

Decennial liability in Qatar: A contractor's Adversary

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Concept Origin and Rationale

The concept of responsabilité décennale originated in the French Civil Code and evolved from a desire to protect building owners, who could not ordinarily be expected to possess the technical expertise required to identify defects in design or construction at the point of delivery of a project, particularly where such defects are latent.

Benefits to Owners, Risks for Contractors

As we will see below, decennial liability is a form of strict liability and, accordingly, offers significantly more security to real estate investors than collateral warranties, which will only be triggered by breach or negligence on the part of the contractor. Furthermore, the breadth of the pool of potential defendants lessens the risk that an owner or investor would be left out of pocket in the event that defects are discovered after one of the parties involved in the construction is adjudged insolvent. Many civil law jurisdictions worldwide – including most Middle Eastern countries – have codified decennial liability in their civil laws; the position in Qatar is set out at Articles 711 to 715 of the Civil Code (Law No. 22 of 2004).

However, despite the topicality of this issue, and notwithstanding the high levels of commercial sophistication and industry experience they likely possess, foreign contractors entering the Qatari market are often ignorant of the potentially devastating implications of decennial liability. Accustomed to standard forms of contract, such as FIDIC or JCT, and to being obliged to address issues arising during the defects liability period following practical completion, contractors may not realise that their existing risk management structures are often insufficient to cover their potential exposure under decennial liability, nor has the significant cost of insuring against that risk been priced into their tender for the works in Qatar. Where the contract and the structure it produces are of high value, the application of decennial liability could pose a catastrophic threat to the liquidity of even the most prominent of international contractors.

Fast Facts

• Projects Covered

Decennial liability applies to all buildings and fixed installations constructed in Qatar. Interestingly however, while contracts having a Qatari State entity as employer will in most instances be subject to local law (including decennial liability), the position is less clear where the parties have chosen to have their contract governed by the laws of another jurisdiction – which law may not recognise the concept of decennial liability, or may not consider it to be of mandatory application.

• Parties Responsible

Depending on the type of defect and the extent of their respective involvements in the particular project in question, decennial liability can apply to main contractors, design consultants (architects) and those acting in a supervisory capacity (such as engineers and project managers). As liability is imposed on a joint and

several basis, the building owner can proceed against any or all of the parties involved for the full amount of the claim. Accordingly, if one such party becomes insolvent, the other(s) will shoulder the burden of making good all damage incurred by the owner as a result of the defect(s).

However, a design consultant having no involvement in the execution or supervision of the works will be liable only for defects attributable to his design. Architects who undertake to approve a contractor's shop drawings should be mindful of the risk that such activities may represent involvement in contract administration. Similarly, contractors will be excused from liability for pure design defects, but only where those defects would not have been apparent to a competent contractor exercising due diligence in the performance of his obligations.

However, contractors or project consultants may not seek to avoid the imposition of decennial liability on the basis that fault in relation to the relevant defect(s) lies with a sub-contractor or sub-consultant.

- Owners' Options

Building owners with a claim for decennial liability may demand specific performance by the contractor or designer of his obligations to repair or rebuild the structure, or the damaged part thereof. Alternatively, with the permission of the Court (required in all but urgent cases), the owner could opt to perform the necessary remedial works himself (or to engage a third party to do so), and could then recover from the original contractor or designer the monies expended. As such, actual loss and any loss of profit incurred will always be recoverable, provided same is a direct and foreseeable consequence of the defect(s) at the time of entering into the contract – for example, personal injuries suffered by a building's occupants as a result of its collapse, or a retail outlet's loss of profit due to temporary closure.

- Burden of Proof

Liability is strict, meaning that the occurrence of damage or discovery of a defect generates an automatic presumption of liability, and there is no onus on the owner/employer to prove fault or negligence on the part of the contractor.

- Limitation or Waiver of Liability

As decennial liability is a mandatory provision of Qatari law, any contractual attempt to limit its scope or exclude or waive its application will be void and unenforceable as a matter of public policy. However, in accordance with general principles of Qatari law, once the collapse occurs or the defect is discovered – and the right to claim for the resulting damage has crystallised – the building owner can then validly waive that right.

- Liability and Prescription Periods

The liability period commences at project handover, and runs for the lesser of ten years or the intended life cycle of the building or structure. If various individual elements of a project are capable of being operated independent of one another – such as may be the case with regard to a power plant consisting of a number of generators, constructed on a phased basis – decennial liability will attach to each part separately; if they are linked, the ten year period will begin to run from the delivery of the final phase.

The prescription period for filing claims on the basis of decennial liability in Qatar is three years from the date of occurrence of the collapse or actual discovery of the defect. Thus, in theory, a contractor or consultant could find themselves facing a claim under decennial liability some thirteen years after practical completion of the works.

If the contractor carries out repairs to any defect discovered during that initial ten year period, his liability in respect of that element of the structure which required repair or reinforcement will remain in force for a further ten years from completion of those remedial works.

- Other Salient Points

Decennial liability attaches notwithstanding that the collapse or defect resulted from geotechnical deficiencies, such as poor soil quality or subsidence. Contractors are therefore advised to carry out thorough site investigations prior to commencing work.

The fact that the building's owner approved or supervised the design or method of construction, or accepted delivery of the building (even with knowledge of the existence of defects), will not protect the contractor, unless he can establish that the owner has technical knowledge or industry experience to equal or better his own. Thus, if faced with persistent instructions from an employer to perform the work in a manner which the contractor knows or believes to be ill-advised, the latter should refrain from acquiescing to the former's demands, as the employer's consent will not necessarily protect the contractor from the imposition of decennial liability later on.

Of course, no liability will attach where the damage to the building or structure was caused by an extraneous event, such as an event of force majeure.

Managing the Risk through Insurance

In France and Egypt, on whose Civil Codes Qatar's own law is modelled, specific insurance for decennial liability is mandatory and failure to carry appropriate cover is punishable by law; this is not the case in Qatar, where insurance requirements are primarily governed by the contract. However, in light of the risks outlined above, contractors and consultants considering entering the Qatari market should be acutely aware of any shortcomings in the scope of the protection offered by their existing insurance policy.

Of particular concern to architects and engineers is that fact that traditional Professional Indemnity insurance policies are usually invoked where there is negligence on the part of the insured – rather than having a broader 'legal or civil liability' trigger – and thus do not cover decennial liability.

For their part, contractors looking to add decennial liability to the laundry list of risks insured under their standard Contractors' All Risks policy may be met with a hefty upwards adjustment of their premium, in addition to higher deductibles, extended limitation and exclusion clauses and stricter reporting requirements. Project-specific cover may be available, but often at a prohibitive cost and on the condition that the insurer becomes intimately involved with activities on site during the currency of the works. There have been some developments in recent years in relation to the availability of latent defects insurance; contractors availing of such cover should ensure that it is properly maintained for the full period of liability.

Conclusion

Of course, harmonisation of the approaches of different jurisdictions to liability for latent defects would provide greater certainty for construction industry participants, may reduce the need for extensive collateral warranties, and would drive down the cost of insuring against such liability, whilst weeding out serial offenders from the market. However, unless and until such time as a consistent approach is adopted internationally, contractors and consultants of all disciplines eyeing the opportunities presented by Qatar's booming construction market would be ill-advised to underestimate the potentially far-reaching implications of decennial liability.

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