29 Japan: the insurance concept in the Insurance Act and the Insurance Business Act

Seiichi Ochiai, Shinichi Takahashi and Ryoko Takeda

1. INTRODUCTION

The concept of 'insurance' (*hoken*) in Japan has recently been a much debated subject. There are three main reasons for this. First, since the coming into force of the Insurance Act of Japan (Law No. 56 of 2008) on 1 April 2010, there has been a debate as to the scope of the Act and the extent to which certain types of insurance arrangements fall within its provisions, with their mandatory contract clauses. Second, the concept of insurance business has been the subject of attention in the context of the Insurance Business Act of Japan (Law No. 105 of 1995) (the 'IBA'), a supervisory legislation for insurance businesses. In particular, until 2005, mutual aid businesses (*kyosai*)[1] (except for some types of mutual aid business ('regulated *kyosai*') established and regulated under specific individual legislation other than the IBA) fell outside the supervisory control of the IBA and as such were unregulated. The IBA was amended in 2005 to bring these mutual aid businesses within the scope of insurance businesses governed by that Act. Finally, the concept of insurance has been the subject of interest in respect of various types of risk transfer schemes, where a number of practical legal issues have arisen. Among such schemes is alternative risk transfer (ART). As ART arrangements frequently operate as an alternative to insurance but fulfill much the same function, it can often arise as an issue as to whether or not such an alternative scheme falls under the concept of 'insurance'.

This chapter looks to shed light on the significance of the concept of 'insurance' in Japan as that issue has arisen in respect of the above scenarios. First we will provide an outline of the relevant Japanese statutory framework under which the 'insurance' concept will be ascertained (see section 2 below). Then we turn to the definition of an insurance contract under the Insurance Act and the Act's regulatory regime for insurance contracts will be outlined (sections 3 and 4, 'Definition of "insurance contract" under the Insurance Act and its interpretation', and 'Outline of regulations under the Insurance Act'). This is addressed here because the question of the definition of insurance contracts is inextricably correlated to the issue of what regulations apply once the Insurance Act applies. Thereafter, because the 'insurance' concept itself is not defined in the context of the definition of 'insurance business' under the IBA, we discuss this point (section 5, entitled 'Definition of insurance business under the IBA' and section 6, 'FSA's view on the

[1] Mutual aid societies (*kyosai*) are cooperatives formed by groups of individuals with the common purpose of mutual aid. Some of these societies, called 'regulated kyosai', are established and regulated under special laws other than the IBA; all other kyosai are regulated under the current IBA. See n. 6 for examples of current *kyosai*.

insurance concept under the IBA'). Finally, we provide our conclusions (section 7). Because of the constraints of space, the chapter focuses on non-life insurance and deals with life business only in passing.

2. JAPANESE STATUTORY PROVISIONS REGARDING THE 'INSURANCE' CONCEPT

There are two regulatory regimes that exist for insurance under Japanese law: the Insurance Act, that governs insurance contracts, and the IBA, which addresses the regulation of insurance business operators. The 'insurance contract' concept under the Insurance Act is significant in that it defines the applicability of the Act to contractual insurance arrangements. In respect of the IBA, 'insurance', rather than 'insurance contract', is the concept used in determining the application of the insurance supervision and regulatory regime. These two concepts have different purposes and the insurance concept under the former Act does not necessarily coincide with that under the latter Act (that is to say, there is a conceptual relativity due to the differences in the legislative purposes). For this reason, although it may be meaningful to consider how the two concepts overlap in meaning and in practical application, it is the authors' position that they should be independently defined.

Thus, this part of the chapter will first outline the Insurance Act and the IBA followed by a detailed discussion of the policy reasons for each Act as well as outlining what constitutes 'insurance' under the respective regimes. In view of its relatively recent integration into the regulatory framework under the IBA we have also included a more detailed focus on mutual aid business under both regimes.

2.1 The Insurance Act

The Insurance Act was promulgated on 6 June 2008, and came into force in April 2010. Before this legal reform, the basic legal framework for insurance contracts dated back to 1899 when it was implemented as a part of the Commercial Code (the 'Former Commercial Code'). The provisions in the Former Commercial Code were partially amended in 1911, but generally they survived for nearly 100 years without substantial modification. As such the language of the legislation had become outdated, written as it was in classical Japanese. Modern commercial practice, including insurance practice, had also developed and as a result many of the requirements of the Former Commercial Code now were out of date. Accordingly, in 2008,[2] the new Act, which made adjustments that reflected modern insurance practice in addition to modernizing the previous statutory language, was enacted. Of the more substantive changes brought in by the legislation, the new Act:

[2] In 2006, the Minister of Justice requested that the Legislative Council propose rules governing insurance contracts to be written in modern statutory language, and an Insurance Law Subcommittee, under the chairmanship of Prof. Tomonobu Yamashita, a professor specializing in Commercial law and Insurance law, was established within the Council. In 2008, the Legislative Council prepared a report containing a proposed outline for the reform of insurance law and consequential to that report draft legislation for insurance was submitted to the Diet.

(a) expanded the scope of regulation to cover mutual aid businesses; (b) reinforced policyholder protections; and (c) established the regulation of legal relationships with third parties to an insurance transaction.[3]

It is generally accepted that what is 'insurance' is not exhaustively defined by the Act. A statutory definition of 'insurance contract' is set out in the Insurance Act which is discussed below in section 3. This statutory definition, however, is not considered to be the end of the matter. During the legislative process which enacted the Insurance Act, there were discussions regarding whether to define 'insurance', but no agreement could be reached. Eventually, it was decided that only a transaction that meets both the definition of 'insurance contract' given in the Insurance Act and also falls under the general legal concept of insurance is deemed to be an insurance contract. Although the Insurance Act does not expressly refer to the additional requirement to meet the general law definition of insurance, it is commonly accepted that both elements need to be satisfied. Thus, the legal concept of insurance is not unequivocally clear.[4] In taking this approach, the Insurance Act aims merely to clarify the scope of its application by reference to the minimal requirements for an insurance contract, but it does not seek to provide a comprehensive definition which may impede the future development of insurance businesses.

To discuss what insurance is under the Insurance Act (both by reference to the definition in the Act and to the general law) is to discuss the scope of the application of the Act, asking what contracts are to be treated as insurance contracts. This is a question of where to draw the line as to whether or not the contract at hand is an insurance contract.

---

[3] To regulate legal relationships with third parties to an insurance transaction the legislation introduced two innovations. These were: (i) in liability insurance the statute gives persons with a claim for damages against an insured a statutory lien over corresponding insurance recoveries to which the insured is entitled (Article 22, paragraph 1 of the Act); and (ii) in policies with premium reserves concerning insurance contracts payable at death or fixed benefit accident and health insurance contracts, certain beneficiaries of the policy are given a right to prevent the termination of the policy by the creditors who are otherwise entitled to do so, such as attaching creditors and administrators in bankruptcy of the policyholder. The beneficiaries may prevent the termination by the payment of an amount equivalent to the surrender value of the policy to the creditor with the consent of the policyholder. The right of the beneficiaries is limited to the beneficiaries who are also, at the time of receipt by the insurer of the notice of termination of the policy from the creditor, insured or family members of the insured or the policyholder (other than the policyholder him/herself). The termination by the creditor is effective only after one month from the day the insurer receives the notice of termination, provided the relevant beneficiaries do not exercise the right of prevention by that time (Articles 60, 61, 89 and 90 of the Act).

[4] Please see section 3.5 below. Prof. Yamashita has stated in his article (Yamashita, T. (2009), 'Hoken-no-Igi-to-Hoken Keiyaku-no-Ruikei [The concept of insurance and types of insurance contracts]', in Takehama, O., Kinoshita, K. and Arai, S. (eds), *Hoken-Kaisei-no-Ronten* [Issues in modification of the Insurance Act], Kyoto: Horitsu-Bunka-sha, pp. 3–20) that there is an 'unstated definition' of 'insurance' under the Insurance Act. In justifying the reference to the general law definition of insurance contract, it has also been pointed out that it is impossible to rule out there being a transaction that substantially meets all the requirements of the definition of the Insurance Act and yet may be properly classified as another contract archetype instead. (Murata, T. (2009), 'Hoken-no-Igi-to-Hokenkeiyaku-no-Ruikei Taho-tono-Kankei [The contents of insurance, types of insurance contracts, and relationships with other legislations]', in Ochiai, S. and Yamashita, N. (eds), *Atarashi-Hoken-ho-no-Riron* [Principles of the new Insurance Act], Tokyo: Keizai-Horei-Kenkyukai, pp. 28–39).

2.2 Insurance Business Act (IBA)

Whereas the Insurance Act is a recent addition to the legislative framework, the Insurance Business Act is a much more established piece of legislation. Promulgated in May 1995 and brought into effect from 1 April 1996 (albeit it has been amended on several occasions since), the IBA put in place a new regulatory regime replacing the former Insurance Business Act (Law No. 41 of 1939) which had itself overhauled the first Insurance Business Act (Law No. 69 of 1900). In the 1995 reform of the IBA, the 'insurance' concept was not modified, and the purposes of the reform were: (i) promotion of competition by the relaxation of regulations; (ii) consumer protection; and (iii) the fair management of insurance business. The 1995 IBA acted to liberalize somewhat the insurance market, allowing insurers to introduce a wider range of products and giving insurers a greater freedom to fix premium rates. Insurers could also now obtain permission to write both life and non-life business (provided the business was segregated in separate companies) and changes were made to open up the distribution of insurance products through the introduction of brokers in addition to exclusive agents. To protect the interest of policyholders in this more liberalized market, a standard solvency margin was introduced in 1998 which allowed for better monitoring. Measures were introduced in the same year for an emergency fund to act as a cushion in the event insurers could not pay claims. In order to make insurance business fair, the disclosure regulations were arranged in a way which ensured the transparency of the insurance business.

Like the Insurance Act, the IBA does not define the concept of 'insurance', but does define the term 'insurance business' (*hokengyo*). The IBA defines insurance business as the business of underwriting: (i) insurance where insurance premiums are received under contracts to pay a fixed amount of insurance claims in connection with the life or death of individuals; (ii) insurance where insurance premiums are received under contracts to compensate for damage caused by a certain fortuitous accident; or (iii) other classes of insurance listed in the Act (but excluding, certain types of business prescribed by special legislation and certain other business as specified in the Act).[5]

2.3 Mutual aid (Kyosai)

Until 2005 the IBA did not apply to the business of underwriting mutual aid services where such a service provider promises, in consideration of a premium, that if a prescribed event occurs it will pay a certain amount of monies as mutual aid to a closed group of potential insureds such as the members of an association, as opposed to traditional commercial insurance which may be sold to the public at large. Prior to the 2005 amendment of the IBA, there were two types of mutual aid services under Japanese law from the viewpoint of regulating legislation: those established and regulated under specific Japanese legislation enacted for the purpose of regulating the mutual aid business in question,[6] and those which are not regulated under such specific legislation (and were

[5] Art. 2, paragraph 1 of the IBA.

[6] Examples of the regulated *kyosai* are the Japan Agricultural Cooperatives (called 'JA *kyosai*') under the supervision of the Ministry of Agriculture, Forestry and Fisheries (MAFF) of Japan, regulated by the Agricultural Cooperatives Act (Law No. 132 of 1947), and the National Federation

thus almost wholly unregulated). Notwithstanding that mutual aid business was in most respects identical in nature to insurance, there appears to have been a tacit assumption that such mutual aid transactions should not be regulated other than by specific legislation. As a result, there was no serious questioning as to whether the distinction between insurance and non-insurance (mutual aid) could be justified.[7]

This exception in the regulations was addressed by the new IBA, and in order to strengthen the protection of counterparties related to the mutual aid service providers, the 2005 revision of the IBA expanded its application. Thus, the IBA has become applicable, in principle, to mutual aid businesses that provide cover to a defined group, that is, *kyosai*. In addition, such mutual aid businesses are now brought within the supervisory remit of the various administrative bodies, including the Financial Services Agency of Japan (the 'FSA'). The IBA, however, only regulates those mutual aid businesses that were previously unregulated. Those regulated mutual aid businesses that were already subject to statutory control remain excluded from insurance business regulated under the revised IBA. Where there is specific individual legislation covering the regulated *kyosai* this has been modified so that the supervision level provided is in line with that under the IBA.

A revision of the IBA (supplementary provisions) promulgated on 19 November 2010, became effective on 13 May 2011. The 2010 revised IBA allows some of the mutual aid providers which had conducted their mutual aid business before the 2005 revision of the IBA, to continue their business for the time being, and establishes relevant regulations required for the protection of policyholders. Under this arrangement mutual aid service providers which meet certain prescribed requirements (including that the provider shall have a certain level of financial soundness and human resources in order to conduct the *kyosai* business appropriately), and which obtain authorization from the FSA (or the relevant supervisory authority, if the mutual aid service provider is a public interest corporation), shall be supervised by it, not as an insurance company (*hoken-kaisha*) but in a manner that reflects the particular situation of the provider in question. Under the 2010 revised IBA, the government is obliged, around five years after promulgation, to review, and if necessary to revise the aforementioned legislation concerning the mutual aid business in view of its actual status, the improvement of the *kyosai* system, economic and social circumstances, and so on.

In contrast to the IBA, the Insurance Act uniformly applies to mutual aid contracts pertaining to mutual aid businesses operated by any cooperative or other mutual aid

---

of Workers and Consumers Insurance Cooperatives (called '*Zenrosai*') under the supervision of the Ministry of Health, Labor and Welfare of Japan regulated by the Consumers' Livelihood Co-operative Society Law (Law No. 200 of 1948), both of which provide various types of insurance and mutual cover for their members.

[7] E.g., in the so-called Orange Mutual Aid Association Case, large amounts of money were defrauded under the guise of deposits or mutual aid contributions at high interest within the Orange Mutual Aid Association, from around 1992 to 1996 when the association failed. In that case, violations of the IBA before the 2005 revision were not raised, and the related investigations were made only for a violation of the Act Regulating the Receipt of Contributions, Receipt of Deposits and Interest Rates (*Shusshi-ho*) (Law No. 195 of 1954). Presumably, it was difficult to pursue a case under the IBA before the 2005 revision because of the questionable applicability of the concept of insurance to the Orange Mutual Aid Association.

organization. The Diet has, however, specified in supplemental resolutions[8] in the legislation of the Insurance Act that supervisory legislation on the mutual aid businesses should not be unified. Thus, as stated above, regulated mutual aid businesses which, for the purposes of supervision, have historically been subject to specific governing legislation, such as the Agricultural Cooperatives Act, the Small and Medium-Sized Cooperatives Act, and the Consumer Cooperatives Act, will continue to be governed by the relevant legislation.

Having now outlined the two main regimes that govern insurance contracts and the supervision of insurance businesses respectively, and identified the source of the definition of insurance in each case (or the equivalent relevant terms), we will now discuss the concept of insurance under the Insurance Act, and whether or not the scope of insurance under the Insurance Act is different from the insurance concept under the IBA.[9]

3. DEFINITION OF 'INSURANCE CONTRACT' UNDER THE INSURANCE ACT AND ITS INTERPRETATION

The Insurance Act defines an 'insurance contract' as:

> a contract, irrespective of whether it is named as an insurance contract, mutual aid contract or otherwise, under which one party promises to give a property benefit (limited to a money payment in the case of a life insurance contract or accident and/or disease insurance contract; each an 'Insurance Benefit') on the condition that one of the events specified in the contract occurs, and the opposite party promises to pay an insurance premium (including a mutual aid contribution) as being commensurate with the possibility of occurrence of the prescribed events.[10]

This definition of insurance contract is divided into the following six elements: (a) one party (the insurer) promises to give a property benefit; (b) the benefit mentioned in (a) is conditional on the occurrence of one of the events specified in the contract; (c) the opposite party (the policyholder) promises to pay an insurance premium in consideration for the benefit mentioned in (a); (d) the benefit mentioned in (a) is limited to a money payment in the case of a life insurance contract or accident and/or disease insurance contract (each a 'Life Insurance Contract'); (e) with respect to (c), the insurance premium that the policyholder promises to pay must be commensurate with the possibility of the occurrence of the specified events (that is, the probability of actualization of the insured

---

[8] Supplemental resolutions by the Committee on Judicial Affairs of the House of Representatives dated April 25, 2008, and by the Committee on Judicial Affairs of the House of Councilors dated May 29, 2008.

[9] In addition to determining the scope of the Insurance Act and the IBA, the definition of insurance may also raise similar issues in determining taxation requirements under tax law or in connection with anti-monopoly and other related legislation, but they are not within the scope of this chapter.

[10] Article 2, item 1 of the Insurance Act. Note that when a contract does not fall within the definition of an insurance contract, the contract itself is construed as being effective but the Insurance Act does not apply directly to it; however, it is the author's view that in such a case there is a possibility that a contract which has many features similar to the insurance concept described herein should be subject to the regulations under the Insurance Act *mutatis mutandis*.

risks); and (f) the definition applies to a mutual aid transaction irrespective of how it is named.[11] Elements (a) and (c) were found in the definition of insurance in the Commercial Code that preceded the 2008 reforms, and as such these requirements appear fairly clear. Certainly, there seems to have been no serious difficulties raised by that earlier definition. The other elements, as listed, and the unstated definition which is also a part of the definition of 'insurance contract' in the Insurance Act do require some consideration.

3.1 An Insurance Benefit is Conditional Upon the Occurrence of an Event Specified in the Contract (a 'Prescribed Event')

The definition does not require a prescribed event to be 'fortuitous'. In the case of non-life insurance Article 2, item 6 of the Insurance Act does go on to introduce a requirement for 'damage caused by a prescribed fortuitous event'. For other types of insurance contracts, the effect of the omission is that the insurer does not need to include 'fortuitousness' explicitly as an indispensable element of the conditions for insurance benefits. However, in determining whether the contract remains an insurance contract the courts, for the purposes of the general legal concept of insurance, will consider whether 'fortuitousness' is a risk factor.

3.2 The Parties' Description of the Contract is Irrelevant

In defining insurance contracts, the legislature has disregarded the way in which the parties themselves may view the transaction. Mutual aid business is a good example of this. The Insurance Act provides that it applies to mutual aid transactions irrespective of how the contract in question is described. Before the Act came into force in 2010, mutual aid contracts were not expressly included within the legislation. Mutual aid contracts and insurance contracts, however, both stand on the premise that a large number of people contribute funds to protect themselves from future events and that compensation is provided if those events take place. Because it is desirable to apply the same basic contractual rules to contracts that are substantially similar, it has been made a rule that the Insurance Act shall apply to a mutual aid contract if it is substantially similar to an insurance contract. The parties' own view of the transaction is not relevant.

---

[11] We have provided here one analysis of the definition of 'insurance contract' under the Insurance Act. There is another interpretation from Prof. Hiroshi Suzaki (Suzaki, H. (2010), 'Commentary on article 2 of the Insurance Act' (in Japanese), in Yamashita, T. and Yoneyama, T. (eds), *Hoken-ho-Kaisetsu* [Commentary on the Insurance Act], Tokyo: Yuhikaku, pp. 129–152) under which the reference to the relationship between (a) the promise of one party (the insurer) to give a property benefit, and (c) the promise of the other (the policyholder) to pay an insurance premium for the benefit mentioned in (a), means indirectly that insurance is a business operated based on actuarial analyses. However, assuming that the notion of consumer protection is an important legislative objective of the Insurance Act, it is inappropriate to conclude that only businesses operated based on actuarial analyses are considered to be insurance. Also, it is generally understood that insurance derivative transactions do not fall under the scope of insurance contracts since a business that is operated based on actuarial analyses is excluded from the scope of insurance contracts if it is another form of legal transaction.

3.3 Insurance Premiums are Commensurate with the Probability of Actualization of the Insured Risks

With respect to the definition's language pertaining to the policyholder's obligation to pay insurance premiums, the notion of the consideration (compensation) for the insurance benefit is included, as was also the case under the Former Commercial Code. Under the new Insurance Act, however, qualifying wording is included which states that the premium must be 'commensurate with the possibility of occurrence of the prescribed events'. According to the legislators of the Insurance Act,[12] the significance of this language is to exclude certain mutual aid programs from the definition of an insurance contract where the amount of contribution is fixed either at a flat rate or in any event without being determined by the underwriting risk and where only small amounts are paid to members of the scheme. An example of such a mutual aid transaction that is not substantially similar to an insurance contract and therefore would be outside the Insurance Act would be a program designed as a part of the welfare regime of an organization under which only small sums are collected, at a flat rate, from the organization members to provide resource funds, from which a congratulatory or condolence benefit may be paid following an auspicious or unfortunate event occurring to an individual. This position can be criticized, however because it is clear, as a matter of social consensus, that mutual aid arrangements with congratulatory or condolence payments as a part of the welfare regime of an organization do not fall under the concept of insurance in any event (see section 3.5 below), and therefore it is unnecessary to add this requirement in order to exclude those cases from the legislation. Worse, this exclusion may lead to inappropriately limited interpretations.

3.4 Insurance Benefits Under Insurance Contracts are Limited to Money Payments

The Insurance Act clearly provides that insurance benefits paid to insureds under life insurance contracts and fixed amount injury and disease insurance shall be limited to money payments.[13] With regard to non-life insurance both money payments and in-kind benefits to insureds continue to be allowed as was the case under the Former Commercial Code. The reason that no in-kind benefit is authorized with respect to life insurance contracts and fixed amount injury and disease insurance under the Insurance Act is that in-kind benefits are subject to significant value volatility risks both for the insurer and the policyholders, so regulatory supervision may be necessary. The concern, therefore, is one of regulatory supervision over the product. Given that no such product is in any event sold at present and as the supervision of such a product would pose significant challenges, for which the regulator is not presently well equipped, it has been concluded that such a contract should be excluded from the definition of an insurance contract. It is suggested, however, that it is inappropriate for the Insurance Act to limit the scope of an insurance contract on the ground that there currently is no adequate supervisory system to regulate such a contract because it would prevent the further development of insurance businesses.

---

[12] Hagimoto, O. (2008), '*Hoken-ho-no-Kaisetsu (2)* [Commentary on the Insurance Act, (2)]', *NBL*, **885**, 23–29.

[13] Article 2, item 1 of the Insurance Act.

Moreover, if such a contract were to be underwritten by an insurer, the legislators of the Insurance Act have made clear that although such an arrangement would not be an insurance contract regulated under the Insurance Act it would nevertheless be enforceable as a contract.[14] Thus this limitation does not have the effect of prohibiting the conclusion of such a contract providing in-kind benefits as a contract other than an insurance contract. As a general rule, however, in non-life contracts a transaction that provides an in-kind benefit as compensation for actual damage has been treated as an insurance contract, both before and after the coming into force of the Insurance Act.

3.5 Unstated Definition

As has already been discussed, there are two elements to the definition of insurance contacts under the Insurance Act. First, it must meet the definition of an insurance contract as set out in the Insurance Act. In addition, it must also fall within the general legal concept of insurance. Given that the legislative objective of the Insurance Act is consumer protection this chapter takes the position that the general legal concept of insurance applies when ordinary consumers have reasonable grounds to believe the transaction to be insurance.[15] It is thought, as a matter of social consensus, that a form of legal transaction is considered to be an insurance contract if it is assumed, as a matter of social consensus, to be equipped with the economic functions of insurance, that is, risk transfer, risk accumulation and risk dispersion. In other words, the issue is not whether a contract incorporates these three functions, but whether or not a contract is thought, as a matter of social consensus, to be premised on these three functions. Thus, conversely, those transactions which are considered, as a matter of social consensus, to be a different legal form, for example, guarantees or insurance derivatives, should be excluded from the scope of insurance contracts.

4. OUTLINE OF REGULATIONS UNDER THE INSURANCE ACT

The Insurance Act takes a prescriptive approach to insurance contract arrangements and at the centre of the regime a substantial number of unilaterally mandatory clauses are required under the provisions of the Act. The term 'unilaterally mandatory clause' means a contractual clause that is required by law and any contractual stipulation that is inconsistent with that clause and is unfavorable to any of the policyholder, insured or insurance claim recipient (each a 'Policyholder' and collectively, the 'Policyholders') will be unenforceable. Thus, the Insurance Act explicitly provides that any provision of an insurance contract that is less favorable to the Policyholders than is provided for by the unilaterally mandatory clauses shall be unenforceable and the court will accordingly give

---

[14] Hagimoto, O. (2008), '*Hoken-ho-no-Kaisetsu (2)* [Commentary on the Insurance Act, (2)]', *NBL*, **885**, 23–29.

[15] There are presently no judicial decisions or other official sources which give further guidance on what is the general legal concept of insurance but it is submitted that the position given in this chapter represents the commonly accepted approach in Japan.

effect to the contract as if the missing unilaterally mandatory clause had been included.[16] In this way, while the insurer is free to develop products (in accordance with its supervisory license) the Insurance Act provides a level of Policyholder protection by mandating that all policies include certain clauses which are there for the Policyholder's benefit.

We discuss some of these unilaterally mandatory clauses below but two points should be noted at this stage. First, because they are based on a policy consideration to protect Policyholders it is not sufficient that an insurer preparing general policy conditions (*yakkan*) should merely ascertain whether the conditions contain any clause that is less favorable, as a matter of formality, to the Policyholders than the unilaterally mandatory clauses in the Insurance Act. In addition, the insurer must determine, as a matter of substance, whether any of the provisions would frustrate the policy considerations that underlie the adoption of the unilaterally mandatory clauses in the Insurance Act. This can be determined by considering the overall policy reasons and scope of the relevant clause, as well as the purpose, requirements, effects and other aspects of that clause. Second, it is not open for the insurer to argue that while the clause may on a formal level fail to meet the requirements of the unilaterally mandatory clauses, that nevertheless in its practical application Policyholders are no worse off. Even in this case the clause will be treated as unenforceable and the unilaterally mandatory clauses will be imposed.

The following types of non-life insurance contracts (except injury and disease insurance contracts) are excluded from the application of such unilaterally mandatory clauses:

(a) Marine insurance contracts, aircraft-related insurance contracts, and insurance contracts appropriate for nuclear facilities are governed, as a whole, by the principle of freedom of contract.[17] In these contracts the risks covered are invariably very large and Policyholders are usually business entities. These insurance contracts are also generally written in the international insurance and reinsurance markets. The same level of Policyholder protection is therefore not required and the application of the freedom of contract principle is appropriate.

(b) A 'non-life insurance contract compensating for damage incurred in connection with business activities by a juridical person[18] or other association or by an individual person conducting a business', is also excluded from the scope of application of the unilaterally mandatory clauses of the Insurance Act.[19] The inclusion of this provision is also based on the determination that an insurance contract in favor of a business entity and which covers risks arising in connection with business activities can properly be governed by the freedom of contract

---

[16] Under the Insurance Act, insurance contracts are classified into three types: (i) non-life insurance contracts (including injury and disease insurance contracts by which real damage is to be compensated); (ii) life insurance contracts; and (iii) fixed benefit accident and health insurance contracts. With regard to the non-life insurance contracts, Articles 7, 12, 26 and 33 of the Insurance Act indicate the unilaterally mandated clauses.

[17] Article 36, items 1 through 3 of the Insurance Act.

[18] 'Juridical person' includes companies and other legal as opposed to natural persons.

[19] Article 36, item 4 of the Insurance Act.

principle. Typical examples of excluded insurance contracts are reinsurance contracts, credit insurance contracts, guarantee insurance contracts and product liability insurance contracts. A fire insurance contract covering the premises of a store or other commercial facility will usually be included within the scope of non-life insurance contracts that compensate for damage arising in connection with business activities. In such cases there can be scope for disagreement as to what constitutes 'damage that may arise in connection with business activities'. Given that the Insurance Act is aimed at providing Policyholder protection, a narrow approach will generally be appropriate. Note also that this exclusion does not apply to fixed amount injury and disease insurance contracts or other injury and disease insurance contracts, even if they are concluded by a business entity. This is because even in the case of a group insurance contract, beneficial interests in the insurance contract usually belong, directly and indirectly, to the group members who are not business entities. As such the reasons for allowing the principle of freedom of contract, such as the existence of reinsurance or international insurance markets do not apply. Where there is any doubt as to the applicability of the unilaterally mandatory clauses, including where there is a clause in the insurance contract excluding their applicability, then the principle of Policyholder protection should apply to interpret the relevant provisions or clause in the contract in favor of the Policyholder.

A general overview of the Insurance Act is beyond the scope of this chapter.[20] As already noted, the Insurance Act in many respects merely updated the Former Commercial Code to put the legislation into a more modern Japanese and reflect current practice. In a number of instances, however, the Act does implement important changes to Japanese law. We discuss five of them here, the first four of which are the 'unilaterally mandatory clauses' for non-life insurance, and the last of which includes an 'absolutely mandatory clause'.

4.1 Revision of the Duty of Disclosure

As already noted, the Act contains articles called 'unilaterally mandatory clauses' which provide that if any provision contained in an insurance policy between an insurance company and Policyholders has content which is more disadvantageous to Policyholders than the relevant articles of the Act, the disadvantageous provision of the insurance policy becomes void. In contrast to this, if there is a provision in an insurance policy which is more advantageous to the Policyholder than is provided for in the Act, such provision remains effective.

In respect of the obligation of pre-contractual disclosure, the Insurance Act requires Policyholders to notify insurers of 'important matters requested by the prospective insurer to be notified'.[21] Under the Act, therefore, the onus is on insurers to specify what

[20] For a more general overview see Takahashi, S., Inoue, Y. and Toda, K., 'Japan', in Abrams, Sharon E., et al. (eds), *PLC Cross-border Handbooks Insurance and Reinsurance 2011* (2nd edition), London: Practical Law Company Ltd., pp. 179–189, and Kozuka, S. and Lee, J., 'The New Japanese Insurance Act: Comparisons with Europe and Korea', *Zeitschrift für japanisches Recht*, 14. Jg., Nr.28, 2009 pp. 73–88.

[21] Articles 4, 37, and 66 of the Insurance Act.

matters are important and must be reported and it is for insurers to put the questions to Policyholders in respect of those matters, which the Policyholder must then answer. This represents a significant change from the previous regime which put the primary obligation on the Policyholder to notify the insurer of 'important facts' as determined by the Policyholder. In respect of such notifiable matters under the new regime, if the Policyholder breaches his/her duty of disclosure, willfully or by gross negligence, the insurer is entitled to terminate the insurance contract.

Although the Insurance Act continues to impose obligations of disclosure on Policyholders the provisions in the Act nevertheless represent a significant protection for Policyholders in the way that they limit that obligation. The requirements of the Insurance Act are mandatory and therefore any contractual stipulation that is inconsistent with this provision and unfavorable to Policyholders will be unenforceable. Consequently, if in its questionnaire the insurer asks for any matter other than those which are important with respect to the risks covered by the insurance contract, the insurance contract will possibly be considered to be unfavorable to Policyholders and the disclosure requirements may be unenforceable.

4.2 Revision of the Handling of Overinsurance

So-called 'overinsurance' arises in a non-life insurance contract where the insured amount exceeds the value of the subject of the insurance (the 'Insurance Value') at the time the contract is entered into. Where the Former Commercial Code deemed the insurance in respect of the difference as invalid, the Insurance Act recognizes the validity of overinsurance contracts, but gives a right of rescission to policyholders in certain limited cases in respect of the overinsured amount.[22] Thus, the Act validates an element of overinsurance while at the same time providing the Policyholder with some flexibility. Accordingly the Insurance Act provides that in cases where, at the time of conclusion of a non-life insurance contract, the Policyholder and the insured did not know of the overinsurance and were not grossly negligent for not knowing it, they may rescind the amount by which their contract is overinsured and the Policyholder may demand the refund of the corresponding portion of the paid premium. Any contractual stipulation that is inconsistent with the above and unfavorable to the policyholder is unenforceable.

If the parties to an insurance contract agree on an Insurance Value and that the amount of damage be assessed on the basis of the agreed Insurance Value, the insured amount is to be fixed on the basis of the agreed Insurance Value.[23] Thus, it is unnecessary for parties to determine whether or not the insured amount exceeds the actual value of the subject of the insurance contract. In cases where an Insurance Value is agreed upon, the Policyholder loses the right of rescission in the event that there is overinsurance on a true assessment of the value, given that such a right of rescission will frustrate the agreement made between the parties.

---

[22] Article 9 of the Insurance Act.

[23] Proviso of Article 9 of the Insurance Act.

4.3 Revision of Handling in Cases of Increase or Decrease of Risks

As a corollary to the previous point, the Insurance Act, provides that if the insured risk substantially decreases, the Policyholder shall be entitled to claim a reduction of the insurance premium.[24] Authorizing a reduction claim for a small decrease of risk would complicate the contract handling practice. Therefore, premium reduction rights are only authorized insofar as the decrease of insured risk is significant, and the cost of an insurance contract including the cost of the reduction of the insurance premium as whole will not be more than the cost of the insurance contract without the reduction.

In contrast, insurers are entitled to rescind their insurance contracts in limited situations of a substantial increase of the insured risk. Under the Insurance Act, an insurer's right of rescission where there is an increase of risk is limited to situations where under the terms of the contract the Policyholder is required to keep the insurer informed of 'notifiable matters' as specified in the contract.[25] In such a case, where the Policyholder fails to notify any change in the notifiable matters in a timely manner, intentionally or due to gross negligence, the insurer may be able to rescind, even though the stipulated insurance premium has become sufficient for the amount of insurance premium that should be paid for the increased risk, on the rationale that the insurer's right to modify the insurance contract is substantially obstructed by the policyholder or the insured. Where increases in risk are notified to the insurer, the insurer may in certain circumstances be able to require that additional premium be paid. Contractual stipulations inconsistent with the above-described rule will be unenforceable.

4.4 New Provisions for Rescission due to Material Events

In addition to the cases already mentioned (breach of the duty of disclosure and material changes in the risk), the Insurance Act allows insurers to rescind or otherwise revise insurance contracts in certain cases where a moral risk or other unjustified intention is found in an insurance contract, that is, in any one of the following three situations:[26] (i) where the Policyholders have caused or attempted to cause damage or an insured event for the purpose of making the insurer give the Insurance Benefit; (ii) where the insured or the insurance claim recipient has made or attempted to make a fraudulent claim under their insurance contract; or (iii) where the insurer's trust in the Policyholder has been impaired and the continuation of the insurance contract has thereby been made difficult. Both for this and the other mentioned rights of rescission, the Insurance Act contains a clause providing for the relief of the insurer from liability for certain damage arising before the time of rescission.

As described above, the conditions for rescission are restrictive and cases where insurers are relieved of liability under the insurance contract in conjunction with rescission are also limited. Therefore, if the general policy conditions (*yakkan*) provide for the insurer's relief from insurance liability in connection with the rescission of an insurance contract

---

[24] Articles 11, 48 and 77 of the Insurance Act.
[25] Articles 29, 56 and 85 of the Insurance Act.
[26] Articles 30, 57 and 86 of the Insurance Act.

due to events other than those prescribed by the Insurance Act, it is thought that such provision shall be unenforceable.

4.5 Refinement of the Provisions for the Calculation of Claims under Non-life Insurance Contracts

In addition to unilaterally mandatory clauses the Insurance Act includes certain 'absolute mandatory clauses' the inclusion of which in the contract is mandated without regard to whether any conflicting terms in the insurance is to the benefit or not of the Policyholder.

For example, it is a general rule that the insurer's liability under non-life insurance indemnity contracts is calculated by reference to the value of the covered items at the place and time of the occurrence of the insured event.[27] It is also explicitly provided that where there is an agreed insured amount, the amount of the claim shall be calculated by reference to that agreed value.[28] These provisions maintain a basic philosophy of the Former Commercial Code and each is a non-mandatory clause.

Under the Insurance Act, however, it is now also provided that if an agreed insured amount substantially exceeds the Insurance Value (as defined in section 4.2 above), the amount of compensation shall be calculated in reference to the Insurance Value.[29] According to the legislators, this clause derives from the general public policy principle of not allowing unjust enrichment and is therefore interpreted as an absolute mandatory clause in the legislation, even though there is no provision stipulating the mandatory nature of the clause in the Insurance Act.

To fall under the wording 'substantially exceeds the Insurance Value', a simple excess of the agreed insured amount over the Insurance Value does not suffice. Rather it is understood that the wording only refers to a situation where the agreed insured amount exceeds the Insurance Value to such a degree that it offends against public policy. Before the enactment of the Insurance Act, an amount exceeding the actual value by 20 to 30 percent was considered to be sufficiently excessive, based on court decisions in 1917 and 1941.[30] The legislators' explanations have it, however, that 'the clause [the aforementioned clause relates to the prohibition of unjust enrichment] will function "on a highly exceptional basis" or "on a highly restrictive basis" to maintain the public policy'.[31] Therefore, and also considering situations where a transaction shall be invalidated for its contravention of the public policy as set forth in the Civil Code, we assume it unlikely that the fixing of an excessive insured amount in such a degree as 20 to 30 percent larger than the actual value will be considered to be unenforceable.

---

[27] Article 18, paragraph 1 of the Insurance Act.
[28] Article 18, paragraph 2 of the Insurance Act.
[29] Proviso of Article 18, paragraph 2, of the Insurance Act.
[30] Decisions of former Supreme Court (Taishinin) (until 1947) on March 10, 1917 (*Min-roku*, 23–484) and on August 21, 1941 (*Min-shu*, 20–1189).
[31] 23rd minutes of the Insurance Law Subcommittee established within the Legislative Council.

5. DEFINITION OF INSURANCE BUSINESS UNDER THE IBA

Article 3, paragraph 1 of the IBA provides that: 'No Insurance Business in Japan may be operated without having obtained a license from the Prime Minister'. A license is only required to issue insurance 'on a regular basis'[32] and operating an insurance business without a license is subject to criminal punishment. It is generally understood that the term 'on a regular basis' refers to the repeated and continuous operation of a business.

In view of the licensing requirement it is important to understand what constitutes 'insurance' and 'insurance business'. Under the IBA, 'insurance' itself is not defined. We have already stated the definition of 'insurance business' above which is defined as the business of offering any type of insurance (with certain exceptions, such as those specially provided in other acts) where insurance premiums are received in exchange for an obligation: (i) to pay a fixed amount of insurance claims in connection with the life or death of individuals; or (ii) to compensate for damage caused by certain fortuitous events.

In light of the fact that the IBA is designed to protect Policyholders, a business should be thought to be an insurance business if it sells insurance instruments or instruments that are the equivalent of insurance. Such a business should be included in the scope of regulation by the insurance supervisory laws so that it may be placed under the supervision of the insurance supervisory authorities. This policy approach is reflected in the wider scope of the definition of Insurance Business, as compared to the approach of the Insurance Act. The concept of insurance will be sufficiently established under the IBA (with certain exceptions such as guarantees and derivatives) if the following three requirements are met among the requirements found in the above-mentioned definition of insurance under the Insurance Act: (1) one party (the insurer) promises to give a property benefit; (2) the benefit in (1) is conditioned on the occurrence of a 'specified event'; and (3) the opposite party (the Policyholder) promises to pay an insurance premium in consideration for the benefit in (1). In contrast to what we find in the Insurance Act, this means that it is not required for Policyholders to ascertain whether the requirement that the insurance premium the Policyholder promises to pay be commensurate with the likelihood of the occurrence of a specified event (the probability of the actual insured risk), and that shall not be considered to be an indispensable element to meet the insurance concept under the IBA.

In practice, derivative instruments including insurance derivatives are not considered to be insurance. The reason for this practical treatment is said to be that under the financial supervisory laws, derivative instruments are characterized (and are therefore regulated) as business lines other than insurance.[33]

---

[32] Article 2, paragraph 1 of the IBA.

[33] Under the IBA, certain derivative transactions and financial derivative transactions are explicitly listed as incidental business lines and therefore do not need to be approved by the regulator. This includes market transactions of derivatives, over-the-counter transactions of derivatives, foreign market transactions of derivatives, commodity derivative financial transactions and emission right derivative transactions. The Financial Instruments and Exchange Act provides that market transactions of derivatives or over-the-counter transactions of derivatives shall constitute financial instruments business only if they are conducted on a regular basis. Incidental business operations are not limited to those explicitly listed in the Act, and are not prohibited from being conducted by business companies, unlike the business lines which are core activities to regulated

In contrast, under the IBA, guarantee business operated using the methodology peculiar to insurance is deemed to be insurance. Such business is regarded as surety bond business, which is defined as:

> among the businesses to promise to guarantee the performance of contractual obligations or legal or regulatory obligations, and to receive the consideration, those carried out by setting the amount of consideration, establishing a reserve, and distributing the risks by reinsurance, based on actuarial science, or by using any other methods inherent to insurance.[34]

Consequently, a guarantee offered by a surety bond business is deemed to be the underwriting of insurance and the consideration payable for the guarantee is deemed to be an insurance premium.

6. FSA'S VIEW ON THE INSURANCE CONCEPT UNDER THE IBA

6.1 Insurance Concept under Supervisory Guidelines

The FSA has made clear that the determination of whether any particular business constitutes insurance business is a matter of interpretation of the IBA as the governing legislation. Nevertheless, the FSA has provided the following guidance as to the factors that it considers relevant when determining whether the IBA applies in respect of non-life business:[35]

(i) The term 'fortuitous' in the phrase 'fortuitous accident' is not limited to fortuitousness that is beyond human control, but means the objective or subjective uncertainty of either of the occurrence, the timing of the occurrence or the mode of occurrence of a damage-causing fact.
(ii) The term 'insurance premiums are received' includes situations where it is clear, as a matter of social consensus, that the business entity in question has received what is equivalent to an insurance premium, even though there is no explicit mention of an insurance premium, on the basis of the comparison with ordinary sale prices and market prices of commodities and in reference to the percentage rate of the required insurance premium in the prices in the relevant commodities.
(iii) The giving of congratulatory or condolence money or similar benefits, based on a certain personal/social relationship, is not included in the concept of insurance business if it is widely recognized as a social custom and if the amount of such a benefit is within social norms (generally one hundred thousand yen (100,000 JPY) or less).
(iv) Services that are performed when an agreed event occurs by collecting money in advance regardless of whether or not the event occurs may fall under the concept of insurance depending upon the substance of the agreement for the service, the service provider and the manner the service is provided as well as whether or not the service has been historically

---

financial institutions. Thus, derivatives are characterized as business lines other than insurance and are not characterized as insurance.

[34] Article 3, paragraph 6 of the IBA.

[35] *Shogaku-tanki-hokengyousha mukeno Kantoku-shishin* [Supervisory guidelines for small-amount short-term insurance business operators] (July 2009), III-1–1(1).

distinguished from an insurance transaction and the legislative objectives of the IBA. For example, the repair and other related services that are incidental to the manufacture and sale of goods does not fall under the concept of insurance business.

In respect of the applicability of the concept of insurance business in terms of the above-mentioned points, warranties and a membership service organization may be specifically questioned. Typical warranties are services offered to purchasers in connection with the manufacture and sale of goods, where repairs will be provided if the goods malfunction within a prescribed period of time. This type of service is generally known as 'quality assurance' irrespective of whether it is paid for by consumers or not, and should therefore be considered to be different from insurance as mentioned in the IBA. If such a service merely provides a cash payment of repair expenses, however, it would be difficult to distinguish it from non-life insurance.

An often-mentioned example of a membership service organization is road-side motor assistance services. In cases where the members are entitled to assistance without paying fees as long as they are paying membership dues, the determination of the applicability of the insurance concept would require overall consideration of the service provider, the manner of providing the service, the general understanding of society as a whole, the necessity of regulation by the IBA and other relevant aspects of the business. In practice, normal road-side assistance programs are not interpreted to be regulated as insurance in Japan.

6.2 FSA's Views in the 'Statutory Application Prior Confirmation' Process

The FSA also operates a process known as the 'statutory application prior confirmation' procedure (or more colloquially known as the 'no action letter procedure'). Under this negative clearance process, parties that are concerned that they may fall within the scope of the IBA can seek confirmation of the position from the FSA. The FSA's published decisions in these cases provide useful additional guidance. In four cases determined by the FSA, the insurance concept was applied in one case and denied in three others.[36]

6.2.1 Rent guarantee for vacancies – recognized to constitute insurance business

The inquiring party was a commercial company engaged in a building development project, which included the construction and letting of the properties and providing a general real estate administration service, including building administration and rent collection. As part of the arrangement, to make the proposal more attractive to potential landlords, the company assured real estate owners that it would pay them 90 percent of rents for each vacant leased premise, if any. The inquiry was whether or not the business constituted insurance business under the IBA. The FSA replied, as of 6 April 2006, that this constituted non-life insurance business.

The inquiring party asserted that the vacancy of the properties could not be considered as fortuitous because it was in the control of the parties to ensure there were tenants through the inquiring party's building maintenance and administration service, by varying the terms being offered for the lease and by actively marketing the properties. In

[36] http://www.fsa.go.jp/common/noact/kaitou/index.html#036

addition, the inquiring party sought to argue that in offering the guarantee it was not using insurance techniques and, moreover, it was offered as a function inseparably embodied in the core business of the inquiring party.

The FSA rejected the arguments of the inquiring party. In the view of the FSA the business constituted insurance business because any vacancy would be caused by an event that had not been definitely identified at the time of the conclusion of the service agreement between the parties and it was difficult to avoid completely such a consequence no matter how the inquiring party performed the service. In respect of the fortuitousness of an insured event, it was stated that even in cases where the insurer is able to have a material influence on whether or not the insured event occurs, such a transaction is not always excluded from the regulations of the IBA. As for the substance of the inquired business, if an alternative structure was adopted where the owner leases real estate to the inquiring party and the inquiring party then subleases it to a third party, the same economic effect would be accomplished without regulation under the IBA.

6.2.2 FSA's subsequent negative replies

Subsequently, three inquiries about the applicability of the concept of insurance have been made in the 'statutory application prior confirmation' procedure. In each case, the FSA determined that the inquired business did not constitute insurance business. The inquired businesses were: (i) a business operated by a property management company to provide the service of cleaning and repairing leased properties with respect to deterioration (although, the actual work of cleaning and repairing was outsourced to third parties); (ii) a service business provided by an internet provider to repair a particular electronic device connected to the internet for an amount up to 50 000 yen per incident (again, the actual work of repairing the items was outsourced to third parties) (the 'Repairing Service Business'); and (iii) a personal computer data recovering service business provided for a lower cost by collecting annual fees from the point in time of the purchase of a device supplied to the customer as part of the service (the 'Recovering Service Business').

In the case of the business of providing cleaning and repairing services with respect to the deterioration of the leased property, the timing when the service was to be provided during the tenancy period was not specified, although it was certain that deterioration was occurring and therefore it was certain that the service would be provided. Therefore, the inquiry included the assertion that the business did not contain the element of fortuitousness. The FSA also pointed out that the business pertained to the deterioration of the building, which was thought to be less affected by fortuitousness. It was also pointed out that the service was only provided to the customers of the inquiring party as part of its business, that the inquiring party was fully responsible for the control of progress and the general quality control of the service.

With respect to the Repairing Service Business, it was similarly held that the business did not constitute an insurance business due to the following four points: (a) the substance of the agreement was not the promise to compensate for pecuniary damage and the provision of any expensive service was not intended since the maximum cost was fixed 50 000 yen; (b) the repairing service was provided under the supervision of the inquiring party, and it was, therefore, a transaction closely related and incidental to the inquiring party's business; (c) the Repairing Service Business was considered to be similar to the

service of repairing home electric products which was generally known to be incidental to the manufacture and sale of those products; and (d) the premise of the Repairing Service Business was solely to provide a particular service that was not expensive. This meant there was no need for the inquiring party to set aside a reserve in respect of its potential liability or undertake any other act which would ordinarily be an activity regulated by the IBA.

Finally, with respect to the Recovering Service Business, the FSA determined that the activities in question were 'incidental to the manufacture and sale of goods' as set forth in the last sentence of Note (iv) in section 6.1 above. It therefore did not constitute insurance business due to the following four points: (a) the agreement for the Recovering Service Business was made in conjunction with the manufacture and sale of the products and would be entered into either at the time of sale or within one month from the sale of the relevant product; (b) the service was provided by the inquiring party; (c) the service enhanced the overall customer service and thus assisted with the manufacture and sale of the products; and (d) in light of the clear description of the service, its very simple and clear content, the well developed provision for customer care (such as customer service desks to deal with complaints), no particular circumstances were found to cause any regulations under the IBA to apply.

6.2.3 FSA's determination criteria

Based on the above, when considering the applicability of the concept of insurance business, it appears that a number of factors should be taken into account: the form of the service that is provided upon the occurrence of a trigger event (in exchange for fees that are collected regardless of whether or not the trigger event occurs); the substance of the agreement to provide the service; the nature of the service provider and the manner in which the service is provided; whether or not the service is conventionally recognized to be an insurance transaction; and the policy reasons for the regulations found in the IBA.

Looking at the substance of the FSA's determinations described in sections 6.2.1 and 6.2.2 above, some commentators may take the view that the FSA has changed its position in the time between the determination described in 6.2.1 and the negative determinations described in 6.2.2. In the view of the authors of this chapter, however, the FSA has not modified its determination criteria and maintains its view that the main purpose of the IBA is the protection of Policyholders, and that the FSA's position is appropriate as an interpretation of the IBA. This is because we believe that, in order to protect Policyholders, it is the policy of the IBA to supervise all forms of business that should be considered to be insurance business according to the above-described criteria by placing it under the supervisory and regulatory legislation focus, and that the IBA bases this policy on the premise that Policyholders enter into transactions under which an insurance product or a product that is considered to be substantially equivalent to insurance is sold in order to mitigate certain risks.

Accordingly, the FSA will presumably continue to hold even now that a scheme of vacancy rent guarantee similar to that described in item (i) above may fall under the notion of insurance business.

6.3 Application of the Insurance Act to Contracts Pertaining to Insurance that are Characterized as Insurance Business under the IBA

In this section we have discussed what constitutes insurance business, as it relates to the insurance concept under the IBA. We have seen that in cases where a transaction consists of a fee being collected in advance irrespective of the actual occurrence of a trigger event and where some service is to be provided upon the occurrence of a trigger event in exchange for the fee, the determination of whether or not such a transaction is considered to be insurance business will be determined by a consideration in the round of the following matters: (i) the substance of the promise to provide the service; (ii) the provider and the manner of provision of the service; (iii) whether or not the service has conventionally been recognized as being different from an insurance transaction; (iv) the purposes of regulation by the IBA; and (v) other relevant matters.

As will be noted, these factors are not co-extensive with the criteria for the application of the Insurance Act to contracts of insurance. The consequence of this is that the IBA and the Insurance Act may not always apply equally to the same circumstances. In the case of the IBA, we have already seen that a new service may be developed that is not generally recognized in society as insurance but which has insurance-like characteristics and is not incidental to the sales of a particular product (for example, the occurrence of an incident within the scope of insured events may be highly fortuitous and a high price may be required). In such a case, there will remain, in our view, a possibility that such a transaction will be held to be insurance under the IBA. This reflects the policy considerations of the legislator, concerned as it was by the failure of the operator of such a business, and the impact such a failure may have upon the concerned parties. The IBA therefore allows the regulator to intervene where it is highly necessary to protect concerned parties through the regulation of insurance-like business operations. These situations, however, are different from cases where a certain transaction should be characterized, based on a social consensus, as an insurance contract in terms of the legal right-obligation relationship thereunder.

The vacancy rent guarantee transaction described above provides a good example of how this difference between the application of the IBA and Insurance Act may arise. In that case it was held that the transaction was subject to the IBA, as mentioned in section 6.2.1 above. Such type of arrangement, however, would not necessarily become subject to the Insurance Act. This clearly supports the above-stated position of this chapter. In other words, the FSA would presumably still determine that granting vacancy rent guarantees as a regular commercial operation would be insurance business in the context of the IBA. In contrast, however, there is no need to apply any of the unilaterally mandatory clauses to such a vacancy rent guarantee contract. In this regard, both the intentions of the contracting parties and the judgment of average consumers would mean that a vacancy rent guarantee contract should be considered to be a legal form different from the form of legal transaction of insurance or any other form of insurance-like legal transaction. In practice, it is difficult to find any reasonable need for any of the regulatory provisions set forth, as unilaterally mandatory clauses, in the Insurance Act, as mentioned in the section 4 above, to apply to a vacancy rent guarantee contract.

As discussed above, this chapter takes the position that it is possible that the Insurance Act will not apply to a contract that is considered to constitute insurance business under the IBA.

7. CONCLUSION

This chapter has discussed the meaning of insurance in the context of insurance contracts under the Insurance Act and the meaning of insurance in the context of insurance business under the IBA. These discussions lead to the understanding set out below.

The Insurance Act is premised, as a law pertaining to contracts, on the perceptions and assumptions of the respective contracting parties. This is reflected in the definition of insurance in the Insurance Act. As we have seen, the Insurance Act provides first that to qualify as an insurance contract, the arrangement must first meet the definition of an insurance contract in the act. In addition, however, to fall within the Insurance Act, the arrangement must also satisfy the unstated definition of insurance as provided for by the Insurance Act. The unstated definition of the notion of insurance specifically requires that a transaction at issue be a contract that general consumers typically believe to be insurance, but does not require that an insurance contract be actually equipped with the functions of risk transfer, risk accumulation and risk dispersion. Thus, a contract that is considered, as a matter of social consensus, to be underpinned by these functions (whether or not that is objectively the case) adequately satisfies the concept of insurance contract. Based on this understanding, any contract that is conceived to be of a form other than insurance, as a matter of social consensus among consumers in general, should be excluded from the scope of insurance contracts.

In contrast, the meaning of insurance under the IBA as interpreted by the FSA is determined through the consideration in the round of various elements so as to determine the applicability of the concept of insurance business as that term is defined in the IBA. The FSA initially determined that a vacancy rent guarantee constituted insurance business, and then denied, in the inquiries made in the course of subsequent no-action-letter procedures, the applicability of the concept of insurance business to other types of services. It is submitted, that in this the FSA has not changed its determination criteria and it is further suggested that this approach of the FSA reflects an appropriate interpretation of the IBA.

Consequently, the concept of 'insurance' under the Insurance Act as defined by social consensus and that of 'insurance business' in the context of insurance supervision and regulation may differ from each other in some respects. The Insurance Act governs the legal rights and obligations between respective contracting parties and, in this sense, applies to contracts that are conceived to be insurance as a matter of social consensus among consumers in general. In contrast, in light of the purposes of the supervision and regulation under the IBA, the applicability of the insurance business concept is determined through an overall consideration of whether the business operation at issue should be placed, as a whole, under the supervision and regulation of the IBA. Thus, it is fair to say that there is some discrepancy between the conceptual underpinnings of the two laws.

This chapter does not assume, however, that the FSA will maintain its present interpretation even in cases where a scheme in question is held by a court not to constitute

an 'insurance contract'. Rather, it is assumed that if such a decision is rendered by a court, the FSA may well modify its previously publicized interpretation.

Such differences as there are between the two definitions appear in our view to originate from the differences in the nature of the Insurance Act and the IBA. Under the Insurance Act, which is a law pertaining to contracts, certain regulations exist for the purpose of making adjustments focusing on the substance of agreements between contracting parties. Therefore, the Insurance Act functions as a mechanism to define the legal rights and obligations between contracting parties and thereby to enable general consumers to utilize such contracts smoothly and safely. In contrast, under the IBA, the necessity of supervision and regulation of a particular form of business operation, as a whole, is determined through overall consideration of, among other things, the operational soundness of the business in question and the impact that may arise from its operational failure. Considering the fact that insurance involves risk transfer transactions that are invisible financial transactions, it is inevitable that such transactions should be subject to extensive regulation by the FSA, and this should be consistent with the policy reasons for the regulations under the IBA.