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Japan

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1 Regulatory

1.1 Which government bodies/agencies regulate insurance (and reinsurance) companies?

The Financial Services Agency (the "FSA") is the main government body regulating insurance and reinsurance businesses.

1.2 What are the requirements/procedures for setting up a new insurance (or reinsurance) company?

There are two ways for foreign insurers to establish an insurance business presence in Japan: (a) establish a branch office in Japan and then obtain an insurance business licence for such branch (the "branch model"); or (b) incorporate a subsidiary in Japan and then cause such subsidiary to obtain an insurance business licence (the "subsidiary model"). The following briefly summarises both models.

(a) Branch model

In this model, a foreign insurer which seeks an insurance business licence for a branch established in Japan must nominate one or more individuals to act as its representatives in Japan, at least one of whom must be a resident of Japan.

Foreign insurers utilising this model are required to deposit 200 million yen or more (depending upon the scope of planned operations in Japan) with a governmental deposit office for the protection of policyholders, insureds, beneficiaries and other related parties in Japan. In addition, they must hold assets physically in Japan, either in cash or other prescribed forms, in an amount equal to the aggregate of (i) the total of policy reserve and outstanding claims, and (ii) the total of deposits and stockholders' equity.

(b) Subsidiary model

A foreign insurer may establish a joint-stock corporation (*kabushiki-kaisha*) in Japan, which will require it to obtain a Japanese insurance business licence. Such a subsidiary is required to have:

- a board of directors;
- a board of corporate auditors (or, if the subsidiary takes the form of (i) a corporation with statutory audit committee (*kansatou-iinkai-secchi-kaisha*), an audit committee, or (ii) a corporation with statutory committees (*shimei-iinkaitou-secchi-kaisha*), a nominating committee, an audit committee and a compensation committee); and
- an independent accounting auditor.

Both the board of directors and the board of corporate auditors must be composed of three or more members.

Any Japanese corporation that engages in the insurance business is required to have paid-in capital of at least one billion yen.

Application for licence

In either model, an applicant for an insurance business licence must file an application with the FSA, accompanied by the following documents:

- a statement of business procedures;
- general terms and conditions for insurance policies; and
- a statement of premium and policy reserve calculations.

It typically takes 12 to 18 months to obtain an insurance business licence, although this may vary depending upon various factors. It should also be noted that most of the requisite documents must be in Japanese or accompanied by Japanese translations, the preparation of which generally requires considerable time.

1.3 Are foreign insurers able to write business directly or must they write reinsurance of a domestic insurer?

Underwriting insurance in Japan without first obtaining an insurance business licence is generally prohibited. As a result, foreign insurers are in principle required to obtain insurance business licences as a condition to underwriting insurance with respect to Japanese residents or with respect to properties located in Japan. The following classes of insurance are exempted from the licensing requirement:

- reinsurance;
- marine insurance;
- aircraft insurance;
- satellite insurance;
- international cargo insurance; and
- overseas travel insurance.

In addition, foreign insurers may, without insurance business licences, enter into insurance contracts with respect to Japanese residents or properties located in Japan if the relevant policyholder files an application with and obtains approval in advance from the FSA.

1.4 Are there any legal rules that restrict the parties' freedom of contract by implying extraneous terms into (all or some) contracts of insurance?

The Insurance Act of Japan (Act No. 56 of 2008, as amended) (the "Insurance Act") is a special-purpose contract law enacted to regulate various aspects of insurance contracts. The Insurance Act prescribes certain default provisions, setting forth rights and obligations between parties that may be freely altered through

contractual agreement. It also prescribes other compulsory provisions which may be altered by contractual agreement only in favour of policyholders or insureds, with any alteration disadvantageous thereto being void. Finally, it prescribes certain compulsory provisions which are applicable to one or both parties to any covered contract and may not be altered.

1.5 Are companies permitted to indemnify directors and officers under local company law?

The Companies Act of Japan (Act No. 86 of 2005, as amended) (the "Companies Act") provides that a director or statutory executive officer (*shikkoyaku*) of a company is liable for damages incurred by such company and caused by his/her negligence of duty, but may be released from such liability entirely through unanimous consent of all shareholders or partially through other specified corporate action. Indemnification is permitted only in amounts corresponding to any release of liability duly implemented under the applicable provisions of the Companies Act.

1.6 Are there any forms of compulsory insurance?

Compulsory classes of insurance underwritten by insurance companies in Japan include the following:

- compulsory automobile liability insurance;
- nuclear energy liability insurance; and
- protection and indemnity insurance for ocean-going vessels.

Additionally, Japanese residents are required to participate in various classes of insurance comprising a social security system operated by the national and local governments.

2 (Re)insurance Claims

2.1 In general terms, is the substantive law relating to insurance more favourable to insurers or insureds?

As explained in question 1.4 above, the Insurance Act contains certain compulsory provisions which may be altered by contractual agreement only in favour of policyholders or insureds, with any alteration disadvantageous thereto being void.

2.2 Can a third party bring a direct action against an insurer?

Under current Japanese law, there is generally no mechanism that would allow a third party claimant to make a claim directly against an insurer. Exceptionally, an aggrieved party in an accident covered by a compulsory automobile liability insurance contract is entitled to claim damages against the relevant insurance company.

2.3 Can an insured bring a direct action against a reinsurer?

No, they cannot.

2.4 What remedies does an insurer have in cases of either misrepresentation or non-disclosure by the insured?

An insurer is entitled to cancel an insurance contract if the relevant policyholder or an insured wilfully or with gross negligence fails to make required disclosure or makes false disclosure regarding any matter required to be disclosed. Even if there is such a breach, however, the insurer will not be entitled to cancel the insurance contract in any of the following cases:

- at the execution of an insurance contract, the insurer was aware of, or negligently failed to be aware of, the relevant omission or false disclosure;
- an intermediary authorised to mediate the execution of the insurance contract on behalf of the insurer interfered with the policyholder's or insured's disclosure; or
- such an intermediary recommended that the policyholder or insured omit disclosure or make false disclosure.

In the event of cancellation of an insurance contract, the insurer generally will not be subject to liability for insurance payments in connection with trigger events occurring prior to the time of such cancellation. As an exception, however, if a trigger event occurs prior to cancellation which is unrelated to the omitted or falsified disclosure, then the insurer will be still liable for insurance payment. (Once cancellation has taken place, of course, no further liability will exist on the part of the insurer with respect to trigger events occurring subsequent to such cancellation.)

2.5 Is there a positive duty on an insured to disclose to insurers all matters material to a risk, irrespective of whether the insurer has specifically asked about them?

Policyholders and insureds are required to disclose important matters regarding risk only upon and in accordance with requests of insurers.

2.6 Is there an automatic right of subrogation upon payment of an indemnity by the insurer or does an insurer need a separate clause entitling subrogation?

Under the Insurance Act, in relation to non-life insurance, if an insured asset loses the entirety of its value or function, and an insurer makes payment against such loss, then such insurer will automatically (unless waived) receive a right of subrogation in respect of ownership and other property rights in such asset that is proportionate to the ratio of the amount of insurance payment to the value of such asset.

In addition, if an insured obtains a claim against third parties based on an event triggering insurance payment, and if an insurer makes an insurance payment to the insured in connection with this event, then such insurer will automatically (unless waived) receive a right of subrogation in respect of such claim up to the amount of its insurance payment.

Insurers must make subrogated claims against third parties in their own names, and insureds are not required by statute to cooperate in such claims but may be required to do so by contract.

3 Litigation – Overview

3.1 Which courts are appropriate for commercial insurance disputes? Does this depend on the value of the dispute? Is there any right to a hearing before a jury?

There are no special courts in Japan that are dedicated to resolving commercial insurance disputes. Rather, insurers in general terms and conditions for insurance policies generally stipulate a jurisdiction

clause, whereby the court located in the area of the insurer's head office is designated as having jurisdiction over any lawsuit arising out of, or in connection with, the insurance policies. The Japanese civil court system does not employ a jury system.

3.2 How long does a commercial case commonly take to bring to court once it has been initiated?

For the first instance of a case, an initial hearing can be expected within roughly one month from filing of the action; but judgment will generally take at least six months and may take a year or more for complex cases.

4 Litigation – Procedure

4.1 What powers do the courts have to order the disclosure/discovery and inspection of documents in respect of (a) parties to the action and (b) non-parties to the action?

The Code of Civil Procedure of Japan (Act No. 109 of 1996, as amended) (the "Code of Civil Procedure") provides that courts may, upon petition, order a holder of a document to submit such document. The holder is required to comply with such a court order unless:

- the document states matters regarding which the holder is entitled to refuse testimony;
- the document concerns a government secret which, if disclosed, is likely to harm the public interest or to substantially hinder public duties;
- the document is held by a doctor, dentist, attorney-at-law (including a registered foreign attorney) or certain other types of professionals and states matters that the relevant professional is required to keep secret;
- the document was prepared solely for use of the holder (except where the document is held by the national or local government and is used by public officers for organisational purposes); or
- the document is concerning a criminal case or a juvenile case or is seized in such a case.

Failure to comply with a court order could result in the following:

- in cases where the holder is a party to the action, the court may recognise that the adverse party's allegation is true; or
- in cases where the holder is not a party to the action, the court may punish the holder by administrative penalty of up to 200,000 yen.

A court order may be issued even before a case has commenced, if the court deems this necessary to preserve evidence in advance.

4.2 Can a party withhold from disclosure documents (a) relating to advice given by lawyers or (b) prepared in contemplation of litigation or (c) produced in the course of settlement negotiations/attempts?

There is no express statutory provision under Japanese law exempting clients from disclosing any advice or information (either testimonial or documentary) obtained through confidential communications with attorneys, although Japanese attorneys (*bengoshi*) and foreign attorneys registered in Japan (*gaikokuho-jimu-bengoshi*) are exempted from such disclosure under the Code of Civil Procedure. Accordingly, if a party wishes to refuse to disclose confidential information, the statutory exemptions discussed in question 4.1 above must be used.

4.3 Do the courts have powers to require witnesses to give evidence either before or at the final hearing?

In principle, courts may examine any person as a witness. If a witness fails to appear without justifiable grounds, the court may issue an order requiring such witness to bear any court costs incurred as a result of his/her failure and may impose an administrative penalty of up to 100,000 yen.

In respect of witnesses located outside Japan, Japanese courts have no power to compel testimony in Japan and must instead rely on the competent government agency of a foreign jurisdiction or a Japanese ambassador, minister or consul stationed in such jurisdiction to examine relevant evidence provided on a voluntary basis.

4.4 Is evidence from witnesses allowed even if they are not present?

Courts may, if they find it appropriate and no objection is raised by parties, allow witnesses to submit written testimony or statements *in lieu* of examination in open court.

4.5 Are there any restrictions on calling expert witnesses? Is it common to have a court-appointed expert in addition or in place of party-appointed experts?

Court-appointed expert witnesses must be independent of both parties and may not have any material interest in the outcome of the relevant dispute. A party may challenge the appointment of an expert witness if there are circumstances that would prevent such expert from giving objective expert testimony.

Expenses associated with court-appointed expert witnesses, such as travel and accommodation costs and *per diem* allowance, are included in court costs, and generally are borne by the defeated party.

Apart from court-appointed expert witnesses, a party may retain experts of its choosing at its own initiative and expense, and produce such expert's testimony as documentary evidence. This is often called "private" expert testimony and is treated in much the same way as other documentary evidence produced by litigants.

4.6 What sort of interim remedies are available from the courts?

An examination of evidence may be initiated by the court at the request of a party, even before commencement of litigation, if the court deems this necessary (for example, if failure to conduct such examination would result in loss of evidence or other difficulties in securing evidence). Provisional attachment of assets may be allowed if it is likely that the rights of a claimant will otherwise be impossible or extremely difficult to execute.

4.7 Is there any right of appeal from the decisions of the courts of first instance? If so, on what general grounds? How many stages of appeal are there?

There are generally two stages of appeal. A party dissatisfied with the decision of a court of first instance may, in principle, appeal to the higher court in the first stage of appeal based on any grounds – whether related to the facts of the case or interpretation of laws. In contrast, final appeals may only be filed in certain limited

circumstances; *e.g.*, on the grounds of misconstruction of the Constitution of Japan. However, even if the case does not fall under such limited circumstances, the Supreme Court may, upon petition, accept an appeal if it finds that the higher court's judgment is contrary to precedents rendered by the Supreme Court or otherwise contains material issues concerning interpretation of law and regulations.

4.8 Is interest generally recoverable in respect of claims? If so, what is the current rate?

Winning parties can recover interest on claims at a rate of 5 per cent *per annum* in respect of non-commercial disputes and 6 per cent *per annum* in respect of commercial disputes.

Reduction of such rates to 3 per cent *per annum*, with subsequent reviews every three years, has been proposed for both commercial and non-commercial disputes. As of December 2015, amendments to the Civil Code of Japan (Act No. 89 of 1896) and related acts are being deliberated by the Japanese Diet.

4.9 What are the standard rules regarding costs? Are there any potential costs advantages in making an offer to settle prior to trial?

In general, defeated parties bear all court costs. Attorneys' fees, however, are not included in the court costs, and each party will bear its own attorney's fees (unless such fees are also litigated successfully during the course of the action).

4.10 Can the courts compel the parties to mediate disputes? If so, do they exercise such powers?

Courts do not have authority to compel disputing parties to mediate (*wakai*), but the Code of Civil Procedure stipulates that courts may recommend mediation to disputing parties. In practice, it is very common for Japanese courts to recommend mediation in civil actions at various stages. In some cases, courts may strongly encourage mediation particularly to reluctant parties, sometimes expressly suggesting that terms of a judgment may be less favourable than those that are obtainable through mediation.

4.11 If a party refuses to a request to mediate, what consequences may follow?

Parties are not obliged to accept requests for mediation (whether originating from courts or counterparties), and in practice often refuse. No sanctions or other negative consequences (including imposition of costs or penalties) will arise from such refusal.

5 Arbitration

5.1 What approach do the courts take in relation to arbitration and how far is the principle of party autonomy adopted by the courts? Are the courts able to intervene in the conduct of an arbitration? If so, on what grounds and does this happen in many cases?

As long as arbitration clauses are properly drafted, party autonomy effectively excludes intervention by courts. In the unlikely event that a party seeks judicial intervention, courts may exercise only the powers explicitly permitted under the Arbitration Act of Japan (Act No. 138 of 2003, as amended) (the "Arbitration Act") (*e.g.*, appointment of an arbitrator when parties are unable to agree).

5.2 Is it necessary for a form of words to be put into a contract of (re)insurance to ensure that an arbitration clause will be enforceable? If so, what form of words is required?

Under the Arbitration Act, arbitration clauses must be in writing but no special wording is required; rather, it is generally sufficient if a contract clearly states the intention of the parties to be bound by arbitral award.

5.3 Notwithstanding the inclusion of an express arbitration clause, is there any possibility that the courts will refuse to enforce such a clause?

The Arbitration Act provides that consumers may, in principle, rescind at any time an arbitration clause that has been agreed to with business operators. In addition, under the Arbitration Act, an arbitration clause included in an employment agreement and relating to resolution of any dispute associated with the employment relationship will be void.

5.4 What interim forms of relief can be obtained in support of arbitration from the courts? Please give examples.

Courts generally will dismiss any action brought in breach of an effective arbitration clause. Courts, however, may conduct examinations of evidence, including examinations of witnesses, expert testimony and documentary evidence, upon request by parties or an arbitral tribunal and to the extent necessary to assist the arbitral tribunal.

5.5 Is the arbitral tribunal legally bound to give detailed reasons for its award? If not, can the parties agree (in the arbitration clause or subsequently) that a reasoned award is required?

Unless otherwise agreed between the parties, the arbitral tribunal must give reasons for its award. Failure to do so may result in the effectiveness of the award being challenged in court by a dissatisfied party.

5.6 Is there any right of appeal to the courts from the decision of an arbitral tribunal? If so, in what circumstances does the right arise?

Parties may not appeal to courts regarding the merits of arbitrated cases. The effectiveness of arbitral awards, however, may be challenged on public policy or procedural grounds, such as illegality, lack of legal capacity of parties, failure to comply with applicable notice requirements and so forth.

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