

中国人民大学法学院海商法保险法研究所 主办

# 海商法保险法评论

(第六卷)

——中国保险市场的新问题  
新实践和新举措专题研讨

主编◎贾林青 李祝用



*H*

AISHANGFA  
BAOXIANFA  
PINGLUN



知识产权出版社

全国百佳图书出版单位



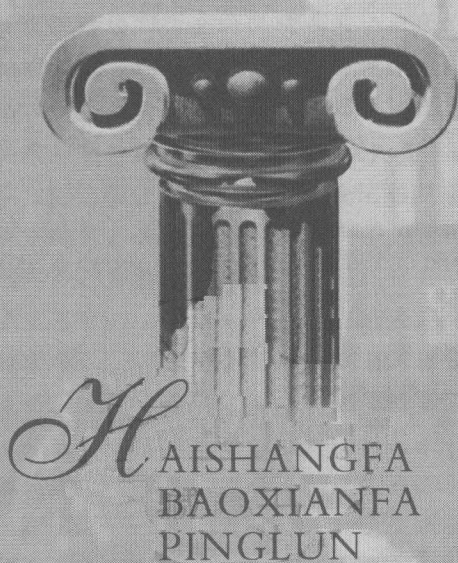
中国人民大学法学院海商法保险法研究所 主办

# 海商法保险法评论

(第六卷)

——中国保险市场的新问题  
新实践和新举措专题研讨

主编◎贾林青 李祝用



知识产权出版社

全国百佳图书出版单位

## 内容提要

中国保险市场自形成到初具规模经过了 30 余年的历程,有必要在总结和发扬中国保险市场发展成绩的同时,针对其发展过程中的问题进行分析,讨论其形成的原因,寻找解决这些问题的途径和方法,以便为中国保险市场的不断深化发展提供理论和实践上的引导与支持。为此,中国人民大学法学院海商法保险法研究所于 2013 年 5 月召开了“中国保险市场新问题、新实践和新举措(制度创新与发展)研讨会”,并将此次研讨会的科研成果集结成书。本书具有以下特色:其特点之一是突出了“新”,所选稿件均涉及目前我国保险市场实践中存在的亟待解决的热点问题,并针对相应的具体问题提出具有新意的解决方法或者创新的制度构建设想。其特点之二是多样性。各篇稿件之观点和论证方法多样,既有就全新的保险制度的设计和理论论证,也有针对具体的个体问题的点滴建议。其特点之三是力求实践性与超前性的相互结合。既为处置诸多实际问题献计献策,同时也就中国保险市场发展中有待补充完善的空白点,设计新的制度规则。本书的编辑出版,有利于加强我国保险法领域学术研究的深度和广度,促进中国保险市场的深化发展,并推动我国保险法研究的深度发展。

责任编辑:纪萍萍

## 图书在版编目(CIP)数据

海商法保险法评论. 第六卷,中国保险市场的新问题、新实践和新举措专题研讨 / 贾林青,李祝用主编. —北京:知识产权出版社,2014.3

ISBN 978-7-5130-2607-9

I. ①海… II. ①贾… ②李… III. ①海商法—研究—中国②保险法—研究—中国③保险市场—研究—中国  
IV. ①D922.294.4②D922.284.4③F842.6

中国版本图书馆 CIP 数据核字(2014)第 033039 号

## 海商法保险法评论(第六卷)

——中国保险市场的新问题 新实践和新举措专题研讨

HAISHANGFA BAOXIANFA PINGLUN (DILIUJUAN)

ZHONGGUO BAOXIANSHICHANG DE XINWENTI XINSHIJIAN HE XINJUCUO ZHUANTI YANTAO

贾林青 李祝用 主编

出版发行: 知识产权出版社有限责任公司

社址: 北京市海淀区马甸南村 1 号

网 址: <http://www.ipph.cn>

发行电话: 010-82000860 转 8101/8102

责编电话: 010-82000860 转 8370

印刷: 北京中献拓方科技发展有限公司

开 本: 720mm×1000mm 1/16

版 次: 2014 年 3 月第 1 版

字 数: 378 千字

邮 编: 100088

邮 箱: [bjb@cnipr.com](mailto:bjb@cnipr.com)

传 真: 010-82000860 转 8240

经 销: 各大网络书店、新华书店及  
相关销售网点

印 张: 20

印 次: 2014 年 3 月第 1 次印刷

定 价: 58.00 元

ISBN 978-7-5130-2607-9

出版权专有 侵权必究

如有印装质量问题,本社负责调换。

## 作者简介

---



**贾林青**，中国人民大学法学院教授，中国保险法学研究会副会长，中国商法学研究会理事。自1982年任教以来，在中国人民大学法学院从事民商法的教学和科研工作，先后为本科生、研究生和博士生讲授民法、商法、公司法、信托法、保险法、海商法、破产法、律师实务等课程。同时，独立或者与人合作了民法、商法、保险法、信托法、海商法等领域的数十本（套）著作，发表了学术论文百余篇。其中的代表作包括《保险法》（普通高等教育“十一五”国家级规划教材）、《海商法》、《信托法》、《中国信托市场运行规制研究》、《中国保险市场的法律调控》、《中国企业兼并与破产的法律规制研究》等，并主持完成了中国社会科学基金项目“中国信托市场的法律调控”的研究，参与完成了数项省部级科研课题的研究。

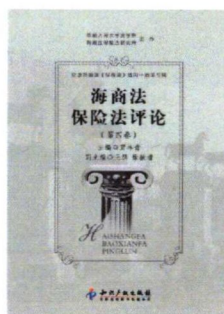


**李祝用**，法学博士，中国人民保险集团股份有限公司法律总监兼法律合规部总经理，中国国际经济贸易仲裁委员会仲裁员，中国政法大学法律硕士学院兼职教授，中国保险法学研究会常务理事、副秘书长。在金融法、公司法方面具有较丰富的实践经验和深入的理论研究。

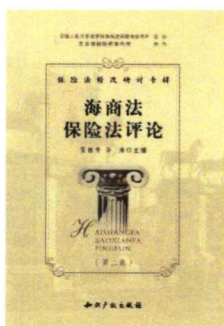
# 已出版书目



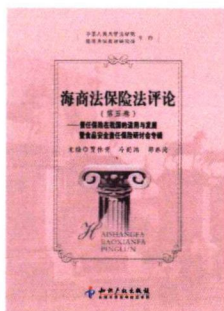
(第一卷)



(第四卷)



(第二卷)



(第五卷)



(第三卷)



## 序 言

众所周知,中国的保险市场自形成到初具规模经过了30余年的历程,其对我国社会主义市场经济发展的促进作用是有目共睹的,但也暴露出了诸多的问题和不足,显现出与各个发达经济国家的成熟保险市场之间的差距。因此,有必要在总结和发扬中国保险市场发展成绩的同时,针对其发展过程中的问题进行分析,讨论其形成的原因,寻找解决这些问题的途径和方法,以便为中国保险市场的不断深化发展提供理论和实践上的引导与支持。

以此为目的,中国人民大学法学院海商法保险法研究所于2013年5月召开了“中国保险市场新问题、新实践和新举措(制度创新与发展)研讨会”。会议主办方邀请了我国法学理论界的学者、司法界的法官和律师、保险和银行监管界的专家、保险实务界的从业人员等,共计80余人出席了会议。与会者从各自不同的视角,以敏锐的眼光发现中国保险市场所存在的问题,用睿智的思想探讨解决这些问题的方法,设计相应的具有可操作性的制度规则。

如今,出于将此次保险法研讨会的科研成果予以固定,能够为我国保险法建设贡献大家的聪明智慧,促进中国保险市场健康有序发展的目的,中国人民大学法学院海商法、保险法研究所特编辑《海商法保险法评论——中国保险市场的新问题、新实践和新举措专题研讨》一书。该书根据中国保险市场的新问题、新实践和新举措的主题,选取了部分与会者的发言和作者向研讨会递交的论文,并形成了以下特色:其特点之一是突出了“新”字。这集中表现在该书所选取的各篇文稿均涉及目前我国保险市场实践中存在的亟待解决的热点问题,例如如何在司法实践中理解和适用《保险法司法解释(二)》、银保协作的热点问题、车损险的实务问题、保险合同的解除权与撤销权的竞合问题、卡式电子保单业务中的适用、保险资金的投资运用等保险实务问题,而诸多作者又从各自的保险实务、保险司法审判或者保险法研究的视角,针对相应的具体问题提出具有新意的解决方法或者创新的制度构建设想,以利于完善我国保险法律体系。其特点之二是多样性。这不仅表现在入选文稿体裁的多样性上,包括有关保险法的学术论文、调研报告、工作报告和案例分析等,以丰富多彩的文体形式取代了单一学术论文的文集体例;更在于各篇稿件之观点和论证方法的多样性,既有就全新的保险制度的设计和理论论证,也有针对具体的个体问题的点滴建议。两者兼优并举,使得全书具有理论上、整体上的多层次体系。其特点之三是力求实践性与超前性的相互结合。大家知道,学术研究并非单纯的

论证游戏，而是为了解决实践问题。鉴于此，该书分别从法院的法官、保险实务部门和高等院校从事保险法研究的学者等领域选取文稿，并立足于实践性与超前性的兼顾，在保持各篇文稿逻辑合理、分析论证较有深度的前提下，或者是针对司法实践抑或保险实务中的实际问题，诸如保险人的说明义务的范围和履行标准、违法驾车的认定、责任保险的产品创新问题、处理保险纠纷的法律机制问题等，讨论行之有效的解决办法，为处置诸多实际问题献计献策；或者是就中国保险市场发展中有待补充完善的空白点，设计新的制度规则，诸如交强险制度的反思与重构、保险消费者的利益保护、新的铁路旅客运输保险体系的构建、人寿保险信托模式、房屋抵押贷款综合保险的制度建设、保险公司破产制度的设计等，各位作者分别论证了相应的制度建设的可能性和必要性，并提出制度构建的设想和建议，不仅展现了各位专家学者敏锐的眼光和智慧，更预示着中国保险市场的发展趋势，以适应市场运行的需要。

总之，借助该书的编辑出版，有利于加强我国保险法领域学术研究的深度和广度，促进中国保险市场的深化发展，并推动我国保险法研究的深度发展，就实现了我们的初衷。

《海商法保险法评论（第六卷）》主编

2013年10月30日

## Preface

It is generally known that it has taken more than 30 years for China's insurance market to develop into one of a considerable size (but still in its early stage) from its establishment. The insurance market has made remarkable contributions to the development of China's socialist market-oriented economy, but on the other hand many problems or deficiencies of this market also surfaced, showing a gap between China's insurance market and those mature markets of the developed countries. Therefore, it is necessary to summarize and continue to build on the achievements of China's insurance market and, at the same time, to seek the methods and ways to solve those problems arising in its development, in order to provide theoretical and practical guidance and support for the continuous and in-depth development of China's insurance market based on the analysis of those problems and discussions on their underlying causes.

For this purpose, in May 2013, Renmin University of China Law School, Maritime and Insurance Law Research Institute hosted the Seminar on New Issues, New Practices and New Measures (System Innovation and Development) in China's Insurance Market. The sponsor of this event invited a total of more than 80 people to this seminar, including Chinese scholars from the jurisprudence academic community, judges and lawyers from the judicial community, experts from the insurance and banking regulatory authorities, and practitioners from the insurance industry. The participants, with their sharp vision, identified the issues faced by China's insurance market from different perspectives, and, with their profound wisdom of thinking, debated on the ways to solve these issues and designed practical regulations and rules accordingly.

Now, for the purpose of recording the scientific research achievements made in this insurance law seminar, enabling the participants to contribute to the development of China's insurance law system with their wisdom, enhancing the healthy and orderly development of China's insurance market, Renmin University of China Law School, Maritime and Insurance Law Research Institute edited the Maritime and Insurance Law Review-Special Seminar on New Issues, New Practices and New Measures in China's Insurance Market. Focusing on the theme



of new issues, new practices and new measures in China's insurance market, this book is a selection of speeches made by some of the participants and treatises submitted to this seminar by some of the authors, and has the following features: first, it stresses what is new. This feature is epitomized by the fact that all of the articles in this book covers the hot issues which exist in the practice of China's insurance market and remain to be solved urgently, such as how to understand and apply the second judicial interpretation on insurance law in the context of judicial practices, hot issues in the collaboration between banks and insurers, practical issues in automobile physical damage insurance, the overlapping of the right to terminate insurance contracts and the right to rescind such contracts, the application of card-type electronic insurance policies in insurance business, the use of insurance funds in investments, and other practical issues in the insurance business, and many authors proposed creative solutions or suggestions on the construction of the relevant system with respect to specific issues, based on their insurance business experiences, trial of insurance cases or researches on insurance law, in order to improve the insurance legal system in China. The second feature is diversity, which is not only shown by the various formats of the selected articles, including insurance law-related academic theses, research reports, working reports or case analysis, etc. (i. e., the book consists of a variety of forms of papers instead of a selection of academic theses solely), but also shown by the diversified opinions and methodologies of argumentation embodied in the articles, which include design of new insurance system and the relevant theoretical support, and specific suggestions on individual issues as well, making this book featured by a multi-level structure as a whole and from a theoretical perspective. The third feature is a combination of practical and forward-looking nature. As we all know, academic research is not a game of argumentation, and instead, it is about solving practical issues. For this reason, this book is a selection of articles authored by judges from courts, staff at business departments in insurance companies, and scholars from higher education institutions specialized in insurance law research, and strikes a balance between its focuses on practical issues and forward-looking issues. As long as we make sure the articles selected are logical and contain in-depth analysis and argumentation, we select articles which (i) either address practical issues in judicial activities or insurance business, such as the boundary of insurer's obligations to explain insurance clauses and standards for performance,

determination of illegal driving, liability insurance product innovation, and the legal mechanism for settlement of insurance disputes, discuss effective solutions, and offer suggestions on how to deal with various practical issues, or (ii) design new regulations or rules to fill the gap in the development of China's insurance market, such as reflection on and reconstruction of the system of mandatory liability insurance for traffic accidents, protection of consumer's interests, the establishment of new railway passenger transportation insurance system, life insurance trust, the development of housing mortgage loan comprehensive insurance system, design of insurance company's bankruptcy regulations, with all of the authors demonstrating the possibility and necessity of the construction of the relevant systems respectively, and proposing their conception of and suggestions on the construction of the systems, which not only shows that the authors have sharp vision and wisdom, but also predicts the trend in the development of China's insurance market, helping adapting to the operation of the market.

In summary, we hope that the editing and publishing of this book will help strengthen the academic research on insurance law in China in depth and width, contribute to the in-depth development of China's insurance market, and fuel the in-depth development of legal research on insurance in China.

Chief Editors of the Maritime and Insurance Law Review (Volume VI)

October 30, 2013

# 目 录

## 第一编 司法界 实务界的视角

解读《保险法司法解释（二）》 .....	宫邦友	3
过犹不及		
——论保险人缔约义务的合理边界 .....	刘建勋	15
论保险法上明确说明义务的说明范围及说明标准		
——兼评《保险法司法解释（二）》第10~13条之适用 .....	韩小安 陈秋荣	24
2012年度上海法院审判保险纠纷案件中发现的问题及应对建议 .....	董 庶	34
试论车上人员责任险的险种创新 .....	袁洪涛	46
以新车购置价作为保险金额的真实含义及推定全损的计算标准		
——对一起车损险纠纷案的评析 .....	郑云端 徐 冰 姜丽丽	50
保险纠纷诉调对接机制的理论与实践		
——以江苏省徐州市为例 .....	单云娟 赵 涛	57
车损险保险金额的确定及相关赔偿处理		
——“机动车辆商业保险示范条款”相关条文评析 .....	刘学生	65
交强险制度的反思与重构		
——兼论《侵权责任法》相关条文的完善 .....	毛大春	75
借鉴国际经验，构建我国保险消费者保护体系 .....	范流通 完颜瑞云	85
银保协作相关热点问题探究 .....	陈 胜	98
我国保险业反垄断执法和行业监管管辖权配置问题浅析 .....	李祝用 鲍为民	105
论保险合同解除权与合同撤销权的竞合 .....	窦文伟 李 劲	114
我国保险集团化管理的制度需求及应对 .....	曹顺明	123
“大资产管理”视角下保险资金投资运用问题浅析 .....	胡 磊 省文杰	129
卡式电子保单业务中的法律问题探讨 .....	万 群 费 伟	135
自助保险卡未被激活 本保险合同不成立		
——对一起卡式保险纠纷案件的评析 .....	偶 见	142
行业调解价值审视及其制度完善 .....	欧秋钢	151



第二编 学术界的视角

重构保险合同成立与生效的制度规则

——以电子保单所涉及保险合同的适用实践为视角·····	贾林青	163
构建新的铁路旅客运输保险保障体系之我见·····	贾林青	175
论人寿保险信托·····	闫海 姜丽	186
商业保险下大病医保模式探究·····	李伟群	197
房屋抵押贷款综合保险法律问题研究·····	潘红艳	209
违法驾车情形的认定·····	谷凌	215
刍议我国交通事故社会救助基金的法律定位·····	赵明昕 杨紫锋	223
比较法视野下《农业保险条例》评析·····	张长利 庾国柱	232
农业环境责任保险理论问题研究·····	王育才 彭刚红	251
对责任保险的社会责任发展的几点认识·····	史卫进 王志平	262
我国责任保险产品创新与模式选择·····	胡军 李向彬	267
私营海上保安公司的责任保险·····	任宪龙 韩立新	276
责任保险人的抗辩义务及在赔偿调解中的履行·····	程淑娟	283
关于构建我国保险公司破产制度的几点思考·····	郭宏彬	294

# Table of Content

## Part I From the Perspective of Judicial Community and Practitioners

How to Read the Judicial Interpretation on Insurance Law (II)	
.....	Gong Bangyou Page 3
Going Too Far Is as Bad as Not Going Far Enough	
——on the Reasonable Boundary of Insurers' Obligations in	
Contract Concluding .....	Liu Jianxun Page 15
On the Scope of Insurers' Obligations in Providing Explicit Explanations for	
Insurance Clauses and Standards for the Explanation	
——Concurrently on the Application of Articles 10 through 13 in the	
Judicial Interpretation on Insurance Law (II)	
.....	Han Xiaoan & Chen Qirong Page 24
Issues Identified in the Trial of Insurance Dispute Cases in Shanghai	
Courts in 2012 and Suggestions on How to Address them	
.....	Dong Shu Page 34
Tentatively on the Innovation of Passengers Liability Insurance Products	
.....	Yuan Hongtao Page 46
What Does It Really Mean to Use the Purchase Price of a New Car as the	
Insured Amount, and the Standards for Calculating the	
Constructive Total Loss	
——An Analysis of a Dispute Involving Car Physical Damage Insurance	
.....	Zheng Yunrui, Xu Bin & Jiang Lili Page 50
Theory on and Practice of the Interface between Litigation and	
Mediation of Insurance Disputes	
——Taking Xuzhou, Jiangsu as an Example	
.....	Shan Yunjuan & Zhao Tao Page 57

The Determination of the Insured Amount for Car Physical Damage Insurance and Relevant Practice on Compensation ——Comments on Relevant Clauses in the Model Clauses for Motor Vehicles Commercial Insurance .....	Liu Xuesheng	Page 65
Reflection on and Reconstruction of the System of Mandatory Liability Insurance for Traffic Accidents of Motor Vehicles ——Concurrently on the Improvement of the Relevant Provisions in the Tort Liability Law .....	Mao Dachun	Page 75
Construction of the Insurance Consumer Protection System in China with Reference to International Practices .....	Fan Liutong & Wanran Ruiyun	Page 85
An Exploration of the Hot Issues related to the Cooperation between Banks and Insurance Companies .....	Chen Sheng	Page 98
A Preliminary Analysis of the Allocation of Jurisdiction over the Anti-monopoly Enforcement and Industry Administration in China's Insurance Industry .....	Li Zhuyong & Bao Weimin	Page 105
On the Overlapping of the Right to Terminate an Insurance Contract and the Right to Rescind Such Contract .....	Dou Wenwei & Li Jing	Page 114
The Needs for a Collective Management System in China's Insurance Industry and How to Address Such Needs .....	Cao Shunming	Page 123
A Preliminary Analysis of Issues related to the Investments and Use of Insurance Funds from A Macro Asset Management Perspective .....	Hu Lei & Sheng Wenjie	Page 129
Discussions on Legal Issues in the Business of Card-type Electronic Insurance Policy .....	Wan Qun & Fei Wei	Page 135
Insurance Contract Not Concluded Since the Self-help Insurance Card Has Not Been Activated ——an Analysis of a Case Involving Card-type Insurance Dispute .....	Ou Jian	Page 142
A Review of the Value of Industry-Based Mediation and Improvement of the System .....	Ou Qiugang	Page 151



## Part II From the Perspective of Academic Community

Reconstruction of the Regulations and Rules of Insurance Contract Formation and Effectiveness ——from a Perspective of the Practice in the Application of Insurance Contract Involving Electronic Insurance Policies .....	Jia Linqing	Page 163
My Opinions on the Construction of a New Insurance and Security System for Railway Passenger Transportation .....	Jia Linqing	Page 175
On Life Insurance Trust .....	Yan Hai & Jiang Li	Page 186
An Exploration of the Models of Critical Illness Medical Insurance under Commercial Insurance .....	Li Weiqun	Page 197
A Study on the Legal Issues in Housing Mortgage Loan Comprehensive Insurance .....	Pan Hongyan	Page 209
Determination of Situations of Illegal Driving .....	Gu Ling	Page 215
A Preliminary Discussion on the Legal Orientation of the Traffic Accidents Social Relief Funds in China .....	Zhao Mingxin & Yang Zifeng	Page 223
A Comparative Analysis of Agricultural Insurance Rules .....	Zhang Changli & Tuo Guozhu	Page 232
A Study on the Theoretical Issues in Agriculture Environment Liability Insurance .....	Wang Yucai & Peng Ganghong	Page 251
Several Points on the Development of Social Responsibility with Respect to Liability Insurance .....	Shi Weijin & Wang Zhiping	Page 262
The Choice of Liability Insurance Product Innovation and Models in China .....	Hu Jun & Li Xiangbin	Page 267
Liability Insurance for Private Maritime Security Companies .....	Ren Xianlong & Han Lixin	Page 276
The Liability Insurer's Duty to Defend and Its Performance in the Mediation for Compensation .....	Cheng Shujuan	Page 283
Several Thoughts on the Construction of the Bankruptcy System for Insurance Companies in China .....	Guo Hangbin	Page 294



