A 10 Year Stretch

Those working in the Middle East should be aware of ‘decennial liability’, which makes you liable for problems with a building for up to a decade after completion

Consultants working in the Middle East will know of the concept of ‘decennial liability’. It is a form of liability that does not exist in the UK and is yet another risk to add to the many challenges involved in doing business in the region. Is there anything that can be done to mitigate the risk?

Decennial liability is a common feature of the Arab civil codes and, deriving from French law, is the imposition of joint and several ‘decennial liability’ on certain parties involved in the design and construction of a building or structure. In the UAE the provisions for decennial liability can be found within Articles 880-883 of the UAE Civil Code (Federal Law no 5 of 1985).

Whilst the precise scope of decennial liability varies from country to country, in general terms, under decennial liability contractors, architects and supervising engineers and design professionals are liable towards an employer for any total or partial collapse of a building for a period of 10 years after delivery of the building – although in certain jurisdictions a design professional’s liability may be limited to those areas of a building or structure where it was responsible for or involved in the design.

In the case of the UAE, decennial liability may potentially extend to any defect which threatens the stability or safety of a building or structure. Importantly, decennial liability imposes strict liability which may be engaged even where none of the parties was at fault - such as where a collapse is as a result of an unforeseen ground condition.

Decennial liability is a mandatory provision of UAE law, you cannot contract out of it or limit it with a cap – such contractual provisions are void in the UAE. Effectively it is a type of contractual liability owed to the employer and a claim can only be made by the employer with whom you contract for the works. Third parties with whom you have no contractual relationship cannot rely on decennial liability unless your contract somehow (expressly or impliedly) gives such third party a right, albeit they may have some other cause of action against you in any event.
Liability commences from project handover which is normally on the issue of the Taking-Over Certificate and runs for the lesser of 10 years or the intended life cycle of the building/structure.

In the UAE no claim may be brought after 3 years from the occurrence of the collapse or discovery of the defect. The decennial liability provisions make no reference to when defects should have been discovered so “discovery” in this context is likely to mean actual discovery.

The employer’s remedy will be the measure of damages required to compensate them for the total/partial collapse of the structure.

Here are some practical pointers on the subject:

- Most professional indemnity insurance policies (being negligence based or legal liability policies) do not provide cover for decennial liability, even though, in certain jurisdictions - notably Egypt - it is mandatory for consultants to obtain insurance cover for decennial liability. Insurance products are available but most have the building owner as the beneficiary and not other parties to whom you may owe duties (such as owners of adjoining property or a subsequent purchaser) so you probably still need to maintain relevant third party liability insurance.

- Ensure that your contracts do not seek to extend decennial liability to other parties beyond the employer and do not specify a longer period than required by the Civil Code i.e. ten years.

- Seek an indemnity from your sub-contractors in respect decennial liability claims against you arising out of failure by your sub-contractor to perform their contractual obligations.

- Consider the financial viability of contractors involved on the project. In cases of joint and several liability if the contractor were to become insolvent then the employer would most likely seek to recover the full costs from the design consultant.

- If you are a designer working in the UAE, where appropriate, you should limit your contractual scope and duties to design only and not take on any supervision or inspection duties; at least not without
adequate reward. Having said this, taking on a full design and supervision role may allow you to identify defects in the design and monitor the workmanship of the contractor to prevent issues arising.

Finally, ‘decennial liability’ should feature in your project risk assessments and you should seek advice from your lawyers and brokers on ways to help you mitigate such risks on a project by project basis.

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