

Managing the Risk of Decennial Liability

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Although much has been written about it, decennial liability continues to surprise and confound architects, engineers and contractors from other parts of the world who are coming to the Middle East to do business. Often they simply do not realize that in the Middle East, their customary risk management tools are not sufficient and they are in fact exposed to potentially catastrophic liability.

Decennial Liability is not covered by most Professional Liability Insurance Policies and cannot be Limited or Waived by Contract.

Architects and engineers are accustomed to the risk of being held liable for professional negligence and all carry professional liability insurance for that eventuality. What many don't realize however, is that professional liability policies written in the U.S., Australia and Europe are generally triggered by negligence and would not respond in a case of strict liability, where no negligence is required. Contractors are also accustomed to being held responsible for their negligence or breach of contract, but rather than professional liability insurance, which does not cover workmanship and is not available to contractors, contractors tend to rely on limited warranties and other contractual limitations of liability to protect themselves. Unfortunately, decennial liability is a mandatory provision of the civil code in most Middle Eastern countries and cannot be limited or waived by agreement of the parties.

The Potential Liability is Enormous.

The civil codes in most Middle Eastern countries were derived from the French and Egyptian civil codes and so are remarkably similar in many respects. Set forth below is a table comparing the decennial liability provisions in the civil codes of Iraq, Jordan, Kuwait, Qatar and the UAE. Although there are some subtle differences, they are very similar. All impose strict liability on architect/engineers and contractors for the partial or total collapse of a building they designed or constructed, as the case may be, and for any defect which threatens the stability or safety of such buildings. Other common features are as follows:

- the liability period commences at handover and is for a period of ten (10) years, or the intended life of the building, if less.
- liability attaches notwithstanding that the collapse or defect resulted from a defect in the land or that the building owner approved the defective building.
- liability is joint and several, meaning that the building owner can proceed against either party for the full amount of the claim.
- any contractual provision purporting to waive or limit decennial liability is void.
- all have a claim limitation period of either three (3) years or one (1) year.

Insurance Products are Available.

Architects and Engineers who intend to be doing business in the Middle East for the long term would be wise to consider obtaining their professional liability policies in the U.K., which has a "legal or civil liability" trigger as opposed to a "negligence" trigger. These policies will provide protection against the imposition of decennial liability, so long as they are kept in force for ten (10) years after completion of the work, which is the duration of the liability period.

Another possible alternative with respect to design professionals is Owner's Protective Professional Indemnity Insurance ("OPPI"), which protects the owner in the event that the underlying professional liability policy is deficient in coverage. Of course, the policy wording would have to be carefully reviewed

to ensure that the policy would respond in the event of strict liability that is not covered by the underlying design professional's policy.

Unfortunately, contractors face a more difficult situation. The French market offers decennial insurance on a project specific basis, but it is very expensive and very invasive. The insurer provides a certificate of intent to issue the policy when the project is completed and becomes heavily involved in process, monitoring the design and construction. The combination of prohibitive cost and interference with the work means this is not a practical alternative for most contractors, who instead find themselves having to rely on their balance sheets.

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Country	Civil Code Provisions	Who is Liable?	Scope of Liability	Liability Period	Claim Limitation Period	Comments
Iraq	Articles 870 - 872 of the Civil Code No. 40 of 1951	Architect / Engineer and Contractor	Total or partial collapse and any defect which may threaten the strength and safety of a building or fixed installation	Ten (10) years	One (1) year from collapse or discovery of defect	No liability if defects are found to have resulted from causes which could not have been foreseen at the time of construction
Jordan	Articles 788 - 791 of the Civil Code No. 43 of 1976	Architect / Engineer and Contractor	Total or partial structural collapse and any defect which imperils the strength or safety of a building	Ten (10) years	One (1) year from collapse or discovery of defect	Appears to be limited to buildings only, not other installations
Kuwait	Article 692 of the Civil Code no. 67/1980	Architect / Engineer and Contractor	Total or partial destruction or damage and any defect that threatens the strength and safety of a building or fixed construction	Ten (10) years	Three (3) years from collapse or discovery of defect	
Qatar	Article 711 of the Civil Code, Law No. 22 of 2004	Architect / Engineer and Contractor	Total or partial collapse or fault and any defect which threatens the sturdiness and safety of a building or fixed construction	Ten (10) years	Three (3) years from collapse or discovery of defect	
UAE	Articles 880-883 of the Civil Transactions Law No. 5 of 1985	Architect / Engineer and Contractor	Total or partial collapse and any defect which threatens the stability or safety of a building or other fixed installation	Ten (10) years	Three (3) years from collapse or discovery of defect	Contractor is strictly liable for all defects, including joint and several liability for design defects