GA2/15/Insurance
Agenda Item 9.2

ACE Policy on Professional Indemnity Insurance (PII)

Insurance

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Introduction

1. Taking into account the Staff Working Paper published by the European Commission in October 2013, the aim of this Policy Paper 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.

Conclusions

2. 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:

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

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

1. No claim in relation to a construction project can be made after the expiration of five years from the completion of the services contracted or the completion date of the project (whichever may be earlier).
2. 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 damage arising from the errors or omissions of other parties.
3. 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).

Certainty and timeliness of claims

4. 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.

5. 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. It may, however, be difficult to establish when, exactly, an error was made, since the damage may have arisen from design error or from an error made later in the project (during the construction phase, for example), or even a combination of circumstances.

6. 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.

7. Again, if different insurers have been involved that is likely to add to the complexity of litigation, resulting from disputes between insurers. In consequence, 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.

8. 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.

9. 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 states of the European Union. Indeed, even within some countries there can be room for dispute over time scales, depending, for example, 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 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.

Joint and Several Liability ('*In Solidum*' Liability)

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

11. Thus, when several parties are involved in a case there should be invoked a principle of fairness, 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 states).

11A. 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.

Presumption of liability ('res ipsa loquitur')

12. 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 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.

Fault: negligence and unforeseen circumstances

13. 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.

Other insurances

14. 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.

The Courts

15. In the context of Professional Indemnity Insurance, it must be observed that there can be a tendency (more marked in some EU 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.