

Mandatory decennial liability insurance in the UAE

The UAE Insurance Authority plans to introduce mandatory decennial liability insurance for contractors and engineers. The UAE Civil Code imposes liability on architects, designers and main contractors for any building collapses and/or structural defects within a ten-year period.

Submitted	11 April 2019
Applicable Law	United Arab Emirates
Topic	Construction Insurance Projects
Sector Focus	Energy and Infrastructure Financial Institutions
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Background

What is decennial liability?

Pursuant to Article 880 of Federal Law No. 5 of 1985 (the UAE Civil Code), architects, contractors and designers are jointly and severally liable to the employer for any partial or total structural collapse of the building, and any defect threatening the stability and safety of a structure, for ten years from the date of handing over the works. This is known as “decennial liability”.

Article 882 of the UAE Civil Code prohibits the architect and contractor from contracting out from decennial liability to limit their liability.

Decennial liability only applies to the supervising architect / designer and main contractor, who in this way take the risk of structural failure. It does not apply to subconsultants and subcontractors. According to Article 881 of the UAE Civil Code, where the role of the architect is simply to prepare plans and not to supervise their execution, (s)he is liable only for defects in the plans (and not structural defects / defective workmanship).

“No fault” liability

Decennial liability imposes strict liability; that is, no proof of negligence is required. The only way to avoid decennial liability is on the basis of force majeure, or if the failure is due to an external cause (eg due to the actions of the employer or a third party in relation to the building, after handover).

This “no fault” concept of decennial liability is somewhat onerous for supervising architects and contractors when compared with many common law jurisdictions (where liability generally only attaches to architects and contractors if

they have breached a duty of care).

Decennial liability insurance

Decennial liability can have significant cost consequences for those architects and contractors who are strictly liable for remedying the defects - where the cost to correct such structural defects will be the costs of replacing the structure, and can include loss of use / loss of profits claims. Decennial liability insurance (DLI) guarantees the cost of those repairs.

In the UAE, DLI is available either as an extension to Contractors/Construction All Risks (CAR) and Professional Indemnity (PI) insurance, or as a standalone policy. To date, uptake of DLI in the UAE construction industry has been limited, presumably due to costs and a lack of familiarity with the issue. The lack of familiarity can be observed through the common misconception that the existing policy cover usually taken on construction projects (such as CAR or Erection All Risks policies), provides sufficient coverage. This is not the case with regards to decennial liability, as these policies usually contain a defects exclusion and more often than not, only provide cover for a small portion of the relevant ten year period. In addition, PI policies likewise usually only provide cover for the insured's negligence or fault, as decennial liability is strict liability and requires no proof of fault, this type of policy may not respond to a decennial liability claim.

Mandatory DLI

In late 2018, it was reported that the UAE Insurance Authority plans to introduce mandatory DLI for contractors and engineers. The exact date of its implementation has not yet been announced, but it is expected sometime this year.

These proposed changes will address the relatively low uptake of DLI and, depending on the level of cover required, should ensure that employers are sufficiently protected in the event that there is a structural defect.

There will of course be costs associated with this new mandatory requirement, which could significantly increase project costs for developers.

Now, more than ever, it is necessary for contractors, consultants and insurers to understand the issue of decennial liability and its associated risks, in order to best prepare for and avoid falling foul of this new regime.

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