THE INSURANCE DISPUTES LAW REVIEW

Sixth Edition

Editor
Russell Butland

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PREFACE

I am delighted that this is now the sixth edition of *The Insurance Disputes Law Review*. It is a privilege to be the editor of this excellent and succinct overview of recent developments in insurance disputes across 17 important insurance jurisdictions. I am particularly pleased in this edition to welcome chapters from China and Mexico.

Insurance is a vital part of the world's economy and critical to risk management in both the commercial and the private worlds. The law that has developed to govern the rights and obligations of those using this essential product can often be complex and challenging, with the legal system of each jurisdiction seeking to strike the right balance between the interests of insurer and insured and also the regulator who seeks to police the market. Perhaps more than any other area of law, insurance law can represent a fusion of traditional concepts (that are almost unique to this area of law) together with constant entrepreneurial development, as insurers strive to create new products to adapt to our changing world. This makes for a fast-developing area, with many traps for the unwary. Further, as this indispensable book shows, even where the concepts are similar in most jurisdictions, they can be implemented and interpreted with very important differences in different jurisdictions.

To be as user-friendly as possible, each chapter follows the same format – first providing an overview of the key framework for dealing with disputes – and then giving an update of recent developments in disputes.

As the editor, I have been impressed by the erudition of all authors and the enthusiasm shown for this fascinating area. It has also been particularly interesting to note the trends that are developing in each jurisdiction.

An evolving theme in almost every jurisdiction is the increase in protections for policyholders. Much of the special nature of insurance law has developed from an imbalance in knowledge between the policyholder (who had historically been blessed with much greater knowledge of the risk to be insured) and the insurer (who knew less and therefore had to rely on the duties of disclosure of the policyholder). With the proliferation of data, the increasing use of artificial intelligence to assess that data and provide more detailed scope for analysis across risk portfolios, the balance of knowledge has shifted; it will often now be the insurer who is better placed to assess the risk. This shift has manifested itself in tighter rules requiring insurers to be specific in the questions to be answered by policyholders when they place insurance, and in remedies more targeted at the insurer if full information is not provided. Coupled with these trends, however, is the increasing desire by some jurisdictions to set limits on the questions that can be asked so that, for example in relation to healthcare insurance, policyholders are not denied insurance for historical matters.

We can expect that this tussle between the commercial imperative for insurers to price risk realistically and the need to balance consumer protection, government policy and privacy will increasingly be at the heart of insurance disputes.

The past year has been tumultuous. The conflict being fought in Ukraine, and its effect on energy security and global supply chains, comes as a further shock on top of climate events and the legacy of the disruption from covid-19. The effect of the Ukraine conflict is having a substantial effect on the aviation insurance market, with previously lightly litigated policy forms now at the front and centre of major litigation in the US, the UK and Ireland. Business interruption issues from the covid-19 pandemic meanwhile continue to be worked through across the legal systems; key areas of coverage have been addressed but now there are more bespoke issues, for example relating to the application of policy limits.

There has in the past year been particular focus on directors and officers policies. These are under increasing pressure as directors are in the spotlight as a result of strategic climate change litigation (particularly relating to greenwashing and transparency of transition to net zero). Similarly, cyber risks are ever increasing, as the scope of cover and capacity provided by the insurance market retreats.

No matter how carefully formulated, no legal system functions without effective mechanisms to hear and resolve disputes. Each chapter, therefore, also usefully considers the mechanisms for dispute resolution in each jurisdiction. Courts appear to remain the principal mechanism, but arbitration and less formal mechanisms (such as the Financial Ombudsman in the United Kingdom) can be a significant force for efficiency and change when functioning properly. The increasing development of class action mechanisms, particularly among consumer bodies (e.g., in France and Germany), is likely to be an important factor.

I would like to express my gratitude to all the contributing practitioners represented in *The Insurance Disputes Law Review*. Their biographies are to be found in the first appendix and highlight the wealth of experience and learning that the contributors bring to this volume. On a personal note I must also thank Rebecca Daramola at my firm, who has done much of the hard work in this edition. I would also like to thank the whole team at Law Business Research, who have excelled at bringing the project to fruition and in adding a professional look and more coherent finish to the contributions.

Last, but not least, I would to like thank Joanna Page, who co-edited the first five editions of this book. Joanna's leadership and intellect were instrumental in bringing the original concept for this book to fruition, and ensuring that it has gone from strength to strength with each edition. In following Joanna as editor I have big shoes to fill.

Russell Butland
Allen & Overy LLP
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Chapter 13

JAPAN

Shinichiro Mori, Sho Tanaka, Ryo Otobe and Shun Tamazaki[1]

I INTRODUCTION

In Japan, the insurance landscape is governed by a dynamic and evolving legal framework, with the Insurance Act at its core. Enacted in 2008, the Insurance Act modernised and enhanced insurance-related provisions that had previously existed within the Commercial Act. This act introduced new measures such as fixed-amount accident and health insurance and emphasised the protection of policyholders. It also brought amendments to damage insurance and life insurance-related provisions.

Further, the amended Companies Act, which came into effect in March 2021, expressly sets out the procedures for certain directors' and officers' (D&O) insurance and also expressly exempts them from conflicts of interest.

As explained in Section V, the rapid development and implementation of autonomous driving technology have spurred new legal considerations under the Act on Securing Compensation for Automobile Accidents. Further, the revised Road Traffic Act, which allows Level 4 autonomous driving under certain conditions, came into effect on 1 April 2023. This revision has significant implications for the future of both autonomous driving technology and insurance law in Japan.

Similarly, the outbreak of covid-19 raised novel issues as to how insurance claims related to covid-19 should be treated within the traditional insurance framework. In April 2020, upon a request of the Financial Services Agency (FSA), the insurance regulatory authority, insurance companies have started to apply a flexible interpretation and application of insurance policy provisions from the perspective of protecting policyholders by, for example, allowing covid-19 patients to be eligible for payment of hospitalisation benefits when treated in accommodation facilities (such as hotels) or at home. Yet, the evolving nature of the pandemic and subsequent changes in legislation mean that the landscape remains uncertain, and further issues may emerge.

This chapter aims to provide an overview of the Japanese insurance landscape by addressing the following areas:

a the year in review – highlighting recent noteworthy cases and judicial decisions;
b the legal framework of insurance disputes in Japan;
c the handling of international insurance disputes; and
d emerging trends in insurance practice in Japan.

1 Shinichiro Mori is a managing partner at Mori & Partners. Sho Tanaka is a senior associate and Ryo Otobe and Shun Tamazaki are associates at Momo-o, Matsuo & Namba.

II YEAR IN REVIEW

The following recent cases are notable for the reasons explained below.

i Tokyo High Court judgment dated 17 December 2020 affirming the application of the insurer's exemption clause in D&O insurance

An insurer had concluded a D&O insurance policy with a company, where the representative director was insured. In a shareholder suit, the representative director was ordered to compensate the company for damages arising from negligence related to his duty of care. An attorney representing the director filed a claim against the insurer, asserting entitlement to legal fees based on the subrogation right to the obligee, who was the representative director. However, after the director's subsequent bankruptcy, the bankruptcy trustee assumed responsibility for the lawsuit.

The D&O insurance policy in this particular instance contained a clause exempting the insurer from obligations to pay claims generated by actions conducted with the insured's conscious knowledge of legal violations (including where there were reasonable grounds to believe that the insured was cognisant of such). The central issue was whether the representative director's breach of duty of care constituted a breach of the law and whether the director was aware of the breach.

A concise summary of the Tokyo High Court judgment is as follows:

a Article 330 of the Companies Act provides that the relationship between a company and its directors is subject to the Civil Code's mandate provisions. Article 644 of the Civil Code provides that a mandatary has a duty of care to handle delegated matters with the care of a good manager in accordance with the essential purpose of the delegation. Thus, the duty of care that a director owes to the company is a statutory duty. Consequently, the term 'breach of the law' in this case's exemption clause encompasses a failure in the duty of care as a director.

b The High Court interpreted that the exemption clause released an insurer from making an insurance payout in relation to damages if the insured knowingly violated the duty of care or if there were reasonable grounds to believe that the insured had such knowledge.

c The High Court determined that the representative director had directed deceitful accounting practices and provided false explanations to the external auditor, fully cognisant that these actions violated the duty of care. The district court's decision, affirming the applicability of the exemption clause in this scenario, was upheld.

The judgment by the High Court is noteworthy, as there are relatively few legal precedents in Japan that have arrived at a decision concerning the application of an exemption clause to D&O insurance.

ii Yamaguchi District Court judgment dated 15 July 2021 affirming exemption of an insurer based on an increased risk outside the scope of insurance underwriting

The case was brought before the Yamaguchi District Court and involved a dispute between the plaintiff and the defendant, a property and casualty insurance company. The dispute centred around a comprehensive home insurance policy, including fire insurance, covering a building owned by the plaintiff.

The plaintiff insisted that the building was demolished by fire during the policy's coverage period and thus demanded that the defendant pay the insurance claim under the policy's terms.

In opposition, the defendant asserted that it had cancelled the policy by delivering written notice to the plaintiff, consistent with the policy's stipulations. The grounds for this cancellation were:

a the building's structure or utilisation was altered, resulting in an augmentation of risk; and

b the risk had veered outside the scope of insurance underwriting, as the building's use had changed, and it was no longer used for residential purposes.

A summary of Yamaguchi District Court's judgment is as follows:

a Condition of the building: the building had been abandoned for roughly four years after the family who resided there moved out, subsequent to the insurance policy being signed. At the time of the fire, the electrical wiring was found to be severed and stolen. The building was filled with dog feces, debris, and around 10 CRT televisions that had been illegally dumped.

b Change in purpose of use: given the building's state, the court found it implausible that an ordinary policyholder would perceive the building as a residence at the time of the fire. The court determined that the building's purpose had altered, and it was no longer utilised for residential functions.

c Cancellation affirmed: as a result, the court affirmed cancellation of the comprehensive home insurance policy and exemption of the insurer under the terms and conditions of the policy.

Article 29 of the Insurance Act provides for cancellation in the event of an increase in risk 'within' the insurance underwriting. However, Article 29 of the Insurance Act does not apply to this case, because the insurance policy was cancelled based on an increased risk 'outside' the scope of insurance underwriting. This is a rare case in which the insurer's exemption for increased risks outside of insurance underwriting has been challenged, and is instructive in practice.

iii Tokyo High Court judgment dated 27 February 2020 affirming exemption of an insurer based on an intentionally caused insured event

In this case, the appellant, who had purchased a fire insurance policy for a building with an insurance company (the appellee), claimed that part of the building was destroyed by arson committed by a third party. The appellee countered this by arguing that the appellant or his sister's common-law spouse had a deliberate hand in the arson. Given the circumstances leading to the fire, the appellee contended that it was not liable to cover the damages, citing the terms of the fire insurance policy. These terms mirrored Article 17, Paragraph 1 of the Insurance Act, which absolves the insurer of responsibility for damages stemming from intentional misconduct or gross negligence on the policyholder's part.

In summary, the High Court judgment is as follows:

a the court found that the arson was committed with the involvement of a person who was the beneficial owner of the building or who enjoyed an economic interest in the use or disposal of the building; and

b the arson in this case was equivalent to the deliberately caused insured event by the appellant. Therefore, the court affirmed exemption of the insurer under the terms and conditions of the fire insurance policy in this case.

In Japan, there have been court decisions equating a person who substantially owns the subject matter of the insurance, or has an economic interest in its use or disposition, with the policyholder or the insured. This High Court decision is another case that supports this concept. This case is instructive when insurance companies are engaged in determining whether the exemption clause for deliberately caused insured events is applicable.

III THE LEGAL FRAMEWORK

i Sources of insurance law and regulation

The Insurance Act and other laws

In Japan, the Insurance Act primarily governs the formation and validity of insurance contracts.

The Insurance Act regulates three main types of insurance: damage insurance, life insurance and fixed-amount accident and health insurance. In addition, there are also other laws on specific types of private insurance, such as the Act on Securing Compensation for Automobile Accidents. Further, since insurance disputes are also one type of civil dispute, general private laws such as the Civil Code, the Commercial Act and the Code of Civil Procedure also apply to insurance disputes.

Regulation on insurance business

The Insurance Business Act regulates the insurance business. The primary aim of the Insurance Business Act is – given the public nature of the insurance business – to protect policyholders by ensuring the appropriate management of insurers and the fairness of solicitation for insurance. The FSA regularly issues supervisory guidance and provides responses to public comments.

Although it is not necessarily common for insurance disputes to revolve around the interpretation of the provisions of the Insurance Business Act, the regulations on solicitation of insurance set out in the Insurance Business Act are sometimes at issue in claims for damage caused by an insurer's breach of duty to explain a policy when soliciting insurance.

Major updates in recent years

The amended Companies Act (which came into effect in March 2021) now provides explicit provisions for D&O insurance. Specifically, the amended Companies Act expressly sets out the procedures for certain D&O insurance and also expressly exempts them from conflicts of interest.[2]

2 Companies Act, Article 430-3.

ii Insurable risk

Uninsurable risks

There are two types of insurance in Japan: (1) public insurance managed by the national government and other public organisations and (2) private insurance. With regard to private insurance, under the principle of freedom of contract, theoretically, any risk can be insured in principle; however, there are certain restrictions – for example, insurance contracts that violate public policy are not allowed.

Insurable interest

In Japan, an insurable interest is generally considered an economic interest that could be impaired by the occurrence of an insured event. The insurable interest is an essential element of damage insurance. Article 3 of the Insurance Act provides that only interests that can be assessed in monetary terms may be the subject matter of an insurance policy for damages.

iii Fora and dispute resolution mechanisms

Litigation

Litigation in court remains a primary avenue for resolving insurance disputes in Japan. Japanese civil litigation is governed by the Code of Civil Procedure. The litigation procedure normally starts when a party to an insurance dispute files a lawsuit with the district court. After the district court's judgment, a party dissatisfied with the judgment may appeal to the high court, and the high court's judgment may be appealed to the Supreme Court if certain requirements are met. Although it depends on the complexity of the case and other factors, according to statistics in 2022, approximately 90 per cent of cases are usually completed within one to two years in the case of ordinary civil litigation at district courts. More than 90 per cent of cases finish in one year in high court proceedings. Approximately 90 per cent of cases are completed within six months at the Supreme Court.

Japanese judges occasionally recommend settlements, and disputes naturally end more quickly when a settlement is reached in the middle of a legal proceeding. In fact, according to 2022 data, approximately 33 per cent of cases in the civil courts of first instance in Japan ended in settlement.

In addition to the above, the following briefly lists the features of civil litigation in Japan:

a First, in Japanese civil litigation, attorneys' fees are not normally borne by the losing party, and therefore, in principle, the court does not order the losing party to bear the winning party's attorneys' fees (except for up to 10 per cent of the amount of damages in a tort claim).

b Second, there is no extensive discovery system (such as that of the United States). While there are mechanisms in place to request the opposing party to unveil certain documents, these are conditional and restrict the range of documents that can be disclosed.

c Third, as discussed in Section IV, Japanese courts do not allow punitive damages.

Alternative dispute resolution

Aside from traditional litigation, insurance disputes in Japan can also be addressed through the alternative dispute resolution (ADR) system, which was introduced by the FSA in 2009. The designated dispute resolution institutions for insurance disputes are:

a the Life Insurance Association of Japan;

b the General Insurance Association of Japan;

c the Insurance Ombudsman; and
d the Small Amount & Short Term Insurance Association of Japan.

According to recent statistics, the number of cases received by these institutions between April 2022 and March 2023 were 345, 502, 18 and 11, respectively.

Most of the designated dispute institutions do not charge adjudication fees, and approximately 70 per cent of the cases in the dispute resolution process are completed within six months, which has the advantage of being less expensive and time-consuming compared to litigation.

However, although nearly half of dispute resolution procedures end in settlement or conciliation, more than half the cases do not reach resolution and, in such cases, the parties will have to resort to other measures such as litigation proceedings.

IV THE INTERNATIONAL ARENA

i International jurisdiction

When a Japanese court decides on the jurisdiction of an international dispute, the Code of Civil Procedure applies as follows:

Agreement on jurisdiction

If the parties to the insurance contract have agreed which country's court shall have jurisdiction, that agreement shall prevail.[3]

However, for the agreement to be valid, it must pertain to a particular legal relationship and be documented in writing.[4] In addition, an agreement that an action may be filed only in a foreign court may not be invoked if that court is unable to exercise jurisdiction by law or in fact.[5]

Furthermore, jurisdictional agreements between consumers and enterprises (consumer contracts) shall not be effective unless the agreement grants jurisdiction to the courts of the country in which the consumer was domiciled at the time the consumer contract was entered into; or the consumer has brought an action pursuant to the agreement on jurisdiction, or has invoked the agreement on jurisdiction.[6]

In 2020, the Tokyo High Court issued a judgment regarding an agreement between a Japanese small to medium-sized enterprise and a US tech giant in which the two parties agreed to submit to the exclusive jurisdiction of the US courts. The Court rejected the Japanese company's argument that the agreement was invalid as against public policy because the US tech giant had taken unfair advantage of its superior bargaining position.[7]

3 Code of Civil Procedure, Article 3-7, Paragraph 1.
4 id. at Paragraph 2.
5 id. at Paragraph 4.
6 id. at Paragraph 5.
7 The Tokyo High Court Judgment dated 22 July 2020, Hanrei Jiho No. 2491, p. 10.

No agreement on jurisdiction

In the absence of an agreement on jurisdiction, if the defendant is domiciled in Japan, a Japanese court has jurisdiction.[8] In addition, the Code of Civil Procedure provides several types of cases in which Japanese courts have jurisdiction with respect to actions concerning contractual obligations.[9] Further, an action by a consumer against an enterprise with respect to consumer contracts may be brought in a Japanese court if the consumer is domiciled in Japan at the time of filing the action or at the time the consumer contract is concluded.[10]

Dismissal due to special circumstances

Except for cases where there is an agreement that grants jurisdiction only to a Japanese court,[11] even where a Japanese court has jurisdiction over the action, the court may dismiss the action in whole or in part without prejudice when it finds that there are special circumstances that would prejudice the equity between the parties or prevent a fair and speedy trial if a Japanese court were to hear and try the action.[12]

ii Governing law

When Japanese courts decide on the governing law of international insurance disputes, the Act on General Rules for Application of Laws applies as follows:

Agreement on governing law

If the parties to an insurance contract agree on governing law, that agreement shall prevail.[13] However, in consumer contracts, if the consumer indicates to the enterprise that a specific mandatory provision in the law of the consumer's habitual residence should apply, that mandatory provision also applies.[14]

No agreement on governing law

In the absence of an agreement on governing law, the law of the place most closely connected to the juridical act at the time of the act shall apply.[15] Further, if a characteristic performance in the juridical act is performed by only one of the parties, the law of the habitual residence of the party providing that performance is presumed to be the law of the place most closely connected.[16]

8 Code of Civil Procedure, Article 3-2, Paragraph 1.

9 id. at Article 3-3.

10 id. at Article 3-4, Paragraph 1.

11 In consumer contracts, an agreement that an action may be filed only with a court of the country where the consumer is domiciled is deemed not to preclude the filing of an action with a court of any other country (Code of Civil Procedure, Article 3-7, Paragraph 5, Item 1).

12 Code of Civil Procedure, Article 3-9.

13 Act on General Rules for Application of Laws, Article 7.

14 id. at Article 11, Paragraph 1.

15 id. at Article 8, Paragraph 1.

16 id. at Article 8, Paragraph 2.

Thus, in insurance contracts, the law of the habitual residence of the insurer providing the characteristic performance is presumed to be the law of the place most closely connected. Yet, for consumer contracts, the law of the consumer's habitual residence is applied, superseding the law of the most related place.[17]

iii Recognition and enforcement of foreign judgments

Requirements for recognition of foreign judgments

To enforce a foreign final and binding judgment in a Japanese court, it is necessary to obtain recognition of the judgment and obtain an execution judgment. The requirements for recognition of a foreign judgment are as follows:[18]

a the jurisdiction of a foreign court is recognised by law, regulation or treaty;

b the losing defendant has received service of the summons or an order necessary to commence the litigation (other than service by publication or other similar service), or has appeared without being so served;

c the contents of the judgment and the court proceedings are not contrary to public order or morals in Japan; and

d a guaranty of reciprocity is in place.

Judicial precedents

Punitive damages

The Supreme Court of Japan refused to allow the enforcement of the part of the judgment of the Superior Court of California that allowed punitive damages. This decision was made on the grounds that punitive damages were incompatible with the basic principles of the Japanese damages system and violated public order.[19] In a subsequent case where a party made a payment based on the judgment of the Superior Court of California which ordered punitive damages, the Supreme Court of Japan held that punitive damages were not effective in Japan and the part of the monetary claim related to the punitive damages could not be deemed to exist. Thus, the payment made by the party was appropriated to the portion of the claim excluding the punitive damages, and only the remaining amount was allowed to be enforced.[20]

Attorneys' fees

In Japan, attorneys' fees are not generally borne by the losing party. In a case where the petitioner sought to enforce an order by the Hong Kong High Court that ordered the losing party to bear the attorneys' fees of the winning party, the Supreme Court of Japan held that it was not against public order if the fees were within the range of actual costs.[21]

17 id. at Article 11, Paragraph 2.

18 Code of Civil Procedure, Article 118, Civil Execution Act, Article 24.

19 The Supreme Court Judgment dated 11 July 1997, Minshu Vol. 51, No. 6, p. 2573.

20 The Supreme Court Judgment dated 25 May 2021, Minshu Vol. 75, No. 6, p. 2935.

21 The Supreme Court Judgment dated 28 April 1998, Minshu Vol. 52, No. 3, p. 853.

Default judgments

In a case concerning a default judgment by the Superior Court of California, the Supreme Court of Japan held that, where a foreign judgment becomes final and binding without giving notice, or substantial opportunity to know, of the foreign judgment even though it was possible to notify the contents of the foreign judgment, recognising such a judgment is against public order under Article 118, Item 3 of the Code of Civil Procedure.[22] Reflecting this judgment, in a case where enforcement of a default judgment by the Superior Court of California was sought, the Tokyo District Court refused to allow enforcement on the grounds that the party subject to enforcement was not notified of, or given the substantial opportunity to know, of the foreign judgment, even though it was possible to provide notice of the contents of the foreign judgment.[23]

iv Recognition and enforcement of arbitral awards

The New York Convention

Japan is a Member State to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). An arbitral award, regardless of whether the place of arbitration is in Japan, has the same effect as a final and binding judgment if the party seeking enforcement obtains an enforcement order.[24] An enforcement order is granted unless there are grounds for refusal of recognition.[25] Grounds for refusal of recognition are substantially the same as those set out in Article 5 of the New York Convention.[26]

Amendment to the Arbitration Act

On 21 April 2023, the bill to amend the Arbitration Act to reflect the latest revision of the 2006 UNCITRAL Model Law on International Commercial Arbitration passed the Diet. The amended Arbitration Act will take effect in or before April 2024.

The amended Arbitration Act introduces the following measures:

a Interim or provisional measures: Japanese courts may recognise and enforce certain interim or provisional measures ordered by arbitral tribunals.[27] A party may file a petition with the court for the enforcement of interim or provisional measures. The grounds for refusal of enforcement are narrowly limited in line with the 2006 UNCITRAL Model Law.[28]

b Submission of translations: the current Arbitration Act requires the petitioner seeking to enforce an arbitral award to submit a complete Japanese translation of the award. The amendment will allow the court to decide not to require the submission of the translation if the court considers it appropriate after hearing the respondent's opinion.[29] The same will apply to a petition for an enforcement order of interim or provisional measures.[30]

22 The Supreme Court Judgment dated 18 January 2019, Minshu Vol. 73, No. 1, p. 1.

23 The Tokyo District Court Judgment dated 9 March 2021, 2021 WLJPCA03098001.

24 Arbitration Act, Article 45, Paragraph 1.

25 id. at Paragraph 7.

26 id. at Paragraph 2.

27 Amended Arbitration Act, Article 24, Paragraph 1, Article 47.

28 id. at Article 47, Paragraph 7.

29 id. at Article 46, Paragraph 2.

30 id. at Article 46, Paragraph 2.

c Jurisdiction over arbitration-related cases: with respect to arbitration-related court cases, the Tokyo District Court or the Osaka District Court will have concurrent jurisdiction regardless of the locations of the parties or the competent court agreed on by the parties.[31]

v Recognition and enforcement of international settlement agreements

On 21 April 2023, the Act for Implementation of the Singapore Convention on Mediation (the Implementation Act) passed the Diet. The Act will come into force on the day the Convention enters into force with respect to Japan.[32] On 9 June 2023, the Diet approved Japan's accession to the Convention.

The Implementation Act will allow Japanese courts to enforce commercial international settlement agreements resulting from mediation.[33] For international settlement agreements to be enforceable, the parties must expressly agree that the agreement can be enforced under the Convention.[34] The party seeking enforcement must file a petition with the court, and the court will grant the enforcement unless there are grounds for refusal.[35] The Implementation Act is novel in the Japanese legal system in that it grants enforceability to a settlement agreement between private parties entered into without the supervision of a court or other government institution.

V OUTLOOK AND CONCLUSIONS

i Insurance for autonomous driving and bodily injury

The development and implementation of AI-driven autonomous driving technology are accelerating in Japan, posing some challenges to the traditional landscape of motor vehicle insurance.

Historically, motor vehicle accidents have been primarily caused by human error, with personal injury risk covered by mandatory insurance under the Act on Securing Compensation for Automobile Accidents. However, the advancement of autonomous driving technology is shifting the nature of risk. As human negligence decreases, malfunctions and defects in autonomous systems could become more common sources of accidents.

This shift presents legal challenges in defining liability. In cases of accidents caused by autonomous system malfunctions, the vehicle owner may still be considered an automobile operator under the Act on Securing Compensation for Automobile Accidents.[36] In such a case, while the manufacturer of the autonomous car should be responsible for the malfunction or defect of the car, the liability insurance may be paid for by liability insurance, which is financed by the insurance premium paid by the car owner. As a result, there may be a discrepancy between the location of the risk and the legal 'person' who bears the cost for covering that risk.

31 id. at Articles 5, 8, 35, 46 and 47.

32 Implementation Act, Supplementary Article 1.

33 id. at Article 2, Paragraph 3, Article 5.

34 id. at Article 3, Singapore Convention on Mediation, Article 8, Paragraph 1, Item (b).

35 Implementation Act at Article 5.

36 An 'automobile operator' is defined as a person who controls the operation of and profits from the operation of a motor vehicle. Such person is liable for personal injury caused by the motor vehicle under Article 3 of the Act on Securing Compensation for Automobile Accidents.

With regard to the issue of liability and insurance in autonomous driving, one proposal involves applying a mechanism that ensures insurance companies' right to reimbursement from automobile manufacturers. This would shift some of the financial responsibility for accidents caused by system malfunctions or defects from vehicle owners to the entities responsible for those malfunctions. This represents a complex and evolving area of insurance law, and stakeholders must pay careful attention to further developments that could affect both the industry and consumers.

Further, a significant milestone in this field was reached on 1 April 2023, when revisions to the Road Traffic Act went into effect in Japan. The revised law allows Level 4 autonomous driving, which allows vehicles to operate without a human driver present under certain conditions.

The revised law is expected to further advance the implementation of the autonomous driving system in the future, and is also expected to stimulate discussions on insurance for autonomous driving.

ii Aftereffect of the covid-19 pandemic

Issues

The covid-19 pandemic has posed significant challenges to the insurance industry, leading to a re-evaluation of traditional frameworks and practices. In the beginning of the pandemic, the outbreak of covid-19 led to insurance claims being made by people infected with covid-19. At that time, it was not clear how these claims would be positioned within the traditional insurance framework. For example, some people infected with covid-19 were required to be hospitalised, while others were required to stay in certain accommodation or remain at home (instead of hospitals) because of hospitals' limited capacity. In the case of people staying in an accommodation or at home in lieu of hospitalisation, a problem arose as to whether they would be eligible for payment of hospitalisation benefits. As explained below, insurance companies' handling of this issue has changed with the evolution of the infection situation and the changing position of covid-19 under the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases (the Infectious Diseases Act).

FSA's requests to insurance companies and changes in insurance companies' practice

Since March 2020, the FSA has issued requests to insurance associations for the flexible handling of covid-19-related matters. In accordance with such requests, insurance companies took flexible measures in providing insurance benefits, etc.

More specifically, on 10 April 2020, the FSA requested insurance companies to consider applying a flexible interpretation and application of insurance policy provisions as well as taking necessary measures in their insurance products from the perspective of protecting their customers. In response, insurance companies have treated covid-19 as a disease that is eligible for payment of hospitalisation benefits, and have treated all infected patients who are treated in accommodation facilities (such as hotels) or at home as being eligible for payment of hospitalisation benefits.

As the infection situation has changed and the position of covid-19 in the Infectious Diseases Act has also changed, the insurance industry in Japan has had to continually adapt its approach as follows.

First, on 25 August 2022, the Ministry of Health, Labour and Welfare (MHLW) limited the scope of reporting of outbreaks when a doctor diagnoses a patient with covid-19 from all cases to only those at high risk of serious illness, such as those 65 years of age or

older. In response, insurance companies have limited the individuals eligible for payment of hospitalisation benefits when treated in an accommodation facility or at home to those who are at high risk of serious illness.

Next, on 8 May 2023, the status of covid-19 under the Infectious Diseases Act was downgraded from 'new influenza and other infectious diseases' (so-called category 2 equivalent) to 'category 5 infectious diseases'.

In response to this change, insurance companies terminated the payment of hospitalisation benefits for treatment in an accommodation facility or at home.

MHLW expresses its views on workers' accident compensation insurance

Under the workers' accident compensation insurance system, which is covered by the insurance premiums paid by employers in principle, insurance benefits are provided to workers who sustain an injury or illness because of work-related reasons or commuting. The MHLW expressed its view that workers' accident compensation insurance benefits will be provided if covid-19 infections are caused by work or if symptoms of covid-19 persist and absence from work is necessary. Further, the MHLW has also indicated that it would make judgements on the work-relatedness for workers' accident compensation on an individual basis, even if the route of infection is not necessarily clear, in cases where the employee was engaged in work that is considered to have a high risk of infection, after investigating the work engagement status and general living conditions during the incubation period.

The MHLW's view on the matter remains unchanged even after the reclassification of covid-19 as a 'category 5 infectious disease' under the Infectious Diseases Act, as of August 2023.

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