

# The New Japanese Insurance Act: Comparisons with Europe and Korea

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## INTRODUCTION

In 2008, the insurance contract law in Japan was modernised in both form and substance. The new Insurance Act<sup>1</sup> was enacted to replace the section on insurance in the Commercial Code,<sup>2</sup> which had remained basically unchanged since its codification at the end of the nineteenth century. Some of the provisions in the Insurance Act simply restate the rules in the Commercial Code in modern Japanese language; many others have changed the previous rules; others have clarified the issues disputed under the Commercial Code. The new Insurance Act will enter into force on 1 April 2010.

The purpose of this paper is to describe and analyse the major changes made by the Insurance Act by considering how such changes were brought about and by comparing them with the recent reforms of insurance contract law in other jurisdictions.<sup>3</sup> The

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1 *Hoken-hô*, Law No. 56/2008.

2 *Shôhô*, Law No. 48/1899.

3 For an overview of the Japanese insurance law under the Insurance Act, see S. KOZUKA / M. TAKAHASHI, *Versicherungsrecht*, in: Baum / Bälz (Hrsg.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Cologne, forthcoming).

comparison will be made, on the one hand, with the Principles of European Insurance Contract Law (hereinafter “PEICL”), drafted to constitute a part of the common frame of reference in European contract law. On the other hand, the bill pending before the Korean Diet to amend the insurance law (hereinafter “Korean bill”) will be referred to in order to see how the two neighbouring countries coincide or differ with regard to the reform of the same area of law.

The analysis proceeds as follows. First, the history and background of the reform are briefly described (I). Then the new provisions in the new Insurance Act that appear to be inspired by other countries’ legislation are introduced (II), followed by the examination of the provisions to address the problems that arose from the practice in Japan (III). Further, the comparison with the Korean bill is made, emphasising the differences in the approaches of law making and policies over a similar issue (IV). A concise conclusion will follow (V).<sup>4</sup>

## I. OVERVIEW OF THE NEW INSURANCE ACT

### 1. Background

The reform of insurance law was taken up by the Ministry of Justice after completion of the overall reform of the corporate law that resulted in the enactment of the Companies Act in 2005. This may be viewed as the second step of modernisation of the Commercial Code. Apparently a modernisation equivalent to corporate law was also needed for the Commercial Code’s section of insurance law, which was awkwardly written in the classical Japanese of more than a century ago.

In fact, the standard contracts employed by Japanese insurers had derogated from the rules of the Commercial Code in many respects, implying that the latter rules were outdated as compared with the practice of insurance business. With such a situation in mind, studies on the reform of insurance law were begun as early as 1964 by some academics and practitioners in indemnity insurance. The latest proposal for the reform of indemnity insurance, including accident insurance, was published in 1995 as private draft provi-

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4 There are many books and papers on the Insurance Act written in Japanese. To name a few, O. HAGIMOTO (ed.), *Ichimon ittô hoken-hô* [Questions and Answers on the Insurance Act] (Tokyo 2009); K. KINOSHITA, *Kokuchi-gimu, tsûchi-gimu* [Duty of disclosure and duty to give notice], in: *Jurisuto* 1364 (2008) 18; S. NOMURA, *Songai hoken keiyaku tokuyû no jikô* [Issues specific to indemnity insurance], in: *Jurisuto* 1364 (2008) 34; H. SUZAKI, *Hoken keiyaku no seiritsu oyobi shûryô* [Formation and termination of an insurance contract], in: *Jurisuto* 1364 (2008) 27; O. TAKEHAMA, *Seimei hoken keiyaku oyobi shôgai shippei hoken keiyaku tokuyû no jikô* [Issues specific to life insurance and accident and sickness insurance], in: *Jurisuto* 1364 (2008) 42; T. YAMASHITA, *Atarashii hoken-hô: sôronteki jikô oyobi jakkan no kyôtsû jikô* [The new Insurance Act: General provisions and some common issues], in: *Jurisuto* 1364 (2008) 10; T. YAMASHITA, *Hoken-hô gendai-ka no igi* [The significance of the modernisation of the insurance law], in: *Jurisuto* 1368 (2008) 60.

sions,<sup>5</sup> while a similar private draft for the reform of life, accident and sickness insurance was published in 1998 as a result of a study going on since 1987.<sup>6</sup> Both drafts basically restated the provisions of standard contracts in use at that time, partly because the members of the two study groups consisted of academics and insurers' employees and did not include representatives of consumers.

The situation was much different when the government finally took up insurance law as the agenda of modernisation and established the Working Group on insurance law under the Legislative Council (*hōsei shingi-kai*) in 2006. Beginning in 2005, it had been revealed that there were many cases where insurers failed to pay the insurance money that was in fact payable. Most such "failure to pay" occurred because neither the policyholder nor the insurer realised the existence of the payable claim. Although the literal reading of the insurance contracts indicated that the insurance money was not due until the policyholder was aware of his claim and made a valid request for payment, the complaints of consumers were such that the Financial Services Agency ordered the insurers to improve their claims handling.<sup>7</sup> In some other cases, the insurer refused to pay insurance benefits in accident and sickness insurance in spite of not being able to ascertain evidence of fraud. Still other cases were reported in which the insurers, at the time of undertaking, failed to notice the technology used in constructing the insured building and did not apply the reduction of premium that should have been applicable. All these troubles were reported extensively in the media, giving the insurance industry the label of "anti-consumers".

Reflecting these complaints from consumers, the Insurance Act became much more protective of consumers than previous private drafts. Some issues that previously had not seriously been considered were much disputed during the reform process as relevant to consumer interests, such as the timing of performance (*infra*, in III.1.). These features are, by the way, in contrast to the Korean bill, which tends rather to associate with the insurers and emphasises the prevention of fraud.

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5 SONGAI HOKEN HŌSEI KENKYŪ-KAI, *Songai hoken keiyaku-hō kaisei shian, shōgai hoken keiyaku-hō (shinsetsu) shian riyū-sho (1995nen kakutei-ban)* [Commentary to the draft amendments to the indemnity insurance contract law and draft (new) accident insurance contract law, finalised version of 1995] (Tokyo 1995).

6 SEIMEI HOKEN HŌSEI KENKYŪ-KAI, *Seimei hoken keiyaku-hō kaisei shian (1998nen-ban) riyū-sho, shōgai hoken keiyaku-hō shinsetsu shian (1998nen-ban) riyū-sho, shippei hoken keiyaku-hō shinsetsu shian (1998nen-ban) riyū-sho* [Commentary to the draft amendments to the life insurance contract law (1998 version), commentary to the draft accident insurance contract law (1998 version), commentary to draft sickness insurance contract law (1998 version)] (Tokyo 1998).

7 See S. KOZUKA, Compliance Tales, in: *Monash Business Review* 4 (2008) 8.

## 2. Basic policy

One of the basic policies of the Insurance Act is consumer protection. Besides the changes from the previous Commercial Code in favour of the insureds, policyholders and beneficiaries, most of the provisions protective of the latter's interests are declared half-mandatory.<sup>8</sup> Therefore, parties cannot derogate from those provisions to the detriment of the insureds and policyholders. This is in line with the PEICL, which also provide that their provisions can be derogated only "as long as such derogation is not to the detriment of the policyholder, the insured or beneficiary".<sup>9</sup> Similar to the PEICL, which deny the mandatory character of their provisions with regard to the insurance of large risks,<sup>10</sup> the Insurance Act also provides that certain types of indemnity insurance are not subject to the half-mandatory regulation.<sup>11</sup>

The emphasis on consumer interests is not only the result of recent complaints. It should also be noted that consumer interests have been considered by both the legislature and judiciary in the last decade. The enactment of the Consumer Contract Act<sup>12</sup> in 2000 and amendments to the Law on Certain Kinds of Commercial Transactions<sup>13</sup> several times since 1999 resulted in important recent Supreme Court decisions in favour of consumers;<sup>14</sup> in addition, a series of decisions by the Supreme Court on the Moneylenders Control Law,<sup>15</sup> culminating in the decision of 2006 that almost eliminated the exemption from the underlying Interest Rate Restriction Law,<sup>16</sup> moved the Diet to reorganise the regulation of consumer credit by revamping the Moneylenders Control Law into the renamed Moneylenders Law<sup>17</sup> in the same year.<sup>18</sup> The Consumer Contract Act was amended in 2004 to introduce the consumer group suit, which was extended to the Law on Certain Kinds of Commercial Transactions in 2008. In the face of all these developments, it was obvious that insurance law could not be the exception.

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8 See Arts. 7, 12, 26, 33, 41, 49, 53, 65, 70, 78, 82 & 92 Insurance Act.

9 Art. 1:103 (2). PEICL.

10 Provisions of Art. 1:103 (2) PEICL.

11 Art. 36 Insurance Act. The exempt types of indemnity insurance are marine insurance, aircraft and air cargo insurance, nuclear insurance, and indemnity insurance (except accident and sickness insurance of indemnity type) contracted for risks of a corporation or risks of an individual arising from his or her business activities.

12 *Shôhi-sha keiyaku-hô*, Law No. 61/2000.

13 *Tokutei shô-torihiki ni kansuru hôritsu*, Law No. 57/1976.

14 S. KOZUKA, Judicial Activism of the Japanese Supreme Court in Consumer Law: Juridification of Society through Case Law?, in: ZJapanR 27 (2009) 81.

15 *Kashikin-gyô no kisei tô ni kansuru hôritsu*, Law No. 32/1983.

16 *Risoku seigen-hô*, Law No. 100/1954.

17 *Kashikin-gyô-hô*, Law No. 32/1983, as amended by Law No. 115/2006.

18 See S. KOZUKA / L. NOTTAGE, Re-regulating Unsecured Consumer Credit in Japan: Overindebted Borrowers, the Supreme Court and New Legislation, in: Parry et al. (eds.), *The Yearbook of Consumer Law 2009* (2008) 197; A. PARDIECK, Japan and the Moneylenders: Activist Courts and Substantive Justice, in: *Pacific Rim Law & Policy Journal* 17 (2008) 529.

Further, in the case of insurance law, the deregulation since the late 1990s, initiated by the renewal of the Insurance Business Law<sup>19</sup> in 1995, has been significant. Although, contrary to the insurance regulation in Europe, insurance products (standard contracts) are still subject to approval by the Financial Services Agency, the examination by the regulator has become so liberal as to approve various kinds of new products. In fact, this liberalisation has been one of the causes of the recent troubles mentioned above. When the products became too diversified and complicated, the sales agents and employees often lacked sufficient knowledge of the products and made mistakes in marketing the products or assessing the claims.

## II. AMENDMENTS INSPIRED BY COMPARATIVE LAW STUDIES

Many new ideas have been brought to the Insurance Act as compared with the previous Commercial Code. Some of these resulted from theoretical analysis based on comparative law studies rather than the urgent needs of practice. This does not mean, however, that any suggestion by academics was adopted if supported by comparative law. When the industry resisted strongly, such as in the case of the departure from the all-or-nothing principle (*infra*, II. 2.), the suggestion was abandoned. It appears that in the legislative process of Japan, every participant has a veto to block a proposal it finds totally unacceptable.

### 1. Successful amendments

#### a) Transactions covered

First to be noted is the structure of the Insurance Act. The Commercial Code had provisions for indemnity insurance and life insurance only, leaving accident and sickness insurance out of the coverage. The Insurance Act departed from the structure of its predecessor and, after general provisions on the purpose of the Act and definitions, provided three chapters that apply to indemnity insurance, life insurance and accident and sickness insurance of fixed sums, respectively. This structure is based on the theory of dividing insurance into indemnity insurance and the insurance of fixed sum, but reflects at the same time the regulatory framework in Japan. The license of insurance business under the Insurance Business Law must be either life insurance or indemnity insurance.<sup>20</sup> Accident and sickness insurance may be sold by the licensee of either type, whether the insurance benefit is fixed sum or not.<sup>21</sup> Having such a regulatory framework in mind, the drafter of the Insurance Act considered that accident and sickness

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19 *Hoken-gyô-hô*, Law No. 105/1995.

20 Art. 3 (2) Insurance Business Law. One entity cannot have both licenses, though it is free to establish a subsidiary engaged in the other type of insurance.

21 See Art. 3 (4), (5) Insurance Business Law.

insurance providing cover for actual losses constitutes a specific branch of indemnity insurance,<sup>22</sup> while the accident and sickness insurance of fixed sum needs specific provisions as the second type of insurance of fixed sum, besides life insurance.<sup>23</sup>

It is also worth noting that the Insurance Act covers insurance-like products by friendly societies (*kyôσαι*) as well.<sup>24</sup> These products are in some cases regulated by the Financial Services Agency, such as in the case of *kyôσαι* by agricultural cooperatives regulated by the Ministry of Agriculture, Forestry and Fishery. However, as had been pointed out by commentators, there is no reason that the insurance contract law should not be applied as long as the products of *kyôσαι* are almost the same as insurance. It is all the more so when the Insurance Act is protective of consumer interests in a semi-mandatory way.<sup>25</sup>

b) *Overinsurance*

Rules on overinsurance have also been modernised. The Commercial Code provided that when the sum insured (*hoken kingaku*) exceeded the insurable value (*hoken kagaku*), the insurance contract was invalid as regards the difference.<sup>26</sup> Academics had long criticised this provision as being too rigid in view of, among others, the fact that the depreciation or fluctuation of the value of the insured asset could bring about unintended overinsurance. The Insurance Act has adopted this view and provides that the insurance contract is voidable by the policyholder with regard to the difference between the sum insured and insurable value, as long as the policyholder or the insured was neither aware of the fact nor being grossly negligent in not knowing it.<sup>27</sup> Further, when the insurable value becomes significantly smaller after the conclusion of the insurance contract, the policyholder is entitled to request reduction in the sum insured and the corresponding reduction in the premium.<sup>28</sup> The parties cannot derogate from this rule to the detriment of the policyholder.<sup>29</sup> The new rules are in line with the modern trends in major countries, reflected in Art. 8:103 PEICL. In fact, there had been little inconvenience with the previous provision of the Commercial Code, since the provision on overinsurance in the Commercial Code was non-mandatory and most standard contracts in practice derogated from it. Still, it was considered inappropriate to retain the outdated rule of absolute nullity in the new Insurance Act.

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22 Arts. 34 & 35 Insurance Act.

23 Arts. 66-94 Insurance Act.

24 See Art. 2 no. 1 Insurance Act.

25 HAGIMOTO, *supra* note 4, 13-14.

26 Art. 631 Commercial Code (prior to 2008).

27 Art. 9 Insurance Act.

28 Art. 10 Insurance Act.

29 Art. 12 Insurance Act.

c) *Lien for victims in liability insurance*

As regards liability insurance, the interest of the victim became the issue. Most liability insurance in Japan provides that the insurance money be paid to the insured when the amount of the liability is settled by a final judgement, conciliation or other agreement with the victim. It was pointed out that, if the insurance money is paid to the insured under such a contract, it will not be available to the victim in full amount when the insured is insolvent. Against this background, the Insurance Act has introduced a new provision that entitles the victim (a person with a claim for damages against the insured) to a lien over the claim for insurance money.<sup>30</sup> Further, in order to prevent the insurance money from being paid to the insured without the victim knowing it, it is also provided that the indemnification shall be made only to the extent that the insured has performed its liability to the victim or when the victim has given consent.<sup>31</sup>

d) *Right of intervention of the beneficiary*

The Insurance Act has also introduced the right of intervention, inspired by the *Eintrittsrecht* of German insurance contract law, with regard to life insurance and accident and sickness insurance of fixed sum. Under the Commercial Code, the Supreme Court held that the creditor of the policyholder can garnish the conditional claim for the surrender value and, to realise this value, terminate the contract on behalf of the debtor as a form of the collection by the garnishor.<sup>32</sup> Without affecting this case law, the Insurance Act provides that such termination by the creditor take effect only after one month from the day the insurer is notified of it.<sup>33</sup> During this period, the beneficiary is given the opportunity to intervene by paying off the amount of surrender value to the creditor in order to prevent termination.<sup>34</sup> Unlike German insurance contract law, the beneficiary does not substitute for the policyholder unless the insurer agrees to it, but is merely entitled to prevent the termination from taking effect.

2. *Unsuccessful attempts*

The suggested departure from the Commercial Code did not always survive the process of reform. The most conspicuous of the failed proposals was the abolishment of the all-or-nothing principle with regard to the duty of disclosure.

The Commercial Code provided that if the policyholder or insured knowingly or with gross negligence did not disclose, or made a false representation of, a material fact, the insurer was entitled to terminate the contract.<sup>35</sup> If the insured event occurs before termi-

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30 Art. 22 (1) Insurance Act.

31 Art. 22 (2) Insurance Act.

32 Art. 155(1) Civil Enforcement Law.

33 Arts. 60 (1) & 89 (1) Insurance Act.

34 Arts. 60 (2) & 89 (2) Insurance Act.

35 Arts. 644 (indemnity insurance) & 678 (life insurance) Commercial Code (prior to 2008).

nation, no insurance money shall be payable unless the policyholder proves that the insured event was not caused by the fact not disclosed or falsely represented.<sup>36</sup> It was suggested by academics that such an all-or-nothing principle be replaced by the pro-rata principle, and the sanctions for non-disclosure or misrepresentation shall be the reduction in insurance amount payable, in proportion to the amount of the premium actually paid against the amount that would have been required had the disclosure been made correctly. However, this suggestion was opposed both by insurers and consumers. While insurers were afraid of losing discipline over the non-disclosure and misrepresentation, the consumers were reluctant because they felt that the pro-rata rule was complicated and difficult to foresee the outcome.<sup>37</sup> As a consequence, the suggestion failed and the all-or-nothing principle has been maintained.<sup>38</sup> In this respect, the Insurance Act still differs from the PEICL, in particular their Art. 2:102 (5).

However, the rule did not remain exactly as it was under the Commercial Code. First, the subject of disclosure is limited to “such material facts relevant to the possibility of occurrence of insured event as was required by the insurer to disclose.”<sup>39</sup> Because this provision is semi-mandatory, the insurer cannot require other facts to be disclosed by the contract clause. Secondly, the requirement of the link between the insured event and the fact not disclosed or falsely represented as a condition of the insurer’s exemption has also become semi-mandatory so that it cannot be dropped in the contract.<sup>40</sup> As a result of these regulations, which are more consumer-friendly than the previous rules of the Commercial Code, the insurers appear to face some difficulties in offering premiums differentiated according to the risks of the insured. For example, in the case of automobile insurance, insurers usually ask the history of accidents and determine the premium rate according to it. Under the Insurance Act, however, the policyholder can easily make a false representation about his accident history to avail himself of the lower premium and then, when he causes an accident, allege the lack of a link between the accident and misrepresentation, as the accident could have occurred even if the representation had been correctly made.<sup>41</sup> Such misrepresentation could have been well disciplined if the pro-rata rule had been adopted. It is, after all, not clear which party has gained and which has lost by the new rules of the Insurance Act.

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36 Art. 645 Commercial Code (prior to 2008); also applied to life insurance through Art. 678 (2).

37 See YAMASHITA, *Gendai-ka*, *supra* note 4, 63.

38 Art. 28 (1) Insurance Act.

39 Art. 4 Insurance Act.

40 Art. 33 Insurance Act.

41 Since the accident history is shown by the colour of the driver’s license in Japan, this issue was symbolically described as “the problem of driver’s license colour”.

### III. AMENDMENTS ARISING FROM JAPANESE PRACTICE

The Insurance Act has also met several issues that needed to be resolved in practice under the Commercial Code. Complaints of consumers about the “failures to pay” by major insurance companies (*supra*, I.2.) required the regulation over the payment of insurance money by the insurer. Further, there were some court decisions indicating the issues to be clarified.

#### 1. *Complaints from consumers: Timing of performance*

On the issue of the timing of payment, the Commercial Code had no provision. The standard contracts in practice provided that the indemnity was to be made after a certain number of days from the receipt of the claim except when necessary investigation was not completed within this period, in which case the insured was to be indemnified immediately after the completion of the investigation. In a case where this clause was disputed, the Supreme Court held the proviso to be not binding for the reason that it was not clear at all about the meaning of the “necessary investigation” or the maximum extent of time to be spent for investigation and ordered the insurer to pay the interest from the end of the period reserved for investigation, which was thirty days in the case at issue.<sup>42</sup>

The Insurance Act differs both from the standard contracts and the Supreme Court decision. It provides that the timing of performance agreed in the contract shall be extended no later than a reasonable time necessary for making investigation about the insured event, the amount to be indemnified, the existence of exclusions or other relevant facts.<sup>43</sup> If the timing of performance is not agreed, the insurer shall not be liable for the time necessary for investigating the insured event and amount to be indemnified after the claim is made.<sup>44</sup> In any case, the insurer shall not be liable for the delay if the policyholder or insured obstructed the investigation by the insurer or refused to allow investigation without due cause.<sup>45</sup> These rules, which are far more complicated than Arts. 6:103 and 6:104 of the PEICL, have posed considerable difficulties to the insurers about how to draft a new standard contract. It is reported that the standard contract will foresee thirty days after the occurrence of the insured event as the default and provide additional periods of time if special investigation is necessary, the period being specified for each reason of investigation.

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42 Supreme Court, 25 March 1997, Minshû 51, 1565.

43 Art. 21 (1) Insurance Act.

44 Art. 21 (2) Insurance Act. Note that the necessary period in this paragraph is counted from the time the claim is made and, therefore, could end at a later period than in the case of the first paragraph. On the other hand, the investigation in this paragraph is allowed only for the occurrence of the insured event and amount to be indemnified, not extending to the exceptions and other matters.

45 Art. 21 (3) Insurance Act.

## 2. *Responses to the case law*

### a) *Rescission for grave reasons*

The Insurance Act has introduced an interesting provision based on the case law under the Commercial Code. Several lower court decisions entitled the insurer to rescind the life insurance contract when there was an abuse of the insurance contract, such as causing the insured event to take place.<sup>46</sup> These courts did not refer to any statutory provision but rather relied on the doctrine of “special right of rescission”, apparently inspired by the German doctrine of *außerordentliches Kündigungsrecht*, holding that such an abuse had destroyed the reliance in the relationship between the parties. The Insurance Act has generalised this case law as applicable to indemnity insurance as well and provided under the heading “rescission by the insurer for grave reasons”. Such grave reasons are the inviting of the insured event or the deceit in claiming the insurance money by the policyholder, insured or beneficiary, or any other grave reason destroying the reliance of the insurer in the policyholder, insured or beneficiary such that the insurance contract can no longer be maintained.<sup>47</sup> If the insurance contract is terminated under this provision, the insurer is exempt from covering the insured event after such grave reason arises, though it may retain the premium for the whole period. These provisions are half-mandatory and cannot be derogated from to the detriment of the policyholder, insured or beneficiary.<sup>48</sup>

### b) *Death of the beneficiary before the insured event*

Another new provision restating the case law is on the question of who should be the beneficiary of life insurance contract when the original beneficiary was dead before the person at risk dies. The Commercial Code before 2008 provided that the policyholder can nominate a new beneficiary in such a case and that if the policyholder had not nominated anyone before he or she was dead, the heirs of the original beneficiary were entitled to the insurance money.<sup>49</sup> In a case where the heirs of the original beneficiary were already dead when the person at risk died, the Supreme Court held that the heirs of the heir of the original beneficiary were entitled to the insurance money.<sup>50</sup> Perhaps restating this case law, the Insurance Act provides that if the beneficiary is dead before the insured event (most typically the death of the person at risk) takes place, all the heirs of the original beneficiary shall become the beneficiary.<sup>51</sup> Since this provision is not mandatory, the standard contract in practice will continue to entitle the policyholder to nominate a new beneficiary until the insured event takes place.

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46 E.g. Osaka District Court, 30 August 1985, Hanrei Jihô 1183 (1986) 153.

47 Arts. 30, 57 & 86 Insurance Act.

48 Arts. 33, 65 & 94 Insurance Act.

49 Art. 676 Commercial Code (prior to 2008).

50 Supreme Court, 7 September 1993, Minshû 47, 4740.

51 Art. 46 Insurance Act.

c) *Substitution of the beneficiary*

The example of overriding the existing case law is seen in a new provision about the substitution of the beneficiary. The Insurance Act provides that the policyholder can substitute the beneficiary until the insured event takes place.<sup>52</sup> A slight change from the Commercial Code, which allowed such a substitution as long as the contract reserved the policyholder the right to do so.<sup>53</sup> It will not change the practice, as the standard contract without exception reserves the right of substitution. The difficult problem under such a practice was how to exercise the right of substitution. The Supreme Court in 1987 held that notice to either the insurer, the original beneficiary or a new beneficiary was effective.<sup>54</sup> However, the Insurance Act overruled this case law and has provided that the substitution shall be made by notice to the insurer<sup>55</sup> or by the testament.<sup>56</sup> According to the drafter of the Insurance Act, the case law under the Commercial Code was considered to cause unnecessary complication and not appropriate.<sup>57</sup>

3. *Issues left unresolved: Burden of proof*

Interestingly enough, the Insurance Act has not addressed all the issues that were of practical concern under the Commercial Code but has left some of them to the further development of case law. One of significant importance is the burden of proving the insured event, in particular in the case of accident insurance. The insured event in accident insurance is the accidental bodily injury, which is defined as a “sudden, external and accidental” incident to the person at risk. The Supreme Court in 2001 held in a case where the person at risk was suspected to have committed suicide that the burden of proving all the elements of the insured event, including the element of “accidental”, should lie with the beneficiary claiming the insurance money.<sup>58</sup> The insurance contract in the case provided in another clause that the insurer was exempt from paying the insurance money if the insured event was invited intentionally by the person at risk, but the Supreme Court held that such an exclusion clause did not have an independent meaning from the definition of the insured event.

The Supreme Court decision did not put an end to the discourse. After three years from the decision on accident insurance, the Supreme Court held in the case of fire insurance that the insurer owed the burden of proving that the fire had been set by the insured as exclusion from its liability.<sup>59</sup> Then a few years later in the two cases of property insurance, the Supreme Court again held that the burden of proving that the

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52 Art. 43 (1) Insurance Act.

53 Art. 675 (1) Commercial Code (prior to 2008).

54 Supreme Court, 29 October 1987, Minshû 41, 1527.

55 Art. 43 (2) Insurance Act.

56 Art. 44 Insurance Act.

57 HAGIMOTO, *supra* note 4, 185.

58 Supreme Court, 20 April 2001, Minshû 55, 682.

59 Supreme Court, 13 December 2004, Minshû 58, 2419.

insured property had been stolen by the instruction of the insured lay with the insurer.<sup>60</sup> These cases seemed to be inconsistent with the 2001 decision.

The Insurance Act has not provided any definite solution to the issue of burden of proof. Therefore, the issue remains to be solved by future court decisions. However, the Insurance Act, unlike the previous Commercial Code, has introduced specific regulations for the accident and sickness insurance, among which is a provision to the extent that the insurer shall be exempt when the insured event is caused by the person at risk, policyholder or beneficiary with intent or gross negligence. With this new statutory text, it seems doubtful that the decision of 2001 can be maintained.<sup>61</sup>

#### IV. COMPARISON WITH THE DRAFT AMENDMENTS IN KOREA

If enacted, the Korean Bill will be the second major amendment to the insurance law of Korea since its codification as part of the Commercial Code in 1962, the first time being in 1991. Like the Japanese Insurance Act, the Korean Bill is also a part of the overall modernisation of the Commercial Code, following the reform of maritime law in 2007 and paralleling the reform of corporate law expected soon.<sup>62</sup> Further similarity with the Japanese Insurance Act is that it is partly based on the comparative study of foreign insurance contract laws and partly responding to the needs in practice.<sup>63</sup>

Notwithstanding, it is very interesting to see that the Japanese Insurance Act and Korean Bill have fewer common than different elements. The difference seems to derive, in part, from the minimalism of Japanese law. In Japan, no new provision is enacted unless there is a clear consensus on the benefit of a provision, whereas the Korean Bill is more ambitious in proposing many new rules. Here again, the “veto” rule in the Japanese legislative process (*supra*, II.) can be observed. Another source of divergence may be the different situation that the industry is facing. While in Japan the complaints from consumers led to many consumer-oriented provisions of the Insurance Act, it appears that there is rather a strong will to combat fraud in insurance in Korea.

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60 Supreme Court, 1 June 2006, Minshû 60, 1887; Supreme Court, 17 April 2007, Minshû 61, 1026.

61 TAKEHAMA, *supra* note 4, 48.

62 As regards the Korean Bill, the minutes of the Special Committee that drafted the Bill have been published as *Sangpup Bohum-pyoen Gaejung-tukpyeol-bunka-wewonhue Hureirok* [Minutes of the Special Committee on the amendments of the insurance law part of the Commercial Code] (Seoul 2008). More recently, a book discussing the background of and major issues in the Korean Bill was published whose authors include two members of the Special Committee: S. YANG / D. JANG / C. HAN, *Bohumbup Gaejunge Kanjum* [Viewpoints of the amendments to the insurance law] (Seoul 2009).

63 The recent book on the Korean Bill mentions the PEICL and work of the British Law Commission as cases of most recent attempts to modernise the insurance law. See YANG / JANG / HAN, *supra* note 62, 4.

### 1. *Minimalism versus legislative activism*

Some of the provisions proposed in the Korean Bill are equivalent to those dropped from the Insurance Act in Japan. The most typical of them is the provision stating the principle of utmost good faith in the Korean Bill.<sup>64</sup> The idea of enacting a provision on “good faith and fair dealing” was also examined in Japan but was given up in the end because it was no different from the principle of good faith in the Civil Code, which is of course applicable to an insurance contract.<sup>65</sup>

Similar minimalism was observed in Japan with regard to the regulation of group insurance. In the early 1990s in Japan, group insurance was often purchased by the employer on the deaths of their employees. Notwithstanding the requirement of consent by the person at risk if the person is not the policyholder, in practice consent by the officers of the labour union was substituted. After a number of disputes in which the heirs of the dead employee claimed the insurance money that the employer received as the beneficiary,<sup>66</sup> the insurers changed the product so that the beneficiary shall be basically the heirs, not the employer. The product change has been monitored by the regulation of the Financial Services Agency. As a result of these developments, no statutory provision about the group insurance was included in the Insurance Act.

In Korea, on the other hand, a provision had been added to the Commercial Code in 1991 that saved the consent of the person at risk in group insurance as long as the conclusion of such group insurance was pursuant to the rules of the group. Apparently the provision had in mind a group insurance over employees’ death, the group implying principally labour unions.<sup>67</sup> After many disputes between employers and employees or their heirs, more or less similar to those in Japan,<sup>68</sup> the Korean Bill proposes a new section to the provision on group insurance requiring consent in writing of the person at risk when the latter is not the beneficiary.<sup>69</sup>

Still another example that shows the divergence in legislative approach is the duty of disclosing other life insurance contracts for the same person at risk. The Korean Bill provides this duty explicitly and entitles the insurer to terminate the insurance contract when another insurance contract is not disclosed by the policyholder or person at risk intentionally or with gross negligence.<sup>70</sup> The purpose of this proposal is to clarify that the existence of other life insurance contracts is included in the subject of duty of disclosure. Although similar disclosure is required in the standard contracts in Japan, the

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64 Art. 638 Korean Bill.

65 HAGIMOTO, *supra* note 4, 37.

66 See Supreme Court, 11 April 2006, Minshû 60, 1387. The heirs of the employee denied the entitlement to the part of the insurance money that the employer received as the beneficiary.

67 Art. 735-3 Korean Commercial Code.

68 See e.g. Great Court of Judicature, 25 May 1999, 98 (DA) 59613 (the group insurance naming the policyholder (employer) as the beneficiary held to be valid).

69 Art. 753-3 (3) Korean Bill.

70 Art. 732-3 Korean Bill.

Japanese Insurance Act did not provide any specific rule on this type of disclosure. It was considered that the general rule of duty of disclosure was sufficient to prevent fraud, because the cumulative taking of insurance contracts for the same risk can be “important facts relevant to the possibility of occurrence of insured event”.<sup>71</sup>

## 2. *Difference in policy*

With regard to life insurance for a person other than the policyholder, the policy taken by Japan and Korea has diverged. In Japan, a controversy took place in cases when the person at risk is an infant. In such a case, the parent gives consent on behalf of the infant (the person at risk) as the latter’s statutory agent and then concludes the insurance contract and nominates himself as the beneficiary. Such a transaction was felt to be immoral. Though insurance for the life of an infant was not prohibited by the Insurance Act, the Financial Services Agency has required the insurance companies to establish internal rules that limit the maximum amount of the insured sum to be 10 million yen for insurance for the life of an infant under the age of 15.<sup>72</sup>

On the other hand, under the current law in Korea, life insurance for the death of an infant under the age of 15, insane person or person with diminished capacity is void.<sup>73</sup> It has been argued for a few years that such a restriction is too inconvenient as far as the person with diminished capacity is concerned. The argument accused the regulation of unduly limiting the human rights of such a person. The Korean Bill adopted this argument and suggests lifting the ban as long as the person with diminished capacity gives consent in writing.<sup>74</sup> It is interesting to see that, with regard to the similar problem, the unregulated Japanese law has introduced a modest regulation in protection of an infant, while Korea liberalised the regulation already in existence in favour of the freedom of the person with diminished capacity.

## 3. *Common approaches taken in both countries*

The two neighbouring countries do not always diverge. For example, the extension of scope of application to insurance-like products by friendly societies (see II.1., *supra*) is also proposed in the Korean Bill.<sup>75</sup> Further, faced by the immense cases of insurance fraud,<sup>76</sup> the Korean Bill includes a proposition to render an insurance contract void

71 Arts. 4, 37 & 66 Insurance Act. See HAGIMOTO, *supra* note 4, 47.

72 Art. 53-7 (2) Ministerial Order Implementing the Insurance Business Law.

73 Art. 732 Korean Commercial Code.

74 Addition of provision to Art.732 Korean Bill.

75 Art. 664 Korean Bill.

76 According to the Korean Financial Supervisory Service (KSS), the detected insurance fraud amounted to 146 billion won, involving 22,801 persons, during the first half of 2009. This record has marked an increase of 33.6% in the amount and 44.0% in the number of persons involved from the previous year. See the reports on the website of KSS: [www.fss.or.kr](http://www.fss.or.kr).

when fraudulently concluded<sup>77</sup> and to exempt the insurer from payment of insurance money when the claim is made by deceit.<sup>78</sup> Despite some apparent differences, these proposals have common ideas with the “rescission for grave reasons” introduced in the Japanese Insurance Act, considering that the Korean Bill also allows the insurer to retain the premium even if the fraudulently concluded contract is void.<sup>79</sup>

## V. CONCLUSION

The Insurance Act of Japan is the most recent insurance law among major jurisdictions at this moment. The comparative analysis of this new legislation leads us to interesting insights about both the law of insurance and law-making in Japan.

First, as regards the law of insurance, the Japanese Insurance Act on many issues shares common approaches with other jurisdictions. This fact, which is partly the result of extensive comparative study during the making of the Insurance Act in Japan, may be cited as supporting the possibility to identify the common principles of insurance law, as is being formulated by the PEICL project in Europe.

Second, it must be admitted that some divergences still remain. The divergence sometimes derives from the policy differences adopted by each legislator. For example, although emphasising that consumer interest is a common trend in today’s insurance law, the specific issues where the consumer interests require consideration as well as the degree to which they were found to prevail over other interests could differ in each jurisdiction, depending on the situations in practice. In some cases, even the evaluation about what is in the interest of consumers can differ, as was the case with the all-or-nothing rule opposed by the consumers in Japan.

Third, the difference in law-making styles appears to be another source of divergence. The idea about what should be covered by contract law and how it should be codified may differ from jurisdiction to jurisdiction. In the case of Japanese law, it is on the one hand “minimalist.” Some of the issues causing the controversy were addressed by regulation, while others were not fully addressed by the law and left to solutions provided by the contract (standard conditions) and, finally, to case law in the future. On the other hand, the process of law-making in Japan seems to give a “veto” to each participant. Any one party appears to be able to prevent the adoption of a certain solution if it finds the solution unacceptable at all.

Thus, as in many other cases, the Japanese Insurance Act is a compromise of commonly accepted principles and the unique rules deriving from its own context: market, past case law and style of law-making. Further comparative analyses may be useful for the studies of both insurance law and Japanese law.

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77 Art. 655-2 Korean Bill.

78 Art. 657-2 Korean Bill.

79 Art. 655-2 (2) Korean Bill.

## ZUSAMMENFASSUNG

*Zum 1. April 2010 wird das neue Versicherungsgesetz (Hoken-hô) in Kraft treten, welches das japanische Versicherungsrecht formell und inhaltlich umfassend modernisieren wird. Es ersetzt die vielfach veralteten Regeln zum Versicherungsrecht, die bisher im Handelsgesetz enthalten sind. Zugleich führt es wichtige neue Regelungen ein, die teils auf rechtsvergleichenden Vorarbeiten, teils auf der japanischen Versicherungspraxis beruhen.*

*Die Autoren beschreiben die wichtigsten Neuerungen des Gesetzes und analysieren dessen Entstehungsgeschichte und rechtspolitische Stoßrichtung. Dabei zeichnet sich das neue Gesetz insbesondere durch einen verstärkten Verbraucherschutz aus. Für ihre Analyse vergleichen die Autoren die japanischen Entwicklungen einerseits mit einem Gesetzesentwurf zur Versicherungsreform in Korea, der dort gegenwärtig im Parlament beraten wird, andererseits mit den Principles of European Insurance Contract Law (PEICL).*

*Die Autoren gelangen zu dem Ergebnis, dass das neue japanische Versicherungsgesetz viele Gemeinsamkeiten mit den Versicherungsrechten anderer Länder aufweist, was die Möglichkeit unterstreicht, gemeinsame Prinzipien des Versicherungsrechts zu identifizieren. Andererseits verbleiben auch Unterschiede, u.a. bei der Frage, auf welche Weise und in welchem Umfang Verbraucher zu schützen sind. Darüber hinaus spiegeln diese Unterschiede aber auch verschiedenen Gesetzgebungsstile wider.*