The Insurance and Reinsurance Law Review

Fourth Edition

Editor
Peter Rogan

Law Business Research

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EDITOR'S PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant; it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with the emerging markets of Brazil, Russia, India and China developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all of the contributors for their work in compiling this volume.

Looking back on the past year, market estimates suggest that the insured losses flowing from the explosion at the Port of Tianjin in China may well exceed US$3 billion. The losses will arise on a wide variety of policies ranging from cargo, property and ports and terminals insurance through to product liability and business interruption. Those policies will be subject to a range of governing laws. It is likely that there will be complex issues to consider in relation to each of these types of coverage, both at the direct insurance and reinsurance levels. The US winter storm of January 2016 is predicted to be a multi-billion dollar loss event. In the UK, December 2015 was the wettest on record. Denial of access to homes and businesses was significant, and the insurance market is braced for the ensuing losses.

Events such as these test not only insurers and reinsurers but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. I hope that you find this fourth edition of *The Insurance and Reinsurance Law Review* of use in seeking to understand them and I would like once again to thank all the contributors.

Peter Rogan
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Chapter 19

JAPAN

Shinichi Takahashi, Keita Yamamoto, Yoshihide Matsushita and Takahiro Sato[1]

I INTRODUCTION

The Japanese life and non-life insurance markets have been very competitive, involving a large number of companies. Although Japanese insurance companies are providing individual annuities to respond to the expanding demands of an ageing population, the falling birth rate in Japan has had the effect of reducing demand for life and non-life insurance coverage. Accordingly, major Japanese insurance companies are seeking business opportunities overseas to expand their presence in the worldwide market, which has relatively larger room for growth. At the same time, in their domestic strategies and with a view to streamlining, Japanese insurance companies have promoted mergers and acquisitions, which has led to their integration into some larger insurance groups, and they have sought more cost-effective sales channels for insurance contracts. To achieve a synergistic effect through integrated group management, insurance companies are undertaking cross-selling by sharing the clients of companies in the same group to ensure easy access thereto. Further, the style of solicitation has been diversified for efficiency and to respond to the needs of customers. Traditionally, sales of life insurance were made face-to-face by employees of life insurance companies that undertook solicitation activities on behalf of a sole insurance company. However, the use of agents, including bancassurance (that is, the selling of insurance products by a bank liberalised in December 2007) and those undertaking solicitation activities on behalf of multiple insurance companies, and direct marketing through several channels, which did not occur in the past, are becoming more common. As with the life insurance market, the non-life insurance sales channels are diverse.

1 Shinichi Takahashi is a partner, Keita Yamamoto is a counsel and Yoshihide Matsushita and Takahiro Sato are associates at Nishimura & Asahi.

As for the reinsurance market, there are two domestic reinsurance companies and a number of branches of foreign reinsurers in Japan. Non-life insurance companies also underwrite reinsurance. Japanese non-life insurance companies play an important role in the world's reinsurance market.

II REGULATION

i The insurance regulator

Insurance business in Japan is regulated under the Insurance Business Act (IBA), whereby the Financial Services Agency (FSA) takes the main role as the insurance regulator. Under the IBA, the Japanese prime minister (PM), who has the authority to supervise the entities or persons that conduct insurance business and related business in Japan, delegates most of his or her authority (excluding certain important powers such as granting or cancelling insurance business licences) to the Commissioner of the FSA. The Commissioner of the FSA further delegates a part of his or her authority to the directors of the Local Finance Bureau of the Ministry of Finance (LFB).

The FSA and the LFB have the authority to (1) demand reports from and inspect insurance companies, licensed branches of foreign insurers (licensed branches), small-amount and short-term insurance (SASTI) providers, subsidiaries thereof, service providers subcontracted by any insurance company, certain major shareholders of insurance companies, insurance holding companies, and insurance agents and brokers; and (2) take administrative action against insurance companies, licensed branches, SASTI providers, certain major shareholders of insurance companies, insurance holding companies, and insurance agents and brokers.

The FSA stipulates detailed regulations under the IBA. Additionally, the Comprehensive Guidelines for the Supervision of Insurance Companies and SASTI Providers (Guidelines), set by the FSA, contain basic concepts, evaluation criteria and other guidelines relating to the supervision of insurance companies and SASTI providers, which should be observed when doing insurance business in Japan.

ii Position of non-admitted insurers

Insurance and reinsurance activities are only permitted to be undertaken by insurance companies, Japanese branches of foreign insurers and SASTI providers that have obtained licences in Japan. Foreign insurers not licensed in Japan under the IBA and without branch offices in Japan cannot conclude domestic risk insurance contracts (i.e., insurance contracts for persons resident or domiciled in Japan or with property located, or vessels and aircraft registered, in Japan), with the exception of certain insurance contracts, such as:

a reinsurance;
b insurance covering international freight;
c overseas travel insurance; and
d insurance for which prior permission from the FSA has been received by the policy applicant.

iii Position of insurance intermediaries

Under the IBA, the persons or entities permitted to act as agents or intermediaries for the conclusion of an insurance contract are limited to the following:

a life insurance solicitors, such as life insurance agents, and officers and employees of life insurance providers;

b non-life insurance solicitors, such as non-life insurance agents, and officers and employees of non-life insurance providers;
c small-amount and short-term insurance solicitors; and
d insurance brokers.

Life insurance agents, officers and employees of life insurance providers, non-life insurance agents, and small-amount and short-term insurance solicitors must register with the PM through the LFB.

Unlike non-life insurance, from an insurance regulatory perspective, the officers (excluding officers with authority of representation, company auditors and members of audit committees) and employees of licensed life insurance providers are required to register.

Since these intermediaries listed above, except for brokers, are entitled to act as intermediaries for the conclusion of insurance contracts on behalf of insurance companies, licensed branches and SASTI providers, such insurance providers are responsible for loss incurred by customers because of improper actions of intermediaries during the solicitation of insurance.

Brokers are independent from insurance companies. If a customer incurs loss because of the improper action of a broker, insurance companies are not responsible for the loss and the broker must indemnify the customer for the loss. Therefore, to ensure the resources to indemnify customers against loss, the IBA requires brokers to:

a deposit a security deposit with the deposit office;
b conclude a contract with a security provider stipulating that a required amount of security deposit be lodged by the security provider for the account of the broker, by order of the PM; or
c conclude a broker's liability insurance contract (in this case, brokers are required to ensure the resources of at least ¥20 million by means of (a) or (b), or both).

iv Requirements for authorisation

Japanese insurance companies

Insurance companies must obtain from the PM either a life insurance business licence or a non-life insurance business licence.

The applicant must submit a licence application with the required attachments to the PM through the FSA. The required attachments include:

a the following four documents (basic documents): the applicant's:
- articles of incorporation;
- statement of business procedures;
- general policy conditions; and
- statement of calculation procedures for insurance premiums and policy reserves;

b a business plan;
c documents explaining the status of recent assets, profits and losses; and
d documents relating to the applicant's subsidiaries.

To protect the public interest, the PM can impose conditions on licences or revise their conditions.

Japanese branches of foreign insurers

For a foreign insurer to conduct insurance business in Japan, its Japanese branch must obtain from the PM either a life insurance business licence or a non-life insurance business licence.

The procedures for foreign insurers to obtain a licence are similar to those for Japanese insurance companies.

SASTI providers

SASTI providers must register with the PM through the LFB. The registration application and its required attachments are similar to those for a licence application.

v The distribution of products

No person or entity is allowed to distribute insurance products, other than insurers themselves, their agents and brokers.

vi Other notable regulated aspects of the industry (e.g., ownership, mergers, capital requirements)

Permitted activities and subsidiaries

Insurance companies and licensed branches can carry out only the following three types of business under the IBA:

a underwriting insurance and management of assets (typical business);

b incidental business; for example:
- representing the business or performing services on behalf of other insurance companies and other entities carrying out financial business;
- guarantees of obligations;
- handling private placements of securities; and
- derivative transactions; and

c business permissible under the IBA and other laws (e.g., certain securities trading business and trust business concerning secured bonds).

Insurance companies cannot hold subsidiaries other than those set out in the IBA, including:

a companies that engage in financial business (e.g., insurance companies, banks, securities companies and trust companies);

b companies that engage in business that is dependent on the business of their parent insurance companies and their subsidiaries;

c companies that engage in business that is incidental or related to financial business;

d companies that explore new business fields; and

e holding companies whose subsidiaries are limited to companies listed in (a) through (d) above.

Since this rule was applicable to subsidiaries inside and outside Japan, and as major Japanese insurance companies tended to seek business opportunities overseas – to expand their presence in the worldwide market, with its relatively larger room for growth – it was pointed out that Japanese insurance companies upon acquiring foreign insurance companies found their competitive position impaired because they were forced to sell certain subsidiaries not qualified under the IBA. For this purpose, the reforms of the IBA in March 2012, and May 2014, loosened the restrictions on the business engaged in by subsidiaries of foreign financial institutions acquired by Japanese insurance companies, subject to approvals having

been obtained. However, the approved foreign subsidiaries should be sold within five years after the date of the acquisition unless the insurance companies obtain approval from the PM to extend this period. This affords Japanese insurance companies greater flexibility in expanding overseas.

Neither insurance companies nor their subsidiaries can acquire or hold, on an aggregated basis, more than 10 per cent of the total voting rights of all shareholders of any other company in Japan, except companies that can be held as subsidiaries by insurance companies, as mentioned above. The Anti-Monopoly Law imposes similar restrictions.

Ownership

A shareholder of a Japanese insurance company or insurance holding company that holds more than 5 per cent of the total voting rights must file a notification with the LFB or (in certain cases) the FSA, and file a report each time there is a change to the notification. If the person or entity is to acquire directly or indirectly (through other entities) at least 20 per cent of the total voting rights of a Japanese insurance company (or 15 per cent in certain cases) (major shareholder threshold), they must obtain prior authorisation from the FSA. The IBA provides a certain review standard for the authorisation to ensure sound and appropriate management of the insurance company's business.

Acquisitions of SASTIs must be pre-approved by the LFB when the major shareholder threshold is surpassed.

Further, the acquirer or holder must file an *ex post* notification with either the FSA or LFB respectively, if either:

a the person or entity acquires more than 50 per cent of the total voting rights of a Japanese insurance company or SASTI provider; or

b the number of voting rights held becomes either:
- equal to or less than 50 per cent; or
- less than the major shareholder threshold.

With respect to insurance holding companies, the following must obtain prior authorisation from the PM:

a a company that intends to become a holding company with an insurance company as its subsidiary; and

b a person who intends to establish such a holding company.

In the case of SASTI providers, pre-approval is required from the LFB.

After becoming an insurance holding company, notification is necessary when the company makes an insurance company its subsidiary.

The holding company must file a notification if an insurance company or a SASTI provider ceases to be its subsidiary.

Approval requirements

Under the IBA, insurance companies must obtain approval for the following:

a transactions that are not generally conducted in the ordinary course of business (such as a transfer of insurance contracts, transfer of insurance business or entrustment of insurance business); and

b corporate actions that involve:
- a reduction of the capital of stock insurance companies;

- entity conversion of a stock insurance company into a mutual insurance company (and *vice versa*); or
- a merger, company split or liquidation.

Issuance of any equity triggers an *ex ante* notification obligation only when the insurance company increases its stated capital with such an issuance of equity. Debt security also requires an *ex ante* notification, but only if it is in the form of bonds with share warrants.

Capital requirements and solvency margin requirements

Japanese insurance companies must hold more than ¥1 billion in either:

a stated capital (in the case of a stock company); or

b total amount of *kikin* (the funds held by a mutual insurance company, equivalent to the capital held by stock companies) including a reserve for redemption of *kikin* in the case of a mutual company.

The IBA provides for a solvency margin ratio as a standard to assess the soundness of an insurance company's business. The solvency margin ratio is calculated by dividing the total amount of stated capital, *kikin*, reserves and other amounts by the amount available to cope with possible risks, exceeding the standard predictions that may occur because of insurance accidents. Insurance companies must maintain a solvency margin ratio of at least 200 per cent. In practice, however, all insurance companies maintain a higher ratio.

The group solvency margin requirement has been applicable since the fiscal year end of 31 March 2012, which means the solvency margin ratio should be calculated on a group basis (i.e., the insurance holding company and its subsidiary or the insurance company and its subsidiary).

Similar ongoing requirements apply to licensed branches and SASTI providers.

III INSURANCE AND REINSURANCE LAW

i Sources of law

IBA

The IBA and related regulations provide for the supervision and regulation of the insurance and reinsurance business. The definition of an insurance business under the IBA includes insurance and reinsurance activities. Therefore, the IBA regulates insurers and reinsurers in the same way.

Insurance Act

The Insurance Act generally regulates insurance contracts entered into after 1 April 2010.

ii Making the contract

Essential ingredients of an insurance contract

While the IBA does not define what constitutes an insurance contract, an insurance contract under the Insurance Act is defined as an insurance contract, a mutual aid contract or any other contract in whatever name, under which both:

a one party undertakes to pay financial benefits (limited to the payment of money in life insurance contracts and fixed benefit accident and health insurance contracts) to the other party, subject to a certain event occurring; and

b the other party undertakes to pay insurance premiums (including mutual aid premiums), the calculation of which are based on the possibility of a certain event occurring.

Life insurance is defined as an insurance contract in which insurers will pay financial benefits with respect to the survival or death of individuals, where an interest is clearly eligible to be insured. Non-life insurance is defined as an insurance contract under which the insurer agrees to indemnify the loss that may arise from specific accidents. The subject matter of a non-life insurance contract must be an interest that may be measured by an amount of money (i.e., an insurable interest). The insurable interest must be held by the insured. In this way, non-life insurance is distinguished from gambling. In practice, whether the insured holds insurable interests is decided on a case-by-case basis, so that those in need of cover are not unduly restricted from accessing sufficient cover.

There is no definition of a contract of reinsurance in either the Insurance Act or the IBA. However, a contract of reinsurance is a type of non-life insurance.

Information provided to the insurer at placement

Under the Insurance Act, applicants are required to provide material information that is related to the possibility of an accident or loss to the extent specified by an insurance company at the time of placement (Article 4).

Utmost good faith, disclosure and representations

As stated above, policyholders and the insured are obliged to disclose material facts that are specifically requested by an insurer in relation to the insurance, at the time of concluding an insurance contract (the duty of disclosure). In this regard, under Japanese law, the duty of disclosure is generally considered not as a representation of utmost good faith, but rather as a legal mechanism to correct information asymmetry so that the insurers can have adequate information held only by policyholders or the insured.[2]

Recording the contract

To avoid being exposed to a moral hazard, insurance companies have introduced a system for recording certain insurance contracts with the Life Insurance Association and the General Insurance Association, and share the information of the insurance contracts between the members of those associations for reference in conclusions of insurance contracts and claims handling or for checking the overinsurance.

iii Interpreting the contract

General rules of interpretation

Generally speaking, it is understood that an insurance policy should be interpreted in a uniform manner so that insurance contracts between a number of policyholders are read as the same and policyholders and the insured under the same insurance policy are treated equally. Accordingly, intentions or understandings of an individual policyholder are not considered in the interpretation of insurance contracts.[3]

2 Tomonobu Yamashita, *Insurance Law*, Tokyo: Yuhikaku, 2005, pp. 283–4.

3 Tomonobu Yamashita, *Insurance Law*, Tokyo: Yuhikaku, 2005, pp. 117–8.

Incorporation of terms

Policy conditions

While insurance policies are not required to be in writing, insurance contracts are generally concluded with policy conditions predetermined by the insurance company and approved by the FSA, or, instead of the approval, certain types of insurance contracts can be sold either:

a by giving prior notification to the FSA; or

b by stating in the statement of business procedures that the insurance company can create or change the insurance contracts without any prior notification to the FSA.

A person who wants insurance coverage submits an insurance application form to an insurance company, and if the insurance company accepts his or her application, an insurance contract is concluded and the terms of the policy conditions become binding between them.

Under the Insurance Act, there are several types of provisions that include discretionary provisions, compulsory provisions and unilateral compulsory provisions in favour of the insured or policyholders. When an insurance policy excludes or sets out a provision that conflicts with discretionary provisions, the insurance policy supersedes the discretionary provisions. With respect to compulsory provisions, parties are not allowed to conclude insurance policies that contradict the compulsory provisions and such contradicting policy provisions are null and unenforceable. Further, unilateral compulsory provisions make invalid and unenforceable any provisions in the policy that are less favourable to the insured or policyholders than the unilateral compulsory provisions. That said, however, unilateral compulsory provisions in favour of the insured or policyholders are not applicable to certain commercial lines of insurance, including:

a marine insurance;

b insurance concerning aircraft or air cargo;

c insurance concerning nuclear facilities; and

d business activities insurance.

Generally speaking, it is often the case that reinsurance is interpreted as 'business activities insurance'.

Policy conditions consist of both:

a general policy conditions in which the basic terms of the insurance policy are stipulated; and

b special policy conditions by which the terms of the general policy conditions are amended or supplemented.

Insurance certificate

Under the Insurance Act, if an insurance contract is concluded, the insurance company must deliver an insurance certificate to the policyholder, where the policy conditions do not exclude the application of this provision. The insurance certificates set out basic information such as the:

a insurance premium;

b insurance period;

c risks covered;

d insured amount; and

e policyholder's name.

Types of terms in insurance contracts

General policy conditions commonly include clauses relating to the following matters:

a scope of the insurance and exclusions;
b limit of the insurance company's liability;
c commencement and termination date of the insurance;
d calculation of the amount of the insurance claim;
e procedure for payment of the insurance claim;
f duty of disclosure;
g duty of notification;
h insurance subrogation;
i invalidity, expiration or termination of the insurance contract; and
j resolution of disputes and governing law.

Warranties

As stated above, under the Insurance Act, policyholders and the insured are bound by the duty of disclosure. Where a policyholder or insured party has breached the duty of disclosure or misrepresented matters subject to the duty of disclosure, because of malicious intent or gross negligence, the insurance providers can cancel the insurance contract; provided, however, the insurance providers cannot terminate the insurance contract for breach of the duty of disclosure, if their insurance agent either:

a prevented the insured or policyholders from disclosing material facts; or
b advised the insured or policyholders not to disclose material facts or to misrepresent material matters.

As a result, upon the cancellation, the insurer will not be liable for damage caused by insurance accidents that arise from matters not notified because of the breach of the duty of disclosure (Articles 4, 28, 37, 55, 66 and 84 of the Insurance Act). However, the insurer is still liable for damage caused by insurance accidents that are not relevant to the matters subject to the duty of disclosure. Since the provisions above are categorised as unilateral compulsory provisions in favour of the insured or policyholders, policy terms less favourable to the insured or policyholders are invalid and unenforceable.

Conditions and conditions precedent

Where the insurance policy imposes, as a policy condition, a duty of notice on policyholders and the insured to the effect that when there are any changes in the subject matter of the duty of disclosure that relate to the increase of risk, then the policyholders and the insured are required to give notice to insurers (the duty of notice upon increase of risk). Where the policyholders or the insured have breached the duty of notice upon increase of risk, because of malicious intent or gross negligence, the insurers can cancel the insurance contract. As a result, upon the cancellation, the insurer is not liable for damage caused after the increase of the risk. However, the insurer is still liable for damage caused by accidents that are not relevant to the increased risk (Articles 29, 31, 56, 59, 85 and 88 of the Insurance Act). Since the above provisions are categorised as unilateral compulsory provisions, policy terms less favourable to the insured or policyholders are invalid and unenforceable.

As stated above, policy conditions should not contradict the compulsory provisions or unilateral compulsory provisions in favour of the insured or policyholders, and if they do so, they will be unenforceable. Major compulsory provisions and unilateral compulsory

provisions, and simple explanations thereof are provided in the following paragraphs. In addition, if any of the terms set out in the Insurance Act are omitted from insurance contracts or reinsurance contracts, they will be implied by the Insurance Act.

Retrospective insurance

An insurance contract is null and void if either (Articles 5, 39 and 68 of the Insurance Act):

a a policyholder is aware that any accident to be covered by the insurance has already occurred; or

b an insurance company is aware that an accident to be covered by the insurance will never occur.

Overinsurance

In relation to non-life insurance, if an insured amount exceeds the value of the object insured, a policyholder can cancel the excess part of the insurance contract, unless either (Article 9 of the Insurance Act):

a the excess is caused by the malicious intent or gross negligence of the policyholder; or

b there is an agreement regarding the value of the object insured.

Rights of reducing insurance premiums because of decreasing insurance value

If a non-life insurance value is reduced in a significant way, the policyholder can claim for reducing insurance premiums at the level of reduced insurance value (Article 10 of the Insurance Act).

Rights of reducing insurance premiums because of decreasing insurance risk

If an insurance risk is reduced in a significant way, the policyholder can claim for reducing insurance premiums at the level of reduced insurance risk (Articles 11, 48 and 77 of the Insurance Act).

Extinguishment of the insured objects after the occurrence of covered damage

In relation to non-life insurance, insurers must pay insurance reimbursements if the insured objects are extinguished after the covered damage has occurred (Article 15 of the Insurance Act).

Statutory lien for liability insurance

In relation to liability insurance, those damaged by covered accidents are entitled to obtain a lien over claims for insurance reimbursements. Therefore, the insured are allowed to exercise their claim against the insurer only:

a with the consent of those damaged by covered events; or

b to the extent that they have indemnified those damaged by covered events.

In addition, liability insurance claims against insurers cannot be transferred, be subject to a pledge or be sequestered, except in certain cases (Article 22 of the Insurance Act).

Insurance subrogation

In relation to non-life insurance, if an insured can claim against another person with respect to the loss covered by the insurance and an insurance company has paid the insurance claim,

the insurance company will be subrogated to the rights held by the insured against the other person to an extent that does not prejudice the rights of the insured, but only to the extent of the amount paid (Article 25 of the Insurance Act).

Rights to cancel by insurer

An insurer can cancel the insurance contract when (Articles 30, 57, and 86 of the Insurance Act):

a a policyholder commits fraud or tries to commit fraud against the insurer; or

b where there is a material issue that adversely affects the insurer's trust in the policyholder, making it difficult for the insurer to maintain the insurance contract with the policyholder.

Legal effect of cancellation

The cancellation of insurance contracts is only effective going forward, and the insurer is not then liable for further cases when the insurance contract is cancelled (Articles 31, 59 and 88 of the Insurance Act).

Rights to cancel by the insured

In certain circumstances, when the insured is not the same person as the policyholder, the insured can cancel the insurance contract (Articles 34, 58, and 87 of the Insurance Act). This applies to non-life accident and health insurance, life insurance and fixed-benefit accident and health insurance.

iv Regulations on insurance solicitation

Conduct rules

The solicitation of insurance should be conducted in an appropriate manner in accordance with the rules provided under the IBA and the Guidelines, including:

a persons carrying out insurance solicitation should provide information and an explanation of important items necessary for the customers to determine whether to conclude an insurance policy;

b no false statement should be made with respect to important items;

c policyholders and the insured should not be encouraged to make a false statement or be prevented or discouraged from disclosing a material fact to insurers; and

d no discounts or rebates on insurance premiums or any other special benefits should be offered to policyholders or insured parties.

Obligations to provide information

In the past, regulations on the provision of information were worded as negative obligations under the IBA. However, the 2014 amendment of the IBA, which is scheduled to enter into force on 29 May 2016 with the related Cabinet Order and other Ministry Ordinance, imposes positive obligations. Under the revised IBA, persons carrying out insurance solicitation must provide their customers with the contents of insurance contracts and other helpful information for policyholders. Details of the exact information required to be supplied under this obligation are delegated to subordinate regulations.

Obligation to check intentions of customers

Insurance companies and solicitors are required to confirm the intentions of customers when soliciting insurance. This rule expects insurance solicitors to:

a understand the motivation and purposes behind new customers seeking insurance policies (i.e., the risks that the customer has identified and would like to cover by purchasing insurance);

b offer insurance policies that are suitable for such purposes;

c provide explanations of the policies to customers; and

d prior to the conclusion of insurance contracts offer opportunities for the customers to confirm that the insurance policies are in line with their original purposes, or in cases where there are differences between them, to explain the differences and the reasons for the differences.

Unlike other major requirements for insurance solicitation, detailed requirements are not provided for this obligation; instead, the supervisory authority anticipates that insurance solicitors will adopt innovative approaches and come up with reasonable and appropriate measures depending on the types of insurance policies and solicitation channels.

Restrictions on consignment

Under the IBA, consignment of insurance solicitations is allowed only where they are made directly by the insurance companies, for the purpose of ensuring the appropriateness of the solicitation by means of direct control by the insurance companies.

However, the direct consignment rule is not applicable where (1) an insurance company consigns insurance solicitations to another insurance company, (2) both of the insurance companies belong to the same group, (3) the insurance solicitation is carried out by insurance solicitors (e.g., insurance agents) of the consigned insurance company, and (4) they obtain authorisation from the PM. This will enhance the cost-effective group management of insurance companies.

Regulations on multi-tied agents

Multi-tied agents have often professed to be 'impartial and neutral' advisers to customers, but recently there have been cases in which some have recommended insurance policies from which they derive greater benefits, such as policies involving a high commission and policies provided by an insurer who has a financial interest in the multi-tied agent. Concerns have been raised about a lack of transparency in the sales processes of multi-tied agents and, further, that multi-tied agents have been known to make misleading representations suggesting they are acting for customers rather than insurance providers. To address these concerns, new IBA regulations have been introduced that require multi-tied agents to explain why they are recommending certain insurance policies above others that are available to them. There are two ways to select an insurance policy. One is to select a policy in line with the customer's stated needs. In such cases, multi-tied agents should select, from the insurance policies they handle, policies aligned with the customer's stated needs and explain how the recommended policies fulfil the customer's requirements. For example, if customers request a life insurance policy with a low premium, multi-tied agents should select a low-premium life insurance policy from the products they handle. The other means of selection is to select insurance policies based on the multi-tied agent's own interests. In such cases, the multi-tied agent may recommend insurance policies regardless of the customer's requirements but should frankly

disclose to the customer why they have recommended such products. For example, if the multi-tied agent's policy selection is motivated by a financial interest held by the insurer, or a high commission, this must be disclosed to the customer. Note that the above rule does not apply to insurance brokers who act on behalf of customers. Insurance brokers have a fiduciary duty to provide the best advice to customers. Therefore, they must not select policies on the basis of their own self-interest.

v Claims

Notification

Under the Insurance Act, notifications of loss are required where policyholders or the insured perceive such loss, thereby giving insurers the opportunity to investigate the accident and determine the loss, or to prevent further extension of the loss. In the event of a default of this notice obligation, the insurance company may:[4]

a be indemnified for any damage that it incurs because of the delay; or

b deduct an amount equivalent to any loss caused by failure of this notice from insurance monies.

Good faith and claims

It is generally understood that the parties to an insurance agreement should act in good faith so as not to harm the other parties, although there are no explicit rules that are specifically applicable at the stage of making an insurance claim.

Set-off and funding

A right to set off mutual debts and credits is generally recognised in Japan if certain conditions are met (Article 505 of the Civil Code). These conditions include the satisfaction of both obligations that are due.

Payment of insurance reimbursements must be forthcoming after a reasonable period required for investigations (Articles 21, 52, and 81 of the Insurance Act).

Reinstatement

A basic and very common policy condition of life insurance is a provision that allows policyholders to reinstate an insurance contract in abeyance because of non-payment of an insurance premium. Detailed conditions, effects and procedures are not regulated by law.

Dispute resolution clauses

Arbitration clauses in insurance and reinsurance agreements are enforceable in Japan. Although arbitration clauses are not commonly provided in insurance policies, reinsurance contracts often stipulate such clauses in relation to disputes between ceding companies and reinsurance companies.

4 Supreme Court decision, 20 February 1987, Minshu Vol. 41, No. 1 p. 159.

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

Claims for insurance reimbursement against an insurance company must generally be filed in the jurisdiction of the debtor's residence, unless expressly provided in the insurance policy (Article 5 of the Code of Civil Procedure of Japan). Insurance policies sometimes stipulate the choice of forum and venue as the headquarters of the insurance company or, simply, Japan. These arrangements are valid and enforceable in Japan, subject to the FSA approval and notification requirements for the policy conditions, provided that they are not prejudicial to consumers' interests under the Consumer Contract Act, which does not apply to commercial lines (including reinsurance contracts).

Choice of law is often stipulated in non-life insurance policies, and is also valid and enforceable in Japan, subject to the FSA approval and notification requirements for the policy conditions. If not, it is assumed that Japanese law applies to both life and non-life (except for marine) insurance contracts. A choice of foreign law may be void in insurance policies with consumers under the Consumer Contract Act.

Although arbitration clauses are not commonly provided in insurance policies, reinsurance contracts often stipulate such clauses in relation to disputes between cedent companies and reinsurance companies. Generally speaking, arbitration clauses in insurance and reinsurance agreements are enforceable in Japan.

ii Litigation

Japan's litigation system basically consists of three stages: district courts (first instance), High Courts (courts of appeal) and the Supreme Court (court of final appeal). Depending on the complexity of the case and the actions of the other party, it might take a year or more until the conclusion of a case in the court of first instance. In addition to this, if either of the parties refuses to accept the judgment of the court of first instance, either party may appeal the case to a higher court, and again to the Supreme Court. Anticipated costs also depend on the situation and include the costs of translation into Japanese, since documents filed in a Japanese court must be in Japanese.

According to litigation practice in Japan, if a policyholder files an action for an insurance claim, he or she must prove all of the following facts:

a existence of a valid insurance contract;
b occurrence of an insurance event during the insurance period;
c occurrence and quantum of loss; and
d causal relationship between the insured event's occurrence and the loss.

iii Arbitration

Parties are entitled to agree to submit disputes to arbitration even after occurrence of a dispute; however, an arbitration agreement is required to be in writing for a Japanese court to dismiss a file that is subject to an arbitration agreement, where either party has filed a lawsuit in a Japanese court.

Under the Arbitration Act, parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the arbitral proceedings, subject to the provisions relating to acts against the public order.

iv Alternative dispute resolution

In October 2010, the Financial Alternative Dispute Resolution (ADR) System under the IBA was introduced in Japan. Under the Financial ADR System, insurance companies and reinsurance companies are required to both:

a conclude a contract with the designated institution for dispute resolution designated by the FSA; and

b comply with the procedure of the designated institution for dispute resolution to resolve insurance or reinsurance complaints or disputes arising from insurance business.

However, insurance companies and reinsurance companies are guaranteed the right of access to a court. The Life Insurance Association of Japan, the General Insurance Association of Japan, the Insurance Ombudsman, and the Small Amount and Short Term Insurance Association of Japan are the designated institutions for dispute resolution in insurance business.

In addition, there are some ADR forums for insurance complaints and disputes, such as:

a the Japan Centre for the Settlement of Traffic Accident Disputes;

b the Automobile Liability Insurance and Mutual-aid Dispute Settlement Mechanism; and

c the Dispute Resolution Committee established by the National Consumer Affairs Centre of Japan.

v Mediation

For mediation, the court will form a mediation panel consisting of one judge and two other persons to settle disputes amicably; however, this procedure is not commonly used in insurance claims.

V YEAR IN REVIEW

The latest amendment of the IBA was passed by the Japanese Diet on 23 May 2014 (Amendment). The Amendment mainly includes:

a establishment of new fundamental rules regarding insurance solicitation (as stated in Section III.iv, *supra*);

b streamlining the regulations for insurance agents;

c deregulation of overseas development of insurance companies (as stated in Section II. vi, *supra*); and

d relaxation of regulations for brokers.

While the provisions of the Amendment regarding item (d) above came into effect in August 2014 and in November 2014 for item (c) above, the provisions regarding items (a) and (b) above are scheduled to come into effect on 29 May 2016 with the revision of the Order for Enforcement of the IBA, the Ordinance for Enforcement of the IBA and the Guidelines following the Amendment concerning items (a) and (b) above.

With regard to item (a), in addition to changes noted in Section III.iv, *supra*, the following two matters should be noted. First, the meaning of 'insurance solicitation' was clarified in the revised Guidelines. Before the Amendment, the interpretational issue as to whether an act in question falls under insurance solicitation often arose in practice because the meaning of the phrase was not clear. For greater clarity, the amendment provides three

categories: (1) insurance solicitation, (2) insurance solicitation-related acts and (3) acts that do not constitute insurance solicitation or insurance solicitation-related acts. Further, the insurance solicitation-related acts will be newly regulated by the revised Guidelines. Second, the new Guidelines cover solicitations by telemarketing channels. These require insurance companies and intermediaries engaging in telemarketing solicitation to establish solicitation procedures, including measures to address anticipated problems that may arise when dealing with clients who are solicited via telephone, and to identify problems at an early stage, as well as to provide appropriate education, control and guidance to the persons making phone calls. Further, insurance intermediaries utilising telemarketing should be focused on (1) establishing a script for the discussion, (2) ensuring there is a 'do not call' registry, (3) recording telephone conversations, (4) analysing the reasons for complaints and sharing with the persons making the phone calls measures to prevent such complaints, and (5) monitoring of conversations by personnel who are not party to the conversations, with a view to implementing appropriate measures to address any problems identified by the monitoring.

In relation to item (2) above, the IBA now requires that insurance agents take measures to ensure the sound and appropriate management of their insurance solicitation business, such as:

a explaining important matters pertaining to their insurance solicitation business;

b appropriately handling customer information acquired in relation to their insurance solicitation business;

c properly executing any business they entrust to a third party;

d describing the features of insurance contracts pertaining to the insurance that the entrusting insurance companies will underwrite in comparison with other insurance contracts pertaining to the same insurance; and

e appropriately establishing guidelines and educating persons carrying out insurance solicitation based on those guidelines (if conducting the business of educating persons carrying out insurance solicitation).

Until recently (before the Amendment), only insurance companies were required to take measures to ensure the sound and appropriate management of their business (including the supervision of their insurance agents); in other words, the authorities aimed to supervise insurance agents through insurance companies. The Amendment was enacted in response to the enlarged market presence of insurance agents who are undertaking solicitation activities on behalf of multiple insurance companies, and who are not fully managed and supervised by such insurance companies.

VI OUTLOOK AND CONCLUSIONS

Under the Amendment, restrictions on certain aspects of the insurance business have been relaxed, which may enable more cost-effective management of insurance providers under the IBA and improve the accessibility of insurance products for customers. At the same time, the Amendment introduced further solicitation restrictions to ensure customer protection, especially in relation to persons carrying out insurance solicitation. In 2015, the relevant regulations and guidelines enforcing the newly introduced regulations on insurance agents and insurance solicitation were finalised through the public consultation procedures on the draft revisions of the Order for Enforcement of the IBA, the Ordinance for Enforcement

of the IBA and the Guidelines following the Amendment published by the FSA; these regulations and guidelines will affect the business of insurance agents and the actual practice of selling insurance in the market when they are enforced.

Appendix 1

ABOUT THE AUTHORS

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Shinichi Takahashi is a partner at Nishimura & Asahi and is qualified to practise in Japan and New York. Shinichi's areas of practice include insurance, banking, capital markets, and structured finance and securitisation.

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