ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

The February issue of *The Globe* included Professor Cindy G. Buys' article "Supreme Court Immigration Docket 2020-2021." She had prepared this material for the International & Immigration Law Section Council webinar in February, "2021 Immigration Law Update." Professor Buys participated in the panel for the webinar, which included Scott Pollock and Tejas Shah. Scott Pollock and Tejas Shah are both also former chairs of the International & Immigration Law Section Council and have participated for several years in the Section's annual immigration law update. Their material used with the webinar is included in this issue as "A General Overview and Current Outlook."

Readers that find Cindy G. Buys, Scott Pollock, and Tejas Shah's material of interest will be able to listen to the webinar through the ISBA website in the near future.

Howard L. Stovall concentrates his law practice in advising businesses on commercial matters throughout the Arab Middle East. His article, "Decennial Liability in Egypt – A Brief Summary" is

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2021 Illinois State Bar Association Annual Update on Immigration Law and Practice: A General Overview and Current Outlook

BY SCOTT D. POLLOCK & TEJAS SHAH

The Last Year and the Last Four Years

For immigration lawyers, the year 2020 saw: 1) executive branch efforts to reduce or end immigration to the United States, given a boost by a global pandemic causing U.S. consulates to close or cut back on visa services; visa bans, and bars to entry at U.S. borders; 2) federal courts and the U.S. Supreme Court alternately stopping or green-lighted restrictive policies- courts applied the brakes on many of the Administration's most far reaching efforts, finding the actions violated the Administrative Procedure Act or were done by officials who lacked legal authority to do so; and 3) a new president elected on promises to dismantle many of the restrictive policies over the past 4 years.

Detailing all the changes would be less than useful due to the sheer number of changes from the Executive Branch and the large number of lawsuits challenging the changes. As of mid-January 2021, the Immigration Policy Tracking Project had listed over 1,030 policy and regulation changes initiated by the Trump administration over the last 4 years.[1] These touched on virtually every area of

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the seventh article by Stovall in *The Globe* since his first article, "Summary of Arab labor law rules and practices – Termination of Employment," in the August 2001 issue.

The Illinois State Bar Association's E-Clips includes federal and state court cases deemed to be of interest. During 2020, federal court cases appeared concerning immigration or international legal issues, this in spite of the impact of the coronavirus.

On April 22, 2021, there will be a live webcast entitled, Girls in Crisis, Part III: Immigration Law and Trauma- Informed Lawyering. It will be presented by the ISBA Standing Committee on Women & the Law and Co-sponsored by the ISBA International & Immigration Law Section and the Women's Bar Association of Illinois Immigration Committee. Note that the webcast runs from 12:55 to 4:15 P.M. and has been approved for three hours of MCLE credit, including two hours of Professional Responsibility, one hour of which is for Mental Health and Substance Abuse Credit and one hour of Professionalism, Civility or Legal Ethics Credit.

As always, thank you to all of our authors and contributors.■

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2021 Illinois State Bar Association Annual Update on Immigration Law and Practice: A General Overview and Current Outlook

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immigration law practice: discriminatory Muslim and Africa bans, and subsequent immigrant and nonimmigrant visa bans based on health and economic related rationales; doing away with priorities for interior enforcement and agency discretion; erecting not only a physical wall on the border with Mexico, but interpretive and procedural barriers to legal immigration, including heightened evidence to overcome public charge inadmissibility, issuing decisions and rules making it harder for asylum applicants to win cases or obtain work authorization while their cases are pending; and doing away with an H-1B lottery that followed a statutory first-filed system in favor of a highest-paid worker standard.

The lame duck administration wasn't done until it was gone. It continued to publish final regulations in its last weeks and even days before inauguration day. These included finalizing a sweeping rule eliminating many asylum claims that was widely referred to as the "Death to Asylum" rule; an increase in immigration court fees that, among other things, would have raised the filing fee of an appeal by over 800% to almost a thousand dollars; and a rule that changed the calculation of prevailing wages for H-1B and PERM labor certification applications, that would eliminate employers' ability to hire new graduates or others into entry level jobs, regardless whether there was a scarcity of U.S. workers. Courts issued restraining orders or preliminary injunctions to temporarily block most of these midnight rules.

Remarkably, the outgoing administration also sought to hinder the incoming administration's ability to enact its own policies less than 2 weeks before the inauguration, when it signed unprecedented agreements with the State of Texas, other States, and various sheriff's offices, promising that the federal government will not alter immigration policies without providing 6 months' advance notice to the non-federal

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agencies. It also signed an unprecedented agreement with the union representing U.S. Immigration and Customs Enforcement (ICE) employees in the days before the inauguration of the new president. This too would keep the new administration from ordering changes to existing policies.

Impact of Four Years of Restrictions on Legal Immigration

The past four years compared to 2016 admissions rates[2]:

- 738,000 fewer immigrants from abroad (even before the pandemic, immigrant visas declined by 24 percent from the last year of the Obama administration
- 291,000 fewer refugees
- 246,000 fewer adjustments of status to permanent residence
- 287,000 fewer nonimmigrant work and cultural exchange visas (denial rate doubled from 7% in 2016 to almost 15% by mid-2020)
- The rate of Requests for Evidence also nearly doubled
- 96,000 more denials of asylum
- 698,000 fewer international students
- 9 million fewer tourist and business traveler visas (even before the March 2020 national emergency, visas down 20% from 2016 levels);
- 7 million pending applicants for immigration benefits and 1.3 million pending immigration court cases, more than double the court backlog in 2016

These statistics do not begin to reflect the human toll on "zero tolerance" policies that led to the separation of more than five thousand minor children from their parents (https://time.com/5678313/trump-administration-family-separation-lawsuits/) and the creation of refugee camps in northern Mexico, where persons have been kidnapped or sexually assaulted by criminal organizations, as a result of the inaptly named Migrant Protection Program, more commonly called "Remain in Mexico" by which tens of thousands of persons fleeing violence or poverty were returned to Mexico. https://www.hrw.org/news/2020/06/02/us-investigate-remain-mexico-program; https://www.hrw.org/news/2020/01/29/qa-trump-administrations-remain-mexico-program. 3

2020 Election Impact

President Biden campaigned on a promise to undo many of the Trump administration's immigration policies. On his first day in office he signed a number of executive orders, proclamations, and issued agency policy memoranda that address or reverse the previous administration's policies. He also indicated he would submit comprehensive legislation to Congress. The actions include[4]:

Administrative Actions

Enforcement

1. Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities This executive order specifically revokes the Executive Order on Interior Enforcement issued by the Trump Administration on January 25, 2017 and directs federal agencies to take actions, including issuing revised guidance, to adhere to due process, protect national and border security, address the humanitarian challenges at the southern border, ensure public health and safety, and safeguard the dignity and well-being of all families and communities.
2. DHS Memo-Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Procedures. Acting DHS Secretary David Pekoske issued guidance to CBP, ICE, and USCIS to review enforcement-related policies and procedures, including detention, the exercise of prosecutorial discretion and policies on interactions with state and local law enforcement. The guidance institutes a100-day moratorium on certain deportations while the review is being completed with certain limited exceptions. The guidance indicates that while the policy review is being completed, DHS' enforcement priorities shall focus on those who pose a national security risk, individuals apprehended on or after November 1, 2020, and incarcerated individuals released on or after January 20, 2021 who have been convicted of an "aggravated felony," as defined in the INA at the time of conviction, and are determined to pose a threat to public safety. **In addition, this memo specifically rescinds the 2018 Notice to Appear Guidance which has had a significant and direct impact on survivor-based immigration protections.** The 2011 Notice to Appear Guidance now holds.

Affirmative Protections

1. Affirming DACA: The Secretary of Homeland Security, in consultation with the Attorney General, shall take all actions he deems appropriate, consistent with applicable law, to preserve and fortify the DACA (Deferred Action for Childhood Arrivals) program.
2. Liberian DED: Through this executive order, President Biden reinstated Deferred Enforced Departure (DED) for Liberians (who have a grant of DED as of January 10, 2021) extending protections and work authorizations until June 30, 2022.

Border Policies

1. Suspension of New Enrollments in the Migrant Protection Protocols (MPP) Program. DHS announced that it would stop new enrollments into the MPP program effective yesterday, January 21, 2021. This is a critical first step, but DHS has yet to issue further guidance for individuals currently enrolled in the MPP program. But also notes that nonessential COVID-related travel restrictions remain in place.
2. Halting Border Wall Construction: President Biden signed a proclamation terminating former President Trump's 2019 Executive Order declaring a national emergency at the Southern Border. The Proclamation stops the allocation of funds and construction of the border wall at the Southern border and calls for an assessment

of the legality of the funding used to construct the wall, and calls on the federal agencies to redirect funds and repurpose contracts currently allocated for wall construction.

Ending Muslim and African Travel Bans

On Inauguration Day, President Biden issued a proclamation rescinding the travel ban on Muslim majority and African countries, and calls on the State Department to expedite the cases of those seeking a waiver under the prior ban, create a process by which those visas that were denied under the ban may seek reconsideration, and that applicants for visas are not prejudiced as a result of a previous visa denial due to travel bans. This proclamation also calls for DOS and DHS to review screening and vetting procedures for those seeking immigrant and nonimmigrant visas and provide recommendations for improvement. It also calls on the Department of State to review of foreign government information-sharing practices to ensure accuracy and reliability, and that the agency reviews on the use of social media identifiers and whether this has improved screening and vetting. DOS has issued an initial statement on President Biden's rescinding of the travel ban orders.

Executive Order on Advancing Racial Equity

This executive order calls on federal agencies to redress inequities in their policies and programs that serve as barriers to equal opportunity, including addressing access to benefits and government programs, and increasing engagement with underserved communities. Importantly, this Executive Order overturned the Trump executive order prohibiting certain diversity training on racial and gender biases and disbanding the 1776 Commission.

Regulatory Processes

1. Regulatory Freeze: The Biden Administration issued a regulatory freeze which means that rules that have been published in the Federal Register but have not yet taken effect will be postponed for review. This includes recent EOIR proposed rules like good cause for continuances and motions to reopen.
2. Modernizing Regulatory Review: This executive order instructs the Office of Management and Budget (OMB) to review the regulatory process to provide recommendations on how the regulatory review process can "promote public health and safety, economic growth, social welfare, racial justice, environmental stewardship, human dignity, equity, and the interests of future generations." In addition, it instructs OMB to come up with suggestions to "ensure that regulatory initiatives appropriately benefit and do not inappropriately burden disadvantaged, vulnerable, or marginalized communities."

Employment-Based Visa Changes

The regulatory freeze described above will have multiple practical impacts, which are described in greater detail below.

1. The implementation of a new rule that would have modified the H-1B lottery by preferring highly-paid positions is now likely to be postponed until after this year's H-1B lottery. While this rule is likely to be challenged in federal court as an *ultra vires* regulation if the administration attempts to implement it, the prospects of implementation in this year's H-1B lottery now seem considerably smaller.
2. The regulatory freeze should ensure that the "skinny" Strengthening the H-1B Program Rule that USCIS sought to implement will not see the light of day. This rule would have significantly modified the requirements for establishing an "employer-employee" relationship.
3. The Trump administration had sought to implement a rule revising the methodology for calculating prevailing wages for H-1B, PERM, and related cases. The effective date of this rule was intended to be March 15, 2021. As a result of the Biden Administration's decision to extend the implementation date of any "midnight regulations" by at least 60 days, it now appears that this rule would not be enacted until on or about May 15, 2021. This rule is also likely to be challenged by business and University groups that previously successfully challenged a similar rule that the DOL had enacted without notice and comment.

Ensuring a Lawful and Accurate Census

This executive order rescinds prior Trump administration actions on census data that excluded undocumented immigrants in consideration for the reapportionment of Congressional representatives.

Upcoming Administrative Actions

The administration has planned other executive actions on immigration in the upcoming weeks, including taking actions to restore U.S. asylum protections, review the public charge rule, strengthen refugee processing and create a task force on family reunification.

Travel Restrictions

One area of potential continuity between the Trump administration and the Biden administration is the imposition of travel restrictions on broad swathes of the world based on public health risks. Through various presidential proclamations (9993, 9996, 9984, 9992, 10041), the Trump administration last year blocked visitors from the Schengen Region, the UK and Ireland, Iran, China, and Brazil based on COVID-19 concerns. Although President Trump issued a Proclamation on January 18, 2021 (PP 10138) suspending such restrictions on visitors from the Schengen Region, Ireland, the UK, and Brazil effective January 26, 2021, the Biden administration has made it clear that they will not be suspending these travel restrictions. News reports as of January 24, 2021, indicate that the Biden administration will also be imposing travel restrictions on visitors from South Africa due to concerns about a novel coronavirus variant discovered there. Additionally, the federal government is now requiring all international travelers to the United States (including U.S. Citizens) to show that they tested negative for the

coronavirus in the three days preceding their travel to the United States. The Biden Administration also has not, as of January 24, 2021, taken steps to eliminate PP 10014 and 10052).

Further Executive Actions Issued on February 2, 2021

Expanding on President Biden's first day actions, he issued 3 sweeping executive orders aimed at considering, addressing and modifying restrictive Trump administration policies. These included:

1. creating a task force to reunite separated families, which include over 600 children whose parents have not yet been identified;
2. addressing the situation of asylum seekers at the border, directing the Secretary of Homeland Security to review and decide whether to terminate or modify the MPP; review all current asylum processes; work to improve conditions in home countries while addressing the root causes for displacement, including programs to encourage regional resettlement, and consider reinstating the Obama-era Central American Minors Program to allow parents lawfully in the U.S. to reunify with children coming as refugees or parolees; and
3. address barriers to citizenship to restore faith in the U.S. legal immigration system. This calls for a Task Force on New Americans to do a "top to bottom review" of restrictive Trump administration policies; review and report on changes to the public charge rule; and speed up the naturalization process, making it more accessible.

Legislative Proposals

President Biden has announced a comprehensive immigration bill, the U.S. Citizenship Act of 2021 which would extend legal status to undocumented individuals with the ability to apply for green cards after five years if they pass criminal and national security background checks and pay their taxes. This bill, sponsored by Senator Menendez in the Senate also creates immediate paths to permanent legal status for TPS holders, Dreamers, and farmworkers. In addition, the bill also takes efforts to streamline family immigration, address backlogs, and contain specific protections for immigrant survivors **including tripling the U visa cap.**

Reactions to Biden Proposals and Outlook for Reforms

While many immigration practitioners have responded positively to the reforms, the State of Texas has already filed a lawsuit challenging the 100 day pause on removals, claiming it violates an agreement it signed with the Department of Homeland Security in the waning days of the Trump administration, that DHS must give 6 months advance notice to State agencies that signed such agreements. See https://www.washingtonpost.com/national/texas-biden-lawsuit-ice-deportations/2021/01/22/4548eec2-5cea-11eb-aaad-93988621dd28_story.html. Whether the lawsuit prevails in the district court will depend on the decision of a judge appointed by former President Trump.

Senate Republicans oppose the proposed U.S. Citizenship Act of 2021, rejecting the paths to citizenship as an amnesty that will encourage additional unlawful immigration to the U.S. Democrats describe the proposal as a starting point for legislative discussion.

Another wild card is whether the agencies within the Department of Homeland Security will willingly comply with the new administration's directives. The last-minute agreement between the Trump administration and the ICE union could foreshadow strong internal resistance to reform.

In the authors' views, immigration reform is critical if the U.S. is to come to terms with a broken system. The backlogs in the immigration courts have grown to some 1.3 million cases, meaning that millions of immigrants and their family members are in legal limbo for many years. *See* https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php. Backlogs in the visa preference categories also deprive prospective immigrants of the ability to immigrate in a realistic time frame, some employment based immigrants having to wait decades in some cases, making the idea that immigrants should "wait in line" meaningless. There is a humanitarian crisis on the U.S.'s southern border.

The upcoming period will likely continue to be politically contentious. There will be many legal battles in the courts. But with a new administration, there is new hope for progress and reform to benefit immigrants, refugees, asylum seekers, DREAMERs, and their U.S. citizen family members. Immigration lawyers will continue to be on the front lines of this important national conversation about the nature of our country and what it means to be an American.■

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1 For more on the Immigration Policy Tracking Project, see https://immpolicytracking.org/; https://medium.com/coformaco/immigration-policy-tracking-project-f4bb7c67924c.

2.. Figures are from *Visualizing a 4-Year Assault on Legal Immigration: Trends Biden Must Reverse*, Cato Institute (December 11, 2020).

3. For an incisive analysis of the breadth of President Trump's immigration restrictions and the challenges the Biden administration will have in forging a new agenda, see https://www.washingtonpost.com/opinions/2020/10/29/trump-immigration-daca-family-separation/?arc404=true.

4. This list of President Biden's First Day immigration actions is adapted from ASSISTA, a legal support organization for immigrant survivors of violence. For more information, see https://asistahelp.org/.

Decennial Liability in Egypt: A Brief Summary

BY HOWARD L. STOVALL

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

Background on Decennial Liability

Egyptian law has applied a decennial (ten year) liability or warranty requirement to architects and contractors for almost 150 years, beginning with the civil code issued for the Mixed Courts in 1876 and then the civil code issued for the National Courts in 1883.[1] Decennial liability is an Egyptian legal concept adopted from France, which has provided for such a warranty since the French civil code of 1804.

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

> According to general principles the contractor should cease to be responsible for the building he has erected as soon as it is finished and handed over to the employer. But this would be a dangerous rule to apply to buildings, because defects in construction do not appear at once, and it is only when the building has "settled down," as it is called, that one can say whether the work has been well done or not. On these grounds the law has imposed a special legal responsibility on architects and builders, and for ten years they are jointly and severally responsible for the destruction of the buildings erected by them.
>
> The fall of the buildings may be due either to defective construction or to the fact that the site selected was bad. This does not affect the responsibility of the architects and builders who are liable even if the employer selected the site or authorized the defective buildings. Unsafe buildings are a public danger, and the law rightly prevents the architects and builders from shifting the responsibility from themselves to their employers, who may not have the technical knowledge necessary to enable them to detect the defects.[2]

When the 'new' unified Egyptian Civil Code (the "Civil Code") was enacted in 1948, the decennial liability rules were retained and expanded in Articles 651-54.[3] An unofficial English translation of these decennial warranty provisions, which remain the current legal rules in Egypt today, appears at the end of this article.

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

Scope of Decennial Liability

Under Article 651(1) of the Civil Code, architects and contractors[5] generally face joint and several liability to the owner for the partial or total collapse of a building or other permanent structure, for a period of ten years from the date of delivery (unless the construction was intended by the parties to last for less than ten years). Decennial liability is a special warranty which extends the normal contractual liability of a contractor or architect, is a type of strict responsibility, and generally applies even if the failure/collapse is due to a defect in the ground itself.

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

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

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

(a) A defect in engineering or construction practice, such as a deficiency in foundations.

(b) A defect in the soil on which the construction is erected, for example, if the soil is not solid or is soggy and the necessary measures to remedy this defect have not been taken according to good engineering practice.

(c) A defect in the materials used in construction, such as bad quality supplies or a departure from specifications.[9]

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

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

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

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

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

Nature of Decennial Liability

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

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

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

Exoneration from Decennial Liability

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

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

Otherwise, the architect or contractor cannot rebut the presumption of fault (and strict liability) except by showing that the collapse or defect was due to an event beyond its control, for example, in the case of force majeure.[13] By showing that the damage was due to a cause beyond their control, the architect and contractor do not contradict the strict presumption of error attributed to them, but rather they remove the causal relationship.

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

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

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

Decennial Warranty & Soil

Conditions: Some Examples

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

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

In another instance, the Egyptian court ruled that the contractor was required to check the soil conditions on which to build and, in particular, to determine whether there were any old foundations that might interfere with the newly-constructed ones. Failing that, the contractor's was responsible for the harmful consequences that resulted, and he was liable for the damage that was directly imputable without being able to allege, to exonerate himself from liability, that the owner was aware of the faulty layout of the foundations and had authorized it.[17]

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

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

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

* * * *

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

Excerpts from Egyptian Civil Code: Decennial Liability Provisions

Article 651

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

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

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

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

Article 652

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

Article 653

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

Article 654

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

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1. Davies, *Business Law in Egypt* (1984), at p. 214.
2. H. W. Halton, *An Elementary Treatise on the Egyptian Civil Codes* (Cairo 1911), vol. II at pp. 156-57.
3. Similar decennial liability provisions are found in other civil codes in the Arab Middle East. See, e.g., Jordanian civil code articles 788-791; Kuwaiti civil code articles 692-697; Libyan civil code articles 650-653; Qatari civil code articles 711-715; and United Arab Emirates civil code articles 880-883. In some other Arab countries, the strict liability period extends for only five years. See, e.g., Bahraini civil code articles 615-620; and Lebanese code of obligations and contracts articles 668-669.
4. Article 646 of the Civil Code. See also Al-Sanhuri, 7 *Al-Waseet Fi Sharh Al-Qanoon Al-Madani* [Intermediate Treatise on the Civil Code] 108 (House of Arab Heritage Revival, Beirut 1964).
5. The term "architect" is not narrowly confined to those professionals who are qualified as such. The Arabic term used in the Civil Code is "muhandis mi'mari", which

is broadly interpreted to also include certain types of "engineer". Thus, for purposes of decennial liability under the Civil Code, "architect" is intended to apply to parties involved in the design and/or supervision of construction on a building, whether a licensed architect, engineer, contractor or otherwise.

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

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

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

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

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

11. In rare instances, the Egyptian government has exempted contractors from decennial liability, such as in the inter-governmental agreement for the 1980s Cairo Wastewater Project, but those contractors otherwise remained subject to normal contract and tort liability rules. See, e.g., Attia, supra note 10, at 520-22; the text of that relevant agreement was published in EGYPT – Section B, Middle East Executive Reports (January 1980), pp. 22-23.

12. Davies, supra note 1, at 219.

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

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

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

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

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

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

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

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

21. Egyptian Law No. 106 (1976) required insurance for "true" decennial liability (owed directly to an owner by the architect and contractor, under Articles 651-654 of the Civil Code), but amendment by Law No. 2 (1982) eliminated the insurance requirement for such "true" decennial liability, and instead required only insurance cover for liability to third parties. See also Law No. 119 (2008), the current law on these issues, which similarly does not require insurance for "true" decennial liability but only for liability to third parties.

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

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