

Insurance Law Issues Due to the Great East Japan Earthquake of 2011

(Part One)

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Introduction

- I. Overview of the Loss from the Great East Japan Earthquake and the Insurance Coverage
 1. The Impact of the Earthquake and Tsunami
 2. Non-life Insurance Contracts and the Earthquake Insurance
 3. Responses of Insurers in the Non-life Insurance Sector
 4. Responses of the Insurers of Life Insurance
- II. Exception of Earthquake-Related Risks in Property Insurance
 1. Crimes in the Affected Areas
 2. The Exception Clause and Its Interpretation

INTRODUCTION

The earthquake of 9.0 magnitude that occurred off the Pacific coast of northeast Japan on 11 March 2011 caused devastating damage to that region of the country. The enormous earthquake, which was later named the Great East Japan Earthquake, not only affected the Japanese economy significantly, but also had a profound impact on its society. Just as the terrorist attacks of 11 September 2001 in the United States changed the people's behaviour and mind-set, Japanese people feel that, after the earthquake, they cannot remain unchanged in their way of living.

The earthquake also raised legal issues concerning compensation for the economic loss incurred. Among them are the issues arising under insurance contracts. Examining such issues closely may, on the one hand, add new insights to the classic question about how the law works in Japan; on the other hand, it may also contribute to recent studies on how the members of society should share economic burdens in case of disasters.

This article reviews general and specific issues of insurance law in the wake of the Great East Japan Earthquake. Its first section gives readers an overview of damages

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from the earthquake, followed by general observations about how the insurance industry responded after the earthquake took place. The second and third sections take up specific issues relating to the earthquake. The second section visits the issue of the interpretation of the exception clauses in property insurance with regard to thefts in the damaged area. Then the third section discusses a case where the exception clause in liability insurance was invoked and the causal link between the loss and the earthquake was disputed. The final section places these issues in the broader picture of 'fair' balance under the catastrophic natural disaster.

I. OVERVIEW OF THE LOSS FROM THE GREAT EAST JAPAN EARTHQUAKE AND THE INSURANCE COVERAGE

1. *The Impact of the Earthquake and Tsunami*

According to the statistics of the Japanese government,¹ over 15,800 people died from the earthquake and the tsunami that immediately followed; over 3,200 people are still missing; and over 6,000 people were injured. As of 9 February 2012, over 342,000 people are still homeless, either at the evacuation centres (such as the local community hall or school gymnasium), houses of relatives and friends, or temporary houses built after the earthquake. These numbers include evacuees from the areas surrounding the Fukushima Dai-ichi Nuclear Power Station, an area that did not incur severe physical damage but became uninhabitable due to the high radiation levels. The houses and buildings that suffered partial or total damages were recorded at more than 384,000.² The total economic damages, including social infrastructures (such as roads and riverbanks) and utilities (such as water supply, gas and electricity), are estimated to be 16.9 trillion yen.³

2. *Non-life Insurance Contracts and Earthquake Insurance*

The Insurance Act of 2008⁴ does not mention an earthquake as a cause of exempting the insurer. This does not, however, mean that earthquake risks cannot be exempted. Because

1 GOVERNMENT OF JAPAN, Road to Recovery (March 2012), http://www.kantei.go.jp/foreign/policy/documents/2012/_icsFiles/afieldfile/2012/03/07/road_to_recovery.pdf.

2 NATIONAL POLICE AGENCY OF JAPAN, Damage Situation and Police Countermeasures Associated with 2011 Tohoku District-off the Pacific Ocean Earthquake (28 March 2012), http://www.npa.go.jp/archive/keibi/biki/higaijokyo_e.pdf.

3 GOVERNMENT OF JAPAN, *supra* note 1.

4 For a concise overview of the Insurance Act, see SÔICHIRO KUZUKA / JIYEON LEE, The New Japanese Insurance Law: Comparisons with Europe and Korea, in: ZJapanR/J.Japan.L. 28 (2009) 73. For more comprehensive analyses, see SÔICHIRO KUZUKA / MIKA TAKAHASHI, Chap. 8, in: H. Baum/M. Bälz (eds.), Handbuch Japanisches Handels- und Wirtschaftsrecht (Carl Heymanns Verlag, Cologne 2011).

the rules on the exception of the insurer⁵ are not among the non-derogable provisions, which are exhaustively listed in the Insurance Act,⁶ the insurance policy can introduce a clause providing for other kinds of exempted risks than are mentioned in the Insurance Act. In fact, most non-life insurance (indemnity insurance) policies exempt the insurer from indemnifying the earthquake-related loss. In fire insurance policies, for example, the loss due to a fire caused by an earthquake is usually exempted.

Against this background, the Act on Earthquake Insurance⁷ was enacted in 1966 after the Niigata earthquake that occurred in June 1964. The earthquake insurance under this Act is a commercial product sold by insurance companies as additional coverage to fire insurance. However, the risk is so huge that the government offers reinsurance to cover the excess loss that cannot be borne by the commercial market.

Earthquake insurance is designed to satisfy the imminent needs of those affected by an earthquake through a simple procedure. It covers loss or damages caused by an earthquake, a volcanic eruption or a tsunami to dwelling houses and household goods.⁸ The insured amount shall be between thirty and fifty per cent of that under the main insurance cover, and not more than 50 million yen for the house and 10 million yen for the household goods in any case.⁹ In order to simplify the payment procedure, the loss under earthquake insurance is classified into only three classes, namely the total, half or partial loss. The amount to be paid shall be the whole of the insured amount for a total loss, fifty per cent of the insured amount for a half loss, and five per cent of the insured amount for a partial loss.¹⁰

As regards the reinsurance by the government, technically speaking the government reinsures the commercial reinsurer for the amount exceeding the threshold determined by the Cabinet Order.¹¹ At the time of the Great East Japan Earthquake, it was provided that the government would bear fifty per cent of the amount to be paid if the total amount paid by all the insurers exceeded 115 billion yen, and ninety-five per cent if the total amount paid by all the insurers exceeded 1.925 billion yen.¹² However, the amount to be borne by the government shall be within the limit set by the Diet each fiscal year.

5 Art. 17 of the Insurance Act provides that the insurer is exempted from indemnifying the loss arising from the act that the policyholder or the insured committed intentionally or with gross negligence.

6 See Art. 26 of the Insurance Act.

7 Law no. 73 of 1966.

8 Art. 2 (2) nos. 1 & 2 of the Act on the Earthquake Insurance.

9 Art. 2 (2) no. 4 of the Act on Earthquake Insurance; Art. 2 of the Cabinet Order to Implement the Act on Earthquake Insurance (Cabinet Order no.164 of 1966).

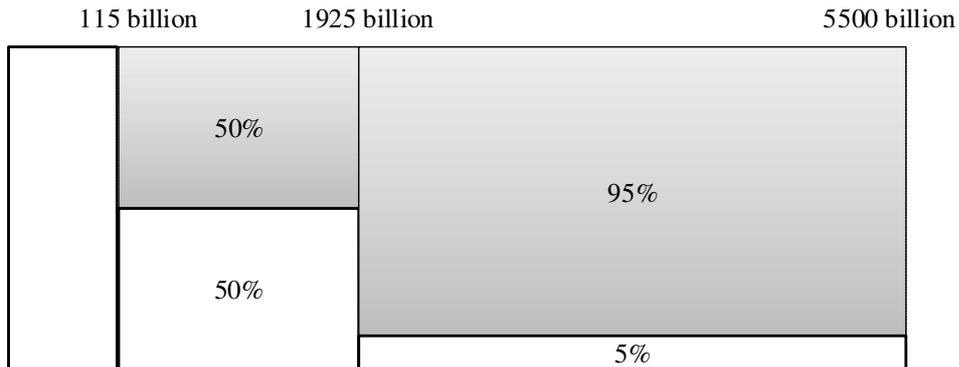
10 Art. 1 (1) of the Cabinet Order Implementing the Earthquake Insurance Act.

11 Art. 3 of the Act on Earthquake Insurance.

12 Art. 3 of the Cabinet Order Implementing the Earthquake Insurance Act, prior to the amendments of 2011. The amount was amended after the Great East Japan Earthquake to keep the insurers of earthquake insurance solvent. The current threshold above which the government bears ninety-five per cent of the loss is 871 billion yen.

Since April 2009, the total amount available to the insured, namely the sum of the maximum of the government's share determined by the Diet and the corresponding commercial insurers' share, was 5.5 trillion yen. In case the total amount of the damages exceeds this limit, the amount to be paid to the individual insured will be reduced proportionately.¹³

Figure



Reinsurance by State: $(1925-115) \times 0.5 + (5500-1925) \times 0.95 = 4301.25$ [billion yen]

3. Responses of Insurers in the Non-life Insurance Sector

After the Great East Japan Earthquake, the non-life insurance companies, as insurers of earthquake insurance, cooperated with each other to make available the proceeds from earthquake insurance to the extent possible. Through the industry organisation (the General Insurance Association of Japan) they set up the Center for Searching Earthquake Insurance Contracts to respond to inquiries from customers about whether, and with which insurer, they maintained their earthquake insurance policy.¹⁴ For the survey of damages, the insurers jointly photographed from the air and by satellite the area completely devastated by the tsunami. Based on the photographs, they identified certain blocks in which insured parties can claim a 'total loss'.¹⁵ Further, they decided to accept

¹³ Art. 4 of the Act on Earthquake Insurance.

¹⁴ See *News Release* of the General Insurance Association of Japan dated 30 March 2011, http://www.sonpo.or.jp/en/news/2011/1103_03.html.

¹⁵ See *News Release* of the General Insurance Association of Japan dated 28 March 2011, http://www.sonpo.or.jp/en/news/2011/1103_02.html. See also the progress report of the General Insurance Association of Japan dated 22 April 2011, http://www.sonpo.or.jp/en/news/2011/1104_02.html.

claims without the required documents where it is found appropriate to do so.¹⁶ The amount of the proceeds paid out within eight months from the earthquake reached 1.18 trillion yen on over 718,000 policies.¹⁷

Still, not all the households in the affected region were covered by earthquake insurance. Because it is an additional coverage that accompanies a fire insurance policy, no coverage is available unless one purchases the fire insurance first. Further, even for purchasers of the fire insurance it is not mandatory to take out earthquake insurance. Though in the absence of an objection the purchaser of a fire insurance policy is deemed to purchase earthquake insurance together with it, it is possible to exclude the additional coverage and save the premium for it by expressly indicating so.¹⁸ The amount of the annual premium varies depending on the prefecture in which the insured lives. In Miyagi Prefecture, which was closest to the seismic centre of the Great East Japan Earthquake, for example, the premium before the earthquake was 6,500 yen if the house was not built out of wood and 12,700 yen if built out of wood for every 10 million yen of the insured amount.¹⁹ Therefore, the owner of a wooden house whose value is 20 million yen can save more than 25,000 yen every year by excluding earthquake insurance coverage.

In Miyagi Prefecture, 68.7 per cent of all fire insurance policies were accompanied by earthquake insurance. It needs to be noted that the coverage rate measured by the number of households is roughly half that measured by the number of insurance policies.²⁰ Among other factors, the difference may reflect the number of families living in a rental house, who may not purchase fire insurance. Thus, in the case of Miyagi Prefecture, only about one-third of all households were covered by earthquake insurance.

4. Responses of Insurers of Life Insurance

Most life insurance contracts also have an exception clause for an accident caused by an earthquake. However, on 15 March 2011, all life insurance companies decided that they would not invoke the exception clause.²¹ Further, the insurers' association requested its members to (i) grant a six-month grace period for premium payments by those living in the areas designated under the Disaster Relief Act to prevent their contracts from

16 See *News Release* of the General Insurance Association of Japan dated 28 March 2011, http://www.sonpo.or.jp/en/news/2011/1103_02.html.

17 See the Statistics by the General Insurance Association of Japan dated 9 November 2011, http://www.sonpo.or.jp/en/news/2011/1111_01.html.

18 A signature or seal of the purchaser is required to make sure that he has been fully informed before choosing not to have earthquake risks covered.

19 YASUFUMI TAKAHASHI, *Jishin Hoken* [Earthquake Insurance] 132 (Kin'yū Zaisei Jijō Kenkyūkai, Tokyo, 2012).

20 See TAKAHASHI, *supra* note 19, p.149.

21 See *News Release* of the Life Insurance Association of Japan dated 15 March 2011, <http://www.seiho.or.jp/english/news/2011/0315.html>.

expiring and (ii) accept claims by the beneficiaries in the same areas without necessary documents where it is found appropriate to do so.²²

As a result, the total of nearly 152.2 billion yen was paid on 19,969 policies within a year for those who died from the Great East Japan Earthquake.²³ In doing so, the insurers made various efforts to identify their customers and invited them or their bereaved to make claims. They even established a network with local lawyers to assist children who had lost their parents and needed a guardian before receiving the insurance proceeds.²⁴

II. EXCEPTION OF EARTHQUAKE-RELATED RISKS IN PROPERTY INSURANCE

1. *Crimes in the Affected Areas*

After the Great East Japan Earthquake, many foreigners praised the orderly behaviour of the Japanese people. However, contrary to the mythical picture of ‘self-disciplined Japanese’, which was not totally incorrect, the statistics shows that the crime rate rose after the earthquake in the affected region.²⁵ The reported cases of sneak thieves in the three prefectures most severely damaged by the earthquake marked 2,161 during the four months after the disaster, a nearly 15 per cent increase from 1,880 during the same months of the previous year.²⁶ The record is all the more remarkable because other types of crimes declined in number by 13 to 45 per cent, apparently due to the evacuation of the residents.

Anecdotal cases include the theft of 40 million yen in cash from the vault of a local thrift in Kesenuma City whose building had collapsed due to the tsunami.²⁷ Sixty-one cases of robbery from automatic teller machines, in particular those in evacuated convenience stores, were reported. The total amount robbed from those ATMs reached 680 million yen.²⁸

22 See *News Release* of the Life Insurance Association of Japan dated 14 March 2011, <http://www.seiho.or.jp/english/news/2011/0314.html>.

23 Statistics by the Life Insurance Association of Japan, <http://www.seiho.or.jp/english/information/pdf/data.pdf>.

24 See *News Release* of the Life Insurance Association of Japan dated 17 June 2011, <http://www.seiho.or.jp/english/news/2011/0617.html>.

25 Looting Rears Its Head in Japan, *Wall Street Journal* (online) 23 March 2011, <http://online.wsj.com/article/SB10001424052748703410604576216293024644156.html>.

26 *Hisaichi tô ni okeru hanzai jôsei* [The Crimes in the Affected Areas], report by the National Police Agency dated 26 July 2011, <http://www.kantei.go.jp/jp/singi/hanzai/dai18/siryô2.pdf>.

27 See Japan: Thieves Steal £250k from Bank Vault Crippled by Earthquake, *Mirror* (online) 22 March 2011, <http://www.mirror.co.uk/news/uk-news/japan-thieves-steal-250k-from-bank-177097>.

28 THE NATIONAL POLICE AGENCY, *Higashi nihon daishinsai ni tomonau keisatsu sochi* [Police Actions in the Wake of the Great East Japan Earthquake] p. 23, dated April 2012, <http://www.npa.go.jp/archive/keibi/biki/keisatsusoti/zentaiban.pdf>.

These risks of theft and other wrongful acts may fall under the exception clause in the property insurance policy that otherwise protects business owners from risks of offences to their property. Therefore, the interpretation of this exception clause is worth careful examination.

2. *The Exception Clause and Its Interpretation*

The wording of the exception for earthquake-related risks in some policies, such as those in the burglary insurance policy, is drafted somewhat differently from the exception clause in the fire insurance policy. Most typically, it excludes coverage for losses due to thefts *on the occasion of* an earthquake. The apparent reading does not require the causal link between theft and earthquake. The drafter may have doubted that theft could ever be 'caused' by an earthquake, in the same sense as fire is in many cases caused by the earthquake.

Such drafting that spares the causation requirement might appear to broaden the scope of the exception. In England it is argued that the draft will be effective, though the courts may sometimes find that the loss is in fact derived from the risk covered by the policy.²⁹ However, Japanese courts may not always enforce the exception clause according to its literal reading. Though it did not arise from this particular earthquake, there is a court decision that adopted a restrictive interpretation of this type of clause.

The case concerned the claim arising from the Great Hanshin-Awaji Earthquake of 1995, an earthquake of magnitude 7.2 that hit the western part of Japan.³⁰ The claim was made by an owner of a shop in the severely damaged downtown of Kobe. When the claimant, who lived in Osaka, came to the shop on the sixth day after the earthquake, he found that the shutter was half open and the goods in the showcase had been stolen. The showcase was broken, but there was no trace that the shutter key had been picked. The shop owner claimed payment under the burglary insurance policy, against which the insurer invoked the exception clause.

The court found that the exception clause was justified because, on the occasion of an earthquake, the risk of theft became so high and concentrated due to the social disorder that covering such risks would result in more expensive premium and make it infeasible to maintain the insurance system. Based on this understanding, the court held that there needs to be significant social disorder and unrest for the insurer to be able to invoke this clause. Further, the court required that the theft took place right after the earthquake. According to the court, the proximity of timing is an element in determining the social disorder and unrest, because ordinarily the social order is recovered and security measures are reinstated as time passes.

29 MALCOLME A. CLARKE, *The Law of Insurance Contracts*, 19-1C2 (6th ed., informa, London 2009).

30 Kobe District Court 24 February 1998, Hanrei Jihô no.1661, p.138.

Applying this restrictive interpretation, the court affirmed that the significant social disorder and unrest existed at the time of the theft at issue and rejected the claim of the shop owner. In so doing, the court referred to the large scale of the earthquake and the occurrence of looting in downtown Kobe. It found that the area surrounding the shop was damaged severely, that the traffic in front of the shop was stopped and that the neighbouring building fell down on the ground. It also noted that the shutter had probably been damaged before the theft, which implied that the security measures that should normally be in operation had been defunct.

The court did not require the causation as in the usual exception clause. However, it did require some kind of relevance of the earthquake to the theft. Then it affirmed the relevance after finding that there were abnormal conditions heightening the risks of the occurrence of the insured event. Thus, the case shows that the courts in Japan can have a not unimportant role in the distribution of burdens from the natural disaster. It can do so by narrowing the scope of the exception clause in the insurance policy by interpretation, even against the apparent reading of the clause.

(To be continued in Part Two)

SUMMARY

This article reviews legal issues concerning compensation under insurance contracts for the economic loss incurred by the major earthquake off the Pacific coast of northeast Japan on 11 March 2011. The earthquake (and tsunami) caused devastating damage to that region. The article's first section gives readers an overview of damages caused by the earthquake, followed by general observations about how the insurance industry responded after the earthquake took place. The following section takes up specific issues relating to the earthquake. It first visits the issue of the interpretation of the exception clauses in property insurance with regard to thefts in the damaged area and then discusses a case where the exception clause in liability insurance was invoked and the causal link between the loss and the earthquake was disputed. The article concludes by highlighting what role the courts in Japan could play in the distribution of burdens from the natural disaster.

(The Editors)

ZUSAMMENFASSUNG

Der Beitrag behandelt Probleme im Zusammenhang mit versicherungsrechtlichen Ersatzforderungen für Schäden, die durch das große Erdbeben (und den anschließenden Tsunami) am 11. März 2011 verursacht wurden. Die Naturkatastrophe hat große Teile der nordöstlichen Pazifikküste Japans weitgehend zerstört. Der erste Abschnitt des Beitrages gibt einen Überblick über das Ausmaß der Schäden und erörtert sodann, wie die japanischen Versicherer in ihrer Gesamtheit auf die Katastrophe reagiert haben. Im folgenden Abschnitt geht es um Einzelfragen. Zunächst wird die Problematik von Ausschlussklauseln in Hausratsversicherungen für Diebstähle aufgegriffen, die sich in einem Katastrophengebiet ereignen. Dies wird an einem konkreten Fall erläutert, in dem sich der Versicherer auf eine Ausnahmeklausel im Rahmen einer Haftpflichtversicherung beruft und die kausale Verknüpfung von Schaden und Erdbeben in Frage stellt. Der Beitrag schließt mit der Frage nach einer „fairen“ Balance beim Ausgleich von katastrophengebundenen Schäden und der Rolle, die dabei den Gerichten zukommt.

(Die Redaktion)