CONSTRUCTION PRODUCERS’ JOINT AND SEVERAL LIABILITY under Kuwaiti Civil Code’s Decennial Guarantee Provisions

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It is conceivable that the involvement of multiple parties in carrying out a construction project renders the determination of liability very difficult. Several producers (architects/engineers and contractors) may be held liable for defective works, either as a result of an agreement or because they were jointly involved in the construction project.

Joint and several liability, (liability \textit{in solidum}) is primarily the province of the law of tort, but can also invoke contractual points at times. The term is associated with the plurality of debtors; it is used to indicate two (or more) obligations directed to one and the same juristic end. Each of the several debtors, who collectively contributed to the same damage, is liable for the whole.

This article is immediately concerned with the construction producers’ joint and several liability in the context of their decennial guarantee, under the Kuwaiti Civil Code No. 67 of 1980 (hereinafter “the KCC”).

Liability \textit{in solidum} is regulated by Arts. 346-360 KCC. The general principle, however, is contained in Art. 341 KCC:

\footnote{Paper was published in \textit{Arab Regional Forum News} (Newsletter of the Arab Regional Forum of the Section on Business Law – IBA), vol. 10, no. 1, June 2003.}
“Solidarity among creditors or among debtors is not presumed; it must be pursuant to an agreement or a provision in the law, with due observation of the rules of commerce”.

Thus, where more than one party is liable in respect of the damage caused, each can be wholly liable for the total, but only if there is an agreement or a legal provision to this effect, as is the case in Art. 695 KCC below.

**LIABILITY IN SOLIDUM IN CONSTRUCTION CONTRACTS**

Art. 692 KCC, pertaining to producers’ decennial guarantee, explicitly stipulates that they are liable *in solidum* to the client:

“If both the engineer and the contractor are responsible for the defects in the work, they shall be held jointly liable”.

Thus, all those involved in the construction process are jointly and severally responsible for latent defects; the ethos behind this is twofold:

1. It relieves the client from the onus of establishing the precise cause of the defect. This is an advantage since it is often impossible for parties’ activities to be individualised as to establish the proportion in which each of them has been influential.

2. It establishes legal rights of recourse between the producers; details of issues of liability among them are left for them to resolve. This relieves the client from involving in lengthy and costly litigation.

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2 However, this rule is reversed in commercial dealings; Art. 97 of the Kuwaiti Commercial Law stipulates that solidarity amongst co-debtors is presumed, unless there is as agreement or a provision in the law contrary to this.
PROCEDURES AGAINST CO-DEBTORS

In practice, Art. 695 KCC entails that the client can commence a legal action for any major defects affecting the stability or safety of a structure, against either of the producers or both, for the whole damages, without having to decide whether the defect is of a design or a structural nature (for the purpose of this section, producers are called “co-debtors” hereinafter).

The court’s decision usually results in one of three scenarios:

1. Liability is apportioned between co-debtors according to guidelines set out in Arts. 693 KCC and 694 KCC;  
2. Only one of the co-debtors is liable for the whole amount; or  
3. Both co-debtors are liable for the whole amount (in which case the client is entitled to look for his compensation from either of the co-debtors or both).

RECOUPERS AMONGST CO-DEBTORS

Payment of the debt by any of the in solidum co-debtors entails the discharge of his liability, as well as that of the other co-debtors. Consequences are:

3 Art. 693 KCC: “(1) Where the engineer’s work was confined to preparing all or part of the design of the building or installation, he shall be responsible for the defects which concern the design prepared by him, but not for the defects concerning the method of execution. (2) Where the client appointed him to supervise all or part of the execution, the engineer shall be responsible for the defects related to the method of execution for the supervision of which he was appointed”.

4 Art. 694 KCC: “(1) The contractor shall only be responsible for the defects in the execution, but not for such defects which come from a fault in preparing the design, unless such defects are apparent. (2) The contractor shall, however, be responsible for defects related to design if it was prepared by an architect that he employs”.

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(i) The client could sue any of the co-debtors, as he deems favourable for his case; this depends on the comparative degree of each co-debtor’s solvency; he might also sue all of the co-debtor’s as a group. If the client releases one of the co-debtors from his liability, he retains his right to a joint action to claim the full amount from the others.

(ii) A co-debtor against whom the client claims payment may plead all the defences that result from the nature of the obligation, and those which are common to all co-debtors. He may not plead defences that are purely personal to some of the other co-debtors.

(iii) Between co-debtors, the liability is not joint and several. If one of them pays the debt in full, and afterwards managed to negate his responsibility for the defect, he can recover damages against the other co-debtors.

(iv) Recovery of the paying co-debtor against the other co-debtors is to be divided as per their respective shares, which are equal unless otherwise agreed.

(v) If one of the co-debtors becomes insolvent, his portion is proportionally subdivided among the other co-debtors pro rata. Insolvency often results in a ‘knock-on liability’, where a producer (e.g. the architect/engineer) may be held liable for more than his share of blame. This usually occurs when he is only partly to blame for the loss, but other co-debtors (e.g. the contractor) who are also partly responsible, cease to remain solvent for one reason or another. Here, the architect/engineer will be totally liable for a loss event to which he did not solely contribute, and could hence be

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5 Art. 346 KCC.

6 Art. 351 KCC.

7 Art. 346(2) KCC.

8 Art. 359(1) KCC.

9 Art. 359(3) KCC.
held liable for (a) the full cost of repair or replacement of the damaged item; or (b) full amount of damages, where the item is beyond repair or replacement.