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The Foreign Intrigue of Decennial Liability

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Architects and engineers who offer their design services overseas are finding that operating in a foreign country not only presents exciting growth opportunities, but daunting challenges as well. In addition to facing language barriers, unfamiliar socio-economic customs, differing construction practices and extensive travel, A/E firms are also discovering that foreign countries can have dramatically different laws, rules, regulations and liabilities applied to their profession. One of the most troubling issues when working overseas is “decennial liability.”

What Is It?

Simply put, decennial liability is a form of strict, joint-and-several liability for major defects in construction projects in certain foreign countries. As the name implies, this liability typically lasts for 10 years (in some cases up to 13 years) after project completion and acceptance by the owner. Decennial liability applies to any party considered a “builder of the work.” This includes contractors, architects, engineers, technicians, construction managers and other professionals who contract with the building owner to execute the project.

Essentially, any builder of the work is strictly and fully liable to the project owner for latent and patent defects that threaten the stability of a structure and safety of its inhabitants, leading to partial or complete collapse or otherwise rendering the building unsuitable for its purposes. This defect can be in the design or construction of the building itself or even in the ground 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. (Decennial liability for defects that do not threaten the structural integrity of the building are typically subject to a shorter period of liability, sometimes only a two-year period.)

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 it has hired. 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 is 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 the full liability. 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 the French Civil Code of 1804. Today, however, it is applied well beyond the borders of France, including in some of the most active construction markets around the globe. These markets include North Africa, sub-Saharan Africa and the Far East.

Decennial liability is particularly prevalent in the Middle East, where U.S. design firms are finding some of the most lucrative overseas projects. Countries such as Saudi Arabia, Egypt, Kuwait, Iraq, Jordan, Bahrain, Oman and Qatar impose this form of strict liability. The United Arab Emirates (UAE), which includes Abu Dhabi, Dubai, Sharjah, Ajman, Umm al-Quwain, Ras al-Khaimah and Fujairah, has its own civil code rooted in the French Civil Code. For instance, Article 880 of the UAE Civil Code holds that the architect and contractor can be held jointly liable for defects in buildings meant to last more than 10 years. The liability can extend beyond 10 years if specified in the contract or if courts construe that liability should extend to match a building's longer design life.

What are the Details?

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 of the basics:

- You can't eliminate decennial liability through contracts with either the owner or your subconsultants. Nor does an owner's verbal or written acceptance of the project eliminate decennial liability. Regardless of what your client agreement says, you are strictly liable for structural and soil defects that threaten the stability, safety and usefulness of a building.
- You are not liable if a building collapse is caused by a natural disaster such as a major earthquake. However, while this *force majeure* ("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 in the final year 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. However, this is a grey area where the extent of liability can depend upon the country and the interpretation of an architect's consulting versus supervisory role.
- If a structure has a life cycle of fewer than 10 years, then decennial liability likely applies only to the duration of the expected life cycle.
- In many countries, there is little precedent regarding decennial liability claims. Thus, there is much uncertainty as to how any case might eventually be resolved.

What About Insurance?

Chances are, you will discover that decennial liability insurance, a form of products/completed operations insurance, is not available directly from domestic insurance carriers in the U.S. It 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.

In France, Egypt and certain civil law countries, decennial liability insurance is required of the design firm, the contractor and the project owner. While somewhat expensive, it can usually be obtained. In fact, in France insurance companies are required to provide decennial liability insurance.

In some countries, insurers offer a so-called "unified policy" for decennial liability. Under a unified policy, all three parties -- designer, contractor and owner -- are

covered by the same policy; somewhat like a professional liability project policy.

In the Middle East, decennial liability insurance may or may not be mandatory, and directly obtaining affordable coverage is not always easy to do. Often, when decennial liability insurance is available, it must be obtained through a third-party consultant who must review the design and construction work and, in some cases, approve the completed project for the insurance to be put in force.

While professional liability insurance is 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 by a professional liability policy.

What to Do?

There is only one foolproof way to avoid decennial liability: don't perform work in countries that impose it. However, taking this road requires that design firms forego some of the most lucrative international markets available today.

Instead, architects and engineers who are diligent and fully aware of the risks and rewards such work entails can successfully enter these markets and reap the many benefits they present. Here are a few suggestions:

Study up on the foreign country. Educate yourself on the country in question and the laws, rules and regulations under which you must operate. In particular, examine decennial liability laws to determine your potential exposures. Remember, where decennial liability applies, you probably can't limit the extent of

your liability in the event of a structural failure, regardless of what your client contract says.

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.

Select your clients and projects carefully. Check the client's history regarding litigation, troubled projects and relationships with foreign designers. Choose projects types with which you have ample expertise and a long history of claims-free experience. Avoid fast-track projects or other unusual project delivery methods. Seek input about the client from the contractor, and vice versa. Schedule a lengthy meeting with the key parties 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. You have liability for ground and subsurface conditions even if the client hires its own geotechnical engineer.

Draft a solid contract. If your legal and tax counsel is not familiar with the laws, rules and regulations in the foreign country, find experts who are. You will likely need help from in-country attorneys and accountants who can help make sure your client contract provides you with the 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.

Consider teaming 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 to provides the working drawings and

construction-phase services. This can limit your decennial liability until you are confident and experienced enough to offer a fuller scope of design services in a particular country.

Weigh your insurance options. As an A/E insurance specialist, we can help you find an insurer who has worldwide resources, offers worldwide coverage and has experience with the rules and regulations within the particular country in question. Be aware, however, that due to licensing restrictions abroad, we may not be able to directly provide all of your requested insurance coverages.

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 a unified policy that covers the three of you.

We can also help you understand your other overseas insurance needs. An appropriate professional liability carrier should have the right if not 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 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.