

## Incontestability Provisions in Insurance Law and Policies

Jing, Z.; Zhong, M.

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## Incontestability provisions in insurance law and policies

Dr Zhen Jing

Dr Ming Zhong\*

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### **\*J.B.L. 253 Abstract**

*The incontestability clause, i.e. "this policy is incontestable after two years from date of issue ...", restricts the insurer to a definite time within which to discover any non-disclosure or misrepresentation made by the insured at the time of the contract, and precludes the insurer from contesting the validity of the contract after the specified period lapses. This article considers the incontestability provision in English and Chinese law, with a comparative analysis of the approaches in some other common law and civil law jurisdictions. It is suggested that an incontestability provision should be introduced to the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) in its future amendment. This article also proposes solutions to the shortcomings in the incontestability provision in Chinese law.*

### **Introduction**

An insurance contract is a contract of utmost good faith.<sup>1</sup> Under this principle the insured must, at the time of the contract, disclose relevant information to the insurer about the subject-matter and the nature of the insurance. Based on the information disclosed by the insured, the insurer can decide whether or not to accept the risk and, if so, on what terms. If the insured is in breach of the duty of disclosure, the insurer may avoid the contract at any time during the insurance period.<sup>2</sup> If there is **\*J.B.L. 254** no time-limit for the insurer to exercise his right of avoidance the insurer may abuse his right. In order to prevent the insurer from abusing the right of avoidance, the doctrine of incontestability has been adopted in law and practice in many jurisdictions.<sup>3</sup>

The incontestability clause in its simplest form provides that: "This policy will be indisputable from any cause (except fraud) after it shall have been continuously in force for two years."<sup>4</sup> It is said that the most basic and important clause in a life insurance policy is the incontestable clause.<sup>5</sup> The purpose of such a clause is to restrict the insurer to a definite period of time within which to discover any non-disclosure or misrepresentation

made by the insured at the time of applying for the insurance and to take appropriate action to rescind the contract, amend the terms of contract, or raise the premium. It prevents the insurer from invoking the defence of non-disclosure or misrepresentation after the specified period of time expires.

The justification for the incontestability clause is that a claim might be denied by the insurer on the ground of non-disclosure or misrepresentation made by the insured in his application many years before death took place, and it might be difficult either to prove or to disprove the truth of the disclosure or representation in question, particularly when the insured would not be available to testify about the application. It is, therefore, desirable that the application, which is the basis of the contract, be finally accepted as correct or rejected within a reasonable period of time after the contract is entered into. The clause protects the insured from having to defend against a possible specious challenge long after acquisition of the policy, and thus the insured's or beneficiaries' expectation and reliance on the existence of the coverage. The clause also encourages the insurer to be diligent to investigate any alleged non-disclosure or misrepresentation within the specified period.

English insurers created the first incontestable (or indisputable) clause in life insurance policies in 1843<sup>6</sup> which was in later years adopted by insurers in many other countries.<sup>7</sup> English rules of law relating to the insured's pre-contract duty of disclosure and representations were first developed in common law in the 18th and 19th centuries and codified in the [Marine Insurance Act 1906](#) (MIA).<sup>8</sup> These rules apply to marine and non-marine insurance on the basis that it embodies the common law.<sup>9</sup> The principle of utmost good faith, non-disclosure and *\*J.B.L. 255* misrepresentation was also adopted in other common law jurisdictions, such as Australia, New Zealand, Hong Kong and the US; and civil jurisdictions, such as China, Macau, Taiwan and Germany. However, all of these jurisdictions have reformed their laws in relation to the insured's pre-contract duty of disclosure and representations and remedies for breach of the duty to be more insured-friendly. One of these reforms was to introduce an incontestability provision in their statutory laws.<sup>10</sup>

The doctrine of incontestability was for the first time introduced into the Chinese Insurance Law in 2009.<sup>11</sup> The insurer is entitled to rescind the contract where the insured breaches his duty of disclosure intentionally or by gross negligence and the undisclosed circumstances are material,<sup>12</sup> but the insurer's right of rescission must be exercised within 30 days after the insurer becomes aware of the cause for rescission or within two years from the time of conclusion of the contract. After these time-limits lapse, the insurer is barred from contesting the validity of the contract on the ground of non-disclosure or misrepresentation.<sup>13</sup> The incontestability provision plays an active role in preventing the insurer from abusing his right of rescinding contracts and in protecting the insured or his beneficiaries, but it is not free from difficulties.

This article considers incontestability provisions in English law and Chinese law, with a comparative analysis of the approaches in some other common law jurisdictions (Australia, New Zealand, Hong Kong and the US) and civil law jurisdictions (Germany, Macau and Taiwan), in order to make a suggestion as to the question whether an incontestability provision should be introduced to the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) (UK) in the future amendment of this Act; to identify and discuss shortcomings in the incontestability provision in the Chinese Insurance Law; and to

propose solutions to these problems.

## **Historical consideration of the incontestability clause in life policies in England**

In the 19th century, life insurers often abused the defence of non-disclosure or breach of warranty by the insured to invalidate life policies.<sup>14</sup> In order to dispel the general public's fear that insurers would refuse to pay insurance benefits under a life insurance policy owing to the insured's non-disclosure, some life insurers voluntarily adopted the incontestability clause in their policies. *\*J.B.L. 256* <sup>15</sup>

The incontestability clause was first used by an English company, the London, Edinburgh and Dublin Life Assurance Company.<sup>16</sup> The company placed a short advertisement in the London Post Office Directory 1843, which said:

"Important improvements have been introduced into the practice of Life Assurance by this company ... This company has rendered their Policies indefeasible and negotiable securities by the following clause in their Deed of Settlement: Clause 78—'That every Policies issued by the Company shall be INDEFEASIBLE AND INDISPUTABLE; and the fact of the issuing the same shall be conclusive evidence of its validity; and it shall not be lawful for the Company to delay payment of the money assured thereby, on the ground of any error, mistake, or omission, however important, made by or on the part of the person or persons effecting the same; and that, on the contrary, the amount receivable under the same shall be paid at the time stipulated by the Policy, to the person entitled thereto, as if no such error, mistake, or omission had been made or discovered, unless the Policy shall have been obtained by fraudulent misrepresentation.'" <sup>17</sup>

Another English company, the London Indisputable Life, which was organised in 1848, had its deed of constitution prohibit it from disputing a policy

"upon any ground whatsoever. All questions as to age, health, habits and other matters deserving of inquiry prior to the contract being entered into, are held as finally settled when the assured received his policy".<sup>18</sup>

The first known case to bestow judicial approval upon incontestable clauses was *Wood v Dwaris* in 1856,<sup>19</sup> in which the insurer's prospectus said that all policies were indisputable except in cases of fraud. The insured was induced to effect the policy in question upon the faith of such representation. Although the declaration made by the insured in the proposal form contained a false and untrue statement, the statement was not fraudulent, and thus the policy was held to be indisputable. In 1858, a similar case, *Wheelton v Hardisty*,<sup>20</sup> was reported.

From the reported cases, the common law position relating to the doctrine of incontestability in life policies in England<sup>21</sup> is that if a life policy is expressed to be incontestable, the life insurer cannot raise any question of non-disclosure, except where the policy was procured by fraud on the part of the contracting party<sup>22</sup>; this is so even if there is no express exception of fraud in the policy.<sup>23</sup> Where the life insurers advertise in their prospectus that their policies are "indisputable", if the insured can prove that he effected a policy on the faith of such a statement in a *\*J.B.L. 257* prospectus,<sup>24</sup> the

insurer is precluded from relying on a breach of a warranty by the insured that his statements were true.<sup>25</sup> An incontestable clause does not preclude the insurer from relying on their common law right to avoid the policy for fraudulent misrepresentation.<sup>26</sup> The words "except in the case of fraud" are sometimes added to the incontestable clause to make this position clear to the insured. Nor does an incontestable clause prevent the insurer from alleging that the policy is void for lack of insurable interest.<sup>27</sup>

English law relating to insureds' duty of disclosure and representations was provided by the [MIA 1906](#). The law imposed a duty on the insured to voluntarily disclose information to the insurer which would "influence the judgment of a prudent insurer" in fixing the premium or deciding whether to take the risk. If the insured failed to perform the duty, the insurer would avoid the contract ab initio and refuse all claims under it. The law was very harsh to the consumer. So the Law Commission and the Scottish Law Commission recommended the creation of a new consumer statute to reset the pre-contract duty of good faith for a consumer insured.<sup>28</sup> Consequently, the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) (CIDRA) was enacted in March 2012.<sup>29</sup>

The law relating to consumers' duty of representation is now provided by [CIDRA](#), which has removed the insureds' duty to volunteer information to the insurer. Instead consumers need only answer the insurer's questions carefully and honestly. The onerous duty to disclose to the insurer "every material circumstance" which the insured "knows or ought to know" has been replaced by the duty "to take reasonable care not to make a misrepresentation to the insurer".<sup>30</sup>

If a consumer breaches this duty and this misrepresentation induces the insurer to enter into the contract, the insurer will have a remedy which depends on the nature of the consumer's misrepresentation and the consumer's state of mind:

- For an honest and reasonable misrepresentation, the insurer must pay the claim. The consumer is expected to exercise the standard of care of a reasonable consumer, taking into account a range of factors including the type of insurance policy and the clarity of the insurer's question.
- For a deliberate or reckless misrepresentation,<sup>31</sup> the insurer is entitled to avoid the contract and refuse all claims. The insurer may also retain the premium unless it would be unfair to do so. *\*J.B.L. 258* <sup>32</sup>
- For a careless misrepresentation, in respect of claim,<sup>33</sup> the insurer's remedies are based on what he would have done if the consumer had complied with the duty to take reasonable care not to make a misrepresentation. If the consumer would not have entered into the contract on any terms, the insurer may avoid the contract and refuse all claims, but must return the premium paid. If the insurer would have entered the contract on different terms, the contract may be taken to include those different terms. If the premium would have been higher, the insurer must reduce proportionately the amount to be paid on a claim.<sup>34</sup>

- For careless misrepresentation, in respect of treatment of contract for the future,[35](#) if the insurer would not have entered into the contract at all, the insurer may avoid the contract and must return the premium. This means that the contract no longer exists, and the insurer may refuse all past and future claims. However, where the insurer would have contracted on different terms or for a higher premium (or both): (1) in non-life insurance, either side is entitled to terminate future cover on reasonable notice; (2) for life insurance, the insurer is not allowed to terminate the contract and must continue the policy either on the existing terms or on amended terms.[36](#)

The [CIDRA](#) has improved the insured's position in respect of pre-contract duty of disclosure and representation. However, an incontestability provision has not been provided in [CIDRA](#), although the Law Commissions considered the issue of introducing an incontestability provision in consumer life insurance. In the Issues Paper 2006,[37](#) the Law Commissions raised the issue of a cut-off period for life insurance by asking whether in consumer life insurance the insurer should be prevented from relying on any non-fraudulent misrepresentation after the policy has been in force for three years. This question excited considerable comment, and strong arguments were put both for and against the proposal.[38](#) In the Consultation Paper 2007, the Law Commissions proposed to extend the contestability period from three years to five years, considering the fact that many insurers do not conduct a full investigation of past medical records where the life insured's death has taken place more than five years later. This would therefore not add greatly to costs, but would reassure consumers that insurers will not make technical points by dragging through old records many years after the events. *\*J.B.L. 259* [39](#) Responses were again split on the issue whether, in consumer life insurance, insurers should be prevented from relying on a negligent misrepresentation after the policy has been in force for five years. Of the 61 consultees who addressed this issue, 34 were in favour; 24 thought that there should not be a cut-off period; while 3 preferred the shorter period of three years.[40](#) A majority of insurers (including most life insurers) opposed the proposal on the ground that it would lead to more misrepresentation in life policies and would increase costs. Insurers feared the effect of such a rule on consumer behaviour. In the 2009 report, [41](#) the Law Commissions eventually did not recommend that the law should prevent insurers from obtaining a remedy for a careless misrepresentation because a set period has passed since the misrepresentation was made. So the five-year contestability period was not included in the Bill of [CIDRA](#).

The Law Commissions did not raise the issue of a cut-off period for non-consumer insurance in the 2006 Issues Paper.[42](#) The incontestability provision is also not included in the [Insurance Act 2015](#).[43](#) The duty of disclosure for non-consumer insurance is replaced with a duty of fair presentation by this Act.[44](#) The insurer has a remedy for a breach of the duty of fair presentation if the insurer can show that but for the breach it would not have entered into the contract at all, or would have done so only on different terms.[45](#) The insurer may avoid the contract for deliberate, reckless or even "innocent" breach of the duty if the insurer can show inducement, and the insurer's right of avoidance is not time-barred.[46](#)

In many other common law or civil law jurisdictions,[47](#) statutory law is enacted to require an insurer to include an incontestability clause in life policies or to impose a time-limit within which the insurer may exercise his right of avoiding a life contract on the ground of non-disclosure or misrepresentation. This offers a much stronger protection to the insured. Then a question may be raised here: should an incontestability provision be introduced to [CIDRA](#) in its amendment in the future?

Before answering this question, it is helpful and appropriate to look at the development and content of the incontestability provisions in some other jurisdictions.

## **Incontestability provisions in other jurisdictions**

### ***Australia***

In Australia, life policies are commonly made incontestable after a fixed period, usually three years.[48](#) This principle was enshrined in legislation in Australia by *\*J.B.L. 260* s.84 of the Life Insurance Act 1945,[49](#) which prevented the avoidance of a life policy for written misrepresentation after three years from its inception. This section was reformed to take the form of s.29 of the Insurance Contracts Act 1984 (ICA).[50](#)

Section 29 of the ICA represents the current statutory position relating to the doctrine of incontestability in Australia. It applies where the person who became the insured under a contract of life insurance upon the contract being entered into: (a) failed to comply with the duty of disclosure; or (b) made a misrepresentation to the insurer before the contract was entered into; but does not apply where: (c) the insurer would have entered into the contract even if the insured had not failed to comply with the duty of disclosure or had not made the misrepresentation before the contract was entered into; or (d) the failure or misrepresentation was in respect of the date of birth of one or more of the life insureds.[51](#) If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract at any time.[52](#) If the failure was not fraudulent or the misrepresentation was not made fraudulently,[53](#) the insurer may, within three years after the contract was entered into, avoid the contract.[54](#) If the insurer has right of avoidance but choose not to exercise the right, he is entitled to scale down the amount of recovery by reference to the proportion which the actual premium bears to the premium that would have been charged.[55](#)

By virtue of s.29 of the ICA, the insurer is entitled to avoid the contract if he can prove fraud on the part of the insured and prove that he would not have entered into the contract on any terms but for the misrepresentation or non-disclosure. In the absence of fraud, the right of avoidance is retained for an insurer who would not have entered into the contract on any terms irrespective of the state of mind of the insured in presenting the risk[56](#); but he must exercise the right of avoidance within the three-year contestability period. An insurer who would have entered *\*J.B.L. 261* into the contract but on different terms has no right of avoidance for an innocent or negligent misrepresentation or failure to disclose.[57](#)

The incontestability provision applies only to life insurance and not to general insurance,

for which the insurer may avoid the contract for fraudulent non-disclosure or misrepresentation, but not for innocent non-disclosure or innocent misrepresentation.<sup>58</sup> If the insurer is not entitled to avoid the contract or, being entitled to avoid the contract has not done so, the liability of the insurer in respect of a claim is reduced to the amount that would place the insurer in a position in which the insurer would have been if the failure had not occurred or the misrepresentation had not been made.<sup>59</sup>

In Australia, the insurer has no right to avoid the contract for misstatement of age in all cases, including those of fraud. Instead, the apportionment principle is applied.<sup>60</sup>

In comparing English law with the Australian counterpart, the remedy for deliberate or reckless (or fraudulent) misrepresentation is the same in [CIDRA](#) and ICA, that is, to avoid the contract. The remedy for careless (or non-fraudulent) misrepresentation is different in that under [CIDRA](#), an insurer who would not have entered into the contract on any terms has right to avoid the contract *at any time*<sup>61</sup>; while under s.29 of the ICA, an insurer who would not have entered into the contract on any terms has the right of avoidance within three years from the inception of the contract. It is submitted that the Australian approach is fairer.

## ***New Zealand***

In New Zealand,<sup>62</sup> the first legislation relating directly to the life insurance industry was the Life Insurance Companies Act 1873, which was modelled on the Life Assurance Act 1870 (UK). The Life Insurance Policies Act was enacted in 1884. These two legislations were consolidated to form the Life Insurance Act 1908, which, with its amendments, has ever since been the principal enactment governing the operation and oversight of the life insurance industry in New Zealand.<sup>63</sup> The Insurance Law Reform Act 1977 made substantial changes to law relating to misrepresentation by the insured. The incontestability provision was introduced into s.4 of this Act. A life policy cannot be avoided by reason only of a statement (other than a statement as to the age of the life insured) unless the statement was *\*J.B.L. 262* substantially incorrect,<sup>64</sup> material<sup>65</sup> and made either fraudulently<sup>66</sup> or within the period of three years immediately preceding the date on which the policy is sought to be avoided or the date of the death of the life insured, whichever is the earlier.<sup>67</sup> The insured cannot avoid a life policy by reason only of misstatement of the age of the life insured.<sup>68</sup>

In May 1998 the New Zealand Law Commission published its report *Some Insurance Law Problems*,<sup>69</sup> in which it was recommended that

"any right that an insured's non-fraudulent non-disclosure gives the insurer to cancel the contract from its inception should have a time-limit. That time-limit would mean the right was exercisable only within the period that begins with the risk first attaching<sup>70</sup> and ends 10 working days later".<sup>71</sup>

Subsequently, in November 2004, the Law Commission published a further report, *Life Insurance*,<sup>72</sup> which reaffirmed the recommendation set out in the 1998 Report.<sup>73</sup>

In the 2004 Report,<sup>74</sup> the Law Commission annexed a draft Insurance Contracts Bill.<sup>75</sup> Clause 10 of the Bill deals with misrepresentation in life policy, which re-enacts

substantially s.4 of the Insurance Law Reform Act 1977. Clauses 14 and *\*J.B.L. 263* 15 of the Bill modify the insurer's common law right to avoid a contract (that is, terminate the contract with retrospective effect where the insured has failed to disclose a material fact) for non-disclosure in accordance with the Law Commission's recommendations in the 1998 Report.<sup>76</sup> Clause 14(1) of the Bill states:

"A right of an insurer to avoid a contract of insurance because of the failure of an insured to disclose a fact to the insurer before the contract was entered into may be exercised only within 10 working days of the risk first attaching." <sup>77</sup>

In September 2006, the New Zealand Ministry of Economic Development published *Review of Financial Products and Providers: Insurance*. Some proposals for remedies for non-disclosure and misrepresentation for both life and non-life insurance were set out in the review. It is proposed that the duty of disclosure be retained, but the rights of an insurer to avoid a contract of insurance owing to non-disclosure or misrepresentation be limited to four circumstances<sup>78</sup>:

1.

**In the case of fraud:**

a misrepresentation or non-disclosure is fraudulent where, for instance, the insured making the presentation or failing to disclose does so intentionally or recklessly.

2.

**Specific answer to a specific question put by the insurer:**

where the misrepresentation or non-disclosure is contained in an answer to a specific question expressly put by the insurer, and is substantially incorrect and material.<sup>79</sup>

3.

**Where the insurer seeks to avoid the contract within 10 days of the risk first attaching:**

this caters for the market practice of interim cover to allow time for the insurer to ask questions. The time allowed may need to be longer than 10 days.<sup>80</sup>

4.

**Where the contract is for reinsurance:**

where the contract relates to reinsurance the parties are deemed to know the duty and have ability to discharge their disclosure obligations. In all other cases avoidance is removed and is replaced with restitutionary remedies.

**\*J.B.L. 264 [81](#)**

In the paper *Insurance: Contracts, Agency and Assignments*,[82](#) the Hon. Lianne Dalziel (Minister of Commerce) recommended that the time-limit for an insurer to avoid a life or non-life policy on the ground of non-disclosure or misrepresentation is 30 working days (not 10 days) from the risk first attaching.

In summary, the current legal position relating to the doctrine of incontestability in life insurance is provided in s.4 of the Insurance Law Reform Act 1977: a life insurer's right to avoid the policy on the ground of misrepresentation (not non-disclosure) needs to be exercised within three years from the date when the misrepresentation was made to the date of avoidance or the date of the death of the life insured, whichever is the earlier. After the three-year period expires, the insurer is barred from avoiding the contract on the ground of misrepresentation, except in the case of fraud. The insured cannot avoid a life policy by reason only of misstatement of the age of the life insured.[83](#) According to the present state of the New Zealand proposals, the time-limit for an insurer to avoid a life or non-life policy on the ground of non-disclosure or misrepresentation is 30 working days from the risk first attaching.

## **US**

The first American company to adopt an incontestable policy was Manhattan Life, which, in 1861, made its policies incontestable after five years "for or on account of errors, omissions, and misstatements in the application, except as to age".[84](#) Following the insurer's voluntary practice, the first statute requiring an incontestable clause was enacted in New York in 1906 in the wake of the Armstrong investigation, and in the following decades similar legislation was taken in many other states.[85](#) Over many years, a significant body of common law rules have been developed for various circumstances in the application of incontestability clause in life policies, health policies, disability policies, etc.[86](#)

In a few states in the US, statutes explicitly except fraudulent misrepresentations from the applicability of the incontestability clause or give the insurer the option to narrow the clause in that respect.[87](#) In New Jersey, for example, an insured may not recover under a disability insurance policy for a disease that he or she intentionally concealed when applying for the policy, even if there is an incontestable clause in the policy and the specified two-year period expires. **\*J.B.L. 265**

The case of *Paul Revere Life Insurance Co v Gilbert K. Haas*[88](#) explains how the New Jersey court interprets and applies the statutory provision in relation to incontestability, which provides:

"After 2 years from the date of issue of this policy no misstatements, except fraudulent misstatements, made by the applicant in the application for such policy shall be used to void the policy or to deny a claim for loss incurred or disability (as defined in the policy) commencing after the expiration of such 2-year period." [89](#)

In this case, the issue is whether a statutorily mandated incontestability clause included in a disability policy precludes the insurer from denying a claim when the insured intentionally

failed to disclose a disabling disease in the insurance application. There, the insured intentionally concealed the fact that he had known for about four years that he was suffering from retinitis pigmentosa (a progressive disease of the eyes that leads to blindness). Relying on the insured's false statements, the insurer issued a disability policy in March 1987. The policy contained an incontestability clause required by statute.<sup>90</sup> In January 1991, the insured executed a proof of claim stating that as of 1 December 1990 he had become totally disabled because of retinitis pigmentosa. The insurer's investigation of that claim revealed that the insured had lied in his application. The court ruled that an insured may not recover under a disability insurance policy for a disease that he or she intentionally concealed when applying for the policy.

Sometimes courts allow a fraud defence notwithstanding an incontestability clause if the insured's fraud at the time of applying for insurance is so profound that public policy would be disserved by enforcing the policy.<sup>91</sup> Similarly, in some states, if a person applies for insurance through the use of an imposter, the incontestability clause will not bar the insurer from contesting coverage.<sup>92</sup> But in some other states,<sup>93</sup> an incontestability clause bars the insurer's impostor defence.<sup>94</sup>

In California, for instance, after the expiration of the contestability period, the insurer was not allowed to assert the defence that the insured has used an imposter to take the medical examination. In *Amex Life Assurance Co v Superior Court*,<sup>95</sup> a viatical settlement company which had purchased a life policy from the insured shortly before he died of AIDS was entitled to the proceeds of the policy, and the insurer was not allowed to assert the defence of misrepresentation, even though the insured had used an imposter to take the medical examination and thereby misrepresent his health status. The court was of the view that the incontestability clause requires the insurer to investigate fraud before it issues the policy or within two years afterwards. The insurer may not accept the premiums for two years and investigate a possible defence only after the beneficiaries file a claim. Here, the insurer could have easily discovered the fraud at the outset, as the insured on the *\*J.B.L. 266* application was four inches shorter and 30 pounds lighter than the person who took the medical examination. The insurer ignored this information and merely accepted the premiums for the entire period of contestability. Then it became too late to claim for the first time that an impostor took the medical examination. Beneficiaries have the right to expect that after the premiums are paid for the specified time, the insurer will promptly pay the policy proceeds upon the insured's death. The incontestability clause protects that right.

After the case of *Amex Life Assurance* was decided, the California legislature enacted statutes that voided any insurance contract from its inception "if photographic identification is presented during the application process, and if an imposter<sup>96</sup> is substituted for a named insured in any part of the application process".<sup>97</sup>

## **Germany**

In the German Insurance Contract Act 2008, if the insured intentionally or by gross negligence breaches his duty of disclosure, the insurer has right to *withdraw* from the contract<sup>98</sup>; if the insured's breach was neither intentional nor by gross negligence, the insurer has right to *terminate* the contract subject to a notice period of one month.<sup>99</sup> The

insurer must assert these rights in writing within one month from the time when the insurer becomes aware of the breach.<sup>100</sup> The insurer's right to withdraw from the contract on account of grossly negligent non-disclosure and his right to terminate the contract where the insured's breach was neither intentional nor by gross negligence shall be ruled out if the insurer would also have concluded the contract in the knowledge of the undisclosed facts (albeit with other conditions).<sup>101</sup>

The rights of the insurer to *terminate* the contract by reason of the insured's breach of his duty of disclosure by neither intentional nor gross negligence shall lapse five years after the contract was entered into. If the insured has breached the duty of disclosure intentionally or by acting fraudulently, this period shall be 10 years within which the insurer can exercise his right to *withdraw* the contract. This is in contrast to the approaches in the common law jurisdictions in that in German law, intentional or fraudulent non-disclosure is not an exception to the incontestability of the contract, but the contestability period is longer (i.e. 10 years). \*J.B.L. 267

### **Hong Kong**

Hong Kong is a common law jurisdiction.<sup>102</sup> There are two major insurance legislations in Hong Kong: the Insurance Companies Ordinance (Cap. 41) and the Marine Insurance Ordinance (Cap. 329). The latter is more or less identical to the [Marine Insurance Act 1906 \(UK\)](#). There is no specific legislation dealing with non-marine insurance which is governed by common law.<sup>103</sup> The current legal position relating to non-disclosure and misrepresentation in Hong Kong is that the insured is required to disclose to the insurer, before the contract is concluded, every material circumstance which he knows or ought to know. If the insured fails to make such a disclosure, the insurer may avoid the contract.<sup>104</sup> The insured is also under a duty to avoid positive misrepresentation. The insurer may avoid the contract for material misrepresentation.<sup>105</sup> The harshness of the statutory law is to some extent mitigated by the Code of Conduct for Hong Kong Insurers.<sup>106</sup> English law in relation to consumers' non-disclosure and misrepresentation has been radically changed by [CIDRA](#), so legislators in Hong Kong might need to seriously consider insurance law reform by taking into account the local situation of the insurance industry and the need to protect the insureds.<sup>107</sup>

As far as the doctrine of incontestability is concerned, there is no statutory incontestability provision in Hong Kong. The common law rules governing incontestability are summarised by Professor Merkin in his book *Colinvaux's Law of Insurance in Hong Kong*.<sup>108</sup> Life insurers often advertise in their prospectus and sometimes insert a statement in their policies that they are "incontestable". If such a statement is included in a policy, or the insured can prove that he effected a policy on the faith of such a statement in a prospectus,<sup>109</sup> the insurer is barred from relying on the defence of a breach of warranty by the insured.<sup>110</sup> But the incontestability clause does not apply to bar the insurer from exercising his common law right to avoid the policy for fraudulent misrepresentation. \*J.B.L. 268 <sup>111</sup>

### **Macau**

In Macau, insurance contract law is included in the Commercial Code. [112](#) The insured's duty of disclosure and representation and remedies for breach of the duty are provided in arts 973 to 975 of the Commercial Code. The incontestability provision is stipulated in art.1041 of the Code. The insureds are required, up to the time of conclusion of the contract, to declare to the insurer in a complete and unequivocal manner all circumstances which they know or ought to know and which may influence the assessment of risk. In addition to truthfully answering the questions raised in the questionnaire, they must voluntarily disclose information to the insurer.[113](#)

If the insured omitted or misrepresented, in bad faith,[114](#) any of the material circumstances, the contract shall be voidable and the insurer can claim the return of any compensation already paid. The insurer loses the right of avoidance if he does not inform the insured of its intention to avoid, within one month from the date when he becomes aware of the non-disclosure or misrepresentation.[115](#)

If the non-disclosure or misrepresentation was not made in bad faith, the insurer can, within two months from the date when he gained knowledge of such non-disclosure or misrepresentation either rescind the contract or propose a new premium to the insured. The rescission of the contract becomes effective 15 days after serving a notice of rescission to the insured.[116](#)

The insured's right to avoid or rescind the contract must be exercised either within one year from the time of conclusion of the contract, or within a period stipulated in the contract, if the latter is shorter. This incontestability provision does not apply in the case of intentional non-disclosure or misrepresentation.[117](#)

## **Taiwan**

Article 64 of the Taiwan Insurance Act is concerned with the insured's duty of disclosure, representation and the incontestability provision.[118](#) The insured is required to make truthful representation to the written inquiries of the insurer at the time of applying for the insurance contract. If the insured has made any intentional concealment, negligent non-disclosure or misrepresentation, and such concealment, non-disclosure or misrepresentation are sufficient to alter or diminish the insurer's estimation of the risk to be undertaken, the insurer is entitled to rescind the contract. The insurer's right of rescission shall also apply after the risk has occurred. The insurer is not entitled to rescind the contract where the insured can prove that the occurrence of the risk was not connected with any fact disclosed or undisclosed. The right to rescind shall be extinguished if not exercised within one month from the time the insurer knows of the cause for rescission. Once two years *\*J.B.L. 269* have elapsed after the contract is entered into, the contract may not be rescinded even if cause for rescission exists.

In summary, all jurisdictions (except England and Hong Kong) as mentioned above have statutory incontestability provisions to restrict insurers' right to avoid contracts by reason of non-disclosure or misrepresentation within certain period of time. The contestability period varies from one year in Macau, two years in Taiwan and in 41 states of the US,[119](#) three years in Australia and New Zealand, five years for non-intentional non-disclosure in Germany, to 10 years for intentional non-disclosure in Germany. As a rule the incontestability provision does not apply to fraudulent non-disclosure or fraudulent

misrepresentation in most of these jurisdictions except in some states in the US. In addition, in some jurisdictions (including Germany, Macau and Taiwan), the insurers must exercise their right of avoidance within one month from the time they become aware of the non-disclosure or misrepresentation.

### **Suggestion for CIDRA's amendment in the future**

The incontestability provision is not included in [CIDRA](#) owing to the fact that most insurers opposed the Law Commissions' proposal of a cut-off period for the situation where the insured's careless misrepresentation induced the insurer entering into the contract. This represents a missed opportunity to introduce the incontestability provision into the legislation, and consequently leaves English law out of line with its common law and civil law counterparts in this respect. It is suggested that the incontestability provision should be introduced to [CIDRA](#) in its amendment in the future for the following reasons:

First, the security and certainty of a life policy are of paramount importance to the insured or beneficiary. The security which the insured acquires through the incontestability provision against the possibility of a challenge by the insurer to the policy's validity at a later time outweighs the disadvantage of a possibly higher premium for purchasing the policy. No insured would want a policy that did not eliminate the possibility of being made invalid when the insured event occurs. An incontestability provision would boost consumers' trust and encourage consumers to take out insurance policies.[120](#)

Secondly, the incontestability provision requires and encourages the insurer to investigate misrepresentation before it issues the policy or within the contestability period afterwards. The insurer should not be allowed to accept the premiums for the contestability years and investigate a possible defence only after the insured or beneficiaries file a claim. Investigations would increase costs and premiums; however, the insured would rather pay a slightly higher premium for a secured policy. As mentioned by the Law Commissions,[121](#) at present most life insurers do not investigate misrepresentation made more than five years previously in the absence of evidence of fraud. It would increase consumer confidence if this good industry practice could be built into law, without adding substantially to costs. The figures from the US which measure the number of successful claims against the *\*J.B.L. 270* number predicted from the actuarial models show a higher than anticipated pay-out in year 3 and 4 but little effect in year 6 onwards. This would lead to suggestions that consumers have misdescribed the risk. If the contestability period is for five years instead of three years, the cases with misdescribed risk can be contested during the five-year period and the insured who misrepresented the risk will not get away with it.

Thirdly, a contestability period would not encourage fraud as it is not proposed to apply in the case of a deliberate or reckless misrepresentation.

Finally, if the incontestability provision is introduced to [CIDRA](#), it should apply to all long-term insurance policies, such as term policies (10, 20 or more years), endowment policies, whole life policies, investment contracts in the form of life policies, life policies with critical illness cover, etc. In the Law Commissions' proposal,[122](#) life insurance was the only insurance product in the whole protection range that was included, despite critical illness insurance being the protection product mainly associated with the problems of declined claims. This means that the contestability period would only apply to the life cover even if

critical illness is attached to it. The implication on the insurance industry is that the insurers would have to end up separating all these policies.<sup>123</sup> If the incontestability provision applies to a life policy and also to critical illness cover attached to the policy, the inconvenience to the insurance practice can be overcome.<sup>124</sup> The incontestability provision is designed to protect the insured for long-term policies; there is no particular reason for the provision to be applied only to life policies.

Accordingly, it is suggested that [para.5 in Sch.1 to CIDRA](#) could be amended as follows:

"If the insurer would not have entered into the consumer insurance contract on any terms, the insurer may, *within 5 years after the contract was entered into*, avoid the contract and refuse all claims, but must return the premium paid."

Here the phrase "within 5 years after the contract was entered into" is added to limit the insurer's right of avoidance within the period.

Having considered the relevant rules in relation to incontestability provision in these common law and civil law jurisdictions, we now turn our attention to the Chinese law relating to incontestability provisions for the purposes of identifying deficiencies in the law and working out solutions to the problems.

## **Incontestability provisions in the Insurance Law and in insurance policies in China**

### ***Statutory provisions***

The 1995 and 2002 versions of the Insurance Law entitled the insurer to reject a claim and rescind a contract on the ground of intentional or negligent non-disclosure *\*J.B.L. 271* or misrepresentation, but did not provide time-limits within which the insurer could exercise his right of rescission of the contract.<sup>125</sup> As a result, the insurer often abused his right to reject claims and rescind the contract at any time by reason of non-disclosure or misrepresentation. This was very unfair to the insured, particularly in life insurance where the insured had paid premiums for many years, but could not get anything because of non-disclosure when the life insured died. In the 2009 version of the Insurance Law, the relevant rules relating to the insured's duty of disclosure and the incontestability provision are provided in art.16 of the Law. For the convenience for later discussion of relevant rules relating to non-disclosure, misrepresentation and incontestability, the article is shown below:

"Art.16(1): When concluding an insurance contract, the insurer may raise questions concerning relevant details of the insured subject matter or of the insured. The proposer shall truthfully disclose such details to the insurer.

Art.16(2): The insurer shall have the right to rescind the insurance contract where the proposer fails to fulfil the obligation of truthful disclosure provided in the preceding paragraph intentionally or by gross negligence so that the failure of disclosure or representation shall sufficiently influence the insurer's decision on whether he will accept the insurance or raise the premium rate.

Art.16(3): The right of rescission provided in the preceding paragraph shall lapse where the insurer does not exercise it thirty days after he knows that there is the cause for rescission. Where over two years have passed from the date of formation of the contract, the insurer may not rescind the contract; where an insured event occurs, the insurer shall be liable for making indemnity payment or paying insurance benefits.

Art.16(4): Where the proposer fails to perform his duty of disclosure and truthful representation of information to the insurer intentionally, the insurer shall not be liable for making indemnity payments or paying insurance benefits in connection with the insured events that occur prior to the rescission of the contract, and shall not refund the premium.

Art.16(5): Where the failure of the proposer to perform his duty of disclosure and truthful representation by gross negligence has a material impact on the occurrence of the insured events, the insurer shall not be liable for making indemnity payments or paying insurance benefits in connection with the insured events that occur prior to the rescission of the contract, but he shall refund the premium."

By virtue of art.16, the insured is required to disclose material information at the time of applying for the insurance. The Law adopts the way of inquiring disclosure *\*J.B.L. 272* (not voluntary disclosure).<sup>126</sup> The insured is only obliged to disclose the information asked in questions by the insurer in the proposal form, and the insurer may not avoid a policy on the ground that the insured did not disclose something material which is beyond the questions raised in the proposal form.<sup>127</sup> The Supreme People's Court of China (SPC) has recently provided that the insured's duty to disclose is confined to the scope and content of the insurer's inquiry; where the insurer and the insured dispute on the scope and content of the inquiry, the onus of proof rests upon the insurer.<sup>128</sup> The material information is such that sufficiently influences the insurer's decision as to whether to accept the risk, and if so, on what terms.<sup>129</sup> The insurer has right to rescind the contract where the insured breaches his duty of disclosure intentionally or by gross negligence and the undisclosed circumstances are material.<sup>130</sup> For intentional non-disclosure, the insurer is free from liabilities for any loss that occurred before rescission of the contract whether or not the loss is caused by the undisclosed facts, and can retain the premium.<sup>131</sup> For grossly negligent non-disclosure, the insurer is not liable for pre-rescission losses if the insured's non-disclosure has a material impact on the occurrence of the insured events, but should refund the premium.<sup>132</sup> These remedies relating to pre-rescission losses are available only where the insurer has exercised his right to rescind the contract within the contestability periods. Article 16(3) provides two contestability periods: (1) a 30-day period from the time the insurer becomes aware of the non-disclosure or misrepresentation; and (2) a two-year period from the time of the conclusion of the contract. After the time-limits lapse, the insurer is barred from contesting the validity of the contract on the ground of non-disclosure or misrepresentation.

The Insurance Law 2009 also provides rules of law on misstatement of age of the insured. Article 32 states:

"Where the age of the insured as declared by the proposer is not true and his true age fails to meet the age requirements set forth in the contract, the insurer may rescind the contract and in this case, he shall refund the cash value of the insurance policy according to the contract. Where the insurer exercises the right of rescission, the provisions in articles 16(3) and 16(6) of this Law shall be applicable. *\*J.B.L. 273* <sup>133</sup>

The incontestability provision improves insured's position in the insurance bargaining, but it is not free from difficulties. There are three major shortcomings with the provision. First, it is unclear whether or not the insurer should be barred from contesting the validity of the contract on the ground of fraud or fraudulent non-disclosure or misrepresentation after the expiration of the two-year contestability period. Secondly, the incontestability provision is ambiguous in the situation where the insured event occurs within the two-year contestability period, and the insured postpones filing a claim until the expiration of the two-year period. And thirdly, in the case of the reinstatement of suspended life policies, there is no answer to the question when the two-year period of contestability should commence to run; should it start to run from the time of formation of the original contract, or from the date of reinstatement of the suspended contract? These shortcomings and questions will be discussed shortly.

### ***Incontestability clause in insurance policies***

In accordance with the statutory requirements, insurers usually set forth incontestability clauses in life policies which are simply a restatement of art.16(3) and art.32(1) of the Insurance Law. For example, cl.8.2 of the life insurance policy of Ping An Insurance Company states:

"Our right of rescission provided in the preceding paragraph shall lapse if we do not exercise it 30 days after we become aware of the cause of rescission. If over 2 years have passed from the date of conclusion of this contract, we shall not rescind the contract; where an insured event occurs, we shall be liable for paying insurance benefits."

Clause 8.3 of the same policy states:

"Where the age of the life insured as declared by you is not true and his true age fails to meet the age requirements set forth in the contract, we have right to rescind the contract and in this case, we shall refund the cash value of the insurance policy. Where we exercise the right of rescission, clause 8.2 of this policy shall be applicable."

In the household property policy of Ping An Insurance Company, cl.18 states:

"The right of rescission provided in the preceding paragraph shall lapse where the insurer does not exercise it in 30 days after he knows that there is the cause for rescission.[134](#) Where over 2 years have passed from the date of formation of the contract, the insurer may not rescind the contract; where an insured event occurs, the insurer shall be liable for making indemnity payment or paying insurance benefits."

This is exactly the same as art.16(3) of the Insurance Law. *\*J.B.L. 274*

### **Scope of application of the incontestability provision**

As the Insurance Law does not mention whether the incontestability provision applies to life insurance only or also applies to property insurance, this causes confusion. Some people[135](#) have argued that the incontestability clause is not applicable to property insurance,[136](#) while others have argued that incontestability is applicable to life insurance as well as to property insurance.[137](#) It is submitted that the incontestability provision

should be applicable to both life and property insurance contracts for the following reasons. First, the incontestability provision is provided in the section of General Provisions in the Insurance Law, [138](#) which implies that it is not limited to be applicable only to life insurance; it should be applied to property insurance as well. Secondly, the purpose of the incontestability clause is to prevent the insurer from abusing his right of rescission, so it should be applied to both life and property insurance contracts. Thirdly, although the standard form of contract for property insurance is usually for one year, if the contract is specially negotiated, it can be for more than two years. [139](#) There is no particular reason to prevent the two-year incontestability clause from being applied to such a contract. Finally, the 30-day incontestability period should be applied to one-year term property insurance contracts. [140](#)

It can be seen from the above-mentioned provisions in the Insurance Law and clauses in insurance policies that the incontestability provisions affect insurers' right of rescission of the contract based only on the insureds' non-disclosure or misrepresentation of material circumstances or misstatement of the age of the insured, [141](#) not on any other defences. Incontestability should not apply to any policy for which the insured does not pay premiums as scheduled in the contract. The provisions and the policy clauses regarding incontestability do not entitle the insured to "free" insurance. If the insured does not keep on paying premiums, the policy becomes invalid.

In addition, the concept of incontestability does not operate in the situation where there is lack of insurable interest. Where the insured does not have an insurable interest on the life insured, the contract is void ab initio. [142](#) So the lack of an insurable interest does not become incontestable after the two-year contestability period expires because the evils of wagering in the guise of insurance *\*J.B.L. 275* and intentional destruction of the subject-matter of the insurance do not become less deviant at that time. The incontestable provision presupposes that the contract has been valid for a period of time. If the contract was void in the first instance because of lack of insurable interest, it could not be enforced by a court, even if there was an incontestable clause in the policy. [143](#) Lack of an insurable interest makes the contract void, [144](#) while breach of the duty of disclosure makes a contract voidable at the option of the insurer. [145](#) Insurers may or may not exercise the right of rescission of the contract on the grounds of non-disclosure. If the insurer decides to rescind the contract, his right to do so is limited by two incontestability periods which are considered in detail below.

## **Two incontestability periods**

### ***A 30-day contestability period from the time the insurer knows the cause for rescission***

The Insurance Law requires the insurer to exercise his right of rescinding the contract within 30 days after he becomes aware of the insured's non-disclosure and misrepresentation. If he does not, he will lose his right to rescind the contract after the 30-day period expires, [146](#) and the contract then becomes incontestable. This is explained by the following case.

In *Mr Zhang v Life Insurance Company*,<sup>147</sup> Mr Zhang effected a life policy on his father's life and named himself as the beneficiary on 28 May 2008. His father was diagnosed with emphysema in a local hospital on 26 May 2008. He concealed this fact at the time of applying for the insurance. The life insured died on 6 January 2010. Mr Zhang claimed. Upon investigation, on 21 February 2010 the insurer discovered from the life insured's medical record that the life insured had suffered from emphysema before the contract was entered into. The insurer therefore rejected the beneficiary's claim on the ground of intentional non-disclosure and gave the rejection notice on 16 March 2010, but did not rescind the contract. The court held that according to art.16(3) of the Insurance Law, the insurer's right of rescission of the contract shall lapse where the insurer does not exercise it within 30 days after he became aware of the cause for rescission. The date on which the insurer was deemed to know the cause of rescission was 21 February 2010, when the insurer learned from the life insured's medical record that he had suffered from emphysema before the contract was entered into, so the insurer should have exercised the right of rescission within 30 days from 21 February 2010. The insurer failed to rescind the contract within the 30-day time-limit and therefore lost the right; thus he should be liable for paying out the insurance proceeds. \**J.B.L. 276* <sup>148</sup>

As mentioned earlier, the insurer's remedies relating to pre-rescission losses are available only where the insurer has rescinded the contract within the contestability periods. If the insurer has lost his right to rescind the contract, these remedies are not available to him.<sup>149</sup> In the case discussed above, the insurer would not have been liable for the insurance payments had he exercised his rights to rescind the contracts within 30 days after he became aware of the cause of rescission.

In the situation where the insurer wants to reject a claim on the ground of intentional or grossly negligent non-disclosure, he must rescind the contract first unless the insurer and the insured have reached an agreement with regard to the claim settlement and the continuation of the contract. Chinese courts will not uphold any rejection of claims on the basis of non-disclosure or misrepresentation if the insurer has not rescinded the contract.<sup>150</sup> In practice, it is rare that the insurer would find the insured's non-disclosure or misrepresentation during the insurance period if the insured event does not occur. Even if the insurer becomes aware of the non-disclosure or misrepresentation prior to the occurrence of the insured event, the insurer usually would not actively seek a rescission of the contract for the purpose of receiving a premium. If the insurer were not to be barred by the 30-day time-limit for exercising his right of rescission after becoming aware of the intentional non-disclosure or misrepresentation, he would be able to collect the premium and then refuse to pay claims on the ground of intentional non-disclosure or misrepresentation before the two-year contestability period lapsed. Thus the insurer would be in a "nothing to lose but all to gain" position.

It must be mentioned here that there is a limitation on the insurer's exercising his right of rescinding the contract within 30 days after he knows the cause for rescission. If the insurer becomes aware of or should have known of the insured's non-disclosure or misrepresentation, but still collects the premium, the courts will not uphold the insurer's request for rescission of the contract on the ground of non-disclosure or misrepresentation, even within the 30-day period.<sup>151</sup> In English law, the acceptance of a premium or the grant of an extension of cover after receiving knowledge of a non-disclosure is good evidence of the insurer's waiver to avoid the contract.<sup>152</sup>

As mentioned earlier, the 1995 and 2002 versions of the Insurance Law did not provide time-limits for the insurers to exercise right of rescission of the contracts *\*J.B.L. 277* by reason of non-disclosure and misrepresentation.<sup>153</sup> This is unfair to the insureds, as can be seen in the case of *Mr Xu v Life Insurance Company*.<sup>154</sup> There Mr Xu effected a life policy to cover his wife's life and severe diseases on 12 May 2006. The life insured was found to have haematuria and stayed at Weifang Hospital for treatment in July 2007. Mr Xu claimed for medical costs on 5 November 2007 but was rejected by the insurer on the ground that Weifang Hospital was not one of the named hospitals in the policy. The insurer continued to collect premium from Mr Xu annually. On 22 February 2010, the life insured went to Xiamen First Hospital for treatments of thyroid nodules and chronic renal failure syndrome. Mr Xu claimed for medical costs on 28 March 2010. The insurer's investigation revealed that the life insured was diagnosed with primary nephrotic syndrome and stayed at hospital for treatment on 19 February 2002. After that, the life insured regularly visited the hospital for treatments. The insured concealed this fact at the time of the contract. On this basis, the insurer rejected the insured's claim and rescinded the contract on 29 April 2010.

The court found that when Mr Xu made the first claim on 5 November 2007, he submitted to the insurer the life insured's medical record, with other relevant evidence and information for the claim. The life insured's medical history was shown in the medical record. The insurer either knew or should have known the fact from the medical record that the life insured suffered from primary nephrotic syndrome before the contract was entered into. The insurer was deemed to know the cause of rescinding the contract at the time when he refused Mr Xu's first claim.<sup>155</sup> Article 17(2) of the Insurance Law 2002 allowed the insurer to rescind the contract on the ground of intentional or negligent non-disclosure or misrepresentation, but did not provide a contestability period within which the insurer should exercise his right of rescission. Instead of rescinding the contract, the insurer continued to collect the premium. The 2009 version of the Insurance Law became effective on 1 October 2009; accordingly, the 30-day time-limit for the insurer to exercise his right of rescission as stipulated in art.16(3) of the Insurance Law 2009 should have started to run from 1 October 2009.<sup>156</sup> In this case, the insurer rescinded the contract on 29 April 2010, by which time the 30-day contestability period had lapsed. Consequently the insurer's rescission was ineffective. On this reasoning the court held that the contract was valid and the insurer was thus liable for paying the insurance proceeds.

### ***A two-year contestability period from the inception of the contract***

The Insurance Law 2009 provides another contestability period—the insurer's right to rescind the contract by reason of non-disclosure or misrepresentation must *\*J.B.L. 278* be exercised within two years from the inception of the contract.<sup>157</sup> During the two-year period, a potential defence must clear both the requirements of intentional or grossly negligent misrepresentation and of materiality in order to be effective.

In another case,<sup>158</sup> Mr Zhang effected a life policy on his own life, with the coverage of death and severe diseases in August 2000. Zhang paid a premium every year and was diagnosed with uraemia in June 2005. His claim for being diagnosed with uraemia was paid by the insurer after investigation of the claim. When Zhang died of uraemia on 13 December 2006, the insurer successfully rejected the beneficiary's claim on the ground of

intentional non-disclosure of the fact that Zhang suffered kidney disease before the contract was entered into. The 2002 version of the Insurance Law did not have the incontestability provision. The insurer was allowed to rescind the contract by reason of non-disclosure or misrepresentation at any time. In this case, the insurer should have discovered the insured's non-disclosure in June 2005 when he investigated Zhang's claim for being diagnosed with severe disease (uraemia) and rescinded the contract at that time. Instead, the insured continued to collect the premium and turned down the beneficiary's claim for death payment when Zhang died. This is obviously unfair to the insured and the beneficiary.

By contrast, in the following case, the insurer had no right to rescind the contract on the ground of non-disclosure and misrepresentation according to the 2009 version of the Insurance Law, although the court upheld the insurer's rescission of the contract by using the exclusion clause in the policy. In *Mr Li v Life Insurance Company*,<sup>159</sup> Mr Li took an early retirement in October 2010, because he suffered from emphysema and was unable to work. Mr Li effected a life insurance on his own life and named his son as the beneficiary. He gave a negative answer to the question about his medical history "whether you have ever had any disease" on the proposal form. He paid premiums and the policy became effective on 10 April 2011. There was an exclusion clause in the policy which states: "The insurer is not liable for the insured event where there was any act of concealment or fraud by the proposer or the life insured". Mr Li died of primary pulmonary heart disease (heart disease caused by his lung problem) on 26 October 2013. The beneficiary's claim was turned down by the insurer on the ground that the insured intentionally concealed the fact that he had emphysema at the time of the contract. According to art.16(4) of the Insurance Law, the insurer can rescind the contract and reject the claim. But the beneficiary argued that as the contract had been effective for more than two years, the contract became incontestable in accordance with art.16(3) of the Insurance Law. The court held that the insurer should have been barred from rescinding the contract because the contract became incontestable after the two-year period lapsed. However, in this case, the insurer explicitly excluded his liability in the presence of the insured's concealment, so the insurer was not liable for the claim.

It can be argued that where the exclusion clause is not in agreement with the statutory rules, the exclusion clause should be ineffective according to *\*J.B.L. 279* art.19 of the Insurance Law.<sup>160</sup> In this case, the insured concealed the fact that he suffered from emphysema. His concealment is equivalent to intentional non-disclosure. According to art.16(3) of the Insurance Law, intentional non-disclosure becomes incontestable after the two-year contestability period expires. The insurer's exclusion of the liability in the presence of the insured's concealment should not be effective, because this exclusion exempts the insurer of the obligations that he should have borne according to law.<sup>161</sup> If an exclusion clause is allowed for the insurer to exclude liability based on the insured's concealment at the time of the contract, the insurer would be able to bypass the incontestability provision as stipulated in art.16(3) of the Insurance Law. By this reasoning, the court's decision in the above case was incorrect. The insurer should be made liable notwithstanding the exclusion clause.<sup>162</sup>

### **Fraud versus fraudulent non-disclosure or misrepresentation**

The major difficulty with the incontestability provision in art.16(3) of the Insurance Law is that it is unclear whether or not the insurer should be barred from contesting the validity of the contract on the ground of fraud or fraudulent non-disclosure or misrepresentation after the expiration of the two-year contestability period. This ambiguity has caused and will continue to cause disputes.

In the literal meaning of art.16(3) of the Insurance Law, the insurer can rescind the contract for intentional and grossly negligent non-disclosure or misrepresentation, but must exercise this right within two years from the inception of the contract. If the insured had a disease but intentionally concealed the fact and gave a negative answer to the question raised by the insurer, the insured's act can be called intentional non-disclosure or misrepresentation, which should be equivalent to fraudulent non-disclosure or misrepresentation. In English law, fraud is proven when it is shown that a false representation has been made (1) knowingly; (2) without belief in its truth; or (3) recklessly, careless whether it be true or false. To prevent a false statement from being fraudulent, there must always be an honest belief in its truth.<sup>163</sup> If the insured knows that he has hepatitis, but gives a negative answer to the question "Have you had any disease in the last three years?", he has knowingly made a false representation. This false representation can be called fraudulent misrepresentation. If the analysis is correct that fraudulent non-disclosure or misrepresentation is equivalent to intentional non-disclosure or misrepresentation, then fraudulent non-disclosure or misrepresentation should be covered by art.16(3) and can become incontestable after two years from the inception of the contract. As we have seen from the cases discussed above, the non-disclosure or **\*J.B.L. 280** misrepresentation were all made intentionally (or fraudulently); if fraudulent non-disclosure or misrepresentation are not covered by art.16(3), the scope of the incontestability provision would be confined to grossly negligent non-disclosure or misrepresentation only. This would not be the intention of the legislation. So it is submitted that the insurer should be barred from contesting the validity of the contract on the ground of fraudulent non-disclosure or misrepresentation after the expiration of the two-year period.

The next question to be considered is whether other kinds of fraud should be excepted from the incontestability provision. It is, however, not always easy to distinguish fraudulent misrepresentation from other kinds of fraud, but it is important and necessary to do so in order to find an answer to the question. Fraudulent misrepresentation is a type of passive act. The insured can answer the questions in the proposal form with either "yes" or "no". He can conceal the true fact and give a false one, but he does not actively seek to do anything else to deceive the insurer. In contrast, if the insured actively takes other steps to deceive the insurer, the insured's act should be treated as fraud. For example, if the insured employs an imposter (who is in good health) to take the medical examination in the place of the sick insured, the insured's act should be treated as fraud (not fraudulent misrepresentation), because the insured actively seeks to deceive the insurer for the purpose of obtaining the contract which he would otherwise not have been able to obtain.

This can be illustrated by the case of *Ms Shuai Ying v China Life Insurance Company Ltd.*<sup>164</sup> There Ms Ying effected a life policy in July 1998 and another life policy in March 2000 on her mother's life, and named herself as the beneficiary. A clause in the policy states that "Any person who is under 70 and healthy can be the person to be insured ...". Her mother fell over at home and died of a stroke on 15 March 2003. The insurer paid Ms

Ying the full amount of the death proceeds (¥270,000).<sup>165</sup> In July 2003, the insurer received a letter with the signatures of more than 10 local people, which said that the insured's age was wrong and there was fraud in this case. The insurer's investigation revealed that at the time of applying for the first life policy, the insured's age was 77, well beyond the insurable age limit of the policy, but Ms Ying misrepresented the insured's age to be 54. Ms Ying also managed to change her mother's date of birth from 7 January 1921 to 7 November 1944 in the Household Registration Book,<sup>166</sup> and employed an imposter to take the medical examination in the place of her mother. Upon the death of her mother, she also changed her mother's date of birth in her own relevant records. The major argument in this case is whether Ms Ying's acts constitute a crime of insurance fraud.

**\*J.B.L. 281**

According to art.138 of the Insurance Law 2002,<sup>167</sup> if an insured deliberately fabricates the subject-matter of the insurance to defraud the insurer of insurance payments, then the insured commits a crime of insurance fraud. So the question whether Ms Ying committed a crime of insurance fraud becomes a question whether Ms Ying's misrepresentation of the insured's age should be regarded as "deliberately fabricat[ing] the subject matter of the insurance". Ms Ying argued that the subject-matter of the life policy is a person's physical body and lifetime. In this case, the insured subject-matter is her mother's death or life, but not her age. So her misrepresentation of her mother's age should not be regarded as fabricating the insured subject-matter. Article 54 of the Insurance Law 2002 was concerned with remedies to the insurer for the misstatement of the life insured's age; it stated that if the age of the life insured as declared by the proposer is untrue and the true age does not fall within the age limit specified in the contract, the insurer may rescind the contract and refund the premium to the proposer after deducting service charge. However, this does not apply to cases where the formation of the contract has been over two years ago. During the two-year period, if the insurer finds any untrue statement of the insured's age, he has the right to rescind the contract. In this case, the insurer neither investigated the truth of the insured's age nor rescinded the contract during the two-year period, so the insurer should be barred from rescinding the contract because the contract was more than two years from the time of formation of the contract.

The insurer counter-argued that the life policy was supposed to cover a person who was born on 7 November 1944, but this person in fact did not exist. This insured person was a fabricated subject-matter of the insurance. The person who was born on 7 January 1921 did exist, but should not be covered by the policy. Ms Ying changed her mother's date of birth at the time of applying for the policy and changed her own relevant documents where her mother's date of birth was recorded after her mother's death. By virtue of art.138 of the Insurance Law 2002, if the insured intentionally fabricates the subject-matter of the insurance in order to defraud the insurer of insurance proceeds, his act constitutes insurance fraud. He should be investigated for his criminal responsibility in accordance with law. Ms Ying's acts were intentional fraud for the purpose of securing the life policy which would otherwise not have been obtained without the misstatement of her mother's age. The court held: (1) the misstatement of the age of the insured is not **\*J.B.L. 282** "fabricating the subject matter of insurance" and should not be treated as a crime of insurance fraud; (2) art.54 of the Insurance Law 2002 should apply to this case. The insurer did not contest the validity of the contract during the two-year period, so it was barred from rescinding the contract based on misrepresentation after the two-year period

has lapsed. The insurer appealed to the High Court of the Yunnan Province. The High Court did not make a decision and reported the case to the Supreme People's Court. The case has yet to be decided by the SPC.

There has been no final decision in this case as to whether or not Ms Ying's misstatement of her mother's age constitutes a fraud. It may be argued that substitution of a healthy person (the imposter) to take a medical examination for her sick mother should be treated as a fraud, and contest should be allowed even though the fraud was successfully concealed for more than two years. Such kinds of cases might be handled on the theory that there was no policy at all in the first place.

As mentioned earlier, English, Australian and New Zealand law do not tolerate fraud.<sup>168</sup> The insurer is not barred from contesting the validity of the contract on the ground of fraud or fraudulent non-disclosure or misrepresentation after the contestability period expires. The approaches to fraud or fraudulent misrepresentation vary from one state to the next in the US. Fraudulent misrepresentation is excepted from the applicability of the incontestable clause in a few states.<sup>169</sup> Sometimes courts allow a fraud defence notwithstanding an incontestability clause if the insured's fraud at the time of applying for insurance is so profound that public policy would be disserved by enforcing the policy.<sup>170</sup> Similarly, in some states, if a person applies for insurance through the use of an imposter, the incontestability clause will not bar the insurer from contesting coverage.<sup>171</sup> But, in some other states,<sup>172</sup> the incontestability clause bars insurer's impostor defence.<sup>173</sup> German law provides two contestability periods: five years for unintentional non-disclosure, and 10 years for intentional or fraudulent non-disclosure.<sup>174</sup>

Having considered approaches relating to the applicability of the incontestability provision in the case of fraud or fraudulent non-disclosure or misrepresentation in China and in other jurisdictions, it is now appropriate to make suggested answers to the question whether the insurer should be barred from contesting the validity of the contract on the basis of fraud or fraudulent non-disclosure or misrepresentation after the expiration of the two-year contestability period as provided in art.16(3) of the Insurance Law. **\*J.B.L. 283**

It is suggested that the insurer should not be allowed to contest the validity of the contract on the ground of fraudulent non-disclosure or misrepresentation after the two-year contestability period expires; and that for profound fraud, such as the use of an imposter, the incontestability clause should not bar the insurer from contesting the validity of the contract after the two-year contestability period expires. Accordingly art.16(3) of the Insurance Law should be amended as follows: "Where over two years have passed from the date of formation of the contract, the insurer may not rescind the contract, *except in the presence of fraud ...*".<sup>175</sup> Here the phrase "except in the presence of fraud" is added. By this amendment, profound fraud (such as the use of an impostor) is excluded from the scope of application of the incontestability provision.

### **The insured event occurred during the two-year contestability period but the claim is made after expiration of the period**

Article 16(3) of the Insurance Law provides:

"Where the proposer fails to fulfil the obligation of truthful disclosure ... Where over two

years have passed from the date of formation of the contract, the insurer may not rescind the contract; where an insured event occurs, the insurer shall be liable for making indemnity payment or paying insurance benefits."

This provision does not make it clear whether or not the insurer shall be liable for the insured event which occurred within the two-year period but the claim is made after expiration of the period. The ambiguity of the provision has caused lots of disputes. It happens in practice that where the insured event occurred during the contestability period, the insured or beneficiaries deliberately postpone filing a claim until the expiration of the two-year contestability period in order to avoid the insurer's rescission of the contract on the ground of non-disclosure and secure the protection of the incontestability. For example, in *Mr Wang v Life Insurance Company*,<sup>176</sup> Mr Wang effected a severe disease insurance policy on 7 April 2009. Under the policy the insurer promised to pay ¥50,000 if the insured was diagnosed with a severe disease (such as cancer, heart attack, etc.). At the time of applying for the insurance contract the insured gave a negative answer to the question in the proposal form "Have you ever had any disease or received treatments for any disease?" The insured in fact had suffered a chronic kidney disease for years but concealed this fact. The insured was diagnosed with uraemia on 25 Oct 2010, and made a claim on 10 October 2011, by which time the two-year contestability period was expired. The insurer rescinded the contract and rejected the claim on the ground of intentional misrepresentation. The court held that the insurer was barred from rescinding the contract by the incontestability provision of the Insurance Law and thus liable for the claim. *\*J.B.L. 284 177*

In this case, the insured successfully bypassed the two-year contestability period and avoided the insurer's rescission of the contract. The ambiguity of the law in this respect would certainly encourage the insured to intentionally avoid contestability of the contract by waiting until the two-year contestability period has expired before filing a claim for the insured event which occurred during the two-year contestability period. The law is thus in need of improvement.

The approach on this point in the US can be referred to here. In order to avoid this situation, in the US, most incontestability clauses are limited by a provision stating that the contestability period must be completed "during the lifetime of the insured".<sup>178</sup> With this nuance the insurer is able to contest a claim for insurance benefits after the contestability period has lapsed if the insured dies before the end of that period. The "during the lifetime of the insured" requirement suggests that the insured must live through the contestability period for the contract to become incontestable. If the insured dies immediately prior to the expiration of the contestability period, the two-year contestability period passes, and the insurer then announces that it is refusing to pay proceeds because of the insured's misrepresentation, the incontestability clause does not operate to cause the insurer to lose the misrepresentation defence.<sup>179</sup> In some situations, however, the insured's death does not interrupt the running of the two-year period if the policies do not include the phrase of "during the lifetime of the insured" in the incontestability clause. Under this line of authority, the insurer who takes action after expiration of the contestability period to contest coverage in a situation where the insured did not survive through the contestability period is barred by the incontestability clause from denying coverage.<sup>180</sup>

In order to avoid disputes arising from the ambiguity of the art.16(3) of the Insurance Law and prevent the insured from taking advantage of the loophole of the provision, the law

should make it clear that the insurer is barred from contesting the contract only for the insured event which occurs after the two-year anniversary of the formation of the contract passes. Accordingly, art.16(3) of the Insurance Law should be amended as follows:

"Where over two years have passed from the date of formation of the contract, the insurer may not rescind the contract; where an insured event occurs *after such a two-year period*, the insurer shall be liable for making indemnity payment or paying insurance benefits."

Here the phrase "after such a two-year period" is added to define the scope of period during which the insured event occurs. As discussed earlier, the *\*J.B.L. 285* incontestability provision should also be applicable to property insurance contracts, so it seems not appropriate to add the phrase "during the lifetime of the insured" into art.16(3). Instead, it would be appropriate for the insurers to add this phrase into the contestability clause in life policies.

### **Incontestability for reinstated contracts**

It is not difficult to determine the time point when the two-year contestability starts to run, as the Insurance Law clearly sets out that the time starts to run from the date of conclusion of the contract.<sup>181</sup> The Insurance Law allows a suspended life contract to be reinstated; it is submitted that the incontestability provision should also apply to an application for reinstatement of lapsed coverage. The question to be considered here is when the two-year contestability period should commence to run. Should it start to run from the time of formation of the original contract, or from the date of reinstatement of the suspended contract? There is no apparent answer to this question in the Insurance Law.

The rules for reinstatement of a suspended contract are stipulated in art.37 of the Insurance Law, which provides:

"A contract which lapses in accordance with art.36 of this Law<sup>182</sup> is reinstated where the insurer and the proposer have reached an agreement through consultations and the proposer has paid the outstanding premiums. However, the insurer has the right of rescission where no agreement has been reached by the parties within two years from the date of the lapse of the contract."

According to this article, the insured can apply for a reinstatement and the application must be agreed by the insurer. The insurer needs to check if the suspended contract meets the requirements of the reinstatement.

It is unclear whether or not the insured has a statutory duty to disclose material fact to the insurer at the time of reinstatement of the contract, as the Insurance Law does not give any stipulation in this regard. In practice, however, the insurer usually requires the insured to disclose new information about the reinstatement. The insurer can either agree to reinstate the contract or to reject the application for reinstatement based on the information supplied by the insured.

It is reasonable for the insurer to request the insured to disclose new information relating to the reinstatement of the contract, because it is often the case that after the contract is suspended, the insured has found the life insured to have a disease and then wishes to reinstate the suspended contract. This is called adverse selection. If an adverse selection is

not limited, it would not be fair to the insurer. On the other hand, the insurer should not be allowed to refuse an application for reinstatement on the ground of a disease which developed or was diagnosed prior to the suspension of the contract. *\*J.B.L. 286*

In practice, the insurers usually ask questions in the application form for reinstatement. In *Mr Zhang v Life Insurance Company*,<sup>183</sup> a question on the reinstatement application form asks: "From the date of formation of the original contract to this date, do you have any physical symptoms or signs which are newly found or were found before the contract was entered into." If the insurer is allowed to ask such a question and then refuses the application for reinstatement based on the information from the answer to the question, this would be equivalent to giving the insurer the second opportunity to turn down the contract (particularly in the case of a bad bargain) which the insurer would otherwise not have been able to reject if the contract had not been suspended.

It is submitted that the insured should be allowed to ask a question such as "From the beginning of suspension of the original contract to this date, do you have any physical symptoms or signs or diseases?"<sup>184</sup> And then the insurer can decide to accept or reject the application for reinstatement on the basis of the answer to this question. It is appropriate for the insurer to have an adequate window of time to investigate the new information relating to the reinstatement. It is suggested that a two-year period of time should be adequate from the date of the reinstatement,<sup>185</sup> so the two-year contestability period should also apply to reinstatement and run from the date of the reinstatement.

If the reinstatement occurs within two years from the time of formation of the original contract, information supplied by the insured at the time of the original contract and that at the time of reinstatement can all be invoked by the insurer to contest the contract. But if the reinstatement occurs after two years from the formation of the original contract, only the new information can be used by the insurer to contest the reinstated contract and the contest should be barred after two years from the date of reinstatement of the contract.

It is the settled law in the US that before a lapsed policy is reinstated, the insured is almost always required to present new evidence of insurability.<sup>186</sup> If the policy is reinstated owing to the insured's fraud or misrepresentation, most courts hold that with respect to the new evidence presented the contestability period runs again from the date of the reinstatement.<sup>187</sup> Defences based on facts relevant to the initial issuance of the policy and that were barred by the running of the first contestability period remain barred.<sup>188</sup>

As mentioned earlier, the Insurance Law requires the insurer to exercise his right of rescinding the contract within 30 days after he knows the cause for rescission. If he does not, his right of rescission will be extinguished after 30 days. *\*J.B.L. 287* Logically, the 30-day limitation should also be applied to a reinstated contract. If the insurer is allowed to rescind the contract by reason of the insured's non-disclosure of new material information at the time of applying for the reinstatement, his right to rescind the contract should also be exercised within 30 days after he becomes aware of the new cause for rescission.

## Conclusions and suggestions

This article has examined the incontestability provision in the insurance law and policies in some common law and civil law jurisdictions.

The [CIDRA](#) does not include an incontestability provision. This is out of line with approaches in many other jurisdictions. The insurer is entitled to avoid the contract at any time by reason of careless misrepresentation where the insurer would not have entered into the contract on any terms. It is suggested that an incontestability provision be introduced to [CIDRA](#) in its amendment in the future. [Paragraph 5 in Sch.1 to the CIDRA](#) could be amended as follows:

"If the insurer would not have entered into the consumer insurance contract on any terms, the insurer may, *within 5 years after the contract was entered into*, avoid the contract and refuse all claims, but must return the premium paid."

In Chinese law, three major shortcomings with the incontestability provision have been identified and critically discussed. The ambiguity of the provision has been clarified as to the question whether the insurer should be barred from contesting the validity of the contract on the ground of fraud or fraudulent non-disclosure or misrepresentation after the expiration of the two-year period. It is suggested that the incontestability provision should be applicable to fraudulent non-disclosure or misrepresentation, but not to other kinds of fraud. For profound fraud, such as the use of an imposter, the insurer should be allowed to contest the validity of the contract after the two-year period expires.

The incontestability provision is ambiguous where the insured event occurs within the two-year period, the insured postpones filing a claim until the expiration of the two-year period. It is suggested that in the case of intentional or grossly negligent non-disclosure or misrepresentation, the insurer should be liable only for the event which occurs after the two-year period expires.

It is suggested that the incontestability provision should be applied to reinstatement of suspended life policies; and that with respect to the new information presented at the time of applying for reinstatement, the two-year contestability period should run again from the date of the reinstatement.

It is recommended that art.16(3) of the Insurance Law be amended as follows:

"Where over two years have passed from the date of formation of the contract, the insurer may not rescind the contract, *except in the presence of fraud*; where an insured event occurs *after such a two-year period*, the insurer shall be liable for making indemnity payment or paying insurance benefits."

Here the phrase "except in the presence of fraud" is added to exclude fraud from the scope of application of the incontestability provision. The phrase "after such *\*J.B.L. 288* a two-year period" is added to define the scope of period during which the insured event occurs.

### **Dr Zhen Jing**

*Senior Lecturer in Law*

*School of Law, Bangor University, UK*

### **Dr Ming Zhong**

*Professor*

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1. [Marine Insurance Act 1906 \(UK\) \(MIA\) s.17](#). It must be noted that any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of the [Consumer Insurance \(Disclosure and Representations\) Act 2012](#) and the [Insurance Act 2015](#). In [s.17 of the MIA](#) (marine insurance contracts are contracts of the utmost good faith), the words from ", and" to the end are omitted.
  2. The rule of disclosure was provided by [s.18\(1\) of the MIA 1906](#) which was repealed by the [Insurance Act 2015](#). For non-consumer insurance contracts, the duty of disclosure is now provided in [s.3\(4\)\(a\) of the Insurance Act 2015](#), which effectively replicates the disclosure duty in [s.18\(1\) of the MIA 1906](#). The key features of [s.3\(4\) of the Insurance Act 2015](#) are that the insured must disclose "every material circumstance" which the insured "knows or ought to know". For consumer insurance contract, the duty of disclosure and misrepresentation is provided in [s.2 of the Consumer Insurance \(Disclosure and Representations\) Act 2012](#). The remedy for breach of the duty for consumer insurance contracts will be discussed below.
  3. Such as Australia, New Zealand, China, Germany, Macau, Taiwan and the US.
  4. *Anstey v British Natural Premium Life (1908) 99 L.R. 765 CA.*
  5. See G. Salzman, "The Incontestable Clause in Life Insurance Policies" [1969] Ins. L.J. 142.
  6. The Post Office London Directory (1843), p.1590, <http://books.google.co.uk/books?id=lw87AQAAMAAJ&pg=PA9&dq=the+post+office+london+directory+1843&hl=en&sa=X&ei=mPbpU-ufL-So4gTxzoCADw&ved=0CCoQ6AEwAA#v=onepage&q=the%20post%20office%20london%20directory%201843&f=false> [Accessed 22 March 2016].
  7. See *J. Stalson, Marketing Life Insurance: Its History in America (Cambridge, MA: Harvard University Press, 1942), p.317*. See also Salzman, "The Incontestable Clause in Life Insurance Policies" [1969] Ins. L.J. 142, 142.
  8. The nature of, and the reasons for, the imposition of a duty of disclosure were clearly set out by Lord Mansfield in his judgment in [Carter v Boehm \(1766\) 3 Burr. 1905](#). [Section 18\(1\) of the MIA 1906](#) codified Lord Mansfield's judgment in [Carter v Boehm](#). For more on history of the development of the duty of disclosure in English law, see *Colinvaux's Law of Insurance, 9th edn, edited by R. Merkin (London: Sweet & Maxwell, 2010), para.6-02*.
  9. *The Law Commission and the Scottish Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Law Com No.353/Scot Law Com No.238, 17 July 2014), para.1.10 of the Executive Summary.*
  10. For example, an incontestability provision is included in s.84 of the Life Insurance Act 1945 (Australia), which prevented the avoidance of a life policy for written misrepresentation after three years from its inception.
  11. The Insurance Law of the People's Republic of China was enacted by the National People's Congress in 1995; it was the first comprehensive legislation on insurance in China, consisting of insurance contract law and insurance regulation. To meet the commitment to the WTO, the Insurance Law 1995 was amended in 2002 mainly on insurance regulation, and insurance contract law was essentially not changed in the 2002 version. The Law was again amended in 2009. Both contract law and regulation were amended substantially.

12. Insurance Law art.16(1) and (2). For more on the insured's pre-contract duty of disclosure, see Z. Jing, "Insured's Duty of Disclosure and Test of Materiality in Marine and Non-marine Insurance Laws in China" [2006] J.B.L. 681.
13. Insurance Law art.16(3).
14. As Moulton LJ said (in *Anstey v British Natural Premium Life (1908) 99 L.R. 765*), "For many years I have been of opinion that life insurance conducted on wrong lines—namely, that the companies have gradually made the terms of life policies more and more strict, so that at last in many cases the security of the assured has been reduced to a minimum. That was done by making the assured guarantee and accept as conditions of the contracts all sorts of statements about his health ...."
15. See *Stalson, Marketing Life Insurance (1942), p.317*. See also Salzman, "The Incontestable Clause in Life Insurance Policies" [1969] Ins. L.J. 142, 142.
16. See The Post Office London Directory (1843), p.1598.
17. The Post Office London Directory (1843), p.1598.
18. See *Stalson, Marketing Life Insurance (1942), p.317*.
19. [Wood v Dwarris \(1856\) 11 Ex. 493](#). See Salzman, "The Incontestable Clause in Life Insurance Policies" [1969] Ins. L.J. 142, 143.
20. [Wheeldon v Hardisty \(1958\) 8 El. & Bl. 232](#).
21. See *Colinvaux's Law of Insurance (2010), paras 6-083 and 18-038; Houseman's Law of Life Assurance, 14th edn, edited by R. Surridge, B. Murphy, N. John and C. Griffin (London: Bloomsbury Professional, 2011), p.95*.
22. Professor Merkin summaries three possible consequences for insurance fraud: the insured may face an action in deceit; if the policy is avoided the insured will lose the right to recover the premium; and any clause which purports to limit or exclude the insured's duty of utmost good faith will not as a matter of public policy extend to fraud, as no person will be permitted to take advantage of his own fraud ([HIH Casualty and General Insurance v Chase Manhattan Bank \[2003\] Lloyd's Rep. I.R. 230 HL](#)). See *Colinvaux's Law of Insurance (2010), para.6-17*.
23. *Anstey v British Natural Premium Life (1908) 24 T.L.R. 871*.
24. [Wood v Dwarris \(1856\) 11 Ex. 493](#); [Wheeldon v Hardisty \(1858\) 8 El. & Bl. 232](#).
25. *Anstey v British Natural Premium Life (1908) 99 L.R. 765*.
26. *Re General Provincial Ex p. Daintree (1870) 18 W.R. 396*.
27. [Anctil v Manufacturers Life \[1899\] A.C.604 PC](#) (Canada).
28. For more, see the report by the *Law Commission and the Scottish Law Commission, Consumer Insurance Law: Pre-contract Disclosure and Misrepresentation (December 2009), paras 12.1 to 12.35*.
29. Consumer insurance contract means a contract of insurance between (1) an individual who enters into the contract wholly or mainly for purposes unrelated to the individual's trade, business or profession, and (2) a person who carries on business of insurance and who becomes a party to the contract by way of that business; consumer means the individual who enters into a consumer insurance contract, or proposes to do so.
30. [CIDRA s.2\(2\)](#).
31. A misrepresentation is deliberate or reckless if the consumer (a) knew that it was untrue or misleading, or did not care whether or not it was untrue or misleading, and (b) knew that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the

- insurer ([CIDRA s.5\(2\)](#)).
- [32.](#) [CIDRA Sch.1, para.2.](#)
- [33.](#) A misrepresentation is careless if it is not deliberate or reckless ([CIDRA s.5\(3\)](#)).
- [34.](#) [CIDRA Sch.1, paras 3 to 8.](#)
- [35.](#) [CIDRA Sch.1, para.9.](#)
- [36.](#) For more, see *Macgillivray on Insurance Law, 12th edn, edited by J. Birds, B. Lynch and S. Milnes (London: Sweet & Maxwell, 2012), paras 19-047 and 19-048.*
- [37.](#) *The Law Commission and the Scottish Law Commission, Insurance Contract Law: Issues Paper 1, Misrepresentation and Nondisclosure (September 2006), paras 6.126 to 6.129.*
- [38.](#) *The Law Commission and the Scottish Law Commission, Insurance Contract Law: A Joint Consultation Paper, Misrepresentation, Nondisclosure and Breach of Warranty by the Insured (June 2007), paras 4.195 to 4.200.* The main argument for a contestability period was that it would increase trust in the market. As Nick Kirwan of Scottish Widows put it: "This is the right thing to do. The biggest single issue in the industry is consumer trust. Non-contestability could boost trust and encourage consumers to take out insurance policies" (para.4.199). The main arguments against a contestability period were that it would encourage fraud; increase costs and premium; and lead to inconsistent treatment between cases on different sides of an arbitrary line. The ABI said "it would tip the balance too far in favour of the insured" (para.4.196).
- [39.](#) *Law Commissions, Insurance Contract Law: A Joint Consultation Paper (June 2007), paras 4.203 and 4.204.*
- [40.](#) See *Law Commissions, Consumer Insurance Law (December 2009), para.10.23.*
- [41.](#) *Law Commissions, Consumer Insurance Law (December 2009), paras 4.52 to 4.53 and paras 10.20 to 10.28.*
- [42.](#) See *Law Commissions, Insurance Contract Law: Issues Paper 1 (September 2006).*
- [43.](#) Non-consumer insurance contract means a contract of insurance that is not a consumer insurance contract. This includes insurance for charities, micro-businesses and small or medium enterprises, as well as large risks, marine insurance and reinsurance.
- [44.](#) [Insurance Act 2015 s.3.](#)
- [45.](#) [Insurance Act 2015 s.8.](#)
- [46.](#) [Insurance Act 2015 Schedule, Pt 1, paras 2 –4.](#)
- [47.](#) Such as Australia, New Zealand, Canada, China, Germany and the US.
- [48.](#) For an overview of life insurance on misrepresentation and non-disclosure in Australia, see *R. Merkin, Reforming insurance law: is there a case for reverse transportation?, Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform (2007), paras 4.58 to 4.62;* and also G. Boyd, "The Duty of Disclosure in Life Insurance: is the Balance struck by Part IV of the Insurance Contracts Act Appropriate?" (2001) 13 Ins. L.J. 59.
- [49.](#) Life Insurance Act 1945 s.84 provides: "A policy shall not be avoided by reason only of any incorrect statement (other than a statement as to the age of the life insured) made in any proposal or other document on the faith of which the policy was issued or reinstated by the company unless the statement —

(a) was fraudulently untrue; or

(b) being a statement material in relation to the risk of the company under the policy, was

made within the period of three years immediately preceding the date on which the policy is sought to be avoided or the date of the death of the life insured, whichever is the earlier."

- [50.](#) For more, see *Merkin, Reforming insurance law (2007)*, para.4.58.
- [51.](#) ICA s.29(1).
- [52.](#) ICA s.29(2). The insurer must initially prove that he would not have entered into the contract on any term but for misrepresentation or non-disclosure, i.e. that he was induced by the presentation of the risk. This is so even if there is fraud (*Schaffer v Royal & Sun Alliance Life Assurance Australia Ltd [2003] QCA 182*). If the inducement requirement is satisfied, the insurer has the right of avoidance for fraud, although this subject to the court's power to disapply the remedy of avoidance under s.31 of the ICA.
- [53.](#) The ICA does not define fraudulent non-disclosure or fraudulent misrepresentation. Accordingly, its meaning is derived from the common law. Non-disclosure of a material fact is fraudulent if the insured knew the fact and deliberately concealed it because they believed the insurer might decline the risk or only accept it on special terms if they disclosed the fact (*Dalgety Co Ltd v Australian Mutual Provident Society [1908] V.L.R. 481* at 499). Misrepresentation of a material fact is fraudulent if the insured made it: without actually and honestly believing it was true, or recklessly indifferent to whether it was true or not (*NTG Victory Australia Ltd v Hudson [2003] WASCA 291* at [5] (Steytler J), [32] (Parker J), citing *Sutton, Insurance Law in Australia, 3rd edn (LBS, 1999)*, para.3.138); and with the intention of it being acted on (*Dr Gregory Moore v National Mutual Life Association of Australasia Ltd [2011] NSWSC 416* at [71]). For more, see *G. Pynt, Australian Insurance Law: A First Reference, 2nd edn (LexisNexis Butterworths, 2011)*, para.8.25.
- [54.](#) ICA s.29(3).
- [55.](#) ICA s.29(4). There are also other remedies as provided at s.29(5) to 29(10) of the ICA.
- [56.](#) *Mccabe v Royal & Sun Alliance Life Assurance Australia Ltd [2003] WASCA 162*.
- [57.](#) *Schaffer v Royal & Sun Alliance Life Assurance Australia Ltd [2003] QCA 182*.
- [58.](#) ICA s.28(2).
- [59.](#) ICA s.28(3). For example, if the insurer would (1) have charged a higher premium if there had been proper disclosure and no misrepresentation, the insurer's liability will be reduced by the amount of the notional increase in premium; (2) have inserted a different term into the contract if there had been proper disclosure and no misrepresentation, the insurer will only be liable to the extent that it would have been if the term had been inserted. If the term would have excluded liability for the claim, the insurer's liability will be reduced to nil; or (3) not have entered into the contract at all if there had been proper disclosure and no misrepresentation, the insurer's liability will be reduced to nil, although it will be required to return the premium (unless the non-disclosure or misrepresentation was fraudulent). For more, see *Pynt, Australian Insurance Law (2011)*, para.8.54.
- [60.](#) ICA s.30.
- [61.](#) [CIDRA Sch.1, para.5](#).
- [62.](#) For an overview of the legislations on non-disclosure and misrepresentation in New Zealand, see *Merkin, Reforming insurance law (2007)*, paras 4.63 to 4.67.
- [63.](#) *New Zealand Law Commission, Preliminary Paper 53, Life Insurance (December 2003)*, paras 5.1 to 5.3, [http://www.lawcom.govt.nz/sites/default/files/mediaReleaseAttachments/Publication\\_90\\_271\\_PR%20LI F.pdf](http://www.lawcom.govt.nz/sites/default/files/mediaReleaseAttachments/Publication_90_271_PR%20LI F.pdf) [Accessed 24 March 2016].
- [64.](#) Insurance Law Reform Act 1977 s.6:

**"Incorrectness and materiality defined:**

(1)For the purposes of sections 4 and 5, and notwithstanding any admission, term, condition, stipulation, warranty, or proviso in the application or proposal for insurance or in the life policy or contract of insurance, a statement is substantially incorrect only if the difference between what is stated and what is actually correct would have been considered material by a prudent insurer.

(2)For the purposes of sections 4 and 5, and notwithstanding any admission, term, condition, stipulation, warranty, or proviso in the application or proposal for insurance or in the life policy or contract of insurance, a statement is material only if that statement would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether he would have taken or continued the risk upon substantially the same terms."

[65.](#) Insurance Law Reform Act 1977 s.6.

[66.](#) A statement is made fraudulently if the person making it makes it knowing it is incorrect, or without belief in its correctness, or recklessly without caring whether it is correct or not (s.4(2) of the Insurance Law Reform Act 1977).

[67.](#) Insurance Law Reform Act 1977 s.4:

**"Misstatements in contracts of life insurance:**

(1)A life policy shall not be avoided by reason only of any statement (other than a statement as to the age of the life insured) made in any proposal or other document on the faith of which the policy was issued, reinstated, or renewed by the company unless the statement—

(a) was substantially incorrect; and

(b) was material; and

(c) was made either—

(i) fraudulently; or

(ii) within the period of 3 years immediately preceding the date on which the policy is sought to be avoided or the date of the death of the life insured, whichever is the earlier.

(2)For the purposes of subparagraph (i) of paragraph (c) of subsection (1), a statement is made fraudulently if the person making it makes it—

(a) knowing it is incorrect; or

(b) without belief in its correctness; or

(c) recklessly, without caring whether it is correct or not."

- [68.](#) Insurance Law Reform Act 1977 s.7.
- [69.](#) *New Zealand Law Commission, Some Insurance Law Problems (Report 46, May 1998).*
- [70.](#) A reference to a risk first attaching does not include the attaching of a risk on the issue of a policy replacing interim cover or on the reinstatement or renewal of a policy (*New Zealand Law Commission, Some Insurance Law Problems (May 1998), para.31.*
- [71.](#) *New Zealand Law Commission, Some Insurance Law Problems (May 1998), para.31.*
- [72.](#) *New Zealand Law Commission, Life Insurance (Report 87, November 2004).*
- [73.](#) *New Zealand Law Commission, Some Insurance Law Problems (May 1998).*
- [74.](#) *New Zealand Law Commission, Life Insurance (November 2004).*
- [75.](#) See *New Zealand Law Commission, Life Insurance (November 2004).*
- [76.](#) *New Zealand Law Commission, Some Insurance Law Problems (May 1998).*
- [77.](#) Certain circumstances where cl.14 of the Bill does not apply are set out in cl.15 of the Bill. Clauses 14 and 15 of the Bill affected only non-disclosure and not misrepresentation.
- [78.](#) *New Zealand Ministry of Economic Development (NZMED), Review of Financial Products and Providers: Insurance (December 2006), para.283.*
- [79.](#) An answer to a question would be substantially incorrect and material where, for instance, the difference between what is stated or failed to be disclosed and what is actually correct would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether the prudent insurer would have taken or continued the risk on substantially the same terms.
- [80.](#) A question was asked in *NZMED, Review of Financial Products and Providers (December 2006)* for consultation (question 35): should the interim cover circumstance giving the right to avoid be limited to 10 days or a longer period?
- [81.](#) These remedies will apply where (1) the insurer is not entitled to avoid the contract, and in the circumstances a reasonable person ought to have known that the undisclosed or misrepresented fact would have influenced the judgment of a prudent insurer in relation to that insurance contract; or (2) for life insurance, an incorrect statement of the age of the insured (*NZMED, Review of Financial Products and Providers (December 2006), para.292*). The restitution remedies that will apply to the insurer are: (1) declining to accept the risk on any terms (i.e. exclude a particular risk prospectively, or cancel the policy prospectively); (2) accepting the risk only at a higher premium; (3) accepting the risk on different terms regardless of the premium; and (4) for life insurance age misstatement, the formula in cl.13 of the Insurance Contracts Bill 2004 will apply.
- [82.](#) *L. Dalziel, Insurance: Contracts, Agency and Assignment (n.d.), Ministry of Business, Innovation and Employment.*  
<http://www.med.govt.nz/business/business-law/pdf-docs-library/past-work-and-older-topics-pdfs/revie-w-of-financial-products/insurance-contracts-agency-and-assignments.pdf/view> [Accessed August 2014].
- [83.](#) Insurance Law Reform Act 1977 s.7.
- [84.](#) *Stalson, Marketing Life Insurance (1942), p.317.* See also Salzman, "The Incontestable Clause in Life Insurance Policies" [1969] *Ins. L.J.* 142, 142.
- [85.](#) Of the 50 states, 43 states have statutes setting out mandatory incontestable clauses in life insurance

- contracts: see Salzman, "The Incontestable Clause in Life Insurance Policies" [1969] *Ins. L.J.* 142, 143.
- [86.](#) See *R. Jerry and D. Richmond, Understanding Insurance Law, 5th edn (LexisNexis, 2012)*, p.763.
- [87.](#) See, e.g., Ala. Code §27-19-5 (2001); N.J. Stat. Ann. §17B: 26-5a (2010); Tex. Code Ann. §705.104 (2005).
- [88.](#) *Paul Revere Life Insurance Co v Gilbert K. Haas* 644 A. 2d 1098 (N.J. 1994).
- [89.](#) N.J. Stat. Ann. §17B: 26-5 (2010).
- [90.](#) N.J. Stat. Ann. §17B: 26-5 (2010).
- [91.](#) See *Jerry and Richmond, Understanding Insurance Law (2012)*, p.769.
- [92.](#) See *Obtartuch v Sect. Mut. Life Ins. Co* 114 F. 2d 873 (7th Cir. 1940); *Strawbridge v N.Y. Life Ins. Co* 504 F. Supp. 824 (D.N.J. 1980); *Muslin v Columbian Nat'l Life Ins. Co* 3 F. Supp. 368 (S.D.N.Y. 1932).
- [93.](#) Such as Florida, California, etc.
- [94.](#) See *Allstate life Ins. Co v Miller* 424 F. 3d 1113 (11th Cir. 2005); *Amex Life Assurance Co v Superior Court* 14 Cal. 4th 1231 [60 Cal. Rptr 2d 898, 930 P. 2d 1264 (1997)].
- [95.](#) *Amex Life Assurance Co v Superior Court* 14 Cal. 4th 1231 [60 Cal. Rptr 2d 898, 930 P. 2d 1264] (1997).
- [96.](#) California Insurance Code 2010 §10113.59(b)(2)(B) defines an impostor as "a person other than the named insured who participates in any manner in the application process for a certificate under an individual life insurance policy and represents himself or herself to be the named insured or represents that a sample or specimen of blood, urine, or other bodily substance is that of the named insured".
- [97.](#) Cal. Ins. Code §10113.5(b) provides: "Notwithstanding subdivision (a), if photographic identification is presented during the application process, and if an impostor is substituted for a named insured in any part of the application process, with or without the knowledge of the named insured, then no contract between the insurer and the named insured is formed, and any purported insurance contract is void from its inception."
- [98.](#) Insurance Contract Act 2008 s.19(2) and (3). In the event of withdrawal after the occurrence of the insured event, the insurer shall not be obligated to effect payment, unless the breach of the duty of disclosure refers to a circumstance which is neither responsible for the occurrence or for the establishment of the occurrence of the insured event nor for the establishment or the extent of the insurer's liability. If the policyholder has fraudulently breached the duty of disclosure, the insurer shall not be obligated to effect payment (Insurance Contract Act 2008 s.21(2)).
- [99.](#) Insurance Contract Act 2008 s.19(3). It is implied that the insurer should be liable for the insured event which occurred prior to the termination of the contract.
- [100.](#) Insurance Contract Act 2008 s.21(1).
- [101.](#) Insurance Contract Act 2008 s.19(4).
- [102.](#) According to art.5 and art.8 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1990, the socialist system and policies shall not be practised in the Hong Kong and the previous capitalist system (including the common law, rules of equity and so on) and way of life shall remain unchanged for 50 year from 1 July 1997.
- [103.](#) See *Colinvaux's Law of Insurance in Hong Kong, 2nd edn, edited by R. Merkin (London: Sweet & Maxwell, 2012)*, para.1.011.
- [104.](#) Marine Insurance Ordinance s.18(1). For more on non-disclosure and misrepresentation in Hong Kong, see *Colinvaux's Law of Insurance in Hong Kong (2012)*, paras 6.001 to 6.140.
- [105.](#) Marine Insurance Ordinance s.20(1).

- [106.](#) For example, art.24 of the Code provides: "An insurer should not refuse a claim by a policyholder: (a) on the grounds of nondisclosure of a material fact which the policyholder could not reasonably have been expected to disclose, or if the insurance was issued without the policyholder being requested to submit a proposal; (b) on the grounds of misrepresentation unless this is a deliberate or negligent misrepresentation of a material fact, provided that this does not apply to marine or aviation policies; or (3) in the absence of fraud by the policyholder, on the grounds of a breach of warranty or condition if the loss is unrelated to the breach." The Code of Conduct for Hong Kong Insurers published by the Hong Kong Federation of Insurers is specifically required under s.67 of the Insurance Companies Ordinance (Cap. 41) (the full text of the Code can be seen at the website of the Office of the Commissioner of Insurance, [http://www.oci.gov.hk/framework/index\\_06\\_08.html](http://www.oci.gov.hk/framework/index_06_08.html) [Accessed 22 March 2016]).
- [107.](#) Unlike other branches of law, the insurance law may not be a priority on the political agenda. However, well-balanced provisions with a high degree of certainty will promote the insurance industry in Hong Kong which, in turn, will strengthen the position of this city as an international financial centre in the region. See *P. Sooksripaisarnkit, "Insurance Contract Law: Should there be Reform in Hong Kong" (11 October 2011), Hong Kong Legal Community, LexisNexis*, <http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/Insurance-contract-law-should-there-be-reform-in-Hong-Kong> [Accessed 22 March 2016].
- [108.](#) See *Colinvaux's Law of Insurance in Hong Kong (2012), paras 6.083 and 16.037*.
- [109.](#) [Wood v Dwaris \(1856\) 11 Ex.493](#); [Wheulton v Hardisty \(1858\) 8 El. & Bl. 232](#).
- [110.](#) *Anstey v British Natural Premium Life (1908) 99 L. R. 765*.
- [111.](#) *Re General provincial Ex p. Daintree (1870) 18 W.R. 396*.
- [112.](#) Approved by Decree-Law No.40/99/M, of 3 August 1999; First amendment: Law No. 6/2000 of 27 April 2000; Second amendment: Law No.16/2009 of 10 August 10 2009. Part 18 of the Commercial Code concerns insurance contracts.
- [113.](#) Commercial Code art.973.
- [114.](#) The term "bad faith" is not defined in the Code. It is translated from the term "e yi" in the Chinese version of the Commercial Code. It means here intentional or fraudulent, or with ill will.
- [115.](#) Commercial Code art.974.
- [116.](#) Commercial Code art.975.
- [117.](#) Commercial Code art.1041.
- [118.](#) It was first enacted on 30 December 1929 and amended many times in later years. The latest amendment was made on 8 January 2014.
- [119.](#) See Salzman, "The Incontestable Clause in Life Insurance Policies" [1969] *Ins. L.J.* 142, 162.
- [120.](#) *N. Kirwan, "No test" (16 November 2006), Money Marketing*, <http://www.moneymarketing.co.uk/no-contest/132389.article> [Accessed 22 March 2016].
- [121.](#) See the *Law Commissions, Consumer Insurance Law (December 2009), para.10.22*.
- [122.](#) *Law Commissions, Insurance Contract Law: A Joint Consultation Paper (June 2007), para.4.203*.
- [123.](#) *J. Gornitzki, "Non-contestability Proposal could Prove to be Harmful" (1 August 2007), Cover*, <http://www.covermagazine.co.uk/cover/news/2149042/non-contestability-proposal-prove-harmful> [Accessed 22 March 2016].
- [124.](#) The incontestability provision applies to life policy with severe disease cover in Chinese insurance practice. This will be seen later.

[125.](#) The 1995 and 2002 versions of Insurance Law did provide incontestability on misstatement of the life insured's age after two years have lapsed from the date of conclusion of the contract. Article 53 of the 1995 version and art.54 of the 2002 version are exactly the same; both provide: "Where the age of the insured as declared by the proposer is not true and his true age fails to meet the age requirements set forth in the contract, the insurer may rescind the contract and in this case, he shall refund the premium to the proposer after deducting a service charge, except that over two years have lapsed from the date of conclusion of the contract.

Where the age declared by the insured is not true so that the proposer pays a premium less than the premium payable, the insurer shall have the right to adjust the premium and demand the proposer to make up the premium, or pay insurance monies in accordance with the proportion of the premium actually paid to the premium payable at the time of paying such insurance monies.

Where the age declared by the insured is untrue so that the proposer has actually paid a premium more than the premium payable, the insurer shall return the exceeding premium received to the proposer."

[126.](#) Insurance Law 2009 art.16(1).

[127.](#) Jing, "Insured's Duty of Disclosure and Test of Materiality in Marine and Non-marine Insurance Laws in China" [2006] J.B.L. 681, 688.

[128.](#) Article 6 of the Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China, which was passed by the Judgement Committee of the Supreme People's Court on 6 May 2013 and became effective on 8 June 2013 (SPC Interpretation (2)). According to arts 5 and 6 of the Stipulation of the Supreme People's Court on the Judicial Explanation (2007 No.12), the Supreme People's Court stipulation, judicial explanation or decision have legal effect. This means that the Supreme People's Court stipulation, judicial explanation or decision is one of the legal sources in China.

[129.](#) Insurance Law art.16(1). For test of materiality and remedies for breach of such duty of disclosure, see Jing, "Insured's duty of disclosure and test of materiality in marine and non-marine insurance laws in China" [2006] J.B.L.681; and H.Y. Yeo, "Of Remedies and Non-disclosure in the Insurance Law of the People's Republic of China" [2011] J.B.L. 556.

[130.](#) Insurance Law art.16(1) and (2).

[131.](#) Insurance Law 2009 art.16(4).

[132.](#) Insurance Law 2009 art.16(5). It is implied that for an innocent or mere negligent non-disclosure, the insurer is not entitled to rescind the contract even if the facts undisclosed are material. Logically, the insurer should be liable for any loss even if the non-disclosure has a material impact on the occurrence of the insured event.

[133.](#) Insurance Law 2009 art.32 continues: "Where the age declared by the insured is not true so that the proposer pays a premium less than the premium payable, the insurer shall have the right to adjust the premium and demand the proposer to make up the premium, or pay insurance monies in accordance with the proportion of the premium actually paid to the premium payable at the time of paying such insurance monies.

Where the age declared by the insured is untrue so that the proposer has actually paid a premium more than the premium payable, the insurer shall return the exceeding premium received to the proposer.""

[134.](#) It should be noted that "the cause of rescission" refers only to rescission caused by non-disclosure and misrepresentation.

[135.](#) R.H. Zhang, "Application of Incontestability Clause" (18 December 2013), *China Insurance Newspaper*, [http://fl.sinoins.com/2013-12/18/content\\_82861.htm](http://fl.sinoins.com/2013-12/18/content_82861.htm) [Accessed 22 March 2016].

- [136.](#) For a number of reasons: first, property insurance is usually for one year, while the incontestability clause is to protect the insured's longer-term (two years or more) expectation. Secondly, the insured in property insurance is usually alive, so he is able to show evidence more easily than the insured in life insurance who has died. Thirdly, property insurance is for the protection of the value of property, while life insurance is for the protection of the value of life, as it is important for the insured's beneficiaries to have a financial source for a living when the life insured has died and is no longer able to financially support the beneficiaries.
- [137.](#) *Y.C. Zhang, "Application of Incontestability Clause in Chinese Insurance Law"*, <http://www.civillaw.com.cn/article/default.asp?id=56734> [Accessed 22 March 2016].
- [138.](#) In the Insurance Law 2009, the section of General Provisions consists of art.10 to art.30. These articles apply to both property insurance and life insurance. Articles 31–47 are concerned with life insurance contracts; arts 48–66 deal with property insurance contracts.
- [139.](#) Such as a construction insurance contract.
- [140.](#) This will be discussed shortly.
- [141.](#) There are other circumstances where the insurer is entitled to rescind the contract. For example, where the insured is in breach of the duty of notification of increase of risk during the insurance period, the insured can rescind the contract (art.54 of the Insurance Law 2009). For more, see Z. Jing, "The Insured's Post-contract Duty of Notification of Increase of Risk: A Comparative Perspective" [2013] J.B.L. 842.
- [142.](#) Insurance Law 2009 art.31. For more on insurance interest in life insurance in China, see Z. Jing "Insurable Interest in Life Insurance: a Chinese Perspective" [2014] J.B.L. 337.
- [143.](#) [Anctil v Manufacturers Life Insurance Company \[1899\] A.C. 604](#). The incontestable clause was a good answer to innocent misrepresentation, but not a good answer to a wager policy.
- [144.](#) [Life Assurance Act 1774 s.1](#); Insurance Law 2009 art.31.
- [145.](#) Insurance Law 2009 art.16(2).
- [146.](#) Insurance Law 2009 art.16(3).
- [147.](#) This case was decided by the Intermediate People's Court, Nan Yang City, Henan Province, Civil Court Judgment (2011) No 498, and is reported in *The Annual Report of the Typical Insurance Cases (2012)*, Vol.4, p.130.
- [148.](#) In a similar case, *Mrs Huang v Life Insurance Company Xiang Tan Branch* (decided by the Intermediate People's Court, Xiang Tan City, Hunan Province, Civil Court Judgment (2011) No.71, and reported in *The Annual Report of the Typical Insurance Cases (2012)*, Vol.4, p.133), Mrs Huang insured her husband's life. He fell over and died in hospital. Upon investigation of his medical record, the insurer became aware on 19 November 2010 of the fact that the life insured had coronary heart disease before the contract was concluded, but Mrs Huang did not disclose this material fact to the insurer at the time when the contract was concluded. The insurer rejected Huang's claim and also rescinded the contract on 8 March 2011. The court held that the insurer lost his right to rescind the contract because from the date when he knew the fact of insured's non-disclosure to the date when he rescinded the contract, more than 30 days had passed. The contract remained valid, and the insurer was liable for paying the insurance benefit.
- [149.](#) See *X.M. Xi, Understanding the Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China* (People's Court Press, 2014), p.206.
- [150.](#) SPC Interpretation (2) art.8. This is similar to English law, under which the insurer cannot refuse to pay a claim on the ground of non-disclosure or misrepresentation, yet keep the contract alive for the future ([West v National Motor & Accident Union \[1955\] 1 Lloyd's Rep. 207 CA](#)), unless the contract provided otherwise ([Tilley & Noad v Dominion Ins. Co Ltd \(1987\) 284 E.G. 1056](#)). See *M. Clarke, The Law of Insurance Contracts*, 6th edn (London: Informa, 2009), para.23-17C.
- [151.](#) SPC Interpretation (2) art.7.

- [152.](#) [Hemmings v Sceptre Life \[1905\] 1 Ch. 365 Ch D](#); [Holdsworth v L. & Y. Insurance \(1907\) 23 T.L.R. 521](#); [Ayrey v British Legal & United Provident Assurance Co Ltd \[1918\] 1 K.B. 136 KBD](#); [Simon, Haynes, Barlas & Ireland v Beer \(1944\) 78 Ll. L.R. 337 KBD](#); [Frans Maas \(UK\) Ltd v Sun Alliance & London Insurance Plc \[2004\] 1 Lloyd's Rep. 484 QBD](#) at [63].
- [153.](#) Insurance Law 1995 art.16(2) and Insurance Law 2002 art.17(2) are exactly the same, providing: "The insurer shall have the right to rescind the insurance contract where the proposer intentionally conceals the facts and fails to perform his duty of disclosure and truthful representation of information to the insurer or negligently fails to perform such duty, so that the failure of disclose or representation shall sufficiently influence the insurer's decision on whether he will accept the insurance or raise the premium rate."
- [154.](#) This case is cited in *B.X. Jiang, Insurance Disputes (Law Press China, 2014), p.223.*
- [155.](#) In English law, refusal to pay a claim while not declaring avoidance of the contract and making a return of premium is evidence of an intent to affirm the contract ([Simon Haynes & Barlas v Beer \(1946\) 78 Lloyd's Rep. 337](#); [West v National Motor Accident & Insurance Union \[1955\] 1 Lloyd's Rep. 207](#)).
- [156.](#) This rule is provided in art.5(2) of the Supreme People's Court First Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China (14 September 2009).
- [157.](#) Insurance Law 2009 art.16(3).
- [158.](#) See "How can a beneficiary benefit from the incontestability clause" (14 August 2010), <http://china.findlaw.cn/info/baoxian/sybx/bkbb/128142.html> [Accessed 22 March 2016].
- [159.](#) This case is reported in *Y.L Dai and G.Q. Chen, Lawyers Show You How to Make a Lawsuit: Insurance Disputes and Cases (China Economic Publishing House, 2013), p.9.*
- [160.](#) Insurance Law 2009 art.19 provides: "The following terms and conditions in an insurance contract concluded by adopting the standard clauses provided by the insurer shall be invalid: (i) those that exempt the insurer of the obligations that the insurer should have born according to law or that aggravate the obligations of the proposer and the insured; and (ii) those that deny the proposer, the insured or the beneficiary the rights that they should have been entitled to according to law."
- [161.](#) Insurance Law 2009 art.19.
- [162.](#) There is another kind of exclusion clause in insurance policies, in which the insurer lists the risks which are not covered. For instance, the insurer may exclude liability where the insured dies while piloting a helicopter. In other words, this risk of piloting a helicopter is not covered by the policy. In this situation, the incontestability clause should not operate to bar the insurer's defences pertaining to the policy's coverage. If the incontestability clause took away the insurer's defences based on coverage, the effect of the clause would be to expand coverage that never existed in the first place.
- [163.](#) [Derry v Peek \(1889\) 14 App. Cas. 337 HL](#) at 374, where Lord Herschell defined what must be proved.
- [164.](#) This case was cited in *Y.H. Zhou, The Latest Insurance Law and Doctrines: Cases, Materials and Problems (2008), p.508.*
- [165.](#) The payment was made in a meeting organised by the insurer. Many local people attended the meeting. The event received a great deal of interest from the press and the local people. See <http://china.findlaw.cn/info/baoxian/bxfal/317015.html> [Accessed 22 March 2016].
- [166.](#) In China, a household must register with a local Public Security Bureau. A Household Registration Book (HRB) is given to every household which shows the records of date of birth, sex, job of every member of the household and address of the household. The HRB can be used as an ID document. All information on an ID card comes from the records in the HRB.
- [167.](#) Insurance Law 2002 art.138 provides: "An applicant, an insured or a beneficiary, who commits insurance fraud by means of any of the following acts, which constitutes a crime, shall be investigated for his criminal responsibility in accordance with law:

(1)in the case of the applicant, deliberately fabricating the subject matter of the insurance and swindling the insured amount out of the insurer;

(2)falsely alleging the occurrence of an insured event which in fact has not occurred, and swindling the insured amount out of the insurer;

(3)deliberately causing the occurrence of an event which leads to property damage and obtaining the insured amount by fraudulent means;

(4)deliberately causing the occurrence of such insured events in the insurance of the person as death of the insured, injury and disability, or illness and obtaining the insured amount by fraudulent means; whereupon an insurance claim is fraudulently made; or

(5)forging or tampering with certifications, data or other evidence related to the occurrence of the insured event, or abetting, instigating or bribing others to adduce false evidence, data, or other proofs, or cooking up the cause of the occurrence of the insured event or overstating the extent of loss, thereby obtaining the insured amount by fraudulent means.

Administrative sanctions shall be imposed in accordance with the relevant regulations of the State if the circumstances attending any of the acts listed in the preceding paragraphs are minor and do not constitute a crime."

[168.](#) There may be an argument that even fraud by the insured ought not to prevent the incontestability clause operating to the advantage of those beneficiaries, as a term life policy is, in essence, for the benefit of the insured's beneficiaries rather than the insured himself. The argument becomes stronger in the light of the more relaxed view of privity of contract in the [Contracts \(Rights and Third Parties\) Act 1999](#). That Act might well itself operate to allow the enforcement of the incontestability clause by beneficiaries if the clause can be construed as one which is enforceable by them or is for their benefit. For more, see *Colinvaux's Law of Insurance (2010)*, para.6-83.

[169.](#) For example, in New Jersey.

[170.](#) See *Jerry and Richmond, Understanding Insurance Law (2012)*, p.769.

[171.](#) See *Obtartuch v Sect. Mut. Life Ins. Co* 114 F. 2d 873 (7th Cir. 1940); *Strawbridge v N.Y. Life Ins. Co* 504 F. Supp. 824 (D.N.J. 1980); *Muslin v Columbian Nat'l Life* 3 F. Supp. 368 (S.D.N.Y. 1932).

[172.](#) Such as Florida, California, etc.

[173.](#) See *Allstate Life Ins. Co v Miller* 424 F. 3d 1113 (11th Cir. 2005); *Amex Life Assurance Co v. Superior Court* 14 Cal. 4th 1231, 60 Cal. Rptr. 2d 898, 930 P. 2d 1264 (1997).

[174.](#) German Insurance Contract Act 2008 s.21(3).

[175.](#) Fraud here does not include fraudulent non-disclosure or misrepresentation. It means any act in which the insured actively seeks to deceive the insurer for the purpose of obtaining the insurance contract which otherwise would not have been obtained, such as the act of employing an imposter to take medical examination in the place of the sick insured.

[176.](#) This case was cited in *Zhi Hua Song (ed.), The Insurance Law Review (Law Press China, 2013)*, Vol.5, p.152.

- [177.](#) In a similar case, *Mr Wei v A Life Insurance Company*, Mr Wei effected a life policy on his own life on 6 February 2010. He died of the diseases of acute and severe hepatitis on 6 August 2011. But his beneficiary postponed making a claim until 11 September 2012, when the two-year contestability period had lapsed. Upon investigation, the insurer found that the insured had the disease of hepatitis B for about 10 years, but intentionally concealed this material fact at the time of the contract. The insured would not have entered into the contract had he been informed this fact. On this basis, the insurer rescinded the contract and rejected the claim according to art.16(2) of the Insurance Law which entitles the insurer to rescind the contract if the insured failed to disclose material fact intentionally or by gross negligence. The beneficiary argued that according to art.16(3) of the Insurance Law the insurer was barred from rescinding the contract after two years from the time of formation of the contract. The court mediated the dispute. The insurer in the end agreed to pay the insurance benefit. This case was reported by Qian Huo in the *China Insurance Newspaper*, 31 Jan 2013, <http://www.cnfol.com> [Accessed 22 March 2016].
- [178.](#) See "*Incontestability Clause*" in *West's Encyclopedia of American Law (2005)*, <http://www.encyclopedia.com/doc/1G2-3437702261.html> [Accessed 22 March 2016].
- [179.](#) See *Jerry and Richmond, Understanding Insurance Law (2012)*, p.765.
- [180.](#) See *Bolick v Prudential Ins. Co of Am.* 249 F. Supp. 735 (D.S.C. 1969); *Ramsey v Old Colony Life Ins. Co* 131 N.E. 108 (Ill. 1921); *Kocok v Metro. Life Ins. Co.* 189 N.E. 677 (N.Y. 1933).
- [181.](#) Insurance Law 2009 art.16(3).
- [182.](#) Insurance Law 2009 art.36 provides: "Where the contract specifies payment of the premium in instalments and the proposer has paid the first instalment but fails to pay the current instalment over 30 days from the date when the insurer presses for payment or over 60 days from the scheduled date of payment, the contract shall suspend, or the insurer may reduce the sum insured in accordance with the contract, unless otherwise agreed in the contract."
- [183.](#) This case was decided by the People's Court, Xin Hua District, Shi Jia Zhuang City, Hebei Province, Civil Court Judgement (2009) No.28, and is reported in *The Annual Report of the Typical Insurance Cases (2010)*, Vol.2, p.173.
- [184.](#) *Mr Zhang v Life Insurance Company* in *The Annual Report of the Typical Insurance Cases (2010)*, Vol.2, p.173.
- [185.](#) Insurance Law art.44 provides: "With respect to a contract with death as the condition for payment of insurance benefits, where the insured commits suicide within two years after the contract formed or reinstated, the insurer shall not be liable for payment of insurance benefits, unless the insured is an incapacitated person at the time of committing." Here, the two-year period runs from the time of the conclusion of the contract or from the time of the reinstatement of the contract. This gives an example for a time limitation to run from the time of the reinstatement of the contract, and the length of limitation period for a reinstated contract is the same as for an original contract.
- [186.](#) See *Jerry and Richmond, Understanding Insurance Law (2012)*, p.771.
- [187.](#) For example, see *Nyonteh v Peoples Dec. Life Ins. Co* 958 F. 2d 42 (4th Cir. 1992) (applying Virginia law); *DiMaggio v Roslyn Sav. Bank* 714 N.Y.S. 2d 314 (App. Div. 2000); *Myers v National States Ins. Co* 606 S.E. 2d 486 (S.C. Ct App. 2004). See *R. Keeton, Insurance Law Basic Text (West Publishing Co., 1971)*, p.393.
- [188.](#) See *Halstead Consultants, Inc v Cont'l Cas. Co* 891 P. 2d 926 (Ariz. Ct App. 1994); *Spencer v Kember Investors Life Ins. Co* 764 P. 2d 408 (Colo. Ct App. 1988); *N.Y. Life Ins. Co v Burris* 165 So. 116 (Miss. 1936).

