

The Spanish Construction Planning Act

Insurers can no longer count on the protection of joint liability when things go wrong.

The role of insurers in the Spanish construction sector is undergoing a fundamental change as a result of the courts' interpretation of the 1999 Construction Planning Act (Ley de Ordenación de la Edificación). Although the Act is six years old, it is only recently that its new principles have really been tested by the courts.

The Act is concerned with the safety and quality of new buildings and sets out, for the first time in Spain, the responsibilities of the different operators in the construction process: the developer, contractor, designer, project director and executive project director. The last three may be architects or engineers, as required by the particular project.

But the 1999 legislation is also concerned with the insurance cover that has to be arranged for the benefit of the end owner - the consumer. Under the Act, the developer must arrange for latent defects insurance (responsabilidad decenal) to be in place for at least 10 years. This is aside from any public liability cover that the contractor may have arranged. Without such responsabilidad decenal insurance cover, the building project will not be given official permission to start.

Joint liability - in principle

Of particular interest to insurers is the fact that recent case law seems to have abandoned the rule that all operators should be held jointly liable in the event of a loss. This matters to insurers because if the general principle of joint liability is upheld, then all the insurers will chip in. However, if the courts take the view that liability should be a matter for the individual operator (the contractor or architect, for example) who was liable for the loss, then only the insurer of that particular operator will end up paying the bill. It is worth backtracking to see how things have reached this point. The traditional view in Spanish law has been that the developer and architect (or engineer, in some instances) are jointly liable for the loss in a case where:

- buildings have collapsed or suffered structural damage; and
- it is impossible to ascertain the extent to which each defendant is liable; and
- there are no exonerating circumstances, such as force majeure.

This approach is respected by the new regime. The position under the Act is that, in the absence of evidence to the contrary and any exonerating circumstances, all operators should be held jointly liable. At first glance, the end result is much the same - joint liability - although extended to all parties participating in the building process, rather than just the developer and architect. However, there are dissenting voices which advocate the following argument: if the Act clearly sets out the activities and responsibilities of those involved in a building exercise, surely it must be possible to attribute liabilities individually so that those who have nothing to do with the loss are not caught by the joint liability trap.

Changing attitude of the courts

The courts are beginning to recognise the logic of this argument. There are reported Court of Appeal decisions in which the designer, project director and executive project director - effectively, the entire technical team - have been exempted from liability since the developer delivered the building without having obtained the relevant completion certificates from them. The court has taken the view that the technical team could not be

liable for the defects of a building they had not certified as complete. The developer and its insurers were alone held responsible for the full claim. In a recent Supreme Court decision, developers were exempted from liability for injuries sustained by a bystander who was hit by parts of a building that detached from the main structure and fell on him. The court argued that, although developers are strictly liable for latent defects, it is a different matter when the loss is caused by construction or design defects. In such a case, factual evidence should be taken into consideration in order to establish which parties are actually responsible for the loss. The same reasoning has been followed in a subsequent Supreme Court decision. As two Supreme Court rulings constitute precedent in Spanish law, first instance judges can now adopt the same line without being criticized by their senior colleagues. All this is good news for the building sector and those providing quality services, since each operator will be held accountable for its own actions. On the other hand, insurers will need to assess each prospective insured carefully, and attempt to keep a quality conscious portfolio. Otherwise, if things go wrong, the joint liability umbrella may no longer be there to help spread the loss.

However, the question is not settled finally: one can see from other judgments that the Supreme Court is still debating which way to go. While recognising that each operator should only have to answer for its contractual or statutory responsibilities, in some instances the court has justified holding operators jointly liable so as to ensure that the end owner is adequately protected.

An uncertain ending

It is not at all clear how this whole story will end. This is largely due to the role of precedent in Spanish law, which is a curious one. It can be argued that Supreme Court decisions are only as binding as those of, say, the Judicial Committee of the Privy Council in the UK, which have merely authoritative force. In Spain, while lower courts are encouraged to follow Supreme Court decisions, they are not compelled to do so, provided they give reasons for taking their own line. As a result, insurers cannot be entirely sure whether - as a matter of law - they will be footing all or only part of the bill when their insured is found liable. Careful assessment of each individual insured is therefore more important than ever before.

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