



The International Comparative Legal Guide to:

# Insurance & Reinsurance 2019

**8th Edition**

A practical cross-border insight into insurance and reinsurance law

Published by Global Legal Group, with contributions from:

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**Published by**  
Global Legal Group Ltd.  
59 Tanner Street  
London SE1 3PL, UK  
Tel: +44 20 7367 0720  
Fax: +44 20 7407 5255  
Email: info@glgroup.co.uk  
URL: www.glgroup.co.uk

**GLG Cover Design**  
F&F Studio Design

**GLG Cover Image Source**  
iStockphoto

**Printed by**  
Stephens & George  
Print Group  
March 2019

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ISBN 978-1-912509-62-1  
ISSN 2048-6871

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Insurance & Reinsurance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of insurance and reinsurance.

It is divided into two main sections:

Six general chapters. These chapters are designed to provide readers with an overview of key issues affecting insurance and reinsurance work, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in insurance and reinsurance laws and regulations in 40 jurisdictions.

All chapters are written by leading insurance and reinsurance lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Jon Turnbull and Michelle Radom of Clyde & Co LLP for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at [www.iclg.com](http://www.iclg.com).

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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 (“FSA”) regulates insurance and reinsurance companies.

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

Foreign insurers may run an insurance business in Japan either by (1) setting up a subsidiary insurance company in Japan (the local subsidiary method, “Method A”), or (2) opening a branch in Japan (the branch method, “Method B”).

Under Method A, a foreign insurer must obtain a life insurance business licence or non-life insurance business licence as set forth in Article 3 of the Insurance Business Act (the same business operator may not obtain both licences). Under Method B, a foreign insurer must obtain a foreign life insurance business licence or foreign non-life insurance business licence as set forth in Article 185 of the Insurance Business Act (the same business operator may not obtain both licences).

The licence application procedure is governed by (a) under Method A, Articles 4 and 5 of the Insurance Business Act, and (b) under Method B, Article 187 of the Insurance Business Act. Examination standards for licence application under either Article are almost identical and choosing either Method A or B will not significantly affect the complexity of the licence application process.

The FSA endeavours to complete its review of licence application procedures within 120 days after a licence application reaches the FSA (which is a standard processing period under Article 246 of the Order for Enforcement of the Insurance Business Act). Foreign insurers who lay out a plan for obtaining a licence, however, cannot normally rely on this standard processing time, first, because it only obligates the FSA to make an effort to meet that time-period, and second, because their negotiations with the FSA begin by an exchange of drafts preceding the formal filing of documents for the licence application – in fact, in common practice, no formal documents for the licence application are filed before obtaining an acknowledgment from the FSA.

This depends largely on the level of preparation of a foreign insurer. However, in our opinion, it would be desirable to start negotiating with the FSA one-and-a-half years or two years prior to a scheduled date of the establishment of a company or branch.

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

Other than as listed below, foreign insurers may not conclude insurance contracts with persons having an address or residence in Japan, property located in Japan, or vessels or aircrafts with Japanese nationality (pursuant to rules for overseas direct insurance in Article 186 (i) of the Insurance Business Act), unless they have opened a branch and obtained the applicable licence (this restriction does not apply to a case where a licence applicant has, in advance of its application for insurance, obtained an acknowledgment from the FSA as set forth in Article 186 (ii) of the Insurance Business Act):

- (i) reinsurance contracts;
- (ii) marine insurance contracts pertaining to objects such as vessels with Japanese nationality used for international maritime transportation;
- (iii) aviation insurance contracts pertaining to aircrafts with Japanese nationality used for commercial aviation;
- (iv) insurance contract pertaining to launching into outer space;
- (v) certain insurance contracts covering cargo located within Japan which is in the process of being shipped overseas; and
- (vi) overseas travel insurance.

The rules mentioned above thus preclude foreign insurers from directly assuming risks within Japan, requiring them to procure reinsurance from insurers licensed in Japan. Under the Insurance Business Act, there is no express restriction on the rate ceded in reinsurance for insurers in Japan.

### 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?

- Mandatory or unilaterally mandatory provisions in the Insurance Act (the latter is a series of provisions making void any agreement that, contrary to such provisions, adversely affects policyholders); and
- invalid provisions under the Consumer Contract Act.

For example, Article 10 of the Consumer Contract Act stipulates that:

*“Any consumer contract clause that restricts the rights or expands the duties of the consumer beyond the application of provisions unrelated to public order in the Civil Code, the Commercial Code (Act No. 48 of 1899) and any other laws and regulations, and that unilaterally impairs the interests of the consumer in violation of the fundamental principle provided in the second paragraph of Article 1 of the Civil Code, is void.”*

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

The Company Act does not necessarily preclude companies from providing directors and officers liability insurance (D&O) to their officers or indemnifying them for damages to third parties in accordance with a prior indemnity contract. However, in the case that a company seeks to exempt its officers from liability to the company, it must satisfy strict requirements set forth in the Company Act, including obtaining the unanimous consent of all shareholders.

### 1.6 Are there any forms of compulsory insurance?

The following are the examples of forms of compulsory insurances:

- compulsory automobile damage liability insurance;
- nuclear damage liability insurance; and
- oil pollution damage liability insurance.

## 2 (Re)insurance Claims

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

- Mandatory or unilaterally mandatory provisions in the Insurance Act (the latter is a series of provisions making void agreements that, contrary to such provisions, adversely affect policyholders); and
- invalid provisions under the Consumer Contract Act.

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

With respect to compulsory automobile damage liability insurance, the Automobile Liability Security Act permits an aggrieved party to directly claim damages against the relevant non-life insurance company. Not being part of the legal system, the right to make direct claims may be provided for in agreements with respect to typical automobile liability insurance in Japan (voluntary insurance further covering any part not covered by the compulsory automobile damage liability insurance).

A typical damage liability insurance contract does not provide for making direct claims. On the other hand, the Insurance Act grants an aggrieved party a statutory lien in connection with insurance claims, carrying legal priority.

### 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?

The Insurance Act imposes on a policyholder or the insured a duty of disclosure with respect to material matters regarding risks which are requested to be disclosed by the insurer (the duty of question-and-answer).

If a policyholder or the insured violates such duty, the insurer may cancel the insurance contract and, except for damage not caused by

violation of the duty of disclosure, will be discharged from liability for insurance payments.

However, an insurer will not, in principle, have the right of cancellation for violation of the duty of disclosure in the following cases:

- (a) insurer's bad faith or negligence;
- (b) obstruction of disclosure by an insurance agent; and
- (c) solicitation of non-disclosure by an insurance agent and others.

An insurer's right of cancellation will be extinguished one month after the time the insurer knew the cause of cancellation or five years after the time of conclusion of the contract.

### 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?

The Insurance Act limits the scope of the duty of disclosure to what is requested to be disclosed by an insurer (the duty of question-and-answer).

This is a unilaterally mandatory provision (a provision making void agreements that, contrary to such provision, adversely affect policyholders); however, in the field of non-life insurance: (i) maritime insurance contracts; (ii) aviation insurance contracts; (iii) nuclear energy insurance contracts; and (iv) non-life insurance contracts, covering damages which may arise in business activities by a juridical person or other organisation or an individual who operates a business, are excluded from the scope of the application of the foregoing provision and are allowed for providing additional special provisions.

### 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, an insurer that makes an insurance payment is subrogated by operation of law to any salvage of the object of the insurance, the right to seek damages or other compensation recovered by the insured through an insured event, to the extent of the rate and limit set forth therein (Articles 24 and 25 of the Insurance Act).

## 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 for resolving commercial insurance disputes. Commercial insurance disputes are generally resolved in district courts or summary courts depending on the value of the dispute. In practice, a jurisdiction clause in insurance policies determines which court would hear disputes in relation to the insurance policies.

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

Generally, a first hearing date is scheduled around one month after the filing of a lawsuit. It usually takes six months to one year to reach a judgment.

## 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?

1. Under the Code of Civil Procedure, when the court finds a petition for an order to submit a document by the parties well-grounded, it must order the holder of the document to submit the document. In the following cases, the holder of the document may not refuse to submit the document:
  - (i) Where a party personally possesses the document that he/she has cited in the suit.
  - (ii) Where the party who offers evidence makes a request to the holder of the document for the delivery or inspection of the document.
  - (iii) Where the document has been prepared in the interest of the party who offers evidence or with regard to the legal relationships between the party who offers evidence and the holder of the document.
  - (iv) In addition to the cases listed in the preceding three items, in cases where the document is not a document:
    - (a) stating the matters prescribed in Article 196 with regard to the holder of the document or a person who has any of the relationships listed in the items of said Article with the holder of the document;
    - (b) concerning a secret in relation to a public officer's duties, which is, if submitted, likely to harm the public interest or substantially hinder the performance of his/her public duties;
    - (c) stating the fact prescribed in Article 197, paragraph (1), item (ii) or the matter prescribed in Article 197, paragraph (1), item (iii), neither of which are released from the duty of secrecy;
    - (d) prepared exclusively for use by the holder thereof (excluding a document held by the State or a local public entity, which is used by a public officer for an organisational purpose); and
    - (e) concerning a suit pertaining to a criminal case or a record of a juvenile case, or a document seized in these cases.
2. If a party to the action does not comply with an order to submit a document, or has caused the document to be lost or otherwise unusable in order to prevent the opponent from using it despite his/her obligation to submit it, the court may recognise that the opponent's allegations concerning the statements in the document are true.
3. If non-parties to the action do not comply with an order to submit a document, the court may, by order, punish them with a non-criminal fine of not more than 200,000 yen.

### 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?

A party may not withhold from disclosure documents relating to advice given by lawyers, prepared in contemplation of litigation, or produced in the course of settlement negotiations/attempts.

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

The court may examine any person as a witness. If a witness does not appear without justifiable grounds, the court must make an order to the effect that he/she shall bear any court costs incurred from the non-appearance, and punish him/her by a non-criminal fine of not more than 100,000 yen.

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

Article 205 of the Code of Civil Procedure provides that, when the court finds it appropriate and no objection is made by the parties, it may have a witness submit a document *in lieu* of examining him/her. In such a case, the court may allow the opponent to submit a document stating matters for which they desire to have a response made in a document to be submitted by the witness.

### 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?

Under the Code of Civil Procedure, an expert witness may not serve as an expert witness if his/her testimony relates to matters for which a nominated witness or person closely related to such witness, such as spouse or close relative, is possibly subject to criminal prosecution, or matters of great concern for such a nominated witness or closely related person. It is common to have party-appointed experts, and a party may submit such expert's opinion as documentary evidence and conduct examination. However, such opinion may not have the same probative value as a court-appointed expert because of its lack of independence.

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

Even if the final judgment has not been issued, a party may file a petition for an order for provisional seizure over the other party's assets if there is likelihood that a compulsory execution with regard to a claim for payment of money will be impossible or extremely difficult. A party also may file a petition for an order for provisional disposition with regard to a disputed subject matter where there is likelihood that an exercise of rights will be impossible or extremely difficult due to changes to the existing state of such subject matter.

### 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?

The losing party may appeal to the upper court based on any grounds if such party is not satisfied with the decisions of the court of first instance. There are two stages of appeal.

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

Yes, interest is generally recoverable in respect of claims; 5% *per annum* for non-commercial claims and 6% *per annum* for

commercial claims. However, a revision of those interest rates to 3% *per annum* with subsequent reviews every three years to reflect market interest rates is now being discussed in the Japanese Diet.

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

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The losing party bears court costs. Such court costs do not include fees for attorneys retained by the winning party. Early settlement prior to trial may save court costs, especially in relation to the costs for witnesses, but it would not be a substantial amount.

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

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Courts cannot compel the parties to mediate disputes. However, the Code of Civil Procedure provides that courts may recommend that the parties settle their disputes regardless of a stage of a lawsuit, and it is very common for courts to make such recommendation before judgment.

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

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A party may refuse a request to mediate and no sanction will be issued with respect to such refusal.

## 5 Arbitration

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**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?**

---

The Arbitration Act (Act No. 138 of 2003) provides that the court may exercise its authority only in the case provided for in the Arbitration Act with respect to an arbitration procedure. Article 14 of the Arbitration Act provides that, when a court action is filed concerning a civil dispute which may be subject to an arbitration agreement, the court in charge of the case must dismiss the action upon the defendant's petition.

---

**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?**

---

The Arbitration Act provides that an arbitration agreement must be in writing but does not require that any specific words be put into writing.

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

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The Arbitration Act provides that a consumer who has accepted an arbitration clause may, in general, terminate such a clause, and, upon such termination, the courts will refuse to enforce an arbitration clause.

---

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

---

Under the Arbitration Act, upon the petition of parties, the courts will have the power to appoint an arbitrator. In addition, upon the petition of parties or an arbitral tribunal, the courts may examine evidence, including examination of witness, expert testimony, examination of documents and observation.

---

**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?**

---

Under the Arbitration Act, an arbitral tribunal is required to state the reasons for its award unless otherwise agreed by parties.

---

**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 to the arbitration may not appeal to the courts from the decision of an arbitral tribunal. However, the Arbitration Act provides that the parties may file a petition to set aside the arbitral award to the court in some situations, such as invalidity of the arbitration award due to the limited capacity of a party.

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For more than 50 years, we at Chuo Sogo Law Office have assisted insurance companies with compliance issues, corporate, complex litigation/dispute resolution and other matters that require legal analysis. Many of our lawyers have experience working at the Financial Services Agency of Japan and have deep practical insight into insurance regulations which may have significant impact on the insurance operations in Japan. We are a dedicated group of professionals, committed to providing clients with excellent legal services necessary to support their success in a wide range of areas. We remain acutely aware of the need to constantly innovate and improve our services, and continuously strive to achieve it.



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- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
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- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
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