

Construction Dispute Costs Engineer and Contractor 195 Million AED

Mohamed Al Marzouqi - Partner, Regional Co-Head of Dispute Resolution - Litigation / Legislative Drafting

m.almarzouqi@tamimi.com - Abu Dhabi

Ahmad Ghoneim - Partner - Litigation / Construction and Infrastructure

a.ghoneim@tamimi.com - Abu Dhabi

Introduction

The UAE Civil Transaction Code ("CTC") imposes in article number (877) a strict joint liability on the contractor and the supervisor engineer if a building collapses within ten years of the date of handing over the building. This liability known as the Decennial Liability ("DL").

We are aware of a perception in the market that the engineer's liability should not exceed its contract's value, and thus the engineer's civil liability should be limited to this value. In this article, we analyse the scope of the engineer's liability in relation to DL, in line with a recent judgment issued by the Abu Dhabi Court of Cassation, in which Al Tamimi & Company successfully represented a leading developer in Abu Dhabi in a dispute related to a collapse in a part of a mega project in Abu Dhabi, which created much publicity in the UAE local media in 2012.

Background

A developer ("Employer") entered into an agreement with a contractor ("Contractor") to build a mega project in Abu Dhabi ("Project"). The Employer further contracted with a project manager ("Project Manager"). Then, the Employer contracted with a consultant ("First Engineer") to design and supervise the construction of the Project. The First Engineer provided the design of the Project, and supervised the construction of part of the Project. The Employer decided to change the First Engineer during the construction progress, and thus contracted with another consultant ("Second Engineer") to continue the supervision of the construction.

The residential part of the Project was completed, and handed over to the Employer, who leased it out. Almost five years ago, a collapse of 1,400 square meter occurred in one of the parking areas. Fortunately, there were no loss of life. The authorities of the Emirate of Abu Dhabi decided immediately after the collapse to evacuate the Project from the residences. The Employer immediately provided alternative accommodation (hotel apartments) for the residents of the Project, until the Employer prepare a permanent accommodation for the residents.

The Prosecutor General of the Emirate of Abu Dhabi decided to appoint an engineering committee to visit the Project and prepare a report regarding the reason for the collapse and to highlight whether there was any other potential risk for another collapse. In the meantime, the Prosecutor General referred the Contractor, First Engineer, Second Engineer, the Project Manager, and a governmental authority to the Criminal Court on the grounds that they had intentionally damaged the Project ("Criminal Case").

The engineering committee came to a conclusion that the reason of the collapse related to a defective design. The engineering committee decided that the Contractor, Project Manager, First Engineer, Second Engineer, and a governmental authority are responsible, with a different percentage of liability, for the collapse incident.

The total damages affected the Employer due to the collapse incident was around AED 192 million, which

included the value of the alternative and permanent accommodation, re-building the collapsed area, ratification of the defective design related to the remaining parts of the Project to prevent any potential collapse in the future, and etc. it is important to note that the total contract's value of the supervisor engineer, was around AED 24 million.

Al Tamimi & Co represented the Employer and accordingly filed a civil claim against the Contractor, First Engineer, and Second Engineer. The total claim amount was around AED 192 million, in addition to a compensation for loss of reputation, Court's fees, and an interest rate as of the date of obtaining a final judgment until a full payment is made.

Court's Judgment

Court of First Instance

In summary, the First Engineer requested the Court of First Instance to reject the case, as the Second Engineer was the one who took over the construction supervision, and thus the latter should be responsible. Alternatively, the First Engineer requested the Court to limit its liability for the cost of re-building the collapsed part of the Project.

The Second Engineer requested the Court to reject the case, as the reason of the collapse relates to the defective design produced by the First Engineer.

The Contractor requested the Court to reject the case, on the basis that he notified the First and Second Engineer about the defective design issue during the construction; however, both Engineers instructed the Contractor to follow the related drawings.

In response, Al Tamimi highlighted to the Court that the UAE CTC grants the Employer the legal right to cover its damages and loss of profit from the contractor and the supervising engineer, jointly and/or severally, as long as the collapse occurred within ten years of the date of handing over the project. We further pointed out that neither the contractor nor the supervisor engineer was entitled to defend or limit their strict liability, unless the reason of the collapse was due to external reason, which they failed to prove.

The Court of First Instance appointed an expert committee comprising an engineer and an accountant to calculate the damages and the loss of profit affected the Employer due to the collapse of the parking area. The Court-appointed Experts issued their report, in which they reported to the Court that the value of the damages and loss of profit affected the Employer was (approximately) AED 186 million.. The Court appointed Experts highlighted that the collapse incident is resulted from three reasons. The final liability percentage is based on the following analysis regarding the reasons of the collapse:

The Design: This reason represents 30%

The First Engineer's liability is 65%

The Second Engineer's liability is 20%

The Contractor's liability is 10%

The Project Manager's liability is 1.5%

Overloads (After the First Engineer left the Project): This reason represents 50%

The First Engineer's liability is 0%

The Second Engineer's liability is 44%

The Contractor's liability is 44%

The Project Manager's liability is 12%

The Construction Joints: This reason represents 20%

The First Engineer's liability is 0%

The Second Engineer's liability is 42.5%

The Contractor's liability is 42.5%

The Project Manager's liability is 15%

Based on the abovementioned analysis, the Court appointed Experts opined that all the defendants were liable for the collapse incident to varying degrees: the Contractor's total percentage of liability was 33.5%, the First Engineer's total percentage of liability was 19.5%, the Second Engineer's total percentage of liability was 36.5%, and the Project Manager's total percentage of liability was 10.5%

Al Tamimi asserted to the Court that no party should have the right to limit its liability, as the DL under UAE CTC imposes a strict liability on the contractors and supervisors engineers to compensate the employers in case a collapse occurred during the ten years as of the date of handing over the project.

The Court of First Instance issued its judgment, in which it awarded the Employer the compensation amount set out in the Court-appointed Experts' report, after deducting the Project Manager's total percentage of liability (10.5%), as the latter was not a party of the case. The Court further rejected the opponents' defence related to the limitation of liability based on the percentages set forth in the Experts' report, and instead, the Court decided to oblige the Contractor, the First and Second Engineer, jointly and/or severally, to pay the Employer the compensation of (approximately) AED 165 million, in addition to an amount of one million dirhams as a compensation for loss of reputation, Court's fees, and an interest at the rate of 5% as of the date on which the judgment would be final and binding.

Appeal Court

Al Tamimi filed an appeal, and requested from the Court to amend the judgment issued by the Court of First Instance in relation to the deduction of the Project Manager's total percentage of liability. Al Tamimi asserted to the Court that it was the Employer's right to opt as against whom to claim in the case of a strict liability, i.e., the Employer was entitled to claim the full amount of compensation from the Contractor, and/or the First and/or Second Engineer, jointly or severally. Therefore, Al Tamimi requested the Court not to deduct the percentage of liability related to the Project Manager, and accordingly to award the Employer the full claimed compensation amount.

The Contractor, the First and Second Engineer, filed an appeals as well. The Contractor and the Second Engineer requested the Court to reject the case, and highlighted that the party who should be responsible for the collapse was the First Engineer who provided the defective design, and supervised part of the collapsed area. The First Engineer argued that its design was not defective, and claimed that the Second Engineer did not stick to the design requirements related to the loads, and alternatively, the First Engineer requested the Court to limit its liability to the cost of re-building the collapsed part of the Project. The opponents further argued that the Employer's claim did include indirect losses that should not be accepted by the Court, as the compensation should be for the direct damages only.

We reiterated to the Court that the Employer's claim is related to direct damages that affected the Employer, which were a direct result of the collapse.

The Appeal Court decided to uphold the judgment issued by the Court of First Instance, and hence rejected all appeals.

Cassation Court

The parties escalated the dispute to the Abu Dhabi Cassation Court. Al Tamimi filed a cassation appeal, in which we asserted that the Court of First Instance, and the Appeal Court should not deduct the Project Manager's percentage of liability, as the Employer's claim was based on the DL liability which provides a strict joint liability on the contractor and the supervisor engineer, and consequently the Employer was entitled to claim the full due amount of compensation from both of them, jointly or severally, and neither the Contractor nor the Engineer had the legal right to limit its liability by excluding the liability of any other third party, including the Project Manager.

The Contractor, and First Engineer and the Second Engineer all filed cassation appeals, reiterating their defence in line with the defence raised before the Court of First Instance and Appeal Court.

The Cassation Court issued its judgment number (876/2016 + 43/2017 + 71/2017 + 72/2017 + 80/2017 + 83/2017), in which the Cassation Court accepted Al Tamimi's arguments that the Employer was entitled to

claim the full amount of compensation from the contractor and/or the engineer, jointly or severally, as long as their liability was a strict liability, and as long as the Appeal Court and the Court of First Instance applied its powers laid down in article (291) of the UAE CTC which states that "If a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability". Consequently, the Cassation Court stipulated that the Court of First Instance and the Appeal Court should not have deducted the Project Manager's percentage of liability. The Cassation Court further rejected the arguments of the Contractor, First Engineer, and the Second Engineer in relation to the scope of their liability for the collapse, as the DL under UAE law imposes a strict joint liability on the contractor and the engineer, if a collapse occurred within ten years of the date of handing over the project. However, the Cassation Court decided to refer the case to the Appeal Court in order to calculate the total due amount of compensation without deducting the Project Manager's percentage, and to ensure that the Employer's compensation claim did not include any indirect damages.

The Appeal Court issued its second judgment, and decided to accept Al Tamimi's appeal, and therefore not to deduct the Project Manager's percentage of liability, and consequently amended the Employer's due compensation amount to be AED 185 million (approximately). The Appeal Court further confirmed that the Employer's claim was related to direct damages resulted from the collapse incident. The Appeal Court rejected the appeal filed by the opponents.

The First Engineer, and the Second Engineer filed a cassation appeal, and objected to the second judgment issued by the Appeal Court, and they repeated their previous defence. The Cassation Court issued its second judgment number (625/2017 + 767/2017), in which the Cassation Court rejected the arguments raised by the First and Second Engineer regarding the limitation of liability, and the alleged indirect damages. The Cassation Court decided to uphold the second judgment issued by the Appeal Court, according to which the Contractor, the First Engineer, and the Second Engineer are, jointly and severally, liable to pay the Employer a total amount of AED 195,705,408. This amount represents the total awarded compensation amount of AED 185,466,630.00, a compensation for loss of reputation an amount of AED 1,000,000.00, Court fees an amount of AED 2,800,362.00, interest rate at 5% as of the date of Appeal Judgment, and some other charges.

Conclusion

Although the matter of the engineer's liability may or may not exceed its contract value, is not expressly addressed in the present case, however, it is worth noting that the approximate contract value for the supervision engineer was around AED 24 million, and the judgment obliged the engineer to pay more than AED 195 million, which means that the contract value for the supervisors engineers is not a point that may limit their civil liability under the DL.

The supervisor engineer, and the contractor cannot limit the scope of their liability in relation to DL. The employer has the legal right to claim all due compensation from either the supervisor engineer, or the contractor, or both of them to be jointly and severally liable to pay the full claimed compensation amount. The UAE law only allows the direct damages to be compensated (and not the indirect damages).

For further information please contact Mohammad Al Marzouqi & Ahmad Ghoneim (m.almarzouqi@tamimi.com) & (a.ghoneim@tamimi.com).