

Revision of the Japanese Insurance Business Act in 2014

Insurance Distribution Channels in Japan and New Rules on the Solicitation of Insurance

*Satoshi Nakaide**

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I. INTRODUCTION

Insurance is an important financial system necessary for any population of individuals in modern society. However, insurance contracts are complicated and often difficult for buyers, especially for consumers, to understand. There is a notable asymmetry between the buyer and the seller of insurances. In fact, many of the complaints as well as the legal actions in connection with insurances arise from misunderstandings of the buyer regarding the contract at the time of buying an insurance.

In Japan, the duty of the seller of financial products has been reinforced during the last two decades by various legislative efforts. In addition, the responsible regulatory body has issued a number of supervisory guidelines to promote the protection of consumers. After reviewing these rules and in order to provide a legal scheme to protect buyers of insurances in a more comprehensive way, the main regulatory law on insurance activities, the

* Professor of Waseda University. Dr. (Waseda University), LL. M. (London, LSE). This article is derived from my presentation titled "Revision of the Japanese Insurance Business Act", delivered at the Max Planck Institute for Comparative and International Private Law on 20 March 2017. I extend my deep appreciation to Professor Jürgen Basedow and Professor Harald Baum for giving me the opportunity to undertake a research stay at the Max Planck Institute for Private Law and allowing me to make the above-noted presentation.

Insurance Business Act (“IBA”), was largely revised in 2014, with changes becoming effective from 29 May 2016.

This paper aims at presenting the main contents of the new IBA rules that are imposed on sellers of insurances at the contractual stage, with some analysis being provided as well.¹ For this purpose, the article details, first, the history of the IBA (Section II). Secondly, it outlines the distribution channel for insurances, including its historical background, to elucidate the necessity of revision (Section III), since the main part of the 2014 revision relates to distribution. After identifying the objectives of the 2014 revision (Section IV), two main and specific revisions are explained, one reinforcing the pre-contractual informational duties of sellers of insurances and the other on the duty of creating a management system to secure a sound insurance solicitation practice (Sections V, VI). Lastly, the article analyses the essence of the 2014 revision and considers its effect on the insurance sector (Section VII) before offering a short conclusion (Section VIII).

It is hoped that this article will help readers to understand the characteristics of the distribution of insurance in Japan as well as the Japanese approach to regulating the conduct of the seller of insurance.

II. HISTORY OF THE IBA

1. Major Legislation on Insurance²

There are two major pieces of legislation on insurance. One is the IBA and the other is the Insurance Act.

The IBA³ is a regulatory law on insurance business⁴ in Japan. It covers, though limited in number, contractual matters such as the duty of explaining insurance products and the cooling-off period for insurance contracts.

1 The writer relied on the English translation provided by the Japanese Law Translation of the Ministry of Justice, Insurance Business Act (Translation date 27 March 2015). The translation is found at; <http://www.japaneselawtranslation.go.jp/law/detail/?id=2716&vm=04&re=01&new=1>. For the contents and interpretation, the writer relied mainly on; M. ISHIDA, *Naruhodo hoken gyōhō – Heisei 26-nen hoken gyōhō kaisei no kaisetsu* – [I see! The Insurance Business Act. An Explanation of the 2014 Revision of the Insurance Business Act] (Hoken mainichi shinbun 2016), this being a book written by the person who was in charge of the 2014 revision.

2 For an English-language overview of Japanese insurance law, see N. KOBAYASHI, et al., *Insurance Law in Japan* (2nd ed., Alphen aan den Rijn 2014).

3 Law No. 105 of 1995.

4 Mutual aid insurance provided by various cooperatives, named *Kyōsai*, is also popular in Japan. *Kyōsai* is very similar to insurance in substance but is not called insurance and is governed by the respective Act governing the provider. The IBA does not apply to *Kyōsai*.

The IBA is supplemented by the Insurance Business Act Cabinet Ordinance⁵ and the Ministerial Regulation on the IBA.⁶ In addition, the Financial Services Agency (“FSA”), a governmental body responsible for the supervision of financial affairs,⁷ has issued various guidelines in respect of its administrative policy.

Another major piece of legislation, the Insurance Act,⁸ was enacted in 2008⁹ as an independent and comprehensive basic act to be applied to insurance contracts of any type irrespective of the name of the service or the type of the provider.¹⁰ Prior to its enactment, rules on insurance contracts were contained in the Commercial Code,¹¹ which was enacted in 1899 and has not been revised substantially since 1911. With the enactment of the Insurance Act, provisions on insurance contracts in the Commercial Code, except those on marine insurance contracts, were abolished. As for marine insurance contracts, both the Insurance Act and the Commercial Code apply. At present, provisions on marine insurance contracts in the Commercial Code are in the process of being revised.¹² Contractual matters not specified in the Insurance Act or in the Commercial Code are governed by the Civil Code, enacted in 1896.¹³

2. History of the IBA

Originally, the IBA was first enacted in 1900, and it was largely revised in 1939. Even after the 1939 revision, the IBA was frequently revised and it has provided the basic framework for the insurance sector for about 60 years. In connection with the governmental project aiming at deregulating the financial market in the 1990s under the motto of “fair, free, global”,¹⁴

5 Cabinet Ordinance No. 425 of 1995.

6 Regulation of Ministry of Finance No. 5 of 1996.

7 Including insurance but not *Kyōsai*.

8 Act No. 56 of 2008.

9 The Act became effective as of 2010; for an overview of the Act see S. KOZUKA / J. LEE, *The New Japanese Insurance Act: Comparisons with Europe and Korea*, ZJapanR / J.Japan.L. 28 (2009) 73.

10 As to the insurance types, the scope of the Insurance Act is wider than the IBA. The IBA solely covers insurance provided by an insurance company and small amount and short-term insurance providers.

11 Act No. 48 of 1899.

12 In October 2016, the cabinet decided to submit to the Diet a bill on the revision of maritime law, including marine insurance law contained in the Commercial Code.

13 Law No. 89 of 1896. The part concerning the law of obligations and contracts contained in the Civil Code was revised in 2017.

14 The reform of insurance business law was also urged by the US government during the Japan-US talks on insurance in the 1990s.

the IBA was fundamentally revised in 1995¹⁵ by consolidating two other laws on insurance business: the Law Concerning Control of Insurance Solicitations 1948¹⁶ and the Law Concerning Foreign Insurers 1949.¹⁷

Prior to the deregulation of the financial sectors, the Japanese government adopted what was termed a “convoy system”¹⁸ as a policy of supervising the financial sectors, including insurance, and it regulated the market so that Japanese nationals would not suffer from the bankruptcy of a financial institution. Based on this restrictive policy, premium rates and the conditions for insurance policies were also strictly regulated. The IBA 1995 changed the market rules fundamentally and allowed a number of first-time innovations, these including the establishment of an insurance holding company,¹⁹ the cross-selling of life and non-life insurance, the introduction of insurance brokers, deregulation of premiums and policy conditions, the introduction of supervision utilizing the index of solvency margin, and the establishment of a security fund system for the bankruptcy of insurance companies.

Even after the 1995 revision, the IBA has been frequently revised almost every year to adjust the law to the changes in the regulated environment. However, the part of the rules on the solicitation²⁰ of insurance contained in the former Law Concerning the Control of Insurance Solicitations 1948 was almost unrevised. In the 2000s, the protection of consumers became an important concern in the supervision of the insurance business. The FSA tried to promote the protection of consumers by demanding that insurance companies establish a compliance system to facilitate the sound solicitation of insurance.²¹ To do so, the FSA has issued detailed guidelines, strengthened the inspection of insurance companies on site and imposed a number of sanctions against insurance companies to improve their conduct and management.²² However, this approach was a rather indirect way of con-

15 The revised Act came into force in 1996.

16 Law No. 171 of 1948.

17 Law No. 184 of 1949.

18 The “convoy system” here refers to the wartime operation where a group of ships sailed together to protect themselves.

19 A pure holding company was prohibited by the Anti-monopoly Act enacted after the Second World War. The establishment of a holding company became possible in line with the revision of the Anti-monopoly Act in 1997.

20 The IBA uses the term “*Hoken boshū*”. This present article translates the term as “insurance solicitation” and uses the words “sale” or “selling” of insurance when explaining the term generally. The IBA defines “insurance solicitation” as meaning “acting as an agent or intermediary for the conclusion of an insurance contract” (Art. 2 (26) IBA).

21 For this purpose, Article 100-2 was added to the IBA, and the FSA relied on it and strengthened the oversight of solicitation by insurance companies.

trolling solicitation given that most of the solicitation was made through intermediaries as shown below. To better promote proper solicitation and to reflect the changes in market practice, the IBA was again revised in 2014. Generally, the revision in 2014 is regarded as the most important revision after the IBA 1995 since the new rules affect the sales of insurances greatly.

III. DISTRIBUTION CHANNELS FOR INSURANCES IN JAPAN

The most important part of the 2014 revision relates to the duty of sellers of insurances.²³ To understand the revision well, it is necessary to understand the market for distributing insurances in Japan.

1. *An Overview of the Distribution Channels*

The IBA allows insurance solicitation only to directors, officers, or members of an insurance company or a ‘small amount and short-term insurance company’, insurance agents or insurance brokers.²⁴ They need to be registered with the office of the Prime Minister if they are to conduct insurance solicitation.²⁵

Historically, distributing channels have developed differently in the non-life insurance market and the life insurance market in Japan because selling of insurance products across these two insurance sectors was not allowed prior to the IBA 1995.²⁶

a) *Non-life Insurances Market*

The main channel for distributing non-life insurance is the insurance agent. More than 90% of insurance premiums in the Japanese non-life insurance market are attributable to sales by insurance agents.²⁷ An insurance agent is an agent entrusted by an insurance company to conduct certain insurance business for the insurer. There are various insurance agents, ranging from

22 This approach of the regulator was in line with the slogan of the government “from prior restriction to monitoring and sanction”.

23 The 2014 legislation also revised provisions on insurance brokers, the scope of business allowed for a subsidiary company of a Japanese insurance company established outside Japan and a number of other issues as well.

24 Art. 275 IBA.

25 Art. 276 IBA.

26 Separation was strict. The establishment of a non-life insurance company by a life insurance company or vice versa was also not allowed prior to the 1995 IBA.

27 Based on the statistics of The General Insurance Association of Japan (“GIAJ”). Statistics in English are available at: <http://www.sonpo.or.jp/en/statistics/distribution/>. In fiscal year 2015, the figure was 91.7% of net premiums.

an individual agency with just one person to a large company.²⁸ The IBA allows an insurance agent to do agency business for more than one insurer.²⁹ About 25% of insurance agents are affiliated with more than one insurer.³⁰ Where the insurance agents are affiliated with multiple insurers, they will be able to offer a wider range of products to clients.

In Japan, it is not prohibited for an insurance agent to conduct non-insurance business.³¹ In fact, more than 80% of insurance agents are selling insurance in addition to other business activities.³² This means that a company doing various businesses is also allowed to become the agent of an insurance company. It is common for a car-selling company to act as an insurance agent, and its sales persons sell motor insurance when they sell a car. Car repairers, real estate agencies, travel agencies, pet shops and banks³³ are in many cases entrusted to sell insurance products to their clients. In addition, it is common for a large company to own a subsidiary company doing various incidental businesses, and the subsidiary also acts as the insurance agent in arranging insurance for their associated group of companies, for their employees and for others.³⁴

28 As to the number of agents, the proportion of corporate agents is 53.9% (108,997 agents), while individual agents measured at 46.1% (93,151 agents) as of the end of fiscal year 2015 based on GIAJ statistics (*supra* note 27).

29 There is no legal restriction under the IBA. It is up to the agent and insurer whether the insurer entrusts insurance business to an agent doing business with other insurers.

30 The proportion of insurance agents affiliated with only one insurance company is 75.8% (153,236 agents), while the proportion of agents affiliated with more is 24.2% (48,912 agents). Statistics are from the end of the 2015 fiscal year from the GIAJ (*supra* note 27). It must be noted that the former figure consisted mostly of individual insurance agents. In the case of corporate insurance agents, it is common that they are affiliated with more than one insurance company.

31 The IBA does not contain any provision prohibiting a non-life insurance agent from doing non-insurance business. In practice, an insurance company will examine the suitability of the company as an insurance agent since the insurance company is liable for the negligence of an agent.

32 According to the GIAJ's end of fiscal year 2017 statistics, the proportion of insurance agents doing solely insurance agent business is 19.0% (38,407 agents), while the number selling insurance as a subsidiary business is 81.0% (163,741 agents).

33 In the past, banks were not allowed to sell insurance. As of 2001, the prohibition has been lifted with an incremental widening of the range of insurance products which banks are allowed to handle.

34 By this method, a subsidiary company earns commissions for arranging the insurance of groups of companies. The IBA restricts the magnitude of such dealings to a certain percentage of the subsidiary's agency business.

In recent years, a new type of insurance agent, called a “*Raiten-gata shop*” (agent waiting client’s visit),³⁵ has been expanding its business. This type of insurance agent is a specialist company for insurance business targeting sales to consumers; it opens many shops at convenient places such as at the city center or near the railway station and welcomes clients visiting for an insurance consultation.³⁶ This type of insurance agent is affiliated with many insurance companies and finds a product which matches the needs of the client.³⁷ This type of agent handles both non-life and life insurance.

In total, as of the end of 2015 fiscal year there were 202,148 non-life insurance agents and 2,059,743 people registered to sell non-life insurance products.³⁸

The broad spread of the agency system will be recognized as one of the characteristics of the non-life insurance market in Japan. A large number of agents affords clients easy access to insurance. On other hand, it becomes vital to regulate the conducts of various sellers in the market.

The second largest channel for non-life insurance is direct selling by insurance companies. Their market share is 7.8% of all insurance premiums.³⁹ Direct selling has a long history in Japan, whereby a sales representative, an employee of the insurance company, sold insurance directly to clients. In recent years, direct selling by telephone or by internet is also observable. However, the market share has been increasing only at a slow speed despite the penetration of the internet.

Selling through a broker has not been a major channel in Japan. The number of brokers registered in Japan was 46 as of the end of April 2017.⁴⁰ The market share of insurance brokers is only 0.5% of the aggregate value of

35 Traditionally, the office of an insurance agent was not necessarily in the center of town, where the rental price is high.

36 Some insurance agents of this type own hundreds of shops. Unlike the traditional insurance agents who sell insurances by visiting the homes or offices of clients, they do not visit the clients and wait for customers to come to their office for insurance.

37 Legally, they are the agents of the insurance companies, but they operate like insurance brokers. Despite this function, they only owe a duty as the agent of the insurance company, not as that of an insurance broker. The emergence of insurance shops necessitated the rules that are to be observed when comparing insurance products as well as rules on such agents’ duties when selling one insurance product among various insurance products.

38 Based on the GIAJ statistics (*supra* note 27). In recent years, the number of agents has been decreasing, this reflecting the strategy of insurance companies as well as the difficulties in complying with the increasingly detailed regulations.

39 Based on the GIAJ statistics (*supra* note 27).

40 Based on the Report of the Financial Services Agency. Statistics available at: <http://www.fsa.go.jp/menkyo/menkyoj/nakadachi.pdf>.

non-life insurance premiums in Japan.⁴¹ Before the enactment of the IBA 1995, insurance brokers were not allowed to do business in Japan. After the implementation of the IBA 1995, a substantial number of brokers registered, but more than half have already disappeared from the market. Some international brokers are active in the international business insurance area, including reinsurance. Reasons for the difficulties in the broker business in Japan are numerous. One major reason may be the fact that an insurance agent affords a function quite similar to that of insurance broker when the agent is entrusted with selling insurances from multiple insurance companies.

b) Life Insurance Market

The major channel for selling life insurances has been sales by the sales representatives or sales persons of life insurance companies.⁴² Sales persons are either employed by the insurance company or affiliated with it.⁴³ They have played an important role in the life insurance market especially since the end of the Second World War.⁴⁴ As of the end of fiscal year 2014, the number of registered sales persons was 228,878.⁴⁵

There are insurance companies in Japan selling life insurance over the internet. The appeal of these sellers is in their relatively lower insurance premiums. However, this type of direct selling has not penetrated the market.

In the past, insurance agents were used mainly in the non-life insurance market. However, after the IBA 1995, which enabled cross-selling of insurance products between a non-life insurance company and a life insurance

41 Based on the GIAJ statistics (*supra* note 27).

42 According to the survey by the Japan Institute of Life Insurance, about 60% of new contracts are concluded through sales persons. The market share of insurance agents is around 14%. The figure includes contracts of certain *Kyōsai*. The provisional results from the fiscal year 2015 survey are available at: http://www.jili.or.jp/press/2015/pdf/h27_zenkoku.pdf.

43 Sellers of life insurance companies were not allowed to sell life insurances of other life insurance companies. This has contributed to sales by the employees of various life insurance companies.

44 Life insurance companies employed many housewives who lost their spouse in the war. Salesladies cultivated the market by selling life insurances, especially insurance featuring large saving elements, to their friends, relatives, neighbours and so on. Sometimes their sales were criticized by academics as “GNP sales”, standing for *giri*, *ninjō* and present, meaning sales relying heavily on personal relationships with some small gift included. However, it must be understood that the main users of life insurance are consumers, and consumers have preferred personal relationships and trust when entering into a life insurance contract.

45 THE LIFE INSURANCE ASSOCIATION OF JAPAN, Life Insurance Fact Book 2016. For an English version of the Fact Book see <http://www.seiho.or.jp/english/statistics/trend/>.

company, insurance agents are becoming an important channel also for the sale of life insurances. After the IBA 1995, non-life insurers entered into the life insurance market by establishing life insurance subsidiaries; the life insurance subsidiaries, in turn, entrusted life insurance solicitation to the insurance agents with whom their parent non-life insurance company already had a business relationship. In addition, many banks became the agents of insurance companies and began to sell life insurance products to their clients. In recent years, a new type of insurance agent called a “*Raiten-gata shop*” has emerged (as described above) and is expanding its business similarly as in the non-life insurance market. Life insurance agents are classified either as an individual or a company. As of the end of fiscal year 2015, the number of individual life insurance agents was 57,786, while the number of companies doing agency business was 35,199.⁴⁶ The number of sales representatives registered to sell life insurance was 999,218 as of the end of fiscal year 2015.⁴⁷

c) Small Amount and Short-term Insurance

The IBA 1995 introduced a new legal framework for the relatively small insurance business that had been conducted in the past by many mutual societies, some being without adequate supervision. After the IBA 1995, businesses not named an insurance business but which nevertheless (i) could be regarded as a commercial insurance business in substance and (ii) were conducting insurance business at a certain scale became illegal, unless the activities were being conducted based on a specific law.⁴⁸ On the other hand, the IBA provided a new legal framework for businesses dealing with small and short-term insurances only.⁴⁹ For this category of business a licence based on the IBA is not necessary. A provider is allowed to do business by registering with the FSA.⁵⁰ As of the end of September, 2016, the number of registered sales persons was 176,206.⁵¹

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ There are a number of cooperatives, normally called *Kyōsai*. For example, the Japan Agricultural Cooperatives is established based on the Agricultural Cooperatives Act (Act No. 132 of 1947).

⁴⁹ The insured amount needs to be less than Japanese yen 10,000,000, and the insurance period needs to be less than one year.

⁵⁰ The number of companies was 89 as of 13 June 2017. Statistics available at: <http://www.fsa.go.jp/menkyo/menkyoj/shougaku.html>.

⁵¹ Based on the report of the Small Amount & Short-term Insurance Association of Japan. <http://www.shougakutanki.jp/general/info/2016/news2016120802.pdf>.

2. *Legal Position of Insurance Intermediaries*

Knowledge of the legal position of intermediaries under Japanese law is also necessary to understand the revision of the IBA.

a) *Insurance Agents*

An insurance agent means a person (or a company) delegated by an insurance company who acts as an agent or intermediary for the conclusion of insurance contracts on behalf of the company, and who is not an officer or employee of the insurance company.⁵² An insurance agent is regarded as a commercial agent under the Company Act.⁵³ The IBA lays down detailed rules on the registration and operation of insurance agents. The actual scope of business that an insurance agent is permitted to do is stated in an agency agreement between the agent and the insurance company. Normally, insurance agents are given authority to conclude a non-life insurance contract. However, they are not given authority to conclude a life insurance contract. Life insurers normally conclude life insurance contracts after obtaining approval from their medical experts.

An insurance agent is liable to policyholders or other persons in tort,⁵⁴ for a breach of contract⁵⁵ and for a breach of duty under the Act on Sales, etc. of Financial Instruments 2000⁵⁶ as well as under other laws. Where insurance agents cause loss and/or damage to the policyholder and/or any relating party through their insurance solicitation and are liable for it, the insurance company which entrusted insurance business to the agents is also liable to the policyholder by virtue of the IBA.⁵⁷ The insurance company is relieved from this liability if the insurance company proves that it used due care in appointing the agents and made reasonable efforts in relation to the insurance solicitation to prevent the damage to the policyholder.⁵⁸ Meeting this burden of proof is in most cases difficult for the insurer.⁵⁹ When the

52 Art. 2 (21) IBA.

53 Article 16 Company Act (Law No. 86 of 2005) defines a commercial agent as a person who acts on behalf of a company as an agent or an intermediary in any transaction in the ordinary line of business of the company, and who is not an employee of the company.

54 Art. 709 Civil Code.

55 Art. 415 Civil Code.

56 Law No. 101 of 2000, Article 5.

57 Art. 283 (1) IBA.

58 Art. 283 (2) IBA.

59 The IBA requires insurance companies to ensure that the agent solicits insurance business in a sound manner, and companies are required to monitor the activities of agents (IBA 100-2). This means that any misconduct by the insurance agent can be deemed a breach of a duty owed by the insurance company.

insurance company compensates the loss of the policyholder or other insured parties, it is allowed to exercise its right to obtain reimbursement from the insurance agent.⁶⁰ This legal relation between the insurance company and its insurance agent is similar to the liability system of an employer for the conduct of its employees. This legal position was created in the IBA to protect the policyholders and any related parties.

It should be understood that insurance companies in Japan are allowed to entrust agency business widely, even to a person or a company doing non-insurance business. However, it must also be noted that insurance companies are liable for the conduct of their agents.

b) Insurance Brokers

An insurance broker is defined as a person who acts as an intermediary for the conclusion of an insurance contract in a manner other than the intermediation carried out by life insurance agents, non-life insurance representatives, and small amount and short-term insurance agents on behalf of their affiliated insurance companies or small amount and short-term insurance company.⁶¹ The IBA provides detailed regulations on the registration as well as the operation of the insurance broker business.

An insurance broker falls within the legal concept of a broker under the Commercial Code, which provides that the term 'broker' means a person who engages in the business of acting as an intermediary for a commercial transaction between other parties.⁶² Insurance brokers act as an intermediary for their clients, i.e. for policyholders, and are not agents of the insurance company. Legally, the brokerage fee, i.e. the remuneration paid to the brokers for their services, needs to be paid by the client who asked for the broker's services. However, for insurance brokers, the brokerage is paid by the insurance company.

Although the insurance company pays the brokerage on behalf of the policyholder, is not liable for the conduct of an insurance broker since the broker is not an agent of the insurance company. The IBA requires insurance brokers to possess a minimum-security fund or have adequate liability insurance cover to meet their potential liability to policyholders or other insured parties.⁶³ An insurance broker is not allowed to become an insurance company or its agent.⁶⁴

60 Art. 283 (4) IBA.

61 Art. 2 (25) IBA.

62 Art. 543 Commercial Code.

63 The requirement of security was lightened to some extent by the 2014 revision of the IBA.

64 Art. 289 (1) 7 IBA.

The IBA imposes various duties on insurance brokers. As a general duty, the IBA provides that an insurance broker is to act in good faith for the benefit of the customer when acting as an intermediary for the conclusion of an insurance contract.⁶⁵

IV. OBJECTIVES OF THE 2014 REVISION OF THE IBA

I. Necessities

As stated above, the IBA was largely revised in 1995, consolidating two Acts, which changed the market scheme fundamentally. However, it must be admitted that the 1995 revision efforts were devoted mainly to changing the market framework, and most of the issues regarding the behaviour of sellers of insurance were left open for future discussion. In fact, virtually no change was made to the rules of conduct for sellers of insurance.

The IBA 1995 replaced provisions in the Law Concerning Control of Insurance Solicitations 1948 regarding prohibitions pertaining to the solicitation of insurance; inter alia, the 1995 legislation prohibited the making of false statements and prohibited the non-disclosure of material matters.⁶⁶ However, it did not impose these duties on sellers in a comprehensive way.⁶⁷ The duty stated in the IBA 1995 was the duty to provide the names and other particulars of the insurance company entrusted as well as the legal status of the seller.⁶⁸ In the 2000s, the protection of consumers became an increasingly important issue in the sale of insurance. To promote protection of insurance buyers, Article 100-2 was added to the IBA in 1998, which required insurance companies to take measures to ensure sound and appropriate management, such as explaining important particulars of its business to its customers, the appropriate handling of customer information acquired in rela-

65 Art. 299 IBA. This obligation is understood as providing a so-called “duty of giving best advice”.

66 The status was the same prior to the IBA 1995. Article 300 of the IBA prohibits certain conduct pertaining to the conclusion of insurance contract. This rule applies to insurers, agents, brokers and their employees. Article 300 of the IBA enumerates various conduct as illegal, such as falsely informing or failing to disclose any important particulars, encouraging false disclosures or discouraging disclosure, inducing the policyholder or others to apply for a new insurance contract without disclosing disadvantages, communicating a misleading message regarding the features of an insurance contract, making a conclusive statement on a dividend or any other benefit, and so on.

67 Since violation of the prohibition against non-disclosure of material matters or the making of a false statement (Art. 300 (1) 1 IBA) is subject to criminal penalty, it was argued that the application of the article needed to be restrictive, and it was thus difficult to adopt a flexible application of the IBA.

68 Art. 294 IBA.

tion to its business, and the proper execution of any business entrusted to a third party, pursuant to the provisions of the Cabinet Office Ordinance.⁶⁹ The FSA issued detailed guidelines on this requirement.

On the other hand, the revision of the Financial Instruments and Exchange Act 1948 came into force in 2007, which stipulated various prohibitions and duties for the seller of financial services of an investment type. The IBA was revised to impose the same prohibitions and duties for the sale of certain types of insurance products entailing a risk of losing the principal money, such as variable life insurance, variable pensions or insurance in a foreign currency.⁷⁰

In 2005, the FSA established a working group to study duties in the solicitation of insurance, and it set up a working group again in 2012. The working group issued a report in 2013 after 16 meetings.⁷¹ The report became the basis of the IBA revision in 2014. The proposal made by the working party was broader than the actually adopted revision of the duties owed by sellers of insurance.⁷²

As has been described earlier, an insurance company is responsible for the misconduct of an agent in the solicitation of insurance business. Consequently, it was rational to make it a duty of the insurance company to take measures to ensure sound practice by insurance agents and other sellers. However, it was a rather indirect way to regulate the conduct of sellers of insurance. In addition, it became necessary to consider the existence of a new type of independent agents, such as insurance shops. Thus, it became necessary to enhance the standard of management required of insurance agents by their own efforts.

Against this background, it became necessary to revise the IBA in order to detail the duty of sellers in a more comprehensive and direct way.

2. *Reasons that Duties of the Seller Were not Specified in the Insurance Act*

It may appear curious, especially for some European lawyers, that the duties of sellers of insurance at the pre-contractual stage, such as a duty of

69 Art. 53 IBA Enforcement Rules (IBA ER) states more details.

70 Art. 300-2 IBA.

71 Reports of the Working Group can be found at; <http://www.fsa.go.jp/news/24/singi/20130611-2.htm>.

72 In addition to the points explained in this article, the report of the working group proposed (a) the simplification of solicitation papers, (b) clarification of the scope of application of the IBA to various selling processes, and (c) relaxation of the restrictions on the broker system. As to (a), the insurance industry responded so as to simplify the documents. Regarding (b) and (c), the IBA was amended based on the proposal of the working group.

providing information and a duty of explanation, are not contained in the Insurance Act. However, it should be recalled that duties of the seller to the buyer may well be stated in the contract law as well.

In the process of drafting the Insurance Act, it was examined and discussed whether or not to specify in the Act duties of the insurer to provide information and to explain the insurance contract.⁷³ However, it was decided not to make any such provisions. It was thought that the duty is better described in the IBA and related ordinances, reflecting on the nature of insurance. In addition, it was thought to be easier to revise the IBA consistent with a change of circumstances, while the Insurance Act is a basic Act which is expected to stand for a longer period without revision.⁷⁴

3. *Main Areas of the 2014 Revision*

From the background shown above, it became necessary to revise the IBA so as to modernize the law and reflect changes in the market situation, including the emergence of a new type of insurance agent, and so as to promote sound solicitation in the market. To achieve this, various duties were introduced into the Act. They may be classified into two groups: (a) a duty in respect of the conduct of the seller in the solicitation process and (b) a duty in respect of the management of sellers, including insurance agents. This paper considers these two groups separately in Sections V. and VI.

V. REINFORCEMENT OF THE PRE-CONTRACTUAL INFORMATIONAL DUTIES OF A SELLER OF INSURANCES

1. *Overview*

With regard to the informational duty at the pre-contractual stage, prior to the 2014 revision the IBA prescribed: (a) a prohibition of certain conduct in the solicitation of insurance, (b) a duty to disclose names and other particulars and (c) a special duty for any financial type of insurance (as stated earlier). To set out the informational duty in a more comprehensive manner, the 2014 revision introduced two new duties; (d) a duty of providing information⁷⁵ and (e) a duty of ascertaining a customer's intention.⁷⁶ The newly

73 O. HAGIMOTO (ed.), *Ichimon ittō hoken-hō* [Insurance law – questions and answers] (Tōkyō 2009) 37–38.

74 Professor Kobayashi outlines various difficulties in creating a new article on the duty of explanation in the Insurance Act. See M. KOBAYASHI, *Hoken keiyaku-hō no gendai-ka to hoken boshū ni okeru jōhō teikyō kisei* [Modernization of Insurance Contract Law and the Regulation of Disclosure during the Solicitation of Insurance] *Journal of Insurance Science* 599 (2007) 97.

75 Art. 294 IBA, Art. 227-2 IBA ER.

added duties of (d) and (e) are duties that are more general in nature and are applicable to the solicitation of any insurance.⁷⁷

2. *Duty of Providing Information*

First is the duty of providing information. Article 294 (1) IBA makes it a duty for an insurer, agent, broker, etc. to provide policyholders or other insured parties with information on the contents of insurance contracts and any other information that should serve as reference for them in concluding an insurance contract, pursuant to the provisions of the Cabinet Office Ordinance.

The IBA Enforcement Rules (IBA ER) provide that the above-described provision of information stated in the IBA should be completed by (a) delivering a document containing information on the important items⁷⁸ and (b) explaining items necessary for the policyholder or the insured to decide whether or not to enter into an insurance contract.⁷⁹ As to the contents of the document, the IBA ER enumerates 16 items as well as any other items necessary for the policyholder or the insured to understand the contents of the insurance product.⁸⁰ The information necessary may be classified into three types:⁸¹ (a) outlines of the insurance contract which are necessary for policyholders to understand the insurance contract, such as the basic structure of the product, conditions of insurance payment, any additional cover that may be added, the period of insurance cover, and matters on the premium, amount of insurance payment and benefit; (b) information to alert the policyholders, such as the duty of disclosure, the starting time for insurance cover, major exclusions, cancellation and return of premiums; and (c) other important information, such as the name of the ADR organization responsible for disputes and services incidental to insurance. In addition, the FSA has issued detailed guidelines on this duty.⁸² With regard to non-life busi-

76 Art. 294-2 IBA, Art. 227-6 IBA ER.

77 Under Article 300 (1) IBA, violation of the prohibition against failing to explain material facts constitutes a criminal offense. To avoid any broader interpretation of it, Article 300 (1) was revised in 2014 and now specifically refers to “the important matters contained in the provisions of an insurance contract prescribed in that item which would affect the determination of the policyholder or the insured”. Because the violation of this article constitutes a criminal offence, the scope of application is much narrower than the general duty under Articles 294 and 294-2 IBA.

78 Art. 227-2 (3) IBA ER.

79 Art. 227-2 (4) IBA ER.

80 Art. 227-2 (3) IBA ER.

81 This classification is also used by the FSA to explain the seller’s duty (see ISHIDA, *supra* note 1, 79). The IBA ER does not classify items.

82 Art. II-4-2 Comprehensive Guidelines for the Supervision of Insurance Companies (CGISIC) (Revised in May 2015).

ness insurance,⁸³ personal insurance with a small premium of less than 5,000 yen per year, group insurance and alteration of a contract already concluded, any method other than that stated in the Rules is allowed if it serves to facilitate the understanding of the policyholder or the insured.⁸⁴

An additional duty is imposed on insurance agents entrusted with agency business by more than one insurance company.⁸⁵ When these insurance agents recommend an insurance product of a certain insurance company among the various products of different insurance companies that they handle, the insurance agents must provide their customers with information on alternative products so that the customers may understand them; furthermore the agents must explain how and why they chose such a product.⁸⁶

For insurance having a benefit that varies with market fluctuations, the IBA ER include a special rule regarding the provision of information and necessary explanations.⁸⁷

In addition, the IBA ER provides a rule for when a contract is concluded over the internet.⁸⁸ In general, a seller is allowed to provide information and explanation by way of the internet if the policyholder or the insured has agreed with this procedure beforehand.

3. *Duty of Ascertaining Customer's Intention*

When concluding an insurance contract, Article 294-2 IBA makes it a duty for the insurance company, agent, broker, etc. to (a) ascertain the customer's intention, (b) propose the conclusion of an insurance contract in line with such intention, (c) explain the contents of the relevant insurance contract to the customer, and (d) provide the customer with the opportunity to confirm that the customer's intention at the time of the conclusion of an insurance contract is in accord with the contents of the relevant insurance contract.⁸⁹ This duty is not applicable to insurance on a business risk or compulsory insurance or other types of insurance specified in the IBA ER.⁹⁰ This duty is a general duty in principle, and it is up to the seller how it

83 This refers to insurance for business enterprises regarding risks from their business activities.

84 Art. 227-2 (3) 3 IBA ER.

85 An insurance shop is the typical example of this type of insurance agent.

86 Art. 294 IBA, Art. 227-2 (3) 4 IBA ER.

87 Art. 227-2 (3) 6 IBA ER.

88 Art. 227-2 (4) IBA ER.

89 These rules are not entirely new to the insurance market. CGISIC demanded the use of documents to confirm the intention of the client. However, there was the criticism that this had not brought the expected effects.

90 Art. 227-2 (3) 3 IBA ER.

performs the duty. Nevertheless, the FSA sets out in its Guidelines detailed procedures that are necessary to fulfil this legal obligation.⁹¹

It must be noted that this duty is not a duty of giving advice. Sellers are not required to go beyond the intention of the client and offer advice suitable for the client. On the other hand, an insurance broker has a duty to act in good faith for the benefit of the customer in acting as an intermediary for the conclusion of an insurance contract,⁹² this being in addition to the duty stated in Article 294-2.

4. *Sanctions*

Breach of the prohibition stated in Article 300 (1) IBA as to non-disclosure or false statements regarding material matters carries a criminal penalty of prison or its equivalent.⁹³ Conversely, breach of the two duties introduced into the IBA in the 2014 revision, as stated above, does not carry any criminal penalty, instead being subject only to administrative sanctions. The FSA is given the power to impose administrative sanctions against insurance companies, agents, brokers or any other party engaged in insurance business for a breach of the duty under the IBA depending on the seriousness of the breach. Examples of the sanctions include: an order to investigate the situation and submit a report on it, an order to improve the business transactions, an order to stop operation of a certain business for a certain period of time, an order to change the director or any other management person(s) and an order withholding a licence for insurance business or insurance solicitation.

5. *Other Legislation Applicable to Insurance Solicitation*

The IBA is now the main law which regulates the duty of the seller at the stage of contracting insurance. However, there exist other Acts which also apply to the sale of certain types of insurance. The scope of application, terminology, duties and sanctions are not identical among them.

The Act on Sales, etc. of Financial Instruments⁹⁴ applies to a wide range of financial instruments including insurance. Under this Act, sellers must explain certain risks specified in the Act as “important matters” to their customers at or before the time of sale. Failure to comply allows the customer to file a claim for damages. The amount of damage is presumed to be the loss

91 Art. II-4-2-2 (3) CGISIC. The provision details both the method to be used and the subjects that need to be confirmed.

92 Art. 299 IBA.

93 Arts. 315, 317-2 IBA.

94 Law No. 101 of 2000.

of principal incurred by the customer. While the Act applies to a wide range of financial products, matters necessary for explanation are limited.

As to consumer insurance, the Consumer Contract Act⁹⁵ also applies. The Act allows consumers⁹⁶ to avoid acceptance of a contractual offer where the consumer experienced a misunderstanding as related to certain situations specified in the Act.

6. Relationship with the Duty of Good Faith under the Civil Code

Apart from the duty imposed by the IBA and other Acts, there is a duty of good faith under the Civil Code, which is the general mandatory rule applied to any contract.⁹⁷ The Civil Code does not prescribe any duty of providing information or a duty of explanation at the time of making a contract. However, where it has been determined that a serious asymmetry of information created a duty of explanation on the part of the seller based on the duty of good faith, judges have issued decisions allowing buyers of financial products to claim damages in tort.⁹⁸

While the breach of a duty under the IBA by the seller does not in itself create a legal right for the policyholder or the insured to claim damages against the insurance company, agent, or broker, the fact of the breach may be used in certain situations as evidence of the failure to fulfil the duty of good faith under the Civil Code.⁹⁹ In this writer's view, the new legal regime for sellers of insurance under the revised IBA equates to an increased level of due care in the solicitation process. This change may affect the standard for judging the liability of a seller under the Civil Code.

VI. DUTY OF CREATING A MANAGEMENT SYSTEM TO SECURE A SOUND INSURANCE SOLICITATION PRACTICE

1. Background

Prior to the 2014 revision, the IBA made it a duty for an insurance company to take measures to ensure that the solicitation of insurance occurs in a sound and appropriate manner, as stated earlier. Because of the emergence

95 Law No. 61 of 2000.

96 The Consumer Contract Act defines a consumer as an individual, except where the individual becomes a party to a contract as a business enterprise or for the purposes of business enterprise (Article 2 (1)).

97 Article 1 (2) states that the exercise of rights and the performance of duties must be done in good faith.

98 Tort law is provided in Articles 709 et seq. Civil Code.

99 The decision on liability in tort is judged based on the facts. The violation of regulatory law will not necessarily incur civil liability.

of new types of insurance agents on a large scale and to urge insurance agents to make an effort, the duty to create a management system was extended to insurance agents and brokers by the 2014 revision.¹⁰⁰

2. *Duties Imposed on Insurance Agents and Insurance Brokers*

The duty imposed on agents and brokers is in general identical to the duties imposed on insurance companies aiming to ensure sound practice in the area of insurance solicitations, such as an explanation of important matters to customers, an appropriate handling of customer's information, and proper execution of any business entrusted to a third party.¹⁰¹ Such a management system must be created based on the size and character of the intermediaries.¹⁰² The FSA lists necessary items, such as creating internal rules, educating the relevant actors as to their contents and the supervision of business entrusted to third parties;¹⁰³ furthermore, the FSA has declared that it will supervise and monitor large insurance agents directly.¹⁰⁴

In addition, with its 2014 revision the IBA imposed an additional duty on insurance agents who are affiliated with more than one insurance company and who will make a recommendation to a client for a certain product. These agents are obliged to create a management system ensuring a proper comparison of insurance products.¹⁰⁵ The IBA ER also imposes a duty in situations where an insurance agent adopts a franchise method.¹⁰⁶

It must also be noted that the IBA requires certain insurance agents (limited to large-sized agents as defined by the Cabinet Office Ordinance¹⁰⁷) and insurance brokers to keep books and documents on their insurance business¹⁰⁸ and preserve them for five years after the conclusion of contracts;¹⁰⁹ they must also prepare a business report and submit it to the office of the Prime Minister¹¹⁰ within three months of the end of the previous business year.¹¹¹ This helps the FSA to more closely monitor the condition

100 Art. 294-3 IBA.

101 Art. 294-3 IBA, Arts. 227-7 ~ 227-15 IBA ER.

102 Art. 227-7 IBA ER, Art. II-4-2-9 CGISIC.

103 Art. 227-7 IBA ER, Art. II-4-2-9 (1) (2) CGISIC, Art. 217-11 IBA ER.

104 Specifically, this applies in instances where an agent is affiliated with more than 15 insurance companies for general insurance or life insurance or receives insurance premiums totaling more than one billion yen per year.

105 Art. 294-3 IBA, Art. 227-14 IBA ER.

106 Art. 227-15 IBA ER.

107 Art. 236 IBA ER.

108 Art. 303 IBA.

109 Art. 237 IBA ER.

110 The task is delegated to the local administrative office. Art. 237 IBA ER.

111 Art. 304 IBA.

of large-sized insurance agents and insurance brokers. In addition, the FSA's rights to demand reporting and to inspect insurance agents and insurance brokers were further extended to cover parties to which the insurance agent or insurance broker deals with or entrusts business.¹¹²

3. *Sanctions for Breach*

The kinds of sanctions for a breach of duty are in general the same as those imposed for a breach of the duty to provide information and not make misleading statements. The FSA has the power to order various sanctions against insurance agents and insurance brokers.

VII. ANALYSIS OF THE REVISION

1. *Japanese Approach to the Informational Duty*

Insurance is a complicated contract and typically there exists an asymmetry of information between the seller and the buyer. This situation justifies the enactment of laws regulating the conduct of sellers. The approach taken by Japanese law may be explained and characterized as follows.¹¹³

a) *Combination of Regulatory Law and General Contract Law*

Since insurance is a contract, one method is to regulate insurance practice by using the law governing insurance contracts. However, the Japanese did not choose this approach and did not include any provision on the informational duty of sellers of insurance into the Insurance Act, this despite there having been a good chance to do so when they made a new law on insurance contracts. This means that the Japanese took the approach that the conduct of a seller of insurance is governed by regulatory law while the rights of the policyholder or other insured parties are governed by the general civil law. There are, in this writer's view, certain advantages in this approach.¹¹⁴ First, regulatory law on the conduct of sellers operates to prevent malpractice in advance and fosters better practice. Secondly, regulatory law has the advantage that it can prescribe detailed rules easily, and it is also easy to alter the law in a timely manner reflecting changes on the market. In addition, it is also easy to adjust rules to coincide with the develop-

112 Art. 305 IBA. This is because insurance business is increasingly entrusted to third parties.

113 The following analysis is by the writer of this article.

114 It would have been possible to provide for the duty both in the Insurance Act and the IBA. However, in such a case it would become difficult to make clear the relationship or the differences between two duties in the different Acts.

ment of other laws on financial services. Thirdly, regulatory law affords various sanctions to control the conduct of sellers. Sanctions imposed by supervisory bodies force players in the market to change their conduct and management practice directly or indirectly.

Conversely, this approach has weakness as well. The first is the relationship between regulatory law and private law. A breach of a duty under the IBA does not in itself create legal liability. The liability for damages needs to be determined under the duty of good faith as found in the Civil Code. It is not clear how the breach of a duty under the IBA affects the legal liability of the seller to the policyholder and/or the insured. The second weakness is the extent of the duty under a contract for insurance. The Insurance Act does not create any specific informational duty for the insurer in a contract of insurance. Therefore, it is not clear whether there exists any difference in the level of the duty in connection with the making of an insurance contract as opposed to the general standard of a duty of good faith as found in the Civil Code.

b) Combination of the Duty Regarding the Behavior of the Seller and the Corporate Duty of Establishing Proper Management

The revised IBA introduced a rule which requires sellers of insurance to establish a management practice ensuring the sound solicitation of insurance, protection of personal information, and so on. This duty had already been introduced for insurance companies by the IBA in its earlier form and now the duty was extended to intermediaries such as insurance agents and insurance brokers.

This approach has certain merits. To promote better conduct in the market, it is not enough to regulate individual conduct. The management duty will be effective in promoting good market practice. Secondly, it also has an advantage in that it will be easier for the FSA to make an order against sellers based on this duty. The FSA will be authorized to investigate sellers to determine their management practice. Thirdly, the duty of management can be flexible. The contents and level of the duty may vary depending on the size and nature of the seller.

These advantages can also be disadvantages. The duty regarding the management system is too general and vague. There is the possibility that the FSA will obtain a wider power, allowing it to interfere with the operation of private companies. In addition, it is not easy to foresee the required level of management demanded of agents and brokers. To increase foreseeability, regulators are creating detailed lists of their expectations in the guidelines, and agents and brokers will rely on them and spend time and money so that they can prove with evidence that they have followed the

guidelines and are inside the “safe harbour”. Such conduct might increase procedural activities and increase administrative expenses for business.

c) Combination of Legal Duty and Soft Law

The third characteristic stems from regulatory law. The FSA has issued very detailed guidelines to be observed in respect of solicitation.¹¹⁵ This approach has the advantage that sellers will better understand how they are to conduct business so as to avoid sanctions by the FSA. Soft law may work as a safe harbor rule. On the other hand, very detailed guidelines may weaken the creativity of market players. In addition, too much reliance on soft law may not be desirable because a supervisory body is able to create rules of a substantive nature without going through the law-making process.

2. Evaluation: How do the New Rules Affect the Insurance Business?

It is too early to make any evaluation of the 2014 revision because it became effective only from the end of May 2016. However, it may be possible to make some general comments on the effect of the revision.

The first is in respect of the duty of providing information and explanation. Clearly, the revision has enhanced the duty of explanation by stipulating detailed rules. The new rule will foster a better degree of communication between the parties to the insurance contract as to the contents of the contract. In addition, the detailed guidelines on procedures will change the behavior of sellers. The guidelines will operate to prevent problems beforehand. On the other hand, it is also clear that the rules require more procedures and the preservation of evidence in connection with solicitation activities.¹¹⁶ The purpose of the 2014 revision was to promote the protection of the users of insurance. Ironically, because of the enhanced rules on the procedures, sellers will also be more protected against a claim from the policyholder or the insured, at least in a legal sense if they follow the method set down in the IBA ER and the guidelines of the FSA.¹¹⁷ As a result of the enhanced procedures, the conclusion of an insurance contract will incur

115 CGISIC details the guidelines on solicitation from p. 124 to p. 175, amounting to a total of 51 pages. The volume of the guidelines indicates the degree of detail with which they are formulated. In addition, the FSA published its manuals for the inspection of insurance companies, insurance agents etc. They are also very detailed.

116 In fact, CGISIC states a duty of taking appropriate measures that will enable sellers to show they have properly fulfilled their duties, e.g. satisfying the intentions of the client (Art. II-4-2-2 (3) (4)). This means the preservation of documents or data is necessary.

117 Unlike the IBA and the IBA ER, guidelines are not law and are not legally binding. However, they may work as safe harbor rules for the sellers.

greater costs. It must be born in mind that transaction costs associated with making a contract accrue to every single contract and increase the amount of premiums.

The second general comment relates to the duty of establishing proper management. It is hoped that the revision will lead insurance intermediaries to be more independent and more responsible for their conduct. No one will deny the importance of management, because this is something that should of course be done in any organization. However, in the writer's view, this sort of legislation carries a possibility of bringing an adverse effect as well. The concept of proper management is vague. It is not easy for an organization to prove the fitness or properness of its management. Therefore, organizations will rely on the guidelines to be inside a "safer harbor", and they will spend time and money so that they can prove with evidence that they are complying with the law and the guidelines of regulators. Since it is extremely difficult to prove the properness of the management system in substance, companies may spend time and money primarily on the visible efforts, such as establishing a special organization, manuals, education by way of lectures and other means, and engaging in frequent auditing processes. Without a doubt, these activities are important. However, it must be borne in mind that the importance lies in whether the management system operates to elevate the level of sellers effectively. In the writer's view, the properness of management should be judged primarily by the actual quality of the solicitation resulting from management measures, whether they follow the guidelines or not. And ideally, the quality of solicitation should be judged by the clients, namely, by the market.

In any event, regulators need to observe whether the quality of solicitation improves in the market.

VIII. CONCLUSION

It is expected that the new law will enhance the protection of consumers. Detailed procedures will also protect sellers if they follow them. However, such regulations may have the pitfall that they hamper the creativity of business methods and increase the complexity of the solicitation process and the associated paperwork. Management duties might lead companies to pursue a safe harbour approach and devote their efforts to comportsing with formalities. It is important for regulators to watch the conduct of the relevant players closely and judge whether the new regime is enhancing the quality of solicitation in the market substantially.

The key issue may lie in the character of the Japanese insurance market, where too many people are engaged in insurance solicitation. Some can have less expertise. It is necessary to enhance sellers' knowledge and skills

as professionals in the insurance business. The attitude of consumers is also important. It is necessary to create a market where consumers can judge whether the insurance is fit for their needs based on information provided by the seller.

In the long run, education regarding the insurance business for both sellers and buyers of insurance will be the most important and most effective method for developing a sound market since many of the disputes between the parties arise from misunderstandings surrounding the insurance contract.

SUMMARY

In Japan, there are two major Acts on insurance. One is the Insurance Act, enacted in 2008 as the basic law governing insurance contracts. The other is the Insurance Business Act (IBA), which regulates insurance business. The IBA was first enacted in 1900 and was fundamentally revised in 1939. It has served as a framework for the system of insurance business in Japan. Amid the trends of deregulation and internationalization, the IBA was largely revised in 1995 by consolidating three Acts. However, the law regarding the duties of sellers was only minimally revised from its formulation of 1939. To cope with the need to protect consumers, the Financial Services Agency (FSA) strengthened supervision of insurance companies by using “soft law”. The IBA did not specify the duties of sellers in a comprehensive way.

The large number of sellers as well as a variety of sellers in terms of size, expertise and business method may be regarded as the characteristics of the Japanese distribution situation. The number of individuals selling insurance totals more than two million for non-life insurance and one million for life insurance. For general insurance, more than 90% of all insurance premiums are attributable to sales by insurance agents. There are various agents, ranging in form from individuals to large companies. Insurance brokers are active in only a limited area. For life insurance, insurance representatives employed by life insurance companies have been the major channel. However, sales by insurance agents including banks have been increasing since the IBA 1995. In recent years, a new type of insurance agent called a “Raiten-gata shop”, which sells insurance by comparing products of various insurance companies, has been expanding its business both for life and non-life insurance. The emergence of new types of agents necessitated a revision of the IBA.

The IBA was revised in 2014 to reflect the changes in the market and to state the duties in a comprehensive manner. With the 2014 revision, the seller was assigned the duty of providing necessary information on the insurance product, ascertaining the intention of the client, providing insurance in accordance with

the clients' intention and confirming with clients whether the insurance product in question corresponds to this intention. In addition, insurance agents and brokers are required by the IBA to establish a proper management system so as to ensure sound solicitation. The right of the FSA to monitor and inspect intermediaries and their related parties was also enlarged. The FSA has set down very detailed guidelines for the new duties.

This new duty regarding the solicitation process requires a certain procedure to be followed in making an insurance contract, including the preservation of evidence. It is expected that the new rule will facilitate communications between sellers and buyers of insurance and avoid misunderstandings. On the other hand, too much control and overly detailed procedures for making a contract may hamper creativity in the market and increase premiums as a result of the higher costs associated with the conclusion of a contract. As to the duty of management, sellers might increase procedural formalities in the management system. Bearing these adverse effects in mind, regulators need to monitor the level of solicitation closely to determine if the new rules are yielding the expected effect.

ZUSAMMENFASSUNG

In Japan gibt es zwei wichtige Gesetze zum Versicherungsrecht: Einerseits das Versicherungsgesetz, welches im Jahre 2008 zur grundlegenden Regelung von Versicherungsverträgen erlassen wurde; andererseits das Versicherungsgewerbe-gesetz (Englisch: Insurance Business Act, IBA), welches das Versicherungsgewerbe reguliert. Das IBA wurde im Jahre 1900 erlassen und 1939 grundlegend reformiert. Es hat den Rahmen für die Systematisierung des Versicherungsgewerbes in Japan geschaffen. Im Zuge des Trends zur Deregulierung und Internationalisierung wurde das IBA 1995 durch die Konsolidierung von drei Gesetzen stark überarbeitet, wobei die Regulierung der Pflichten von Verkäufern nur minimal abgeändert wurde. Aufgrund der Notwendigkeit eines stärkeren Verbraucherschutzes hat das Aufsichtsamt für Finanzdienstleistungen (Englisch: Financial Services Agency, FSA) die Überwachung von Versicherungsgesellschaften durch die Anwendung von „soft law“ verstärkt, da das IBA keine umfassenden Angaben zu den Pflichten von Verkäufern machte.

Die beträchtliche Anzahl an Versicherungsverkäufern, so wie auch ihre Verschiedenartigkeit aufgrund von Größe, Expertise und Geschäftsmethoden kann als Charakteristikum der Situation in Japan angesehen werden. Die Anzahl von individuellen Versicherungsverkäufern beläuft sich auf über zwei Millionen für Schadensversicherungen und eine Million für Lebensversicherungen. Bei allgemeinen Versicherungen werden über 90 % der Versicherungsbeiträge aus Verkäufen durch Versicherungsvertreter generiert, die es in vielfältigsten Formen von Einzelpersonen bis hin zu Großkonzernen gibt. Versicherungsmakler

sind dagegen nur in begrenzten Bereichen aktiv. Bei Lebensversicherungen stellen bei den Lebensversicherungsgesellschaften angestellte Versicherungsvertreter den hauptsächlichen Verkaufskanal dar, wobei die Verkaufszahlen durch Versicherungsvertreter, einschließlich Banken, seit der Reform des IBA von 1995 zugenommen haben. In den letzten Jahren hat eine neue Art von Vertretern – sog. „Raiten-gata Läden“, die Versicherungen durch den Vergleich von Angeboten verschiedener Gesellschaften verkaufen – ihr Geschäft sowohl in den Bereich der Schadensversicherungen als auch Lebensversicherungen stetig ausgeweitet. Die Verbreitung dieser neuen Vertreter machte eine Reform des IBA notwendig.

Das IBA wurde 2014 novelliert, einerseits um den Veränderungen im Markt angepasst zu werden, andererseits um eine umfassende Darstellung der Pflichten von Verkäufern aufzunehmen. Durch die Reform von 2014 werden Verkäufern folgende Pflichten auferlegt: Die Bereitstellung aller erforderlichen Informationen über das Versicherungsprodukt; die Feststellung der Kundenwünsche; das Angebot einer mit diesem Kundenwunsch übereinstimmenden Versicherung; sowie die Einholung einer Bestätigung vom Kunden, dass das angebotene Produkt mit dessen Wunsch übereinstimmt. Darüber hinaus müssen Versicherungsvertreter und -makler ein Steuerungssystem errichten, welches eine angemessene Art der Kundenwerbung sicherstellt. Die Berechtigung der FSA zur Überwachung von Vermittlern und damit zusammenhängenden Parteien wurde ausgeweitet, und die FSA hat detaillierte Richtlinien zur Umsetzung dieser neuen Pflichten festgelegt.

Aufgrund der neuen Regelungen in Bezug auf die Kundenwerbung ist für den Vertragsschluss und die Aufbewahrung von Beweisen ein bestimmtes Verfahren einzuhalten. Die neue Regelung soll die Kommunikation zwischen Käufern und Verkäufern fördern und der Entstehung von Missverständnissen vorbeugen. Andererseits könnte eine zu detaillierte Regelung des Vertragsschlusses die Kreativität im Markt hemmen und aufgrund der erhöhten Transaktionskosten zu höheren Prämien führen. Was die Verwaltungspflicht betrifft, so wäre eine Übertreibung verfahrenstechnischer Formalitäten durch Verkäufer denkbar. Diese nachteiligen Auswirkungen müssen bedacht werden, sodass die FSA die Kundenwerbung genau beobachten sollte, um festzustellen, ob die neuen Regelungen das erwünschte Ziel erreichen.

(Die Redaktion)