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Decennial Liability: Is the Risk Worth It?

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With a slowdown in domestic design and construction, an increasing number of architects and engineers are looking overseas for potential projects. Many are finding that operating in a foreign country presents both exciting opportunities and daunting challenges. In addition to facing language barriers, unfamiliar customs and extensive travel, A/E firms are also discovering that foreign countries can have dramatically different laws and regulations applied to their professional work. One of the most disconcerting issues when it comes to overseas risk is so-called "decennial liability."

What Is Decennial Liability?

Simply put, decennial liability is akin to strict liability that is applied to construction projects in certain foreign countries. As the name implies, this liability typically lasts for at least ten years (in some cases up to 13 years) after project completion and approval by or delivery to the owner. Decennial liability applies to any party considered a "builder of the work," which includes contractors, architects, engineers and other professionals who contract with the building owner to work on the project.

Essentially, any builder of the work is strictly liable to the project owner for defects that can threaten the stability of a structure and safety of its inhabitants, leading to partial or complete collapse. This defect can be in the design or construction of the building itself or even in the soil upon which the building sits. The financial liability extends to the amount necessary to compensate the building owner to correct the defect and/or repair the collapse.

The differences between professional liability and decennial liability are dramatic. First, with professional liability, a design firm is liable only for its own negligence, errors and omissions, or the negligence, errors or omissions of a subconsultant hired by the design firm. However, because decennial liability is a strict liability, no negligence, error or omission need be shown. A design professional can be held liable even if the building design proves to be flawless.

Also, with professional liability, a design firm is typically liable proportionately for damages caused by its negligent actions. With decennial liability, each builder of the work jointly shares its liability with all others. In other words, you can be held liable for a structural flaw even if it can be proved that the problem was caused solely by the contractor.

Where Does It Apply?

The roots of decennial liability lie in French Civil Code. Today, however, it is applied well beyond the borders of France, including in some of the most active construction markets around the globe.

Decennial liability is imposed elsewhere in Europe and Asia and is particularly prevalent in the Middle East. Countries such as Saudi Arabia, Egypt, Kuwait, Iraq, Jordan, Bahrain, Oman and Qatar impose this form of strict liability. It is also used in the United Arab Emirates (UAE), which includes Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Quwain, Ras al-Khaimah and Fujairah. Other locales worldwide that are civil code jurisdictions may also impose decennial liability.

What Are the Ground Rules?

Certainly, it would be impossible to cover all of the details of decennial liability in this short article. Plus, each country that uses this code of law can have its own unique rules and applications. Regardless, here are a few factors to be aware of:

- You can't eliminate decennial liability through contracts with either the owner or your subconsultants. Nor does an owner's verbal or written approval of the project eliminate liability. Regardless of what your agreement with the owner says, you are still strictly liable for structural and soil defects that could threaten stability and safety of a building.
- You are not liable if a building collapse is caused by a natural disaster such as a major earthquake. While this *force majeure* (also known as "act of god") liability exclusion provides some relief, it is open to interpretation. Plus, in some countries, the burden of proof is placed on the builder of the work to establish that the building collapse was caused by a force majeure.
- The building owner has up to three years after the discovery of the defect to file a claim. Thus, if the discovery is made at the end of the 10-year liability period, a design firm can be sued up to 13 years after project completion.
- If an architect's scope of services is limited to drafting plans only and does not include construction observation or administration services then liability may be limited to errors and omissions in the plans themselves. This is another area where the extent of liability can be a gray area depending upon the interpretation of an architect's consulting versus supervisory role.
- If a structure has a life cycle of fewer than 10 years, then the decennial liability applies to the duration of the life cycle.
- In many countries, there is little precedent regarding decennial liability claims. Fortunately, claims have been relatively rare. But that means there is little certainty as to how any case might be resolved.

What Are the Insurance Issues?

Decennial liability insurance, a form of products/completed operations insurance, is not currently available directly from domestic insurance carriers in the U.S. Coverage to limit the liability must typically be provided through a “fronting” arrangement between an international insurance company that operates in the U.S. and an in-country insurance company. Most policies are project specific.

In both France and Egypt, decennial liability insurance is required and, while often expensive, can usually be obtained. Such is not necessarily the case in much of the Middle East. There, decennial liability insurance may or may not be mandatory and directly obtaining affordable coverage is not always easy to do.

In some countries, decennial liability insurance is readily available only to the project owner and/or contractor. Frequently, the policy must be managed through a third-party consultant who must review the design and construction work and approve the completed project in order for coverage to be put in force.

While professional liability insurance is highly recommended (and sometimes mandatory) for architects and engineers practicing in these foreign countries, it does not adequately cover decennial liability. First, the limits of professional liability insurance are rarely adequate to make the project owner whole in the event of a building collapse. Second, and more important, professional liability coverage comes into effect only when it has been shown that the design firm was negligent in performing its professional services. Decennial liability is not based on negligence and therefore all or portions of a claim may not be covered. (Note: Just recently, some professional liability insurers began offering endorsements that may provide additional but not total coverage for decennial liability claims.)

Recommendations

There is only one foolproof way to avoid decennial liability: don't perform work in countries that impose it. However, that doesn't mean that design firms can't take on projects in these countries. It simply means that architects and engineers must be extremely diligent and fully aware of the risks and rewards such work entails. Here are a few suggestions:

Learn about the foreign country. Educate yourself on the country in question and the rules and regulations under which you must operate. In particular, examine the country's specific decennial liability laws to determine your exposures. Remember, regardless of what your contract says, you probably can't limit the extent of your liability in the event of a structural failure.

Valuable sources of information regarding a foreign country's laws and economic climate include the U.S. Department of Commerce, the U.S. Department of the Treasury, the U.S. Department of State, the National Trade Data Bank, the Export-Import Bank of the United States, the Overseas Private Investment Corporation (OPIC), the Federation Internationale des Ingenieurs-Conseils (FIDIC), and both the ACEC's and AIA's International Committees.

Choose your client and project carefully. Check the client's history regarding litigation, troubled projects and relationships with foreign designers. Choose project types with which you have ample expertise and a long history of claims-free experience. Avoid fast-track projects or other unfamiliar project delivery methods. Get references from the contractor and schedule a lengthy meeting to judge trust and compatibility. Make certain the land underneath and surrounding the project site has been thoroughly examined and shows no signs or history of instability.

Draft a solid contract. If your attorney is not familiar with the laws, rules and regulations in the foreign country, you will likely need outside help from in-country attorneys and accountants. Make sure that your contract with your client provides you with appropriate protection and will be enforceable overseas. You will also need to make sure you have all the appropriate permits and licenses to legally conduct business.

Team up with a foreign partner. It is often recommended, and in some countries mandatory, to form a joint venture with a consulting firm in the foreign country. Many design firms entering into their first foreign project find it prudent to provide schematic design work only and team with an in-country consulting firm who provides the working drawings and construction phase services. The in-country consultant should also sign and seal all documents. This can limit your decennial liability until you are confident and experienced enough to offer a fuller scope of design services.

Weigh your insurance options. As an A/E insurance specialist, we can search for an insurer who has worldwide resources, offers worldwide coverage, and has experience with the rules and regulations within the country in question. Be aware, however, that we may not be able to directly provide all of your requested insurance coverages due to unavailability and to licensing restrictions abroad. We can help you determine whether affordable decennial liability insurance is available through a fronting arrangement with an in-country insurer. If not, perhaps you can negotiate an agreement in which the project owner or contractor secures the necessary coverage as part of the cost of the project.

We can also help you understand your other overseas insurance needs. We can help you find an appropriate professional liability carrier who has the right or even the duty to provide defense counsel in the foreign country in the event of a claim. Auto and employers liability may need to be purchased in-country. Overseas package products that include auto, property, workers compensation (or comparable) and general liability may also be available. Kidnap and ransom insurance may be recommended in some locales. While we can't eliminate all of your risks, we can help make them manageable.

Can We Be of Assistance?

We may be able to help you by providing referrals to consultants, and by providing guidance relative to insurance issues, and even to certain preventives, from construction observation through the development and application of sound human resources management policies and procedures. Please call on us for assistance. We're a member of the Professional Liability Agents Network (PLAN). We're here to help.