

Insurance Law Journal/(2015) 26 ILJ No 2/Articles/Restrictions on the insurer's defence of non-disclosure or misrepresentation in Chinese Insurance Law

(2015) 26 ILJ 145

Restrictions on the insurer's defence of non-disclosure or misrepresentation in Chinese Insurance Law

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At common law, before concluding an insurance contract, the insured is obliged to disclose material information to the insurer in order that the insurer can properly assess the risk to be insured. If the insured fails to comply with the obligation, the insurer may plead the defence of non-disclosure or misrepresentation to rescind the contract and repudiate liability. In order to prevent the insurer from abusing the right of rescission, the Chinese Insurance Law provides a number of restrictions on the insurer's defence of non-disclosure or misrepresentation. This article considers the approaches adopted in the Insurance Law 2009 to the restrictions on the insurer's defence, and critically examines how Chinese courts interpret and apply the rules of law in relation to such restrictions. Meanwhile suggestions on how to improve the Insurance Law on some specific issues in relation to the restrictions are put forward with references to the approaches in some other jurisdictions, including Australia.

Introduction

The nature of an insurance contract is that the insured transfers the risk of some uncertain and adverse events to the insurer by paying premiums to the latter who in return promises to compensate the former when such events occur and cause losses. In order to assess the risk to the best extent, the insurer must acquire, before entering into the contract, the relevant facts about the risk, upon which the insurance contract is built. The relevant facts, however, lie more commonly in the knowledge of the insured only.¹ Because of this information asymmetry,² the insured is under a common law duty to disclose to the insurer, prior to the conclusion of the contract, facts which are material to the insurer's decision on whether to accept the risk and, if so, on what term.³ If the insured failed to comply with the duty, the insurer may plead the defence of non-disclosure or misrepresentation to rescind the contract and repudiate liability.⁴

The current Chinese law relating to the insured's duty of disclosure or representations is provided in Art 16 of the Insurance Law 2009,⁵ and Arts 5 to 8 of the Supreme People's Court of China (the SPC) Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China (the SPC Interpretation).⁶ There are rules of law in these legislations which restrict insurers' defence on insured's failure to perform this duty.

Basically, there are two major kinds of restriction. First, an insurer is restricted from invoking the defence of non-disclosure if it has waived the duty of disclosure in certain circumstances or in relation to certain matters.⁷ Second, the Insurance Law 2009 provides time limits within which the insurer may exercise its right of rescission.⁸ The insurer is restricted from exercising its right of rescission beyond the time limits in order to prevent the insurer from abusing the right of rescission. The focus of discussion in this article is on the first kind of restriction. The second kind of restriction has critically been examined in a separate article,⁹ so it is not intended to give an in-depth analysis on the second kind of restriction in this article.

This article considers the approaches adopted in the Insurance Law 2009 and the SPC Interpretation to the restrictions on the insurer's defence of non-disclosure or misrepresentation, and critically examines the ways in which Chinese courts interpret and apply the rules of law in relation to the restrictions or limitations of the insurer's defence in judicial practice. At the same time, suggestions on how to improve the Insurance Law on some specific issues in relation to the restrictions are put forward with references to the approaches in some other jurisdictions.

A number of issues are discussed: first, circumstances under which insurers may be deemed to have waived the duty of disclosure or waived information in relation to certain matters before concluding the contract; second, insurers' knowledge of non-disclosure and waiver of potential right of rescission prior to entering into the contract; third, insurers' knowledge of non-disclosure and waiver of the right of rescission by affirmation of the contract during the insurance period; fourth, time limits on insurer's right of rescission of the contract; fifth, the relationship between rescission of the contract and repudiation of liability on the defence of non-disclosure; and finally, the causal connection between the occurrence of the insured event and the undisclosed fact in the case of a material non-disclosure by gross negligence.

Before discussing the issues mentioned above, a brief examination of the duty of disclosure or misrepresentation in the Insurance Law is appropriate and necessary.

The duty of disclosure or misrepresentation in the Insurance Law

The duty of disclosure or misrepresentation is provided in Art 16(1) of the Insurance Law 2009, which states:

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.

Disclosure can be performed in two ways -- voluntary disclosure and inquiry disclosure.¹⁰ By voluntary disclosure, the insured is bound to volunteer material information to the insurer before the contract is concluded, this has the same meaning as disclosure under common law; while by inquiry disclosure the insured's duty of disclosure is to correctly answer the questions in the proposal form and he or she is released from the duty by doing so, this is equivalent to the meaning of representation in common law.

The Insurance Law adopts the way of inquiry disclosure.¹¹ According to Art 16(1) of the Insurance Law, the insured is required to disclose only the information asked by the insurer on the proposal form; while the insurer is not permitted to plead the defence of non-disclosure of something material which is beyond the scope of the questions raised in the proposal form even if it is material.

In its judicial interpretation of the Insurance Law, the SPC provides a rule about the scope and extent of the insured duty of disclosure, which states:

The insured's duty of disclosure is limited 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.¹²

Accordingly, the insured is deemed to have performed the duty of disclosure if he or she has truthfully answered the questions in the proposal form.

The insured can only disclose what he or she knows and should not be taken to have failed to perform the duty of disclosure if he or she does not know the information.¹³ The question of whether the insured needs to disclose what he or she ought to know is unclear in the Insurance Law. The SPC has recently answered this question, by providing that:

When entering into an insurance contract, circumstances about the subject matter of insurance or of the insured which are to be truthfully disclosed by the insured as required by Art 16(1) of the Insurance Law are those which the insured actually knows.¹⁴

So the current law position is that the insured is obliged to disclose only what he or she actually knows, not what he or she ought to know. Constructive knowledge is irrelevant. For example, if the insured did not know that he or she had a tumour in their stomach before entering into the contract, they cannot be said to have failed to disclose such disease to the insurer.

Where the insured failed to comply with the duty of disclosure, the insurer has different remedies depending on the insured's state of mind and consequences of the breach.¹⁵ The insurer is entitled to rescind the contract where the insured fails intentionally or by gross negligence to fulfil the obligation of truthful disclosure of material facts which sufficiently influence the insurer's decision on whether to accept the insurance or raise the premium rate.¹⁶ It is implied in Art 16 of the Insurance Law that the insurer is not entitled to plead the de-

fence of an innocent or mere negligent non-disclosure or misrepresentation even if the undisclosed information is material.

The Insurance Law sets out time limits within which the insurer may exercise the right of rescission. The right of rescission shall lapse where the insurer does not exercise it within 30 days after having become aware of the material non-disclosure, or within 2 years from the date of formation of the contract.¹⁷

For the losses which occurred prior to the rescission of the contract, the Insurance Law takes two different approaches, depending on the insured's state of mind. First, in the case of an intentional non-disclosure the insurer is not liable for the pre-rescission losses and can retain the premium paid. It is not necessary to find a causal connection between the occurrence of the insured event and the undisclosed fact in order to refuse claims for pre-rescission losses.¹⁸ Second, for a grossly negligent non-disclosure, where the undisclosed facts has a material impact on the occurrence of the insured events, the insurer is not liable for the pre-rescission losses but must refund the premium paid.¹⁹

The Insurance Law includes a new provision regarding the insurer's waiver of the potential right to rescind the contract:

Where an insurer knows that the proposer fails to make a truthful disclosure at the time of entering into a 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.²⁰

As compared with the 1995 and 2002 versions of the Insurance Law, three major amendments have been introduced into the 2009 version for the purpose of restricting the insurer's right of rescission by defence of material non-disclosure or misrepresentation: First, the innocent or merely negligent breach of the duty of disclosure will no longer entitle the insurer to rescind the contract, instead, only gross negligence will give rise to an insurer's right to rescind.²¹ Second, the insurer's right of rescission of the contract is now limited by time.²² Third, the insurer is restricted from pleading the defence of non-disclosure to rescind the contract and repudiate liability if it knew before the inception of the contract that the insured had failed to disclose material facts.²³

In the following parts, the issues relating to restrictions on the insurers' defence of non-disclosure or misrepresentation are critically examined. To begin with, some circumstances under which insurers may be deemed to have waived disclosure before conclusion of the contract are considered.

Circumstances under which insurers may be deemed to have waived disclosure before concluding the contract

Waiver refers to the intentional relinquishment of a known right.²⁴ Through action or inaction, an insurer may waive compliance with duty of disclosure, or certain information about the subject matter of insurance, or the potential right of rescission of the contract, before entering into the contract.²⁵ The insurer may waive its right of rescission by affirmation of the contract after becoming aware of the insured's breach of the duty of disclosure during the insurance period.²⁶ Whenever the waiver occurs and whatever such a waiver is related to, once the waiver has been made, the insurer is later precluded from pleading the defence of non-disclosure to rescind the contract and repudiate liability. No insurer would readily waive the insured's compliance with the duty of disclosure, but under certain circumstances it can be deemed that an insurer has waived the insured's compliance with the duty of disclosure, or waived information relating to certain matters, therefore, the insurer is later restricted from pleading the defence of non-disclosure of the facts waived. These circumstances are considered below.

Failure to inform the insured of the duty of disclosure

In China, an ordinary person does not usually know the duty of disclosure and the consequences for failure to comply with the duty. Therefore, it is an important question whether an insurer has a duty, at the time of negotiating the contract, to inform the insured of the duty of disclosure and the consequence of breach of the duty.

According to Art 17 of the Insurance Law, when standard clauses provided by the insurer are used for concluding an insurance contract, the insurer shall attach the standard clauses to the proposal form, and explain

contents of the contract to the insured.²⁷ Usually a standard clause about the insured's duty of disclosure is provided in insurance contracts.²⁸ Therefore, the insurer's duty to explain contents of the contract should include the explanation of the disclosure clause to the insured. In practice, some insurers provide a notice, at the beginning of a proposal form, about the duty of disclosure and the consequences for breach of the duty.²⁹ However, the Insurance Law does not provide any remedies for the insurer's failure to explain the contents of the contract to the insured, except for the standard exclusion clauses.³⁰ This means that the law encourages the insurers to explain the duty of disclosure to the insured but does not punish the insurers who fail to do so.

The Intermediate People's Court of Quanzhou City, Hunan Province, expressed the view that where the insurer did not explain to the insured the duty of disclosure and the consequences for breach of the duty, the insured should not bear the duty of truthful disclosure. Therefore, in order to find whether the insured have performed the duty of disclosure, courts should first examine whether or not the insurer has performed the duty of explaining to the insured of the clause about the insured's duty of disclosure in the contract. Particularly, where an inquiry-form containing questions is used, courts should examine whether the insurer has explained to the insured the relative professional or medical terms in the questions. In the situation where the questions asked are unclear and ambiguous and mislead the insured to give inaccurate or wrong answers, the insurer is taken to have waived disclosure of information in relation to the matters, rather than the insured have failed to perform the duty of disclosure.³¹

In some other civil law and common law jurisdictions, the insurers are obliged to inform the insured of the duty of disclosure and the consequences for breach of the duty, otherwise the insurers have no remedies for the insured's breach of the duty of disclosure. For instance, under s 19(5) of the German Insurance Contract Act 2008, the insurer shall not be entitled to exercise its rights in respect of a failure to comply with the duty of disclosure if it has not instructed the insured in writing in separate correspondence of the consequences of any breach of the duty of disclosure.

In Australia, under the Insurance Contracts Act 1984 (ICA), the insurer is obliged, before a contract is entered into, to clearly inform the insured in writing of the general nature and effect of the duty of disclosure.³² The Insurance Contracts Regulation 1985 prescribes a form of writing to be used for informing an insured of the matters in respect of disclosure, the writing to be used may be in accordance with the form so prescribed.³³ An insurer who has not complied with the duty of informing the insured of his pre-contract duty of disclosure is restricted from exercising a right in respect of a failure to comply with the duty of disclosure unless that failure was fraudulent.³⁴

It is suggested that a new provision relating to the insurer's duty to inform the insured of the duty of disclosure and the effect of breach of the duty be introduced into Art 16 of the Insurance Law as follows:

The insurer shall, before a contract of insurance is entered into, clearly inform the insured in writing of the general nature and effect of the duty of disclosure. The insurer who has failed to do so may not exercise a right in respect of the insured's failure to comply with the duty of disclosure.³⁵

In practice, a notice about the duty of disclosure in red-colour or bold font must be placed at the beginning of a proposal form to draw the attention of the insured. The insurer should not be allowed to take the defence of non-disclosure if it has failed to provide such a notice.

An insurer is restricted from asking general questions

A general question, such as '[i]s there any other information within your knowledge that is likely to affect our consideration of this proposal', is designed to include all other information which has not been asked for by specific questions in the proposal form. In essence, this kind of question puts the insured in the position of voluntary disclosure and is treated as an invalid question by some courts.³⁶

The SPC does not permit the insurer to use general questions without any limit on the scope, by providing that:

The People's Courts will not uphold the insurer's rescission of the contract on the ground that the insured was in breach of the duty of disclosure if he failed to reply to a general question in the proposal form, except that there are confines in the general question.³⁷

A general question such as 'Have you had any other diseases which are not asked in the above questions?' must be invalid; while a question which is confined within reasonable scope, such as 'Have you had other cardiovascular disease in the last 5 years?' may be permitted.³⁸

Failure to make further inquiries to an incomplete or unanswered question or to contradictive answers to a question

If an insured does not answer or gives an obviously incomplete or irrelevant answer to a question in the proposal form, but the insurer who, having been put on inquiry, proceeds to issue a policy without further inquiries, the insurer is deemed to have waived further specific information in relation to the relevant matter. In *He v China Life Insurance Company Ltd Feshan Shunde Branch*,³⁹ the insured did not answer the question of '[h]ave you applied for insurance or been insured by any other insurance company?' it was held that even if the insured did not give an answer, this was deemed as an intentional breach of the duty of disclosure. The insurer clearly knew the breach, but issued the policy and received the premium without making further inquiry on the question. The insurer should be deemed to have waived disclosure in relation to the matter, so it was not allowed to take the defence of non-disclosure.

If the insured makes contradictive answers to a question, the insurer who fails to make further inquiry is deemed to have waived the disclosure of the information. In *Zhang v China Life Insurance Company Ltd Zhumadian Branch*,⁴⁰ the insured answered in the negative to the question of '[h]ave you ever had any disease and treated in a hospital in the last 5 years?' in the proposal form, but Mrs Zhang (the life insured's wife) gave to the insurer's agent the insured's medical record which showed that the life insured suffered from coronary heart disease. So the agent knew the fact that life insured had suffered the disease, but did not make any further inquiry. It was held that when facing contradictive information, the insurer did not take further steps to resolve the contradiction but issued the policy, so the insurer should be deemed to have waived its right of rescission of the contract.

Similarly, in English and Australian law, if the insured leaves a blank to a question which is accepted without inquiry by the insurer, this will normally be taken as a waiver by the insurer of any duty of disclosure in respect of the matters covered by the question.⁴¹ Under the ICA, if the insured failed to answer, or gave an obviously incomplete or irrelevant answer to a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter.⁴² An insured shall not be taken to have made a misrepresentation by reason only that he or she failed to answer a question included in a proposal form or gave an obviously incomplete or irrelevant answer to such a question.⁴³

Under the Principles of European Insurance Contract Law (PEICL), remedies for breach of the duty of disclosure shall not be available to the insurer in respect of a question which was unanswered, or information supplied which was obviously incomplete or incorrect.⁴⁴

Chinese Insurance Law does not provide any statutory rule in relation to an incomplete, irrelevant or unanswered question in the proposal form. The approach discussed above was the approach taken by the courts. Different courts may take different approaches in a similar set of facts, so it is necessary to introduce a new provision into Art 16 of the Insurance Law to govern the situation. This new provision could be phrased as follows:

Where the insured failed to answer, or gave an obviously incomplete or irrelevant answer to a question included in a proposal form about a matter, if the insurer did not make further inquiry on this question, the insurer is deemed to have waived compliance with the duty of disclosure in relation to the matter covered by this question.⁴⁵ Remedies for breach of the duty of disclosure shall not be available to the insurer in this situation.

Does an insurer have a legal duty to verify the information disclosed by the insured before entering into the contract?

It is reasonable and fair that an insurer should have a duty to check that the insured has answered all questions on the proposal form. If the insurer finds that there are ambiguous or incomplete answers or no answers to the questions, it should have a duty to make further inquiry in relation to the relevant matters. If it does not, it is deemed to have waived the insured's compliance with the duty of disclosure in relation to the

matters. However, it may be unreasonable that the insurer should be obliged to verify the information provided by the insured.

There is no answer, either by the Insurance Law or by the SPC's Interpretation, to the issue of whether the insurer has a duty to verify the information provided by the insured before the contract is entered into. As a result, sometimes the courts take the view that the insurer should verify the information provided by the insured, otherwise, it should take the legal consequence for failure to do so. This can be explained by the case of *Bai v the Life Insurance Company Ltd.*⁴⁶ There the life insured died of cirrhosis, but the insurer rejected the claim on the ground of non-disclosure of the fact that the life insured suffered hepatitis and stayed in a hospital for treatment for 15 days before the conclusion of the contract. The insured said that the insurer's agent completed the proposal form and the insured disclosed to him the life insured's hepatitis, which was evidenced by witness testimony. The court held that the insured had performed the duty of disclosure, but expressed the view that it is the insurer who is in the position to make the final decision on whether or not to conclude the contract. If the life insured does not meet the insurer's requirements and conditions for the contract, the insurer should not conclude the contract with the insured. Since the insurer concluded the contract with the insured, the insured is deemed to have met the insurer's condition for entering into the contract. Even if the insured did not meet the insurer's conditions, it was the insurer's fault for failing to verify the information carefully but entered into the contract, so the insurer should take the consequence for his fault. It could be argued that conclusion of the contract is based on the belief that the information provided by the insured is true. If the information is untrue and the insurer would not have entered into the contract had it known the true information, it cannot be said that the insured had met the insurer's conditions for concluding the contract. It is incorrect to hold that the insurer has a duty to verify the information provided by the insured before concluding the contract. If the insurer were to be obliged to verify the information, once the contract is entered into, in essence the insurer would later be precluded from any defence of non-disclosure even if the insurer was induced by the undisclosed fact.

Investigation and verification of information provided by an insured would be time-consuming and costly and would increase the costs of purchasing insurance. It is impracticable and difficult to verify all the information for every contract. It would also increase the frequency of intentional non-disclosure. Therefore, it is suggested that insurers should not be obliged to verify the information provided by the insured before concluding the contract. However, where the insurer is put on notice by the answers to the questions asked in the proposal form, it should have a duty to make further inquiry about or to investigate the specific matter. By failing to do so, the insurer should be taken to have waived the information in relation to the matter.

Facts which need not be disclosed

The Insurance Law and the SPC Interpretation do not provide any rules in relation to exceptions to the insured's duty of disclosure. The HPC of Beijing City provides a guiding rule that 'the insured is not required to disclose a circumstance if -- (1) it may diminish the probability of occurrence of the risk; (2) the insurer know it or ought to know it; or (3) it is something as to which the insurer expressly waives information'.⁴⁷ Similarly, the HPC of Zhejiang Province also provide that '[t]he insured is not deemed in breach of the duty of truthful disclosure where he did not provide an answer upon being inquired by the insurer in respect of the following matters: (1) the insurer knew; (2) according to common sense, in the ordinary course of its business the insurer should have known; and (3) the insurer declared that the insured did not need to disclose'.⁴⁸ Accordingly, the insurer should be prevented from taking the defence of non-disclosure of such information.

Insurer's knowledge of non-disclosure before the contract is concluded

As mentioned earlier, the 2009 version of the Insurance Law has introduced a new provision which provides that '[w]here the insurer knows that the proposer fails to make a truthful disclosure at the time of entering into a 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'.⁴⁹ In *Yang v the Life Insurance Company*,⁵⁰ Mr Yang effected a life policy with critical illness cover in January 2010. He gave a negative answer to a question in the proposal form: 'Have your medical examinations in the last 3 years shown any medical abnormality?' A few days later, without being asked, he submitted to the insurer a report of medical examination which he took in November 2009 in a hospital. It was clearly shown in the report that he was found to have a thyroid nodule. The insurer then arranged two medical examinations on Mr Yang. The policy was then

issued. In November 2010, the insured was diagnosed with thyroid cancer which was later removed by surgery in the hospital. The insured claim for critical illness payment but was refused by the insurer on the grounds that the insured failed to disclose the fact that he was diagnosed with thyroid nodule at the time of the contract. The court held that the insurer was aware of the fact that the insured had thyroid nodule which was clearly shown in the medical report at the time of the contract. The insurer accepted the risk after two medical examinations, so it should not be allowed to rescind the contract on the ground of non-disclosure.

Two points about Art 16(6) of the Insurance Law need to be considered here. The first point is concerned with the insured's failure to make a truthful disclosure. The phrase 'the insured fails to make truthful disclosure' must mean that the insured fails to make truthful disclosure intentionally or by gross negligence and the undisclosed fact is material. If the insurer knew that the insured had made such a non-disclosure before concluding the contract, it will lose the right of rescission. When an insured event occurs, the insurer cannot invoke the remedies as provided in Arts 16(4) and (5) of the Insurance Law to refuse liability. Where the insured had made an immaterial non-disclosure intentionally or by gross negligence, or made a material non-disclosure innocently or negligently, even if the insurer knew such a non-disclosure prior to entering into the contract, the insurer still has not the right to rescind the contract and is liable for paying insurance monies.

The second point is concerned with the insurer's knowledge. Two questions may be raised in this regard. The first one is whether the insurer's knowledge should be the actual knowledge only, or should include constructive knowledge. The HPC Beijing City expressed the view that constructive knowledge should be included by providing that:

Before entering into the contract or before the occurrence of the insured event, if the insurer knew or ought to have known that the insured had failed to perform the duty of disclosure but still entered into the contract, his exercise of rescinding the contract or repudiating the liability after occurrence of the insured event should not be upheld.⁵¹

The SPC has so far not given an interpretation in this regard for the situation before concluding the contract, but provided a rule for the situation after concluding of the contract that if the insurer becomes aware of or *ought to have known* the insured's failure to disclose material facts after the conclusion of the contract, but still collect premiums, the insurer's defence on non-disclosure or misrepresentation should not be upheld by courts.⁵²

It is suggested that the insurer's knowledge before concluding the contract should include both actual and constructive knowledge. Accordingly, Art 16(6) of the Insurance Law could be amended by adding the phrase of 'ought to know' into it as follows:

Where the insurer knows or *ought to know* that the proposer fails to make a truthful disclosure at the time of entering into a 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.

The second question is how to determine that the insurer knew or ought to have known the insured's failure to perform the duty of disclosure prior to the conclusion of the contract. In the following part, the circumstances under which the insurers are deemed to know the insured's breach of the duty of disclosure are considered.

Insurer's agent knows means the insurer knows

An insurer's agent is authorised by the insurer to negotiate insurance contracts on behalf of the insurer, the insurer must take legal consequences for the agent's acts within the scope of authorisation.⁵³ Therefore, if the agent knows that the insured has failed to perform the duty of disclosure, the insurer is deemed to know that as well, and is thus prohibited from taking the defence of the non-disclosure. In *Li v China Pingan Insurance Company Shanghai Branch*,⁵⁴ Mrs Li's husband suffered from hepatitis and went to a hospital on 7 December 2000. While her husband was staying at the hospital for treatment, Mrs Li effected a life policy on her husband's life through an agent of the insurer (Mr Xie) on 8 December 2000. She gave negative answers to all questions about the state of the life insured's health in the proposal form. Mr Xie stated in his business report to the insurer that he met the life insured on 8 December 2000. The life insured died of cirrhosis in August 2001. The insurer repudiated liability by reason of the insured's failure to perform the duty of disclosure when

applying for the insurance. The issue of argument was whether the insured intentionally withheld the fact of the life insured's hepatitis, or the insurer knew that fact but still entered into the contract. The trial court held that the contract was entered into when the life insured was in hospital for medical treatment for hepatitis. Mr Xie met the life insured in the hospital so he was aware of the illness of the life insured. The appeal court held that the insurer was deemed to know the fact of the life insured's illness, thus should not be allowed to repudiate liability on the ground of non-disclosure.

In another case,⁵⁵ the insured took out an all risk policy for his ship which was rebuilt from an old ship. However, due to the fact that the certificate of the ship still retained the words of the 'date of the building' and the 'manufacturer of the building' rather than the 'date of the rebuilding' and the 'manufacturer of the rebuilding', the insured filled in the proposal form by giving information about the ship according to the certificate and he did not disclose the fact that the ship was rebuilt from an old ship. The agent of the insurer knew the fact that the ship had been rebuilt and checked the ship in the port before the conclusion of the contract, but he did not ask the insured any further questions about this. The ship was destroyed by a collision with another ship. The insurer repudiated the liability on the ground that the insured failed to disclose the material fact of the rebuilding of the ship. The court rejected the insurer's argument and held the insurer liable.

The circumstance which the insurer's agent can observe is taken to be known by the insurer

Sometimes, courts hold that the insurer is deemed to have known the circumstance which the insurer's agent can notice by observation, and the insured is released from disclosing such circumstance to the insurer. In *Mr Jiangang Guo v China Life Insurance Company Ltd Hebi Branch*,⁵⁶ the life insured had surgery to remove a tumour from her brain (anesthesia intracranial tumor resection). A few days later, an insurer's agent visited her and persuaded her to take a life policy. The insured told the agent about the life insured's disease and the treatment by surgery. The life insured's hair had not grown out. The agent would easily notice the fact that the life insured had just taken a brain surgery, but the agent (who completed the proposal form) gave negative answers to the questions about diseases in the proposal form. When the life insured died, the insurer refused to pay on the ground of non-disclosure of the disease. The court held that the life insured had an anesthesia intracranial tumor resection, her hair did not grow out, the agent would easily see that from her appearances, so the insurer should have known the life insured's circumstance, thus the defence on non-disclosure was not upheld.

In some situations, it is unreasonable to expect the insurer's agent to know the state of health of the life insured by observation of the appearances of the life insured. For example, in *Chen and Chen v Prudential Life Insurance Company Ltd Guangdong Branch*,⁵⁷ the life insured had diabetes and eye standing retinal detachment but did not disclose the fact to the insurer. The trial court held that the insurer's agent should observe the life insured's state of health from the appearances of the life insured according to the common sense of a man, and then decide whether or not to take the risk. The appeal court found such a judgment by the trial court unreasonable. It would be very unlikely for any person to notice such an eye disease by mere observation from the appearances of the life insured.

If the insurer's agent is a friend or a relative of the insured, is he deemed to know the insured's state of health?

Some courts hold that if the insurer's agent is a relative or a friend of the life insured, he or she is deemed to know the state of the life insured's health, thus the insured is released from the duty of disclosure. For example, in *Mr Jianxiang Li v China Life Insurance Company Shangli County Branch*,⁵⁸ it was held that as the insurer's agent who negotiated the life policy with Mr Li (the insured) was a friend of Mr Li and Mrs Li (the life insured), he should be aware of the state of the life insured's health.

It is rather arbitrary and unpersuasive to make such a judgment. A friend of the insured may have more opportunity to know the state of the life insured's health, but it does not necessarily mean that the friend must know the state of the life insured's health. Whether or not a friend of the insured knows the life insured's disease must be determined in light of the relevant facts of the case. For example, as a friend of the life insured, the agent takes the life insured to a hospital for treatment of a kind of disease, the agent should be deemed to know the fact that the insured has the disease.

The observation by medical examination and the information disclosed by the insured are inconsistent, but the insurer still enters into the contract

In the situation where the insurer has discovered from the report of medical examination that the life insured suffered from a disease which the insured did not disclose, but has still issued the policy, the insurer is precluded from pleading the defence of non-disclosure of the disease. In *Li v Hezhong Life Insurance Company Pingdingshan Branch*,⁵⁹ Mr Li insured his wife's life in February 2008. The life insured had a kind of heart disease before the contract was concluded. The insurer arranged a medical examination for the life insured which revealed that the life insured had coronary heart disease. The insurer accepted the risk on a higher rate of premium. The life insured died of heart failure in April 2008. The court held that the medical examination showed that the life insured had heart disease. The insurer accepted the risk and demanded a higher premium. The insurer's defence of non-disclosure was unfounded and should not be upheld. Even if the insured failed to disclose the disease, the medical examination revealed it, the insurer should not be allowed to plead the defence of non-disclosure of the disease.

A medical institution is sometimes appointed by the insurer for medical examination of the life insureds. If this is the case, it is the representative of the insurer. Where the medical examination institution finds a disease of the insured but fails to report it to the insurer, the insurer nevertheless enters into the contract; it is deemed that the insurer has waived disclosure of the disease. The HPC of Jiangsu Province expressed the view that:

The People's courts will not uphold the insurer's plea for rescission of the contract on the ground of the insured's failure to comply with the duty of disclosure for the situation where the insurer had known the inconsistency between what the medical examination showed and what the insured's disclosed but still underwrote the risk, or where the agent of medical examination did not report the result of medical examination but the insurer underwrote the risk.⁶⁰

The insurer's knowledge of non-disclosure after the contract is concluded

As discussed above, the Insurance Law provides rules in restricting an insurer from exercising the right of rescission of contract on the defence of a material non-disclosure where the insurer knew the non-disclosure before concluding the contract.

By law, an insurer is entitled to rescind the contract where he or she becomes aware of a material non-disclosure after the conclusion of the contract.⁶¹ In practice, more often than not, some insurers continue to collect premiums after they become aware of the breach of the duty of disclosure, so a question of whether or not the insurer can still rescind the contract and repudiate liability in this situation arises. In the absence of a statutory provision, there are two different viewpoints in judicial practice to this question.

The first view is that this situation is different from that provided in Art 16(6) of the insurance Law, ie, the insurer is inhibited from rescinding the contract on the defence of a material non-disclosure where the insurer knew the insured's failure to comply with the duty of disclosure before concluding the contract. Where an insurer becomes aware of, after the conclusion of the contract, the insured's failure to disclose material facts and continues to collect premiums, its right of rescission of contract and repudiation of liability should not be restricted.⁶²

The second view is that if an insurer becomes aware of the insured's failure to disclose material facts after the conclusion of the contract and goes on collecting premiums, it should be deemed to have waived the right of rescission, so it should be precluded from exercising the right of rescission and the right of repudiation of liability.⁶³

The SPC has recently provided an answer to the question that:

After the contract was entered into, if the insurer becomes aware of or should have known the insured's failure to comply with the duty of disclosure, but still collect premium, the courts will not uphold the insurer's request for rescission of the contract on the ground of non-disclosure or misrepresentation.⁶⁴

This is similar to the English approach -- 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.⁶⁵

When an insurer has learned that the insured failed to disclose a material fact intentionally or by gross negligence after conclusion of the contract, it is faced with the choice of whether to affirm the contract or to rescind it for the breach of the duty of disclosure. Acceptance of premium is treated by the SPC as evidence of the insurer's waiver of the right to rescind the contract by affirmation.

To bring waiver into play, the insurer must become aware of (or should have been aware of) the undisclosed fact after the conclusion of the contract and must have received premium after having learned of the non-disclosure.⁶⁶ But the interpretation by courts of the degree of the insurer's knowledge of non-disclosure necessary to bring waiver into play varies from court to court. Some courts interpret the degree of the insurer's knowledge broadly. For instance, in *Mr Jianxiang Li v China Life Insurance Company Shangli County Branch*,⁶⁷ the insured effected two life policies with coverage of hospital expenses on her own life in May 2003 and July 2003 respectively, and paid the first annual premium. She successfully claimed for hospital expenses for the treatments of dilated cardiomyopathy and bronchitis in the Second Hospital of Pingjiang City on two occasions (one in November 2003 and the other in April 2004). She paid the second annual premium in June 2004. The insured died of dilated cardiomyopathy in July 2004. Mr Li (the husband of the insured) claimed but the insurer rejected the claim on the ground of intentional non-disclosure and counter-claimed for return of insurance money paid.

The court held that the insured successfully claimed for hospital expenses for the treatments of dilated cardiomyopathy and bronchitis in the Second Hospital of Pingjiang City on two occasions. This hospital is a nominated hospital by the insurer;⁶⁸ doctors must know the medical history of the insured. So the insurer was most probably aware of the fact that the insured suffered the disease before entering into the contract. Instead of exercising the right of rescission of the contract, the insurer received the second annual premium -- this should be deemed as a waiver of the right of rescission by affirmation of the contract.

The court further held that even if the insured failed to inform the insurer of the material fact at the time of the contract, the insurer should exercise its right to rescind the contract once the insurer became aware of the non-disclosure during the insurance period. The court did not consider the issue of the time period within which the insurer should exercise its right of rescission.

As mentioned earlier, the 1995 and 2002 versions of Insurance Law did not provide a time-bar to restrict the insurer's right of rescission within a certain period of time. In practice, even if the insurer becomes aware of the insured's failure to disclose material information, it would normally receive premium. When the insured event occurs, the insurer would refuse to pay the claim on the defence of a material non-disclosure or misrepresentation and delay in exercising its right of rescission. Therefore, the insurer would be in a 'nothing to lose but all to gain' position. For the sake of protecting the insured and restricting the insurer's right of rescission, the 2009 version of the Insurance Law provides time limits for the insurer's rescission of the contract. These time limits are briefly considered below.

Time limits on insurers' right of rescission of the contracts

Article 16(3) of the Insurance Law in 2009 provides:

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.

The insurer is entitled to rescind the contract where the insured failed to comply with the duty of disclosure intentionally or by gross negligence and the undisclosed fact is material.⁶⁹ But the insurer must exercise his or her right of rescission within 30 days after having become aware of the material non-disclosure, or within 2 years from the time of conclusion of the contract. After these time limits lapse, the insurer is barred from pleading the defence of non-disclosure or misrepresentation.⁷⁰

After the insurer has known a material non-disclosure during the insurance period, the insurer can either rescind the contract within the 30 day time limit or receive premiums to affirm the contract. If the insurer receives premiums after the 30 day time limit lapse, it cannot be said to have waived the right of rescission as it has lost that right thus has no right to waive. No matter whether or not the insurer has known the

non-disclosure, it is prohibited from exercising the right of rescission after 2 years from the moment of conclusion of the contract.

Here is an example to explain how courts apply the 30 day time limit. In *Mr Tian v the Life Insurance Company*,⁷¹ Mr Tian effected a life policy on the life of his son in June 2007. His son died of tuberculosis in November 2009. The insurer refused to pay the insurance benefit on the ground that the insured failed to disclose a material fact that his son suffered from tuberculosis before the contract was entered into. The trial court held that the insurer was not liable because of the insured's non-disclosure. But the appeal court found that the insurer sent a letter to the insured to inform him of the refusal to pay the claim but did not rescind the contract on 25 December 2009. The insurer was deemed to have become aware of the non-disclosure on 25 December 2009, but failed to exercise its right of rescission of the contract within the following 30 days, thus it lost the right of rescission. The contract was still alive, so the insurer was not allowed to repudiate their liability.

This case raises an interesting question of whether or not rescission of the contract on the ground of a material non-disclosure is a condition precedent for refusing claims for losses which occurred prior to the rescission of the contract. This question is discussed below.

Is rescission of the contract a condition precedent for refusing claims?

There are two different views on the question raised above. The first view is that rescission of the contract should not be regarded as a condition precedent for repudiating liability for losses which occurred prior to the rescission of the contract. The reason for holding this view is that the right of rescission and the right of repudiating liability on the ground of breach of the duty of disclosure are two independent rights; there is no causal connection between the two rights. The insurer has the option to exercise one or both rights.⁷²

It could be argued that if the insurer is allowed to refuse claims without rescinding the contract first, any insurer would logically choose to refuse claims, yet keep the contract alive for the future. But this argument seems unpersuasive for two reasons. First, when the insurer takes the defence of non-disclosure to refuse a claim, this can be evidence that the insurer has known the cause of rescission of the contract; if the insurer does not exercise the right to rescind the contract within 30 days after having learned of the cause for rescission, the right of rescission will be distinguished. Consequently, the insurer is no longer permitted to refuse claims on the defence of non-disclosure. Second, there is a possibility that the insurer can collect premiums within the 30 day period and then rescind the contract before the 30 day period lapses. But once the insurer has received a premium after having known the insured's breach of the duty of disclosure, it is taken to have waived the right of rescission and is thus precluded from rescinding the contract from the moment of receiving the premium.⁷³

The second view holds that the insurer can refuse to pay claims only after it has rescinded the contract by reason of a material non-disclosure.⁷⁴ It seems that this view is consistent with the legislative intent. Articles 16(4) and (5) of the Insurance Law use the phrase 'insured events that occur prior to the rescission of the contract'. If no rescission is performed, there would be no 'insured events that occur prior to the rescission', so the insurer cannot take the remedies as provided in Arts 16(4) and (5) of the Insurance Law to refuse claims for pre-rescission losses in the case of intentional or grossly negligent non-disclosure.

The adoption of this 'condition precedent' is intended to protect the insured and prevent the insurer from abusing its right of rescission on the ground of non-disclosure. However, in some situations, rescission of the contract may benefit neither the insured nor the insurer. Some policies may cover several risks and some policies have long lifetimes. It is detrimental to the insured's interest and may also be undesirable to the insurer if the insurer has to rescind the whole policy in order to refuse a claim for loss after occurrence of a single insured event. For example, it is typical that a life policy may be attached to it with some other covers, such as accident cover, or medical expenses coverage. If an accident happens and the insured incurs loss, and the insurer wants to refuse the claim for the loss on the ground of a material non-disclosure, it has to rescind the contract first according to the 'condition precedent' view. As a result, the insured would lose the interest of the whole policy and the insurer would lose the opportunity to keep the policy alive for the future. Therefore, it is desirable and necessary to permit the parties to negotiate and make agreement on the matters of claim and continuation of the policy when disputes occur on the matter of non-disclosure in the situation where the insurer has become aware of the insured's non-disclosure and still collected premiums.

The SPC has therefore adopted a flexible approach to the issue of whether or not rescission of the contract on the ground of a material non-disclosure is a condition precedent for repudiating liability for losses which occurred prior to the rescission of the contract. On the one hand, the insurer is required to rescind the contract first before rejecting claims by reason of a material non-disclosure; on the other, the parties are permitted to depart from this general rule by agreement. Article 8 of the SPC Interpretation provides:

Where the insurer has not exercised his right of rescission of the contract, but rejects the claim on the basis of the circumstances as stipulated in Arts 16(4) and 16(5) of the Insurance Law, People's Courts will not uphold such rejection of the claim, except that the parties involved have reached an agreement on the matters of rejection of the claim and continuation of the contract.

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,⁷⁵ unless the contract provided otherwise.⁷⁶

The current law position in respect of the relationship between rescission of the contract and refusal of claims on the ground of non-disclosure or misrepresentation can be summarised as follows. First, where the insurer has no right of rescission, or has lost the right of rescission, it cannot plead the defence of non-disclosure to refuse claims.⁷⁷ The remedies for the insured's breach of the duty of disclosure as provided in Arts 16(4) and (5) of the Insurance Law are available to the insurer only after it has rescinded the contract, but is not available where the insurer has no right or has lost the right to rescind the contract. Second, where the insurer has the right of rescission, it can refuse to pay claims only after it has rescinded the contract.⁷⁸ Third, the parties involved in the insurance contract are permitted to negotiate and reach an agreement on the matters of claim and continuation of the contract.⁷⁹ Sometimes, rescission of the contract may not benefit any parties, so when the insured event occurs they can negotiate so as to reach an agreement as to the matter of claim and survival of the contract. It is noteworthy that this kind of agreement can only be reached after the dispute occurs. Prior to the occurrence of the dispute on breach of the duty of disclosure, the parties are not allowed to make any agreement which permits the insurer to refuse the claim before rescission of the contract.⁸⁰

A causal connection between the occurrence of the insured event and the undisclosed fact

Another restriction on the insurer's defence of non-disclosure to refuse claims is that there must be a causal connection between the occurrence of the insured event and undisclosed fact if the insurer can repudiate liability for losses which occurred prior to the rescission of the contract in the case of a material non-disclosure by gross negligence.⁸¹

This can be illustrated by the case of *Li v China Ping An Life Insurance Company Ltd Hainan Branch*.⁸² There the insured effected a life policy on her own life in June 2004. She died due to serious head injury by a robbery in January 2005. The insurer refused to pay the claim on the ground of a non-disclosure of a material fact that she suffered from chronic myeloid leukemia before conclusion of the contract. Mr Li (the son of the insured) argued that the proposal form was completed by the insurer's agent although the insured signed the proposal, so the answers to the questions about the insured's health could not reflect the true representations of the insured. The court held: (i) the insured's failure to perform the duty of disclosure was not intentional but due to the insured's negligence; and (ii) the insured died of head injury not of the disease, the undisclosed fact had no causal connection with the happening of the insured event, so the insurer was liable to pay the insurance benefit.

The main difficulty with this causal connection approach is that in the situation where the insurer would not have entered into the contract or would have entered into the contract with a higher premium had it known the undisclosed fact at the time of the contract, it is nevertheless liable for the loss if there is no causal connection between the undisclosed fact and the occurrence of the insured event. Therefore, the insurer is put in a position where it may receive a lower premium but bear higher risk. It is suggested that in the case of non-disclosure or misrepresentation due to gross negligence, the insurer should be allowed to reduce the amount to be paid on the claim proportionately to the ratio of premium it received and the premium it should have received.⁸³ If the insurer would not have entered into the contract had it been informed by the insured

of the material fact, the insurer shall not be liable for the insured events which occurred prior to the rescission of the contract, but shall refund the premium paid.⁸⁴

Conclusions

This article has critically examined the current approaches to the restrictions on the insurer's defence of non-disclosure or misrepresentation in the Insurance Law and the SPC Interpretation. The Insurance Law and Chinese courts take rather insured-friendly approaches in this regard in order to protect the insureds. This should be applauded. However, the Law has ambiguities and lacunae, and the courts were sometimes over-protective for the insureds.

Three major weaknesses of the Insurance Law relating to the restrictions on the insurer's defence of insured's non-disclosure have been critically discussed and solutions to the problems proposed. First, it is suggested that a new provision relating to the insurer's duty to inform the insured of the duty of disclosure and the effect of breach of the duty be introduced into Art 16 of the Insurance Law. The insurer should, before a contract of insurance is entered into, be obliged to clearly inform the insured in writing of the general nature of the duty of disclosure and effect for breach of the duty. Otherwise it should be precluded from exercising the right of rescission.⁸⁵

Second, the Insurance Law does not provide any statutory rule in relation to an incomplete, irrelevant or unanswered question in the proposal form. It is suggested that a new provision be added into Art 16 of the Insurance Law to govern this situation. In the situation where the insured failed to answer, or gave an obviously incomplete or irrelevant answer to a question included in a proposal form about a matter, the insurer should be obliged to make further inquiry on this question. Otherwise, the insurer should be taken to have waived compliance with the duty of disclosure in relation to the matter covered by this question.

Third, it is suggested that Art 16(6) of the Insurance Law could be amended to include the insurer's constructive knowledge before concluding the contract. Accordingly, in the situation where the insurer knew or ought to have known the insured's failure to comply with the duty of disclosure before concluding the contract, it should be deemed to have waived its potential right of rescission of the contract by reason of the insured's breach of the duty.

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1 *Carter v Boehm* (1766) 3 Burr 1005 at 1009.

2 See F D Rose, 'Information asymmetry and the myth of good faith: back to basis' (2007) *LMCLQ* 181.

3 For example, see Chinese Insurance Law 2009 Art 16; Consumer Insurance (Disclosure and Representations) Act 2012 (UK) s 2; Australian Insurance Contracts Act 1984 s 21, and German Insurance Contract Act 2008 s 19.

4 Insurance Law 2009 Art 16(2).

5 The Insurance Law of the People's Republic of China was enacted by the National People's Congress in 1995 which was the first comprehensive legislation on insurance in China which consists 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 2002 version. The Law was again amended in 2009. Both contract law and regulation were amended substantially.

6 The Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China was passed by the Judgement Committee of the Supreme People's Court on 6 May 2013 and became effective on 8 June 2013. 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.

7 Insurance Law Art 16(6) and SPC Interpretation Art 7.

8 Insurance Law Art 16(3).

9 For a comparative analysis of time limitation on insurers' right of rescission of contract on the ground of non-disclosure or misrepresentation, see Z Jing and M Zhong, 'Incontestability provisions in insurance law and policies' (2015) *JBL* (forthcoming).

10 See Z Jing, 'Insured's duty of disclosure and test of materiality in marine and non-marine insurance laws in China' (2006) *JBL* 681.

11 In contrast to the inquiry disclosure in non-marine insurance, voluntary disclosure is adopted for marine insurance. Chinese Maritime Code 1992 Art 222 provides: 'Before the contract is concluded, the insured shall disclose to the insurer material circumstances which the insured has knowledge of or ought to have knowledge of in his ordinary business practice and which would influence the insurer in deciding the premium or whether he agrees to insure or not'.

12 SPC Interpretation Art 6(1).

13 Guidance of Jiangsu Province High People's Court Concerning Questions of How to Deal with Insurance Disputes 2011 Art 17 provides: 'Where the insured failed to disclose what he did not know, People's Courts will not uphold the insurer's request to rescind the contract on the ground of the insured's breach of the duty of disclosure.'

14 SPC Interpretation Art 5.

15 Insurance Law Art 16(4) and (5). For more, see Z Jing, 'Remedies for breach of the pre-contract duty of disclosure in Chinese Insurance Law' (2015) *BLI* (forthcoming), and H Y Yeo, Z Yu and J Chen, 'Of remedies and non-disclosure in the insurance law of the People's Republic of China' (2011) *JBL* 566.

16 Insurance Law Art 16(2).

17 Insurance Law Art 16(3).

18 Insurance Law Art 16(4).

19 Insurance Law Art 16(5).

20 Insurance Law Art 16(6).

21 Insurance Law Art 16(2).

22 Insurance Law Art 16(3).

23 Insurance Law Art 16(6).

24 For the doctrine of waiver in respect of non-disclosure or misrepresentation in English insurance law, see R Merkin, *Colinvaux's Law of Insurance*, 9th ed, Sweet & Maxwell, 2010, at [6-068]-[6-074], [6-019]-[6-100].

25 In English law, in respect of non-disclosure, waiver arises principally at three points: waiver of the duty of disclosure, waiver of further information, and waiver of right to rescission. See M Clarke, *The Law of Insurance Contracts*, 6th ed, Informa, 2009, at [23-11].

26 SPC Interpretation Art 7. This will be discussed later.

27 Insurance Law Art 17.

28 For example, see cl 8.1 about the insured's duty of disclosure and the insurer's duty of explanation in the Endowment Policy of China Ping An Life Insurance Company Ltd (2013 version).

29 For example, see the reminder of duty of disclosure in the proposal form for Life Policy of Samsung Air China Life.

30 Insurance Law Art 17(2) requires insurers to explain clauses which exclude or exempt the insurer from liability to pay insurance benefits, and to include notice of these exemptions in the proposal form, the insurance policy and any other insurance certificate in a way that attracts the insured's attention. Failure to properly notify the insured of these exemption clauses will render them void.

31 Intermediate People's Court of Quanzhou City, Fujian Province, 'Report on difficult problems in hearing insurance disputes' [2007] People's Judicature, see at <<http://www.zwmssp.com/a/caipanbaogao/20100726/9069.html>> (accessed 4 January 2015).

32 ICA s 22.

33 Regulation 1985 s 2. In February 2014, the *Exposure Draft of the Insurance Contracts Amendment Regulation 2014 (No 1)* was released for public consultation by the Treasury, Australian Government. The proposed amendments in the Draft Regulation prescribe written notices in relation to contracts of general insurance, life insurance and eligible contracts of insurance and to the duty of disclosure for a person who will be insured by others. For example, Pt 2 of the Draft Regulation provides the following writing for contracts of life insurance:

Your duty of disclosure

Before you enter into a contract of life insurance with us, you have a duty, under the Insurance Contracts Act 1984, to disclose to us every matter that you know, or could reasonably be expected to know, is relevant to our decision whether to accept the risk of the insurance and, if so, on what terms.

This duty of disclosure applies until the contract is entered into.

You have the same duty to disclose those matters to us before you renew, extend, vary or reinstate the contract.

The duty however does not require disclosure of a matter:

- o that diminishes the risk to be undertaken by us; or
- o that is of common knowledge; or
- o that we know or, in the ordinary course of business, ought to know; or
- o as to which compliance with your duty is waived by us.

Nondisclosure

If you fail to comply with your duty of disclosure and we would not have entered into the contract on any terms if the failure had not occurred, we may avoid the contract within 3 years of entering into it.

If your non-disclosure is fraudulent, we may avoid the contract at any time.

If we are, or have been, entitled to avoid a contract of life insurance but do not avoid it, we may elect, at any time, to reduce the sum that you have been insured for in accordance with a formula that takes into account the premium that would have been payable if you had disclosed all relevant matters to us.

If the contract is for insurance of the life of another person, any failure by him or her to tell us a matter that he or she knows, or could reasonably be expected to know, is relevant to our decision whether to enter into the contract and, if so, on what terms may be treated as a failure by you to comply with your duty of disclosure.

34 ICA s 22. For more on this point, see G Pynt, *Australian Insurance Law: A First Reference*, 2nd ed, LexisNexis Butterworths, Australia, 2011, at [8.60] and [8.61].

35 This is the approach in ICA s 22.

36 Guidance of Beijing City High People's Court Concerning Questions of How to Deal with Insurance Disputes 2005 Art 12; Guidance of Shandong Province High People's Court Concerning Questions of How to Deal with Insurance Disputes 2011 Art 4(2).

37 SPC Interpretation Art 6(2).

38 See X M Xi, *Understanding and Application of the Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China*, the People's Court Press, 2014, p 171.

39 The Supreme People's Court Bulletin, 2008 No 8. see at <http://blog.sina.com.cn/s/blog_a87dad3d01016qgd.html> (accessed 28 December 2014).

40 This case was decided by the People's Court, Yicheng District, Zhumadian City, Henan Province, Civil Court Judgement (2010) No 901, and the report of the judgment can be seen at <<http://www.hlkdata.com/hw/?c=news3&m=view&id=3284>> (accessed 28 December 2014).

41 *Roberts v Avon Insurance Co* [1956] 2 Lloyd's Rep 240.

42 ICA s 21. For more on this point, see G Pynt, *Australian Insurance Law: A First Reference*, 2nd ed, LexisNexis Butterworths, Australia, 2011, at [8.9].

43 ICA s 27.

44 PEICL Art 2:103(a).

45 This is the approach in ICA s 21(3).

46 This case was decided by the People's Court, Yancheng District, Henan Province, Civil Court Judgement (2009) No 1552, at <<http://ws.hncourt.gov.cn/paperview.php?id=154705>> (accessed 27 December 2014).

47 Guidance of Beijing City High People's Court Concerning Questions of How to Deal with Insurance Disputes 2005 Art 14.

48 Guidance of Zhejiang Province High People's Court Concerning Questions of How to Deal with Property Insurance Disputes 2009 Art 9.

49 Insurance Law Art 16(6). This is similar to the German law under which, an insurer does not have the right to rescind the contract if the insurer was aware of the undisclosed risk factors or the incorrectness of the disclosure (German Insurance Contract Act 2008 s 19(5)).

50 This case was decided by the People's Court, Dongying District, Dongying City, Shandong Province, Civil Court Judgement (2011) No 249, and is reported in *the Annual Report of the Typical Insurance Cases*, Law Press China, 2012, Vol 4, p 27.

51 Guidance of the Beijing City High People's Court Concerning Questions of How to Deal with Insurance Disputes 2005 Art 10.

52 SPC Interpretation Art 7. This will be discussed further in the text below.

53 Insurance Law Art 127.

54 This case was decided by the Second Intermediate People's Court, Shanghai City, Civil Court Judgement (2003) No 110.

55 See China Maritime Law Association News Letter (1999) No 48, p 17.

56 This case was decided by the Intermediate People's Court, Hebi City, Henan Province, Civil Court Judgement (2010) No 81.

57 This case was decided by the Intermediate People's Court, Guangzhou City, Guangdong Province, Civil Court Judgement (2009) No 4198. See at <<http://www.fsou.com/html/text/fnl/1177137/117713788.html>> (accessed 30 December 2014).

58 This case was decided by the Intermediate People's Court, Pingxiang City, Jiangxi Province, Civil Court Judgement (2009) No 75. See <http://china.findlaw.cn/falvchangshi/hetong_jiufen/bxjff/jfal/32457.html> (accessed 29 December 2014).

59 This case was decided by the Pingdingshan Intermediate People's Court, Henan Province, Civil Court Judgement (2009) No 261. See <http://www.110.com/panli/panli_142345.html> (accessed 13 November 2014).

60 Guidance of Jiangsu Province High People's Court Concerning Questions of How to Deal with Insurance Disputes 2011 Art 19.

61 Insurance Law Art 16(2).

62 X M Xi, *Understanding and Application of the Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China*, the People's Court Press, 2014, p 179.

63 Ibid.

64 SPC Interpretation Art 7.

65 *Hemmings v Sceptre Life* [1905] 1 Ch 365; *Holdsworth v L & Y Insurance* (1907) 23 TLR 521; *Ayrey v British Legal & United Provident Assurance Co Ltd* [1918] 1 KB 136; *Simon, Haynes, Barlas & Ireland v Beer* (1944) 78 LI LR 337; *Frans Maas (UK) Ltd v Sun Alliance & London Insurance Plc* [2004] 1 Lloyd's Rep 484 at [63].

66 SPC Interpretation Art 7.

67 This case was decided by the Intermediate People's Court, Pingxiang City, Jiangxi Province, Civil Court Judgement (2007) No 918, see <http://china.findlaw.cn/falvchangshi/hetong_jiufen/bxjf/jfal/32457.html> (accessed 29 December 2014).

68 This means that insureds should go to this hospital for treatments.

69 Insurance Law Arts 16(1) and (2). See Z Jing 'Insured's duty of disclosure and test of materiality in marine and non-marine insurance laws in China' (2006) *JBL* 681.

70 Insurance Law Art 16(3). For more on the doctrine of incontestability in Chinese law, see Z Jing and M Zhong 'Incontestability provisions in insurance law and policies' (2015) *JBL* (forthcoming).

71 This case is cited in the book, *Understanding and Application of the Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China*, X M Xi (Ed), People's Court Press, 2014, p 204.

72 See J X Liu, *Typical Cases and Adjudgement Consideration of Insurance Law*, Law Press China, 2012, p 268.

73 SPC Interpretation Art 7.

74 X M Xi, *Understanding and Application of the Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China*, the People's Court Press, 2014, p 203.

75 *West v National Motor & Accident Union* [1955] 1 Lloyd's Rep 207.

76 *Tilley & Noad v Dominion Ins Co Ltd* (1987) 284 EG 1056. See M Clarke, *The Law of Insurance Contracts*, 6th ed, Informa, 2009, para 23-17C.

77 Insurance Law Arts 16(2) and (3).

78 Insurance Law Arts 16(4) and (5).

79 SPC Interpretation Art 8.

80 X M Xi, *Understanding and Application of the Supreme People's Court Second Interpretation on Certain Questions Concerning the Application of the Insurance Law of the Peoples' Republic of China*, the People's Court Press, 2014, p 208.

81 Insurance Law 2009 Art 16(5).

82 This case was decided by the Intermediate People's Court, Haikou City, Hainan Province, Civil Court Judgement (2009) No 75.

83 In Australia, by virtue of s 28 of the ICA, for general insurance, where the insured failed to comply with the duty of disclosure or made a misrepresentation to the insurer before the contract was entered into, 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.

84 For more on a critical analysis of the remedies in the case of non-disclosure by gross negligence, see Z Jing, 'Remedies for breach of the pre-contract duty of disclosure in Chinese Insurance Law' (2015) *BLI* (forthcoming).

85 This is the approach in ICA s 22.