

# A Brief Talk on the Incontestable Clause in China's Insurance Law

Kai Li

School of Finance, Anhui University of Finance and Economics, Anhui, China

## Abstract

Since the introduction of the incontestable clause in China's insurance law in 2009, it has protected the legitimate rights and interests of the policyholder to a certain extent and prevented the insurer from abusing the right to terminate the contract. However, the specific provisions on the scope of indefensible, time limit and exclusion of liability are not clear provisions, resulting in a lot of insurance claims disputes. In view of this, this paper analyzes the application of this clause in foreign countries and the actual situation in China and puts forward some ideas and suggestions.

## Keywords

The incontestable clause; The contract rescind right; Starting date; Exclusions.

## 1. Overview of the Incontestable Clause

### 1.1. The Meaning of the Incontestable Clause

The so-called the incontestable clause, in our country insurance law the 16th the 3rd, it is such specific provisions: "the contract rescind the right that the preceding paragraph stipulates, since the date that the insurer knows to have rescind the matter, more than 30 days do not exercise and exterminate. If more than two years have passed since the date of formation of the contract, the insurer may not rescind the contract; In the event of an insured event, the insurer shall be liable for indemnity or payment of insurance benefits." That is to say, the insurer is subjectively exercising the time limit of the right to rescind the contract for 30 days, and objectively exercising the time limit of the right to rescind the contract for two years. The regulation that the incontestable clause, make the insurance contract that holds water lawfully is in hold water after two years, become the document that cannot dispute namely. Right now the insurer must not be in again with policyholder when being insured, did not perform inform obligation truthfully for will exercise contract rescind right. In the incontestable clause, we need to pay attention to the definition of counterplea period and cannot counterplea period. Counterplea period is to point to inside this time limit the insurer can exercise the contract that because policyholder did not fulfill tell obligation truthfully and enjoy rescind right. Cannot counterplea period is to point to after pass counterplea period, the insurer cannot remove a contract at will again for this, from counterplea period to the time limit that insurance contract terminates. It can be seen that the limitation of the counterplea period is the key to define whether an insurer can use the right to rescind the contract. Usually, most countries set the counterplea period as 2 years, and there are also cases of 10 years, 5 years, 3 years, 1 year or even shorter.

The incontestable clause is the embodiment of the basic principle of civil law in the field of insurance law. As a branch of commercial law, insurance law should also abide by the basic principles of civil and commercial legal relations, which is the legal basis for the existence and establishment of the incontestable clause.

### 1.2. The Development Course of the Incontestable Clause

In the process of insurance inchoate development, "insure easy, claim is difficult" the problem appears in endlessly, and the reason is that the insurer can at any time with the policyholder

did not fully fulfill the obligation of telling the truth exercise contract rescind right. The function of the insurance is to protect the risk that the insurance applicant may encounter, but it has become the risk factor that the insurance applicant is worried about at all times during the insurance period, which obviously has many irrationality. It makes the policyholder assume too strict guarantee obligation, which greatly frustrates the insurance enthusiasm of the insurance customer. In view of this, the incontestable clause stepped on the stage of insurance history formally.

In the middle of the 19th century, Britain introduced the incontestable clause for the first time, which restricted the right of the insurer to exercise the right of termination of the contract to avoid the abuse of the right of termination. Later, the United States also followed suit. In 1864, Manhattan Life Insurance Company fixed the incontestability clause in the insurance contract. At the beginning of the 20th century, the state of New York took the lead in legislating the incontestable clause to give a clear position and make it legitimate. Other states also introduced the relevant content of the incontestable clause in the legislative process. At this point, the United States states in the incontestable issue of the legislation basically reached the same meaning, trying to let the insurance customers establish confidence in the insurance industry and urge the insurer to reasonably and prudently perform their duties within the insurance period. Subsequently, countries all over the world have realized the importance and necessity of adding the incontestable clause in insurance law, and the incontestable clause has gradually become a practice in insurance industry.

However, China's insurance law has not introduced the incontestable clause before 2009, and the insurer's abuse of the right to terminate the contract is endless, which not only causes a lot of insurance claims disputes, but also brings a great negative impact on China's insurance industry. The time goes back to 1995, our country promulgated formally for the first time "insurance law of the People's Republic of China". The law restricted the insurer because the age when the policyholder is insured is wrong to tell and enjoy the contract rescind the right to use time limit is two years, after more than two years the insurer will not rescind the contract on the grounds of this. However, the insurer did not fulfill the obligation of telling the truth when the applicant is being insured and the contract rescind right that enjoys does not receive any time limitation however. That means no matter how long insurance contract exists namely, the insurer can remove the contract for this reason. Admittedly, our country did not establish the incontestable clause at the beginning also has the exquisite background in that era. Unlike some well-developed insurance markets abroad, China's insurance market at that time was still full of adverse selection and moral hazard. If we blindly follow the international insurance market without considering the actual social situation, the effect will be counterproductive. The incontestable clause, which is intended to protect the legitimate rights and interests of the applicant, may in turn be used as a weapon to cheat the insurance by the ill-meaning person, which violates the original intention of the existence of the incontestable clause. However, with the continuous development of China's insurance industry and the improvement of the public's insurance awareness, more and more people really regard insurance as an effective means to deal with risks and protect their own interests, which lays the foundation for the introduction of indefensible clauses to a certain extent. The introduction of the incontestable clause may not be mature at that time, but it is an inevitable trend in the long run. Following the appeal of the public and scholars in the industry, China formally added the incontestable clause into the Insurance Law in 2009 after fully examining the pros and cons.

## **2. The Establishment Value of the Incontestable Clause**

### **2.1. Avoid the Abuse of the Principle of Maximum Good Faith by the Insurer**

As is known to all, insurance contract is a kind of maximum good faith contract, which puts forward great good faith requirements to both sides of the insurance contract. Both parties shall abide by their commitments and fulfill their due obligations during the term of this contract. However, in the process of the fulfillment of insurance contract, it is inevitable to be affected by moral factors and psychological factors. In the principle of maximum good faith, the obligation of notification and guarantee is mainly used to restrain the insured. Through the regulations of the insurer on the cancellation of the contract or refusal of compensation caused by a series of behaviors of the insured, the insurer encourages and urges the insured to improve their credit awareness and fulfill their due obligations during the whole duration of the insurance contract. However, in practice, the insurer may make use of its professional underwriting to create loopholes to guide the insurer to make a violation of the disclosure and warranty obligations and not be found out. The insurer is after collecting old premium, once occurrence insurance accident rescind insurance contract on the grounds of this, this is obviously the abuse of the principle of the greatest good faith. The incontestable clause limits the behavior of the insurer to exercise the right to terminate the contract at will. After a certain period of time, the insurer cannot refuse to pay with the obligation of untruthful disclosure by the applicant, which makes it difficult for the insurer to exploit the loophole and abuse the principle of maximum good faith.

### **2.2. Protect the Legitimate Rights and Interests of Insurance Customers**

The main purpose that insurance client cast is to depend on, after passing long-term on schedule pay insurance premium, if cause a loss as a result of the accident inside insurance liability limits, can obtain due economic compensation in time. The existence of insurance objectively provides a kind of risk protection for people. People avoid the large uncertain risk loss through the small certain premium expenditure, so that they can be more secure in production and stable life. However, the absence of indefensible clauses makes insurance a worrying risk, with the risk that it could be rescinded at any time, in a state of long-term instability. After the introduction of the incontestable clause, insurance customers' expected interests can be reasonably guaranteed, the confidence of consumers is enhanced, and the legitimate rights and interests of insurance customers are protected.

### **2.3. Urge the Insurer to Fulfill its Obligations**

Before the incontestable clause comes on stage, because its contract rescues the right to grasp firmly in his hand, often can appear therefore when the insurer is accepting insurance or during insurance no longer ask relevant matters, until the ability when insurance accident happens launches an investigation. Come so, increased unnecessary insurance policy to exist, to the insurance business that should not protect originally however is long to just give processing when insurance accident happens, expend the energy of both sides of contract party in vain, also go against the development of other normal and effective business. After the introduction of the incontestable clause, the insurer has no right to terminate the contract on the ground of false information found in the investigation after the contract takes effect for a certain period of time. This objectively urges the insurer to review the insurance related matters at all times, urges the insurer to pay attention to the underwriting choice, underwriting control, and strengthen underwriting business, so as to enhance the number of effective policies, reduce the stock of invalid policies, and promote the healthy and stable development of insurance companies.

### **3. Problems of the Incontestable Clause in China's Insurance Law**

#### **3.1. Issues Concerning the Scope of Application of the Incontestable Clause**

In our country, the incontestable clause is included in the general provision of insurance contract in the first section of the second chapter of insurance law. From this point of view from the legislative style, it is reasonable to say that both life insurance business and non-life insurance business can be applied. However, according to the establishment value of the incontestable clause and the characteristics of life insurance and property insurance, the scope of its application is often very controversial. On the one hand, some scholars believe that the law should be treated equally, can not be treated differently, the incontestable clause should be applied to all insurance contracts. They believe that for the insured of property insurance, when their important property is damaged, their economic life will also be severely hit. It would be too harsh to completely negate the obligation of paying the premium on schedule that has been fulfilled just because of the fault of not fulfilling the obligation of telling the truth truthfully. On the other hand, some scholars argue that cannot contradictory clause shall only apply to person insurance contract, and regard it as the current defects cannot contradictory clause in the insurance law, said countries should make a clear limit.

#### **3.2. The Incontestable Clause Related to the Definition of Time Limit**

According to our country "insurance law" the 13th regulation: "insurance applicant puts forward insurance requirement, classics insurer agrees to accept insurance, insurance contract holds water." That when setting the insurer's commitment accepting insurance namely is when insurance contract holds water. However, in practice, we know that if the contract of personal insurance usually has to go through a series of underwriting procedures such as physical examination, the definition of the date of establishment of the contract becomes more complicated. Accordingly, the date that regards the day that insurance contract holds water directly as the starting date of period of two years of indefensible clause is not very clear. Referring to the provisions on the period of irrefutable clauses in the international insurance industry, two starting dates are generally adopted: one is the issuing date of the policy, the other is the effective date of the policy. In the meantime, many scholars also think should choose to cast insurance day to count start to calculate date. Since the interests of the insurer and the insured vary with the date of commencement of calculation, a clear applicable provision should be given. At the same time, after a clear time point, it should also be dealt with in view of the resulting problems. For example, if the effective date of the insurance policy is taken as the starting date, it is necessary to consider whether the starting date of the incontestable clause will be reset after the contract is reinstated. These similar issues need to be clarified.

#### **3.3. The Indefensible Clause Related to the Exclusion Clause**

Since the incontestable clause was added into the insurance law in China, it has not been modified or supplemented, and no specific exceptions have been specified in detail. Although this reflects our country's insurance law resolutely safeguard the interests of the insured's determination, but also inevitably breed some moral hazard phenomenon. Although the existence of irrefutable can effectively reduce the moral hazard behavior that the insurer deliberately uses its professional to mislead the consumer to make the contract terminated, it also gives rise to some moral hazard behaviors that the policyholder delusions to deceive the insurer, such as taking out insurance with illness, or having an insurance accident within the defensible period, but deliberately delays the notice until the expiration of the defensible period. From the perspective of international insurance industry, many countries have made clear the exclusion of liability, which is worthy of China's reference.

Comparatively speaking, western countries are relatively sound in this respect, with the following points being prominent: the United States does not apply the indefensible clause in

the case of the dispute over the insurance coverage, the failure of the insurance contract, especially serious fraud, and the failure to meet certain conditions proposed by the insurer. Setting up exceptional circumstances can make up for the indefensible clauses in the Insurance Law and reduce the contradictions and disputes between the two parties.

## **4. Suggestions on the Improvement of the Incontestable Clauses in China's Insurance Law**

### **4.1. Clarifying the Scope of Application of Indefensible Clauses**

As far as individuals are concerned, the State should specify the applicable scope of the incontestable clause for life insurance business. First, one of the reasons for the incontestable clause is to protect the interests of the beneficiary. In a person insurance contract, often can have the circumstance that insurant and beneficiary are not same individual, after guarantee slip survives many years, often already very difficult find out at the outset inform true. If the insured has died, the beneficiary is more difficult to recognize the specific situation when insuring. If at this time, the insurer arbitrarily rescinds the insurance contract because the insured fails to fulfill the obligation of truthful disclosure, it will undoubtedly make the interests of the beneficiary lose their due protection. Even if what the insurer said is true, it will also make the beneficiary bear the fault that should be borne by the insured. Second, the term of property insurance itself is relatively short, often a one-year contract, which is different from the long-term nature of life insurance policies, especially life insurance policies, and the original intention of the incontestable clause to protect the insured to wait for a long time is different. Third, property insurance in the event of an insurance accident, not like life insurance, there will be casualties of the insured or the insured, just property damage. So the burden of proof to fulfill the obligation of truthful disclosure is greatly reduced, whether the insured or the insurer are difficult to challenge the authenticity of the meaning of the insurance.

### **4.2. Clarifying the Term of the Incontestable Clause**

First of all, we should grasp several time points: the date of insurance, the date of issuing the policy and the effective date of the policy. Generally speaking, the order of the three time points from morning to night is: insurance date, policy issuing date and policy effective date. If the starting date of the counterplea period is set as the insurance date, it is obviously more beneficial to the interests of the insured. If it is set as the effective date of the policy, it is obviously beneficial to the insurer. As far as individuals are concerned, they support the effective date of the bail as the starting date of the counterplea period. From the date of insurance to the formal effectiveness of the policy, it often needs to go through a process. During this period, the declaration of various situations about the subject matter of insurance may also change. Therefore, I think that the effective date of the policy is the best starting date of the defensible period. At the same time, on the basis of this, the author thinks that it is necessary to analyze the specific issues of whether the period of defensibility should be reset. If the reason for the termination of the contract is only because the applicant forgets to pay the premium as agreed or because of financial difficulties, then the previous defensible period should be continued, otherwise it is not conducive to the interests of the insured. However, if the termination of the contract is due to other major reasons such as the failure to fully perform the obligation of truthful disclosure, the defensible period should be reset and recalculated from the date of the contract's reinstatement.

### **4.3. Clarifying the Exclusions of the Incontestable Clause**

It is true that the courts in the society do not rigidly adhere to the setting of the incontestable clause in the current insurance law. They have made a fair and reasonable trial in line with social justice against the malicious insurance fraud, such as the insured's Insurance with illness.

They have not blindly ruled that the insurer's right to terminate the contract will be lost when the contract reaches the non defensible period, However, this practice sometimes seems to have the suspicion of "ultra vires law making". Therefore, China's insurance law should still make clear some exceptions that are conventional in the incontestable clauses, such as substituting by others in the physical examination, failing to pay the premium. Accidents that are not covered by the insurance and insurance with illness, so as to provide evidence for the court to try, reduce unnecessary insurance disputes, and further avoid being insured The insurance company tries to exploit legal loopholes to obtain improper benefits.

## 5. Conclusion

Since the development of China's Insurance Law in 1995, the incontestable clause has emerged from scratch and has been introduced into practice, which not only reflects the determination of the state to protect the interests of the insured, but also reflects the state's efforts to maintain the order of the insurance industry. To be sure, it can be seen from the above that the incontestable clause is not perfect in China's Insurance Law, which is not mature and perfect. However, we believe that as we learn from the experience of foreign advanced insurance industry and continue to explore in combination with our own national conditions, we will eventually form a complete insurance legal system with Chinese characteristics, so as to consolidate the steady operation of the insurance industry and realize the sustainable development of the whole society Stability and harmony.

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