



**Decennial Liability under UAE Law  
(Articles 880-883 of Law No. 5 of 1985)**

المسؤولية العشرية بموجب قانون دولة الإمارات العربية المتحدة  
(المواد 880-883 من القانون رقم 5 لسنة 1985)

by

**ASHOK CHAKRAVARTHY SAMRAJ**

**A dissertation submitted in fulfilment  
of the requirements for the degree of  
MSc CONSTRUCTION LAW AND DISPUTE RESOLUTION  
at  
The British University in Dubai**

**Dr Abba Kolo  
March 2018**

## **DECLARATION**

I warrant that the content of this research is the direct result of my own work and that any use made in it of published or unpublished copyright material falls within the limits permitted by international copyright conventions.

I understand that a copy of my research will be deposited in the University Library for permanent retention.

I hereby agree that the material mentioned above for which I am author and copyright holder may be copied and distributed by The British University in Dubai for the purposes of research, private study or education and that The British University in Dubai may recover from purchasers the costs incurred in such copying and distribution, where appropriate.

I understand that The British University in Dubai may make a digital copy available in the institutional repository.

I understand that I may apply to the University to retain the right to withhold or to restrict access to my thesis for a period which shall not normally exceed four calendar years from the congregation at which the degree is conferred, the length of the period to be specified in the application, together with the precise reasons for making that application.

---

Signature of the student

## **COPYRIGHT AND INFORMATION TO USERS**

The author whose copyright is declared on the title page of the work has granted to the British University in Dubai the right to lend his/her research work to users of its library and to make partial or single copies for educational and research use.

The author has also granted permission to the University to keep or make a digital copy for similar use and for the purpose of preservation of the work digitally.

Multiple copying of this work for scholarly purposes may be granted by either the author, the Registrar or the Dean only.

Copying for financial gain shall only be allowed with the author's express permission.

Any use of this work in whole or in part shall respect the moral rights of the author to be acknowledged and to reflect in good faith and without detriment the meaning of the content, and the original authorship.

## **Abstract**

Decennial Liability is an exceptional liability in UAE, under Articles 880 to 883 of Law No. 5 of 1985. According to this provision of the Law, the Architect / Engineer (A/E) and the Contractor are jointly and severally liable to the Employer, for partial, or total collapse, or defects threatening the stability, or safety of the structure. Since decennial liability is a matter of public policy, it cannot be exempted or contracted out. Due to the paucity of literature and lack of published data with regard to the implementation and specific liability to A/E and the Contractor in various methods of procurements and executions models, there is prevalent misapprehension and presumptions among the construction professionals about application of certain provisions of the law. Decennial liability provisions in UAE Law appears to have drafted considering to projects procured through the traditional procurement route. However, in recent decades, new procurement methods and technologies have developed in the construction industry and it is likely that the current provisions of the Law have not addressed the specific liability implications and stakeholders of these new methods and technologies.

This dissertation aims to examine the provisions of the decennial liability law of UAE to clarify and dispel prevalent misapprehensions and presumptions of construction professionals and analyze whether the provisions are applicable / sufficient enough for projects procured under new procurement methods and structures built using new technologies. In addition, this dissertation compares the provisions on decennial liability under UAE law with similar provisions in other GCC countries, Egypt and French law. This study will enlighten the constructional professionals about the decennial liability law in practice around the region and the research findings of this study may be used as guidance for contractual and legal liabilities they are subject to, for the latent defects.

## ملخص

المسؤولية العشرية هي مسؤولية استثنائية في دولة الإمارات العربية المتحدة، بموجب المواد من 880 إلى 883 من القانون رقم 5 لعام 1985. وفقاً لهذا الحكم من القانون، يكون المهندس المعماري / المهندس والمقاول خاضعين بالتزامن والتكافل لصاحب العمل ، وبما أن المسؤولية العشرية تعتبر من مسائل السياسة العامة ، فلا يمكن التغاضي أو التخلي عنها. وبسبب قلة الكتيبات ونقص البيانات المنشورة فيما يتعلق بالتنفيذ والمسؤولية المحددة للمهندس المعماري / المهندس والمقاول، في مختلف أساليب المشتريات ونماذج التنفيذ ، فإن هناك سوء فهم وافتراسات سائدة بين خبراء البناء حول تطبيق بعض أحكام القانون. ويبدو أن أحكام المسؤولية العشرية في دولة الإمارات العربية المتحدة قد صيغت وفقاً لمشاريع تم شراؤها من خلال مسار الشراء التقليدي. غير أنه في العقود الأخيرة، تطورت أساليب وتكنولوجيات المشتريات الجديدة في صناعة البناء، ومن المرجح أن الأحكام الحالية للقانون لم تتناول آثار المسؤولية المحددة والمساهمين في هذه الأساليب والتكنولوجيات الجديدة.

تهدف هذه الرسالة إلى فحص أحكام قانون المسؤولية العشرية الخاص بدولة الإمارات العربية المتحدة لتوضيح وتبديد سوء الفهم السائد وافتراسات خبراء البناء، وتحليل ما إذا كانت الأحكام قابلة للتطبيق / كافية بالقدر اللازم للمشاريع التي يتم شراؤها في إطار أساليب وهياكل الشراء الجديدة التي بنيت باستخدام تقنيات جديدة. بالإضافة إلى ذلك، فإن هذه الرسالة تقوم بمقارنة الأحكام المتعلقة بالمسؤولية العشرية بموجب قانون دولة الإمارات العربية المتحدة ، مع أحكام مماثلة في دول مجلس التعاون الخليجي الأخرى، ومصر والقانون الفرنسي. ستقوم هذه الدراسة بتوفير خبراء البناء حول قانون المسؤولية العشرية في جميع أنحاء المنطقة، ويمكن استخدام نتائج البحث في هذه الدراسة كتوجيه للمسؤوليات التعاقدية والقانونية التي يخضع لها خبراء البناء، بشأن العيوب الكامنة.

## **Acknowledgements**

This dissertation could not have been completed without the generous assistance of many individuals who shared their knowledge and expertise. To all those people, I extend my deep appreciation and gratitude.

I would especially like to thank my Supervisors, Professor Dr. Abba Kolo and Professor Dr. Aymen Masadeh for their guidance. I would also like to express my thanks to BUiD, for bringing out the researcher in me by virtue of this excellent course.

## Table of Contents

1.	Introduction.....	1
1.1	Background.....	1
1.2	Main Research Questions.....	3
1.3	Aim and Objectives.....	3
1.4	Significance of Research.....	3
1.5	Research Methodology .....	3
1.6	Structure of the study .....	4
2.	Review of UAE Law Decennial Liability Provisions .....	6
2.1	General.....	6
2.2	Synopsis of Decennial Liability under UAE Law.....	7
2.3	Extent / Coverage.....	8
2.3.1	Collapse or Threat to Stability .....	9
2.3.2	Defects or collapse due to Poor Maintenance:.....	10
2.3.3	Implications of Design approval by the Local Authorities .....	11
2.3.4	Liability for Extension / Modification / Renovation Works .....	12
2.3.5	Subcontractor Works.....	13
2.3.6	Liability for Ground Conditions .....	16
2.3.7	Liability Limited to Design.....	16
2.3.8	Liability for Force Majeure.....	17
2.3.9	Establishing / institutionalizing damages.....	18
2.3.10	Duty of Purpose .....	18
2.3.11	Causation Principle .....	19
2.4	Ownership of Liability .....	20
2.4.1	Joint Liability .....	20
2.4.2	The apportionment of liability .....	21
2.4.3	Exemption or limitation of liability.....	22
2.5	Compensation .....	22
2.5.1	Jointly Liable for Compensation.....	23
2.5.2	Scope of Compensation .....	23

2.5.3	Limiting the scope of compensation .....	25
2.5.4	Settlement .....	26
2.5.5	Decennial Liability Insurance .....	26
2.6	Period .....	27
2.6.1	Joint Liability for Decade .....	27
2.6.2	Liability Period .....	28
2.6.3	Defects Notification Period and Decennial Liability Period.....	29
2.6.4	Lapse of Time / Limitation Period .....	30
2.6.5	Time Limit for Claim.....	30
2.6.6	Liability Waiver .....	32
2.6.7	Unforeseeable events and judicial actions .....	34
2.7	Privity of contract and "decennial liability" .....	34
2.7.1	Scholar (Interpretation) Theory .....	35
2.7.2	The Warranty .....	35
2.7.3	Third Party Contract.....	36
2.7.4	Legal Warranty .....	37
2.8	Constraints / Limitations and Amendments.....	37
2.8.1	Dubai Law No. (27) of 2007.....	37
2.8.2	No joint and Several Liability.....	39
2.8.3	Express Terms in Construction Contracts.....	40
3.	Critical review of Decennial Liability Provisions against various Procurement Methods, Project Administration Approaches and Construction Methodologies (Buildings/Structures).....	42
3.1	Procurement Methods .....	43
3.1.1	Design – Bid – Build (DBB) (Traditional Method).....	43
3.1.2	Design and Build.....	44
3.2	Methods of administering / Project Team.....	45
3.2.1	Program Manager or Project Management Consultant (PMC).....	46
3.2.2	Consultant Team .....	46
3.3	Construction Methodologies (Buildings/Structures).....	47
4.	Comparison of Decennial Liability Provisions in Civil Law Countries .....	49
4.1	French Law .....	49
4.2	Egyptian Law .....	53



4.3	Decennial Liability in GCC Countries .....	55
5.	Conclusion and Recommendation .....	61
5.1	Conclusion .....	61
5.2	Recommendation .....	63
6.	Bibliography .....	64
6.1	Books .....	64
6.2	Journals Articles / Reports .....	64
6.3	Electronic Sources .....	65
7.	Word Count:.....	69

**Table of Cases**

Dubai Court of Cassation, 150/2007, dated 7 October 2017  
Abu Dhabi Court of Cassation, 293/Judicial Year 3  
Abu Dhabi Court of Cassation, 721/Judicial Year 3  
Union Supreme Court, 125/Judicial Year 1  
Union Supreme Court, 336/Judicial Year 21  
Union Supreme Court, 407/Judicial Year 21  
Union Supreme Court, 293/2009 dated 27 May 2009  
Union Supreme Court, 722/21 dated 9 October 2001  
Union Supreme court, 336 and 470/ 21 dated 20 March 2001  
Union Supreme Court, 101,102 and 59/16 dated 28 June 1998  
Donoghue v. Stevenson (1932) A.C. 562  
Murphy v Brentwood DC (1991) 1 AC 398 (HL)

**Table of Statutes and Law**

UAE Federal Law No. 5 of 1985 amended by Federal Law No.1 of 1987

French Civil Code

French Insurance Code

Egyptian Civil Code

Bahrain Civil Code

Kuwait Civil Code no. 67/1980

Oman Civil Code No. 29 of 2013

Qatar Civil Code, Law No. 22 of 2004

Government Tenders and Procurement Law (GTPL) of Saudi Arabia

Contracts (Rights of Third Parties) Act 1999 - UK

**Keywords**

<b>DL</b>	Decennial Liability
<b>A/E</b>	Architect(s) and/or Engineer(s)
<b>UAE</b>	United Arab Emirates
<b>UK</b>	United Kingdom
<b>CTC</b>	Commercial Transaction Code
<b>FIDIC</b>	The International Federation of Consulting Engineers (Fédération Internationale Des Ingénieurs-Conseils)
<b>TOC</b>	Taking Over Certificate
<b>DNP</b>	Defects Notification Period
<b>DLP</b>	Defects Liability Period
<b>DBB</b>	Design Bid Build
<b>D&amp;B</b>	Design and Build
<b>DM</b>	Dubai Municipality
<b>PII</b>	Professional Indemnity Insurance
<b>GCC</b>	Gulf Cooperation Council

# 1. Introduction

## 1.1 Background

Dubai, one of the seven Emirates forming the United Arab Emirates is amongst the fastest growing cities in the world. The Construction industry has also been growing simultaneously, delivering new commercial and residential developments, manufacturing & logistics facilities, tourism and leisure related projects to cater for the increased demands associated with the growth of the city. The most commonly used procurement and contractual arrangement in the UAE is the traditional design-bid-build, under which the A/E are engaged for designing and supervising the construction with the exception of few, where supervision services are detached from A/E to be assigned to a separate consultant. Following emerging trends in the international construction industry, Dubai also started adopting new procurement methods (Design and build, construction management, management contract and PPP, amongst others). Apart from the innovations in the procurement methods, the industry is also has been adapting new construction technologies such as precast structure, 3D printing of concrete, pre-fabricated structure and steel structure.

Considering the involvement of foreign stakeholders in the industry and use of new procurement methods and new technologies, it is very important that all the parties understand their legal liabilities throughout the project life cycle as appropriate to the procurement and development model adopted for their projects. In this regard, latent defects are considered as most sensitive and may lead to contentious debate over establishing the liability between the stakeholders.

Reason for Defects in a construction projects may happen throughout their life-cycle starting from the design till completion of construction and use of the facilities. Defects can be in the design (where a design does not meet standards of care, or does not comply with building regulations), or in the construction (where work is not executed according to specifications, or does not meet acceptable standards of workmanship), or where materials and equipment are not fit for purpose.

UAE law and the standard construction contracts have provisions to address defects notified during and after the project is handed over. Under the Articles 880 to 883 of Civil Transaction Code of the UAE, the A/E and contractor are jointly liable to employer for 10 years in the event of partial or total collapse of the structure. Provisions of law with regard to latent defects, often referred as DL, is a strict liability under UAE Law, which is not covered by most professional liability insurance policies and cannot be limited or waived by the contract.

Based on the provisions in the Law, if the A/E who has designed the structure were not to supervise the construction, then A/E is only liable for design not for construction. However, if an independent engineer, other than A/E supervises the construction designed by A/E, the engineer can still be held jointly liable with architect and contractor. It is a misconception amongst some construction professionals that the supervision engineer cannot be held liable, but the position of the law is contrary to this view. Similarly, there is prevalent misinterpretation that DL does not apply to expansion / extension of existing structure projects which is also incorrect, since the courts have established that the DL provisions still apply to expansion / extension projects also. Articles 880 to 883 do not have provision for subsequent buyers and public to bring their claim. Whilst the provisions in Law No (27) of 2007 on Ownership of Jointly Owned Properties in the Emirate of Dubai (the so-called “Strata Law”) which, in the context of strata developments, apparently extend the concept of decennial liability to developers towards home owners and Owners’ Associations, based on the law ‘burden of proof’ in the event of structural failure lies with the client. It should also be pointed out that DL does not apply to subcontractors, unless, specially mentioned in their contract.

The above noted equivocal nature of DL provisions under the UAE law often surprise and confound architects, engineers and contractors from other parts of the world, coming to the Middle East to do business. Often, they simply do not realize that in the Middle East, their customary risk management tools are not sufficient, and they are in fact exposed to potentially catastrophic liability.

## **1.2 Main Research Questions**

The primary aim of this study is to analyze and summarise the provisions of decennial liability under UAE law. The study results will act as a useful handbook for all the stakeholders and to use as guidance for the legal liabilities they are subject to, in addition to the contractual liabilities for the latent defects.

## **1.3 Aim and Objectives**

- Examine the principle and provisions of DL and latent defects law of UAE
- Analyze whether decennial liability applies to projects procured under new procurement methods and for structures built using new technologies
- Clarify and dispel prevalent misconceptions and presumptions of construction professionals.

## **1.4 Significance of Research**

Many constructions professionals, employers and subsequent buyers are not aware of the provisions of decennial liability under UAE law. In most cases, the team that constructed the project does not carry out the operation and maintenance of the facility. So, the professional involved in the construction has limited exposure to latent defects and the law that deals with decennial liability. The lack of knowledge and relative paucity of literature about decennial liability has led to construction professionals misunderstanding and presuming certain provisions of the law. It is important that architect and contractor understand their legal liability for faults in design and defective construction. The Employer and subsequent buyer understand their rights and how they can bring the claim against the architect and contractor. Findings from this study are expected to shed light on the decennial liability, clarify and dispel the misconceptions and presumptions and to help the construction professionals, employer and subsequent buyer to understand their rights and liabilities under law.

## **1.5 Research Methodology**

The dissertation analyzes books, journals, literature reviews, reports, construction magazines and UAE case-law. A literature review will be undertaken to “Analyze” the provision of the

decennial liability under UAE law, investigate how employer and subsequent buyer can pursue their rights under Articles 880 to 883 and what are the limitations and how to avoid/mitigate these limitations, and the prevalent misconceptions and presumptions about Article 880 to 883. Also, how the decennial liability applies to the procurement methods and construction methods adopted in UAE and examine the DL provision in other civil laws of GCC countries, French and Egypt law in reference to Articles 880 – 883.

## **1.6 Structure of the study**

This section outlines how the dissertation is structured.

### **1) Chapter 1 - Introduction**

Chapter one provides an overview of the research. A summary of the background, research questions, aims and objectives, significance of research and research methodologies are identified.

### **2) Chapter 2 – Review of UAE Law Decennial Liability**

An overview of Decennial Liabilities under UAE Law – this chapter will explain about DL, the limitations and other component factors. This includes analysis of types of damages and losses, types of consequential losses, applicable remedies or damages.

### **3) Chapter 3 – Critical review of Decennial Liability Provisions against various Procurement Methods, Project Administration Approaches and Construction Methodologies (Buildings/Structures)**

This chapter explains new procurement methods adopted and development of new construction technologies in the UAE in brief and analyzes how DL is applied to new methods and technologies.

### **4) Chapter 4 – Comparison of Decennial Liability Provisions in Civil Law Countries**

This chapter will discuss the provision of DL in other civil law countries like France, Egypt and GCC and compare the provisions of decennial liability.



**5) Chapter 5 - Conclusion**

This chapter will conclude all the findings to summaries the provisions of decennial liability under UAE law, clarify and dispel popular misconceptions and presumptions of the construction professionals and propose further studies.

## 2. Review of UAE Law Decennial Liability Provisions

### 2.1 General

Under Law, liable means “legally obligated to responsible or answerable under the law<sup>1</sup>”. By definition, liability is “the state of being legally responsible for something<sup>2</sup>”. Legal liability is the duty of a person, or firm, to perform the nominated duty or act in accordance with the governing law or contract. The sources of liabilities are contract, tort and law. The definitions of legal liabilities are, to some extent broad and apply to different types of liabilities namely:

- **Absolute liability**, sometimes referred to as strict liability, is primarily found in cases of defective products or services.
- **Vicarious liability** is when one party is held accountable for the actions of another.
- **Joint and several liability**, refers to a scenario in which two or more parties are jointly responsible for an event or act that results in damage to another party.

All of the above offer legal recourse in the event of failure to perform or breach<sup>3</sup>.

Decennial Liability (DL) is a UAE legal concept adopted<sup>4</sup> from the French law<sup>5</sup>. The UAE legislators were concerned, the same as the French legislators, regarding the construction works and their liability. The UAE civil code under Federal Law No. 5 of 1985 includes provisions concerning DL. Under the Federal law of UAE, A/E and contractor are jointly and severally liable to the employer<sup>6</sup>, for the partial or total collapse of structure or for the defects that threatens the safety or stability of the structure for a period of ten (10) years from the date of delivery<sup>7</sup>. The provisions of UAE Federal law pertaining to DL raise many legal issues for A/E, contractors and employer involved in the construction industry. A degree of misunderstanding

---

<sup>1</sup> [https://en.wikipedia.org/wiki/Legal\\_liability#cite\\_note-1](https://en.wikipedia.org/wiki/Legal_liability#cite_note-1)

<sup>2</sup> [www.oxforddictionaries.com/definition/English/liability](http://www.oxforddictionaries.com/definition/English/liability)

<sup>3</sup> <http://legalbeagle.com/7567769-legal-types-liability.html>

<sup>4</sup> Kamal Hafez Property & Construction, ‘Managing the Risk of Decennial Liability’, Law Update, 2011, 244, 61

<sup>5</sup> Decennial Liability, Professional Liability Update Newsletter, March 2011 available at <http://www.cavnac.com/publications/professional-liability-update-decennial-liability/>, accessed on 29 June 2017

<sup>6</sup> Grose Michael, ‘Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 104

<sup>7</sup> UAE Civil Transaction Code, Law # 5 of 1985, Articles 880 to 883

has spread in the milieu of Foreign Investors, because their native legal systems, e.g., the English legal systems, almost ignore the concept of DL and consequently they do not comprehend the UAE legal requirements against this liability. It is important to note that, DL as civil law concept does not exist in common law. Also, some construction professionals have misunderstood and presumed certain provisions of the law.

This chapter will discuss in more detail the DL provision under UAE law - which all the parties involved in the construction project need to be entirely conversant. This dissertation will only analyze the civil liabilities associated with the Law and not the criminal liability as the Articles 880-883 are concerned only with civil liability.

## **2.2 Synopsis of Decennial Liability under UAE Law**

*‘Article 880(1)- If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.’<sup>8</sup>*

Under UAE law, the DL is an exceptional liability; not a default liability. For the default liability<sup>9</sup>, the person who committed the breach of contract (tortfeasor<sup>10</sup>) will be liable for his fault and to pay compensation to the person who incurred damages, that is “personal liability<sup>11</sup>”. DL introduces the concept of, joint and several liability<sup>12</sup> imposed by the power of law, not by will of the parties<sup>13</sup>. It is an extreme exception to the legal principle ‘freedom and autonomy of the parties’ and forces both the parties to the contract (A/E and contractor), to guarantee each

---

<sup>8</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (1)

<sup>9</sup> <https://www.lawinsider.com/clause/default-liabilities>, accessed on 07 July 2017

<sup>10</sup> <https://legal-dictionary.thefreedictionary.com/tortfeasor>, accessed on 07 July 2017

<sup>11</sup> <https://financial-dictionary.thefreedictionary.com/personal+liability>, accessed on 08 July 2017

<sup>12</sup> Grose Michael, ‘Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 103

<sup>13</sup> Grose Michael, ‘Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 103

other, which exhibits the perception of mutual guarantee. Decennial Liability is termed as such because of its validity for a decade (10 years).

Under the provision of Article 880 (1), A/E who has designed and supervised the construction and contractor who carried out the construction under the supervision of the A/E are jointly liable to employer for any partial or total collapse of the structure, or for any defects that threaten the stability, or the safety of the structure, for a period of ten years from the delivery of the structure. The DL is limited to the structural works and includes any addition or omission to the structure and has no relevance to the finishes of the building like painting, tiling, decorating works etc., it only considers the structural and safety defects that threaten the stability of the structure.<sup>14</sup>

The UAE Supreme Court, in one of the decisions on classifying whether the DL is tortuous liability or contractual liability, has established that DL is a contractual liability imposed by law<sup>15</sup>.

To establish the DL, the first requirement is that the A/E has to prepare the design and supervise the construction works, and then A/E will be held jointly liable with contractor, which exhibits the DL applies to projects which are procured under traditional procurement method.

Following sections of this report analyzes the UAE law of DL in detail.

### **2.3 Extent / Coverage**

This section examines the coverage of the DL imposed under Article 880 (1) which states that the architect who prepared the plans and the Contractor who carried out the construction under the supervision of the Architect shall both be jointly liable for a period of ten years to make compensation to the employer for any *total or partial collapse* of the building they have

---

<sup>14</sup> Abu Dhabi Court of Cassation, 721/Judicial Year 3

<sup>15</sup> Union Supreme Court, 293/2009 dated 27 May 2009 and Union Supreme Court, 722/21 dated 9 October 2001

constructed or installation they have erected and for any defect ***which threatens the stability or safety*** of the building ...'<sup>16</sup>

### **2.3.1 Collapse or Threat to Stability**

The construction defects may be broadly classified into two categories, patent defects and latent defects. The patent defects are obvious and detectable by reasonable inspection and generally included in snag or punch lists prepared during handing over inspection. The contractor has to rectify these defects, prior to final handing over of the project. Latent defects exist in the structure, however invisible and undetectable by reasonable inspection<sup>17</sup>. The latent defects can occur as result of faulty design, substandard workmanship and inferior quality of materials or poor supervision. These defects may remain undetectable at the time of delivery of the project and for years<sup>18</sup> and may come to light after causing severe damage to the structure. Few examples of latent defects are foundation instabilities, under designed foundations causing collapse or settlement, failure of foundation due to poor soil bearing, swollen soil, water seepage and structural cracks in foundations, slabs, beams, walls and basement due to overloading, misplaced or inferior quality of reinforcement, or under strength concrete<sup>19</sup>. UAE Law imposes liability of any such latent defects to the architect who prepared the plans and the Contractor who carried out the construction under the supervision of the Architect through the DL Clauses being discussed in this report.

DL is an important security / protection for employer, in the event of any latent defects, since the employer can bring an action against both parties without any requirement to prove which party has caused the defect, but only with proof that there had been a collapse or defects threatening the safety and stability of the structure. A/E and contractor will not be in a position to challenge employer's claim easily, rather they have to argue whose fault has caused the defect, and consequently the employer is well protected. A/E has to design carefully (with due diligence) and provide supervision, such that the structure is constructed in accordance with their approved design.

---

<sup>16</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (1)

<sup>17</sup> <https://www.thelienzone.com/construction-defects-latent-vs-patent/>, accessed on 22 March 2018

<sup>18</sup> [https://www.jltspecialty.com/-/media/files/sites/specialty/insights-construction/jlts\\_insights\\_latent\\_defects\\_jan\\_2015.ashx?la=en-gb&hash=1CD99C3E894E5BF9E78B5FA8124F6D87DDAFF845](https://www.jltspecialty.com/-/media/files/sites/specialty/insights-construction/jlts_insights_latent_defects_jan_2015.ashx?la=en-gb&hash=1CD99C3E894E5BF9E78B5FA8124F6D87DDAFF845), accessed on 22 March 2018

<sup>19</sup> [https://www.designingbuildings.co.uk/wiki/Latent\\_defects](https://www.designingbuildings.co.uk/wiki/Latent_defects), accessed on 22 March 2018

DL is an exceptional liability under the law. ‘Exceptions’ are interpreted narrowly and shall not have analogy. That is the same rule cannot be applied to another case. Because DL is interpreted narrowly and strictly, it is necessary to establish that the cause of liability has materialized, which means to prove the existence of structural defect, or there is threat to the safety of the structure. If there is partial or total collapse, then there is no need for any evidence, as the collapse itself is the evidence<sup>20</sup>. The defects threatening the safety of a structure has to be dealt with on a case by case basis, for one simple reason, that there is no clear definition by the courts as to what constitutes the defects threatening the stability or safety of the building. It is not easy in many cases to establish these defects. In some instances, it will be unclear whether the defect falls under DL or general rules of liability. For the purpose of DL, defects are anything that renders the structure unfit for the intended use<sup>21</sup>.

DL is therefore convenient for employer, because employer only has to prove the case to satisfy the requirement of DL not the defaulting party.

### **2.3.2 Defects or collapse due to Poor Maintenance:**

One defense that may come from the defaulting party in latent defects claims scenario is the quality of maintenance of the facility. If the damage is caused by lack or poor maintenance, it is the contractor’s responsibility to prove that the defect was due to poor maintenance and the employer did not comply with the maintenance methods and procedures, which are generally difficult for the contractor to prove. This raises the question as to whether the structure can be affected due to poor maintenance or not. However, A/E and contractor may prove the defects were caused by the poor maintenance or misuse of the facility and event that they are successful in such defense, DL will not apply<sup>22</sup>. Not only the DL any other liability will not arise, because

---

<sup>20</sup> Union Supreme court, 336 and 407/Judicial Year 21, 20 March 2001

<sup>21</sup> <http://constructionblog.practicallaw.com/patent-defect-or-latent-defect-does-it-matter/>, accessed on 22 March 2018

<sup>22</sup> Grose Michael, ‘Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 108

the causation link is broken; that is there is no causation link between the breach and the loss<sup>23</sup>. In such situation contractor and A/E may even deny the breach.

### **2.3.3 Implications of Design approval by the Local Authorities**

#### **2.3.3.1 Design Endorsement by Local Municipality Architect of Design completed by International Consultants**

In UAE, to obtain the building permit for construction from the respective municipality (the designated planning authority), the construction drawings have to be submitted to the Municipality by a municipality approved architect, who will endorse the design by signing and stamping the design and drawings<sup>24</sup>. When employer imports the design from outside the UAE, then in order to satisfy this requirement, the employer may engage a municipality approved (third party) architect in UAE, to facilitate obtaining the approval from the municipality<sup>25</sup>. The local architect will just act as link to obtain the approval of (in this case) the Dubai Municipality. The local architect may or may not supervise the construction but will be held liable for the design. The question arises as to whether the local architect will be held liable for either the constructability or safety of the design? To answer this question, first we have to consider the rationale of why the Dubai municipality requires the local registered architect to submit the design / drawings for approval, and why the international non-resident architect is not allowed to submit directly to the municipality, to be examined. The answer is that the municipality requires the local resident architect to be held responsible and liable for constructability and safety of the design. Accordingly, the local resident architect has to endorse the imported design / drawings and obtain the approval of the municipality and latterly will be held liable for constructability and safety of the design. Since the local architect is not the owner of the design but has endorsed the design and drawings to facilitate the approval, it does not mean that he will be simply relieved from this responsibility. Instead, they are liable for their endorsement and can be sued by the employer under UAE law.

---

<sup>23</sup> <https://plato.stanford.edu/entries/causation-law/>, accessed on 16 September 2017

<sup>24</sup> <https://portal.dm.gov.ae/SCWebUI/DataDetails.aspx?servicecode=3398&PageLang=En>, accessed on 06 October 2017

<sup>25</sup> <https://www.clarington.net/en/do-business/resources/engineering-design-guidelines-and-standard-drawings.pdf>

### **2.3.3.1 Design changes from Local Authority reviews / comments**

If the local administration requests any changes to design or construction which has resulted in a defect in the building, the risk stays with the employer because it is neither the fault of the A/E or the contractor. Contractor and A/E are bound to satisfy the requirements of the local administration. This raises the question that if employer may bring a claim against the local administration in such an event? It would be very difficult to hold the local administration accountable and there is no evidence of such cases reported in the UAE. However, in the UK there are cases of claims brought against the local administrators for structural defects, because the structural works could not be covered without inspection / approval of the local administration. The court has rejected such claims, stating the inspection / approval of local municipality is for administration purposes and to ensure the safety of the structure and they cannot be held liable for any structural failure<sup>26</sup>. If A/E or contractors are aware of any issues that may result in collapse or threaten the safety of the structure, when implementing the instruction of the local administration, then they shall raise their concerns to employer. In the event of any positive resolution of the concern, the contractor and A/E are entitled to suspend the works until the issues are resolved between employer and local administration. The rationale under the law, A/E or contractor shall not knowingly construct any unsafe structure.

### **2.3.4 Liability for Extension / Modification / Renovation Works**

This section reviews the decennial implication with regard to the decennial liability when modification, extension or renovation is carried to a structure within the 10 years after project completion. For example, if employer decides to construct one or more floor to the existing building (vertical extension), or extend the facility (horizontal extension), or carry out structural modifications and renovate buildings by engaging new A/E and contractor within ten year of DL period, or after the end of the tenth year, in such cases how will the DL be applied? The UAE court has established that the new A/E and contractor are liable, albeit the failure or defects is caused due the defect in the existing structure<sup>27</sup>.

---

<sup>26</sup> Murphy v Brentwood DC 4 (1991) 1 AC 398 (HL)

<sup>27</sup> Union Supreme court, 336 and 470/ 21 dated 20 March 2001 previously Union Supreme Court, 101,102 and 59/16 dated 28 June 1998



It is the duty of new A/E and contractor to ensure that the existing structures are stable enough to withstand the proposed extension, or modification or renovation works. Accordingly, new A/E and contractor will be held liable for any defect or collapse<sup>28</sup>.

If the above stated works are carried out within the DL period, under the general principle of the law, existing A/E and contractor will be relieved from joint and several liability under Article 880 to 883. Which is similar to, when the car is under the warranty and owner has taken the car to another garage to fix the problem, then warranty is then considered to be invalid. After which, if the owner pursues any claim under the warranty, then the dealer will argue that, the owner has allowed another technician to work on the car, so the warranty is broken and over<sup>29</sup>.

If extension, or modification, or renovation works are carried out after the end of the tenth year, that is after the guarantee period of the existing structure is completed, then under the DL provisions the legal guarantee period for the structure is ten years. After which the existing A/E and contractor will be automatically relieved from their obligations under the DL.

In the event A/E or contractor is terminated and employer appoints a new A/E or contractor, how will the DL be applied? Also, if the project is suspended for seven years and another A/E or contractor is appointed to complete the structure, in this scenario how will the DL be applied? By interpreting the court judgments, the new A/E and contractor can be held jointly liable, it is the duty of both to ensure the existing uncompleted structure is free from defects.

### **2.3.5 Subcontractor Works**

Whether subcontractor can be held liable under the provision of DL under UAE law, the answer is no straightway<sup>30</sup>. Because under the UAE law, employer cannot bring any claim whatsoever against subcontractor<sup>31</sup>, conversely main contractor will be held liable for the defects in

---

<sup>28</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 106

<sup>29</sup> <https://www.choice.com.au/transport/cars/maintenance/articles/car-warranties-and-dealer-servicing>, accessed on 07 October 2017

<sup>30</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 111

<sup>31</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 891.- A sub-contractor shall have no claim against the employer for anything due to him from the first contractor unless he has made an assignment to him against the employer.

subcontractor works<sup>32</sup>. Accordingly, main contractor is responsible for the works carried out by subcontractor, regardless of the type of subcontractor i.e., domestic or nominated. This shows, main contractor cannot escape from DL, for the works carried out by subcontractor. It is also important to note that DL is triggered by the contractual relationship and there is no contractual relationship between employer and subcontractor that is employer does not enter direct contact with subcontractor<sup>33</sup>. As a result, employer cannot bring the claim directly against subcontractor under the principle of privity of contract<sup>34</sup>. Also, the DL cannot be shifted automatically to subcontractor; for the reason that the Articles 880 to 883 govern the relationship between employer, contractor and A/E and does not govern subcontractor. Consequently, the DL under Articles 880 to 883 will not apply to subcontractor by default, as it applies for contractor and A/E. In other words, contractor and A/E may not pass the risk of DL down to subcontractor; therefore, they both are liable even if the defect was caused by subcontractor<sup>35</sup>.

The critics may argue this is unfair, because of how the strict liability which also intended to protect the public, mandatorily applies to main contractor and does not govern subcontractors. The rationale is main contractor and subcontractors are professional and specialized in construction. Furthermore, they are competent enough to agree, their own terms, conditions and allocation of risk. Whilst the employer is not specialist in construction, except real estate developers, government organization, industry, Oil & Gas Company, municipality, transportation authority etc., hence the purpose of Articles 880 to 883 is to protect and provide fair treatment to all employers. Furthermore, contractor may hire subcontractor for the structural works and try to pass their liability to subcontractors. To pass DL to subcontractor, the solution is express terms and conditions of DL, or including Articles 880 to 883 in subcontract, that is back to back terms for liability. In this case, DL can be shifted to subcontractor for their part of the works.

---

<sup>32</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 890.- (2) The first contractor shall remain liable as towards the employer.

<sup>33</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 108

<sup>34</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 250.- The effects of the contract shall extend to the contracting parties and their general successors without prejudice to the rules relating to inheritance, unless it appears from the contract or from the nature of the transaction or from the provisions of the law that the effects were not to extend to a general successor.

<sup>35</sup> Professor Ayman Masadeh. "Vicarious Performance and Privity in Construction Contracts" International Construction Law Review (ICLR), Volume 31, issue 1, p.110, accessed on 02 June 2017

In the event contractor is held liable for defective works of subcontractor, can the contractor sue subcontractor? The answer is yes. Under the UAE law, main contractor can bring the claim against subcontractor, if main contractor is held liable for the damages caused by subcontractor and in which main contractor has no part. However, main contractor shall prove the defects was due to the actions of subcontractor, the causation link of breach and damages suffered to be proved, so the burden of proof lies on the shoulder of contractor<sup>36</sup>. Albeit, it is proven that, due to the action of subcontractor the defects, or the collapse, has occurred and subcontractor has been held liable and subcontractor does not have money to compensate employer, or subcontractor has become insolvent, or subcontractor has disappeared, then main contractor will be held liable against employer. That is, main contractor has to pay the money to employer because of the joint liability and as per the UAE law the main contractor continues to be liable to employer<sup>37</sup>.

The question arises as to whether the employer can bring claim against subcontractor? The answer is no, even if the structure collapsed totally, employer cannot bring a claim against subcontractor, except if the subcontractor has breached the rule of law, because of privity of contract<sup>38</sup>. However, employer can demand collateral warranty from subcontractor, which can be enforced as unilateral act under the UAE law, which is one of source of obligation<sup>39,40</sup>. Eventually, contractor shall select the right subcontractor very carefully and if nominated subcontractor was not competent, then contractor shall object to the appointment of nominated subcontractor.

---

<sup>36</sup> Professor Ayman Masadeh. "Vicarious Performance and Privity in Construction Contracts" International Construction Law Review (ICLR), Volume 31, issue 1, p.110

<sup>37</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 890.- (2) The first contractor shall remain liable as towards the employer.

<sup>38</sup> UAE Civil Transaction Code, Law # 5 of 1985 Article 252.- A contract may not impose an obligation upon a third party but it may create a right in him.

<sup>39</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 124.- Personal obligations or rights shall arise out of dispositions, legal events and the law, and the sources of obligations shall be as follows:- 1. contracts; 2. unilateral acts; 3. acts causing harm (torts); 4. acts conferring a benefit; and 5. the law.

<sup>40</sup> Professor Ayman Masadeh. "Vicarious Performance and Privity in Construction Contracts" International Construction Law Review (ICLR), Volume 31, issue 1, p.111

### 2.3.6 Liability for Ground Conditions

*‘Article 880(2) The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises out of a defect in the land itself or that the employer consented to the construction of the defective buildings or installations.*<sup>41</sup>

The UAE law stipulates that A/E and contractor remain liable, notwithstanding the defect or collapse was caused entirely due to the poor ground conditions or settlement of subsurface. Is it the duty of the contractor to ensure that the ground condition is suitable for construction? The answer is yes, because under the DL contractor is jointly liable with A/E for the structural failure, albeit the ground conditions were inadequate, and employer has requested to construct the facility on the poor ground conditions<sup>42</sup>.

### 2.3.7 Liability Limited to Design

*‘Article 881.- If the work of the architect is restricted to making the plans to the exclusion of supervising the execution, he shall be liable only for defects in the plans.<sup>43</sup>*

Article 881 stipulates if employer engages architect, only for the design of the structure, then liability of architect is limited to defective design. If the architect is only involved in the design and has not supervised the works, then why the architect should be held responsible for the failure of construction supervisor to properly execute / implement the design and for faulty workmanship by contractor, which will add risk to architect who has no means of control. What will happen if architect was held liable for defective supervision and construction? Instead of designing correctly and to the required standards and in order to prevent a claim under the DL, architect may over-design (not economical) the structure more than is required, believing the structure will not fail, even if the contractor builds the structure with the poor workmanship or with inadequate supervision. Consequently, the cost of the construction will be more than required. Furthermore, the rationale is since the architect did not supervise the works and had no

---

<sup>41</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (2)

<sup>42</sup> Dubai Court of Cassation, 150/2007, dated 7 October 2017

<sup>43</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 881

idea whether the design was well implemented, and therefore architect cannot be held liable for supervision.

However, it is incumbent upon the architect to guarantee that the design is free from defects or any shortcomings, which are usually priced by the architect. In the event architect is also involved in the supervision of the construction, then there is additional risk for poor supervision, if architect, design and supervise the works, then architect has to ensure the quality of materials used are up to required standards and workmanship is of the standard expected, to avoid the issue of any joint liability.

### **2.3.8 Liability for Force Majeure**

What if defects or collapse occurred due to the effects of force majeure<sup>44</sup>, that is by natural calamities like earthquakes, hurricanes, volcanic eruptions, cyclones, all of which are described as an “act of god”<sup>45</sup> in legal terms, or due to extraordinary event like riots, wars, strikes, etc., These are considered as external forces, which are beyond the control of the parties<sup>46</sup> and do not trigger the DL<sup>47,48</sup>. Usually the A/E follows the design standard and designs the structure to the required earthquake resistance, as per the zone declared by the authorities. For example, A/E was contracted to construct the building to resist the earthquake zone 5 and the earthquake occurred with a magnitude of only zone 3 and the building collapsed. In this event whether employer can bring a claim against the A/E failing to design the building, which can withstand the stated magnitude or A/E is aware of the magnitude of earthquake where the building was constructed, nevertheless fails to design to the required standard and the building collapsed. The collapse was mainly due to either the fault in design to withstand the earthquake, or due to the use of inferior materials and no such defects or collapse could have occurred if the design was sufficient and good quality materials were used to the requisite standard. Whether A/E is liable for failing to design the building to require standard, or zone of earthquake, or the contractor is liable for using

---

<sup>44</sup> <https://www.contractstandards.com/public/clauses/force-majeure>, accessed on 01 September 2017

<sup>45</sup> <https://www.merriam-webster.com/dictionary/force%20majeure>, accessed on 01 September 2017

<sup>46</sup> Abu Dhabi Court of Cassation, 721/Judicial Year 3

<sup>47</sup> A Dimitracopoulos, ‘Design and Beware - Architect's liability under UAE Law’, September, Law Update 2004, 162, 18

<sup>48</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 878.- The contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of an event which could not have been prevented.

inferior materials and also for the A/E in not identifying the use of inferior materials. Yes, the employer can bring the claim against the A/E and Contractor this exhibits the causation link of the defects to the collapse to the structure.

### **2.3.9 Establishing / institutionalizing damages**

DL is a strict liability that means employer does not required to prove the negligence or recklessness of the contractor or A/E. It's not required to prove that contractor was negligent during the construction<sup>49</sup>, or A/E was negligent when designing the structure, employer has to prove only existence of structural or safety defects and loss suffered, that's it. Employer is not required to prove the existence of negligence<sup>50</sup>, because the parties owe a duty of purpose, which is to achieve the specific purpose not duty of care.

### **2.3.10 Duty of Purpose**

UAE Supreme Court, decision to achieve the result which exhibits the duty of purpose, not the duty of care<sup>51</sup>. That is the result of holding that obligation to achieve the result, so breach of such obligation is by simple proof of the result not being achieved, without being required to prove the effect.<sup>52</sup>

For example, the manufacturer of food for human consumption takes this risk, if the food manufacturer works by the book and applies the international standards, and nevertheless, produces food that is not suitable this provides that the food manufacturer is liable. This is on the basis that the buyer cannot make sure whether the food manufacturer was careful or negligent<sup>53</sup>.

---

<sup>49</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 878.- "The contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of an event which could not have been prevented."

<sup>50</sup> Justin Ede, Al Tamimi & Co, 'Decennial Liability in the UAE – a commentary', <http://www.tamimi.com/law-update-articles/decennial-liability-in-the-uae-a-commentary/>, accessed on 06 December 2017

<sup>51</sup> Union Supreme court, 336 and 407/Judicial Year 21, 20 March 2001

<sup>52</sup> The scope of designers liability under construction contracts, Construction dispute avoidance newsletter, number 34, December 2011

<sup>53</sup> Donoghue v. Stevenson (1932) A.C. 562

### 2.3.11 Causation Principle

*‘Article 878.- The contractor shall be liable for any loss or damage resulting from his act or work whether arising through his wrongful act or default or not, but he shall not be liable if it arises out of an event which could not have been prevented<sup>54</sup>’.*

Under the law of the UAE, to establish the liability under the contract, there should be evidence of breach of contract and such breach shall result in damages and existence of causation link between breach and damages suffered, shall be proved<sup>55</sup>. This implies the DL will only exist when the defect or collapse was caused due to the action of contractor, or A/E, otherwise not, that is the defect was established by causation principle<sup>56</sup>. If A/E and contractor managed to prove that the defect is caused by an external force and which is beyond their control, then they shall not be held liable.

In the case of the liabilities of A/E, contractor can be negated only by proving the break of causal link of the causation chain, otherwise they are held liable. So, defendant has to prove that the existence of third party, or external event, has caused such event and the causation was broken, otherwise the defendant will be held liable<sup>57</sup>. Contractor or A/E can claim the defects were not due to their act, or wrongful act, or default. However, A/E and contractor cannot argue or defend by stating the design and the construction were carried out by implementing required standards and in accordance with specification and conditions of contract, nonetheless and unfortunately the structure collapsed<sup>58</sup>.

In the case of more than one cause that is, breach by two or more parties, or for multiple breach, the “but for” rule will be applied<sup>59</sup> the loss could not have occurred but for the breach, that is defect, damages (loss) and causation link<sup>60</sup>. The judges will assess which cause was the predominant factor and the party responsible for such cause will be held liable. If the action of

<sup>54</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 878

<sup>55</sup> F Attia, Al Tamimi & Co, ‘Can We Really Limit Liability?’, Law Update 2012, 254, 3

<sup>56</sup> <https://www.icbcclaiminfo.com/node/153>

<sup>57</sup> Abu Dhabi Court of Cassation, 721/Judicial Year 3

<sup>58</sup> Union Supreme Court, 125/Judicial Year 1, 2007

<sup>59</sup> <http://e-lawresources.co.uk/Causation.php>, accessed on 08 September 2017

<sup>60</sup> [https://uk.practicallaw.thomsonreuters.com/4-107-5865?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-107-5865?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

employer has caused the defect, then employer is liable for such defect under the principle of causation link, because the causation link is broken. For example, after the delivery of the building, the defect has occurred due the action of maintenance contractor engaged by employer, then contractor and A/E will rely on the causation principle and argue that the cause of defect was not due to the fault in design, or poor workmanship, rather due to the improper maintenance works, for which they cannot be held liable.

## **2.4 Ownership of Liability**

*‘Article 880(1) ... they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, ...’<sup>61</sup>*

### **2.4.1 Joint Liability**

The DL is a joint liability the whole purpose is to combine the two entities under one liability, so that it provides convenience for employer. It does not mean ultimately both A/E and contractor will be liable it is up to the judge to apportion the liability between them, or just one of them if liable. Since it is joint liability, both of them are required to act as a guarantor to the other. If A/E cease to exist, then the contractor will be completely liable, even if the defect was in design, which is a very important point to note.

A/E and contractor are jointly liable for defective construction, regardless of whether the defect in structure was caused due to defective design, or defective workmanship. That is A/E will be liable for the fault of contractor, similarly contractor will be held liable for the fault of A/E, but both can shift their liability. However, as far as employer is concerned both will be jointly liable. How they distribute their liability is none of the employer’s business. From the point of a critic this may be unfair and raise the question how A/E can be held liable for defective construction and likewise how contractor can be held liable for defective design? The joint liability does not mean both have to compensate the employer, there may be no fault in design and supervision,

---

<sup>61</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (1)



perhaps pure construction has caused a defect. From the employer's side, employer is protected well. Employer will sue both of them under the DL, it is up to A/E and contractor to prove that, the defect was not due their fault<sup>62</sup>. Employer will be compensated for the losses caused due to defective construction and it is imposed by the law and part of public policy. When the law states jointly liable, it's for a reason, the rationale is DL is not only intended to protect employer but the whole public against structural and safety defects<sup>63</sup>.

In some exceptional projects the architects designing the works are not supervising the construction. The employer appoints another engineer for only supervising the construction. There is misapprehension among the construction professional, that the supervision engineer cannot be held liable under DL. However, the position of the law is contrary to this held view the supervision engineer can be held liable jointly with architect and contractor, which is implied by law<sup>64</sup>. It is the responsibility of supervision engineer to examine the design and to ensure that the design is proper and constructible, also during the supervision of the construction the supervision engineer has to ensure that the project is constructed using quality materials and to required standards.

#### **2.4.2 The apportionment of liability**

The employer can commence any legal actions for partial or total collapse and for any major defect that affects the stability, or the safety of the structure, against both the A/E and contractor, without deciding whether the defect is due to the fault in design or due to poor workmanship. That is employer just has to prove the existence of the damages/defect and it is left to the parties to defend their position.

At the end of day, employer will be compensated either by contractor, or A/E. It is up to A/E and contractor to submit their evidence against each other to the courts, the presiding judge will ask the parties to either share the liability equally, or proportionally, or the party who is considered to be at fault. So what will happen if one of the parties goes insolvent or ceases to trade, or absconds, in the example of the contractor manages to prove that, it wasn't defective

---

<sup>62</sup> Union Supreme court, 125/Judicial Year 1, 2007

<sup>63</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 103

<sup>64</sup> <https://globalarbitrationreview.com/jurisdiction/1004553/united-arab-emirates>, accessed on 18 March 2018

workmanship or defect materials that caused the defect in the structure, rather it was due to poor supervision or design that has caused the defect to the structure (which wasn't easy to spot during the construction, noting this earlier point), so the contractor is not liable. Well in such cases will contractor act as guarantor to A/E, the answer is yes. Albeit, contractor was ultimately not at fault, the contractor will still be held liable, because of the joint liability. This exhibits the risk of insolvent or disappearance of any one party is not that of employer, because employer is protected by the DL. This is one of key benefits of the DL it provides the better protection to employer.

### **2.4.3 Exemption or limitation of liability**

*'Article 882.- Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void.'*<sup>65</sup>

Under the UAE law the DL is mandatory, joint and several liabilities, notwithstanding the parties never agreed to be jointly liable. It is an exceptional liability imposed by the supremacy of the law, against the will of the parties, totally opposite to autonomy and freedom of contract<sup>66</sup>. The rationale is that articles 880 to 883 endeavor to protect employer and the public. DL is matter of public policy; therefore, any agreement purporting to relieve or limit the liability shall be set aside that is, such agreement is invalid under the law<sup>67</sup>.

## **2.5 Compensation**

*'Article 880(1) ... they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, ...'*<sup>68</sup>

---

<sup>65</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 882

<sup>66</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 103

<sup>67</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 882.- Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void."

<sup>68</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (1)

### **2.5.1 Jointly Liable for Compensation**

The Article 880 (1) stipulates A/E and contractor are jointly liable for compensating employer, for their fault. That is, if proved the defect was caused due to the action of any one of them, and the party that caused the defect will pay the compensation, or if the actions of both of them caused the defect, then they both have to pay the compensation. If the party who has to pay compensation does not have money to pay what will happen? For example, if contractor has managed to prove, the defect, or collapse was caused due to the defective design and A/E was held liable and the judge order A/E to pay the damages. A/E either does not have the money to pay or has gone insolvent or disappeared from UAE, so the employer will not be compensated<sup>69</sup>? Probably not, since the DL is joint and severally liable and contractor albeit not at fault and not contributed to the cause of the defect nevertheless, has to pay the compensation to employer<sup>70</sup>. The critics may argue that this is unfair, why the innocent party should bear the damages of the party at fault. Rationality is the essence of the DL, it is a joint and several liabilities that are both parties are mutually guaranteeing each other to compensate employer, which they accept from the outset. Employer is well protected this is another key advantage of the DL under UAE law.

### **2.5.2 Scope of Compensation**

Generally, under the law there is no over compensation or under compensation, always actual losses are compensated, in other words, scope of compensation is linked to the actual loss suffered<sup>71</sup>. Accordingly, the compensation under the DL is total actual losses suffered by employer. While determining compensation the severity of the fault, the size of damages, losses suffered are taken in to account and major damages can be total or partial collapse of the structure and or defects threatening the stability or safety of the structure<sup>72</sup>.

If the building collapsed totally, then compensation will be cost of rebuilding and in the case of partial collapse, if the structure can be reinstated then the cost of reinstatement will be paid as

---

<sup>69</sup> M Grimmitt, 'Uncertainty in the Application of UAE Laws, Tales Of The Unexpected: Where Liability Lurks Unseen', , Pinsent Masons, available at <http://kluwerconstructionblog.com/2009/11/03/tales-of-the-unexpected-where-liability-lurks-unseen/>

<sup>70</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 103

<sup>71</sup> <https://en.wikipedia.org/wiki/Damages>

<sup>72</sup> Abu Dhabi Court of Cassation, 721/Judicial Year 3

compensation and if the structure cannot be reinstated then the cost of rebuilding will be paid. If the defect has occurred and employer ends up repairing the structure, then the actual cost of repairing will be paid, including any other cost suffered by employer<sup>73</sup>.

The Union Court of UAE stipulated, the damages suffered including loss of profit shall be compensated under Article 880 to 883<sup>74</sup>, it shows the damages paid under the DL includes for loss of profit. Loss of profit is sometimes confusing, loss of profit is consequential loss, whether the loss of profit is caused by defects, the law allows the damages that are naturally resulting from such kind of defects<sup>75</sup>. Loss of opportunity suffered by employer in a muqawala contract in the exploitation and enjoyment of his building by unjustified non-performance of the parties, which explicate the loss of opportunity is equal to loss of profit, it is same in other words as to a lost opportunity to generate the profit. For example, if a hotel has suffered defects and repairing works are under progress and employer has missed the season, in which the hotel could have made money, is also included as a claim for loss of profit. This demonstrates the employer will be brought back to the same position, before the instance of the damage or defect occurred. The damage will be actual cost and consequential loss, defamation of employer's brand and liability towards third party. This has the potential for A/E or contractor to become insolvent when resolving the claim.

It is important to note, even if the breach is proved and there is no loss suffered, then the DL cannot be raised or applied, also other liabilities cannot be applied, because of the causation principle.

No compensation will be paid if the claim was pursued after three years from date employer became aware or ought to be aware of the defects or collapse of the structure<sup>76</sup>.

---

<sup>73</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 108

<sup>74</sup> Union Supreme court, 125/Judicial Year 1, 2007

<sup>75</sup> <https://www.lexology.com/library/detail.aspx?g=e5c5dd4d-e8df-42d0-ada8-3dfe3a14b508>

<sup>76</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 883.- No claim for compensation shall be heard after the expiration of three years from the collapse or the discovery of the defect.

### 2.5.3 Limiting the scope of compensation

#### *Article 390.-*

*‘(1) The contracting parties may fix the amount of compensation in advance by making a provision therefore in the contract or in a subsequent agreement, subject to the provisions of the law’.*<sup>77</sup>

*‘(2) The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void’.*<sup>78</sup>

Under the provision of the DL, the liability of A/E and contractor, for the major defects is unlimited, therefore the liability under Articles 880 to 883 cannot be limited or capped, for example employer and contractor or A/E cannot agree to cap the liability, say up to 10% of overall value of the project as compensation for DL, such agreement will also be nullified, when the DL is triggered. It is important to note the agreement of capping or limiting the DL will not help the parties. This implies compensation for DL cannot be limited, this explicates any other liability can be limited. However, any liability based on the tort cannot be limited. Also, DL cannot be limited, because the DL is a contractual liability imposed by the law.

Article 390<sup>79</sup> allows the parties to limit their liability or damages; however, the judge will be able to change the agreed damages in case the other party proves the suffered damages are more than the agreed damages. Article 882<sup>80</sup> makes it clear that in case of DL there is no limitation of liability. It is another benefit for employer under the DL.

---

<sup>77</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 390 .- (1)

<sup>78</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 390 .- (2)

<sup>79</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 390.- (1) The contracting parties may fix the amount of compensation in advance by making a provision there for in the contract or in a subsequent agreement, subject to the provisions of the law. (2) The judge may in all cases, upon the application of either of the parties, vary such agreement so as to make the compensation equal to the loss, and any agreement to the contrary shall be void.

<sup>80</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 883.- No claim for compensation shall be heard after the expiration of three years from the collapse or the discovery of the defect.

## 2.5.4 Settlement

Can the parties agree the damages after the occurrence of the defects? The answer is yes; they can agree and this will not be taken as limiting or capping the liability, the agreed damages will be considered as settlement after the loss has occurred, the judge will not change it because it is not agreed damages, and it is settlement for the losses suffered.

## 2.5.5 Decennial Liability Insurance

Insurance is a method of shifting the risk, A/E and contractor can be relieved from the liability by DL insurance, in other words, DL can be shifted to third party (insurer) by insurance. DL insurance is mandatory under French law<sup>8182</sup>. The best person to purchase the DL insurance is A/E and or contractor, because it is their liability and they want to shift their liability to the insurer against the premium<sup>83</sup>, consequently this will reduce their profit or may increase cost of the project, since they have to include the cost of the insurance in their price. Generally, the DL insurance will cost up to 2% to 3% of the project cost<sup>84</sup>. However, if the structure has been insured for DL, then the insurer will employ another expert to monitor the works of A/E and contractor that is the contractor cannot cover any works without the expert inspection, which means the insurer are now supervising the works and acting as supervising A/E and contractors. Usually the insurance company insures the risks based on the probability, if they have to insure the risk which is under the control of another party, that is A/E and or contractor, then the insurer may not leave them alone, otherwise both parties may be careless. Therefore, insurer will also make sure that the structure is safe and supervise both parties, which creates problem for the parties, it may also affect the time for completion and increase the costs of the project. Can the employer purchase the DL insurance? Yes, employer can buy the insurance, but employer has to distinguish between whether the insurance is for defective construction, or for DL. If the building appears to be defective, then for the rectification of the structure, employer can buy the insurance

---

<sup>81</sup> C Palmer, 'Decennial Liability : A Potential Time Bomb for U.S Design Professionals' available at [https://www.beazley.com/documents/architects%20and%20engineers/risk%20insights/insight\\_decennial\\_liability.pdf](https://www.beazley.com/documents/architects%20and%20engineers/risk%20insights/insight_decennial_liability.pdf)

<sup>82</sup> <https://www.ffa-assurance.fr/en/content/decennial-liability-insurance-france-0>

<sup>83</sup> Kamal Hafez Property & Construction, 'Managing the Risk of Decennial Liability', Law Update, 2011, 244, 61

<sup>84</sup> [https://www.french-property.com/news/build\\_renovation\\_france/architect\\_fees\\_contract/](https://www.french-property.com/news/build_renovation_france/architect_fees_contract/)

there is a difference between DL insurance and insurance for rectification of defects in the building. Even if employer purchases the insurance, insurer may sue A/E and contractor under the subrogation clause. DL insurance purchased by employer does not mean A/E and contractor are relieved. There is no detail of available DL Insurance in UAE.

## 2.6 Period

*‘Article 880(1) .... they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.*<sup>85</sup>

*‘Article 880 (3).- The period of ten years shall commence as from the time of delivery of the work.’<sup>86</sup>*

### 2.6.1 Joint Liability for Decade

Under the Law of the UAE, contractor and A/E have to guarantee to the employer that the works carried out by them are free from structural and safety defects, for the period of ten year and this period of guarantee is called the DL period. Whilst DL also introduces the concept of joint liability for a period of ten years, it is called DL because it lasts for a decade (ten years). The word DL is a phrase in law and by scholarly writing. The parties should not, be carried away or tricked by the word “liability for decade”

The whole purpose of the DL is to oblige both, A/E and contractor to be jointly liable despite their own will, where they never agreed to be jointly liable, nevertheless they are jointly liable under the UAE law and for ten years, the parties can mutually agree to extend the period of liability beyond ten years. The Parties cannot agree to reduce (shrink) / limit the period of DL, unless the life cycle of project is less than ten years or temporary structure with a planned life

---

<sup>85</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (1)

<sup>86</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (3)

cycle period of less than ten years, say for a temporary facility. For example, if the intended life cycle period of a structure is say only three years then the DL is only applicable for three years, even though the structure may be in operation for longer period.

### **2.6.2 Liability Period**

As per Article 880 (3) of UAE law, the period of DL is triggered from date of delivery of works<sup>87</sup>. However, in practice, once the facility is substantially completed and ready to be taken over or put in to use, commonly employer will issue a Taking over Certificate (TOC), to contractor and A/E, the term TOC is widely used in the UAE construction industry.

Whether the TOC is valid under the law or not? The general perception is TOC is valid under the UAE law until the parties do not contradict it. Whilst, if any of the parties legally challenges the date on which the DL is triggered, the question arises whether the judge will consider the date of TOC issued or actual date of major construction works completed. Prior to answering this question, the law should be studied again, as to whether the law stipulates the requirement for a TOC? The answer is no, the law does not stipulate that a TOC be issued, instead the law calls for delivery of works or facility, therefore it is most likely the judge will not be aware of the term TOC and will consider the terms as prescribed in the law and the law specify the term “delivery”. How does delivery differ from the TOC? Well delivery means substantial completion of the works that will allow the employer to put the facility or project in use safely, and without any major pending construction works.

In the event a TOC is issued and there are major works still pending, which are related to the structure, is there any probability of a structural defect? Yes, because since the structure is not completed and the construction is ongoing there is chance of structural defects to occur. Furthermore, the DL will not be triggered without the facility being ready and shall be used safely by employer. Even it is ready to use and the employer starts using the facility, if there are still structural works ongoing somewhere, then the period of DL is not triggered. Most likely, the court will start to calculate the ten year from the time when the structure is fully completed and ready to use safely, provided that the TOC is issued. This is important to remember, because

---

<sup>87</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (3)



generally the contractors presume that once the TOC is issued the period of DL along with the DNP has commenced.

Besides, how the DL will apply to the structure or facilities, handed on part or sections, for example if there are three sections in a project and each section was taken over by employer at three different dates. So how will the DL period be applied, either from date of issuance of first TOC, or from date of last TOC, or from the date on which each part or section is taken over. The answer is, for each part or section the DL period, will be applied separately from the date on which that part or section is taken over by employer. For example, during the construction of a road, tunnel and bridge, if contractor opens part of the road temporarily for traffic, the question arises as to whether the period of DL is triggered for that part or not? By applying the above principle, it is obvious that if the road is opened for temporary diversion, then it is considered as traffic management for completion of the works, therefore the DL is not triggered. However, if employer request contractor to open lanes, or one part of the bridge, or the tunnel for traffic, or contractor handed over the lane, or one part of the road, or bridge, or the tunnel to employer and employer open up for the permanent traffic, then the period of DL is triggered. Notwithstanding that the employer has not issued the TOC to contractor. This demonstrates as soon the facility is allowed to be used, or occupied by employer, or his beneficiary, then the period of the DL is triggered. This resembles the provisions in the FIDIC contract, which stipulates that, in the event employer utilizes, or occupies any part of the works, then that part of the works is deemed to be taken over by employer<sup>88</sup>, who has beneficial use.

It is important to note the DL under Articles 880 to 883 will not be applied for the structural defect or collapse for the project under construction. Because the DL is triggered after the delivery to employer, nonetheless other liabilities under the law shall apply.

### **2.6.3 Defects Notification Period and Decennial Liability Period**

The DL period will not affect the defects liability period (DLP), or defect notification period (DNP), which is generally one year from the date of the TOC. The DL period and DNP overlap

---

<sup>88</sup> FIDIC Sub-Clause 10.2 Taking Over Certificate, “... (a) the part which is used shall be deemed to have been taken over as from the date on which it is used. ...”

each other. The DNP is one year after handing over and covers major and minor defects. In other terms it is called a ‘maintenance period’, the period where contractor is fully in charge of maintaining everything. In practice, these periods are also used for completing minor defects or more commonly ‘snags’, in such conditions the DNP period is considered as part of the construction period. The snag lists are supposed to contain minor snag works, like fixing something, touchups etc., and not substantial matters. However, sometimes the reality is that certain items of major pending works are included in the snag list and nevertheless employer has issued the TOC. In the Government projects, the TOC should be approved by the committee in the ministry, so in order to assist contractor to receive the final payment and the first half of (50%) retention money, the major pending construction activities are included in the snag list, which is not advisable and could result in major risk. Perhaps, this might result in a dispute about when the DL period and DNP is triggered. Consequently, the employer may argue that the TOC was issued in order to assist contractor and contractor is aware of this, therefore contractor shall maintain the facility for one year from the date of actual completion and not based on the date of TOC issued and Contractor will argue that DNP and DL period are based on TOC date. Therefore, employer shall keep in mind about the importance of the date of the TOC. In the perspective of law, DL is public policy therefore the judge will consider the date of actual completion of major construction activities.

#### **2.6.4 Lapse of Time / Limitation Period**

*‘Article 883.- No claim for compensation shall be heard after the expiration of three years from the collapse or the discovery of the defect.’<sup>89</sup>*

#### **2.6.5 Time Limit for Claim**

Limitation period, or lapse of time period, is totally different from the DL period. The ten years of DL periods are a guarantee period, not the period of limitations. The limitation period or lapse of time to bring a claim under the DL is three years. Time when the defect or collapse has appeared, the lapse of period to bring claim is three years from the time of employer became aware or ought to become aware of the defects, or collapse of the structure, this is very similar to

---

<sup>89</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 883

limitations period in tort<sup>90</sup>, which is three years from time the plaintiff became aware or ought to have become aware of the tortious actions and tortfeasor.

Any claim for compensation under Articles 880 to 883 must commence within three years from date of collapse, or discovery of the defects. If the defect appears at the end of ten years, then employer has three years that is overall thirteen years, from which to bring the claim, which is counter to 15 years general limitation period under UAE law<sup>91</sup>. The limitation period is three years for each defect, that is, if there is defect no. 1 the limitation period for defect no.1 is 3 years from date it appeared and for defect no. 2, the limitation period is 3 years from date the defect no. 2 appeared.

The limitation period is three years from date the defects appears, or the collapse occurs, whichever is earlier. What if the defects may render to the collapse, whether employer has to bring the claim after the defects, or after the collapse, defects is enough to bring the claim, in the event employer is aware of the defects or if employer was not aware of the defects, then the claim can be pursued after the collapse. Once the defect has occurred, employer has to take some measure to prevent the collapse. However, if employer is aware of the defects occurrence and has not taken any remedial measures and as consequence the structure collapsed, whether the employer can pursue the claim? In this case, employer may lose the claim, or the damages suffered, because employer has not taken any necessary remedial measures to stop the collapse and waited for the collapse to occur. The limitation period of three years starts from the date of defects occurred not from the date of the collapse occurred<sup>92</sup>.

---

<sup>90</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 298.- (1) No claim for compensation arising out of a harmful act shall be heard after the expiration of three years from the day on which the victim became aware of the occurrence of the harm and of the identity of the person responsible for it.

<sup>91</sup> Justin Ede, Al Tamimi & Co, 'Decennial Liability in the UAE – a commentary'

<sup>92</sup> Al-Mulla Abdulaziz, Bremen James & Halliwell Simon. 'Decennial liability: the case for harmonization' Construction Law, Volume 7 issue 2, June 2012

Parties cannot agree to reduce the limitation period, because DL is the matter of public policy, so the parties cannot agree anything against it<sup>93</sup>. It is certain it is imposed against the will of the parties.

### 2.6.6 Liability Waiver

*‘Article 880(2) The said obligation to make compensation shall remain notwithstanding that the defect or collapse arises out of a defect in the land itself or that the employer consented to the construction of the defective buildings or installations.’<sup>94</sup>*

The Article 880 (2) demonstrates, if the defects or collapse occurred, even as the result of the employer consenting to construct the defective construction, it will not relieve contractor and A/E from the liability. That is the consent of employer will not be considered as a waiver.

Liability attached, notwithstanding employer approves the defective workmanship, this happens when the DL exists and is the main difference between the DL and other general liability under the law. Because DL is a strict liability under the UAE law and matter of public policy and cannot be contracted out or waived<sup>95</sup>. That is, employer does not have the power and or rights to waive the liability of contractor and A/E under the DL and it is implied on employer, A/E and contractor.

Even when defects are patent at the time of delivery, the DL still exist, so long as employer made certain reservations concerning these defects, this must explicate at the time of accepting the delivery of the facility. If there are any problems or defects which affect the DL, then employer shall make some reservation in accepting the delivery. If employer knowingly accepts the defective design or defective construction, can the contractor or A/E be held liable? As per the principle of “Caveat Emptor”, they are not liable, “Let the buyer beware”<sup>96</sup>. Nonetheless the court may ignore this principle in case of DL, because the DL is a matter of public policy. The

---

<sup>93</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 882.- Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void.

<sup>94</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880 .- (2)

<sup>95</sup> UAE Civil Transaction Code, Law # 5 of 1985, “Article 882.- Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void”

<sup>96</sup> <http://www.mnemonicdictionary.com/word/caveat%20emptor>, accessed on 18 August 2017

critics may argue this is unfair, however, in the perspective of the law all employers are not specialist in construction, except the major developers so the Articles 880 to 883 serve to protect and to treat all employers uniformly.

This suggests that contractor or A/E should not be carried away or tricked with the promise of employer “*does not matter just to go ahead with the faulty design and or poor workmanship*”. If it is matter of DL, the parties have two options: first option is either to suspend the works and apply for extension of time, it will be dealt with as a suspension or directed by A/E, consequently contractor will be compensated with extension of time and prolongation cost. In the event employer or A/E dispute the action of contractor, then this will lead to a dispute and referred to arbitration or court, then it is likely that the judgment will in the favour of contractor. The second option is to request a letter of indemnity from employer. How will the letter of indemnity function? If A/E or contractor is liable under the DL of UAE law, then employer shall indemnify contractor and or A/E from the liability, in so doing the employer cannot sue both parties. If employer sues the parties and as a result contractor and or A/E is held liable, then employer shall pay the damages of contractor and or A/E.

However, this option is not preferable. The question arises whether the indemnity letter is a true waiver of liability? Ultimately the letter of indemnity is waiver of liability<sup>97</sup>. However, it is important to note that a letter of indemnity only waives the civil liability, not the criminal liability<sup>98</sup>, because the criminal liability cannot be waived since it is matter of public policy. When the dome collapsed for the mosque project under construction at Sharjah<sup>99</sup>, staffs of contractor and A/E were imprisoned, with one sentence to 15 years jail term handed out. But the best way to deal with the DL is contractor shall not carry out any works, which shall affect the stability or the safety of the structure. If contractor carries out the works with indemnity letter and result with defective construction, employer may not sue contractor because of the indemnity letter’ However, contractor may face consequential loss, as the reputation of contractor is at stake, it may also be that other developers do not engage contractor, the banks and insurance may

---

<sup>97</sup> <https://lawpath.com.au/blog/what-is-a-liability-waiver-form>, accessed on 25 August 2017

<sup>98</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 297.- Civil liability shall be without prejudice to criminal liability provided that the elements of criminal liability are present, and no criminal penalty shall limit the scope of the civil liability or the assessment of the compensation.

<sup>99</sup> <http://gulfnews.com/news/uae/emergencies/structure-collapses-in-the-abu-shagara-area-of-sharjah-1.513163>

hesitate to deal with or provide coverage to contractor. Also, if employer provides letter of indemnity to contractor and A/E, once the structure is collapsed, and the expert finds out the experienced contractor or A/E could have forecasted such structural defects could lead to the collapse of the building, perhaps the court may not entirely relieve them of their obligations.

### **2.6.7 Unforeseeable events and judicial actions**

During the limitation period, if any unforeseeable events prevent employer to bring the claim, or approaching the court, then these periods will not be counted. Suppose, due to the judicial action and unforeseen events like riots, war, or natural disaster, exist for three months, then these three months will not be counted to three years of limitations periods and three years period will be extended by three months because of the unforeseeable event<sup>100</sup>. Furthermore, Article 484 puts the lapse period to an end, when employer makes any judicial action to claim for his rights. In this case, there will be a new limitation period for the same right<sup>101</sup>. However, when it comes to ten years guarantee period this will not apply, there is nothing called the unforeseeable event will stop the ten-year period running, so ten years guarantee period will be keep running because it is only a guarantee period.

### **2.7 Privity of contract and "decennial liability"**

Under the principle of privity of contract<sup>102</sup>, only the parties to the contract can sue on it<sup>103</sup> and a third party cannot bring a claim<sup>104</sup>. Subsequent buyers do not have direct contract with contractor and A/E and vice versa. The question arises as to whether subsequent buyer of the building or apartment can bring the claim against contractor and A/E under the DL? In order to answer this question, Article 880, should be studied carefully and it appears that the article applies to the

---

<sup>100</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 481.- (1) The running of time for prescription shall be suspended if there is a lawful excuse whereby the claim for the right could not be made. (2) The period during which that excuse subsisted shall not be taken into account in the prescription period.

<sup>101</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 484.- The prescription period shall be interrupted upon a judicial claim being made or by any judicial proceeding being taken by an obligee to enforce his right.

<sup>102</sup> [https://www.designingbuildings.co.uk/wiki/Privity\\_of\\_contract](https://www.designingbuildings.co.uk/wiki/Privity_of_contract)

<sup>103</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 250.- The effects of the contract shall extend to the contracting parties and their general successors without prejudice to the rules relating to inheritance, unless it appears from the contract or from the nature of the transaction or from the provisions of the law that the effects were not to extend to a general successor.

<sup>104</sup> UAE Civil Transaction Code, Law # 5 of 1985 Article 252.- A contract may not impose an obligation upon a third party but it may create a right in him.

contract between employer (the owner) and contractor and A/E, but in certain cases the owner may be person other than the employer. Article 880 governs the relationship between employer / owner and contractor and A/E, so in general subsequent buyer cannot sue contractor and A/E<sup>105</sup>. However, there are four theories about this subject matter, which are explained in detailed.

### **2.7.1 Scholar (Interpretation) Theory**

Some scholars have expressed their view about Article 880 in regard to the rights of subsequent buyer. Since the DL is a matter of public policy so any owner whether there is contractual relationship between subsequent buyer and contractor and A/E or not, they can benefit from the DL and bring the claim against contractor and A/E. This may be good in theory, but this is a weak argument, because the DL was triggered by the contract (the DL is contractual liability but imposed by the law) and under the Privity of Contract principle, the contract is made between employer and contractor and A/E, basically only employer can sue contractor<sup>106</sup>. What if employer (owner) has not suffered the loss and loss was suffered by the subsequent buyer, also in the case of employer has sold the building to a subsequent buyer and the subsequent buyer has sold it to another buyer. Now we have end user, can the end user sue contractor and A/E under the DL? These questions remain unanswered at this time.

### **2.7.2 The Warranty**

The employer shall request contractor to issue an open warranty to the ultimate user that is the beneficiary. The warranties are commonly used in UK, nowadays contractors are required to issue warranties not to employer, because they have privity principle<sup>107</sup>, same as the civil law. The warranty can be enforced as a unilateral act, as per the UAE Civil Transaction Code warranty<sup>108</sup>. A warranty does not establish a parallel contract between subsequent buyer and contractor, A/E<sup>109</sup>. The subsequent owner may benefit from contractor's warranty issued in

---

<sup>105</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 109

<sup>106</sup> [https://www.designingbuildings.co.uk/wiki/Privity\\_of\\_contract](https://www.designingbuildings.co.uk/wiki/Privity_of_contract)

<sup>107</sup> [https://www.designingbuildings.co.uk/wiki/Privity\\_of\\_contract](https://www.designingbuildings.co.uk/wiki/Privity_of_contract)

<sup>108</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 124.- Personal obligations or rights shall arise out of dispositions, legal events and the law, and the sources of obligations shall be as follows:- 1. contracts; 2. unilateral acts; 3. acts causing harm (torts); 4. acts conferring a benefit; and 5. the law.

<sup>109</sup> Professor Ayman Masadeh. "Vicarious Performance and Privity in Construction Contracts"

favour of subsequent owners<sup>110 111</sup>. Consequently, contractor is not only liable to employer but to subsequent user<sup>112</sup>.

Furthermore, contractor shall ensure the materials warranties are extended to employer and warranty shall expressly state the warranty is for employer, or his beneficiaries. The Contract is used for extending these warranties.

### **2.7.3 Third Party Contract**

What about the contract made in favour of third party? In UK the Contract (Third Party Rights Act 1999), act applies to a contract made for the third party and the benefits will go directly to the third party<sup>113</sup>. When the construction contract was made, expressly mentioning the intended third party in the contract, so that the benefits will not be passed to employer, however, the benefits will be passed to the third party<sup>114</sup>.

If the owners of say a villa, are known before making the construction contracts and the name of the owner is mentioned in the construction contract, and the owner will receive directly the villa from contractor, then the DL will apply. The Owner can sue contractor for any defects under the DL. That is the intended third party is known, and this party can sue contractor directly under DL, for the defects and collapse of the structure. Otherwise only employer can sue the contractor.

---

<sup>110</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 276.- It shall be permissible for a disposition to take place through the unilateral intention of the disponor without depending on the acceptance of the disponent unless a third party becomes obligated in any respect as laid down in the law, provided that there is no provision in the law to the contrary.

<sup>111</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 278.- If the elements and conditions of a unilateral disposition are satisfied, it shall not be permissible for the disponor to resile from it, unless the law provides to the contrary.

<sup>112</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 276.- It shall be permissible for a disposition to take place through the unilateral intention of the disponor without depending on the acceptance of the disponent unless a third party becomes obligated in any respect as laid down in the law, provided that there is no provision in the law to the contrary.

<sup>113</sup> Contracts (Rights of Third Parties) Act 1999

<sup>114</sup> <http://www.mondaq.com/uk/x/10530/Year+2000/Contracts+Rights+Of+Third+Parties+Act+1999>



## **2.7.4 Legal Warranty**

Under the law, legal warranties are attached to premise<sup>115</sup>. If a product produced by a manufacturer, and end user is buyer, or a person received the product as gift, can the end user sue the manufacture for the defective quality? The answer is yes, if product is defective, because under the law product quality is not linked to the buyer. However, quality is linked to product itself and passes on with the product<sup>116</sup>. So, by analogy, this principle can be applied to the construction.

Out of these four theories, the warranty and contracts made in favour of a third party are the strongest, and the others weaker. These two strong theories are based on conditions that, the requirements of the warranty are satisfied, or the intended third-party name is expressly mentioned in the contract. In comparing the other theories to warranty and contract made for third party, the other theories have not been tested in the court, they are still just theories. How the court will interpret these theories is still unknown. Therefore, it is advisable to include the express conditions for warranty in the construction contract.

## **2.8 Constraints / Limitations and Amendments**

### **2.8.1 Dubai Law No. (27) of 2007**

Under UAE law, the liability period between developer and buyer for defect is only 6 months from the date of receiving the property<sup>117</sup>. The defects liability period under UAE law does not distinguish between real estate, computer and movables etc., In order to overcome this concern, the Government of Dubai enacted a Local Law No. 27 of 2007, for Jointly Owned Real Property, this law holds the developer liable for the structural and safety of the building, for a period of ten years from the date of completion of the building<sup>118</sup>, not from date of delivering the building to

---

<sup>115</sup> <https://www.educaloi.qc.ca/en/capsules/legal-warranty-automatic-protection-consumers>

<sup>116</sup> <https://www.educaloi.qc.ca/en/capsules/legal-warranty-automatic-protection-consumers>

<sup>117</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 555.- (1) A claim of liability for a defect shall become time barred upon the expiration of six months from receipt of the property unless the seller has undertaken to be responsible for a longer period.

<sup>118</sup> Law No. (27) of 2007 “Article (26) 1. Subject to the provisions of Federal Law No. (5) of 1985 Issuing the Civil Code related to construction contracts, the developer will remain liable, for ten (10) years from the date of the

subsequent buyer. If a buyer has purchased the apartment after four years, this means the developer is liable only for the remaining six-year period. The rationale is, within the first ten years the developer can shift the liability to A/E and contractor, after ten-year developer will not be in a position to shift the liability. Furthermore, developer is liable for repairing and replacing the defective electromechanical installation for one year<sup>119</sup>. It is very important to note, this law is mandatory for all Jointly Owned Real Property and any agreement purporting to limit, or exempt this law shall be invalid, which is similar to DL under UAE Federal Law<sup>120</sup>. The Dubai law is applicable only to Jointly Owned Real Property, not for other type of property, building, structure etc.

In the event of occurrence of structural defect, or collapse of building, subsequent buyer can pursue the claim against developer under this law and then developer will pursue the claim against A/E and/or contractor, under Articles 880 to 883, since the loss shifts from subsequent buyer to developer. If developer was not sued by subsequent buyer, then developer cannot sue contractor, even if the developer has managed to prove the cause of the defects. Subsequently, the judge will ask developer to prove the loss suffered, as the compensation shall be equal to actual loss suffered. In this case, developer may face difficulty in proving the loss suffered, because subsequent buyer, who has suffered the loss has not brought any claim against developer. Therefore, it is important that subsequent buyer has to sue developer, which allows developer to sue contractor and or A/E under DL, in other words the liability will reach developer and will be shifted to contractor and or A/E. By this way, the Government of Dubai has protected subsequent buyer and indirectly allowed to bring the claim under the DL.

The property buyer has to remember this law only exists in the Emirate of Dubai and is not applicable to other Emirates. Therefore, they shall be careful when they are purchasing the property in other Emirates perhaps buyer can request developer to include these provisions in

---

completion certificate for the project developed by him, to repair or remedy any defects in the structural components of the Jointly Owned Real Property of which he is notified by the Owners Association or any Unit Owner.”

<sup>119</sup> Law No. (27) of 2007 “Article (26) 2. The Developer will remain liable, for one (1) year from the date of the completion certificate for the project or part of the project developed by him, to repair or replace defective installations in the Jointly Owned Real Property. For the purpose of this Article, such installations include the mechanical and electrical works, sanitary and plumbing installations and similar installations.

<sup>120</sup> Law No. (27) of 2007 “Article (26) 4. Any agreement that contradicts the provisions of this Article and concluded after this Law comes into force will be deemed void.”

their contract. This law does not contradict the over-arching UAE Federal Law, it is just an extension to guarantee period stated in the UAE law.

### **2.8.2 No joint and Several Liability**

Articles 880 to 883 demonstrate that DL is a legal guarantee against the contractual breach. In order to pursue the claim under DL, certain conditions need to be fulfilled, like there should be contractual relationship between the parties and furthermore, A/E has to design and supervise the construction and contractor should construct under the supervision of A/E. If these requirements are not fulfilled, then employer loses the protection under the DL, that is no joint and several liability under the law. If there is no DL does not mean, there is no liability under the law.

Sometimes, designs are imported and stamped by local A/E and after some time the local A/E may have disappeared. In some projects, after the municipality approval, the local A/E will be relieved from the project. Also, the A/E may hire a sub A/E all these complications are in the construction industry. So, there may be a situation unfortunately there is no DL, due to non-fulfillment of requirements under the Articles 880 to 883. Does this mean A/E and contractor do not have any liability that is the parties that designed, supervised and constructed the defective structure escape from the liability say if a tower of 100 storey fell down? Of course not, the only thing is, in all the above cases, employer may lose the right to the DL. Nevertheless, the claim can be pursued against the parties. However, if employer chooses to sue contractor, then it should be proved that the cause is due to defective workmanship, or usage of defective materials. If employer chooses to sue engineer, then employer shall prove that the cause was due to inadequate supervision and if engineer has designed the structure, then defect in the design is to be proved. Whilst if employer choose to sue all the parties under one case then employer should prove several things against each party. But if the DL exists then employer has peace of mind, under DL employer has to only prove existence of a structural defect that's it and whereas the collapse of a structure is easy to prove, by the very act itself. Consequently, it is now left to A/E and contractor to defend themselves, the DL helps employer greatly.

Moreover, if employer loses the period of ten years to bring the claim, then employer has to rely on contract or customs. Besides DL, UAE law does not specify the period for structural and safety defect liabilities. The one year of DNP is a maintenance liability period only.

### **2.8.3 Express Terms in Construction Contracts**

DL is mandatory under UAE law, whether the contract expressly states it or not, sometimes the question arises as to why should the Articles 880 to 883 be included in construction contracts? The answer is: first point for clarity, second point is DL is an exceptional liability it is a joint liability, despite the will of the parties. In the event employer is sure the DL will not apply, due to the method of procuring the project, or in case of uncertainty, whether the DL will apply or not, then the best solution is to include express provisions of DL in all contracts of the project. That is, in the design consultancy contract (architect), supervision consultancy contract (engineer) and construction contract (contractor). Because contract between employer and contractor will only binds employer and contractor not A/E.

Even when the parties use the standard form of contract, the Articles 880 to 883 can be included in the particular conditions. By this way, the employer can be protected and hold A/E and contractor jointly liable. The term protection means shifting of risk, the more protection means more shifting of the risks, shifting the risk results in higher cost of construction. Contract is primarily used for the allocation of risk<sup>121</sup>. The drafter of the contract shall ensure that the intended risk protections are achieved and sit with the right party equipped to carry such risk. DL is hardly seen in bespoke contracts and of course, not in FIDIC, which is widely used in the UAE. Since DL is a civil law concept, when adopting the FIDIC standard contract, contract drafter should remember that whilst FIDIC is widely used in civil law countries<sup>122</sup>, the standard FIDIC contracts are drafted based on the concept of common law<sup>123</sup>.

---

<sup>121</sup> <https://www.pmi.org/learning/library/construction-contracts-risk-allocation-1025>

<sup>122</sup> <http://www.dr-hoek.de/EN/beitrag.asp?t=Germans-Fit-For-FIDIC>

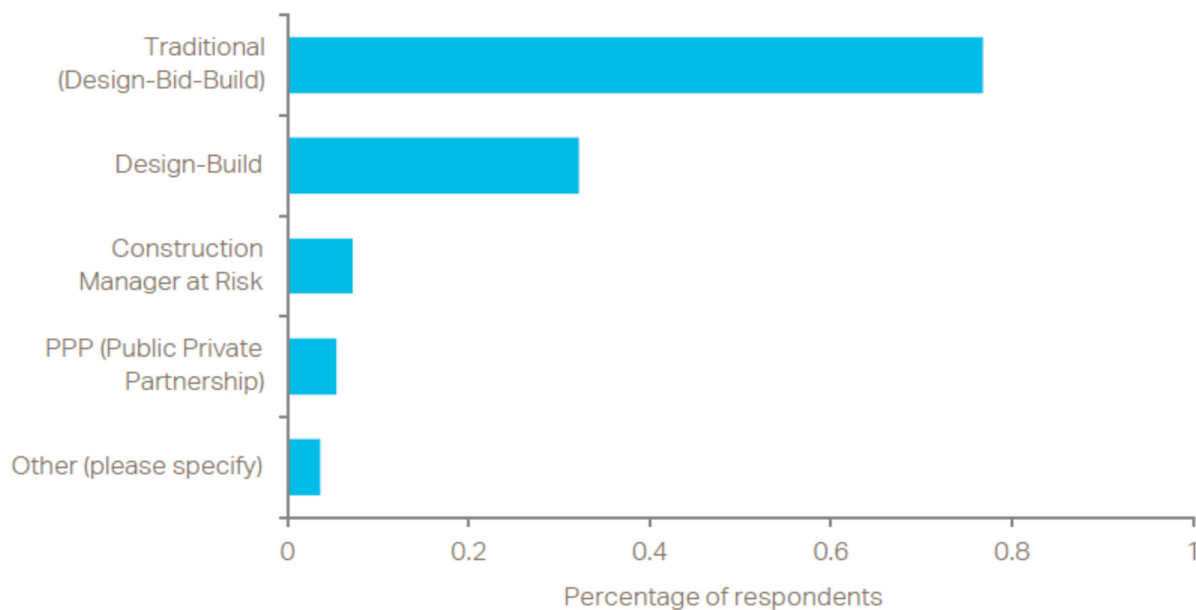
<sup>123</sup> [https://link.springer.com/chapter/10.1007/978-3-642-02100-8\\_6](https://link.springer.com/chapter/10.1007/978-3-642-02100-8_6)

It is always recommended to add express terms addressing the DL requirements in the construction and consultancy contract, because in most cases employer and contractor are not aware of the DL.

### 3. Critical review of Decennial Liability Provisions against various Procurement Methods, Project Administration Approaches and Construction Methodologies (Buildings/Structures)

Most of the projects in UAE are procured through traditional methods<sup>124</sup>. Traditional (Design-Bid-Build) delivery strategy is mostly preferred by Middle East employers, followed by design and build. The below graph exhibits that 80% of the projects are procured through traditional methods and 20% as Design and Build<sup>125</sup>. Few projects procured in other methods due to requirement of projects. In this chapter the traditional and Design and Build methods are discussed and analysed as to how the DL will apply to projects procured under these methods.

Figure-1: Middle East project delivery strategies<sup>126</sup>



<sup>124</sup> Chaminda Janak, SLQS Journal, 'Design and Build Contracts', July 2010, Pg 43

<sup>125</sup> [http://www.aecom.com/ae/wp-content/uploads/2015/08/Handbook-2016-Final\\_Lowres-spreads.pdf](http://www.aecom.com/ae/wp-content/uploads/2015/08/Handbook-2016-Final_Lowres-spreads.pdf)

<sup>126</sup> [http://www.aecom.com/ae/wp-content/uploads/2015/08/Handbook-2016-Final\\_Lowres-spreads.pdf](http://www.aecom.com/ae/wp-content/uploads/2015/08/Handbook-2016-Final_Lowres-spreads.pdf)

### 3.1 Procurement Methods

#### 3.1.1 Design – Bid – Build (DBB) (Traditional Method)

The design-bid-build is a project delivery method, in which the employer appoints A/E and enters into consultancy contract<sup>127</sup>. A/E develops the design and goes out for tender and hires the contractor under construction contract, for carrying out and completion of the project. Under this method the contractor commits to complete the project for a lump sum or ascertained or cost plus, or target, or guaranteed maximum price, within the agreed time for completion<sup>128</sup>. The contractor takes the responsibility for program and financial risk for completing the project and risk of quality of design and A/E team performance lies with employer. The appointed A/E generally assumes the responsibility of design, supervision and to administer the contract.

The employers in UAE are fascinated to the familiarity of DBB method<sup>129</sup>, perceiving that DBB method has lesser risk. Perhaps this may not be the case also it may not offer best value for money.

The DL under Articles 880 to 883 of UAE law applies only to projects procured under traditional procurement methods, that is design, bid and build. In other words, the A/E prepares the design, tenders it, contractor is selected and constructs the building and A/E supervises the works. Therefore, there is no need for express terms of DL in contract. However, it is recommended to include for avoidance of doubt and disputes that may arise in the future.

In DBB projects, A/E provides Professional Indemnity Insurance (PII), to employer for design they undertake, which is usually valid for 10 to 12 years, under which employers can bring claims against A/E for any design failure. However, there is dramatic difference between PII and DL, under the PII A/E is liable only for own negligent acts, errors and omissions<sup>130</sup>. However, DL is a strict liability therefore there is no need to prove negligence, error or omission<sup>131</sup>. The A/E can be held liable even if design proves to be flawless. Also, with PII, A/E is typically only

---

<sup>127</sup> <http://www.constructionlawmadeeasy.com/designandconstruct>

<sup>128</sup> [https://www.designingbuildings.co.uk/wiki/Traditional\\_contract\\_for\\_construction](https://www.designingbuildings.co.uk/wiki/Traditional_contract_for_construction)

<sup>129</sup> Chaminda Janak, SLQS Journal, 'Design and Build Contracts'

<sup>130</sup> <http://dubins.ae/Professional%20Indemnity%20Insurance>

<sup>131</sup> Grose Michael, 'Construction Law in the United Arab Emirates and Gulf (Wiley Blackwell, UAE, 2016), Pg 111

liable proportionately for damages caused by their negligent act. In DL, A/E is jointly liable with contractor, in other words A/E can be held liable for structural failure even if it is proved the contractor has solely caused the problem.

### **3.1.1.1 Part Designed by Contractor**

In the projects procured by the DBB method, sometimes the contractor designs some part of the permanent works. If the contractor designs any part of the permanent works under the DBB projects, then the DL will not apply to that part. For example, contractor has subcontracted the design with sub-consultant and the defects appeared due the fault in the design produced by the sub consultant, then the DL will not apply. Also, for any design developed by contractor and subcontractor the DL will not apply. Engineer will not be held liable for the design prepared by contractor and subcontractor. Because there is no joint liability and Articles 880 to 883 will apply only to main contractor and A/E who has designed and supervised the building. However, the A/E has responsibility to review the contractor's / subcontractor's design and to ensure the designs are flawless and construction was carried out by implementing the required standards.

### **3.1.2 Design and Build**

In the Design and Build (D&B) method, employer appoints a single contractor, who undertakes the responsibility of both detailed design and construction in return for a lump sum price. Prior to the appointment, contractor commits to complete the design and construction within the agreed time for completion<sup>132</sup>. The D&B method is not widely used in UAE, there are a few exceptional projects which demand the use for D&B method, or employer has good knowledge and experience in D&B method<sup>133</sup>. There are two variants available under this method, either the contractor can design the project based on employer requirements, or a performance-based specification provided in at tender stage, or using a concept design developed by employer's design team, before appointing the contractor (as is normally, the case), this strategy is called as develop and construct<sup>134</sup>. The contractor can use the employer's design team to the design works

---

<sup>132</sup> <https://www.thebalance.com/when-to-use-design-build-contracts-844914>

<sup>133</sup> Chaminda Janak, SLQS Journal, 'Design and Build Contracts'

<sup>134</sup> [https://www.designingbuildings.co.uk/wiki/Design\\_and\\_build\\_procurement\\_route](https://www.designingbuildings.co.uk/wiki/Design_and_build_procurement_route)



or engage his own design team<sup>135</sup>. In some exceptional projects the employer will engage consultant or PMC to verify the contractor's design.

It is very difficult to see how the DL, under UAE law, applies to D&B projects. Because to trigger the DL under Articles 880 to 883<sup>136</sup>, A/E should design, and contractor should construct the project under A/E supervision and both are jointly liable. However, under D&B contractor is responsible for both design and construct, therefore DL may not apply. Some scholars have argued that DL may apply to D&B projects, because there is already joint liability anyway. There is a single point of responsibility that is the contractor is responsible for the design and construction<sup>137</sup>. However, there is no preceding case law available for DL of D&B projects therefore how we are to judge and interpret DL for D&B projects is still an unknown quantity.

Furthermore, the absence of DL of D&B projects does not mean there is no liability. The difference is employer needs to prove there was defective workmanship, if employer chooses to go after the contractor and or need to prove the fault in design. Accordingly, it is recommended to include express terms for DL in construction contracts of D&B projects.

Also, in the D&B projects, contractors provide PII to employer, under which employers can bring a claim against contractor for design failure. Under PII, contractor is liable only for own negligence, errors and omissions, or for negligence, errors or omissions of designer appointed by contractor<sup>138</sup>. Therefore, PII under D&B projects doesn't provide the advantages of DL of DBB projects.

### **3.2 Methods of administering / Project Team**

The construction projects may vary from small and medium scale to mega projects. A/E can manage the small and medium scale projects. However, in case of mega projects multitasking is needed<sup>139</sup>. Therefore, for effective management and to increase efficiency of the project,

---

<sup>135</sup> <http://www.probyn-miers.com/perspective/2013/10/the-role-of-lead-consultant-in-design-and-build-procurement-2/>

<sup>136</sup> UAE Civil Transaction Code, Law # 5 of 1985

<sup>137</sup> <https://www.lawteacher.net/free-law-essays/contract-law/the-design-and-build-contract-contract-law-essay.php>

<sup>138</sup> <http://www.contractorweekly.com/contractor-insurance/contractor-professional-indemnity-insurance/>

<sup>139</sup> [http://pmbook.ce.cmu.edu/02\\_Organizing\\_For\\_Project\\_Management.html](http://pmbook.ce.cmu.edu/02_Organizing_For_Project_Management.html)

employers engage Program Manager or Project Management Consultant (PMC) and Consultant Team<sup>140</sup>. In this section the projects administered by Project Management Consultant and Consultant Team are discussed and whether they can be held liable under DL is analysed.

### **3.2.1 Program Manager or Project Management Consultant (PMC)**

PMC are construction professionals appointed under the Agency Agreement, to act as agent on behalf of employer<sup>141</sup>. PMC are involved from project inception, to handing over and responsible for development, planning, designing, procurement and execution of project. PMC appoint and administer A/E and contractor. PMC has authorisation to instruct A/E and contractor regarding design, construction, and quality of works<sup>142</sup>. This raises the question, whether PMC can be held jointly liable with A/E and contractor under DL law of UAE? It appears PMC cannot be held liable, because Articles 880 to 883 applies only to A/E and contractor and not to any other parties acting as agent for employer (PMC). Therefore, if there is any issue in design and quality, A/E and contractor should not be carried away with the promise of PMC *“does not matter just go ahead with the defective design and or defective workmanship”*, so the consent of PMC is not a waiver, albeit they are construction professionals. The rationale is, even employer does not have the right to waive A/E and contractor from DL<sup>143</sup>. The solution is to provide for express terms in contract, so that PMC can be held liable, otherwise PMC can be held liable for general liability under the law.

### **3.2.2 Consultant Team**

In some mega projects, consultant teams are appointed to perform expert tasks of the projects, the consultant teams in most of the projects consists of architects, structural designer, construction supervisor, cost consultant, service engineer, etc.,<sup>144</sup> In this case, how will the DL be applied? In this type of arrangement, DL cannot be triggered since the project does not satisfy the requirements stipulated in Articles 880 to 883. Therefore, when employers appoint consultant

---

<sup>140</sup> Snehal Dewalkar and Anurag Sarada, International Journal of Technical Research and Applications, ‘Role of Project Management Consultant in Construction.’, Volume 4, Issue 2 (March-April, 2016), Pg 317

<sup>141</sup> [http://www.howdengroup.com/brochures/understanding\\_the\\_role\\_of\\_the\\_employers\\_agent-branded.pdf](http://www.howdengroup.com/brochures/understanding_the_role_of_the_employers_agent-branded.pdf)

<sup>142</sup> <https://www.masterbuilder.co.in/role-of-project-management-consultancy-in-construction-project/>

<sup>143</sup> UAE Civil Transaction Code, Law # 5 of 1985, “Article 882.- Any agreement the purport of which is to exempt the contractor or the architect from liability, or to limit such liability, shall be void”

<sup>144</sup> [https://www.designingbuildings.co.uk/wiki/Consultant\\_team\\_for\\_design\\_and\\_construction](https://www.designingbuildings.co.uk/wiki/Consultant_team_for_design_and_construction)

team to administer the project, the express terms of DL can be included in all contracts, so that consultant team can be held liable under the DL.

### **3.3 Construction Methodologies (Buildings/Structures)**

Generally, factories and warehouse are constructed with structural steel and clad with metallic sheets<sup>145</sup>. In the current market trends, employer and A/E prefer to build either part or full structure with steel and or precast concrete, in order to achieve good quality, earlier completion and to reduce site overheads<sup>146</sup>. In UAE, many structures are built with steel and or precast concrete<sup>147</sup> like the metro system, bridges, pedestrian crossings, amusement and leisure parks, car parking and worker accommodation, etc.,<sup>148</sup>. So the question arises if defects occur in these structures, whether the DL will apply or not? In general, it appears the DL under Articles 880 to 883 applies to these structures also, because Article 880 stipulates that DL will apply to “...construction of buildings or other fixed installations...”. However, there is still some ambiguity, because the Articles 880 to 883 need to be studied and the question should be raised on the reason of holding contractor and A/E jointly liable for construction, that is for workmanship and they are guaranteeing each other for workmanship? The Rationale is during the construction; contractor and A/E proceed with “due diligence”, follow the standards, specification and construct the structure which will be free from defects. By interpretation the contractor has to play a larger role in constructing the structure and A/E should supervise the construction without any limitation. In other words, they are jointly held liable for any defect in the works for which they hold the entire control.

However, in the case of steel structures, the contractor’s purchase the standard sections readily available from the market and build the structure by erecting / fabricating the standard section with bolting / welding. Also, in the case of precast structures, the suppliers produce the concrete section in their factory contractors will only erect the individual precast units and fill the joints to build the structure. Consequently, when constructing these types of structures, the contractor plays a lesser role, that is only erecting / fabricating the structure. Both A/E and contractor do not

---

<sup>145</sup> [https://www.steelconstruction.info/Single\\_storey\\_industrial\\_buildings](https://www.steelconstruction.info/Single_storey_industrial_buildings)

<sup>146</sup> <https://www.buildingsguide.com/building-applications/commercial-steel-buildings/factories/>

<sup>147</sup> <http://www.arabianindustry.com/construction/features/2012/jun/25/precast-takes-the-lead-3518398/>

<sup>148</sup> <http://gulfnews.com/business/sectors/construction/use-of-precast-concrete-growing-in-uae-market-1.799606>

have total control on quality of steel produced in the factory and limited control on the quality of precast units produced in the supplier's factory. If the defect in material results in collapse of structure, can both of them held liable under DL, for the material defect for which they do not hold total control? The Proponents may argue it is unfair to hold both of them liable. The critics may argue that the quality of material can be verified by testing. What if the material has passed all tests and still the structure has collapsed as a result of material defect, so what will happen in this case? Well, as of now, there is no study or preceding case about this, it will be interesting to know whether the DL will be applied to these types of structures. To avoid the discrepancy the contract can have express terms covering the requirements for DL and how this is to be applied.

## 4. Comparison of Decennial Liability Provisions in Civil Law Countries

UAE is civil law jurisdiction, with influence from the Egyptian legal system, which in turn is based on the French legal system and the roots of DL can be traced back to the French Civil Code. Nevertheless, it is also applied well outside the borders of France, which includes some of the most booming construction markets around the World.

DL is imposed elsewhere in Asia and Europe and is particularly prevalent in the Middle East. Countries such as UAE, Egypt, Iraq, Kuwait, Jordan, Bahrain, and Qatar impose this form of several liability. Other locales worldwide that are civil code jurisdictions may also impose decennial liability. In this chapter, the provisions of DL under French and Egyptian law and DL provision in GCC countries, are examined and compared to relevant provision in UAE law.

### 4.1 French Law

The rules of DL were brought into French civil law as early as 1804. The French jurisprudence suggests that DL is not a contractual or tortious liability, but rather a special rule that is not based on the general principles of laws and cannot be expanded or compared within the context of the principles of legal analogy.

Under the French Civil Code, any builder involved in the construction of the building are liable to the owner, or purchaser, for defects that affect the stability of the building, or affect any part of the building and as result, the building is rendered to unfit to habitat or its intended purpose<sup>149</sup>. There is no need to prove the omission, or error, no negligence, since the DL is strict liability

---

<sup>149</sup> French Civil Code, 'Art. 1792 (Act no 78-12 of 4 Jan. 1978) 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. Such liability does not take place where the builder proves that the damages were occasioned by an extraneous event.'

under the French law<sup>150</sup>, also the A/E can be held liable, even if the design is flawless<sup>151</sup>, which is important, because this is typical strict liability, which derives its roots from French law. However, A/E and contractors in the Middle East region, lack the comprehensive understanding of no-fault provisions, imposed by the concept of DL<sup>152</sup>.

French law defines 'builders' as (1) contractors, architects, technicians or any other persons, relation engaged to work, or by hire contract involved in the construction of the building, (2) any seller who sells the building after completion, either built by the seller or by others (3) any person acting in the capacity of agent for the owner<sup>153</sup>. This implies the architect, supervision engineer, contractor and other professionals are jointly and severally liable to the owner or subsequent buyer and they are equally exposed to the liability to the extent of their involvement. Furthermore, the law extends the liability to real estate developers and leasing agents as well<sup>154</sup>. Notwithstanding this provision, the builders remain responsible for the works carried out by subcontractors, albeit it is possible to bring the claim against the subcontractor for their default<sup>155</sup>. Under the UAE law, only A/E and contractor can be held liable against employer and UAE law does not contain express wording to exclude the subcontractor from DL liability. However, by interpreting the Article 890<sup>156</sup> it is understood DL will not be applicable to subcontractors. Under 1135<sup>157</sup> of the French Civil Code, the contractor owes a duty to inform and advise the project manager and employer as to the risks that they should reasonably be aware

---

<sup>150</sup> Frilet Marc & Karila Laurent, 'Contractors', engineers' and architects' duty to advise and decennial liability in civil law countries: highlights of some prevailing principles', *Construction Law International*, Volume 7, issue 2, June 2012, Pg 22

<sup>151</sup> [https://www.mclaughlinbrunson.com/pdf\\_files/file\\_1269436584.pdf](https://www.mclaughlinbrunson.com/pdf_files/file_1269436584.pdf)

<sup>152</sup> <http://www.lexology.com/library/detail.aspx?g=dad8586b-a856-45d6-b86f-47b79859a08b>

<sup>153</sup> French Civil Code, 'Art. 1792-1 Are deemed builders of the work: 1° Any architect, contractor, technician or other person bound to the building owner by a contract of hire of work; 2° Any person who sells, after completion, a work which he built or had built; 3° Any person who, although acting in the capacity of agent for the building owner, performs duties similar to those of a hirer out of work.'

<sup>154</sup> Haris Deen, *Understanding Decennial Liability In Relation To Construction Contracts*, 2011, Pg 1

<sup>155</sup> <https://www.french-property.com/guides/france/building/new-build/defect-guarantee/>

<sup>156</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 890.- (2) The first contractor shall remain liable as towards the employer.

<sup>157</sup> French Civil Code, 'Art. 1135...agreements are binding not only as to what is expressed therein, but also as to all the consequences which equity, usage or statutes give to the obligation according to its nature'.

of after having reviewed the technical specifications<sup>158</sup> however there is no such mandatory provision in UAE.

Liability attaches notwithstanding, that the defect resulted from a defect in the land itself<sup>159</sup>, also the consent of the owner for defective works will not relieve the builders from the liability<sup>160</sup>. The DL will not be triggered, if builders prove the defect was due to external event, which is beyond their control<sup>161</sup>. These provisions are extremely similar in UAE and French law.

As per Article 2270, the period of DL is ten years from the date of approval of the works<sup>162</sup>, the guarantee period of ten years operates on a tiered basis, that is, up to one year the builder will guarantee the complete performance of the works<sup>163</sup> and guaranteeing the building products and equipment up to two years<sup>164</sup> and overall ten year guarantee for works concerned with integrity and stability of the structure<sup>165</sup>. The limitation period to bring the claim is three year from the date the owner is aware, or ought to be aware of the defects, if owner is aware of defect at the end of tenth year then the claim can be pursued within three years from the end of tenth year, that is the owner has thirteen years overall in which to pursue the claim<sup>166</sup>. The DL under UAE

---

<sup>158</sup> Frilet Marc & Karila Laurent, 'Contractors', engineers' and architects' duty to advise and decennial liability in civil law countries: highlights of some prevailing principles', *Construction Law International*, Volume 7, issue 2, June 2012, Pg 22

<sup>159</sup> French Civil Code, 'Art. 1792 ... 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. ....'

<sup>160</sup> French Civil Code, 'Art. 1792-6 Approval is the act by which the building owner declares that he accepts the work with or without reservation. It occurs at the suit of the first requesting party, either amicably or, failing which, judicially. In any case, it shall be pronounced adversarially. ...'

<sup>161</sup> French Civil Code, 'Art. 1792 ...Such liability does not take place where the builder proves that the damages were occasioned by an extraneous event.'

<sup>162</sup> French Civil Code, 'Art. 2270 Any natural or juridical person who may be liable under Articles 1792 to 1792-4 of this Code is discharged from the liabilities and warranties by which they are weighed down in application of Articles 1792 to 1792-2, after ten years from the approval of the works or, in application of Article 1792-3, on the expiry of the period referred to in this Article.'

<sup>163</sup> French Civil Code, 'Art. 1792-6 ...The warranty of perfected completion, to which a contractor is held during a period of one year, after the approval, extends to the repairs of all shortcomings indicated by the building owner, either through reservations mentioned in the memorandum of approval, or by way of written notice as to those revealed after the approval.'

<sup>164</sup> French Civil Code, 'Art. 1792-3 Other elements of equipment of a "work" (Ord. no 2005-658 of 8 June 2005), are the subject of a warranty of good running for a minimum period of two years "as from its approval" (Ord. no 2005-658 of 8 June 2005).'

<sup>165</sup> <https://www.french-property.com/guides/france/building/new-build/defect-guarantee/>

<sup>166</sup> <http://www.cavignac.com/publications/professional-liability-update-decennial-liability/>

applies uniformly to ten years, there no tiered basis application as in French law, limitation periods are similar in both laws.

Under the French law, DL is a joint and several liabilities therefore any agreement purporting to cap / limit or exempt DL is invalid and void<sup>167</sup>. DL liability is a strict liability on builders involved in the construction activities, there is a legal requirement to insure the building against the DL, the Articles 242.1<sup>168</sup> and 242.2<sup>169</sup> of French Insurance Code, stipulates the requirement of DL insurances, the coverage is standard and the law has laid down the non-negotiable policy wording, the cost of insurance is high, premiums are paid during construction and coverage is maintained for the ten year from handing over<sup>170</sup>, also the premium carries premium taxes<sup>171</sup>, under the French law the DL insurance is mandatory<sup>172</sup>, failure to obtain the mandatory DL insurance will result in six month imprisonment and/or a €75,000 as fine<sup>173</sup>. DL is a strict liability under UAE law, however there is no such mandatory provision for DL insurance.

Another area of uncertainty, when applying DL to defects that endanger the stability and safety that is whether or not the threat has to materialize prior to the expiry of the 10-year guarantee

---

<sup>167</sup> French Civil Code, 'Art. 1792-5 Any clause of a contract having the purpose, either of excluding or limiting the liability provided for in Articles 1792, 1792-1 and 1792-2, or of excluding "the warranties provided for in Articles 1792-3 and 1792-6" (Act no 90-1129 of 19 Dec. 1990) or of limiting their extent, or setting aside or limiting the joint and several liability provided for in Article 1792-4, shall be deemed not written.'

<sup>168</sup> French Insurance Code, 'Article L241-1 Any natural person or legal entity whose decennial responsibility may be incurred on the basis of the presumption provided for in Articles 1792 and following of the Civil Code must be covered by an insurance policy. Upon the commencement of the building work, he/it must be able to prove that he/she has underwritten an insurance contract that covers his/its liability. Notwithstanding any clause to the contrary, any insurance contract underwritten by virtue of this Article shall be deemed to contain a clause ensuring that the cover shall be maintained for the term of the decennial responsibility imposed on the person who is submitted to the compulsory insurance

<sup>169</sup> French Insurance Code, 'Article L242-1 Any natural person or legal entity who, acting as owner of a work, seller or representative of the owner of the work, has building works carried out, must, before the opening of the building site, on his/its behalf or on behalf of successive owners, take out insurance policy that covers, on a no-fault basis, payment of the entire reparation work of the damage of the type that builders are liable for within the meaning of Article 1792-1, manufacturers and importers or a consulting engineer are liable for under Article 1792 of the Civil Code....'

<sup>170</sup> Frilet Marc & Karila Laurent, 'Contractors', engineers' and architects' duty to advise and decennial liability in civil law countries: highlights of some prevailing principles', *Construction Law International*, Volume 7, issue 2, June 2012, Pg 22

<sup>171</sup> [http://www.hwifrance.com/sub\\_menu.php?submenuId=158](http://www.hwifrance.com/sub_menu.php?submenuId=158)

<sup>172</sup> <https://www.ffa-assurance.fr/en/content/decennial-liability-insurance-france-0>

<sup>173</sup> French Insurance Code, 'Article L241-3 Anyone who breaches the provisions of Articles L241-1 to L242-1 of this Code shall be punished by a six months prison sentence and a fine of € 75,000 or by only one of said two sanctions.'



period. The wording in French Civil Code (Article 1792), is noticeably different to that of the UAE Civil Code and can be translated as follows, *‘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.’* By comparing this with the wording of Article 880 (1) of the UAE law, the French law is arguably narrower as the UAE law provides the guarantee includes *‘for any defect which threatens the stability or safety of the building’*.

This demonstrates the position in French law is pretty clear and French Court of Cassation has applied DL, where it was certain, damage would have become sufficiently serious within the 10 years<sup>174</sup>. The French Courts have considered the issue of “future damages” and a foreseeable threat to the structure’s strength and safety. Therefore, it is clear that the French law applies to defects provided, it is certain that the damage will become sufficiently serious within the ten-year guarantee period<sup>175</sup>.

## **4.2 Egyptian Law**

The Egyptian civil code contains the provision of DL since it was published in 1948, under the Egyptian law the A/E and contractor are jointly and severally liable for defects, which endanger the stability or safety of the structure and partial, or total collapse of the structure. The A/E and contractor will not be relieved from DL, albeit the defect or collapse was caused due to the defect in the ground itself and also the employer’s consent to the defective construction. The period of liability is ten years from the date of the delivery of the structure, unless the intended life cycle

---

<sup>174</sup> Court of Cassation (3rd Civil Chamber, cassation number 11-16943), ruled that: ‘... the works had aggravated the existing slope of the slant at the rear of the property and created a risk of crumbling that was certain within the ten-year guarantee time limit, endangering the strength of the building and the occupants’ safety and making it impossible for them to use the backyard, the court of appeal has validly ruled that the Company has to bear the charges of the works to remedy the situation and indemnify burden of the work to and compensate the owners for the loss they have suffered from the inability to use their habitat ....’

<sup>175</sup> <http://www.lexology.com/library/detail.aspx?g=dad8586b-a856-45d6-b86f-47b79859a08b>

of the structure is less than ten years<sup>176</sup>. The limitation period to bring the claim is three years from the date the employer discovers or ought to be aware of the defect or collapse<sup>177</sup>.

As per the Egyptian law, if the architect has only contracted to design the structure, then the liability of the architect is limited to the fault in design and does not extend to the defective workmanship or execution<sup>178</sup>. The DL is a strict liability, which can't be capped or contracted out and any agreement purporting to restrict or exclude the DL will be invalid and set aside by the Courts<sup>179</sup>. These provisions are substantially similar in Egyptian and UAE law, with subtle differences, such as the Egyptian law does not explicitly state that the architect who has designed the structure has to supervise the construction for DL to exist.

In Egyptian law and jurisprudence, the idea of DL is seen as a “right in rem” that cannot be separated from the structure and would therefore be transferable, to the benefit of other subsequent purchasers of the building, allowing them to take advantage of this guarantee<sup>180</sup>. Whilst DL will not apply to the subcontractors, this demonstrates the contractor remains responsible for the subcontractor works and the liability cannot pass down to the subcontractors<sup>181</sup>. Under the UAE law, the subsequent buyer cannot sue the A/E and contractor. However, in the Emirate of Dubai, the subsequent buyer can sue the developer, and developer will pass the liability to sue the A/E and contractor.<sup>182</sup>

---

<sup>176</sup> Egyptian Civil Code, ‘Article 651. The architect and contractor are jointly and severally responsible for a period of ten years for the total or partial demolition of constructions or other permanent works erected by them, even if such destruction is due to the defect in the ground itself, and even if the owner-employer authorised the erection of the defective construction, unless in this case the construction were intended by the parties to last for less than ten years. The warranty imposed by the preceding paragraph extends to defects in constructions and erection which endanger the solidity and security of the works...’

<sup>177</sup> Egyptian Civil Code, ‘Article 654. Actions on the warranties above referred to are prescribed after three years from the date of the destruction of the works or the discovery of the defect.’

<sup>178</sup> Egyptian Civil Code, ‘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 his plans.’

<sup>179</sup> Egyptian Civil Code, ‘Article 653. Egyptian Civil Code, ‘Article 653. Any clause tending to exclude or restrict the warranty of the architect and the contractor is void.’

<sup>180</sup> Sanhūrī (n 2) 111

<sup>181</sup> Egyptian Civil Code, ‘Article 651. ... This article does not apply to the rights of action which a contractor may have against his sub-contractor.’

<sup>182</sup> Dubai Law No (27) of 2007

Under Egyptian law, there is provision for mandatory DL insurance the coverage period includes construction period and ten years guarantee period. However, UAE law does not contain any such provisions.

### 4.3 Decennial Liability in GCC Countries

Most of the GCC countries follow the civil codes, except Saudi Arabia, GCC civil codes are derived from the Egyptian and French civil codes and so are extremely similar in many respects. Set forth below is a Table-1 comparing the DL provisions in Bahrain, Kuwait, Oman, Qatar, UAE<sup>183</sup> and Saudi Arabia<sup>184</sup>. Oman introduced the Civil Codes by 2013, therefore, limited explanation is available regarding Omani DL provisions, but a high-level study of the DL provisions in Oman it would appear that it is very similar to the provisions in the UAE<sup>185</sup>.

**Table - 1**

<b>Country</b>	<b>Civil Code Provisions</b>	<b>Who is liable</b>	<b>Scope of Liability</b>	<b>Liability</b>	<b>Claim Limitation Period</b>	<b>Comments</b>
Bahrain	Articles 615 – 620 of Bahrain Civil Code <sup>186</sup>	A /E and contractor	Any defect which endangers the strength and safety of a works and Partial or total	Five (5) years	Three (3) years from destruction of the works or the discovery of the defect.	

<sup>183</sup> Kamal Hafez, Al Tamimi & Co, ‘Managing the Risk of Decennial Liability’, Law Update 2011, 3

<sup>184</sup> Ben Cowling and Diana Hudson, Clyde & Co , ‘Construction in Saudi Arabia: decennial liability, Law update

<sup>185</sup> <https://www.dentons.com/en/insights/alerts/2014/february/5/civil-code-client-alert-contracts-to-build-and-construction-related-issues>

<sup>186</sup> Bahrain Civil Code, ‘Article 615 (a) The architect and contractor are jointly and severally responsible for the total or partial demolition of constructions or other permanent works erected by them for a period of five years from the date of completing the building or construction subject always to the following articles.’

			collapse			
Kuwait	Article 692 of the Civil Code No. 67/1980 <sup>187</sup>	A /E and contractor	Damage and any defect that threaten the strength and safety of a building or fixed construction or partial or total or partial destruction	Ten (10) years	Three (3) years from collapse or discovery of defect	
Oman	Article 634 of the Civil Code No. 29 of 2013 <sup>188</sup>	A /E and contractor	Any defect which threatens the strength or safety of a building and partial or total collapse of building.	Ten (10) years	Three (3) year from collapse or discovery of defect	

<sup>187</sup> Kuwait Civil Code, ‘Article 692 1) Both the Contractor and the Architect shall guarantee any total or partial collapse of failure of the buildings and fixed installations which they have constructed for ten years as from the date of completion of such building or construction, subject to the following Articles. 2) Nevertheless, if it is established that the contracting parties intend for the buildings or installations to last for a period of less than ten years, the guarantee shall be extended for this period only. 3) The guarantee shall include the collapse even if it results from a defect in the ground involved or if the Employer has permitted the construction of the defective buildings and installations. It shall also include any defect that may appear in the buildings and installations resulting in a threat to their consistency and safety.’

<sup>188</sup> Oman Civil Code, Law No. 29 of 2013, ‘Article 634’

Qatar	Articles 711 - 715 of the Civil Code, Law No. 22 of 2004 <sup>189</sup>	A /E and contractor	Fault and any defect which threatens the sturdiness and safety of a building or fixed construction or partial or total or partial collapse	Ten (10) years	Three (3) years from collapse or discovery of defect	
Saudi Arabia	Article 76 of the GTPL <sup>190</sup>	Contractor	Partial or full collapse, if such collapse is due to a construction defect	Ten (10) years	No concept of limitation periods in Saudi Arabia	
UAE	Articles 880 - 883 of the Civil Transactions Law No. 5 of 1985 <sup>191</sup>	A /E and contractor	Any defect which threatens the stability or safety of a building or other fixed installation and Total or	Ten (10) years	Three (3) years from collapse or discovery of defect	Contractor is strictly liable for all defects, including joint and several liability for design

<sup>189</sup> Qatar Civil Code, Law No. 22 of 2004, Article 711.- 'The contractor and architect/engineer will jointly guarantee against total or partial collapse or flaw that occurs within ten years in the buildings they have constructed, or fixed structure they have erected, even if that collapse or flaw arises from defect in the land itself, or the employer for the works has allowed the defective buildings or structures. This guarantee includes defects that appear in the buildings or structures that poses a threat to their strength and safety.'

<sup>190</sup> Government Tenders and Procurement Law (GTPL), 'Article 76: A contractor shall provide a ten-year warranty against partial or full collapse of what he constructs starting from the date of final handover to the government authority, if such collapse is due to a construction defect, unless the two contracting parties agree on a shorter period.'

<sup>191</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 880(1)

			partial			defects
--	--	--	---------	--	--	---------

The Table-1 exhibits the similar wording of the DL provisions within the GCC Countries, albeit, there are some minor differences. All the laws impose several liabilities on A/E and contractors for the defect which threatens the safety or stability of the structure and for partial, or total collapse of a structure they designed, or constructed, as the case may be. The other common features are namely<sup>192</sup>:

- The triggering of the liability period, upon the delivery of the building and the DL guarantee period is either ten years or five years, or the period of intended life cycle, if less.
- Liability attaches notwithstanding, that the defect, or collapse, resulted from a defect in the land or that the employer consented for defective design and or construction.
- Liability is joint and several, meaning that the employer can bring a claim against both parties for the full amount of the compensation.
- Any agreement or contractual conditions purporting to limit or waive off the DL is invalid and void.
- All laws have a time period (lapse) by which time the employer must bring the claim, either one (1) years or three (3) year.
- If architect is engaged only for designing the structure and not for supervising the construction, then architect will only be held liable for defect in design.

<sup>192</sup> Kamal Hafez, Al Tamimi & Co, 'Managing the Risk of Decennial Liability', Law Update 2011, 2

- If the employer engages engineer for supervision of execution, then engineer will be held liable for defect arising due to the method of construction.

The material differences of DL provision in the GCC Countries are:

- Under Qatar law<sup>193</sup>, the contractor will be held liable, only if the defect arises from execution, not for defect in design, unless contractor is aware of defect in design<sup>194</sup>, these provisions are reflected in Bahrain<sup>195</sup> and the Kuwait Civil Code<sup>196</sup>. There no such exemption in the UAE law.
- Article 711 (3)<sup>197</sup> of Qatar law expressly states that, DL will not apply to subconsultants or subcontractors and liability cannot be passed down to subconsultants or subcontractors. UAE law does not contain similar wording, however by interpreting the Article 890<sup>198</sup>, it can be reasoned that the UAE court will not hold the subconsultants or subcontractor, until their contracts include the provision of back to back DL provisions.
- Under the Qatar<sup>199</sup>, Bahrain<sup>200</sup> and Kuwait<sup>201</sup> law, the contractor is liable for defective design, if the designer was appointed by contractor, this demonstrates the DL is applicable to design and build projects and also for any part of design by the contractor

<sup>193</sup> Qatar Civil Code, Law No. 22 of 2004, 'Article 713 (1) The contractor will only be liable for defects occur in execution, and not the defects that derive from the flaw in the design, unless these defects are such as should not be hidden to him in accordance with principle of trade.'

<sup>194</sup> Michael Grose and Ramiz Shlah , 'Construction Law in Qatar and the United Arab Emirates: Key Differences', Turkish Commercial Law Review , Vol. 1, No. 3, October 2015 , 191 to 192

<sup>195</sup> Bahrain Civil Code Article 616 (a) If the architect's work is limited to producing the design of the building or construction or a part thereof, he shall be responsible for the defects attributed to the design prepared by him but not for the defects due to the execution method.

<sup>196</sup> Kuwait Civil Code, 'Article 694 1) The contractor shall be responsible only for such defects as may occur in the execution other than the defects which arise out of error in the drawing up of the design unless these defects are visible.'

<sup>197</sup> Qatar Civil Code, Law No. 22 of 2004, 'Article 711 (3) The provisions of this article will not apply to any right of recourse by the contractor may have to subcontractors.'

<sup>198</sup> UAE Civil Transaction Code, Law # 5 of 1985, Article 890.- (2) The first contractor shall remain liable as towards the employer.

<sup>199</sup> Qatar Civil Code, Law No. 22 of 2004, 'Article 713 (2) Nevertheless, the contractor will be liable for defects that are caused by the design, if the architect/engineer who produced the design is subordinate to him.'

<sup>200</sup> Bahrain Civil Code, 'Article 617 (b) However, the contractor shall be liable for the defects due to the design if the architect who prepared the design is an employee thereof'

<sup>201</sup> Kuwait Civil Code, 'Article 694 2) Nevertheless, the Contractor shall be responsible for defects which are attributed to the design if the Architect who drew up the design is engaged by him.'

under traditional procurement methods. UAE law does not contain similar express provisions, nevertheless by interpreting Article 880<sup>202</sup>, it is understandable that, the DL will not apply to design and build projects.

- Civil Codes of GCC Countries do not have mandatory requirements for DL insurance as in French and Egyptian law<sup>203</sup>.

The above comparisons demonstrate that the provisions of DL in the GCC countries are substantially similar, with subtle differences, except the DL provisions in Saudi Arabia. Saudi Arabia has not enacted Civil Code like the other GCC Countries, Saudi Arabian Law is based on Islamic Law (Sharia) and contracting parties can agree to any terms which are not conflicting with Sharia<sup>204</sup>, so there is no codified DL regime of general application. Nevertheless, Government Tenders and Procurement Law (GTPL) has provision of DL, however this regulation is limited to contracts made with ministries, government authorities and public institutions<sup>205</sup>.

---

<sup>202</sup> UAE Civil Transaction Code, Law # 5 of 1985, 'Article 880(1) If the subject matter of the contract is the construction of buildings or other fixed installations, the plans for which are made by an architect, to be carried out by the contractor under his supervision, they shall both be jointly liable for a period of ten years to make compensation to the employer for any total or partial collapse of the building they have constructed or installation they have erected, and for any defect which threatens the stability or safety of the building, unless the contract specifies a longer period. The above shall apply unless the contracting parties intend that such installations should remain in place for a period of less than ten years.'

<sup>203</sup> <http://www.lexology.com/library/detail.aspx?g=dad8586b-a856-45d6-b86f-47b79859a08b>

<sup>204</sup> Ben Cowling and Diana Hudson, Clyde & Co , 'Construction in Saudi Arabia: decennial liability, Law update

<sup>205</sup> Government Tenders and Procurement Law (GTPL), 'Article 69: Without prejudice to effective international agreements and treaties to which the Kingdom is party, this Law and its Implementing Regulations shall apply to all government authorities, ministries, departments, public institutions and public bodies with independent corporate personality. As for agencies with their own laws, this Law shall apply to cases not provided for in their laws.'



## 5. Conclusion and Recommendation

### 5.1 Conclusion

In UAE Law Decennial Liability (DL) is a contractual liability imposed by law, under the provision of Articles 880 to 883, according to which architect / engineer (A/E) and contractor are jointly and severally liable to the employer for partial, or total collapse, or defects threatening the safety and stability of the building, for a period of ten years from the project delivery. The DL will be applied, albeit the employer has consented to use a defective design, or defective construction, and also for defect, or collapse caused due to poor ground conditions. The claims should be pursued within three years from the date of collapse, or employer becoming aware, or ought to have become aware of the defects. The employer will be compensated for actual loss suffered either by one party (A/E and the Contractor), or by both based on the cause for the defect, or collapse. The DL is an exceptional liability under the UAE law and is applied against the will of the parties. Since it is a strict liability and intended to protect the public, it cannot be exempted or contracted out and cannot be limited. A/E and contractor can be relieved from DL only if it is proven that the cause of defect was not due to their fault.

Under the UAE law, if an architect is engaged only for design, then the liability of architect is limited to the design. If engineer has only supervised the construction and not designed the structure, then engineer will be held jointly liable with architect and contractor for any collapse, partial collapse or defects that threatens the safety of the building. Some construction professional has misinterpreted this provision, albeit the position of the law is contrary to this held view. DL also applies to extension and modification projects for which it is the responsibility of the A/E and contractor to ensure that, the existing structure is capable enough to resist the proposed extension and modifications. Whilst some of the construction professionals are now aware of this provision some, the court judgments have made it more obvious.

From the comparison of Articles 880 to 883 with provisions of DL in other GCC countries, Egypt and French law conducted in this research it is apparent that the provisions are similar, with few there are a few short-comings in UAE law. Lack of clarity with regard to DL provision under UAE with regard to projects delivered through design and build route may be cited as example. Under the law of Qatar, Bahrain and Kuwait, the contractor can be held liable for defective design, if the designer is appointed by him, making it clear that the projects procured through D&B method is within the DL provisions. Under current UAE law provisions, it is recommended to include the express term in the contract if the project is procured through D&B route, so that it is clear that the employer has DL coverage.

Although the provisions of law, through Articles 880 to 883, generally applies DL to all type of, it is recommended to include the express term in the contract to avoid any potential for disputes in the future.

Under the UAE law DL provisions, the subcontractor cannot be held liable similar to the provisions in other GCC countries. The rationale behind not including the subcontractor under the provision of DL is primarily the limited involvement of the subcontractor with only elements of works under his scope without any liability to the overall project or information about the overall design. It is considered that the main contractors are professional and capable of administering and managing the subcontracted works to offset any risks across the whole project. In addition, enforcing the DL provisions to the subcontractor will also increase the price of the works. It is therefore recommended that no express term in the contract is included to extend DL provisions to subcontracted works unless the nature and magnitude of subcontracted works warrants such express inclusion.

As per provisions of UAE law, any subsequent buyer will not be able to bring a claim against the A/E and contractor. The scenario is different in the Emirate of Dubai wherein the subsequent buyer can bring a claim against the employer under Dubai Law No. 27 of 2007 and employer can sue A/E and contractor. It is recommended to enact similar law in

other Emirates, or to amend the Federal Law, so that the subsequent buyer can bring a claim against the employer and employer can sue the A/E and contractor. However, since it is unlikely that this change is made in near future, it is recommended that this is covered through warranty or third-party contract, or inclusion of express contractual provisions.

The UAE law doesn't stipulate a mandatory provision for DL insurance as in the case of Egyptian and French law. Based on the analysis conducted in this research, it is not recommended to introduce such provisions as it could lead to increase in the cost of the construction and should be left to parties to decide whether the DL insurance is required or not.

Notwithstanding the above, it is always recommended to include express terms of DL in the construction and consultant contracts.

## **5.2 Recommendation**

To summarize, this study reveals that the provisions of DL in the Civil Code of UAE will apply to projects procured under traditional procurement methods and for all types of construction methodologies of structures for a period of ten years from delivery. If engineer has only supervised the works, still supervision engineer will be held liable. The DL provision as included in the law also applies to extension and modification projects. The law is unclear on the DL provisions with regard to projects procured through D&B route which may potentially lead to dispute if any latent defects noted in the completed project. Based on the analysis conducted in this research, it is proposed to have more scholarly research, literature reviews and journals to enlighten and help the construction professional, employer and subsequent buyer to understand their rights and the liabilities they are subject to, in addition to the contractual liabilities for the latent defects.

## **6. Bibliography**

### **6.1 Books**

Michael Grose, *Construction Law in the United Arab Emirates and Gulf* (Wiley Blackwell, UAE, 2016)

### **6.2 Journals Articles / Reports**

Kamal Hafez Property & Construction, 'Managing the Risk of Decennial Liability', *Law Update*, 2011

Justin Ede, Al Tamimi & Co, 'Decennial Liability in the UAE – a commentary', <http://www.tamimi.com/law-update-articles/decennial-liability-in-the-uae-a-commentary/>, accessed on 06 December 2017

The scope of designers liability under construction contracts, *Construction dispute avoidance newsletter*, number 34, December 2011

A Dimitracopoulos, 'Design and Beware - Architect's liability under UAE Law', September, *Law Update* 2004

F Attia, Al Tamimi & Co, 'Can We Really Limit Liability?', *Law Update* 2012

Shahram Safai, Afridi & Angell, 'Liquidation of cancelled real estate projects in Dubai'

Professor Ayman Masadeh. "Vicarious Performance and Privity in Construction Contracts", accessed on 02 June 2017

Chaminda Janak, *SLQS Journal*, 'Design and Build Contracts'

Snehal Dewalkar and Anurag Sarda, *International Journal of Technical Research and Applications*, 'Role of Project Management Consultant in Construction.'

Sanhūrī (n 2) 111

Ben Cowling and Diana Hudson, Clyde & Co , 'Construction in Saudi Arabia: decennial liability, Law update'

Marc Frilet & Laurent Karila 'Contractors', engineers' and architects' duty to advise and decennial liability in civil law countries: highlights of some prevailing principles', Construction Law International, Volume 7, issue 2, June 2012.

Al-Mulla, James Bremen & Simon Halliwell 'Decennial liability: the case for harmonization' Construction Law, Volume 7 issue 2, June 2012

### **6.3 Electronic Sources**

[https://en.wikipedia.org/wiki/Legal\\_liability#cite\\_note-1](https://en.wikipedia.org/wiki/Legal_liability#cite_note-1)

[www.oxforddictionaries.com /definition/English/liability](http://www.oxforddictionaries.com/definition/English/liability)

<http://legalbeagle.com/7567769-legal-types-liability.html>

Decennial Liability, Professional Liability Update Newsletter, March 2011 available at [http://www.cavnac.com /publications /professional-liability-update-decennial-liability/](http://www.cavnac.com/publications/professional-liability-update-decennial-liability/), accessed on 29 June 2017

<https://www.lawinsider.com/clause/default-liabilities>, accessed on 07 July 2017

<https://legal-dictionary.thefreedictionary.com/tortfeasor>, accessed on 07 July 2017

<https://financial-dictionary.thefreedictionary.com/personal+liability>, accessed on 08 July 2017

<http://www.mnemonicdictionary.com/word/caveat%20emptor>, accessed on 18 August 2017

<https://lawpath.com.au/blog/what-is-a-liability-waiver-form>, accessed on 25 August 2017

<http://gulfnews.com/news/uae/emergencies/structure-collapses-in-the-abu-shagara-area-of-sharjah-1.513163>

<https://www.contractstandards.com/public/clauses/force-majeure>, accessed on 01 September 2017

<https://www.merriam-webster.com/dictionary/force%20majeure>, accessed on 01 September 2017

<https://www.icbcclaiminfo.com/node/153>

<http://e-lawresources.co.uk/Causation.php>, accessed on 08 September 2017

[https://uk.practicallaw.thomsonreuters.com/4-107-5865?transitionType=Default&context=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/4-107-5865?transitionType=Default&context=(sc.Default)&firstPage=true&bhcp=1) Data=

<https://plato.stanford.edu/entries/causation-law/>, accessed on 16 September 2017

<https://portal.dm.gov.ae/SCWebUI/DataDetails.aspx?servicecode=3398&PageLang=En>, accessed on 06 October 2017

<https://www.clarington.net/en/do-business/resources/engineering-design-guidelines-and-standard-drawings.pdf>

<https://www.choice.com.au/transport/cars/maintenance/articles/car-warranties-and-dealer-servicing>, accessed on 07 October 2017

<https://www.myuaeguide.com/51-cancelled-dubai-building-projects-going-liquidation/>

M Grimmitt, 'Uncertainty in the Application of UAE Laws, Tales Of The Unexpected: Where Liability Lurks Unseen', Pinsent Masons, available at <http://kluwerconstructionblog.com/2009/11/03/tales-of-the-unexpected-where-liability-lurks-unseen/>

<https://en.wikipedia.org/wiki/Damages>

<https://www.lexology.com/library/detail.aspx?g=e5c5dd4d-e8df-42d0-ada8-3dfe3a14b508>

C Palmer, 'Decennial Liability : A Potential Time Bomb for U.S Design Professionals' available at [https://www.beazley.com/documents/architects%20and%20engineers/risk%20insights/insight\\_decennial\\_liability.pdf](https://www.beazley.com/documents/architects%20and%20engineers/risk%20insights/insight_decennial_liability.pdf)

<https://www.ffa-assurance.fr/en/content/decennial-liability-insurance-france-0>

[https://www.french-property.com/news/build\\_renovation\\_france/architect\\_fees\\_contract/](https://www.french-property.com/news/build_renovation_france/architect_fees_contract/)

[https://www.designingbuildings.co.uk/wiki/Privity\\_of\\_contract](https://www.designingbuildings.co.uk/wiki/Privity_of_contract)

<http://www.mondaq.com/uk/x/10530/Year+2000/Contracts+Rights+Of+Third+Parties+Act+1999>

<https://www.educaloi.qc.ca/en/capsules/legal-warranty-automatic-protection-consumers>

<https://www.pmi.org/learning/library/construction-contracts-risk-allocation-1025>

<http://www.dr-hoek.de/EN/beitrag.asp?t=Germans-Fit-For-FIDIC>

[https://link.springer.com/chapter/10.1007/978-3-642-02100-8\\_6](https://link.springer.com/chapter/10.1007/978-3-642-02100-8_6)

[http://www.aecom.com/ae/wp-content/uploads/2015/08/Handbook-2016-Final\\_Lowres-spreads.pdf](http://www.aecom.com/ae/wp-content/uploads/2015/08/Handbook-2016-Final_Lowres-spreads.pdf)

<http://www.constructionlawmadeeasy.com/designandconstruct>

[https://www.designingbuildings.co.uk/wiki/Traditional\\_contract\\_for\\_construction](https://www.designingbuildings.co.uk/wiki/Traditional_contract_for_construction)

<http://dubins.ae/Professional%20Indemnity%20Insurance>

<https://www.thebalance.com/when-to-use-design-build-contracts-844914>

[https://www.designingbuildings.co.uk/wiki/Design\\_and\\_build\\_procurement\\_route](https://www.designingbuildings.co.uk/wiki/Design_and_build_procurement_route)

<http://www.probyn-miers.com/perspective/2013/10/the-role-of-lead-consultant-in-design-and-build-procurement-2/>

<http://www.contractorweekly.com/contractor-insurance/contractor-professional-indemnity-insurance/>

[http://pmbook.ce.cmu.edu/02\\_Organizing\\_For\\_Project\\_Management.html](http://pmbook.ce.cmu.edu/02_Organizing_For_Project_Management.html)

[http://www.howdengroup.com/brochures/understanding\\_the\\_role\\_of\\_the\\_employers\\_agent-branded.pdf](http://www.howdengroup.com/brochures/understanding_the_role_of_the_employers_agent-branded.pdf)

<https://www.masterbuilder.co.in/role-of-project-management-consultancy-in-construction-project/>

[https://www.designingbuildings.co.uk/wiki/Consultant\\_team\\_for\\_design\\_and\\_construction](https://www.designingbuildings.co.uk/wiki/Consultant_team_for_design_and_construction)

[https://www.steelconstruction.info/Single\\_storey\\_industrial\\_buildings](https://www.steelconstruction.info/Single_storey_industrial_buildings)

<https://www.buildingsguide.com/building-applications/commercial-steel-buildings/factories/>

<http://www.arabianindustry.com/construction/features/2012/jun/25/precast-takes-the-lead-3518398/>

<http://gulfnews.com/business/sectors/construction/use-of-precast-concrete-growing-in-uae-market-1.799606>

[https://www.mclaughlinbrunson.com/pdf\\_files/file\\_1269436584.pdf](https://www.mclaughlinbrunson.com/pdf_files/file_1269436584.pdf)

<http://www.lexology.com/library/detail.aspx?g=dad8586b-a856-45d6-b86f-47b79859a08b>

Haris Deen, Understanding Decennial Liability In Relation To Construction Contracts, 2011, Pg 1

<https://www.french-property.com/guides/france/building/new-build/defect-guarantee/>

<https://www.french-property.com/guides/france/building/new-build/defect-guarantee/>

<http://www.cavignac.com/publications/professional-liability-update-decennial-liability/>

[http://www.hwifrance.com/sub\\_menu.php?submenuId=158](http://www.hwifrance.com/sub_menu.php?submenuId=158)

<https://www.ffa-assurance.fr/en/content/decennial-liability-insurance-france-0>

<http://www.lexology.com/library/detail.aspx?g=dad8586b-a856-45d6-b86f-47b79859a08b>



<https://www.dentons.com/en/insights/alerts/2014/february/5/civil-code-client-alert-contracts-to-build-and-construction-related-issues>

Michael Grose and Ramiz Shlah , ‘Construction Law in Qatar and the United Arab Emirates: Key Differences’, Turkish Commercial Law Review.

<https://www.lawteacher.net/free-law-essays/contract-law/the-design-and-build-contract-contract-law-essay.php>

<https://globalarbitrationreview.com/jurisdiction/1004553/united-arab-emirates>, accessed on 18 March 2018

<http://constructionblog.practicallaw.com/patent-defect-or-latent-defect-does-it-matter/>, accessed on 22 March 2018

<https://www.thelienzone.com/construction-defects-latent-vs-patent/>, accessed on 22 March 2018

[https://www.jltspecialty.com/-/media/files/sites/specialty/insights-construction/jlts\\_insights\\_latent\\_defects\\_jan2015.ashx?la=en-gb&hash=1CD99C3E894E5BF9E78B5FA8124F6D87DDAFF845](https://www.jltspecialty.com/-/media/files/sites/specialty/insights-construction/jlts_insights_latent_defects_jan2015.ashx?la=en-gb&hash=1CD99C3E894E5BF9E78B5FA8124F6D87DDAFF845), accessed on 22 March 2018

[https://www.designingbuildings.co.uk/wiki/Latent\\_defects](https://www.designingbuildings.co.uk/wiki/Latent_defects), accessed on 22 March 2018

## **7. Word Count:**

Total Word = 23,401