesetzblatt (Government Gazette of the German Reich) (Berlin 1871-1945; since 1922 divided into parts I and II)
RGD	Revista general de derecho (Valencia 1.1945 ff.)
RGDC	Revue générale de droit civil/Tijdschrift voor Belgisch Burgerlijk Recht (1.1987-)
RGZ	Amtliche Sammlung der Entscheidungen des Reichsgerichtes in Zivilsachen (Decisions of the German Imperial Court in civil matters) (Berlin 1.1872-172.1945; cited by volume and page)
RH	Rättsfall från Hovrätterna (Decisions of the Swedish court of appeal, changing places of publication, usually Stockholm, 1.1980 ff.; cited by year and number)
RHG	Reichshaftpflichtgesetz (Imperial Third Party Liability Act, Austria; RGBl. 1871, 201)
Riigikohus tsiviilkollegium	Supreme Court Civil Chamber, Estonia
Ringkonnakohus	District Court, Court of Appeal, Estonia
RIS-Justiz	Austrian internetpublication of OGH-decisions, www.ris.bka.gv.at/jus/; decisions are cited by date, number of legal subject and keyword
Riv.crit.dir.priv.	Rivista critica del diritto privato (Bologna 1.1989 ff.; cited by year and page)
Riv.Dir.Civ.	Rivista di Diritto Civile (Padova 1.1955 ff.; cited by year, book and page)
Riv.Dir.Com.	Rivista del Diritto Commerciale e del Diritto generale delle obbligazioni (Milano 1.1903 ff.; cited by year, book and page)
Riv.dir.eur.	Rivista di diritto europeo (Roma 1.1961 ff.; cited by year and page)
Riv.dir.int.priv. proc.	Rivista di diritto internazionale privato e processuale (Padova 1.1969 ff., cited by year and page)
Riv.dir.lav.	Rivista di diritto del lavoro (Milano 1.1949-32.1980; cited by year and page)

Riv.dir.sport.	Rivista di diritto sportivo (Milano 1.1949 ff.; cited by year and page)
Riv.giur.circ. trasp.	Rivista giuridica della circolazione e dei trasporti (Roma 1.1947 ff.; cited by year and page)
Riv.giur.lav.	Rivista giuridica del lavoro e della previdenza sociale (Roma 1.1954 ff.; part 1: Dottrina; part 2: Giurisprudenza; part 3: Previdenza; part 4: Diritto penale del lavoro; cited by year, book and page)
Riv.it.med.leg.	Rivista italiana di medicina legale (Milanoo, 1979-, cited by year and page)
Riv.pen.	Rivista penale (Roma 1.1952 ff.; cited by year and page)
Riv.trim.dir. proc.civ.	Rivista trimestrale di diritto e procedura civile (Milano 1.1947 ff.; cited by year and page)
RIW	Recht der Internationalen Wirtschaft (Heidelberg 1954-1957 and 1975 ff.; from 1958 to 1974 Außenwirtschaftdienst des Betriebsberaters [AWD]; cited by year and page)
RJDA	Revue de jurisprudence du droit des affaires (Paris 1.1991 ff.; cited by year and page)
RLJ	Revista de Legislação e Jurisprudência (Coimbra 1.1868/69 ff.; cited by volume, year and page)
RM	Rechtsgeleerd magazijn: tijdschrift voor binnen- en buitenlandsche rechtsstudie (Haarlem 1.1882-58.1939; cited by year and page)
RM-Themis	Rechtsgeleerd magazijn Themis. Tijdschrift voor publiek- en privaatrecht. (Zwolle 1.1939 ff.; cited by year and page)
RN	Rivista del notariato (Milano 1.1947 ff., cited by year and page)
ROA	Revista da Ordem dos Advogados (Lisboa 1941 ff.)
RP	RP 189/1998 rd – Regeringens proposition till Riksdagen med förslag till lagstiftning om borgen och tredjemanspant (Finland)
RPC	Reports of Patent, Design & Trade Mark Cases (London 1.1884 ff.; cited by year and page)
RPDB	Répertoire pratique du droit belge – Encyclopédie Reeks (Bruxelles and Paris 1.1928 ff.)
RPL	Retsplejeloven (Rules of Procedure, Denmark, no. 90, 11 Apr. 1916, lovbekendtgørelse no. 815 of 30 September 2003)
RRJ	Revue de la Recherche Juridique. Droit Prospectif (Aix-en-Provence 1.1974/75 ff.; cited by year and page)
r+s	Recht und Schaden. (Kippenheim 1.1974 ff.; cited by year and page)
RSC	Rules of the Supreme Court (England)
RSCOrd	Rules of the Supreme Court, Order (England)
RT	Revista dos Tribunais (Sao Paulo 1912 ff.)
Rt	Retstidende, publishing the decisions of the norwegian Høyesterett (Supreme Court)
RTD civ	Revue trimestrielle de droit civil (Paris, 1.1902 ff.); see Rev.trim.dr.civ.
RTD com	Revue trimestrielle de droit commercial (Paris, 1.1948 ff.); see Rev.trim.dr.com.
RTR	Road Traffic Reports (London 1.1970 ff.; cited by year and page)
Rv	Wetboek van Burgerlijke Rechtsvordering (Code of civil procedure, Netherlands) (Stb. 1828 no. 14)
RvdW	Rechtspraak van de Week (Zwolle 1.1939 ff.; cited by year and number)

RvT	Raad van Toezicht op het Verzekeringswezen (Council for the Supervision of the Insurance Sector, Netherlands)
RW	Rechtskundig Weekblad (Antwerpen 1.1931/32 ff.; cited by year and page)
S	Shaw's Session Cases, First Series (Scotland)(1821-1838)
S.	Recueil général des lois et arrêts resp. Recueil Sirey; 1801/02 ff.; see D.
Sadem pierwszej instancji	Court of Appeal, Poland
Sad Najwyzszy	Supreme Court, Poland
Sad okregowy	Circuit Court (Court of First Instance), Poland
Sady grodzkie	Court of First Instance, Poland
Salk	Salkeld's Reports (ER 91) (London 1689-1712, cited by year, volume and page)
SALR	South Australian Law Reports (Melbourne, 1869-, cited by number and page)
SAP	Sentencia de la Audiencia Provincial (Decision of a Court of Appeal, Spain)
SavZ Rom.Abt.	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (until vol. 31 divided into Germanist.Abt., Romanist.Abt. and Kanonist.Abt. each department has its own system of numbering volumes. Rom.Abt.: 1. = 14.1880-65 = 78.1947 ff.; cited by volume, year and page)
SC	Session Cases. New Series. Cases decided in the Court of Session, and also in the Court of Justiciary (J. C.) and the House of Lords (H. L.); Edinburgh 1.1907 ff.; cited by year and page)
ScanStudL	Scandinavian Studies in Law (Stockholm 1.1957 ff., cited by volume, year, and page)
sch.	schedule(s)
Scientia jurídica	Scientia jurídica. Revista de direito comparado português e brasileiro (Braga 1.1951/52 ff.; cited by volume, year and page)
SCLR	Scottish Civil Law Reports (Edinburgh, 1987-, cited by year and page)
Scot.Law Com.	Scottish Law Commission Report (Edinburgh, 1966-, cited by number, year and paras.)
Scot CS	Approved judgment of the Court of Session. Scotland
SDR	Special Drawing Rights
sec., secs.	section, sections
SEK	Reference of the Commission General Secretary's Office and of the Council of the European Union
SemJur	La Semaine Juridique. Edition Entreprise. Cahiers de Droit de l'entreprise (Paris 1.1966 ff.; cited by year, part and number), Edition Générale. (also Juris Classeur Périodique; Paris 1.1927 ff.; cited by year, part and number), Edition Nouvelles, Panorama (Pan.), Sommaire (Som.), also quoted as JCP, see there
sent.	sentence(s)
SeuffArch	Seuffert's Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten (1.1847-98.1944; from 1.1847-11.1857: Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten; cited by volume, year, number and page)
Sez. giur.	Sezione giurisdizionale

SFS	Svensk författningssamling (Official gazette, Sweden) (Stockholm 1.1825 ff.; cited by year and number)
SGB	Sozialgesetzbuch (Social Security Code, Germany) 11 Dec. 1975 (BGBl. I p. 3015)
SGECC	Study Group on a European Civil Code
SH	Sø- og Handelsretten. Maritime and Commercial Court (Copenhagen, Denmark)
ShApp	Shaw's Appeals (Scotland 1821-1824; cited by year, book and page)
Sh.Ct.	Sheriff Court (Court of first instance in civil and criminal matters; Scotland)
SHD	Sø- og Handelsretsdom (Judgement of the Maritime and Commercial Court Copenhagen, Denmark)
S. I.	Statutory Instrument
SJ	Solicitor's Journal (London 1.1857 ff.; cited by year and page)
SJZ	Schweizerische Juristenzeitung (Zürich 1.1904/1905 ff.; cited by year and page)
SKL	Skadeståndslag. Damages Liability Act (Sweden: SFS 1972:207; Finland: 31 May 1974 no. 412)
SLD	Søndre Landsrets Dom (decision of the southern court in Denmark)
SLPQ	Scottish Law and Practice Quarterly (London 1.1995 ff., cited by year, number and page)
SLR	Scottish Law Reporter (1865-1925)
SLT (Rep)	The Scots Law Times (News and Reports, the latter with separate pagination) (Edinburgh 1.1893/94 ff.; Sheriff Court reports 1.1922 ff., cited by year and page)
SmLC	Smith's Leading Cases in Various Branches of the Law (13th ed. London 1929)
SN	Session Notes (Edinburgh 1925-1948)
Som.	See under SemJur
SOU	Statens offentliga utredningar (Government gazette, Sweden) (Stockholm 1.1939 ff.; cited by year, number, title and page)
Sr	Wetboek van Strafrecht (Penal Code, Netherlands) (Stb. 1881, p. 40 [Nr. 35])
SR	Systematische Sammlung des Bundesrechts (Switzerland, since 1970; cited by number)
SR NSW	New South Wales, State Reports, (1.1901 ff.)
s(s).	et sequentia
S&S	Schip en Schade. Beslissingen op het gebiet van zee- en binnenvaartrecht en brandverzekeringsrecht (Zwolle 1.1957 ff.; cited by year and page)
STA	Supremo Tribunal Administrativo (Supreme Court in Administrative Matters, Portugal)
Stark	Starkie's Nisi Prius Reports (171 ER, London 1814-1823)
StAZ	Das Standesamt. Zeitschrift für Standesamtswesen: Personenstandsrecht, Ehe- und Kindschaftsrecht, Staatsangehörigkeitsrecht (Neue Folge Frankfurt/M. 1.1948 ff.; cited by year and page)
Stb	Staatsblad van het Koninkrijk der Nederlanden (Official Gazette; Netherlands) (Zwolle 1.1813 ff.; cited by year and page)
StGB	Strafgesetzbuch (Penal Code, Germany) 15 May 1871 (RGBl. p. 127) formulation of the bulletin of 13.11.1998, BGBl I p. 3322;

	Bundesgesetz vom 23.1.1974 über die mit gerichtlicher Strafe bedrohten Handlungen (Penal Code, Austria, 23 Jan. 1974) (BGB1. no. 60)
STJ	Supremo Tribunal da Justiça (Supreme Court, Portugal)
StPO	Strafprozeßordnung (Code of Criminal Procedure, Germany, as amended by Act of 7 Apr. 1987; BGBl. I p. 1075)
STRFL	Borgerlig Straffelov (Civil Penal Code, Denmark) (Act no. 126, 15 Apr. 1930 [Lovtidende A 1930, p. 697-752])
STS	Sentencia del Tribunal Supremo (decision of the Supreme Court, Portugal)
Stud.Iuris	Studium Iuris. Rivista per la formazione nelle professioni giuridiche (Padova 1.1995 ff., cited by year and page)
StVG	Straßenverkehrsgesetz (Road Traffic Act, Germany, 19 Dec. 1952; BGBl. I p. 832)
StVO	Straßenverkehrsordnung (Road Traffic Regulation, Germany, 16 Nov. 1970 (BGBl. I p. 1565)
subs.	subsections
Sup.Ct.	Supreme Court (Ireland)
Suppl.	Supplement
Suppl.ord.	Supplemento ordinario (Part of the government gazette, Italy)
Sv	Wetboek van Strafvordering (Code of Criminal Procedure, Netherlands; Stb. 15 Jan. 1921, p. 14)
SvJT	Svensk Juristtidning (Stockholm 1.1916 ff.; cited by year and page)
SZ	Entscheidungen des österreichischen Obersten Gerichtshofs in Zivilsachen (Wien 1.1919-20.1938; 21.1946 ff.; with changing titles; until vol. 34.1961: Entscheidungen des österreichischen obersten Gerichtshofs in Zivil- und Justizverwaltungssachen; cited by volume, number, and page)
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht (Zürich 1.1991 ff.; cited by year and page)
tab.	tabulae
TAgrR	Tijdschrift voor agrarisch recht; Revue de droit rural (Brussel 1.1979 ff.; cited by year and page)
TBBR	Tijdschrift voor Belgisch Burgerlijk Recht; see RGDC
TBH	Tijdschrift voor Belgisch handelsrecht; Revue de droit commercial belge (Antwerpen 1.1967-29.1996; 103.1997 ff.; continuation of the Jurisprudence commerciale de Belgique)
TBP	Tijdtschrift voor Bestuurswetenschappen en Publiekrecht (Brussels 1.1946 ff., from 1.1946 to 6.1951 under the title Tijdtschrift voor Bestuurswetenschappen; cited by year and page)
TBR	Tijdschrift voor Brugse rechtspraak (Brugge 1.1983 ff.; cited by year and page)
TC	Tribunal Constitucional (Constitutional Court; Spain)
Tel Aviv UnivStudL	Tel Aviv University Studies in Law (Tel Aviv 1.1975 ff.; cited by volume, year and page)
Temi	Il Temi. Rivista di giurisprudenza Italiana (Parma, Milano et al. NS 1 = 22.1946 ff.; cited by year and page)
Temi nap.	Il Temi napoletana (Milano 1.1958 ff.; cited by year and page)
Temi rom.	Temi romana (Milanoo 1.1929-5.1933; [n. F.] 1.1952-40.1991; cited by year and page)

Term Rep	Dunford & East's Term Reports (ER 99-101) (London 1785-1800)
TfR	Tidsskrift for Rettsvitenskap (Oslo 1.1888 ff.; cited by year and page)
TGI	Tribunal de grande instance (Court of first instance, France)
Themis	Hebdomacliaia dikastike ephemeris ekdiclomene en Athenais (Athens 1.1890/91 (1930)-65.1954/55; cited by volume, year and page)
TI	Tribunal d'instance (Court of first instance, France)
TLR	Annual Digest of the Times Law Reports (London 1.1884 ff.; cited by volume, year and page)
TMA	Tweemaandelijks tijdschrift voor milieu aansprakelijkheid. Environmental Liability Law Review (Lelystad 1.1987 ff.; cited by year and page)
ToΣ	To Syntagma (Athens 1.1975 ff.; cited by volume, year and page)
TPR	Tijdschrift voor Privaatrecht (Ghent 1.1964 ff.; cited by year and page)
TR	Durnford & East's Term Reports, King's Bench (ER 99-101) (London 1785-1800; cited by volume, year and page)
TranspR	Transportrecht (Frankfurt/Main 1.1978 ff.; cited by year and page)
Trb	Tractatenblad van het Koninkrijk der Nederlanden (Official Gazette recording treaties in force in the Netherlands) (s'-Gravenhage 1.1951 ff.; cited by year and page)
Treaty of Rome	Treaty establishing the European Community, 25 Mar. 1957
Trib.	Tribunale (Court of First Instance, general jurisdiction; Court of Appeal in small claims matters; Italy); Tribunal de première instance (Court of First Instance; Belgium, France); Tribunal d'arrondissement (Court of First Instance, general jurisdiction, Luxembourg)
Trib.com.	Tribunal de Commerce (Commercial Court; Belgium and France)
Trib.Corr.	Tribunal Correctionnel (Criminal Court, Belgium)
Trib. enfants	Tribunal pour enfants (Youth Court, France)
TS	Tribunal Supremo (if not specified: senate for civil matters) (Supreme Court, Spain)
TSJ	Tribunal Superior de Justicia (Supreme Court of the autonomous regions, Spain)
TSL	Trafikskadelag (Traffic Damages Act; SFS 1975: 410, Sweden)
TulCivLaw Forum	Tulane Civil Law Forum (New Orleans, 1.1973-1977; NS 1.1987 ff.; cited by volume, year and page)
TulLRev	Tulane Law Review (New Orleans, 1.1916 ff.; cited by volume, year and page)
TvC	Tijdschrift voor Consumentenrecht (Deventer 1.1985 ff.; cited by year and page)
UfR	Ugeskrift for Retsvæsen (Copenhagen 1.1867 ff.; as of 1902 division into: A = Danks domssamling; B = Juridiske afhandlinger, meddelelser; C = Abstracts; cited by year, book and page)
UIC	Ufficio Italiano dei Cambi (Italian Foreign Exchange Office)
UKHL	Approved judgment of the House of Lords (United Kingdom)
Ulp.	Ulpian
UmweltHG	Umwelthaftungsgesetz (Environmental Liability Act, Germany, 10 Dec. 1990; BGBl. I p. 2634)
UNCITRAL	United Nations Commission for International Trade Law

UnfContTA	Unfair Contract Terms Act (France: Law no. 95-96 of 1. February 1995 art. 1 consolidated in ConsC art. 132-1; United Kingdom: Unfair Contract Terms Act 1977)
UnifLRev	Uniform Law Review = Revue de droit uniforme; see Rev.dr.uniforme
UNTS	United Nations Treaty Series. Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations (Washington DC 1.1946/47 ff.; cited by volume and page)
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte v. 9.September 1965 (act on copyright and related patent rights, Germany, BGBl I p. 1273, formulation of 1.9.2000; BGBl I p. 1375); Urheberrechtsgesetz v. 9.4.1914 (copyright-act, Austria, BGBl 1936/111)
UTR	Umwelt- und Technikrecht (Düsseldorf 1.1986 ff.; cited by volume, year and page)
UWG	Gesetz gegen den unlauteren Wettbewerb (Act against Unfair Competition, Germany, 7 June 1909; RGBl. 499; 3 July 2004, BGBl I 1414)
v.	versus
V°	Verbo
V-C	Vice-Chancellor (UK)
Varosi birosàg	City Court (Court of First Instance), Hungary
Vern	Vernon's Chancery Reports (ER 23, London 1680-1719)
VersR	Versicherungsrecht (Juristische Rundschau für die Individualversicherung; Karlsruhe 1.1950 ff.; cited by year and page)
VersRAI	Versicherungsrecht Beilage Ausland (Karlsruhe 1.1959/60, 2.1961 ff.; cited by year and page)
VfGH	Verfassungsgerichtshof (Constitutional Court; Austria)
VfSlg	Verfassungssammlung. Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes (Collection of cases before the Austrian Constitutional Court) (Wien 1.1919 ff., New Series 33.1968 ff.; cited by the 1fd. no. of the decision)
VG	Verwaltungsgericht (Administrative Court, Germany)
Vita not.	Vita notarile (Palermo 1.1949 ff., cited by year and page)
VL	Vestre Landsret (Western High Court, Denmark)
VLD	Vestre Landsrets dom (Judgments of Western High Court, Denmark)
VLK	Vestre Landsrets kendelse (Decisions of Western High Court, Denmark)
vol	Volume
VÕS	Võlaõigusseadus (Estonian Law of Obligations Act of 1 July 2002; Official Journal I 2002, 53, 336)
VR	Verkeersrecht ('s-Gravenhage 1.1953/54 ff.; cited by year and page)
Vrb	Verzekeringsrechtelijke berichten (Zwolle 1.1989 ff.; cited by year and page)
Vred	Vredegerecht (magistrates court, Belgium)
VS	Visje sodisce (Court of Appeal, Slovenia); Vrnchi soud (Court of Appeal, Czech Republic)
VS RS	Vrhovno sodisce Republike Slovenije (Supreme Court of Slovenia)
V. T.SV.	Voorafgaande Titel Wetboek van Strafvordering. Preliminary Title to the Penal Code (Belgium)

VVDStRL	Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer (Berlin 1.1924 ff.; cited by volume, year and page)
VVG	Gesetz über den Versicherungsvertrag (Act on insurance contracts, Germany), 30 May 1908 (RGBl. p. 263)
Vw	Versicherungswirtschaft (Karlsruhe 1.1946 ff.; cited by year and page)
VwGH	Verwaltungsgerichtshof (Supreme Administrative Court, Austria)
W	Weekblad van het Recht (Zwolle et al. 1.1839-105.1943; from 1936 contents the same as Nederlands Juristenblad (NJB); cited by year, number and page)
WAM	Wet betreffende de verplichte aansprakelijkheidsverzekering inzake motorrijtuigen (Act on Compulsory Insurance for Keepers of a Motor Vehicle, Belgium, 1 July 1956; B. S. 15 July 1956; as amended by Act of 21 Nov. 1989; B. S. 8. Dec. 1989)
Warsaw Convention	Warsaw Convention, 12 Oct. 1929. Convention for the Unification of Certain Rules Relating to International Carriage by Air (as amended)
WBl	Wirtschaftsrechtliche Blätter (Wien, 1.1987 ff.; cited by year and page)
WHG	Wasserhaushaltsgesetz. Gesetz zur Ordnung des Wasserhaushalts (Water Budget Act, Germany, 23 Sep. 1986; BGBl. III pp. 753)
WiB	Wirtschaftsrechtliche Beratung (München, Frankfurt/Main 1.1994 ff.; cited by year and page)
WL	West Law
WLR	The Weekly Law Reports (containing decisions in the House of Lords, the Privy Council, the Supreme Court of Judicature, Assize Courts; London 1.1953 ff.; cited by year, book and page)
WM	Wertpapier-Mitteilungen: Zeitschrift für Wirtschafts- und Bankrecht (Frankfurt am Main et al. 1.1947 ff.; cited by year and page)
Wm Bl	Sir William Blackstone's King's Bench Reports (ER 96) (London 1746-1780)
WPNR	Weekblad voor privaatrecht, notariaat en registratie ('s-Gravenhage 1.1870 ff.; cited by year, number and page)
WR	The Weekly Reporter (London 1.1852/53 (1853)-54.1905/06 (1906))
WRG	Wasserrechtsgesetz (Water Act of 1959, Austria; BGBl. 215)
WRP	Wettbewerb in Recht und Praxis (Frankfurt am Main 1.1955 ff.; cited by year and page)
WVW	Wegenverkeerswet (Road Traffic Act, Netherlands), 13 Sep. 1935 (Stb. 554) and 21 Apr. 1994 (Stb 475)
WWR	Western Weekly Reports (Calgary 1.1911/12 (1912)-10.1916; 1917-1950; NS 1.1951 ff.; cited by year, book and page)
YAR	York Antwerp Rules (London 1996)
Y&J	Younge and Jervis' Exchequer Reports (ER 148) (London 1826-30; cited by volume, year and page)
Zacchia	Zacchia. Archivio di medicina legale, sociale e criminologica (Roma 1.1921-13.1934; 2nd series 1.1937 ff.; cited by year and page)
ZBB	Zeitschrift für Bankrecht und Bankwirtschaft (Köln 1.1989 ff.; cited by year and page)

ZBernJV	Zeitschrift des Bernischen Juristenvereins (Revue de la société des juristes bernois; Berne 1.1864/65 ff.; cited by volume, year and page)
ZEuP	Zeitschrift für Europäisches Privatrecht (München 1.1993 ff.; cited by year and page)
ZEV	Zeitschrift für Erbrecht und Vermögensnachfolge (München, Frankfurt/Main 1.1994 ff.; cited by year and page)
ZfRV	Zeitschrift für Rechtsvergleichung (Wien 1.1960 ff.; cited by year and page)
ZfS	Zeitschrift für Schadensrecht (Essen 1.1980 ff.; cited by year and page)
ZfU	Zeitschrift für Umweltpolitik und Umweltrecht. Journal of Environmental Law and Policy. Revue de la politique et du droit d'environnement (Frankfurt/Main 1.1978 ff.; cited by year and page)
ZfVB	Zeitschrift für Verwaltung; supplement: decisions of the VfGH and VwGH (Wien 1.1976 ff.; cited by year and page)
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (Heidelberg 1.1858-110.1944, 111.1948 under different titles: until vol. 60: Zeitschrift für das gesamte Handelsrecht, until vol. 124 (1962): Zeitschrift für das gesamte Handels- und Wirtschaftsrecht; cited by volume, year, and page)
ZIP	Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis (previously Insolvenzrecht; Köln 1.1980 ff.; cited by year and page)
ZPO	Zivilprozeßordnung (Code of civil procedure, Germany) 12 Sep. 1950 (BGBl. 1950 I p. 533); Zivilprozeßordnung (Code of civil procedure, Austria) 1, Aug. 1895 (RGBl 1895/113)
ZRP	Zeitschrift für Rechtspolitik (München 1.1968 ff.; cited by year and page)
ZSR	Zeitschrift für Schweizerisches Recht (Basel NS 1.1882 ff.; cited by volume, year and page)
ZVersWiss	Zeitschrift für die gesamte Versicherungswissenschaft (Karlsruhe 1.1901 ff.; 43.1943, 56.1967 ff.; cited by year and page)
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft (Heidelberg 1.1878 ff.; cited by volume, year and page)
ZVR	Zeitschrift für Verkehrsrecht (Wien 1.1956 ff.; cited by year, number of the decision and page)
ZZP	Zeitschrift für Zivilprozeß (Köln et al. 63.1943, 64.1950/51, 65.1952 ff.; cited by volume, year and page)

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