

Earthquake in Chile - Some views with respect to insurance.

The strong earthquake and tsunami on 27 of February 2010, caused extensive and severe damage to both public and private property, including productive centers and infrastructure. Legal consequences are manifold and, with respect to insurance, are relevant for civil liability covers and eventual subrogation action against insurers of physical assets.

For those that may invoke the earthquake as an unforeseeable act of force majeure (Act of God), then this represents an exempting circumstance to liability. An Act of God terminates obligations and the compliance thereof becomes impossible. It may have an objective character, if the impossibility of performing an obligation is absolute and fulfillment is not possible, no matter what degree of diligence is employed. It may be subjective, and assimilates to the lack of guilt, if the impediment is not absolute but it can be overcome by exacting the appropriate diligence.

In order for the event to be validly invoked as a ground for exemption it must be irresistible and unforeseeable, thus making compliance impossible even though necessary and reasonable precautions were taken. It is true that an earthquake is expressly mentioned in Article 45 of the Civil Code (enacted in 1845) as an example of an Act of God. But it is now not accepted that every earthquake must always be irresistible and therefore configures such cause for exemption. In old cases of shipwrecks, which the Civil Code also mentions as force majeure or Acts of God, courts have not accepted it per se as an exempting circumstance to liability, maintaining that the shipowner's liability shall depend on the negligence committed by the Captain or crew (Valdes vs. the State of Chile, Supreme Court, 31 May 1918). It shall be necessary to examine in each case; if the appropriate diligence had been employed, would it have been possible to avoid - or diminish - the consequences of the catastrophe? The higher degree of onerosity should not be an element in such analysis, unless stipulated in the contract.

Courts have decided that, due to their frequency in Chile, an earthquake of regular intensity does not constitute force majeure or an Act of God (Porzio v. De Cabri and Shell, Supreme Court, August 1941). What happens in the case of a severe earthquake? In this same decision, the Court stated that force majeure or an Act of God is a question of fact and must be established in each case. With respect to the unforeseeable aspect, it shall be necessary to take into account in any analysis how frequently Chile is affected by medium and high-intensity earthquakes.

With respect to construction, for some decades now anti-seismic regulations have been applied which take into account the different areas of the country according to their seismic threat. The purpose of these regulations is to limit damage to non-structural elements in the event of medium-intensity earthquakes, and to prevent collapse, in the event of exceptionally severe earthquakes. Collapse must be understood as the destruction or ruin of the structure. Also, the examination of an eventual liability cannot ignore standards that, at the time of construction, were included in good construction and engineering practices for areas exposed to severe earthquakes.

Thus, construction damages attributed to negligent conduct may not rely on the occurrence of an earthquake to invoke force majeure or an Act of God as an exempting circumstance to liability. Technical aspects that appear to be relevant in a liability analysis include soil mechanics, structure calculus, execution of construction, and sufficiency and quality of materials, among others. Naturally, each situation must be viewed within its own context.

On the other hand, and from a contractual point of view, the delay of one of the parties in delivering a good may transfer to the debtor the risk of loss or damage caused by an event considered as force majeure or an Act of God, such as an earthquake. In general, the owners of goods support its destruction or damages. But Article 1672 of the Chilean Civil Code states that, if the thing perishes or is damaged due to force majeure or an Act of God and the debtor is overdue in delivering the said thing, then the debtor must compensate the creditor for all damages, unless the thing would have perished anyway due to the force majeure or Act of God, if it had been in the hands of the creditor. In the last case, the debtor in arrears shall owe only the damages due to the delay, and not those due to the loss of the thing as a consequence of the force majeure or Act of God.

Finally we shall mention that the definitions of "event", "occurrence" and "damage due to the same cause" in the different insurance policies are key to establishing the limits and deductibles applicable to each case, as the events that occurred in Chile not only include the earthquake of February 27, but also a subsequent tsunami, aftershocks and even earthquakes that could be independent from the first one.

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