

GETTING THE DEAL THROUGH

Insurance & Reinsurance

in 32 jurisdictions worldwide

Contributing editor: Paul Kanefsky

2008



Published by

Getting the Deal Through

in association with:

Advokatfirman NorelidHolm

AKD Prinsen Van Wijmen NV

Albors Galiano & Co

Attride-Stirling & Woloniecki

Axer Partnerschaft

Berkemeyer Attorneys & Counselors

BLP Abogados

Buddle Findlay

Bulló Tassi Estebenet Lipera Torassa Abogados

Cabinet BOPS

Cara Groeneweg-Heijkoop

Castrén & Snellman Attorneys Ltd

Creel y García-Cuéllar

Deneys Reitz Inc

Edwards Angell Palmer & Dodge LLP

Ercin Bilgin Bektasoglu

Estudio Carvallo

Gonçalves Pereira Castelo Branco

Hoet Peláez Castillo & Duque

Hughes Fields & Stoby

HWL Ebsworth Lawyers

Jurinflot International Law Firm

Kleyr Collarini Grasso

Lydian

Mattos Filho Veiga Filho Marrey Jr

e Quiroga Advogados

Nagashima Ohno & Tsunematsu

Naschitz Brandes & Co

Ormai és Társai CMS Cameron McKenna LLP

Rodrigo Elias & Medrano Abogados

Studio Legale Giorgetti

Walder Wyss & Partners

Wang Jing & Co

Japan

Keitaro Oshimo

Nagashima Ohno & Tsunematsu

Regulation of insurance and reinsurance

- 1** Identify the government agencies responsible for regulating insurance and reinsurance companies.

The Financial Services Agency (the FSA) is the governmental agency that is responsible for regulating insurance and reinsurance companies under the legal and regulatory framework of the Insurance Business Law (the IBL, Law No. 105 of 1995, as amended). The FSA has broad authority to set rules, supervise and penalise insurance and reinsurance companies as well as their major shareholders or insurance brokers and agents.

The FSA is charged with the supervision of broker-dealers, asset managers and banks as well primarily under the Financial Instruments and Exchange Law (Law No. 25 of 1948, as amended) and the Banking Law (Law No. 59 of 1981, as amended).

Certain administrative functions, such as the insurance broker registration, are delegated to regional financial bureaus subordinated to the FSA.

- 2** What are the requirements for formation and licensing of new insurance and reinsurance companies?

Foreign companies that consider establishing a vehicle in Japan to acquire the insurance business licence from the FSA may choose either a subsidiary or a Japanese branch. The subsidiary must take the form of a *kabushiki kaisha* (stock company) under the Company Law (Law No. 86 of 2005, as amended). The IBL requires a minimum capital of ¥1 billion (approximately US\$9.8 million).

The FSA examines the charter documents, including the general policy conditions, the business method statement and the premium and reserve calculation method statement, and the business projections (for 10 years generally) as well as resumes of directors, during the licensing procedures. The licence is not issued unless the FSA is convinced of the credibility of the applicant in terms of sufficient financial basis, human resource and business projections.

Formation of a Japanese branch is simpler but the same licensing requirements apply. In lieu of the minimum capital requirement, the IBL requires the Japanese branch to make a deposit of a minimum of ¥200 million prior to commencement of the insurance business in Japan (approximately US\$1.96 million).

The foregoing applies generally to reinsurance companies as well.

- 3** What licences, authorisations or qualifications are required for insurance and reinsurance companies to conduct business?

The IBL sets forth three types of insurance business licence, namely life insurance, general insurance and small-amount, short-term insurance. The last one is intended for small mutual association-type business, which presumably is not an option for foreign entrants into the Japanese mainstream insurance market.

There is not an additional licence specifically for reinsurance business. Foreign reinsurance companies that intend to assume reinsurance in Japan shall acquire the general insurance business licence, regardless of whether the Japanese vehicle assumes the portfolio of general insurance or life insurance from the ceding companies. The licence is not required if foreign reinsurance companies assume reinsurance offshore without reinsurance activities in Japan.

- 4** What are the regulatory requirements with respect to insurance products offered for sale? Are some products regulated by multiple agencies?

Insurance products generally must be reviewed and approved by the FSA before they are offered for sale to customers. Certain insurance products for corporate customers are exempted from the approval requirements. The FSA examines the products from the standpoint of protection of customers as well as public order. The FSA is the sole agency in charge of insurance product approval.

Certain securities regulations in respect of public distribution (for instance, the suitability test) are built into the IBL and apply to the offer for sale of investment-type insurance products like variable annuities. Compliance with these regulations is supervised by the FSA like any other regulations under the IBL.

- 5** What are the regulatory requirements with respect to agreements for reinsurance ceded and assumed by insurance and reinsurance companies domiciled in your jurisdiction?

Other than financial reinsurance, the parties may execute reinsurance contracts, either treaty or facultative, without obtaining the FSA approval. In the case of financial reinsurance, it is the obligation of the ceding company, not the assuming company, to make prior notification to the FSA, which will examine the purpose of the transaction and its impact on the finances of the ceding company.

- 6** What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers and directors of the acquirer subject to background investigations?

Prior to the change of control, the acquirer of the majority stock shares in the insurance or reinsurance company must obtain FSA approval to become either an insurance major shareholder or an insurance holding company depending on the asset size of the acquirer. That is, if the value of the acquired stock shares in the insurance company, together with any other Japanese subsidiaries, exceeds 50 per cent of the total assets of the acquirer, the acquirer is deemed to be an 'insurance holding company' for the purpose of the IBL. Otherwise, the acquirer constitutes an 'insurance major shareholder' for the purpose of the IBL. The FSA will examine the background of the directors of the acquirer during the approval procedures.

- 7** What are the requirements and restrictions regarding financing of the acquisition of an insurance or reinsurance company?

There are no specific restrictions but the FSA will review the financing of the acquisition during the processing of the application for the approval set forth in our answer to the preceding question.

- 8** What are the minimum qualification requirements for officers and directors of insurance and reinsurance companies?

There are no specific examinations or other qualification requirements. It is expected that the management as a whole has sufficient capability to run insurance or reinsurance companies with each director or officer having the background relevant to the duties assigned; for example, the compliance officer should have the experience as such.

- 9** What are the requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens or companies?

Foreign investment into insurance businesses is not considered to have national security implications. There are no requirements or restrictions from the standpoint of foreign investment control.

However, if the foreign investor is to constitute an 'insurance major shareholder' as noted above, it must obtain the FSA's approval prior to the investment into the insurance or reinsurance company in Japan. The FSA will conduct the background check about the acquirer such as the examination of the purpose of the investment and the acquisition finance during the application processing to see whether or not the investment could hamper the sound management of the insurance or reinsurance company. Ownership of 20 per cent (or 15 per cent in certain circumstances) voting share in an insurance or reinsurance company is the trigger threshold for 'insurance major shareholder'.

- 10** What are the requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign governments?

See question 9.

- 11** What are the capital and surplus requirements for insurance and reinsurance companies?

In addition to the minimum capital requirement as noted above, insurance and reinsurance companies are required to meet the solvency margin ratio of 200 per cent. If the ratio goes below

200 per cent, the FSA may issue an order to direct appropriate measures to improve the solvency. Due to practical considerations, such as avoidance of reputation risk, insurance and reinsurance companies generally maintain much higher solvency margin ratios.

- 12** What are the requirements with respect to reserves maintained by insurance and reinsurance companies?

Insurance companies must set forth their method of reserve calculation in respect of each line of their insurance business in the premium and reserve calculation method statement, which is subject to the review and approval by the FSA during the licensing procedures. Insurance companies must set aside reserves in accordance with the approved premium and reserve calculation method statement and the regulations set by the FSA from time to time. (Reinsurance companies are not required to lodge the premium and reserve calculation method statement at the FSA.)

Under the IBL, the chief actuary hired by the insurance or reinsurance company is responsible for checking the adequacy of the reserves and recommending that the management takes appropriate actions (eg, capital increase) if any deficiency or other problem is found or expected based on the business projections. The FSA and the chief actuary have sessions to discuss the adequacy of the reserves and other financial matters after the end of each fiscal year.

- 13** What are the collateral requirements for assuming reinsurance companies?

There are no collateral requirements. Ceding companies may take credit as to the portfolio ceded to qualified reinsurance companies, such as insurance or reinsurance companies with the general insurance business licence in Japan. Collateral is irrelevant to the qualification as such.

- 14** What laws govern insolvent or financially troubled insurance and reinsurance companies?

They are governed primarily by the IBL and the Reorganisation Law for Financial Institutions (the Reorganisation Law, Law No. 95 of 1996, as amended). The IBL sets forth the administrative procedures governing insolvent or financially troubled insurance and reinsurance companies. The procedures under the IBL are supervised by the FSA. The Reorganisation Law governs the legal procedures to revitalise insolvent insurance and reinsurance companies under the supervision of the court. After the enactment of the Reorganisation Law, the administrative procedures under the IBL are superseded virtually by the court-sponsored procedures under the Reorganisation Law. The reorganisation allows a number of different ways of business combination, such as stock purchases, asset purchases and mergers involving the insolvent companies.

There are laws subordinate to the IBL that set forth the policyholder protection funding structure for the purpose of protecting the interests of the holders of insurance policies issued by insolvent insurance companies.

- 15** What requirements and restrictions govern the amount of ceded reinsurance and retention of risk by insurers?

There are no anti-fronting or other regulations that specifically restrict the amount or ratio of ceded business against the retention. Within the broad powers assigned to the FSA, it may direct

the ceding companies to reconsider their risk taking and reinsurance practice if the FSA believes that the reinsurance is excessive or otherwise not appropriate from the risk management standpoint.

- 16** What are the licensing requirements for intermediaries representing insurance and reinsurance companies?

The IBL sets forth two types of intermediaries in insurance distribution or execution of reinsurance contracts; namely insurance agents and insurance brokers. Insurance agents distribute insurance products on behalf of the insurance companies under their direction. They are required to be registered as such at the competent regional financial bureaus. The registration procedures for insurance agents are much simpler than the insurance broker registration noted below. Practically speaking, the administration of the insurance agent registration is delegated to the insurance industry associations. Intermediary activities of banks are regulated under special provisions of the IBL, but they are subject to the same registration requirements.

Insurance brokers intermediate in their capacity as independent broker. They also are required to be registered at the competent regional financial bureaus. The brokers must have passed the examination sponsored by the broker association, which is conducted only once a year, prior to their filing of the application for the registration with the regional financial bureaus. The broker must make a guarantee deposit of at least ¥40 million (approximately US\$392,000) prior to commencement of the broking business. Reinsurance broking from offshore without broking activities in Japan does not require the insurance broker registration.

The registration under the IBL is required when the person engages in insurance soliciting but the term ‘insurance soliciting’ is not clearly defined for practical purposes. (For instance, it is not so clear how far telephone receptionists at a call centre provider contracted by an insurance company can go without the registration to act as its insurance agent when they talk to customers on the line about the products of that insurance company.)

Finally, claims adjusters may provide services to insurance companies without any licence or registration under the IBL.

Reinsurance disputes

- 17** Are formal reinsurance disputes common or do insurers almost always reach business solutions for their disputes without formal proceedings?

Given the nature of the reinsurance market (where they transfer risks each other in a small community), formal reinsurance disputes are rare. Quite often, they opt to reach business solutions without formal proceedings.

- 18** What are the most common issues that arise in reinsurance disputes?

Typically, disputes relate to the scope of coverage, which sometimes is written in vague terminology or industry jargon, the meanings of which are not necessarily clear.

- 19** Can parties to reinsurance arbitrations seek to vacate or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

The Japanese courts will generally honour arbitration clauses in reinsurance contracts (like any other commercial agreements) and arbitration awards issued by the agreed panel. Foreign

awards may be brought to the Japanese courts for enforcement in Japan.

- 20** Do reinsurance arbitration awards typically include the reasoning for the decision?

If the arbitration clause in a reinsurance contract sets forth that the arbitration panel shall issue a written and reasoned award, the panel will include the reasoning for the decision in the arbitration award. Otherwise, it is up to the arbitrators whether or not to include the reasoning of the decision in the arbitration awards.

- 21** What powers (if any) do reinsurance arbitrators have over non-parties to the arbitration agreement?

Arbitrators do not have any powers over non-parties to the arbitration agreement in respect of the arbitration proceedings.

Reinsurance principles and practices

- 22** Does a reinsurer have an obligation to follow its cedent’s underwriting fortunes and claims payments or settlements in the absence of an express contractual provision to that effect? Where such an obligation exists (whether or not expressly provided by contract), what is the scope of the obligation, and what defences are available to a reinsurer?

Without express contractual provision, the reinsurer is not obligated to follow the fortunes of the ceding company unless the circumstances demonstrate that such practice is established (and therefore the parties are deemed to have agreed to cede and assume the risks based on that practice in addition to the express terms and conditions in the reinsurance contract). Even if such obligation exists on the part of the reinsurer, it may try to refuse payment based on gross negligence in claims settlements on the part of the ceding company if there is material deviation from the generally accepted prudent and professional manner.

- 23** Is a duty of utmost good faith implied in reinsurance agreements? If so, please describe that duty in comparison to the duty of good faith applicable to other commercial agreements.

The ceding company is expected to take reasonable care in claims settlements, and the level of such reasonable care will be determined based on the industry standard, not the notional ordinary commercial standard.

- 24** Is there a different set of laws for facultative reinsurance and treaty reinsurance?

There is not a different set of statutes for facultative reinsurance and treaty reinsurance, but the court will consider the difference of the two types in deciding reinsurance disputes.

- 25** Can a policyholder or non-signatory to a reinsurance agreement bring a direct action against a reinsurer for coverage?

No. A policyholder or non-signatory may not bring a coverage action against the reinsurer directly.

- 26** What is the obligation of a reinsurer (if any) to pay a policyholder’s claim where the insurer is insolvent and cannot pay?

The reinsurer must discharge its own liability against the insolvent ceding company under the terms and conditions of the rein-

Update and trends

The Commercial Code (Law No. 48 of 1899, as amended) includes a chapter that was intended to govern insurance contracts generally. However, the FSA-approved general policy conditions used by insurance companies govern in practice, superseding corresponding provisions in the Commercial Code.

One example is allocation of payments among multiple policies triggered by the same claim. Section 633 of the Commercial Code reads that the oldest policy should pay

first until its limit is consumed and so on towards the most recent policy. However, the 'other insurance' clauses govern in practice as noted in question 40.

It is expected that the chapter of the Commercial Code will be replaced by new legislation on insurance contracts generally, which will be discussed at the Diet this year. We must observe its progress carefully, but we expect that its impact on insurance practice, reinsurance business especially, will be limited.

insurance contracts, regardless of whether the liability of the ceding company against its policyholders is reduced in the reorganisation proceedings. Practically speaking, the reinsurers will have opportunity to negotiate commutation of the assumed portfolio with the reorganisation trustee of the insolvent ceding company that is in charge of collection from the reinsurers.

27 What type of notice and information must a cedent typically provide its reinsurer with respect to an underlying claim? If the cedent fails to provide timely or sufficient notice, what remedies are available to a reinsurer?

The ceding company must provide notice and information as set forth in the reinsurance contract, which will vary depending on the type of the reinsurance, for example, treaty versus facultative, or the reinsured risks. It is not unusual that the reinsurance contracts require timely delivery of all material claim-related information, including the information about the contested claims, together with reasonable supporting documents, and also set forth the consequence of failure by the ceding company in timely delivery of the required notice and information.

28 In the case of multi-year occurrences, such as pollution, how are underlying claim payments or settlements allocated among policy years covered by multiple reinsurance agreements?

There are no specific statutorily or judicially established rules.

29 What type of review does the governing law afford reinsurers with respect to a cedent's claims handling, and settlement and allocation decisions?

There are no specific rights of review afforded to reinsurers by statutes.

30 What type of obligation does a reinsurer have to reimburse a cedent for commutation payments? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

The scope of commutation is left to the negotiation between the reinsurer and the ceding company unless specified in the reinsurance contract. Usually, IBNR will be included in the analysis in arriving at a mutually agreed commutation value.

Insurance claims and coverage

31 Can a third party bring a direct action against an insurer for coverage?

Unless specifically afforded, such as victims of automobile accidents against automobile liability insurers, third parties gener-

ally may not bring direct coverage actions against insurance companies.

32 Can an insurer deny coverage based on late notice of claim without demonstrating prejudice?

An insurer may deny coverage if it has successfully demonstrated extraordinary bad faith on the part of the policyholder in respect of the late notice in breach of the agreed policy wording. Otherwise, the insurer may reduce its claim payment obligation only to the extent of the actual damage suffered due to the late notice, and only after successfully demonstrating the actual damage.

33 Is an insurer subject to extra-contractual exposure for wrongful denial of a claim?

The insurer will owe a tort liability in respect of wrongful denial of a claim. (The insurer may incur an administrative penalty from the FSA, such as a temporary business suspension order, as well.)

34 What triggers a liability insurer's duty to defend a claim?

Liability insurers do not owe duty to defend a claim. Liability insurers indemnify policyholders from expenses incurred by them to defend a claim in accordance with the terms of liability insurance policies.

35 For indemnity policies, what triggers the insurer's indemnity obligations?

The triggers can be losses occurrence, losses discovered, claims made, risk attaching or otherwise as agreed in the indemnity policy.

36 Is there an incontestability period beyond which a life insurer cannot contest coverage based on misrepresentation in the application?

A life insurer may not allege misrepresentation in the application after the expiration of five years from the execution date of the policy. Moreover, a life insurer may not allege misrepresentation if it fails to contest within one month from the time when it is known to the life insurer.

37 Are punitive damages insurable?

It is generally thought that punitive damages are not insurable. (Punitive damages generally are not enforceable in Japan.)

38 What is the obligation of an excess insurer to 'drop down and defend', and pay a claim, if the primary insurer is insolvent or its coverage is otherwise unavailable without full exhaustion of primary limits?

The law does not impose such obligation on the part of the excess of loss reinsurers. (It is not unusual in practice for the parties to specifically set forth in the ELC contract wording that the reinsurance company does not owe such obligation.)

39 What is the order of priority for payment when there are multiple claims under the same policy?

There are no statutorily or judicially determined rules.

40 How are payments allocated among multiple policies triggered by the same claim?

The allocation will be made in accordance with the 'other insurance' clauses in the relevant multiple policies. They are usually allocated on a pro-rata basis. (A holder of a policy is required to disclose the other insurance policies, if any, covering the same risk.)

NAGASHIMA OHNO & TSUNEMATSU

Keitaro Oshimo

keitaro_oshimo@noandt.com

Kioicho Building 3-12

Tel: +81 3 3511 6132

Kioicho

Fax: +81 3 5213 2232

Chiyoda-ku Tokyo

www.noandt.com

Japan