

## **The Civil Law decennial (decennal) liability under FIDIC contracts**

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FIDIC advises users of the FIDIC Books that under some Civil Law jurisdictions the Contractor will be liable absolutely (without proof of fault) for hidden defects for ten years from completion (which is called the decennial liability). This is true and not true at the same time.

The decennial liability (or French: responsabilité décennale or garantie décennale) has its sources in French legislation (see art. 1792 et seq. French Code Civil). For example the Louisiana Civil Code articles 2762 and 3500 and their predecessors are derived from the French Civil Code. Thus it is true that the decennial liability derives from a civil law jurisdiction. However the decennial liability is not limited to a liability for "hidden defects" and it does not really start from completion.

Art. 1792 Code Civil provides that any builder of a work is liable as of right, towards the building owner or purchaser, for damages, even resulting from a defect of the ground, which imperil the strength of the building or which, affecting it in one of its constituent parts or one of its elements of equipment, render it unsuitable for its purposes. The presumption of liability established by Article 1792 also extends to damages affecting the strength of the elements of equipment of a building, but only where the latter are an indissociable and integral part of the works of development, foundation, ossature, close or cover (art. 1792-2 Code Civil). Are by the way deemed builders of the work any architect, contractor, technician or other person bound to the building owner by a contract of hire of work (art. 1792-1 Code Civil). Such liability does not take place where the builder proves that the damages were caused by an extraneous event. It is therefore true that the decennial liability is strict and that there is no escape unless the contractor proves an extraneous event. It is however necessary to note that the French liability system is much more complete than that. Under French law the contractor also warrants a "garantie de bon fonctionnement" of two years and a warranty of perfected completion, to which a contractor is held during a period of one year.

As the decennial liability concerns all defects (those which were apparent and those which were hidden), it is not limited to hidden defects to the contrary of FIDIC's annotation in the FIDIC Guidance. Furthermore FIDIC contracts do not follow the civil law concept of reception. Completion will be certified by the Taking-Over Certificate followed by the Defects Notification Period, which is a supplementary contractual remedy. After expiry of the Defects Notification Period, the Performance Certificate will be issued, thus certifying that all defects which appeared up to that date have been remedied. That date will be the date of reception or approval of the Works under Civil Law, thus starting the decennial liability.

The decennial liability today is a well known and worldwide adopted form of construction liability which exists e.g. in the legislations of Angola, Belgium, Bolivia, Brasil, Cameroon, Chile, Egypt (Art. 651 Civil Code), Indonesia, Italy, Kuwait, Louisiana (USA), Malta, Morocco, Paraguay, Peru, Philippines, Qatar, Romania (Law n° 10/1995), Spain (partially), Syria, Sweden, Tunisia, United Arab Emirates (UAE: Art. 880 Civil Code) etc. Notwithstanding the fact that the wording differs from country to country (e.g. concerning the duration of the liability, which is three years in Bolivia, five years in Chili and fifteen

years in the Philippines but in most countries ten years) the scope of the decennial liability is almost the same.

The scope and extent of the decennial liability is difficult to ascertain as in most countries having adopted the decennial liability very little case law exists. For example Egyptian case law defines such a defect as "total and partial collapse, including other defects that threaten the [building's] solidity and safety, even if they did not lead to its immediate collapse" (Appeal no 1847 for the judicial year 59, Court of Cassation. Reproduced in: Mu'awad Abdultawab, *The Annotated Reference to Civil Code's Articles*, 4th edn (Alexandria: Munsha'at Al-Ma'arif, 1998), III, p. 699). Unfortunately the trigger events for liability as "partial or structural collapse" and "defects threatening the stability or safety of a structure" as referred to in the Qatari Civil Code or "manifest danger of falling to ruin" as referred to in article 1638 Maltese Civil Code are not defined in the Codes. However under French law there is a sophisticated set of case law which may serve as a authority under other legal systems.

According to article 711 of the Qatari Civil Code, Law n° 22/2004 main contractors and design consultants are jointly liable, without fault, for the cost of rectifying structural defects that appear in a building or structure within ten years of handover.

As a rule decennial liability falls outside the scope of the standard cover provided by Contractors' All Risks (CAR) and Professional Indemnity (PI) insurance and, therefore, is generally uninsured unless particular cover has been obtained. In some countries (e.g. France, Egypt) a **decennial insurance** is mandatory, being a high cost insurance. Insurance coverage available for decennial liability in the Middle East is limited and also expensive and hence not generally attractive to the majority of developers although the long term risk is considerable. During the time of which insurance cover is granted a specialised engineering firm will control the construction, thus producing additional cost.

For the avoidance of doubt, in most countries having adopted the French decennial liability, it derives from the original version of the French Civil Code which has come in force 1804. The current French decennial liability is much more sophisticated than the former one. It is complemented by two other contractual guarantees called warranty of good running (two years) and warranty of perfect completion (one year). All three types of warranties (decennial liability, warranty of good running and perfect completion) apply to Contractors, architects and other involved persons being involved in the construction process. However subcontractors do not fall under the warranties as all three of the warranties are contractual remedies presupposing a construction contract with the owner. On the other hand even owners who wish to sell a French real estate may fall under the decennial liability if they have carried out additional work during their ownership. However, this extended form of liability currently remains -as far as we can see- a French particularity.

Foreign contractors have to be aware of the decennial liability even if the proper law of the contract is not the law of the country where the site is situated. As a rule the decennial liability overrules choice of law clauses and is applicable by law in the country where the site is located if and when the laws of this country provide the decennial liability. Thus even under a FIDIC contract contractors will be liable most often during ten years (or more years) after the performance certificate has been issued (compare Art. 651 Egypt Civil Code). The defects liability period which is the period after the issuance of the taking-over certificate until the date of the issuance of the performance certificate is an additional contractual remedy which does not replace the decennial liability nor other forms of defects liability given under the proper law of the contract, which has to be determined in default of

a choice-of-law-clause by the concerned conflicts of law rules. Those rules may differ from country to country.

Again for the avoidance of doubt and misunderstandings it is worthwhile to note that under a FIDIC contract the decennial liability starts to run not earlier than after the issue of the so called Performance Certificate which shall be issued after the expiration of the so called *Defects Notification Period*. In some civil law countries it is a common misunderstanding that the Defects Notification Period replaces the legal liability under the proper law of the contract. This is wrong. Thus the decennial liability establishes a supplemental period of liability for defects which may last even longer than ten years because the decennial liability is considered being a guarantee period and claims arising from the decennial liability fall under additional limitation periods meaning that the risk arising from it may last for more than 13 years or even longer.

## 1.0 The Concept Of “Decennial Liability”

By admin On August 6, 2011 · Leave a Comment

Decennial liability is a strict liability that is applied to construction projects in certain foreign countries. Here, liability lasts for at least ten years (in some cases up to MORE THAN 10 Years) after completion and approval of the project or delivery to the owner!!

Decennial liability applies to any party considered as a “builder of the work,” which means it includes not only “contractors”, but 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**. So defect can be both in the design or construction!!!

-You can't eliminate ” decennial liability ” through formation of contracts... Owner's verbal or written approval of the Project **DO NOT** 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.

-The decennial liability concerns all defects, whether apparent or hidden.

-Such liability does not take place where the builder proves that the damages were caused by an extraneous event.

-Foreign contractors have to be aware of the decennial liability even if the proper law of the contract is not the law of the country where the site is situated. Here, As a rule the decennial liability overrules “choice of law clauses” and is applicable by law in the country where the site is located if and when the laws of this country provide the decennial liability...

-The decennial liability has been enacted in order to guarantee the structural stability of building works, which is legitimised by public interest concerns. Whichever law the parties have agreed to apply to their contract, the decennial liability of the country where the site is located will apply.

-If such a contract form becomes combined with civil law, **the exact date of reception must be carefully ascertained in order to determine the beginning of any legal defects liability**, especially for those countries where the so called decennial liability has been introduced by the legislator.

**-If a FIDIC form of contract has been used by the parties**, the commencement date of the decennial liability will therefore be the date of the issuing of the **Performance Certificate** only.

To sum up, many contractors may see ‘taking over’ as the moment when the contractor is finally relieved of the burden of delivering the project. Because, **for a contractor, the process of taking over is an important threshold that the works will pass to the employer and the employer’s entitlement to recover liquidated damages will cease.**

**However, contractor will remain liable for defective workmanship and materials beyond handover. Here one can argue that, the contractors liability will depend on the nature of defects; whether (a) defects are apparent & capable of discovery when the works are handed over ,**

**(b) defects that are capable of being discovered after handover (**latent defects**), or like contained under same country laws as (decennial liability).**

The starting point is that a contractor’s liability for defects will, unless the construction contract or the law says otherwise, cease upon the works being taken over by the

employer. At hand-over an employer is deemed to accept that the works were carried out properly and in accordance with the contractual requirements.

On that basis, a contractor will have no liability for defects that are apparent at the time of taking over. The law, however, does recognise the freedom of the parties to agree differently: "...the employer may make a reservation when he takes delivery of the work or accepting the thing to the effect that such delivery or acceptance will not prevent him from having recourse against the contractor if a defect appears in the work even if such defect is apparent."\*

This is essentially what a defects liability period does; it extends performance under a contract beyond taking over. Defects liability periods can be found in most forms of construction contract.

The position is different for defects that can not be discovered or are not capable of discovery at handover. In that instance an unconditional acceptance of the works by an employer would not relieve a contractor of liability.

A contractor's liability for latent defects could extend to 10 years or more, although the right of an employer to bring a claim is likely to be lost should he fail to act upon the existence of a defect once it is known or has become apparent. A contractor's liability for defects that cause collapse or threaten the stability or safety of a structure is different again. This is subject to decennial liability, being a 10-year strict or no-fault liability which is an additional or concurrent obligation that applies within the overall 10 or 15-year limitation periods.

As with a contractor's general liability for latent defects, the clock will start ticking once the collapse occurs or the defect is discovered. Under decennial liability a contractor will remain exposed to claims from the employer for a period of three years following the collapse or discovery of the defect.