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Decennial Liability in Egypt –

A Brief Summary

Under the Egyptian Civil Code, architects and contractors generally face strict liability for the collapse of a building they erected, for a period of ten years from the date of delivery. This article provides brief background on some of the more significant aspects of such so-called “decennial liability”.

A. BACKGROUND ON DECENNNIAL LIABILITY

Egyptian law has applied a decennial (ten year) liability or warranty requirement to architects and contractors for almost 150 years, beginning with the civil code issued for the Mixed Courts in 1876 and then the civil code issued for the National Courts in 1883.¹ Decennial liability is an Egyptian legal concept adopted from France, which has provided for such a warranty since the French civil code of 1804.

One British judge who served on both the Mixed Court and National Court in Egypt described the rationale for such decennial liability as follows:

According to general principles the contractor should cease to be responsible for the building he has erected as soon as it is finished and handed over to the employer. But this would be a dangerous rule to apply to buildings, because defects in construction do not appear at once, and it is only when the building has "settled down," as it is called, that one can say whether the work has been well done or not. On these grounds the law has imposed a special legal responsibility on architects and builders, and for ten years they are jointly and severally responsible for the destruction of the buildings erected by them.

The fall of the buildings may be due either to defective construction or to the fact that the site selected was bad. This does not affect the responsibility of the architects and builders who are liable even if the employer selected the site or authorized the defective buildings.

Unsafe buildings are a public danger, and the law rightly prevents the architects and builders from shifting the responsibility from themselves to their employers, who may not have the technical knowledge necessary to enable them to detect the defects.²

When the ‘new’ unified Egyptian Civil Code (the “Civil Code”) was enacted in 1948, the decennial liability rules were retained and expanded in Articles 651-54.³ An unofficial English translation of these decennial warranty provisions, which remain the current legal rules in Egypt today, appears at the end of this article.

Decennial liability provisions appear in a section of the Civil Code applicable to a particular type of transaction, the so-called “contract for work” (in Arabic, *muqaawala*). Under such a contract for work, one of the contracting parties (an independent contractor) undertakes to perform some work in consideration for remuneration from the other contracting party (an owner). In order for the decennial liability rules to apply, there must be a “contract for work” and not, for example, an employment contract or a sales contract. In an employment contract, by way of contrast, the employer directs the performance of work by the employee, and in such case decennial liability rules will not apply.⁴

1. Scope of Decennial Liability

Under Article 651(1) of the Civil Code, architects and contractors⁵ generally face joint and several liability to the owner for the partial or total collapse of a building or other permanent structure, for a period of ten years from the date of delivery (unless the construction was intended by the parties to last for less than ten years). Decennial liability is a special warranty which extends the normal contractual liability of a contractor or architect, is a type of strict responsibility, and generally applies even if the failure/collapse is due to a defect in the ground itself.

Under Article 651(2) of the Civil Code, decennial liability also covers defects discovered in a building even though there has not yet been a collapse, although not every defect is covered under this provision. Article 651(2) specifies that the defect must threaten the strength or safety of the building or other permanent structure -- not merely the usefulness, efficiency or functioning of the structure -- in order to be covered by decennial liability rules.⁶

Article 651(1) of the Civil Code refers to “buildings and other permanent structures”, which has been interpreted to mean works of a fixed immovable nature, such as houses, offices, schools, hospitals, factories, mosques, churches, bridges, dams, tunnels, railways and the like. The construction must be permanent, in other words, it cannot be moved without being damaged. Movable equipment and fittings are not subject to the decennial warranty.⁷

One influential Egyptian jurist, Dr. Abdel-Razzaq Al-Sanhuri,⁸ has suggested that any of the following causes may give rise to decennial liability:

- (a) A defect in engineering or construction practice, such as a deficiency in foundations.
- (b) A defect in the soil on which the construction is erected, for example, if the soil is not solid or is soggy and the necessary measures to remedy this defect have not been taken according to good engineering practice.
- (c) A defect in the materials used in construction, such as bad quality supplies or a departure from specifications.⁹

Under decennial liability rules, the beneficiary of the warranty is the owner. A third party does not benefit directly from this warranty and generally may only sue the architect or contractor during the ten year warranty period if the third party establishes an alternate basis for liability, *e.g.*, negligence by the architect or contractor. However, a third party may sue the owner (or possibly the architect or contractor if damages occur during the construction phase) pursuant to Article 177 of the Civil Code, which states in part:

A person in charge of a building, even if he is not its owner, is liable for damage caused by the collapse of the building, even if such collapse is only partial, unless he shows that the accident did not occur as a result of negligent maintenance, or the age of, or a defect in the building.

The decennial warranty provisions of the Civil Code do not generally allocate liability between the architect and contractor, but rather assume their joint and several liability towards the owner. In practice, such division of responsibility is usually determined by a court with calculations similar to those used to determine contributory negligence (*i.e.*, showing the relative negligence of each party). A contractor who is not at fault may claim reimbursement from another negligent contractor, but this has no impact on each contractor's absolute liability to the owner.

However, Article 652 of the Civil Code states that an architect who only undertakes to prepare the plans for a building or other structure, without supervising its execution, is responsible only for defects resulting from its plans.

Article 651(4) of the Civil Code emphasizes that a main contractor's statutory rights against its sub-contractor do not include the decennial liability rules contained in Article 651. Rather, a sub-contractor's liability to its main contractor normally would be based on general contract principles, while sub-contractor liability to the owner normally would be based on general tort principles.

2. Nature of Decennial Liability

Liability under the decennial warranty is a contractual liability. Since this warranty arises from contract, the architect and contractor will not be held liable for damages greater than those which could have normally been foreseen at the time of entering the contract.¹⁰

Under Article 653 of the Civil Code, any advance contractual agreement between the owner and the architect or contractor, whether to waive or limit the latter's decennial liability, is void. This is because the imposition of decennial liability is considered a matter of Egyptian public policy.¹¹ The public policy behind decennial liability has been described as follows: unsafe buildings are a public danger, and Egyptian law rightly prevents an architect or contractor from shifting responsibility to the owner, who might not have the technical knowledge needed to detect the defects.

Decennial liability differs from tort liability in that the latter requires evidence of a negligent act (Article 163 of the Civil Code). In effect, Articles 651-54 of the Civil Code establish a presumption of fault (strict liability) on the part of the architect and the contractor whenever a building or other permanent structure collapses, or if a defect affecting its structural stability and soundness is discovered. Thus, an architect or contractor would not be absolved from the decennial liability even if it was able to show that it took every precaution to prevent such defect or collapse of the building. Similarly, an architect or contractor will not be able to avoid decennial liability on the basis that the reason for the building's defect or collapse remains unknown.

3. Exoneration from Decennial Liability

As mentioned above, and in accordance with Article 653 of the Civil Code, any advance agreement between the owner and the architect or contractor, whether to waive or limit the latter's decennial liability, shall be void as contrary to Egyptian public policy. Thus, the parties cannot contract in advance to cancel the warranty, reduce the ten year period (unless the building is intended to last for less than ten years), or restrict the warranty to certain defects.¹²

However, an owner may (explicitly or implicitly) renounce the benefit of decennial liability after that owner has acquired the right to invoke it. Thus, an owner's unconditional acceptance of the works upon delivery, with defects either readily apparent or known to the owner at that time, exonerates the architect and contractor from decennial liability for such defects.

Otherwise, the architect or contractor cannot rebut the presumption of fault (and strict liability) except by showing that the collapse or defect was due to an event beyond its control, for example, in the case of force majeure.¹³ By showing that the damage was due to a cause beyond

their control, the architect and contractor do not contradict the strict presumption of error attributed to them, but rather they remove the causal relationship.

However, according to Dr. Al-Sanhuri, the Egyptian courts should not allow the presumption of architect/contractor fault to be easily rebutted, such as by a contractor resorting to expert testimony in an effort to show the existence of force majeure. Rather, the Civil Code provisions on decennial warranty should be interpreted to limit instances in which force majeure discharges strict fault/liability, allowing such exoneration only where force majeure is clearly and definitely ascertained without the need for expert opinion.¹⁴

Although the general rule is that a force majeure event would allow an architect or contractor to rebut the presumption of fault, the Civil Code would also allow the parties to contractually agree that the architect or contractor accepts liability even for a force majeure event.¹⁵ By permitting such contractually agreed allocation of risk, the Civil Code in effect makes the architect or contractor an ‘insurer’ against any damage the owner might suffer as a result of force majeure.

Although decennial liability remains in effect for a period of ten years, Article 654 of the Civil Code imposes a limitation period -- any claim against the architect or contractor under the decennial warranty must be filed no later than three years after the discovery of a structural defect in, or after the collapse of, the building or other structure.

B. DECENNIAL WARRANTY AND SOIL CONDITIONS **-- SOME EXAMPLES**

As mentioned above, Article 651(1) of the Civil Code states that an architect or contractor is liable “even if the collapse was due to a defect in the ground itself”. In general, soil defects will not be unexpected to a prudent architect or contractor -- solidity of the soil is of obvious importance, and defects in the soil usually can be assessed and addressed before construction. Therefore, soil defects will not generally be deemed an event of force majeure that would exonerate the architect or contractor from decennial liability.

On this basis, an Egyptian court imposed decennial liability on a contractor when a house collapsed under the pressure of an exceptionally heavy (but foreseeable) rainstorm, particularly as the building was built low to the ground and near to the street (and thus susceptible to the rain washing away its foundation).¹⁶

In another instance, the Egyptian court ruled that the contractor was required to check the soil conditions on which to build and, in particular, to determine whether there were any old foundations that might interfere with the newly-constructed ones. Failing that, the contractor’s was responsible for the harmful consequences that resulted, and he was liable for the damage that

was directly imputable without being able to allege, to exonerate himself from liability, that the owner was aware of the faulty layout of the foundations and had authorized it.¹⁷

Similarly, an Egyptian court denied a contractor's attempted reliance on force majeure to exonerate itself from liability arising out of the subsidence of sidewalks built alongside the Nile River. The court attributed the subsidence to the nature of the ground located alongside the river; the case is also among a large group of decisions that refer to the 'self-propelled movement' of soil, with the court denying exoneration of the contractor by reason of force majeure.¹⁸

In contrast, if the defect in the ground was so concealed, undetectable and/or unforeseeable by a prudent contractor using all the available techniques of detection, then the Egyptian courts have customarily considered such a circumstance to be a case of force majeure exonerating the contractor from decennial liability.¹⁹

For example, an Egyptian court did not impose decennial liability on a contractor hired to pave a road with asphalt, when the asphalt subsequently subsided due to a flaw in water lines running underground. Since the contractor proved that the subsidence in the asphalt was traceable to the depression of the street resulting from a flaw in underground water lines, the Egyptian court held that such circumstance would constitute force majeure -- because the subsidence in the road is what caused the cracking of the asphalt, something that is not attributable to either the location of the ground or its (again, so-called 'self-propelled') nature. Rather, the defect in the asphalt is attributable to water lines running underground, which burst, causing the road to collapse. Thus, the contractor was not held liable in that case.²⁰

* * * *

Decennial liability presents some potentially significant risks to architects and contractors in Egypt (and elsewhere in the Arab Middle East). Although decennial warranty insurance is sometimes available, it is usually quite expensive and most contractors resort to self-insurance, relying on the fact that decennial liability claims are relatively uncommon.²¹ Nonetheless, such parties should carefully consider their potential exposure -- as well as methods to mitigate their overall liability, such as by contractually allocating responsibility between the architect and contractor(s), and seeking indemnification agreements from relevant sub-contractors.²²

Excerpts from Egyptian Civil Code –

Decennial Liability Provisions

Article 651

(1) The architect and the contractor are jointly and severally responsible for a period of ten years for the total or partial collapse of buildings or other permanent structures built by them, even if such collapse is due to a defect in the ground itself, and even if the owner authorized the building of the defective structure, except in instances where the contracting parties had intended that the structure was to last for less than ten years.

(2) The warranty imposed by the preceding paragraph extends to defects in buildings and structures that endanger the solidity and security of the building.

(3) The period of ten years runs from the date of delivery of the works.

(4) This Article [651] does not apply to the rights of action which a contractor may have against its sub-contractors.

Article 652

An architect who only undertakes to prepare the plans, without being entrusted with the supervision of their execution, is responsible only for defects resulting from its plans.

Article 653

Any clause tending to exclude or restrict the warranty of the architect and the contractor is void.

Article 654

Claims on the above-referenced warranties shall lapse after three years from the date of the collapse of the works or the discovery of the defect.

ENDNOTES

¹ Davies, *Business Law in Egypt* (1984), at p. 214.

² H. W. Halton, *An Elementary Treatise on the Egyptian Civil Codes* (Cairo 1911), vol. II at pp. 156-57.

³ Similar decennial liability provisions are found in other civil codes in the Arab Middle East. See, e.g., Jordanian civil code articles 788-791; Kuwaiti civil code articles 692-697; Libyan civil code articles 650-653; Qatari civil code articles 711-715; and United Arab Emirates civil code articles 880-883. In some other Arab countries, the strict liability period extends for only five years. See, e.g., Bahraini civil code articles 615-620; and Lebanese code of obligations and contracts articles 668-669.

⁴ Article 646 of the Civil Code. See also Al-Sanhuri, *7 Al-Waseet Fi Sharh Al-Qanoon Al-Madani* [Intermediate Treatise on the Civil Code] 108 (House of Arab Heritage Revival, Beirut 1964).

⁵ The term “architect” is not narrowly confined to those professionals who are qualified as such. The Arabic term used in the Civil Code is “muhandis mi’ mari”, which is broadly interpreted to also include certain types of “engineer”. Thus, for purposes of decennial liability under the Civil Code, “architect” is intended to apply to parties involved in the design and/or supervision of construction on a building, whether a licensed architect, engineer, contractor or otherwise.

⁶ See also Alhajeri, “Defects and Events Giving Rise to Decennial Liability in Building and Construction Contracts Under The Kuwaiti Civil Code” (undated), at <https://www.irbnet.de/daten/iconda/CIB14488.pdf> .

⁷ Al-Sanhuri, supra note 4, at 107-08.

⁸ Dr. Al-Sanhuri was probably the most important drafter of the Civil Code. In the 1950s, this same basic text was adopted – in some cases, through the support and efforts of Dr. Al-Sanhuri -- in Syria, Iraq, Libya and Kuwait. The Civil Code has more recently influenced the development of civil codes in other Arab countries, such as in the Arab Gulf States.

⁹ Al-Sanhuri, supra note 4, at 113-114.

¹⁰ Attia, “Decennial Liability and Insurance Under Egyptian Law”, 1 Arab Law Quarterly 504 (Part 5, November 1986), at p. 512.

¹¹ In rare instances, the Egyptian government has exempted contractors from decennial liability, such as in the inter-governmental agreement for the 1980s Cairo Wastewater Project, but those contractors otherwise remained subject to normal contract and tort liability rules. See, e.g., Attia,

supra note 10, at 520-22; the text of that relevant agreement was published in EGYPT – Section B, Middle East Executive Reports (January 1980), pp. 22-23.

¹² Davies, supra note 1, at 219.

¹³ Force majeure is defined under Egyptian jurisprudence as a supervening (‘overpowering’) event, not foreseeable by the parties at the time of contracting, and which is impossible to avoid despite reasonable efforts. In general, such force majeure events would normally excuse a party from its otherwise applicable contractual obligations. See Article 165 of the Civil Code.

¹⁴ Al-Sanhuri, supra note 4, at 135: “Moreover, we should not make it easy to refute this presumption by resorting to expert opinion in order to show that the contractor did not commit any technical error in inspecting the ground’s nature and identifying the defects therein. The concern here is that the experts will favor those of their own profession and thus the protection intended in the text would be lost. Therefore, the text is intended to limit the cases where force majeure is acceptable as a reason for the lapse of responsibility, and restricts it to cases where force majeure is definitively ascertained without the need for expert opinion.”

¹⁵ Article 217(1) of the Civil Code: “The debtor may by agreement accept liability for unforeseen events and for cases of force majeure.”

¹⁶ XV Bulletin de Legislation et de Jurisprudence egyptiennes 358 (24 June 1903), Mixed Court of Appeal, cited in Al-Sanhuri, supra note 4, at 136.

¹⁷ XVII Bulletin de Legislation et de Jurisprudence egyptiennes 99 (26 January 1905), Mixed Court of Appeal, Alexandria, cited in Halton, supra note 2, at 157.

¹⁸ Al-Sanhuri, supra note 4, at 136. See, also, XX Bulletin de Legislation et de Jurisprudence egyptiennes 111 (5 March 1908), Mixed Court of Appeal, Alexandria, cited in Halton, supra note 2, at 157: “With regard to building in the bed of a river and in particular of the Nile, the instability of the ground is not unforeseen. It is therefore the contractor for the construction of a wharf, which guarantees its solidity, good construction and stability, to conduct soundings and works consolidation values before any construction, and it cannot exonerate himself if the work carried out, such as the wall of the quay, collapsed as a result of subsidence.”

¹⁹ Al-Sanhuri, supra note 4, at 114 footnote (1).

²⁰ XIII Bulletin de Legislation et de Jurisprudence egyptiennes 221 (28 March 1901), Mixed Court of Appeal, cited in Al-Sanhuri, supra note 4, at 135-36.

²¹ Egyptian Law No. 106 (1976) required insurance for “true” decennial liability (owed directly to an owner by the architect and contractor, under Articles 651-654 of the Civil Code), but amendment by Law No. 2 (1982) eliminated the insurance requirement for such “true” decennial

liability, and instead required only insurance cover for liability to third parties. See also Law No. 119 (2008), the current law on these issues, which similarly does not require insurance for “true” decennial liability but only for liability to third parties.

²² See, e.g., Coertse (CharlesRussellSpeechlys), “Decennial liability in the Middle East: What is it and does insurance cover it?” (5 October 2020), at <https://www.charlesrussellspeechlys.com/en/news-and-insights/insights/constuction-engineering-and-projects/2020/decennial-liability-in-the-middle-east-what-is-it-and-does-insurance-cover-it/>.