



TAKING COVER – MANDATORY DECENNIAL LIABILITY INSURANCE IN THE UAE

According to recent news reports, the United Arab Emirates (UAE) Insurance Authority (the IA) is planning to introduce legislation to require contractors, engineers and architects to obtain compulsory decennial liability insurance.

The move comes on the back of recent initiatives by the IA and the Abu Dhabi Judicial Academy to raise awareness of the financial and insurance implications of decennial liability in the UAE amongst members of the Abu Dhabi judiciary.

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What is decennial liability?

Decennial liability is, as the name suggests, a 10-year liability imposed upon contractors, engineers and architects as a matter of UAE law. It relates to any building intended to stand for 10 years or more. Under the UAE Civil Code, designers (such as engineers and architects) and contractors are jointly liable to pay compensation for:

- any total or partial collapse of a building; and/or
- any defect affecting the stability or safety of a structure.

This joint liability runs from the delivery of the works and, importantly, parties are prohibited from contracting out of decennial liability under the UAE Civil Code. (However, under the UAE Civil Code, if the architect or engineer is not responsible for supervising the contractor's work, his or her liability will be limited to any defects in the design of the building or structure.)

Decennial liability is an important and powerful protection for project employers, for whom the collapse or failure of a building can produce potentially catastrophic consequences. The costs of rectifying collapses or structural defects can be significant, as can the lost opportunity costs while the building is unavailable for use. Decennial liability is a means to protect owners and end users from being left bearing the costs of repair and rectification themselves.

Why is this important?

Every project brings with it certain risks. Usually, contractors, architects and engineers manage their risk on building and construction projects through insurance. For example, an architect is likely to have a professional indemnity policy to cover negligence in its design, while a contractor may take out “All Risks” insurance to cover risks such as property damage or third-party injuries.

Typically, however, decennial liability falls outside of these traditional types of insurances and is potentially a significant risk for architects and contractors alike:

- First, the liability is “strict” – that is, it exists even in the absence of negligence or fault. In fact, and as the Civil Code makes clear, parties can be liable where the collapse or defect arises out of a defect in the land and even where the Employer has accepted the structure as built. This means that parties may be liable to pay compensation even where they have not done anything wrong (though there may be certain defences in the case of force majeure or contributory actions by third parties). It also means, for example, that a professional indemnity policy may not protect an architect against a decennial liability claim where he or she has not been negligent, even though he or she may still be liable by law to pay compensation to the Employer. Similarly, a professional

indemnity policy is unlikely to provide cover to an architect / engineer where the contractor was at fault, despite the architect / engineer's decennial liability being joint with the contractor (if they held any supervisory role). On the Contractor's side, Contractors' All Risks insurance does not typically cover defects in design or workmanship, such as may threaten the safety or stability of a building.

- Second, the compensation payable to the Employer can be extremely high. For example, it may include the cost of demolishing existing premises and rebuilding the structure, but also compensation for loss of opportunity. For larger or technically complex projects, these costs may be far beyond the financial means of the contractor or architect and are also likely to exceed any limits of cover under traditional insurance policies.

This leaves contractors, architects and engineers in a difficult position – and potentially substantially exposed – when it comes to managing the risk of a decennial liability. That is not to say that cover is unavailable – decennial liability insurance is common in several jurisdictions globally – but, as a consequence of the potentially high levels of compensation and liability in the absence of fault, decennial liability policies are typically far more expensive than traditional insurance policies.

As a result, decennial liability insurance has been comparatively rare in the UAE and the introduction of compulsory cover is a significant development in the construction market.

What will this mean for your projects?

The introduction of mandatory insurance has the potential for wide-ranging ramifications in the construction industry. The obvious and immediate consequences are likely to be increased administration and cost:

- Project costs will increase as the premiums are factored into contract prices at every level of the project supply chain and, ultimately, will be borne by project employers or end users.
- We expect these costs to be higher in the period immediately following the introduction of mandatory insurance, as brokers and insurers seek to manage their own risks and price their policies appropriately. Although there is currently no indication as to the approach the IA may adopt, jurisdictions such as France penalise insurers if the premium is set too high compared to the risk insured.
- We also expect these costs to be higher the later in the project lifecycle the insurance is procured. This is because, where the insurers have not been involved in the early stages of due diligence and site investigation, a project may be seen as higher risk and premiums priced accordingly.
- From an operational perspective, insurers may seek greater involvement in projects when providing decennial liability cover, adding an additional layer of administration and time. Due diligence by insurers may increase and insurers may demand more involvement in the design and construction process, such as actively monitoring performance and output.
- Project timescales are likely to increase as architects and designers seek exhaustively

to satisfy themselves (or their insurers) that there are no unidentified problems, such as latent land defects, which may expose them to liability later on.

- Again, although there are not yet any indications as to how the IA will approach non-compliance, we would expect any failure to obtain the required cover to lead to sanctions, which may include fines, withdrawal of permits or, if other jurisdictions' practices are followed, imposition of prison sentences.

More broadly, however, mandatory insurance has the potential to impact construction practices in the UAE for the better.

- First, as noted above, it is hoped that the potential liability will force better and more thorough due diligence at the outset of any project, as well as better and more proactive working practices and standards during construction.
- Second, it is hoped that the insurance market will help indirectly to regulate the UAE construction industry and promote best practice, with more reliable contractors and architects being rewarded with lower premiums and the opportunity to be more competitive on pricing.

What should you be doing?

The IA has not yet announced when it will introduce this legislation, although it is anticipated to be in the final quarter of 2018 or early in 2019. In the meantime, there are several steps that parties should consider:

- Contractors, subcontractors, architects and engineers should contact their insurance brokers to determine whether appropriate products are available and, if so, their likely cost. Further, as decennial liability policies do not generally cover professional negligence (other than that affecting the safety or stability of the building), professionals should ensure they have adequate cover for both types of risk.
- Costs of obtaining decennial liability insurance should not be assumed, nor should traditional

policy premiums be used as a benchmark. Decennial liability premiums are likely to be more expensive and need to be factored into your contract prices so these costs can be passed on to the end user.

- Standard sub contracts and sub consultancies should also be updated to impose obligations to obtain decennial liability insurance or indemnities down the contractual chain where necessary.
- Employers should likewise begin updating their standard contracts to impose obligations to obtain decennial liability insurance, and present appropriate certificates of insurance, where necessary.
- More broadly, contractors and architects should be reviewing their existing due diligence policies (or creating one) and quality controls to ensure these are robust enough to avoid liability where possible.
- Longer-term, policy holders should seek to work with their insurers to see how premiums for decennial liability insurance can be reduced – for example, through improving working practices or using peer reviews.

If you have any queries regarding this update, please contact the authors for more information.



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