ACE POLICY POSITION
2016

ACE POLICY POSITION ON PROFESSIONAL INDEMNITY INSURANCE (PII)

ARCHITECTS' COUNCIL OF EUROPE
CONSEIL DES ARCHITECTES D'EUROPE

Highlights

The legitimate concerns of architects and other professionals in relation to Professional Liability and Indemnity Insurance are not only a matter of fairness in the construction system but give rise to inefficiency and uncertainty in the construction sector, especially in relation to:

- Time limits for making claims;
- Liability relating to actual errors made (rather than unforeseen circumstances);
- Apportionment of liabilities between parties.

Therefore, the EU authorities are urged to issue guidance to the Member States, introducing the following requirements:

- No claim can be made in relation to a construction project after the expiration of five years from the completion of the services contracted or the completion date of the project (whichever may be earlier);
- Professionals in the construction industry should be liable for their own acts of professional negligence, not for damage arising from unforeseen circumstances (or not reasonably foreseeable circumstances) and not for damage arising from the errors or omissions of other parties;
- Where liability is apportioned between parties, each party should respond only in proportion to their own liability (not on the basis of joint and several liability or *in solidum* liability).

ACE position

1| Certainty and timeliness of claims

By way of background it must be appreciated that, within the EU, two fundamentally different approaches are taken to the way in which claims are made in relation to Professional Indemnity Insurance. These may be described as the “claims arising” or the “claims made” basis for insurance.

In much of the EU, a claim made against an architect must be resolved by the Professional Indemnity Insurer responsible at the time of the alleged fault: the “claims arising” basis. However, it may be difficult to establish when, exactly, an error was made, since the damage may have arisen from a design error or from an error made later in the project (during the construction phase, for example), or even a combination of circumstances.

Moreover, if the claim relates to an alleged error made a number of years ago, the insurer may not be easy to identify and may not still be in business.

Again, if different insurers have been involved that is likely to add to the complexity of litigation, resulting from disputes between insurers. Consequently, it may be desirable (from the architect’s point of view) to continue indefinitely with the same insurer, though that reduces competition and probably increases costs.

By contrast, in some cases insurers respond to claims that are actually made during the year (typically) in which the insurance contract is valid, irrespective of when the alleged error was made (the “claims made” basis), thus covering acts (but not claims) dating from before the commencement of the insurance period.

In either case, one of the areas of most concern in Europe is the very wide disparity between the time periods within which claims must be made in the different EU Member States. Indeed, even within some countries there can be room for dispute over time scales, for example, depending on when work (including design work) was carried out, when particular sections of construction were carried out on site, when the project as a whole was completed, when a fault appeared or when a fault ought reasonably to have been discovered. This lack of clarity generates unnecessary litigation and ought to be resolved, even if a relatively simplistic cut-off criterion were to be adopted.

2| Joint and Several Liability (*‘In Solidum’* Liability)

When disputes arise in the context of construction projects, architects are unduly vulnerable. In some countries within the EU, the participation of an architect in the design process is an essential legal requirement, of course, but in most countries of the EU, architects are required to hold professional indemnity insurance (either by law or by professional code). Consequently, the architect is likely to be the easiest target for a claim (whether justified or not) by another party.

Thus, when several parties are involved in a case, a principle of fairness should be invoked, that each party should be liable in proportion to their own contribution to the damage, rather than one party assume a shared responsibility for the whole of the damage caused. This can be described as a "net contribution" principle (and already can be incorporated by contract as a "net contribution clause" in some EU Member States).

It seems to follow that in the construction sector, all the participants ought to be subject to a requirement to carry an appropriate, proportionate and reliable level of insurance. More (and more transparent) information should be available to ensure that fair comparisons between insurance conditions can be made. This could, perhaps, include provisions for single project insurance (covering all professionals or all participants on a single project), but without losing professional independence.

3| Presumption of liability (*res ipsa loquitur*)

In principle, an allegation must be proved by the party making it ("burden of proof"). Nevertheless, it can be accepted that, in some cases, the circumstances point directly to a fault by a specific party, perhaps the architect. Thus, an initial presumption can be derived in relation to the case – "the thing speaks for itself". Nevertheless, the principle can be taken too far and, in some EU Member States it appears to be the case that a building failure is assumed inevitably to have been the result of a failure by the architect. That is clearly unjust, since fault must be established by proof based on coherent evidence, not on a mere assumption. The reversal of the normal burden of proof should only apply in exceptional cases.

4| Fault: negligence and unforeseen circumstances

Further to the preceding comment, it should be clear that architects (and all professionals) should be liable for their negligence but not for unforeseen circumstances (that were not reasonably foreseeable). Negligent professionals must be held liable, of course, but the diligent professional who could not have foreseen a problem ought not to be held responsible for the faults of others or for matters outside his or her own control. The mere fact that a claim has been made does not demonstrate that the claim is justified.

5| Other insurances

It should be remembered, in this context, that a prudent building owner will, in any case, obtain insurance cover against loss resulting from such matters as fire, subsidence and so on. The professionals' insurance ought not to be seen as a substitute for such prudent management.

6| The Courts

In the context of Professional Indemnity Insurance, it must be observed that there can be a tendency (more marked in some EU Member States than others) for decisions of the courts to find culpable an insured party in preference to parties who may not be in a position to respond to a decision to award damages against them. The courts should not make use of architects' professional indemnity insurance to remedy defects in social provisions.

Background

Taking into account the Staff Working Document published by the European Commission in October 2013[1], the aim of this Policy Position is to provide a brief commentary on issues that arise in relation to professional liability and indemnity insurance for architects in the European Union. Architects play a leading role in the development and construction process and although these comments are particularly related to the architects' situation, they have a general relevance to other professions and the broader industry.

Annexe

Overview of services that architects can provide over the span of a building project, 2014

[1] Commission Staff Working Document of October 2013 on the outcome of the peer review on legal form, shareholding and tariff requirements under the Services Directive, accompanying the Communication from the Commission on Evaluating national regulations on access to professions

The **Architects' Council of Europe (ACE)** is the representative organisation for the architectural profession at European level: it aspires to speak with a single voice on its behalf in order to achieve its aims. Its membership currently consists of 43 Member Organisations, which are the regulatory and professional representative bodies in all European Union (EU) Member States, Accession Countries, Switzerland and Norway. Through them, the ACE represents the interests of over 565.000 architects from 31 countries in Europe.

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