

Insurance & Reinsurance 2020

Contributing editors

William D Torchiana, Mark F Rosenberg and Marion Leydier



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between May and June 2020. Be advised that this is a developing area.

© Law Business Research Ltd 2020
No photocopying without a CLA licence.
First published 2008
Thirteenth edition
ISBN 978-1-83862-351-7

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Insurance & Reinsurance 2020

Contributing editors

William D Torchiana, Mark F Rosenberg and Marion Leydier
Sullivan & Cromwell LLP

Lexology Getting The Deal Through is delighted to publish the thirteenth edition of *Insurance & Reinsurance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, the European Union, Germany, South Korea and Spain.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, William D Torchiana, Mark F Rosenberg and Marion Leydier of Sullivan & Cromwell LLP, for their continued assistance with this volume.



London
June 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in July 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	3	Luxembourg	83
William D Torchiana, Mark F Rosenberg and Marion Leydier Sullivan & Cromwell LLP		Chantal Keereman Bonn & Schmitt	
Austria	8	South Korea	94
Thomas Böhm CMS Reich-Rohrwig Hainz		Myung Soo Lee, Hwanglim Jang, Hyunseok Jung, Ok Pyeong Je and Seung Jae Yeon Yoon & Yang LLC	
Canada	17	Spain	109
Margaret Pak, Albana Musta, John L Walker, Roisin Hutchinson and Sean G Sorensen Walker Sorensen LLP		Jorge Angell and Rossana De la Cruz LC Rodrigo Abogados	
China	26	Sweden	118
Celia Luan, Elizabeth Lan Lan, Elsie Shi, George Hualiang Yu and John Bolin Jincheng Tongda & Neal		Per Sundin, Lars Ulrichs and Sigrid Törnsten Advokatfirman Hammarskiöld	
European Union	37	Switzerland	126
Thomas Böhm CMS Reich-Rohrwig Hainz		Lukas Morscher and Lukas Staub Lenz & Staehelin	
Germany	46	Turkey	136
Henning Schaloske, Tanja Schramm and Daniel Kassing Clyde & Co LLP		Çağlar Coşkunsu Cavus & Coskunsu Law Firm	
India	56	United Kingdom	144
Neeraj Tuli and Celia Jenkins Tuli & Co		Clare Swirski, Benjamin Lyon and Philip Orange Debevoise & Plimpton LLP	
Italy	68	United States	155
Alessandro P Giorgetti Studio Legale Giorgetti		William D Torchiana, Mark F Rosenberg and Marion Leydier Sullivan & Cromwell LLP	
Japan	77	Zambia	167
Keitaro Oshimo Nagashima Ohno & Tsunematsu		Michael Mundashi and Chibuye Chola Mulenga Mundashi Kasonde	

Japan

Keitaro Oshimo

Nagashima Ohno & Tsunematsu

REGULATION

Regulatory agencies

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

The Financial Services Agency (FSA) is the government agency that is responsible for regulating insurance and reinsurance companies under the legal and regulatory framework of the Insurance Business Law (IBL), Law No. 105 of 1995, as amended. The FSA has broad authority to set rules, and to 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 and asset managers as well as banks 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 bureaux subordinated to the FSA.

Formation and licensing

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

Foreign companies that are considering establishing a vehicle in Japan to acquire an insurance business licence from the FSA may choose either a subsidiary or a Japanese branch. The subsidiary must take the form of a stock company under the Company Law (Law No. 86 of 2005, as amended). The IBL requires a minimum capital of ¥1 billion.

During the licensing procedure, the FSA examines the company's documents, including:

- general policy conditions;
- the business method statement;
- the premium and reserve calculation method statement;
- business projections (generally for 10 years); and
- CVs of directors.

A licence is not issued unless the FSA is convinced of the credibility of the applicant in terms of sufficient financial assets, human resources 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 a Japanese branch to make a deposit of at least ¥200 million prior to commencing insurance business in Japan.

The preceding rules generally apply to reinsurance companies as well.

Other licences, authorisations and qualifications

- 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 licences, namely life insurance, general insurance and small-amount short-term insurance. The latter is intended for a small, mutual association-type business, which, from a business standpoint, presumably is not an option for foreign entrants into the Japanese mainstream insurance market.

There is no additional licence specifically for the reinsurance business. Foreign reinsurance companies that intend to carry out reinsurance in Japan must acquire a 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.

Officers and directors

- 4 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 experience as such.

Capital and surplus requirements

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

In addition to the minimum capital requirement, insurance and reinsurance companies are required to meet the solvency margin ratio of 200 per cent. If the ratio drops below 200 per cent, the FSA may issue an order to direct appropriate measures to improve the solvency. Because of practical considerations, such as avoidance of risk to the company's reputation, insurance and reinsurance companies generally maintain much higher solvency margin ratios.

Reserves

- 6 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 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 occasionally set by 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 meetings to discuss the adequacy of the reserves and other financial matters after the end of each fiscal year and periodically as necessary.

Product regulation

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

Insurance products must generally 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 policy. The FSA is the sole agency in charge of insurance product approval.

Certain securities regulations in respect of public distribution (ie, 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.

Regulatory examinations

8 | What are the frequency, types and scope of financial, market conduct or other periodic examinations of insurance and reinsurance companies?

Based on the supervisory authorities, the FSA conducts on-site examinations of financial service providers, including licensed insurers and reinsurers doing business in Japan. Typically, each insurer and reinsurer is visited by the FSA examination team once every three to five years. Depending on the nature, scale and complexity of the insurers and reinsurers, the on-site examination period varies, but typically it takes two to three months, followed by off-site monitoring and progress reporting obligations. The scope of examination extends to all functions of insurers and reinsurers, including their market conduct, claims, asset liability management or enterprise risk management (ERM) (or both), and governance and internal control generally, as well as their financial status. Occasionally, the FSA also requires reporting on specific matters by individual companies or across the industry.

Investments

9 | What are the rules on the kinds and amounts of investments that insurance and reinsurance companies may make?

The permissible types of investment assets are broad; moreover, on 18 April 2012, the FSA lifted the limitations on certain specified asset types, such as a 30 per cent cap on domestic stocks, a 30 per cent cap on any foreign-denominated assets and a 20 per cent cap on real property where 'xx per cent' means the percentage of the sum invested into that asset category against the total general account assets of the insurer or reinsurer. As such, there is no specific set of regulations or guidelines binding insurers and reinsurers as to investment types in terms of amounts. There are credit limit restrictions that are intended to achieve control over exposure to concentration risks in terms of limitations on capital infusion or other investments into one person or a group of persons.

Change of control

10 | What are the regulatory requirements on a change of control of insurance and reinsurance companies? Are officers, directors and controlling persons 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 and controlling persons of the acquirer during the approval procedures.

Financing of an acquisition

11 | 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 while assessing the application for approval.

Minority interest

12 | What are the regulatory requirements and restrictions on investors acquiring a minority interest in an insurance or reinsurance company?

Acquisition of a minority interest less than the 'major shareholder threshold' lies outside the scope of the regulatory requirements. However, acquisition of more than 5 per cent of the voting share, and any fluctuation of 1 per cent or greater of the voting share ownership thereafter, must be notified to the FSA within five days, in principle.

Foreign ownership

13 | What are the regulatory requirements and restrictions concerning the investment in an insurance or reinsurance company by foreign citizens, companies or governments?

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

All the same, if the foreign investor is to constitute an insurance major shareholder it must obtain the FSA's approval before making its investment into the insurance or reinsurance company in Japan. The FSA will conduct a background check on the acquirer, such as an examination of the purpose of the investment and the acquisition finance during the application processing to see whether the investment could hamper the sound management of the insurance or reinsurance company. Ownership of a 20 per cent (or 15 per cent in certain circumstances) voting share in an insurance or reinsurance company is the threshold to qualify as an insurance major shareholder.

Group supervision and capital requirements

- 14 | What is the supervisory framework for groups of companies containing an insurer or reinsurer in a holding company system? What are the enterprise risk assessment and reporting requirements for an insurer or reinsurer and its holding company? What holding company or group capital requirements exist in addition to individual legal entity capital requirements for insurers and reinsurers?

The insurance holding company approval is rendered on the assumption that the holding company is capable of establishing, implementing and maintaining governance and control across its group companies. In addition, a group-wide ERM is a key framework that must be implemented by the holding company in an appropriate manner, and the FSA expects that each holding company will establish its ERM framework depending on the nature, scale and complexity of its group-wide businesses. In light of the group-based ERM, each holding company is expected to establish a group-wide policy regarding enterprise risk and solvency assessment and management, while the group insurers and reinsurers are expected to implement solo risk and solvency assessment and management policies, and to make reports to the holding company in an appropriate fashion in accordance with the group-wide policy.

Reinsurance agreements

- 15 | What are the regulatory requirements with respect to reinsurance agreements between insurance and reinsurance companies domiciled in your jurisdiction?

Other than financial reinsurance, parties may execute reinsurance contracts, either treaty or facultative, without obtaining 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 effect on the finances of the ceding company.

Ceded reinsurance and retention of risk

- 16 | 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 it believes that the reinsurance is excessive or otherwise not appropriate from the risk management standpoint.

Collateral

- 17 | What are the collateral requirements for reinsurers in a reinsurance transaction?

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.

Credit for reinsurance

- 18 | What are the regulatory requirements for cedents to obtain credit for reinsurance on their financial statements?

If the business is ceded to insurers or reinsurers licensed in Japan, the ceding companies may generally obtain reinsurance credit. As to businesses ceded to offshore reinsurers without a licence in Japan, there

are no concrete requirements for taking on reinsurance credits, such as a collateral requirement or the reinsurer's credit ratings.

Insolvent and financially troubled companies

- 19 | What laws govern insolvent or financially troubled insurance and reinsurance companies?

Insolvent or financially troubled companies are governed primarily by the IBL and the Reorganisation Law for Financial Institutions, Law No. 95 of 1996, as amended (the Reorganisation Law). 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 virtually superseded by the court-sponsored procedures set out in the Reorganisation Law. Reorganisation allows for a number of different methods of business combination, such as stock purchases, asset purchases and mergers involving the insolvent companies.

Laws subordinate to the IBL 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.

Claim priority in insolvency

- 20 | What is the priority of claims (insurance and otherwise) against an insurance or reinsurance company in an insolvency proceeding?

In the event of the insolvency of life insurers, the holders of life policies and the beneficiaries have a statutory lien over the total assets, but not over specific assets ring-fenced as security for them. In cases of insolvency of property and casualty insurers, no such priority is granted to the policyholders or beneficiaries.

Intermediaries

- 21 | 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 bureau. The registration procedures for insurance agents are much simpler than those for insurance brokers, which are described below. Practically, 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 an independent broker. They are also required to be registered at the competent regional financial bureau. The brokers must have passed the examination sponsored by the brokers' association prior to their filing of the application for registration with the regional financial bureau. The brokers were required to make a guarantee deposit of at least ¥40 million prior to commencement of the broking business. This minimum deposit sum was reduced to ¥20 million in 2014. Reinsurance broking from offshore without conducting broking activities in Japan does not require the insurance broker to register.

Registration under the IBL is required when the person engages in insurance soliciting, but the term 'insurance soliciting' is unclearly

defined for practical purposes. (For instance, it is unclear how far telephone receptionists at a call centre contracted by an insurance company can go without needing to register to act as its insurance agent when they talk to customers about the products of that insurance company.)

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

INSURANCE CLAIMS AND COVERAGE

Third-party actions

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

Third parties, generally, may not bring direct coverage actions against insurance companies unless it is specifically provided that they may (eg, victims of motor vehicle accidents against motor vehicle liability insurers). Victims are generally protected against insolvency of the insured to the extent that section 22 of the Insurance Act (Law No. 56 of 2008) provides the victims with statutory lien over the insured's claims for indemnification against their liability insurers.

Late notice of claim

23 | 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 owing to the late notice, and only after successfully demonstrating the actual damage.

Wrongful denial of claim

24 | 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 also incur an administrative penalty from the Financial Services Agency, such as a temporary business suspension order. Punitive damages are not available in Japan.

Defence of claim

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

Liability insurers do not have a 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.

Indemnity policies

26 | For indemnity policies, what triggers the insurer's payment obligations?

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

Incontestability

27 | Is there a 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 expiry 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.

Punitive damages

28 | Are punitive damages insurable?

It is generally thought that punitive damages are not insurable. Punitive damages are generally not awarded or enforceable by courts in Japan.

Excess insurer obligations

29 | 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 an obligation on the part of the excess insurers. In practice, it is not unusual for the parties to specifically set forth in the excess of loss cover contract wording as to whether the excess insurers owe such an obligation.

Self-insurance default

30 | What is an insurer's obligation if the policy provides that the insured has a self-insured retention or deductible and is insolvent and unable to pay it?

If an insurer agrees with the insured that it shall absorb the first layer of loss and the insurer shall pay the excess, the subsequent insolvency of the insured where it may not bear a retention or deductible would not affect the insurer's obligation to cover the excess as agreed with the insured.

Claim priority

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

There are no statutory or judicially determined rules.

Allocation of payment

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

Section 20 of the Insurance Act provides that if a risk is covered by policies issued by multiple insurers, the insured person may recover from any such policies up to their respective full insured sum, up to the full amount of the loss. Once the payment is made by one insurer, the allocation will be made among the multiple insurers on a pro rata basis.

Disgorgement or restitution

33 | Are disgorgement or restitution claims insurable losses?

Restitution as compensation for damage in tort or breach of contract is generally covered by liability insurance, whereas disgorgement is excluded.

Definition of occurrence

34 | How do courts determine whether a single event resulting in multiple injuries or claims constitutes more than one occurrence under an insurance policy?

Courts would follow the definition of 'occurrence' as specified in the relevant policies. For instance, if a policy sets out that an 'occurrence' includes an occurrence in respect of bodily injury, an accident or a continuous, intermittent or repeated exposure to substantially the same general harmful conditions that causes or allegedly causes the bodily injury, the multiple injuries or claims allegedly caused by such 'an accident or a continuous, intermittent, or repeated exposure to substantially

the same general harmful conditions' would be deemed to constitute a single occurrence for the purposes of the policy. The question for the court would then come down to fact-finding on the 'accident' or 'exposure', rather than counting the injuries or claims.

Rescission based on misstatements

35 | Under what circumstances can misstatements in the application be the basis for rescission?

If the misstatements are made with knowledge or with gross negligence on the side of customers without any inducement or other intervention by the intermediating sales agents and without the insurer's knowledge of the misstatements, the policy may be cancelled by the insurer.

REINSURANCE DISPUTES AND ARBITRATION

Reinsurance disputes

36 | Are formal reinsurance disputes common, or do insurers and reinsurers tend to prefer business solutions for their disputes without formal proceedings?

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

Common dispute issues

37 | What are the most common issues that arise in reinsurance disputes?

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

Arbitration awards

38 | 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 to include the reasoning of the decision in the arbitration awards.

Power of arbitrators

39 | What powers 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.

Appeal of arbitration awards

40 | Can parties to reinsurance arbitrations seek to vacate, modify or confirm arbitration awards through the judicial system? What level of deference does the judiciary give to arbitral awards?

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 Japanese courts for enforcement in Japan.

REINSURANCE PRINCIPLES AND PRACTICES

Obligation to follow cedent

41 | 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? Where such an obligation exists, what is the scope of the obligation, and what defences are available to a reinsurer?

Without express contractual provision, the reinsurer is not obliged to 'follow the fortunes' of the ceding company, unless the circumstances demonstrate that such a 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 an 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.

Good faith

42 | 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. The ceding company is also expected to act in good faith in entering into reinsurance contracts. However, it is not considered to be a duty of utmost good faith.

Facultative reinsurance and treaty reinsurance

43 | Is there a different set of laws for facultative reinsurance and treaty reinsurance?

There is no 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.

Third-party action

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

A policyholder or non-signatory may not bring a direct action against the reinsurer.

Insolvent insurer

45 | What is the obligation of a reinsurer 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 reinsurance contracts, regardless of whether the liability of the ceding company against its policyholders is reduced in the reorganisation proceedings. In practice, the reinsurers will have the opportunity to negotiate commutation of the assumed portfolio with the reorganisation trustee of the insolvent ceding company in charge of collection from the reinsurers.

Notice and information

- 46 | 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 and how does the language of a reinsurance contract affect the availability of such remedies?

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.

Reinsurance contracts usually 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 to make timely delivery of the required notice and information.

Allocation of underlying claim payments or settlements

- 47 | Where an underlying loss or claim provides for payment under multiple underlying reinsured policies, how does the reinsured allocate its claims or settlement payments among those policies? Do the reinsured's allocations to the underlying policies have to be mirrored in its allocations to the applicable reinsurance agreements?

There are no statutorily or judicially determined rules other than section 20 of the Insurance Act. Reinsurance contracts can set forth the manner of claim allocation among multiple reinsurance contracts differently from section 20. If such an agreement is made, the agreed manner of allocation will govern the relevant reinsured and the reinsurers.

Review

- 48 | 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. There are no judicially established rules.

Reimbursement of commutation payments

- 49 | What type of obligation does a reinsurer have to reimburse a cedent for commutation payments made to the cedent's policyholders? Must a reinsurer indemnify its cedent for 'incurred but not reported' claims?

There are no specific statutorily or judicially established rules. Practically, the reinsureds will advise the reinsurers of the terms of commutation prior to its execution and obtain their consent.

Extracontractual obligations (ECOs)

- 50 | What is the obligation of a reinsurer to reimburse a cedent for ECOs?

ECOs of a ceding company are typically specifically excluded from the reinsurance liability.

NAGASHIMA OHNO & TSUNEMATSU

Keitaro Oshimo

keitaro_oshimo@noandt.com

JP Tower, 2-7-2 Marunouchi
Chiyoda-ku
Tokyo 100-7036
Japan
Tel: +81 3 6889 7532
Fax: +81 3 6889 8532
www.noandt.com

UPDATES & TRENDS

Key Developments

- 51 | Are there any emerging trends or hot topics in insurance and reinsurance regulation in your jurisdiction?

The 2019 annual administration policy published by the Financial Services Agency (FSA) on 28 August 2019 (the summary English translation of which is available at: <https://www.fsa.go.jp/en/news/2019/20190828.html>) indicates that the FSA will continue to place customers at the centre of its financial service supervision.

The FSA specifically has been urging the life insurance sector to improve the transparency of investment-type life insurance or pensions in the course of their distribution through such agents as banks or security houses to the customers, especially elderly people. For instance, the FSA shows its dissatisfaction with the lack of visualisation of the risks or expenses associated with such investment-type products as foreign-denominated life annuities. In its effort to pursue a customer-centered business model, the Life Insurance Association of Japan amended its voluntary guidelines concerning service provision to elderly people on 27 May 2019. The voluntary guidelines will be honoured by industry-wide best practice and followed, in principle, by all member life insurers. The Association will also require the passing of a newly introduced association-sponsored examination for all registered life insurance distributors that intend to distribute foreign-denominated life insurance, starting from 2022 as a target.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)