

Decennial liability in the UAE - a commentary

Justin Ede - Senior Counsel - Arbitration / Mediation / Construction & Infrastructure
- Dubai International Financial Centre

December 2014 – January 2015

Articles 880 – 883 of the UAE Civil Code contain the key provisions.

Article 880 (1) provides that a contractor and a supervising architect (which where the context permits, can mean the supervising engineer) are jointly liable to compensate the employer for a period of ten years from the date of delivery of the work, if the building suffers (a) total, or (b) partial collapse, or (c) there is a defect that threatens the stability and safety of the building. Parties may not agree to a shorter period as this is a mandatory obligation.

Article 880 (2) provides that the remedy to the employer is compensation, which obligation arises despite the defect or collapse arising out of a defect in the land, or that the employer consented to the erection of buildings or installations that have proved to be defective.

Article 880(3) provides that the liability commences on delivery of the work, usually taken to be the issue of the Taking Over Certificate. The starting date can however be contentious and evidence should be sought as to the date of delivery or deemed delivery.

Article 881 makes a distinction between where the architect both produces the design and supervises the works (in which case he shall be liable for both structural defects and design defects) and where he produces the design, without supervising the works (in which case he shall be liable for design defects only).

Article 882 makes it clear that it is not possible for a supervising architect or contractor to contract out of decennial liability or to limit his liability. This is a strict liability matter and no proof of negligence is needed. They can instead only deny liability on the basis of force majeure, or they can seek to show that the failure is due to an external cause, perhaps due to the actions of the employer or a third party in relation to the building, after handover.

Finally, Article 883 provides that no claim for such liability shall be heard after the expiration of three years from the occurrence of the collapse or the discovery of the defect. This is counter to the general limitation period in the UAE of 15 years.

This no fault concept of decennial liability for supervising architects and contractors can be contrasted with the position in many common law jurisdictions where liability will in general only apply to architects and contractors if they have failed to perform their professional obligations in accordance with standards of professional skill and care.

What additional guidance about decennial liability has been provided by the courts in recent years?

In Dubai Court of Cassation 150/2007, it was underlined that “the liability to pay the said indemnity will remain notwithstanding that the defect or collapse arises out of a fault in the ground itself, or if the employer has consented to the erection of faulty installations. The effect of that is that is that the

contractor or the engineer will be liable to pay an indemnity by way of contractual liability towards the employer and it is not open to any third party who has no contractual relationship with either of them to rely on such liability." Thus, for example, adjoining building owners who suffer loss as a consequence of an event that gives rise to decennial liability will be left to pursue a tort claim direct against the owner and most likely also against the contractor and architect/engineer.

In a decision of the Abu Dhabi Court of Cassation 293/Judicial Year 3, the court referred to Articles 880 and 882 of the Civil code and then proceeded to make it clear that the risk of liability only comes into effect after delivery. If a fault develops during construction, the decennial liability provisions will be of no effect. Further, even with a defect that arises after delivery, "liability does not extend to every defect that may be discovered in the building, unless such defect threaten the soundness and stability of the building."

The decision of the Abu Dhabi Court of Cassation 721/Judicial Year 3 casts some light on the compensation that flows from such liability: "The liability of the contractor and the engineer who has supervised the construction of the building is restricted to a total or partial collapse in the building or to any defects that come to light that threaten the solidity and stability of the building. Under the provisions of articles 282, 291 and 293 of the Civil Code, any harm done to a third party requires that the doer make good that harm. Harm is in all cases to be assessed in accordance with the damage sustained by the aggrieved party, together with loss of earnings, on condition that that is a result of the harmful act. Compensation may also be awarded for loss of opportunity of the building owner to exploit the land and have the benefit of it by reason of non-performance by the contractor without justification, of his obligation arising out of the muqawala contract made between them or by reason of his defective performance whereby it becomes impossible to make use of the building. This is one of the elements of damage for which compensation must be awarded in favour of the building owner."

It should finally be pointed out that decennial liability does not apply to subcontractors. The main contractor takes responsibility for the actions of its subcontractors, so the contractor would be well advised to require an indemnity from the subcontractors in respect of any liability that it incurs. Clause 5.2 of the 1999 FIDIC standard form permits a contractor to refuse to employ a nominated subcontractor if the latter does not agree to indemnify the Contractor "against and from all obligations and liabilities arising under or in connection with the Contract and from the consequences of any failure by the Subcontractor to perform these obligations or to fulfil these liabilities.