

Chapter 21

JAPAN

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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. In order 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.

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

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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 Prime Minister of Japan (PM), who has authority to supervise the entities or persons that conduct insurance business and related business in Japan, delegates 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 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, 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 (the 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 brokers

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 agents;
- b* officers and employees of non-life insurance companies;
- c* non-life insurance agents, their officers and employees;
- d* small-amount and short-term insurance agents; and
- e* brokers.

Life insurance agents, non-life insurance agents, and small-amount and short-term insurance agents 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 fall under the category of agents that are required to register.

Since these agents and intermediaries listed above, except for brokers, are entitled to act as agents or 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 due to improper actions of agents or intermediaries during the solicitation of insurance.

Brokers are independent from insurance companies. If a customer incurs loss due to the improper action of a broker, insurance companies are not responsible for the loss as in the case of agents or intermediaries, 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).

The insurance brokers system was introduced in the amendment of the regulations in 1995. However, as this system was underutilised, an amendment of the IBA regarding relaxation of regulations on brokers, aimed at promoting new entries into the insurance broker business, was passed in May 2014 and came into effect in August 2014. The previous regulations required brokers to lodge a security deposit of at least ¥40 million with the deposit office. However, under the new regulations, the minimum amount of the security deposit was lowered to ¥20 million.

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* business related to typical 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* insurance companies;
- b* banks;

- c* securities companies;
- d* companies that engage in business that is dependent on the business of their parent insurance companies and the above-listed financial subsidiaries of the parent insurance companies; and
- e* companies that engage in business incidental or related to financial business.

Since this rule was applicable to subsidiaries inside and outside Japan and major Japanese insurance companies tended to seek business opportunities overseas so that they could expand their presence in the worldwide market with relatively larger room for growth, it was pointed out that when Japanese insurance companies acquired foreign insurance companies, this impaired their competitive position by forcing them to sell certain subsidiaries not qualified under this rule upon the acquisition. For this purpose, in the reform of the IBA in March 2012, the restrictions on the business engaged in by subsidiaries of foreign insurance companies, which became subsidiaries upon the acquisition of foreign insurance companies, are loosened where approvals have been obtained. Under the amendment of the IBA in May 2014 (enforced from November 2014), the exceptions to the limitation on insurance company subsidiaries have been broadened. Consequently, insurance companies may also have foreign institutions with foreign subsidiaries that do not qualify under this rule if the foreign institutions engage in banking, securities services, trust business, investment management business, etc., as well as insurance business. However, the approved foreign subsidiaries should be sold within 5 years after the date of the acquisition. This broadened scope 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 certain companies listed in the IBA. 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 comprehensive 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 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 due to 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.

A new method of calculating the solvency margin ratio has applied from the fiscal year ended 31 March 2012. In addition, the group solvency margin requirement has applied since the fiscal year ended 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 insureds 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 insureds.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 insureds 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

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 insureds 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

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

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

compulsory provisions make provisions in the policy that are less favourable to insureds or policyholders than such unilateral compulsory provisions invalid and unenforceable. That said, however, unilateral compulsory provisions in favour of insureds 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 insureds are bound by the duty of disclosure. Where a policyholder or insured has breached the duty of disclosure or misrepresented matters subject to the duty of disclosure, due to 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 insureds or policyholders from disclosing material facts; or
- b* advised insureds 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 due to 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 insureds or policyholders, policy terms less favourable to insureds 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 insureds 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 insureds are required to give notice to insurers (the duty of notice upon increase of risk). Where the policyholders or insureds have breached the duty of notice upon increase of risk, due to 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 insureds or policyholders are invalid and unenforceable.

As stated above, policy conditions should not contradict the compulsory provisions or unilateral compulsory provisions in favour of insureds 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 due to 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 due to 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, insured parties 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 Intermediaries and the role of the broker

Conduct rules

Distributions of insurance should be made 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 to determine the conclusion of the insurance policy;
- b* they should not make a false statement with respect to the important items;
- c* they should not encourage policyholders and insureds to make a false statement, or prevent or discourage them from telling a material fact to insurers; and
- d* they should not offer a discount or rebate on insurance premiums or any other special benefits to policyholders or insureds.

Agency/contracting

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

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. In order 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 (i.e., life insurance companies sell life insurance to non-life insurance customers of non-life insurance companies in the same group and *vice versa*). For this purpose, the direct consignment restriction rules were relaxed in the reform of the IBA in March 2012, to the extent that consignments are made between those belonging to the same group of insurance companies. This will enhance the cost-effective group management of insurance companies.

How brokers operate in practice

In the past, regulations on distributions of insurance were worded as negative obligations pertaining to the conclusion of insurance contracts or insurance solicitation under Article 300 of the IBA. However, as stated in the Report released by The Working Group for Providing Insurance Products and Services in June 2013 (the Report), it was proposed

that persons carrying out insurance solicitation should be required to perform certain acts in order to ensure that they give finely tuned responses to their customers in each step of the insurance solicitation. Therefore, the 2014 amendment of the IBA introduced two new obligations of persons carrying out insurance solicitation (in February 2015 the FSA announced that the amendment will come into effect on 31 May 2016 and published the draft Cabinet Order regulations regarding the amendment).

The first obligation is to check the intentions of their customers, which will be provided for in Article 294 of the revised IBA. This provision requires persons carrying out insurance solicitation to:

- a* confirm what their customers have in mind;
- b* propose that their customers conclude or participate in insurance contracts according to the intentions of their customers;
- c* explain the contents of the insurance contracts that their customers are considering concluding or participating in; and
- d* offer their customers the opportunity to confirm whether the contents of the insurance contracts they intend to conclude or participate in match their intentions at the time of conclusion of or participation in the insurance contracts.

The second obligation, which will be provided for in Article 294-2 of the revised IBA, is to supply information to their customers. Under the revised IBA, persons carrying out insurance solicitation must provide their customers with the contents of insurance contracts, other helpful information for policyholders, etc. Details of the exact information required to be supplied under this obligation are delegated to subordinated regulations. According to the draft regulations published by the FSA in February 2015, in addition to supplying information on the conditions for payment of insurance claims, insurance terms and amounts insured, persons carrying out insurance solicitation must perform certain acts such as the following:

- a* clearly describe all the comparable insurance products that they can offer to their customers; and
- b* carefully explain the reasons why they propose or offer a specific insurance product if they offer insurance products from multiple insurers to their customers.

Furthermore, it is noteworthy that these two new explicit obligations apply to not only insurance solicitation but also to activities equivalent to insurance solicitation. As a result, the solicitation of participation in group insurance as beneficiaries is expressly regulated in the same manner as insurance solicitation under Article 294 and 294-2 of the revised IBA.

v Claims

Notification

Under the Insurance Act, notifications of loss are required where policyholders or insureds perceive such loss, which give 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 due to 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 due to 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 cedant companies and reinsurance companies.

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

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

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 court (the first instance), High Courts (the court of appeal), and the Supreme Court (the 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 in order 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 in order to settle disputes amicably; however, this procedure is not commonly used in insurance claims.

V YEAR IN REVIEW

The 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 III-iv);
- b* streamlining the regulations for insurance agents;
- c* deregulation of overseas development of insurance companies (as stated in II-vi); and
- d* relaxation of regulations for brokers (as stated in II-iii).

While the provisions of the Amendment regarding item (d) above came into effect in August 2014 and in November 2014 for item (c) above, in February 2015 the FSA announced that the provisions regarding items (a) and (b) above are scheduled to come into effect on 31 May 2016, and published the draft revision of Order for Enforcement of the IBA, Ordinance for Enforcement of the IBA and the Guidelines following the Amendment concerning items (a) and (b) above.

In relation to item (b) above, while before the Amendment only insurance companies were required to take measures to ensure the sound and appropriate management of their business, the IBA now requires that insurance agents take measures to guarantee 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).

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

According to 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. While the relevant regulations and guidelines enforcing the newly introduced regulations on insurance agents and insurance solicitation have not been finalised, they will affect the business of insurance agents and the actual practice of selling insurance in the market when they are enforced.

Appendix 1

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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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