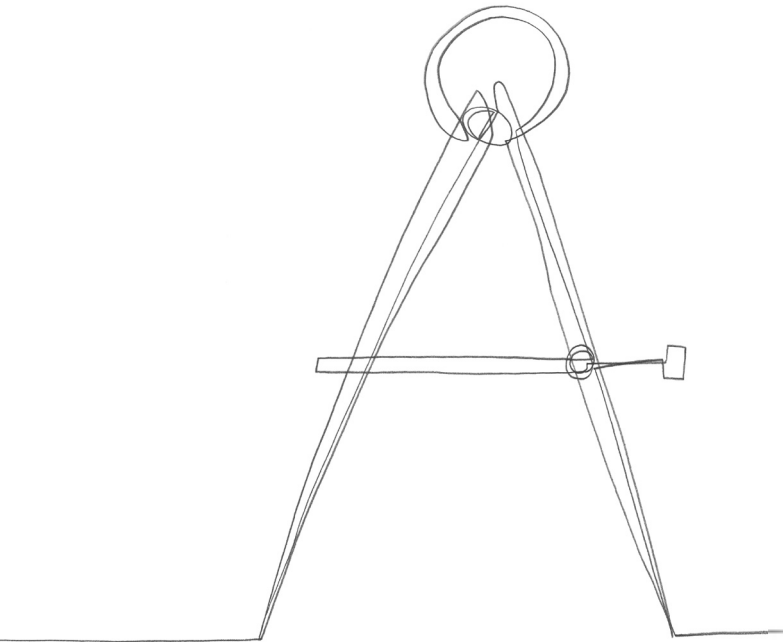


Beazley Insight

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A Potential Time Bomb
for U.S. Design
Professionals?



Decennial Liability: A Potential Time Bomb for U.S. Design Professionals?

by Colleen Palmer

In the United States, liability for architects and engineers arises out of a failure to perform in accordance with generally accepted standards of professional skill and care. Even in the case of a catastrophic failure, liability will only attach to the design professional if the firm can be shown to have breached applicable standards of care, i.e. to have acted negligently. However, the requirement to prove the design professional was negligent does not apply in all countries. Decennial liability is a prime example.

Decennial liability, or *responsabilité décennale*, is a form of strict construction liability arising from the French Civil Code under which no proof of negligence is required. It has been adopted worldwide by numerous civil codes, including jurisdictions in the Middle East such as the United Arab Emirates, Saudi Arabia, Kuwait, Iraq, Egypt, Jordan and Qatar. The specific wording of the applicable codes varies, but all of these countries mandate strict liability for building defects.

As its name suggests, decennial liability lasts for ten years. In France, Article 1792 of the Civil Code provides that a builder is liable towards the building owner or purchaser for damages, even resulting from a defect of the ground, which imperils the strength of the building or which, affecting it in one of its constituent parts or one of its elements of equipment, renders the building unsuitable for its purposes. The ten year duration runs from the approval of the works by the building owner (Art. 2270). By definition, “builder of the work” includes any architect, contractor, technician, or other person bound to the building owner by a contract of hire of work (Art. 1792-1).

The parties cannot contract around decennial liability: contract provisions attempting to exclude or limit decennial obligations are deemed void and unenforceable (Art. 1792-5). A builder can only escape liability by

proving that the damages were caused by an extraneous event, likely to be a force majeure event or major natural disaster (Art. 1792).

In the United Arab Emirates (UAE), decennial liability is codified by Articles 880 – 883 of Federal Law No. 5: 1985 (The Civil Code). The UAE federation comprises seven emirates, including Abu Dhabi and Dubai, where architects are increasingly being engaged to provide design services for multi-billion dollar projects.

In the UAE, if the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect to be carried out by the contractor, the Civil Code imposes strict joint decennial liability on the architect and contractor to the client from the date of delivery of the work. During the ten year liability period (or longer period if specified by contract), the architect and contractor must compensate the client for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect that threatens the stability or safety of the building. This decennial liability applies unless the contracting parties intend that such installations should remain in place for less than ten years (Article 880(1)).

Significantly, the obligation to compensate the client exists even if the defect or collapse arises out of a defect in the land itself or if the client consented to the construction of the defective buildings or installations (Article 880(2)). On most U.S. construction projects, the owner hires the geotechnical engineer directly and maintains responsibility for unforeseen or differing site conditions. Thus, the design professional does not have responsibility for ground and subsurface conditions. Under decennial liability in numerous countries, including France and the UAE, a design professional's responsibility dramatically increases because it effectively assumes the risk for "defective" or "faulty" ground conditions.

The Civil Code requires the client to bring a claim for compensation within three years of the collapse of the building or the discovery of the defect (Article 883). However, the "discovery of the defect" may be a subjective determination akin to the discovery rule in the U.S., making the timeframe in which the client must bring a claim ambiguous.

If the architect's scope is restricted to preparing plans and excludes supervision of the execution, the architect will only be liable for defects in the plans (Article 881). This exception applies if the design is correct and the defect is due to the construction, but architects are cautioned that supervision may be broadly interpreted to include such tasks as approving a contractor's shop drawings.

As with the French Civil Code, parties cannot contract around UAE decennial liability, and Articles 880-883 apply to all design and construction contracts in the UAE. Since there is no requirement for the parties to mention decennial liability obligations in the contract, design professionals should research the jurisdictions in which they practice to understand their potential liability.

Decennial liability raises significant questions regarding professional liability insurance coverage. In some countries, including France and Egypt, specific decennial insurance is mandatory. Decennial liability goes well beyond the scope of traditional professional liability insurance and negligence-based professional liability coverage is unlikely to suffice.

Construction markets are booming in many parts of the world that have adopted decennial liability. Design professionals that venture into these markets without carefully sounding out their liabilities can incur an expensive surprise for up to ten years after their work is completed.

Beazley Group has been underwriting architects and engineers insurance to cover the domestic and international liabilities of U.S. firms for more than 20 years. Contact your insurance broker to find out whether a country in which you are planning to do business imposes decennial liability requirements. This article is prepared and edited by Beazley Group, and is published with the understanding that neither it nor the editors or authors is responsible for inaccurate information. The information set forth in this article should not be construed nor relied upon as legal advice and is not intended as a substitute for consultation with counsel.



Colleen Palmer
A&E Risk Manager
Boston, MA
colleen.palmer@beazley.com

beazley
