

# INSURANCE

## Decennial Liability and Decennial Insurance

*If your next project takes you out of the country, you should know the principles and requirements of “decennial liability.” Your professional liability insurance is not designed to protect you against this particular liability. Robert Stevenson, partner at the firm, Berrymans Lace Mawer LLP, in the United Kingdom, has prepared this overview.*

The concept of decennial liability is derived from the French Civil Code of 1804. In its simplest form, it's

the responsibility for defects that arise in a building for a period of 10 years running from when the building is complete.



Decennial responsibility covers both latent and patent defects, save perhaps patent defects that have been accepted on handover by the building owner. The responsibilities are

imposed both on those who design and those who execute the works.

Defects in minor installations which are not crucial to the building's structure are subject to a shorter, two-year period of liability.

The French Civil Code of 1804 or its updated versions have had a considerable influence on civil law jurisdictions worldwide, including several in North Africa, sub-Saharan Africa and the Middle and Far East.

Taking the United Arab Emirates (UAE) as an example, its civil code, first published in 1985, draws heavily on the civil code of other Arab countries, notably Egypt, which in turn was heavily influenced by the French Civil Code.

Article 880 of the UAE Civil Code provides that where the contract is one for the construction of buildings which are to last more than 10 years, both architect and contractor can be jointly liable to compensate the owner for any defects that threaten the stability or safety of the building.

Article 881 provides that if the architect does not have supervision duties, then his/her liability is limited only to defects of design, whilst Article 882 excludes any attempt to limit or exempt such liability by contract.

Article 880 also provides that the contract may specify a longer period of liability, and there have been instances when the courts have construed the stated design life of a structure as equating to the limitation period; so, for example, an installation that has a design life of 50 years may have a 50-year limitation period.

The obligation to take out specific insurance against this liability, decennial insurance, is to be found in certain civil law countries, most notably France, which introduced the requirement for decennial insurance (*Assurance Décennale*) by the Loi Spinetta in 1978.

This law created an absolute obligation on the part of the contractor, the building designer and the building owner to insure themselves against decen-

nial liability. At the same time, insurance companies in France were obligated to offer decennial liability coverage, and those insurers can be sanctioned if the premiums they demand are exorbitant when adjudged against the risk.

Policies taken out by contractors and designers are called *Assurance Décennale*, whilst the policies taken out by building owners are called *Assurance Dommage-Ouvrage*.

Subsequently, a unified policy, *La Police Unique par Chantier (P.U.C.)*, was created. This unified policy bears some resemblance to project insurance where the building owner, consultants and contractor are all parties to the same policy for a particular project.

The objective behind this law, requiring all parties to be insured against decennial liability, was to remove building owners, particularly owners of apartments in blocks of apartments, from lengthy litigation where there might be a dispute between the contractor and the designer as to who was responsible for the defects.

The *Assurance Dommage-Ouvrage* responds to a claim for defects in the building and then those insurers pursue a subrogated claim against the contractor/designer under their *Assurance Décennale*.

Both *Assurance Décennale* and project insurance are habitually established, requiring the payment of an initial premium and the policy then responds to any notification within 10 years of the date of completion of the building. In this they differ from professional indemnity (PI) insurance, where the policy that's current at the time the claim is made responds to a claim for allegation of negligence leading to defects. As such, a building owner has the absolute assurance that there is a policy in place that will respond, rather than having to rely on the consultant renewing its professional indemnity policy for the next 10 years. In addition, a professional indemnity policy is designed to protect

Building owners, including those building owners that choose to undertake the construction themselves, are required to take out *Assurance Dommage-Ouvrage*, and a failure to do so can incur both civil and criminal sanctions.

a design firm's assets against claims of negligence. It does not extend to the presumption of liability imposed by decennial liability.

Building owners, including those building owners that choose to undertake the construction themselves, are required to take out *Assurance Dommage-Ouvrage*, and a failure to do so can incur both civil and criminal sanctions. Such obligation also applies to an owner that acts as a general contractor or one that self-builds.

The most effective sanction, however, is a commercial one: such a building is practically impossible to sell without decennial insurance being in place.

The only building owners exempt from the requirement to take out such insurance are state, local or regional government agencies that are constructing buildings or having buildings constructed for their own use. In addition, some private companies that are building for their own use are exempt if their turnover and employees demonstrate that they are able to look after themselves.

Whether or not taking out decennial insurance is a contractual requirement, it is a mandatory public law requirement in France and cannot be avoided.

Under decennial insurance, the defences to a claim being made against a designer of a building would be similar to those in a claim to which the designer's professional indemnity policy responded.

These might include: the defects are not design-related, the building owner accepted the building cognisant of those defects and did not require them to be rectified, the building has been badly maintained, the building has been subject to the acts of third parties or force majeure.

If a designer is to undertake work in a jurisdiction where decennial liability applies, he/she should contemplate attempting to limit his/her duties to those of design and not taking on any supervision or inspection duties, leaving those to local members of the consultant team, thereby limiting the designer's liability to design alone.

Decennial insurance, however, will only have as its ultimate beneficiary the building owner, and not other parties, such as adjoining building owners, against whose claims the consultant may still wish to maintain PI insurance.

*© 2011, X.L. America, Inc. All rights reserved. this article may not be duplicated without the express permission of X.L. America, Inc.*

*The information contained herein is intended for informational purposes only and does not constitute legal advice. For legal advice, seek the services of a competent attorney. Any descriptions of insurance provisions are general overviews only.*

*"XL Insurance" is the global brand used by XL Group plc's (NYSE: XL) insurance companies. Coverages underwritten by Greenwich Insurance Company, Indian Harbor Insurance Company, XL Specialty Insurance Company, and XL Insurance Company Limited—Canadian Branch. Coverages not available in all jurisdictions.*



30 Ragsdale Drive  
Suite 201  
Monterey CA 93940  
800-227-8533 ext. 2102508  
[www.xldp.com](http://www.xldp.com)