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THE LIABILITY OF THE TRAVEL ORGANIZER IN THE EUROPEAN DICIPLINES AND IN THE ASIAN DICIPLINE

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INTRODUCTION

Europe has for a long time paid the great attention on the protection of the rights and interests of consumers which is shown in the field of tourism through the development of a series of decrees and laws to strict regulations on the liability of travel business operator in order to achieve the protection on the interests and the rights of the travel consumers.

No matter The International Convention about the Travel Contract in Brussels or the European uniform directive on the tourism, all of them have focused on making the liability of travel business operator specific and strict, and its prominent feature is that the package travel organizers of the package travel contract need not only to be responsible for the whole package travel product but also need to be charge of various single tourism services composed of the package tourism products no matter whether it is provided by the package travel organizers. The package travel organizers can no longer free themselves from the liability like before with the reason that he is not the providers of the tourism service. So this can be seen as to conduct a comprehensive basis for the protection the rights and interests of tourism consumers and this spirit has been accepted by the EU member states in the following procession to adjust their national laws in accordance with EU directive.

With this starting point it gradually forms a relatively complete system of the liability of the package travel organizers through the ways such as the enactment of tourism law and accordingly added to a large number of legal norms to adjust the liability of the package travel organizers in the travel law and civil law. Although the individual EU member States develop their national travel laws in different patterns, but their starting point is the same - to provide a legal basis for the protection of the rights and interests of the travel consumer and constantly improve it.

With regards to the level of protection has not been limited to the provided package tourism product itself; it also includes the ultimate goal of the package tour - the spiritual enjoyment. Originally it was supported only in the judicial practice and later was incorporated into the formal legal provisions by some EU countries; today it has been accepted by more EU member states which expresses the advancement of the entire European region in the protection of the rights and interests of travel consumers and makes its liability system of the package travel organizers in the forefront of the world. Therefore, tracing the source of the European region in the first part is for the purpose to find the reasons and methods for China to learn from it well.

Many countries and regions in Asia have inserted the Europe's successful experience and theoretical learning into their own construction of the liability regime of package travel organizers. They are engaged in the practice of the different legislative mode and content of the EU countries according to the characteristics themselves. Japan learning the model of French to develop their own independent

travel Basic Law to adjust the liability of the package travel organizers, China's Taiwan region in accordance with the German model set up a chapter about the travel contract in the civil law to regulate the liability of the package travel organizers, and Hong Kong Special Administrative Region of China has also kept the case law model of British.

Although they are different in the content and model, but they all find their own suitable patterns with the integration of its own characteristics forming their unique style in the course of learning and drawing on the European advanced theories. the detailed discussion about the construction of the liability system of the package travel organizers of these Asian countries in the second part is for the purpose of exploring the absorbing process of these Asian countries and then gives rise to the thought: How can China find the appropriate model of their own country to form its liability system of the package travel organizers in learning and drawing on the European experience.

China's tourism industry developed rapidly after the reform and opening-up of 1978, but the problems associated with the development of tourism has gradually become apparent in tourism activity, in particular, the issue of the infringement of the legitimate rights and interests of tourists has bee paid attention by a vast number of legislators. Because the relevant laws and regulations in China are very imperfect, China has no travel Basic Law adjusting the liability of the package travel organizers, and in contract law, the travel contract is still taken as a nameless contract, and it can only be applicable to the general principles of Civil Law, Contract Law, and Consumer Protection law which leads to the court often make different decisions under the different legal basis for the same or similar cases about the travel contract and which makes the interests rights of tourists can not be protected reasonably and effectively and seriously impede the healthy development of the tourism industry.

Therefore, the third part of the article is mainly from two aspects, theory and practice, to discuss China's current legislative status and shortcomings and the breakthrough of judicial practice for the laws about the liability system of the package travel organizers.

The study on the liability system of the package travel organizers has for a long time been a rather weak area in the domestic legal research. It is not coordinate with the booming tourism market of China and is not incompatible with an orderly, sound and legal environment after China enters into the WTO under the international standards. Speeding up the construction of the liability system of the package travel organizers in China is not only related to the healthy development of the entire tourism industry, but also affects the protection of the rights and interests of the entire consumer groups. So it plays an important role in socio-economic development of China.

In all, the advanced theories and models of the Europe, particularly Italy as well as the learning process in various Asian countries has given us a good example. China has developed into a big tourism country, because tourism becomes an integral part of Chinese living , the various relationships causes by tourism have been throughout the whole of society, the tourism legislation should be a social legislation and its adjustment scope is the entire community, rather than a particular industry, therefore,

in order to regulate the liability of the package travel organizers, we must firstly establish a sound tourism legislative system in China and at the same time we must also see that China has its own historical and cultural traditions . In such background how to find a model suitable for China is still firstly considered in the tourism legislation.

But anyway, the protection of the rights and interests of tourism consumers and the protection of the rights and interests of consumers as a whole is our persistent goal.

CHAPTER I

THE DICIPLINES ON THE LIABILITY OF THE TRAVEL ORGANIZER IN EUROPE

SUMMARY: 1. The evolution of the travel contract in Europe in the field of the consumers' protection and the liability of the travel organizers. – 2.The liability of the travel organizers European. –2.1.The liability of the travel organizers.–2.2.The difference on the liability between the travel organizer and the travel seller (the intermediaries). – 3.The stages of the process of harmonization on the liability of the travel organizers in Europe. – 4.The international convention about the travel contract (CCV) and its acceptance in Europe.–5.IL system of the liability of the travel organizer in Directive N.90/314/CEE of Council of 13 June 1990 and its implementation in Europe. – 6.The associations of consumers and the protection of the rights of the entire tourist in relation to the liability of the travel organizer.–7.The comparison between the CCV and the CEE -7.1.The comparison of the content between the CCV and the CEE. –7.2.The comparison on the aspect of the protection of the travel consumers. –7.3.The comparison on the liability of the travel organizer and its limitation.-8.The juridical practice on the obligation and the liability of the travel organizer.-8.1.The obligation and liability of the travel organizer in the package tour contract.-8.2.The implied liability of the travel organizer: the liability of the warranted safety. –8.3.The liability of the time damage of the travel organizer in the package tour contract.

1. *The evolution of the travel contract in Europe in the field of the consumers' protection and the liability of the travel organizers.*

As what has been seen in the laws about the tourism, it states that "in the next 20 years tourism will become the first sector of the worldwide economic activity with a share of the worldly domestic product that will generate around 15%.There will be about 1 billion and 700 million people involved in the flow of international tourism, with an annual growth of 4%; the foreign exchange earnings of the tourism industry will reach 2 billion dollars with average increases of 7% per year. One of five workers

will be employed in tourism industry"[1].

The preliminary age of tourism (the period up to half of the twenty century) was connected to the curiosity of the knowledge and to a spiritual adventure of the citizens where the individual travelling organization was a unavoidable component, but for the most, they were called together to gain the possible unexpected pleasure in a holiday never pre-confirmed.[2]

In this context, the organizer of the tourism shall not only presented the individual touristic services but also a travelling product organized on its own name whose subject was to "drawing up the program and disseminate it, collecting the subscriptions of the travelers, concluding diverse contracts, including the contract of transportation, the contract of hotel with restaurants, for entertainment, for excursions or trips in the given places, assisting the tourists during the trip, providing porters, guides, interpreters, ensuring the exchanging of currency and the various administrative procedures, that is, in summary, everything occurred in the travelling because of the services which had been stipulated in the travelling program and which were requested by the travelling customers ".[3]In the sixties started the phenomenon of youth tourism which revolutionized the traditional patterns of family vacation, it could be said t the package-tour which were increasing constantly. The activity carried out by travel agents and possibly recruited by the carriers engaged or contacted by customers was reduced to a simple work of intermediation between each other in the name of the mandatory people.[4]The relationship between the traveler and the industry of tourism services can be changed with the development of tourism from the originally eminent aristocratic connotation to the current mass-tourism. So it is consequently seen the development of the division in the types of work and the contract between the travel organizer and the travel middleman.[5]

In the seventies, a significant step for the unification related to the regulation of

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[1] Cfr. GABRIELIE CELOTTO, *Codice Del turismo Della Regione Pugili, Bari, 2000.*

[2] TOMO SECONDO, *IL contratti dei consumatori,* Torino, 2005, 747.

[3] SPASIANO E.,*Contratto di crociera turistica e clausole particolarmente onerose,i*n RDN,II, 1962,p.401.

[4] TASSONI,*Organizzazione di viaggi nazionali ed internazionali e dove diprotezione*,Giur.it.,1991,I, 2, p. 70.

[5] Cfr.,in proposito, G.MINERVINI, *Il contratto turistico,Riv,dir,comm.,*1971,I,277.

the travel contract and the liability of the travel organizer was the International Convention on the travel contract (CCV) predisposed by the International Institute for the Unification of Private Law (UNIDROIT), prepared and approved in Brussels 23 April 1970 which was ratified in Italy by Law of 27 December 1977, n.1084, and entered into force in 4 October 1979, which was stipulated as the tool of ratification for testifying action . Firstly it provides a systematic and detailed discipline about the travel contract; the significance of the CCV was that it gave the uniformity on the protection of the rights and interests of the tourists.

In the year 1990, the Communal Directive of 13.6.1990, n.314 (in GU9.8.90, 2nd Series Special n.62) was drawn up: Another common rules relating to the countries of CEE, “in the field of travel, holidays and all-inclusive ", formed by the understanding equivalent to the Anglo-Saxon term” package tour” and including transport, accommodation and other services which could be food, entertainment spectacles, small trips during the period of stay etc.[6] It was taken as the first regulatory on the travel contract. It could be applied within the territory of the state.

The Italian system has made the execution of the directive on travel” all inclusive” with the law of the d.lgs.17 March 1995, n.111, as a result of the Act 22 February 1994, n.146, art.24 (the community law of 1993). Regards to cfr.oltre Sub art.83 and art.93 sub, they present a special importance in the field of the distinction between "the contract of the organized travel in which a person is committed in its name to work for another people through the way of a global price, a set of services including transportation, living separated from the conveyance or any other service that they have been committed "(which is the contract as a result similar to services contracted) and" the contract of the intermediate travel in which a person is committed to work for another people by means of a price, being a contract of the organized travel, being one or some services separated that allow you to make any trip or any stay (which is similar to the mandatory service) with the different results of the professional responsibilities, also in the light of the distinction between the liability of the travel organizer and the liability of the travel intermediary.

[6] CIUMELLI G., *IL contratto di organizzazione e di intermedizione d viaggio, in* RGCT, p.697.

2. *The liability of the travel organizers European.*

In Italy, according to the International Convention about the travel contract(CCV) signed in Brussels April 23 1970, ratified and implemented in Italy by Law 27 December in 1977, n.1084, which has already been in force since 4 October 1979, "the travel contract: either a contract of the organized travel or the contract of the intermediate travel," when the travel contract is carried to distinguish between two types, as the result, the contract of the organized travel and the contract of the intermediate travel remain basically be applied.

The travel organizer provides with a global tourism performance consist of all possible services together in travel directly to the traveler (for example, the residence, the transportation) that are provided in a price on its own name[7]. On this assumption, the design and architecture of the journey are also the realization of which is directly provided by travel organizer (tour operator) though it is a widespread practice that makes use of other entrepreneurs, such as hotels, carriers etc, to "ensure" the realization of the entire tourism through the conclusion of the relative contracts, the services promised by program.[8] The organizer may conduct activities on its behalf, not only undertakes to procure the responsibilities of single service but also the liability of the product provided by the organizer, because the organizer has already combined the individual tourist services with its business.

The contract of intermediary travel is committed to provide the individual tourist services (for example, transport, accommodation) or build the relationship between the tourists and the organizer of the travel.[9] The difference between the organized travel contract and the intermediary travel contract is that the organized travel contract inserts its activities in the tourism product, creating a whole product based on many

[7] TASSONI G.,*Aspetti particolari della risluzione del contratto di viaggio,in La tutela del turista*,a cura di G.SILINGARDI eV.ZENO-ZENCOVICH,Esi,Napoli,209-218.

[8] MONTICELLI, *Il contratto di viaggio*,in CIURNELLI-MONTICELLI-ZUDDAS,*Il contratto D'albergo,Il contratto di viaggio,i contratti del tempo libero*,serie Milano,1994,159 e ss..

[9] CIUMELLI G.,*Il contrtto di organizzatore e di intermediazione di viaggio*,in RGCT,1989,683.

individual services. But the intermediary travel contract will only provide services provided by the other carrier. In fact, at the first, the travel organizer takes the works and risk on its own name ,assuming the obligation to provide the services covered by the contract to the travelers (the entrepreneurs who specifically and exclusively only take the role of the assistant people of the travel organizers.), the intermediary, on the other hand, generally does not be committed to provide (either by private means, or by others) services relied on the contract on his name, he faces to the passenger on behalf of employers who provide the presentation of the requests.[10]For example, the air enterprise that presents the transportation service is not responsible for inexact implementation of the provision of "organization of travel". (Trib.Marsal*, 5 aprile 2007)*

As the consequence of the conclusion and subsequent execution of the contract, we read then we go, they respond to the individual responsibilities according to their obligations. It can be seen that in fact it is interpreted in the sense that these entities meet the respective obligations assumed in the travel contract caused by the damages of breach of travel.[11]It thus can be used to specifically correctly examine the liability of the travel intermediary and the liability of the travel organizer.[12]

2.1. The *liability of the travel organizers.*

[10] In argomento cfr.ROPPO,Commentario alla Convenzione internazionale relativa al contratto di viaggio(CCV),Nuove leggi civ.comm.,1978,1761;MOSCATI,La disciòlina del contratto di viaggio ed il diritto privato italiano,in Legislaz.ec.,1979,352;STANGHELLINI,op.cit,.1132;ma vedi anche T.Roma,17 gennaio 1989,Giur.it.,1991,I,2,77,che desume la qualifica di organizzatore dell'agente di viaggi dalla sussistenza di una molteplicità di indici:1)l'offerta al viaggiatore di un insieme di servizi combinati(un tour package)e non di una semplice somma di prestazioni distinte;2)l'impegno dell'agente di fornire i servizi in proprio nome,senza spendere il nome delle imprese che di fatto li erogano;3)il sussistere di un prezzo globale;4)l'offerta di un accompagnatore per il tour.

[11] In questo senso la disposizione viene interpretata dalla dottrina quasi unanime.Del tutto isolata è rimasta la tesi di CARRASSI,*Tutela del turista nei viaggi a forfait.finalmente una risposta adeguata del legislatore italiano*,Comm.al d.lgs.17.03.1995 n.111,Corr.giur.,1995,906 che propende per un regime di responsabilità solidale.

[12] TOMO SECONDO, *Il contratti dei consumatori*, Torino, 2005,788.

With regard to the responsibilities imposed on the travel organizer are outlined in the laws of articles 12 -15 in CCV in protecting the rights and interests of travelers. In the hypotheses that are derived from these responsibilities: the liability of failure to perform the duty of the travel organizer (tour operator) (art.3 CCV), The liability for failure to perform a duty relating to the presentation of the single service that such services are performed by the travel organizers on their own names and the liability of the travel organizer for the services provided by the third parties.

We must therefore make a distinction between the deficiency or partial execution and the defective execution that there is no comparison reflected in our system except the assumptions which are indicated that" the forms of the same expression: incorrect performance of the service, it should be noted, however, that the distinction is again in the words of the directive CEE n.314/90 in .5. n.2.[13]

The organizer has to respond to the responsibilities except that he can prove that he has fulfilled the obligation of a diligent travel organizer, the exclusion of liability borne by the organizer must be assessed only when the organizer demonstrates that they have not been able to prevent unless they can prove that "the deficient or defective performance is due to the impossible presentation resulting from a cause not imputable to their faults "(cfr.art.14, D.Lgs.n.111del 1995), the failure is attributable to" its employees and agents when the action is within the scope of their duties "(cfr.art.12 CCV). The diligence borne by the organizer should be in concrete proportion on the obligations of the travel organizer in the execution of aim of the travel contract concluded or of the individual service (housing, transportation, etc.) on his name in front of the tourists. Of course it can not be that of the diligence of mediate people.[14]All of this is for the failure of "the obligations of organizers", that is, for the non-compliance on the obligation which should correctly coordinate with the

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[13] MOLFESE FRANCEDSCO, *Responsabilità delle parti nel contratto di viaggio, in Il contratto di viaggio e le agenzie turistiche,* 2006,232.

[14] SALVATORE MONTICELLI., *Il contratto di viaggio*, ,in *Il contratto D'albergo,Il contratto di viaggio,i contratti del tempo libero*,serie a cura di PAOLO CENDON,GIUFREE editore.207.

various services which form the final united product of "all inclusive".[15]

The hypothesis concerns the case that the travel organizer also responds to failure caused by services provided by a third party included in the "package tour": carriers, hoteliers, restaurateurs, guides, transportation, etc. it depends on how frequently the non-fulfillment of the obligation contained in the travel contract is to be charged to those entities that are externally dependent on his organization and then are called by the CCA as the services of the third providers.[16] according to article 15 of the Convention, for the organizer committed by the tourists in respect of an obligation to deliver the travel "all inclusive", there are two types of the responsibilities due to the difference between prejudices caused on the tourists, "because of the whole or partly failure of the service" (art.15, n.1, CCV) and those caused "in the course of implementation of these presentation "(art.15, n.2, CCV). Of this provision which imposes a distinction between the failure and incorrect implementation of presentations.[17]

In fact, from art.14 Law n.1084 of 1977, for the travel organizer, there is the possibility that he may on its name provide the individual tourist services, for example, when the organizer on himself provide the service of residence or transportation, he assumes the liability of carriers or hoteliers. Both the Directive 90/314/EEC and D.Lgs.n.111 1995 do not distinguish directly between the two cases in which the organizer directly provide the individual tourist service and the services which they have been entrusted to the third people. Con the reference to Article 5 of the Directive and to n.2 III. co., and to the art .15 and 16 of Directive legislation n. 111 of 1995, it

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[15] GIANLUCA CIURNELLI., *Il contratto di viaggio e la vendita dei Pacchetti Turistici*, in *Manuale di diritto del turismo*, Coordinato da FRANCESCO MORANDI E GIORGIA TASSONI, 422.

[16] TASSONI,G..,*Organizzatore di viaggi nazionali ed internazionali e doveri di protezione*,in GI,I,2,74.

[17] Equesta,secondo ROPPO,*Commentario alla Convenzione internazionale*,cit.,178,l'unica interpretazione che consente di dare un significato autonomo al 1° e al 2° co.dell'a15,n.1,CCV; l'unico modo per identificare una ragionevole differenza tra le due ipotesi di sembra quella di riferire la prima alla mancata esecuzione(in tutto o in parte)delle prestazionipromesse dall'OV al viaggiatore,tale da privare costui di tutte o di alcunoe delle utili cui avrebbe avuto diritto ...;mentre la secondoa va riferita invece alla difettosa escecuzione che abbia per effetto non tanto la vanificazione di utilità sperate da viaggiatore,ma piuttoso la lesione attuale di suoi beni ....

provides the possibility of application of international conventions that discipline the presentation of the individual tourism services and the limits on these responsibilities. For example, the Warsaw Convention regulates the liability of the carrier and the document of the transportation. Which was amended by the Protocol signed at The Hague on 28 September 1955 and rectified in Italy with Law 3 December 1962 n.1832

However, the liability of the organizer for damages directly incurred on travelers which are due to the performance by third parties of the various services covered by the contract with the hypothesis of "direct action" contained in the Code to artt.1595, 1676 and 2867 of CC that is more favorable for certain categories of travelers. The interpretation which is certainly more adherent to the original text of the Convention and accepted unanimously by the doctrine is that in the first case it is wished to refer to non-performance of service, wholly or partly (the quantitative failure), while in the second assumption about the defective performance of the presentation(the quality failure).[18] In the first case, “the quantitative failure " is because the organizer does not provide the service at all, then the liability of the organizer does not need to be proved .however, when it is relates to "the quality failure", the organizer must assume the liability save that the organizer is able to provide the proof "that it results from the travel organizer diligent in choosing the person who performed the service."

The holiday as a "dream vacation" is a precious rest after a long period of employment and, as an occasion "unrepeated" leisure in which to forget the stresses of daily life, the constitutive expressions often contained in advertising are not only the opportunity to relax, but also a time when we celebrate an important fact of life (thinking of the wedding travel needed by the young couples or an anniversary). In this sense, therefore, damages caused by the default, a cause from the travel organizers, by the obligation of the touristic operator or of the agent, he suffers a series of hardships that can easily transform the travel-holiday in a forgotten

[18] GIANLUCA CIURNELLI,*Il contratto di viaggio e la vendita dei Pacchetti Turistici,* nel *Manuale di Diritto del Turismo,*VINCENZO FRANCESCHELLI E GABRIELE SILINGARDI,Torino,2003,424 ss,.

experience that not only harm the interests of the travel consumers, but also the hardships affect the expected enjoyment of the holiday as an opportunity to relax according to what have been promised by the tour operators or by the touristic intermediary.

It is hard to dispute that the damage suffered by the traveler exist not only in the parts of the package tour that has not been paid and in the additional expenses supported by the traveler, but also involves the impossibility of using all or part of the holiday period as an opportunity for rest and fun as programmed. So this is true in any type of vacation, but it is more evident in all of those hypotheses in which the travel is related to circumstances or events unique and unrepeated.[19]

According to the interpretation of ex art.2059 cc and in particularly, more recent, with the ratification by the par.13, 14 and 15 CCV,[20] D.Lgs.17.3.1995, n.111[21] and L.27 December 1977, n.1084, there is a tendency to recognize that the compensation for the damages of the holiday ruined is not patrimonial from the contractual failure. In jurisprudential path of Italia, the leading case is the decision to recognize the compensation for the less enjoyment of the holiday: "The obligation of the compensation for the damage imposed the burden on Zenitur for the reasons given above we find, first, the return of that part of the price, appropriately revalued on the remaining period of residence of the plaintiff which is not enjoyed by the plaintiff and by others, in the minor enjoyment and the inconvenience incurred by the inadequacy of alternative accommodation (the accommodation used nor the size nor the characteristics of Villa Korby). Such damage therefore is assessed as regards the first aspect [in a sum correspondent to the difference between the total cost of stay and the cost of less effective period of stay of tourists which should be revalued]; As to the second, with regard to the particular importance that normally attaches to the

[19] VACCÀ C,*Inadempimento contrattuale e risarcimento del danno non patrimonale:vacanze da sogno e vacanze da invubo,*in *RCP,*1992,914.

[20] A.Milano,21 giugno 1988,cit.

[21] T.Venezia,24 settembre 2000,*Contr.*,2001,580 ss.,con nota di GUERINONI, *Danno da vacanza rovinata* e art.2059,*Codice civile.*

enjoyment of an adequate period of the travel appropriate to their expectations with equitable assessment to current value"[22]

2.2. The difference on the liability between the travel organizer and the travel seller (the intermediaries).

As for the liability of the seller (the intermediaries), it is clear that the seller (the intermediaries) makes a relationship between the passenger and organizer or the third party who supplies the individual tourism services (hotel, transportation and accommodation, etc.) in the name and on behalf of the travelers. (Art.14 CCV and section 3 Art. 22 CCV). It expresses two different types of contracts between them with a legal nature and with the diverse obligations. This provision implicates that they do not totally or partially respond to the liability for the failure or the incorrect execution of the travel services provided either by the travel organizer or by the other entrepreneur. (Art.13-15 CCV). The legislation in the Italian law of D.Lgs.n.111 1995 provides that "in case of failure or inaccurate fulfillment of the liabilities assumed by the sellers of package tour, the organizer and seller are required to compensate for the damages in accordance with their respective responsibilities". [23] The seller (intermediary) does not take the liability according to the package tour contract but according to the content assumed.

Article 19 of CCV provides that if the seller has omitted the indication of the name and address of the travel organizer in the travel contract which have been stipulated by Article 18, par.2, they should respond on their own name to the in-fulfillment imputable to the latter[24] and assume the liability of the providers for the

[22] Trib.Roma,6 ottobre 1989,in Resp.civ.prev.,1991,512,con nota di VACCÀ.

[23] SILINGARDI-MORANDI, *La vensita di pacchetti turistici*,Torino,1998,135-137.

[24] In giurisprudenza cfr.T.Roma,23 marzo 1988,*Giur.it.,*1991,I,2,66 e ss.;T.Torino,8 novembre 1996, *Resp.civ.prev.,*1997,818,connota di GORGONI,*I giudici e l'inadempimento del contratto di viaggio;*T.Roma,6ottobre1989,*Resp.civ.prev.,*1991,512,connotaredazionale;*Resp.civ.prev.,*1992,263,con NotadiVACCÀ,*Inadempimento contrattuale e risarcimento del danno non patrimoniale:vacanza da sogno e vacanza da incubo*,nota sopratutto per aver rappresentato il *leading case* in materia di danno da vacanza rovinata.Secondo ROPPO,*Commentario all convenzione internazionale* ,cit.,1789,

damages on the travel consumers caused by the defective travel product, ex art.4, dpr24 May 1988, n.224, Implementation of Directive 25 July 1985, n.85/374/CEE. Article 5 of Directive n.314 of 1990 does not make the distinction between the liability of the travel organizer and the liability of the travel intermediary either on the solitary liability or on the subsidiary liability. In Italy, there is the different system of the liability. As well as in Italy, it is provided in almost all remaining states of the European Union.

3. *The stages of the process of harmonization on the liability of the travel organizers in Europe.*

As what we have seen, before the seventy years, there is no a convention with a single regulatory system on the liability of the travel organizer, in Italy for a long period of time it was applied by l.2650/1937 which was modified by D.P.R. 28 JUNE 1955, N.630.This law regulates the activities of "the organization of the travel with the touristic characteristic "and provided a number of charges on the holder of an travel office for protecting the interests of the traveler, not constituting in the case of the liability for the in-fulfillment with private characteristic to the passengers.[25]Il Civil Code of 1942 did not provide the specific discipline for the liability of the travel organizer, then there is the difficulty in distinguishing between the liability of the travel organizer and the liability of the travel intermediary, the first discipline of the international travel is the Convention International related to the Travel Contract signed at Brussels on 23 April 1970 (CCV) and entered into force on 4 October 1974, the Convention for the first time to separate the organization of travel from the intermediary of the travel which is also derived that the liability of the travel

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l'immputazione in capo all'intermediario di una responsabilità per l'inosservanza degli obblighi di organizzazione, è conseguenza del fatto che egli agisce nella qualità di rappresentante dell'organizzatore senza tuttavia spenderene il nome,assumendo dunque in proprio,nei confronti del turista,gli obblighi nascenti dal contratto.

[25]*Commentario al codice del consumo*, in quadramento *sistematico e prassi applicativ*a,a cura di Pasquale Stanzione e di Giovanni Sciancalepore,IPSOA,2006,649.

organizers include not only the deficient performance of the tourism services (*en raison de linexecution tltale oupartielle de ces prestations*) but also the in-fulfillment of the obligation of the organizer (*à l'occasione de l'execution de ces prestations*).

The Law of December 27 Italian 1977 n.1084 is ratified by the Italian Government from the International Convention on the travel Contract April 23 1970 ,it is the primary national source which is the special discipline about the liability of the travel organizer. However, it is also in consequence of the emanation and the adoption of a united discipline into Italian laws. The importance of identification of the legal nature had been present at the fact that Italy, when ratified, used the provision of Article.40, n.1 of the Convention, so that the relative disciplines are applicable only to the international travel.[26]"it should be wholly or partly followed that one state divers from the other state where the contract was signed or where the tourists departed." in fact, however, there are few countries that have ratified their national laws, except Belgium, Taiwan, Italy and Togo, lacking of the rectifications or adhesions of the countries, The CCV can not be regarded as a well substantive reuniting. Italy is the only country to retain such ratification in Europe, Belgium, when in the implementation of Directive 90/314/EEC, denounced the CCV.

When in the early part of 90's, the effect of the phenomenon of global economic activity and the gradual transition to market economies planned was that the countries have pursued economic integration for a long time. In the countries of the European Union ,this process has quickly been more accelerated than the rest of Europe, this acceleration is due to the action that have been undertaken in order to achieve the Single Market of Europe. We should reconfirm that as the result of this beneficial project, firstly, the concept of the Single Market is especially for that which the inherent affects of the economical relapses descent and then enter into the particulars of the effects on tourism.[27]

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[26] In tal senso l'orientamento prevalente della dottrima :cfr.fra gli altri E.ROPPO,nel *CommetntoallaCCV,*inN.L.C.,1980,589;GRIGOLI*,Ilcontrattodiviaggio,*inTratt,Rescigno,III,11,P.802.Nova,milano,1995,207.

[27] *I contratti di viaggio e turismo,la disciplina,la giurisprudenza,le strategie*,introduzione di Giorgio De.

In parts of the D.Lgs .17 march 1995 n.111,, the law of Communal origin (the implementation of Council Directive 90/314/EEC of the European Communities of 13 June 1990 on the travels, the holidays and the scope of "all inclusive", until to today, in fact, the D.Lgs .17 march 1995 n.111 is substantially transferred in D.Lgs.6, September 2005, n.206 and in the Code of consumption.

The Articles about the liability of the travel organizer for all of the consumers of the package tour almost unaltered reproduce the Article 1 of d.lg.n. 111, 1995 (the implement of Directive 90/314/EEC) and it is now repealed with the cod.cons.(v.art.146,al.1,lett.e) which has entered into force with the modification the in art.82,section 2 to reconcile the discipline of the distance contracts which presents a great opportunity for the harmonization of national rights in light of the protection of the touristic consumers ,not stipulated by CCV-as what have been said-in the context of the European Union, aiming to request a united rule for all the EU countries ,in order to facilitate and simplify the touristic circulation, eliminating the points of breakages in individual national legislations, including both tour operators and the consumer to enjoy the touristic service.[28]

In Italy, the government has promulgated the Legislative Decree the art.24 of the Community Law 1993 (Law 22 February 1994 n.146) of the Implementation of Directive 90/314/EEC;

In France the law of 14 June 1982 lined the mode of the payment with respect to the corresponding tourists, not rectified by CCV, on the contrary was the implement of the Directive 90/314/EEC with Loi 92-645 of 13 July 1992.[29]

Germany had already for a long time used the law of 4 May 1979 on the travel contract (Reisevertrag) which was diversified in several points from the text of the Convention and that only covered the figure of the travel organizer, such as the BGB §§651 and successively with Vom, 24 June 1994, " the Law on Durchfurhung of Council directive of 13 June 1990 ".

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[28]Marcella Gola, *Evuluzione e prospettive della legislazioe sul turismo* ,2002, p.173.

[29] A, BATTEUR, *la protection illusoire du consommateur par le droit spécial de la consummation:réflexions sur la réglementation nouvelle régissant le contrat de vente de voyages*,in Recueil Falloz Sirey,1996,10e *cahier,chr.,*p.82.

In Spain, the provisions had been issued about its contractual relationship between the travel agents and travelers in implement of the most general Decree n.1524 of 1973 and especially in the orders of 9 August 1974, relating to the travel agencies.

In summary, almost all states adherent to the European Union have made the execution of the directive by the national special legislations.

4. The international convention about the travel contract (CCV) and its acceptance in Europe.

The Italian law of the international source is the law of n.1084, 27 December 1977, n.1084, At this point, as was mentioned above, the law is ratified and executed by the International Convention on the travel contract (CCV) signed in the Brussels 23 April 1970, which came into force in Italy in October 4 1979, successively it has also promulgated the L.17 May 1983, n.217 for the tourism and the diverse regional laws for implement. For example, the regional law of Emilia Romagna, 14 June 1984, n.31 (now replaced by the Act Reg.Emilia Romagna 27 July 1997 n 23), in Article 6, the last co., which forces the tour operator to assume the civil liability. It also can be seen from Article 8 of Law Reg.Veneto 28 August 1986 n.46 , Article 8 of Law of the Province of Trento 17 March 1988 n.9 and Article 8 of Law Reg.Basilicata 13 November 1989 No 31 etc.

The scheme outlined by CCV has the essential purpose of promoting and developing tourism with a view to contribute to economic growth, to international understanding, to peace, to the prosperity and to the universal respect and to observance of human rights and the fundamental freedoms without distinction of race, sex, language or religion ". there are essential two types of liability of the travel organizer, in the first case, by the in-fulfillment of the organizer; in the second case, of the directive damages on the traveler from his provision of services on his own or by others; in this second case, however, it has limited the liability of the travel

organizer unless the travel organizer can not prove that he has been diligent in choosing the person who performs the service.

The introduction into the subject of this liability regime meets a general need for the protection of consumers that devoid of the possibility of controlling on the organization of activity to be enjoyed, remaining otherwise devoid of any adequate measure.[30]

A problem in the continuation of the establishment and implementation of the Convention CVV in national law is "to apply this Convention only to the international travel contract which should be carried out wholly or partly in a state diverse from the State where the contract is signed or where the journey begins, " the limitation of the disciplines about the international travel noted is unsatisfactory in terms of the domestic responsibilities of the travel organizer, from this point it follows that the contracts is related to the travel to be performed in the intern territory of the state. Moreover, the choice of limiting the disciplines on the international travel has achieved the result of unnecessarily complicating the interpretation of the Law n.1084 of 1977.[31]And making the regulation of domestic voyage to be a difficult work of reconstruction, not yet reached results that collect unanimous consent.[32]The national individual discipline is exceeded because the detailed rules are contained in the convention.

When with respect to the International Convention on the travel contract (CCV), what has been derived that it has been recognized the need to establish unified rules regarding the travel contracts., However, from the started date of The Convention, except errors, there are very few (seven) countries have ratified by the Convention in a domestic measure. First, the deficient States are adherent to the convention which have participated in the work, almost all of them lack the confidence in the result reached. For a long time it is recognized in the light of domestic laws to apply the

[30]MARINA DEMARCHI, *I contratti di viaggio e turismo,la direttiva N.314/90,del 13 giugno 1990,sui viaggio e vancanze'tutto compreso'e la recezione nel nostro ordimamento mediante il D.LG.17 MARZO 1995,N.111,* introduzione di Giorgio De Nova,milano,1995,24.

[31] R.PARDOLESI, *Schizofrenia qualificatoria e disciplinare*,in *Foro it.*,1991,I,c.3060.

[32] Cfr.M.DEIANA,*La disciplina del contratto di organizzazione di viaggio turistico nei viaggi interni*,in *Diritto dei trasporti*,II/1988,p.133ss.

discipline of the Convention. There are only Italy, China, Belgium, Denmark, Cameroon, Togo and Argentina in which only two states are the members of the European Community. In particular in terms of European nationality, even in countries after signed, only Italy apply it in the national legal orders, Belgium, at first, in the intern laws it imposed the agents to stipulate the insurance contracts for the liability of the tour operator adherent to the Convention, however, denouncing the CCV in the occasion of the implementation of Directive 90/314/CEE. So the Convention is not a ideal subject to satisfy the aim of the realization of "a typical Community ".

The Italian Government reserves to apply the law n.1084 of 1977 to only international travel, so the liability of the national travel organizer is excluded from the application of the Law n.1084 1977.

In Europe, a selection of opposite sign has been accomplished in Germania, by the virtue of the text of convention appears little clear, precisely on the question of fundamental limitation to the liability to the travel organizer against the third parties involved in carrying out the execution of the individual services, so it is enough to leave the space open to a more satisfactory action of the intern legislation, even if according to what has been said by the government of Justice, the prevailing international travel makes it desirable to have a unified regulation, not constrained by the borders of the states.[33]Also, in the same years, it appeared a scarce desire to give an account of the BGB, when it came to regulate the general conditions of contract.[34] Germany isn't adherent to the international Convention on the Travel contract; it has, instead, proceeded an independent regulation, amended in 1979 with the insertion of a section from the special law, BGB.

As concerned the other problem of the limitation on the liability of the travel organizer ,the scheme of the liability of the tour operators dictated by the artt.12 and segg.Legge n.1084 del 1977, ratified by the art.14/15 CCV, divides the liability in

[33] PARDOLESI, *Turismo organizzato e tutela del consumatore:la legge tedesca sul contratto di viaggio,* in *Riv.dir.civ*. ,1981,I,p.56 ss.

[34] Cfr.V.FRANCESCHELLI E M.LEHMANN, *le nuova legge tedesca sulle condizioni generali di contratto ,* in foro it.1978,V,c.36;G.DE NOVA, *La legge tedesca sulle condizioni generali di contratto,* in *Riv.dir.civ.*,1978,I,p.107 ss..

two types: in the first place, the liability for any injury caused to the tourists by reason of breach of all or part of its obligations which result from the contract or from the present Convention, Except that he can not prove that it is resulted from the diligent travel organizer and of any injuries caused to the tourists in accordance with the provisions governing these services, this prescription seems logical that because the travel organizer personally performs all the various services, he should assume the liability for the injuries to traveler due to him(l 'art.14, CVV), pursuant to Article 14, in particle, the travel organizer personally provides the services of the transportation , accommodation and he should be responsible for any injuries which could been caused on the passenger in accordance with the provisions governing the individual services included in package tourism.[35]The provision in question may be closer to the discipline established by the articlol 228 cod.civ. on the base of the liability of the debtor for the auxiliary practice which has been recognized as a typical case of the liability without faults.

Secondly, however, the travel organizer that have performed the services provided by the third parties is liable for any damages on the traveler caused by the reason of in-fulfillment of all or part of these services in accordance with the provisions of governing, unless the travel organizer can show that it results from the travel organizer having been diligent in choosing the person who performs the service. (The art.15, CVV), in this case, the travel organizer has the possibility of release from the liability if he can show the proof of having carefully chosen the providers of the related travel services. As for the regulation of the liability for the in-fulfillment of the presentation committed to the third suppliers of individual services that make up the package tour, in particular, it has given rise to a definite problem in distinguish between the damages suffered by traveler-because of “the total or the partial non-performance or the occasion of the implementation of the services relating to the conduct of a package tour”.

[35] ROPPO,*Commento alla convenzione internazionale,op.cit.*1781;MONTICELLI,*Il contratto di viaggio,op.cit.,*213;Cass.civ.6 gennaio 1982 n.7,in questa *Rivista*,1982,524;App.Torino 10 gennaio 1986,in *Giur.it.*,1988,I,2,183.

In this sense, the travelers in this way are not allowed to easily distinguish between the accidents casual and the accidents due to the execution of the performance of services of the third providers (of the transportation, of accommodation or of any other kinds relating to the conduct of the travel or of the Stay), it is more difficult to prove that the injuries are resulted during the trip and the damage is from the in-fulfillment in the provision of the tourism service which is used by the travel organizer, therefore, it outlines a system of the liability, if not objective , of course, which is aggravated by the reference to the regulatory systems structured in a way that does not allow for easy testament of the existence of possible causes of exoneration.[36]The principle within the framework dictated by the CCV on the liability of the travel organizer in confront of the travel passenger for damages arising from the person who has been entrusted the performance of the tourism services (of transportation, of hotel or of other services that relates to travel or to stay) which has been found rediscovering in judicial experience.[37]

To conclude, the CCV is limited to the international travel, excluding the internal implementation of the national territory, the system of the liability of the travel organizer appears through mechanisms by the principle of the liability for negligence, it can be said that CCV essentially does not respond adequately to the needs of protection of tourism consumers in the sector of the economically productive tourism. Also with the development of the tourism around the world, especially in Europe, it is requested of the satisfaction of the harmonization of the laws on tourism in order to guarantee to protect the rights of all the travel consumers.

5. *The system of the liability of the travel organizer in Directive N.90/314/CEE of Council of 13 June 1990 and its implementation in Europe.*

[36] SILINGARDI-RIGUZZI-GRAGNOLI,*Responsabilità degli operatori turistici,*in questa *Rivista*,1988,39.

[37] SILINGARDI-MORANDI,*La"vendita di pacchetti turistici"*,op.cit.,175;Trib.Torino 8 novembre 1996,*in Resp.civ.prev.,*1997,828;contra,Cass.civ.6 novembre 1996 n.9643(inedita).

The tourism occupies a prominent position in the community policy, until the middle of the 80's; the community units were occupied with the tourism, representing an important implication in order to complete the European internal market. The Council of the European Community expressed the considerations of the completion of principles on the regulatory piano within the internal market in the scope of the tourism sector with regard to the current practice, which "with regard to the vacation , the package tours travel and all comprehended... ...there are considerable differences between the Member States, both in legal piano and as regards to the current practice which brings the barriers to the free provision of services all-comprehended and the distortions of the competition among the operators established in different Member States. "

In this respect, the CEE has initiated a community policy relating to the tourism, the directive of June 13 1990n.90/314/CEE on the travel, the holidays and the circumstance "all- inclusive" to ensure the creation of a tourism Community space in which the dynamics of the market to take a prominent role at the expense of the legislative conditions and the very rigid administrative constraints ".[38]

On the harmonization of national law concerning the liability of the travel organizer , the directive of June 13 1990n.90/314/CEE, it can be observed from the first two of the "considerations" which are the "the completion of the internal market, in which the touristic sector represents a essential component, is one of the main objectives of the community "and" in the field of travel, the package ,holidays and the circumstances all-comprehended, hereinafter referring to the definition of "the services all- comprehended", there are considerable differences among member states both on the legal piano and as regards to the current practice, which brings the barriers to the free provision of services all-comprehended and the distortions of the competition among the operators established in different Member States", as regards to the "considerations", it can be recalled that the Directive is one of regulatory action is not only in relevant to the implementation of the tourism Community, to the

[38] RIGHI,*La dimensione comunitaria del turismo ed ilsuo impatto sull'ordinamento italiano:profili giuspubblicistici,*in *La tutela del turista* ,a cura di Silingardi Gabriele-Zeno-Zencovich Vincenzo,Esi,Napoli,1993,81.

protection of the rights of all the consumers but also regulating the single rule about the travel contract.

In France, the implementation of the Directive is set up in Article 9 with Law 92-645 of 13 July 1992. In Germany, the reception of June 24 in his law is in the way of amending the paragraphs of the BGB on contract with the 651b, 651f and the new 651k. In Belgium, especially, at first it is equivalent to Italy of being ratified by the International Convention on the Contract of travel and has enacted the Law of 16 February 1994 which has outlined a framework that results from a complex coordination between the Directive and the Old Law, the latter, also, has kept in large part the terminology.[39]

In Italy, it has enacted Legislative *Decree* March 17 1995n.111 ratified by the Directive of June 13 1990n.90/314/CEE on the travel, the vacation and the circumstance "all inclusive". In accordance with the stipulation of the Article 9, the implement of the Directive must, in Member States, before the 31 December 1992.in Italy, however, it is in force two years after the deadline, the law gave the implement by the art .24 of the law 22 Feb.1994, n.146 (Community Law 1993) and with its subject of " package tour " which is offered in the national territory by the tour operators outside the business premises. Article.14 and 15 of Legislative Decree March 17 1995n.111 in accordance with Article 5.1 and 5.2 of the Directive of June 13 1990n.90/314/*CEE* ,has, however, unlike the Directive, has made a distinction between the liability for the obligations of the travel organizer and responsibilities in the execution of services and also has adopt a broader connotation on the liability of the travel organizer not from the *Convention* , because it is acknowledged that the duplex actions are in confront directly of the liability for the damage (organizer) and in confront of the person diverse to organizer. But it is easy to divide the damages coming from the direct contract (the seller).[40] It is clearly and precise that how much

[39] GIORGIA TASSONI,*Il contratto di viaggio*,Giuffrè editore,Milano,1998,97.

[40] Cfr.G.SILINGARDI,*Gli obblighi dell'agente di viaggio nella legislazione comunitaria*,cit.,p.581.Riguardo alla responsabilità del venditore *ex* D.Lgs.n.111 del 1995,conviene ricordare sin d'ora che l'interpretazione accolta inquesta ricerca non trova concorde.

is the liability of the travel organizer and how much is the liability of the travel seller, from the point of view the protection of all the consumers is generally better.

In fact, now the organizer of the trip plays a new role to realize the trip (the package tour) that the organizer of the trip (the tour operator) presents to the touristic consumers a set of individual tourism services "all-inclusive" that makes use of the cases the promise of the fact of himself or the third party, is not the traditional quality of the contract of the travel organizer .In summary assuming the liability not only for the his own organization of the service, but also for the services provided by third parties.

The *Directive*, for ensuring that the manufacturer of the package tour is in confront of the consumer, then, by the unification of the rules that the travel organizer (tour operator) assume the liability resulting from the package tourism that are caused by the in-fulfillment or improper performance except only by in some specifically typical cases of exemption from the liability that this in-fulfillment or improper performance is attributable to the consumer, such failures are attributable to a third party unconnected with the provision of the contracted services, and present a characteristic unexpected or unavoidable, such failures are due to a case of force majeure or an event which the organizer and / or the seller could not, with all the necessary diligence , foresee or resolve.

In summary, in the Legislative *Decree* March 17 1995n.111 excludes the possibility for the organizers not to take the liability in the area if he can not prove that it results from a diligent travel organizer who makes the organizer and / or seller act with the most kindness in choosing the provider of tourism services ", making prompt efforts to find appropriate solutions".[41]It is rigorous in the light of the

[41] Nel progetto del 1988(si tratta della proposta presentata dalla Commissione al Consiglio il 23 marzo 1988,in GUCE,n.C.96/5DEL 12 aprile 1988),"le previsioni dranoassai più articolate proponendo l'intervento degli enti per il turismo per indagare in ordine ai reclami e per comporre in via stragiudiziale le controversie insorte,quindi l'instaurazione di procedure papide ed economiche davanti ad organismi pubblici o privati per la definizione delle liti.Laformula a dottata nella stesura definitiva è molto ampia e tralascia di fornire indicazioni specifiche onde consentire ai singoli stati di predisporre idonne soluzioni nell'ambito dell'ordinamento amministrativo e giudiziario interno ...",*Ult.op.cit.*,pp.26-27.In materia di controversie relative ai contratti ai contratti di viaggio,si

provision of *CVV*. for the organizer, the performance by third party suppliers is already committed by the organizer of the package tours for the completion of the journey, in any service, the organizer, in fact, can not control, however, he is still in charge of liability, for example, the realization of the presentations of transport, it can be found a case in jurisprudence practice decided by the Court of Milan in 1992, the tour operator was declared responsible for the injuries suffered by the traveler as a result of the fact that, since the travel group departed the day following the expected because of the withdrawn flight, Since the travel organizer could not communicated to the hotel booked that the travelers would come to the hotel one day later ,the hotel had annulled the booking.[42]

In Italian jurisprudence practice, a sentence of 1990 by the Court of Lecce, in relation to a holiday in Corfu, condemned organizer to pay a compensation for the damages occurring to passengers for lacking the correspondence of the services actually provided by hotel to those agreed in contract and for lacking the synchronization of the date of the transport of return and that the end of stay.[43]

With regard to the difficulty in the reception of the *Directive* is unclear in its interpretation of Article 5.1 of the Directive on the formula "the organizer and / or retailer" in the individual liability for the in-fulfillment of the obligations arising from the organized travel contract ("services all-inclusive" in the phrase of the *Directive)*.[44]They assume their responsibilities according to their different obligations, from one side; the organizer provides package tour on his own name, from the other

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veda C.VACCA,La'vacanza rovinata'e la tutela dei diritti del fornitore dei servizi turistici,in Riv,dir.comm.,1992,pp.909ss.

[42] Trib.Milano 26 novembre 1992,in *Resp.civ.prev*.1993,p.856 ss..

[43] Trib.Lecce 21 settembre 1990,in *Foro it*.1991,I,c.3061 ss.con commento di R.PARDOLESI .Numerosi esempi sono riportati da E.WYMEERSCH,*Le contrat touristique* ,in *Rapports belges au IXe Congrès de l'Académie internationale de droit comparé*,Bruxelles 1974,p.221.Di recente,Pret.Consegliano 4 febbraio 1997,in *Resp.civ.prev.*1997,p.818 ss.,con commento di M.GORGONI,*I giudici e l'inadempimento del contratto di viaggio*,ha ravvisato violazione di un obbligo di organizzazione nella mancata indicazione sui biglietti di viaggio dei luoghi destinazione.

[44] G.SILINGARDI,*Condizioni generali di contratto e tutela dell'utente nella recente Direttiva CEE n.314 del 13 giugno 1990*,in *Conferenze e seminari dell'Istituto di applicazione forense dell'UniversitàdeglistudidiModena*,n.23,Modena,1991,p.9.edizione,Padova,Cedam,2001,pp.401-402.

side, the travel agent on behalf of the clients. In the directive, however, makes no distinction between the contract of the organizer and the contract of the sales of the travel. As for the consumer it seems more difficult to identify two functions between the organizer and the seller. Moreover, it adds that the solidarity constitutes the rule in light of many objective obligations in the passive side, unless otherwise it expresses different provision that, in this case, cannot be considered implied in the ambiguous expression adopted by legislators.[45]

6. *The associations of consumers and the protection of the rights of the entire tourist in relation to the liability of the travel organizer.*

With the attention to a process of gradual modernization and Europeanization in all European countries, there is a process in our single social-economic system of products and services. The assertion of the rights and needs of citizens, of the consumers and of the users in confront of manufacturers and service providers, both public and private, has now constituted a recurring theme in the more diverse economic and social sectors of our countries.[46]

The evolution of European policy in light of all the consumers can not exclude the sector of the tourism and of the travel. A significant step on presentation of the

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[45] In sintonia con l'orientamento che individua una solidarietà passiva dell'organizzatore e del venditore .M.TOMMASINI,*Interventi normativi sulla responsabilità degli operatori turistici nei contratti di viaggi "tutto compreso"*,in *Giust.civ.*,2000,II,255;C.CARRASSI,*Tutela del turista nei viaggi a forfait .Finalmente una risposta adeguata del legislatore italiano*,cit.,906.*Contra*,A.LEZZA,I contratti di viaggio,cit,290.In giurisprudenza G.d.P.Piacenza 29 gennaio 2004,in *Dir.turismo*,2005,133 ss.,con nota critica di A.GIORDO,*Conclusione del contratto di viaggio ,risoluzione per inadempimento e ripetizione dell'indebito*,per il quale,ricorrendo nella specie un indebito arricchiment,l'azione e esperibile nei soli confronti dell'*accipiens*,data la sua natura personale ; G.d.P.Parma 19 marzo 2004,*ivi*,2005,273 ss.,con nota critica di F.SCORTECCI,*Ancora sulla responsabilità del venditore e dell'organizzaotore della vacanza*,in adesione ad orientamenti dottrinali e giurisprudenziali datati ; Trib.Roma 3 giugno2002,in *Giur.romana*,2002,276.Di non chiara interpretazione per la sua sinteticità è Cass.10 febbraio 2005 n.2713,in *Resp.civ*.,2005,462 ss.e in *Dir.turismo*,2005,337 ss.,che comunque rigetta l'istanza della ricorrente ,basata su *una errata trasposizione dei ruoli tra venditore ed acquirente ,nel senso di far apparire l'agenzia di viaggi come rappresentante dell'acquirente,anziché come venditore o mandatario dell'organizzatore del pacchettio turistico*.

[46] Intruduzione di Giorgio De Nova,I contratti di viaggio e turismo,la disciplina.la giurisprudenza,le strategie,Milano,1995,431.

tourism consumer is the growth of industry of the organized tourism; the tour operator has already converted from a supplier to an organizer who has a integral service, that now of the package tour "all-inclusive".[47]In this perspective, there is conflict between the travel consumers and all the providers of the touristic services.

As what have been said, the International Convention relative to the travel contract (*CCV)* are set up a dual scope on all the tourists and on making a unified legal regulation in the aspects of the activities of travel agencies and the tour operator who is on the aspect relative to the *CCV*. As for the Article 8 and Article 5 of the 1990 *Directive*, in particular, it has accepted the measures in the directive to promote greater protection of tourists in the event of the adverse circumstances that may involve the tour operator or/and the travel agency .[48]Valuating the member states to take automatically the internal law with the necessary measures to ensure the organizer and / or the seller of the good performance of the obligations arising from the contract no matter whether such obligations should be performed by him and no matter whether they must be executed from other service providers, except the fact that the rights of the organizer and / or seller to request these damages from the providers of the travel services "and they are governed by the more stringent disciplines for the purpose of the protection of the consumers.

Following the entering into force of the legislative D.Lgs.17 March 1995 n.111 in Italy which is the first implementation of *CCV*, it made the distinction between the liability of the organizer and the liability of the seller, in this case, indicating the cause exempted from the liability which shall be the cause from the consumer, the cause from the third party, force majeure and fortuitous event) excluding the cases that in the *CCV* the cause unless the organizer is diligent in choice of the third provider.

In part of the securities offered to the tourists, the N.90/314/CEE *Directive* of 13 June 1990 inspects that the States of the European Union take the necessary

[47] "...Con linguaggio tecnicamente discutibile ,ma che dà il senso dell'operazione economica,si parla di"*vendita*"del pacchetto turistico al consumatore-turista,che ""compra"in realtà un fascio di prestazioni(ciò ,di diritti contrattuali)*collegate* dal programma di viaggio(il"pacchetto")proposto dal tour operator ed accettato dal consumatore".G.IUDICA-P.ZATTI,*Linguaggio e regole del diritto privato*,Seconda

[48]PIETRO RESCIGNO, *I contratti di viaggio "All inclusive" tra fonti interne e diritto transnazionale*,2003,43-44.

measures to guarantee the consumer's rights, "the provision is therefore relevant because it ensures the general application for the travel intermediaries in the practice already widely practiced by tour operators to arrange the insurance coverage of civil liability. In this way all operators should ensure the satisfaction of all his rights of the consumers, even when the last have been organized by the organizer with the reduced dimensions financial ".[49]It is precisely by virtue of the fact that the Directive does not coordinate with the contents of the *CCV,* "there are special laws more favorable to certain categories of travelers (art.2, c.2)", and it has been evaluated by the various measures in the provisions in force in member states in light of the protection of consumers. further, the provision of the compulsory insurance responds to the substitutive function of the liability, in the final provisions (Article 7 in the Directive) " the organizer and / or the retailer party of the contract shall provide sufficient evidence of having prepared the guarantee for the security in case of insolvency or bankruptcy and for the repayment of funds deposited and the repatriation of the consumers ".the implement of the Directive 1995 in the decree art.20 stipulates "the organizer and the seller must be covered by the insurance for the civil liability to the consumers for the direct repatriation of the damages suffered by the travelers. The Articles 15 and 16, however, without doubts, is the transfer of the risks borne by the touristic enterprise to insurance people. This, however, lacks the provision on the violation of this obligation.

Finally, it is still an obstacle in the European harmonization of all the touristic consumer on the responsibilities of the travel organizer, in first place, it is, however, the Italian government uses the power from Article .40 of the Convention, which reads: "1.Each Contracting State may, when signing, ratify acceding to this Convention, or express the following reservations: a) to apply this Convention only to the international travel contracts which should be executed wholly or partly in a State other than the State where the contract was signed or where the passenger departed

[49] DEMARCHI,M.,La Direttiva n.314/90del 13 giugno 1990,sui viaggi e vacanze'tutto compreso' e la recezione nel nostro ordinamento mediante il d.lg.17 marzo 1995,n.111,in ISDACI,op,cit.,pp.27-28. *Il contratto di viaggio e l'attuazione della disciplina comunitaria* ,Carla Hubler,Tutore Ch.mo PROF.enrico Quadri,tesi Dottorato di Ricerca in Diritto Comune Patrimoniale VI Ciclo,febbraio,1996.56-57.

[...]" .its ratification in Italy is the d.lgs.n.111 of 1995 whose the regulation does not distinguish between travel "inside" and "international".

In another place, Article 2 of d.lgs.n.111/95 takes the concept of package tour which is already contained in the Directive of 1990 definite that "the package tour has the object of the travel, the holiday and the circumstance" all-inclusive", in this sense, in particular, there is a problem when it is related to the disciplines applied to the liability of the travel organizer and the travel intermediary. In this respect, the liability of the travel intermediary that provides the individual services in the territory of Italy has no regulation to be applied. In the event, however, that the expressed reference can not be applied, in the case of "domestic travel", it is in analogy to the laws of the contracted contract and the entrusted contract.[50]

7. *The comparison between the CCV and the CEE.*

The appearance of the "Convention" makes an important progress without the doubt on the aspect of ascertaining the liability of the travel business people, especially of the travel organizers, it fundamentally establishes the principle that the travel business people should be responsible for the tourists and improves the situation that the tourists travel are unable to get the relief when the travel contract can not be preformed or properly performed due to the absent system of the laws and rules on the liability of the travel organizer. With the establishment that the tour operators should be responsible directly to the tourists, it at the same time firstly establishes the organization obligation and the warranty liability against the defects of the travel organizers, that is, tourists can request the tour organizer to assume the liability of the compensation for all of the defects in the package tour contract. (No. 13-15) and these two points have played a far-reaching impact on the following provisions of all of the countries on the liability of the organizers of Tourism which are also known as two well-recognized fundamental responsibilities of tour operators .

[50]FRANCESCHELLI V.-SILINGARDI G.,Manuale di diritto del Turismo,Giappichelli,op,cit.,Torino, 1999,p.409.

In addition, the tourism business people also has the accompanying obligations in accordance with the good habit of the travel industry to maintain the rights and interests of tourists, especially when after the termination or dissolution of the travel contract, he should take all necessary and powerful measures to take the tourists back to the place of touristic departure. (Article 10, section 3) *Convention* shows also an outstanding manifestation in the protection of the rights and interests of tourists. Such as in order to prevent tour operators to insert the detrimental provisions in the travel contract through making use of his advantages in the formulation of travel contracts, the provision of the "convention" stipulates that the application of this "convention" is not allowed to the exclusion by the parties, as for the contents of the provisions of the *Convention,* the parties can not make the agreement disadvantaged to the tourist. Therefore, some scholars commend that the "convention" gives the very good inspirations for the following the development of *the Germany Contract Law*-Article 651(a-k) of *the Germany Civil Law*.[51]At the same time, we can see the guidance and influence in the relevant legislation of the other European countries by the *Convention*, such as in Italy, in France and other countries.

On the other hand, however, just as what we have said above, there are some regrets of the "convention" which largely limits the effects and the scope on the protection for the rights and interests of the tourists, for example, After absorbing the views of the tourism industry that the liability of the travel organizer direct for the tourists is too heavy, especially the liability for the travel services related to the provision of air or other types of transportation, accommodation, the travel organizers can not provide these services on their owns and must rely on the relevant providers of the touristic services and the travel organizer has no considerable controlling and supervision of them. Therefore, Article 15 of the "the Convention" provides When the travel organizer entrusts to a third party the provision of transportation, accommodation or other services connected with the performance of the journey or sojourn, he shall be liable for any loss or damage caused to the travelers as a result of

[51] KLATT, *Law on the travel contract,* 1979, p.5; TONS OF TRAVEL CONTRACT, 2.Aufl, 1986, EINL.RDN.24; NOLTENIUS, *The change of residence after new travel* , 1985, s.8f

total or partial failure to perform such services, in accordance with the rules governing such services. The travel organizer shall be liable in accordance with the same rules for any loss or damage caused to the travelers during the performance of the services, unless the travel organizer proves that he has acted as a diligent travel organizer in the choice of the person or persons performing the service. It gives the possible choices for the travel organizer to evasion of the liability and this point is in fact proved in the following juridical practice that the travel organizer do not assume the liability with the cause of not the travel service provider which injury the rights and interests of the tourists. Another defective point of the "convention" is that its application is only on the international travel contract and the absent countries to accept it both of which narrow the affective scope of the countries on the travel contract. Under this background, some counties try to find the new way to reach the uniform of the laws on the travel contract with the purpose of the protection of the travel consumers.

The "Directive" aims to harmonize the regulations among the countries of the EU on the package tour and strengthen the protective level of the rights and interests of the consumers in package tour contract. The Regulation No.4057/86,O.J.L 378/14(1986) tends to give more rights and interests to the travel consumers and let the travel organizer to take the more liability. It mainly stipulates that the travel organizer should provide the written materials with the real content including the price, the daily arrangement, the services projects, degrees and levels, the contractual content should not mislead the travel consumers or the travel agency should assume the damages due to this. It straightly limits the advance in the price, changing the content of the activity projects agreed in the travel contract and refusing to start the travel group .the travel organizer must provide the economical insurance to compensate the damages of the travel consumers when the travel organizer goes bankrupt. Every country of the EU should ensure the travel organizer and the provider of the travel services have the ability of fulfilling the agreement of the travel contract. The EU asks all the member counties to take certain measures to implement the Directive and ensure the entire measures take into effect from the December 31, 1992.although finally it only be executed on time in France, England, Netherlands,

other countries delay on some extent due to the special situation. But by the end of the 1995, except Greece, all other countries of the EU take the necessary measures to beginning the implement of the *Directive.*[52]

7. 1. The *comparison of the content between the CCV and the CEE.*

The *Directive* does not use the concept of the tour operator and travel agency in the CCV but uses the concepts of the travel organizer and the travel retailer aim to avoid the differences of the languages among the member counties and the disorders in the usage of the word in the juridical practice.[53]

Although it takes the different concepts, the classification method used by it is essentially not different from the *CCV,* the tour operator is certainly the travel organizer, the unification of the concept for the travel organizer is more useful to ascertain the liability of the travel organizer, but this concept conclude the people who non-occasionally organizes the package tour. For example, the educational and the religious agency organize the training tourism of the students or the religious pilgrimage activity. This concept does not definite the meaning of the "occasionally" which gives the space to the judgments of the juridical agency about that which one can be applied by the "Directive".

The word of "package" is responding to the word of "the organized travel contract" used in the *Convention*, both of two pay attention to the fulfillment of the travel contract. But there exists a difference that there are more limits on the application of the *Directive* which requests the fulfillment of the services must surpasses twenty-four hours or includes the overnight-accommodation.[54]

At the same time, the *"Directive"* stipulates that the "the touristic services"

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[52] Jiang DU, Bin DAI, *The comparative research on the management of the travel agency*, The touristic education press, 2000, p.424.

[53] JOHO DOWNE AND TRICIA PATON, *travel agency law, Pitman publishing*, first published in Great Britain, p.103.

[54] Article 2, section 1 of the Council Directive NO.90/314, O.J.L 158/.

connected to the transportation and the accommodation must composed the important part of the touristic payment in the package tour. But according to the interpretation by the *Directive*, it does not be applies to the situation when the other services connected to the transportation and the accommodation are insignificant in the economical value. Let us hypotheses one situation when a group of the football fans sing the package tour contract for the purpose to see an international ball game, in this case, the economical value of the game tickets is insignificant comparative to the entire price of the package tour, so the package tour contract signed by the football fans may not be protected because it does not meet the requirement of the "Directive". So some scholars believe that the standards of judging which part is of important significance in the touristic services must be ascertained by the judges according to the different situations of the cases. Whether the tourists should be protected depends on the main interests of the travel contract signed.[55]

7.2 *The comparison on the aspect of the protection of the travel consumes.*

Compared the *Directive* with the *Convention*, it has a prominent progress on the aspect of the protection of the tourists. Its legislator pays the special intention on the structure for the purpose to give the tourists the nearly whole protection through building the relative principles on the package tour. For example, on the signing of the package tour contract,[56] the assistance to the tourists in the management,[57] the assistance to the tourists during the trip[58] and the liability of the travel organizer and the safety assurance for this purpose.[59]

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[55] STEFANO ZUNARELLI: *Package travel contracts: remarks on the European community legislation,* 1994, 17 Fordham Int'l L.J.498, p 3.

[56] Article 4, section 1- b and section 2 of Council Directive No. 90/314, O.J.L 158/59, at 61(1990).

[57] Article 4, section 1-a of Council Directive No. 90/314, O.J.L 158/59, at 61(1990).

[58] Article 4, section 1- b(i)-(ii) and article 5 ,section 2 of Council Directive No. 90/314, O.J.L 158/59,at 61,62(1990),the limitation on the changing of the price article 4, section 4 of Council Directive No. 90/314, O.J.L 158/59, at 61(1990).

[59] Article 4, section 5-6 of Council Directive No. 90/314, O.J.L 158/59, at 61-62(1990)

Other improvement with the important significant is the provision about the travel consumer could transfer his touristic rights and interests to other people under the condition that the tourists can not enter into the travelling without the need to have the permission of the travel organizer and this rights can not be excluded by the provisions of the travel contract which is in fact has been limited in the article 8 of the "convention".[60]Because according to its stipulation, the premise of the assignment of his rights is that there is no other agreement between the parties, it means that the transformation should be agreed by the travel organizer. But the *Directive* also stipulates that the travelers have given the reasonable information for the assignment before the department.

The *Directive* at the same time makes the more limitations on the increase of the price compared with the relative provision in the article 11 of the "convention".[61]for example, article 4,sectin 4(a) stipulates that the prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price is to be calculated, and solely to allow for variations in transportation costs, including the cost of fuel, dues, taxes or fees chargeable for certain services, such as landing taxes or embarkation or disembarkation fees at ports and airports which strictly limits the types of the increased price and in the twenty days before the depart the travel organizer has the obligation not to increase the agreed price.[62]

On the other hand, we should pay attention on one amphibious provision about the protection of the travelers. Article 4, section 6 provides that if the organizer cancels the package before the agreed date of departure no matter for what causes other than the fault of the consumer, the consumer shall be entitled withdraws from

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[60]Article 5 of Council Directive No. 90/314, O.J.L 158/59, at 62(1990)

[61]Article 11:1. The travel organizer may not increase the inclusive price, except as a consequence of changes in rates of exchange or in the tariffs of carriers, and provided that this possibility has been anticipated in the travel document. 2. If the increase in the inclusive price exceeds ten per cent, the traveler may cancel the contract without compensation or reimbursement. In that event, the traveler shall be entitled to a refund of all sums paid by him to the travel organizer.

[62]Article 4, section 4(b) of O.J.L. 158/59 at 61(1990).

the contract and be compensated by either the organizer or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, but this rights in some special circumstance can be expelled[63]Which makes this provision about the protection of the rights of the travel consumers uncertain.

7.3 *The comparison on the liability of the travel organizer and its limitation.*

It has been widely recognized that the *Directive* has made greater progress on the liability of the travel organizer than the "Convention". Although some scholars find some indication that the principle of the liability of the travel organizer is the strict liability.[64]But it is essentially on the basis of the principle of the fault liability, that is, The travel organizer shall be liable for any loss or damage caused to the traveler as a result of non-performance, in whole or in part, of his obligations to organize as resulting from the contract or this *Convention*, even through it is due to the acts and omissions of his employees and agents when acting in the course of their employment or within the scope of their authority, and he should take such acts and omissions as his own unless he proves that he acted as a diligent travel organizer. further more the travel organizer is also liable for any loss or damage caused to the traveler as a result of total or partial failure to perform the services which have been entrusts to a third party by the travel organizer and the cause for the exemption from this liability is that the travel organizer proves that he has acted as a diligent travel organizer in the choice of the person or persons performing the service.[65]

On the contrary, the *Directive* takes the principle of the nearly strictly liability on

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[63] Article 4, section 6(b): (i) cancellation is on the grounds that the number of persons enrolled for the package is less than the minimum number required and the consumer is informed of the cancellation, in writing, within the period indicated in the package description; or (ii) cancellation, excluding overbooking, is for reasons of force majeure, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.

[64] SILINGARDI RIGUZZI: *the business risk of the travel organizer and the assurance of the civil responsibility,* in Riv.Giur.Circolaz.Trasp.654 (1980).

[65] Article 12, 13 and 15 of *the Convention.*

the liability of the travel organizer which is also called the risk liability of the sponsorship.[66] It provides that the organizer and/or retailer is/are liable for the damage resulting for the consumer from the failure to perform or the improper performance of the contract unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services.[67] so under the condition that the travel organizer can give the proof that the damages are not due to him or the provider of the travel services, he can exempted from the liability and even provides that the amount of this liability can be limited which makes it seem like the incompletely principle of the strict liability and gives the travel organizer the opportunity to escape his liability.[68]

But at the same time the provision following clearly decreases the possibility of the exemption from the liability which provides with regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable unless such failure to perform or improper performance is attributable neither to any fault of theirs nor to that of another supplier of services, because:- the failures which occur in the performance of the contract are attributable to the consumer, such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable, such failures are due to a case of force majeure, or to an event which the organizer and/or retailer or the supplier of services, even with all due care, could not foresee or forestall. [69]It limits the scope of the exclusion of the liability to only when the organizer and/or retailer can give the proof to certificate the failure to perform or the improper performance of the contract is attributable to the cases having no relation

[66] STEANO ZUNARELLI, *Package travel contracts: remarks on the European community legislation*, 1994, 17 FORDHAM Int'l L.J. 498, P4.

[67] Article 5, section 2 of Council Directive No.90/314,O.J.L 158/59, at 62(1990)

[68] Article 5, section 2 of Council Directive No.90/314,O.J.L 158/59, at 62(1990).In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable.

[69] Article 5, section 2 of Council Directive No.90/314,O.J.L 158/59, at 62(1990)

with the package tour-or the accident, or the irresistible force[70]On the question about the individual liability of the travel organizer and the retailer, the "Directive" has the different opinion from the *Convention*, at first, the concept of the "retailer" in the *Directive* includes a wider meaning than the concept of the "intermediary" in the *Convention*, the "retailer" also include the travel operator who engages in the irregularly action of the touristic business in order to let more tour operators in the system of the liability.[71]The travel organizer and the travel intermediary take their liability according to their personal obligation. So when the travelers ask the compensation for the damages, they should first distinguish that it is whose obligation which it sometimes different for the travelers. The *Directive* uses the expression of "organizer and/or retailer"[72]and it stipulates: "one party of the organizer and/or retailer of the travel contract is responsible for the travel consumers according to the proper performance of the obligation arising from the contract. in addition, the travel organizer and/or the travel retailer should be liable for the compensation for the damages caused to the travelers due to of the non-performance or the improper performance except that the defects of the performance is not due to the defaults of them and the providers of the travel services.[73]That is to say when the obligations arising from the contract are failure to perform or improper performance, the travel organizer and the retailer should take or the jointed liability or the chosen liability. It can be concluded that, the legislators of the "Directive" tend to directly regulate the rights and obligation of the parties, removal of the decision by the member countries about whether the organizer and/or the retailer is responsible for the damages of the travelers.[74] it is also can be seen from the stipulation that the organizer and/or retailer party to the contract shall be required to give prompt assistance to a consumer in difficulty With regard to the damage resulting for the consumer from the failure to perform or the improper

[70]STEANO ZUNARELLI, *Package travel contracts: remarks on the European community legislation*, 1994, 17 FORDHAM Int'l L.J. 498, p.5.

[71] Article 1, section 6 of the Convention and Council Directive article 2(3), O.J.L 158/59, at 62(1990).

[72] Council Directive No.90/314, art 5(2), O.J.L 158/59, at 62(1990)

[73] Commission proposal No.88/C 96/06, article 5(2), O.J.C 96/5, at 8(1998)

[74] STEANO ZUNARELLI, *Package travel contracts: remarks on the European community legislation*, 1994, 17 FORDHAM Int'l L.J. 498, P5.

performance of the contract.[75]

It is apparently that the fundamental purpose of the legislator of the *Directive* is to give more protection of the rights and interests of the travelers and more liability of the travel organizer. So article 5, section 1 provides that the Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable for the damage s resulting for the consumer from the failure to perform or the improper performance of the contract.", the legislation of all the member countries should ensure there is at least one (the travel organizer or the travel retailer) is liable for the damages of the travelers, irrespective of whether such obligations are to be performed by the travel organizer or the travel retailer, This point is reflected in the provision that the travel consumer can institute legal proceeding for the compensation of the damages arising from the travel contract to the travel organizer and the retailer which use the word "and" instead of the "and/or", it means a jointed liability between the travel organizer and the travel retailer which can gives the more protection for the rights and interests of the travelers .but it is not in accordance with the expression of the "and/or" in the "Directive" [76] It has to be called a regrets.

The limitation on the liability of the travel organizer is stipulated in the article 5, section 2:" In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable." The compensation of the damages is limited to the damages due to the non-performance or improper performance of the services involved in the package .so the liability of the travel organizer is limited to scope of the existed international convention relative to the performance of the package tour. It lets the result of the conflict between the provision of the *Directive* and the *Convention*, because the *Convention* not only stipulates the limitation on the damages of the personal injury which is excluded in the "Directive" but also give a low amount

[75] Council Directive No.90/314, art 5(2), O.J.L 158/59, at 62(1990)

[76] STEANO ZUNARELLI, *Package travel contracts: remarks on the European community legislation*, 1994, 17 FORDHAM Int'l L.J. 498, P6.

of the compensation for the damages which is unfavorable for the for the protection of the travelers.[77]

On the other hand, the *Convention* is not included in the international conventions which regulate the activities of the travel organizer lined by the *Directive.*[78] So as a result, when the legislators of the member countries adopt the *Directive* as its principle, they can not also adopt the relative limitation on the liability of the travel organizer.[79]

The *Directive* makes at the same time the conditions for the limitation of the liability of the travel organizer when the damages of the travel consumers are due to the failure to perform or improper performance of the obligation of the travel contract, the condition should still be in accordance with the relative international conventions which regulate this travel services.[80] But it is self-contradictory on whether the limitation of the liability can be agreed in advance in the travel contract. Because it is explained non-exclusion of the feasibility of this means by the article 5, section 2 of the "Directive", it stipulates however that the provision of the section 1 and section 2 can not be excluded by the way of the contractual terms except the exemption stipulated in the article 5,section 2 and Article 5,section 3 of O.J.L 158/59,at 62(1990) provides that without prejudice to the fourth subparagraph of paragraph 2, there may be no exclusion by means of a contractual clause from the provisions of paragraphs 1 and 2."

The limitation on the liability of the damages other than personal injury

[77]Article 13,section 2 of the "Convention": "Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable under paragraph 1 shall be limited for each traveler to- 50.000 francs for personal injury,- 2.000 francs for damage to property,- 5.000 francs for any other damage."

[78]The introduction of the "Directive": "Whereas in cases where the organizer and/or retailer is liable for failure to perform or improper performance of the services involved in the package, such liability should be limited in accordance with the international conventions governing such services, in particular the Warsaw Convention of 1929 in International Carriage by Air, the Berne Convention of 1961 on Carriage by Rail, the Athens Convention of 1974 on Carriage by Sea and the Paris Convention of 1962 on the Liability of Hotel-keepers.

[79] Article 22 of the "Convention": "……2. Without prejudice to the questions as to which persons have the right to institute proceedings and what are their respective rights, compensation payable under paragraph 1 shall be limited to 10.000 francs for each traveler. However, a Contracting State may set a higher limit for contracts concluded through a place of business located in its territory.……"

[80] The introduction of the "Directive": " whereas, moreover, with regard to damage other than personal injury, it should be possible for liability also to be limited under the package contract provided, however, that such limits are not unreasonable;"

resulting from the non-performance or improper performance of the services involved in the package tour becomes a possibility according to the provision of the article 5,section 2.but it can be seen from the history and from all the international conventions that the limitation on the liability of the provider of the payment can not be decreased through the way of the contractual terms, for example in the Brussels Convention of 1924 ,Warsaw Convention of 1929 in International Carriage by Air, etc. even through this limitation is reasonable. It is from the prospective of the need to protect the rights and interests of all the consumers.

8. *The juridical practice on the obligation and the liability of the travel organizer.*

8.1. *The obligation and liability of the travel organizer in the package tour contract.*

In the jurisprudence practice, the sentence of one Italian case 1990 by the Court of Lecce in relation to a holiday in Corfu condemned organizer to pay a compensation for the damages occurring to passengers for lacking the correspondent services actually provided by hotel agreed in contract and for lacking the synchronization between the date of the returning transportation and that the end of stay.[81]

In other case, however, the judge decided which kinds of the damages should be compensated for the tourists according to the package tour contract. The case is following:[82]

The defendant was a travel agency specially in organizing the travelling on foot in the small group. Although the plaintiffs were some travelers who had the rich

[81] Trib.Lecce 21 settembre 1990,in *Foro it*.1991,I,c.3061 ss.con commento di R.PARDOLESI .Numerosi esempi sono riportati da E.WYMEERSCH,*Le contrat touristique* ,in *Rapports belges au IXe Congrès de l'Académie internationale de droit comparé*,Bruxelles 1974,p.221.Di recente,Pret.Consegliano 4 febbraio 1997,in *Resp.civ.prev.*1997,p.818 ss.,con commento di M.GORGONI,*I giudici e l'inadempimento del contratto di viaggio*,ha ravvisato violazione di un obbligo di organizzazione nella mancata indicazione sui biglietti di viaggio dei luoghi destinazione.

[82] Griffiths & Others v WAYMARK Holidays LTD, *The sentence of Slough County Court*, November 18, 1993

experience in travelling, they had not tried this kind of the travelling means. So they took part in the travelling group in 3, April 1993 to a place called Samos on the Greece Island and the base of this travelling was the Astir Hotel.

The plaintiffs believed that the quality condition of the Astir Hotel was very bad, that is, the low level, the damp beds, without air-condition, unkind operator of the hotel, the dirty bath room and stairs with the dangerous passageway. In addition, there were delays and disorders in the airport of Athens and the efficiency of the travelling leader in some works was very low and the tourists were misled to believe that the travelling group is small, but in fact there were two groups and either of which was consisted by 16 peoples living in one hotel, their leaders was a pair of a couple they organized thirty-two travelling peoples on foot in eleven and half days.

In order to prove that they had the reasons for the compensation of the damages, the plaintiffs must to prove their litigation claims really existed and also to prove these litigation claims were in the situation of breaking the contract, that is, the defendant should only be responsible for the services they had promised to the tourists, no matter this promise was ostensive or implied in the travelling booklets. Because the travelling booklets could not give the detailed description for every places, so the people should take into account the general description of the booklets to deduce the activity content in accordance with the special aim of one travelling.

The judge believed that, a group of the travelers to take part in a travelling, every member of the travelling group had the different expectations and tolerant ability. So the conditions and customs of the travelling place made some tourists enjoy but some tourists depressed. A tourist may felt very angry when he came into with the unimagined condition of the bath room, but for other one, he may only shrug the shoulder and say with the smile:" it is no bad." The letters from the member of this travelling group proved my opinion that some of them complained but some were unmeaning. So the subjective standard applied by the court was that no matter whether the single plaintiff was satisfied, it should be judged by the tourists' expectation who booked travelling on foot through reading the general term of the booklet.

The booklet didn't make any promising about the special standards of the hotel, it only described that the tourists would live in Astir hotel operated in KOSMIDES, and there were the standard room of two peoples and the single room of one people with the shower and bathroom. So every one would not expect the condition of the four-star hotel from the booklet but a simple hotel with the fundamental equipment applied for the travelling on foot. So the tourists travelling on foot expected two conditions most: the clean, dry-touch and accommodated bunk bed and the hot water to bathing especially in the harsh whether situation. But both of them could not be provided by the hotel, we could not imagine that when the tourists came back from the travelling on foot, after raining or wet with the sweat, they had no hot water to bathing and no dry bunk bed to rest. In addition, the description of the booklet said that the utmost numbers of the group were not over sixteen people, so if the defendant wanted to mix the groups, they should explain it in advance. So the judge believed that these three points were reasonable.

The judge, on the contrary, believed that the main reason for the dissatisfaction of this travelling was the harsh whether condition and most of the services were provided and they didn't consist of the breaking of the travel contract. So for other requests of the tourists, the judge didn't support.

Finally the judge believed the suitable compensation for every plaintiff was seventy-five pounds.

From these two cases, we can see that the liability of the travel organizer is in accordance with their corresponding obligation in the package tour contract. in the first case, the travel organizer does not properly fulfill his obligation of the organization due to his faults of without the dictation for the information of the travel ticket which made the whole travelling can not be preformed in the agreed time and directly composed the violation of the travel contract; in the second case, however, the judge adopts the prudent attitude and objective judging mean on the obligations and rights of the parties. The compensation should be paid for the activities of breaking the travel contract according to the special characteristics of the package tour. So the judge did not support all the requests of the tourists on the base that the nature of the

package tour was that every member may have the different expectation and the different tolerance; because of the individual different taste, the conditions and customs of the travelling places sometimes made people happy but sometimes depressed. the judge did not support all the requests of the tourists because although the misfortunes of the tourists deserved the sympathy, but which was worth for our reference in this case was that only the basic needs should be guaranteed according to the characteristics of the package tour , because it maintains the interests balance between the parties.

8.2. *The implied liability of the travel organizer: the liability of the warranted safety.*

The following is a representative case about the how to explain the liability of the warranted safety of the travel organizer in the package tour. Because the sentence of this case was made in 2001 when England has take the "directive" of the EU into practice with the national law- *The Package Travel, Package Holidays and Package Tours Regulations 1992* (it was called the "Regulations" in the sentence).in this case it established a principle that the liability of the warranted safety of the travel organizer was not a strict obligation. The travel organizer can not take the liability for the damages of the tourists caused by the activities attributable to the consumer, attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable.[83]

In September 22, 1996, the plaintiff Mr. Gerard and his three relatives singed the travel contract with the defendant-Going Places Agency-for the travelling in GUMBET of Turkey for fourteen days. After they finished their travelling in Turkey and took the airplane came back in October 19, 1996. But when the airplane just got away from the ADNAN MENDERES for few minutes, the airplane received a bomb imitation, so the airplane changed to go to Istanbul airport, after the emergency landing of the airplane, the

[83] Gerard Hone v going Places Leisure Travel Limited, the sentence of England Court of Appeal, June 13 ,2001.

passengers should slip out off the airplane by the emergent inclination channel. The passengers must slip out quickly form left door one by one, when the plaintiff went out of airplane, his wife followed him closely and collided with him whose high heels which made his rear back heavily hurt. So the plaintiff raised the lawsuit against the defendant in accordance with the article 15 of the "Regulations".[84]

It was generally acknowledged that Going Places Agency belonged to the "The other party to the contract" according to the *Rules* and the article 15(1) ensured that Going Places Agency should be responsible for the improper performances of these providers of the travel services-that was air carrier in this case-no matter who was the actual providers. The plaintiff believed that the damages were caused by the faults of the air carrier and the defendant could not provide the ground of the opposition for the "strict liability" stipulated by the "Regulation".Because the expectation of the plaintiff was the carrying safety in the way of the travelling, if the damages were due to the carrying, there was improper performance in the package tour contract.

But the judge refused this quest because he believed that the plaintiff should give the proofs to prove that his damages were caused by the faults of the provider of the travel services relative to the package tour. So this liability was neither absolutely nor strict, there was exemption and the plaintiff did not prove that this accident was caused by the faults of one people. furthermore, the travel contract was usually signed in the informal ways, so it needed to insert some implied terms as the quests for the performance, because the quests for the performance was not detailed listed in the contract, so when in the absence of the opposite opinion, the usual implication was that the services were performed in accordance with the reasonable care and the usage of technical skill. The absolute liability can also be assumed in the contract. But if it lacked the ostensive expression, it should be recognized as the in-absolute liability. So

[84] Article 15 of the "Regulation**s**" stipulates: (1) The other party to the contract is liable to the consumer for the proper performance of the obligations under the contract, irrespective of whether such obligations are to be performed by that other party or by other suppliers of services but this shall not affect any remedy or right of action which that other party may have against those other suppliers of services.(2) The other party to the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract unless the failure or the improper performance is due neither to any fault of that other party nor to that of another supplier of services, because—(a) the failures which occur in the performance of the contract are attributable to the consumer;(b) such failures are attributable to a third party unconnected with the provision of the services contracted for, and are unforeseeable or unavoidable; or(c) such failures are due to—(i) unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised; or(ii) an event which the other party to the contract or the supplier of services, even with all due care, could not foresee or forestall.

if it lacked the ostensive expression in the aspect of the transportation, it should be needed to insert an implied term, that was, the services were performed in accordance with the reasonable care and the usage of technical skill.

Article15 (2) of the *Regulations* stipulated that the other party of the contract is liable to the consumer for any damage caused to him by the failure to perform the contract or the improper performance of the contract. So in the present case the question was not the failure to perform the contract but only the improper performance of the contract, the single possible way for us to ascertain whether existed the situation of the improper performance of the contract was in accordance with the contractual terms being performed. But it can not be answered by the provision of the Article15 (2), that was, what was the meaning of the "the improper performance of the contract" only stipulated the application of the provision of the Article15 (2) when there was the improper performance of the contract, so it depended on the provisions of the contractual terms to ascertain whether existed the situation of the improper performance of the contract. There may be the absolute obligation but if it could not be ascertain the existing of the absolute obligation, the implied terms were that the services were performed in accordance with the reasonable attention and technical ways unless the reasonable care and the usage of technical skill were not be performed in the procession of providing the air-transportation services or there should not be the question of the improper performance of the contract. So if the plaintiff expected the application of the Article 15(2), he should prove the existence of the improper performance of the contract.

The plaintiff put forward that there was the improper performance of the contract, because the expectation of the contractual parties was the safety of the air transportation. But this assumption was tenable only under the condition that there was the definite provision that the air transportation must be safe in the contractual terms. However there was not this absolute terms in the contract. In the absence of the corresponding ostensive agreement, the implied terms should be explained that the reasonable care and the usage of technical skill were performed in the procession of providing the air-transportation services. On the base of the above analysis, finally the judge dismissed the request of the plaintiff.

There are two pinions established by the court that firstly the liability of the warranted safety is not an obligation ostensive agreed in the contract, according to the request of the comprehensive perform of the contract, it is an implied obligation. The

ostensive obligation can be performed according to the agreement of the contract, if it is agreed as the strict liability in the contract; it is an absolute obligation, so the other party of the contract should be responsible for the non-performance of this obligation. If, however, it is not an agreed obligation, it is an implied obligation or we can say it as a legal obligation. The sentence of this case believes that firstly the liability of the warranted safety is not a strict obligation, so according to the provision of the *Regulations* which is implemented from the *Directive*, the travel organizer of package tour assumes the limited liability for the providers of the travel services, that is, if the damages of the failure or the improper performance are due neither to any fault of that other party nor to that of another supplier of services, but attributable to the consumer or a third party unconnected with the provision of the services contracted, and are unforeseeable or unavoidable or unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all the due care had been exercised or an event which the other party of the contract or the supplier of services, even with all due care, could not foresee or forestall, the travel organizer can not take the liability.

Secondly, the standard of its content and requirement is the reasonable care and the usage of technical skill because there is no clear agreement in the contract. So if the travel organizer can prove that he has fulfilled the obligation to take the reasonable care and use the technical skill, he can be exempted from the liability

It can be, thus, deduced from the case that the “Regulations” does not take the strict liability system in ascertaining the liability of the warranted safety-no matter the travel organizer is responsible for his own activities or is responsible for the activities of the providers of the travel services, the liability of the warranted safety is taken as the fault liability which can help us to better learn about the spiritual of the relative provisions of the “Directive”.

8.3. *The liability of the time damage of the travel organizer in the package tour contract.*

The most typical legislation about the liability of the time damage of the travel organizer is the provision of the Article 651f (2) of Germany Civil Law Code

(following it is called § 651f (2) BGB), although in the legal practice, there is a dispute about the nature of the liability of the time damage of the travel organizer, a kind of the immaterial damage or a kind of the property damage.[85]

It is general acknowledged that the legislation about the liability of the time damage of the travel organizer originated from the relative sentence .The starting sentence by BGH(Federal High Court) about the liability of the time damage of the travel organizer in the package tour contract is the famous case of travelling on sea of 1956.[86] In this case, the plaintiffs claimed that due to the delayed arrival of the luggage, the plaintiff could not replace their clothing normally and required the defendant (the Customs) to compensate for the losses caused by it. The judge believed that the inutile past of the travelling time was damage for the tourists so the travel organizer had the liability to compensate for this damage.

Another relative case with the inaugurated meaning is the sentence of Romania case,[87] the plaintiff signed the package tour contract with the defendant the travel agency to participate in a program along seaside of the Romanian Black Sea, but during the travelling the hotel facilities were shabby, the sanitation was poor, the food was cold and there was impossible to swim in the sea, the plaintiff believed that the travelling with many serious defects and the holiday time passed without meaning , so the plaintiff requested the compensation for the time damages from the defendant. Federal Court believed that the travelling itself had the value of the property and it has been finally commercialized in favor of the requests of the plaintiff. In this sentence, the court ascertained the liability of the time damages of the travel organizer and at the same time the court also acknowledged the way how to establish the amount of the damages. The way was paying for the waste of the extra holiday that was, the decreased revenue of the employee and the amount realized by the free professionals in the compensated holiday time in which the main compensated body were only the professional workers. This case made a foundation for the legislation of the § 651f (2)

[85] Münch Komm-Tonner, § 651f RdNr.35. in the sentence of BGH (Federal General Highest Court), it believed that § 651f (2) BGB was the immaterial damages, but in the sentence of the Frankfurt local court, it believed that it was the property damages.

[86] BGH NJW 1956,1234

[87] BGHZ 63, 68 = NJW 1975, 40 = JZ 1975, 249 mit Anm.Stoll.

BGB.

In the following cases, the courts gradually explained the § 651f (2) BGB in their legal practice. For example, in one case, BGH (the Federal General Highest Court) acknowledged the housewife had the corresponding requests for the compensation for the time damages, because she earned the family income along with his husband through her family works.[88] the court believed that the time damages of the travelling is the inutility past of the travelling time, so it should be judged whether the tourists could make use of the time in which the obstacles happened to enjoy the recreation. The consumed time when was forced to stay at home could also be made used to enjoy the recreation. So sometimes the time in which the obstacles happened also could be this possibility. It was said "the recreation of the residual value" and considered it as an element of the decreased damages in the way of the exempting from the liability by this sentence. The BGH believed that for the people who must do the house work, the recreation of the residual value should be ascertained less and for the house wife who needed to look after the underage people, the holiday was the only chance in a year to enjoy a holiday, so there was no the recreation of the residual value in this case.

The courts took the "the recreation of the residual value" into the judging of the relative cases in different degrees. In the sentence of a case, the booked hotel was broken in the earthquake, so the tourists were arranged in another hotel with the lower degree, so the BGH believed that it still leaved 50% the recreation of the residual value.[89] However the Frankfurt local court deduced from its sentences that without the supports of other special situations, it should be taken into account the 50% reduction. that is to say, the request of the compensation for the time damage due to the travelling time passed at home would be discounted by 50% as long as the absence of other reasons.

In the following application of the § 651f (2) BGB in the legal practice, the judges made more flexible usages. For example, the BGH did not limit the main

[88] BGHZ 77,116 = NJW 1980, 1947, Münch Komm-Tommer, § 651f RdNr.37.
[89] NJW 1983, .35.

compensated body to the professional workers for the times damages and had taken the immaterial elements into account, so the sentences were made in accordance with the actual situation of the cases.[90]

[90]Münch Komm-Tommer, § 651f RdNr.39.

CAPITOLO II

THE DICIPLINE ON LIABILITY OF THE TRAVEL BUSINESS PEOPLE IN ASIA

SOMMARY: 1.The liability of the travel business people in Japan. - 1.1 Travel Agency Law-1.2the Japanese standard term of travel industry-1.21 The definition of tourism contract-1.22. The liability of the tourism business people-1.23.The guarantees fee system of the tourism business people-2.The disciplines of the Taiwan region-2.1.The definition of tourism contract and the definition of tourism business people.-2.2.The guarantee liability against defects of the tourism business people and the Limitation of the liability.-2.3.Tourism business people's liability of assistance.-2.4.The liability of tourism business people for perform-assist people and their limitations. - 2.5. The travel contract in fixed formed. - 2.6 Tourism General Insurance system - 2.7.The liability for mental damage compensation of Tourism business people.-3.The disciplines of Hong Kong Special Administrative Region - 3.1. The liability of compensation for mental damages.- 3.2 The liability of the travel Assistance people.- 3.3 the Compensation Fund of Travel Industry、 the quality security fund in Hong Kong region.- 4. The disciplines of the Macao Special Administrative Region.- 4.1 The provision of civil law and the related laws.- 4.2 Decree No. 25/93/M of the Macao Government.- 4.21 the definition of Travel Agency.- 4.22 The liability of the Travel Agency and the system of guarantee and insurance.

1. *The liability of the travel business people in Japan*

After the Second World War, in order to revitalize the country's economy ,Japan put forward "tourist nation" slogan, making the tourism industry develop rapidly, the Japanese congress has enacted *The Tourism Mediation Law* in 1952 aim at the Travel Agency's business ,Since then has undergone several major changes, in June

1963 (Act No. 107) issued the *Japan Basic Travel law* to replace the previous *The Tourism Mediation Law*, stipulating the rights and obligations of both parties of the travel contract(the tourism business and tourists),which promotes the healthy development of the tourism industry, in 1982's amendments of this law (No. 33 law), it provides the overall objective for the development of the Japanese tourism industry: "It is clear for the new direction of tourism development and for the presentation of tourism-related policy goals, "At the same time, from the position of the nation and tourism consumers, it pointed out the significance of tourism as well as the importance of the revitalization of tourism. Because *Japan Travel Basic law* has these two major objectives and characteristics, it is taken thus as *the Constitution of tourism policy* by the Japanese and is the guiding document for the Japanese tourism development. [91]

In nineties, tourism industry has become a pillar industry of the Japanese economy accompanying the rapid development of the Japanese economy, but it is followed with the sharp increasing of disputes between the tourism business people and tourists, it is manifested in many action which infringe the rights and interests of the tourist consumer such as the tourism travel agency takes advantage of the tourists' asymmetric tourism information and thereby greedily seek unlawful profits, in order to stop this condition happening, the Japanese Congress carried out eight times amendment of the old law in 1,aprile 1997 , putting " registration "," business bail "and" travel industry association, " three systems into law, it put forward the required operating conditions of the Travel Agency, the principle which should be obeyed 、the liability to fulfill and the behavior to be prohibited, at the same time, adding the provision of *Tourism Guarantee* , prescribing in the tourism activity, expect of the subject of major social factors such as war and the force majeure of a natural disaster all the essential content documented in a written contract, once changed, As long as it

[91] Youhua CHEN, *Research on Japanese Travel Policy*, Jiangxi Publishing Group, December 2007, 72 -73.

is detrimental to the interests of tourists, even if the change does not belongs to willful or negligence of the tourism business people, they also give compensate for tourists in accordance with the provisions about the proportion and the duration. [92]

1.1. *Travel Agency Law.*

According to the guidelines of *Japan Basic Travel law,* Japan introduce a special package of travel legal system: *Travel Agency Law*, also known as *The Travel Industry Law,* including some important system having great influence on the liability of tour operators, such as "registration system", "operating guarantee system" and "journey guarantee system" and prevent the transaction disputes the " the standard contract terms system of Travel Agency." The purpose of this Act is in order to standardize the tourism market, prevent the travel business people has the action infringe the rights and interests of the tourists' rights and interests in the sales of tourism products, it provides the legal guarantee to regulate the tourism market and protect the legitimate rights and interests of tourism consumers.

The registration management system provided in *Travel Agency Law* stipulates to implement the market access policies for the qualifications of the tourism business people, "it should be made registration directed by the Transport Minister.[93]it is strict on the quality of the Travel Agency, only business people comply with certain conditions, can engage in the activities of travel agencies, so in Japan package tour contract, the tourism business people means it is the enterprises which register at the tourism department (department of Land Infrastructure .Transport and Tourism, the author note), with tourism operating license. And in Article 30 of the "enforcement Rules of Travel Agency Law" provides the matters that the travel business people are not allowed to exaggerate in the tourism business ads. Put an end to the possible fraud

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[92] Yao XU, *Japanese new tourism law and the thinking of it,* Tourism Tribune 1997, p.51.

[93] Article 3 , Chapter 2 of *Travel Agency Law*.

the travel business people may take in tourism publicity.[94]

1.2. *The Japanese standard term of travel industry.*

Because Travel Agency Law does not provide specific terms for the contract of travel, the Japanese Minister of Land Infrastructure. Transport and Tourism in February 14, 1983 published a special legislative norms on travel contract: The Japanese standard terms of the travel industry, it is worked out by Minister of Land Infrastructure . Transport and Tourism according to section 3 Article 12 of the Japan's newly revised Travel Agency Law. the standard terms is the contract form made in advance under the circumstances of existing substantial tourism activity, which is specifically made by the Japanese government to develop tourism enterprises in the form of reasonable control in the law with compulsory effect, because Travel Agency Law stipulates that when the tourism business people and tourists travel do the tourism activity, they must sign the tourism contract, and only after the terms of the travel contract has be recognized by Minister of Land Infrastructure. Transport and Tourism , is it to be valid [95](its modification also should be recognized by Minister of Minister of Land Infrastructure, Transport and Tourism. it has specific and clear provisions in “The amendment of the standard contract of the Travel Agency”),and also states: "The terms agreed must be placed at where the travelers are easy to read." In order to facilitate the tourists to learn, thus to take a fixed format to define the rights and obligations of both travel business people and tourist, to prevent the travel business people use the format of contracts to reduce or waive their own liability , which could avoids much of the controversy arising from the travel contract, so that the purpose of the Japanese travel industry legislation -to protect the legitimate rights

[94] The related translation of the rules see YIN Zuoheng, *Japan tourism laws and regulations*, Social Sciences Documentation Publishing Press， September 2005 edition, 82, 96 and 129.

[95] Section 2, Article 12 of Travel *Agency Law.*

and interests of tourists and the travel industry and to maintain justice travel business transactions - will be able to successfully achieve.[96] "The Japanese standard terms of the travel industry" includes five parts: 1. Package tour contract 2. Particular compensation order 3. Individual travel contracts 4. Tourism agency contract abroad 5. Tourism advisory contract

1.21. *The definition of tourism contract*

Its Article 2 provides the kinds and the definition of the travel contract. "Standard terms of the travel industry" classify the Travel Agency in accordance with whether it engages in package tours, according to the tourism business people provide the different characteristics of the content of travel services to tourists, divides the travel contract into the package travel contract and travel agency contract, This article mainly refer to the travel package contract. Article 2 stipulates that the organized tourism contracts (package tour contract) refers to the tourism business people pre-determined plan, provide a tourism destination, schedule, the delivery of services and content of transportation and accommodation which can be accepted by tourists, and provides the related matters about the price tourists pay for, and then through a public advertisement or other methods to recruit tourists take part in the implementation of the travel contract.[97]

1.22. *The liability of the tourism business people*

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[96] Jianmei ZHANG and Guangping WEI, *On the combination of the management by law with the trade self-management-an inexorable trend for the healthy development of the travel agency industry,* in *Tourism Tribune,* the editorial board of tribune editor,Vol.15, N.4, Jul.18, 2000, page 16.

[97] The relevant Translation of provisions See Chunxiang LIANG, Zujie LIANG, *Translation for Japanese standards terms of travel contract*, in *Compilation of the Western Nations' Tourism laws and regulations* , Social Sciences Documentation Publishing Press, 2005 edition, p.8-38; Zuoheng YIN, *Translation of Japanese tourism laws and regulations*, Social Sciences Documentation Publishing Press, September 2005 edition, p.3-p.7 AND p.174 - p. 210.

The Japanese Standard Terms of Travel Industry specifically provide the liability of the tourism business people listed in Chapters five and six, dividing three kinds: 1. the liability of the tourism business into tourism management liability; 2.liability of compensation for damage 3. Guarantee liability.[98]

1. The safety guarantees liability of the tourism business people.

Article 20 in on the safety guarantees liability of the tourism business people, the provisions cited the major issues which is needed to ensure safety, but it is not limit to the issues listed. In addition, tourism business people should investigate in Japan as far as possible, to collect information through research, set up safe journey and for the directly specific possible danger accompanying with the selection of tourism destination, itinerary, transportation (such as infectious diseases , floods and other danger), if have been foreseen ,they should make pre-prepared plan to exclude the risk or go to inform tourists in advance, so let the tourists have the preparation to be able to deal with danger.[99]

2. The warranty liability against defects of tourism business people and its limitation.

Article 23 stipulates that the willful and negligence of the tourism business people lead to the damage of personal rights and interests or the damage of the tourists' baggage, the tourism business people hold the liability of compensation for the damages .it is applied the doctrine of negligence liability for investigating into the liability of the tourism business people, on the basis of tourism business people has the fault. however, when travelling overseas, due to the inherent situation of the destination, the law or mandatory selection, commissioning, the arrangement of local agency for the tourism Service, except of it, it can not carry out the local business and the Travel Agency has told the tourists the this situation in the preparations of the

[98]Qiaohong GAO, *Terms of the travel industry*, *the law Times*, Vol.54 No. 6, p. 2.

[99]Qiaohong GAO, *The legal issues of tourism industry* ,modified by Zhuneizhaofu and longtian, in *A course of lecture of modern enterprise*, Volume 4.

travel, the travel agencies is not responsible for the liability caused by the behavior of this special travel agency people. In addition, the tourism business people can except from the liability of the uncontrolled things, "uncontrolled" means the accidents of force majeure, transport or accommodation cause the changing of travel dates or travel suspension, the isolation as the result of the order of Japan or foreign institution or foreign immigration regulations, or infectious diseases, accidents in free activity, food poisoning, theft, the delay of traffic department, obstruction or travel schedule changing and the shortened residence time in destination,[100] but except the reason of the willful and negligence of the Travel Agency or its agency; at the same time, the tourism business people is also responsible for passengers' baggage damage due to his willful or negligence, but set up the limitation on the amount and the time of the liability for damages compensation, the time for tourists claim damages to the tourism business people , for domestic travel, it is within 14 days since the second day of the damage occurring, for the overseas trip, it is within 21 days since the damage occurring, and the compensation for each traveler is not more than ￥150,000.[101]

3. Special compensation system.

This System includes two kinds, one is "the personal injury compensation fee ", another is "the carry-on item compensation fee".

"Personal injury compensation fee " is targeted that during the performance of package tour contracts, regardless of whether the loss to the tourists is due to the willful or negligence of the tourism business people or their arranged people, according to special compensation rules, in accordance with the statute, as long as when the tourists participate in the process of travelling, their lives, body or belongings are subject to certain losses, the tourism business people must pay in advance an defined amount of compensation fee and condolence fee [102]and that such damage occurs in the process of tourists are taking part in tourism because of the

[100] Section 2, Article 22
[101] Section 1-3, Article 21 of the *Standard Terms of the Tourism Industry*.
[102] Section 1, article 23 and article 24 of *the Standard Terms of the Tourism Industry.*

sudden and contingent accidents ,when let the body suffer from damages , the Travel Agency should pay death benefits、sequel benefit and hospital condolences gold to the tourists or his legal successor. Such injuries include that the body accidentally and temporarily inhales、absorb or take in toxic gases or toxic substances, the resulting rapid poisoning symptoms (except the poisoning symptoms caused by the continued inhalation, ingestion or absorption), however, does not include bacterial poisoning.[103]

The special compensation system in particular is a reasonable and effective supplement to the liability of the compensation for damage. the compensation for damage is not on basis of the tourism business people has the fault ,let the tourism consumers obtain the economic compensation as soon as possible when the emergencies happens on, it has the important significance for the protection of tourism consumers, which is very suited to Japanese national conditions because in Japan the terrorists often use toxic gases or toxic substances to create terror case; the Article 3 to the Article 5 of the statute provide the situation of non-payment of compensation, mainly including the uncontrolled action by the tourism business people such as tourist willful、force majeure, government action etc and stipulate the limitation on every kind of compensation. “the compensation fee of carry-on items loss " means that the tourists sufferer from the carry-on item damages because of the fortuitous event happening during taking part in the implementation of package tour travel in their delegation ,the tourism business people paid compensation to tourists for loss of items. This compensation is not based on the tourism business people having the fault, providing the kinds of the carry-on items and the situation of non-payment of damages.[104]

In summary, “the special compensation statute” with distinctive characteristics can be said as the implement for the liability system of the tourism business people, it focuses on the protection of the tourism consumers rights and interests, it also takes into account the operating costs of the travel business people,

[103] The Article 1, *the Special Compensation Statute* in *Standard Terms of the Tourism Industry.*
[104] The Article 15, Article 16.

making a good balance of the liability of the parties of the travel contract and making the contribution for between the tourism distribution contract for the healthy and orderly development of the tourism market .

4. Liability for mental damage

On the problem of whether it can be requested the mental damage compensation, Japan's opinion is in consistent with the opinion of the French, consider that non-performance of the contract is not different from the scope of compensation for infringing act. Both of them include the property-damage and non-property damage. Most scholars endorse to expand the explanation of the Article 710 of "Civil Code" which will greatly expand the scope of personal rights, but also consider that when mental damages are caused by the infringement of the property interests, the request for consolation fee can also be supported.[105] "About the compensation of the damage for the non-performance debt, although the law does not expressly provide, but the common says and jurisprudence considers that non-property damage compensation, that is moral damage, can be requested.[106] "Even the non-performing debt should also consider to be paid for." [107]

1.23 . *The guarantee fee system of the tourism business people*

The guarantee fee system of the tourism business people is that the Japanese government set up in order to ensure tourists and other travel claimant occurring in the travel business can protect their own interests and it is an important economic means of the Japanese government to manage its travel agency. That is, "Travel

[105] Li LUO, *The system of Japanese consolation compensation system*, in *Translation and comment of Foreign Law* , 2000 No. 1, p. 50.

[106] Jinhua GUAN, *Ascertainment and compensation for mental damage* 【*M*】, Beijing People court Press, 1998.

[107](Japan)Qiantiandaming, *Dictation of general comments of debt,* 1993, p. 168.

Agency industry must storage operating guarantee fee", if in the stipulated period of time after registering it does not apply for the procedures of storage guarantee fee, it should not carry out tourism services. It is divided into operating guarantee fee system, the system of compensation business and journey guarantee fee system.

Operating guarantee system is that the tourism business people is required to put an amount of money in accordance with the provision of *Travel Agency Law* as the operating guarantee fee storage in advance in the “storage Bureau” , when the tourism business people can not repay the debt because of the reasons such as going bankrupt, it is paid to the claimant in terms of the scope of the operating guarantee fee; If tourism business people is the member of the Japanese Association of the travel business people and the National Association of Travel Business people, when they has a certain conditions to become the guarantee member, it set up “the guarantee fee system of the compensation business” , after they have paid the guarantee fee of compensation business, They do not need to pay the guarantee fee for business .It requires the guarantee Members give the amount of money in accordance with the ratio of one fifth of the operating guarantee fee deposited by the non-guaranteed members in the association as the guarantee fee of compensation business. Association put this part of the guarantee fee of compensation business in "storage Bureau”, the amount of compensation requested by the claimant should be the same with the amount of guarantee fee of operating business that should be deposited when the guarantee Members loss its qualification .[108]

In the amendment of *Tourism Law* in 1997 , it increased the operating insurance from the provisions of ￥2,000,000 (1971) to ￥70,000,000, mainly taking into account that Japan is a country with a lot of natural disasters such as volcano, earthquake, etc., and the tourism industry has been affected by the social, economic and other facts, such as inflation of price、the bubble economy, and so on, so the

[108] Japan General Services Administration Office of Supervision Bureau, *The situation and problems of tourism,* Printing Office of the Dazhang Ministry 1987 edition, p. 97.),quoted from Youhua CHEN, *The Research on Japan Travel Policy*, Jiangxi Publishing Group, December 2007 , p. 82.

tourism business people should bear more risk in operating the tourism products, and also because of Japan's *Travel Agency Law* demand not high capital of the register for engaging in the tourism activities, so that it probably lead to a sudden fracture of the tourism chain at the time of the closure ,while the tourists are the weaker party of the contract, the Japanese government think of the protection of tourism consumers, so it establish the insurance system ,which is also very worthy of our consideration.

The Japanese government set up a" the trip insurance" for the concrete liability of the tourism business people, providing that when occur "important changes of the journey" in the tourism activity, except the irresistible facts (such as natural disasters and wars etc., major events),no matter whether are caused by the willful or negligence of business travel people , it must be given compensation, "" important changes of the journey "means any important aspect of records in the written contract (from the travel time , accommodation to transport and so on), regardless of the degree of the changing, as long as prejudicial to the interests of tourists, it is must be compensated to the tourists in accordance with the provisions of the rate and duration, if the hotel or airlines are changed, even if the travel business people has made the arrangements of the same Level of hotel, airlines to travelers, it also belongs to " the behavior changing the journey." The trip insurance system is an important supplement system to the liability of damage , because the requirement for the tourism business people to assume the liability of damage is he has the fault of willful or negligence, but the characteristic of tourism activity is that the tourism business people need the aids of many auxiliary people to achieve the tourism activity, the defects of the aids will affect the whole journey, so, the Japanese government after the analysis of the characteristics of tourism activity, draws up this "trip insurance system", so that let the tourism business people assume the liability more in line with social convention, helpful for reducing complaints and disputes arising from the changes of journey, so as to achieve the purpose to improve the social status of the tourism industry. [109]

[109] Youhua CHEN, *Research on Japan Travel Policy*, Jiangxi Publishing Group, December 2007, p. 83.

2. *The Taiwan region*

The development of Taiwan region tourism may trace back to 1927 when the first travel agency"China travel agency"was founded whose main business included international travel business and the promotion of travel business in Taiwan region. The sightseeing tour business of Taiwan region started in 1953, the people who came into Taiwan to visit only one ten thousand person times, but through the efforts of Taiwan region government, in 2005, the entry number has increased to 3,370,000 person times, the emigrate number has increased greatly from 320,000 person times in1979 to 8,670,000 person times, Japan (account for 33%) and Hong Kong-Macao special administrative region (account for 12%) are it's mainly visit source regions.[110]

The tourism legislation of Taiwan region is obviously deeply affected by the continental law system, manifested by its concrete provisions law similar with the provisions of Germany, such as: The concept of travel contracts, the guarantee liability against defects and its limitations as well as the provisions of the compensation for time damages and so on. Our country's Taiwan region did not formulate an independently basic tourism Law like Japan but in the form of stipulating tourism contract in Civil code and Commercial Code .In the part of the debt -volume of its Civil Law revised in 1999, there are three new kinds of contracts which are not included before in the number eight section, one of them is the tourism contract. The part of the travel contract are stipulated in the provisions from Article 514 ,Section 1 to Article 514,Section 20 and this law come into force in May 5, 2000 (in May 5,1989 of the Republic of China),which make the tourism contract officially enter into "civil law" of Taiwan area with the well-known identity of contracts. At the same time, Taiwan region's Consumer Protection law is put into effect formally in January 11, 1994 in which the provisions about the protection of

[110] *2007 Taiwan sightseeing tour business-collect edition of checklist*, Riqiao culture business limited company, china travel & tourism press, July, 2007, p.1-3.

consumer's rights and the contract fixed and unchangeable and further strengthened the protection of consumers.

2.1. *The definition of tourism contract and tourism business people*.

The travel contract is added in the newly revised *Civil Code* of Taiwan region of our country as an independent division after the Division of contract of work .The definition of tourism contract is not stipulated in it. the scholar Sun Senmiao of Taiwan region holds that the tourism contact means that the tourism business people designs the project of the whole travel-route for the tourists and furnishes the travel service to the tourists，the contract comes to be founded when the tourists accept the total pay of the travelling which is determine in advance.[111]Taiwan's "Supreme Court" considers: tourism contract is the travel industry provides all the content of the travel and the tourists pay it.[112]Both of them admit that the two parties of the travel contract is tourism business man and tourists, travel business people give the sum of a series of tourism services.

The concept of Tourism business people is stipulated by Article 514 of debit-volume of "civil law" of Taiwan region: "Tourism business people is an enterprise who provides related travel services such as travel and transport arrangements, accommodation, tour guides and others for tourists and the tourists pay the fees . "The travel business people should have the qualifications legal for business. At China's current laws and regulations related to tourism, it can also be presumed that it is a requirement for the tourism business person with the Travel Agency's license checked by administrative authority for the ability of signing the travel contracts.

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[111] Senmiao SUN, *the Research on travel Contract*, in *Law Journal of DongWu University*, Vol.11 No 1, p. 3 1998.

[112] Zejian WANG, *The judicial control on the fixed contract,* in *the civil theory and Study of Case* (vol.7), the Politics and Law University Press, 1998, p. 40.

2.2. *The guarantee liability against defects of the tourism business people and its Limitation.*

Taiwan region *Civil Code* take the tourism contract as a kind of the debt contract, therefore Article 514-6 of *Civil Code* fixes the tourism business people in charge of the warranted liability for the default to the tourists. “Tourism business people to provide tourist services, the services should be with normally value and the agreed quality.” “Normally” is judged based on the following two criteria: First, it should be in line with commercial practice, that is, the practice in the tourism industry, while allowing the parties of the contract to make the special provisions in the tourism contract.

There are two ways to assume the guarantee liability against defects, namely, incomplete payment or non-performance pay, the former is stipulated in the former part of section1, article 514 -7, when travel business people provides the incomplete services, it produce the obligation for them to perfect and remedy it . When the tourist business person is not to perfect or can not to perfect ,he breaches this provision according to the latter part of this section, the tourists would have the rights to asked travel business people for a reduction in costs related to travel or the right to terminate the contract; the latter is although the travel business people provides the travel services, but services do not meet conventional standards or contractual agreement, that is, non-performance of the contract, tourists also can have the rights to request travel business people to pay for damages according to the stipulation of section 2,article 514-7, unless the travel business people can prove that this default is not because of the tourism business people.

The Chapter II of Taiwan region *Consumer Protection Act* takes the guarantee liability against defects as liability without fault, that is, when the travel contract fail to be fulfilled because of the travel business people, the travel business people should bear the liability regardless of whether the travel business people have the fault. But if the consumer has the damage due to goods or services, whiling they do not need to

prove the travel business people has the fault, they should give the prove for the happening of the damage、the fault of the goods or services and the cause - effect relation between fault and damage.[113]And Article 10 set forth that enterprise operator shall not restrict or exclude in advance the liability for damages for the consumers or for the third person.

There is one of a very distinctive "punitive compensation" measures, that is, when the damage is the result of tourism business man's intentional action, the consumer is able to request not above three times punitive compensation; but the damage is caused by the tourism business man' fault ,the consumer is able to request not above one times punitive compensation.[114]

According to this article, when it is applied to tourism contracts, that is, except for the damage to tourism consumers, consumer can request for not above three times punitive compensation (due to the tourism business people's intentional action or one times punitive compensation(caused by tourism business people's negligence).Some scholars in Taiwan region consider the scope of punitive compensation, if it is able to be used in merchandise ,services ,based on duty, formed contract, special trade and false advertising, is bound to increase too much liability of enterprise managers and exceeds the applied scope in foreign counties ,so it is inapposite. [115]

This provision is similar to the United States punitive compensation system, but its existence is only applicable to malicious (malicious) situation and does not apply to negligent cases. Liability for negligence of Tourism business people can be based on whether Tourism business person do business with a reasonable care, which requires the tourism business people assume a legal liability of providing proof and specific juridical organs decide in accordance with content given by tourism business people.

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[113] Zhenyu FENG, Bingjun JIANG, Yingqing XIE, Zhijun JIANG, *Interpretation of the Consumer Protection Act,* Yuan Zhao Publishing Company, May 2005, p. 170.

[114] Article 51 of *Consumer Protection Act*.

[115] Derui LIN, *Question on the legal dispute of application of punitive compensation,* in *the Taiwan law review* (N.110), July 2004, 40 and 46.

Another characteristic provision of the liability of tourism business people in The Taiwan region of China is section 8, Article 514, it may be referred to as " the liability for waste of time " " Tourism has not be carried out in accordance with the agreed schedule because of the cases which can be attributable to the tourism business people, the tourists can request a considerable daily amount of compensation for the waste of time and take the principle of fault liability on determining right to request compensation .it is believed that as long as there is can be attributable to the reasons of the tourism business people which lead to the journey doesn't be carried out in accordance with the agreement, passengers can request the compensation for time - waste damages regardless of tourism does not take place or the journey is partially changed or canceled.[116]for the" time "definition, it usually take the vacation stipulated in contract as the standard, but is not limited to this vacation , for example, if because tourism business people waste time in handling visa matters ,the travel time delays and be stranded abroad, resulting in a waste of time before travelling or after the travelling, most scholars of Taiwan region believe that it can be made the expansion of the interpretation for "time", that is, as long as the waste of time is because of tourism business people fault, regardless of the course happened in the tourism or before and after the travelling, tourists can claim compensation for damages.

This is a theoretical foundation is the specificity of tourism services, that is, tourism is that the tourist obtain the spiritual enjoyment in a specified period of time , if in the specific time ,the tourists doesn't have the spiritual enjoyment, that is "invalid Spending" in the particular time .it is often irreparable later. Therefore, both in Germany and in Taiwan take "times invalid spending" as the non-property liability of tourism business person, at same time gives some restrictions on this non-property liability in taking into account the principle of fairness." The so-called "daily request" is based on the day as the units of the calculation of compensation, but it is not limited

[116] Xinhe LIN, *Comment on Debt Provision in Amended Civil Code of 1999,* in *Hwa Kang Law Review* (No. 27), 92.

to above one day. For the amount of compensation, there should be restrictions on the maximum amount which is fair for the compensation. "[117]

2.3. *Tourism business people's liability of assistance*

Article 514-10, section 1 stipulates: "the accident of the tourists' body or property occurs during the tourism, tourism business people should be necessary to work and deal with together." This is referred when in the process of tourism the damage is not caused by the reason of the tourism business people, but by the reason such as force majeure, infringe of the third people or the fault of tourists themselves, own person or property caused the damage, the tourism business people should also be responsible for assisting tourists deal with the cases, because in the tourism process, because of the weather or the specifically local geographic environment, the possibility to meeting with the damages for tourists appropriately increases, while the tourists is unfamiliar in dealing with this type of situation and tourism business people have the particular experience in this area, although it is not one part of the contract, but it can be seen as a incidental obligations of travel contract. The Taiwan Claims Act has clear provisions of this obligation, the tourism business people's obligation of assistance is turned from the moral obligation into a legal obligation, when the tourism business violates this provision, it occurs a liability of not performing the contract which is aimed to protect the safety of the tourists. These assistant Obligations are not only the moral or legal obligations but also the legal obligation to giving service. However, such obligations are limited to the necessary extent, with the exception of the two sides agreed upon; exceeding the limits is for non-management areas. "[118]

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[117] Chenger LIN, *Legal relations in Tourism Contract* ,(*General Principles of Civil Law debt series)*,Chinese Politics and Law University Press, 2002 edition, p. 343.

[118] Xinhe LIN, *Comment on debt provision in amended Civil Code of 1999,* in *Hwa Kang Law Review*, No. 27, p. 94.

Meanwhile, the Travel Agency owns the liability to assist the tourists has to deal with material flaw. Article 514 ,section 11 of Taiwan *Civil Code* stipulates that: "Travel business people arrange the tourists shopping at specific places, the item purchased is of flaw, the visitors have the right to request the tourism business people to help them deal with the problem within one month when they accept the item." Although the flaw of goods is not caused by the tourism business people which is purchased by the tourists during shopping, but are in specific places arranged by the tourism business people for the tourists during the travelling , so visitors can request tourism business people to give the necessary assistance to deal with the flaw of the items , but at the same time stress that this does not mean that the tourism business people should assume the warranty liability against defects substitute for the seller and give the restrictions on the time requesting for the assistance, that is ,the tourists should request in a reasonable period of time (one month) after take delivery of the goods which safeguards the legitimate rights and interests of tourists and at the same time not indefinitely increase the burden on the tourism business people.

2.4. *The liability of tourism business people for perform-assisted people and their limitations.*

In the part of travel contract in The Taiwan region *Civil Code* Claims there is no a clear stipulation on the relation between the tourism business people and his perform-assisted people, in the doctrine and judicial practice it is generally applied Article 224 of the general provisions of *Civil Law* debt, that is, for the debtor's assisted person's willful and negligence in the performance of debt, the debtor assume the same liability as the liability of his own willful and negligence." The scholar Lin Chenger in Taiwan region thinks that the provision" the cases which can be attribute to the tourism business people "of section 2 Article 514-7 in Taiwan region's *Civil*

Code should include the implementation of cases caused by the perform-assistance people‘s willful or negligence of the tourism business people.[119]

Some other scholars think that in travel contract when it refers to the service given by the third person because the tourists are in the status of the beneficiaries of the contract for the benefit of third party, so when the third person does not perform, the passengers can request directly to the third people.[120]

The author believes that for the tourists, there are the tourism business people and tourists who sign the tourism .so because the travelling services provider doesn’t perform the contract and it makes the tourists suffer damages, the tourists could ask the damages for infringement to him. At the same time, the conduct of travelling services provider results in the contract-breaching of tourism business people, tourists can also request the damages for the contract breaching according to the travel contract

For the restrictions on the liability of the tourism business people ,in Taiwan "Civil Code" Claims doesn’t make specific provisions ,in its administrative rules and regulations document *the Governing Rules On the Travel Industry*, Article 4,sectiong 1 stipulates: "The travel operators organize countrymen travel abroad in Tourism team, the travel operators should carefully select the local travel operators which have qualified registration in the government and only have taken its letters of commitment or document of guarantee, can the local travel operators be entrusted to provide reception or tour guide. Foreign travel operator’s breaching contract impairs the rights of passengers; the liability should be assumed by the domestic travel operators. "

At the same time taking into account the specificity of the tourism industry, tourism business people actually lack the control on the assistance of travelling services provider, in particular manifested in a number of monopoly industries, such as: airlines, railway companies etc. both the normally domestic and foreign contract in

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[119] Chenger LIN, *Legal relations in Tourism Contract ,(General Principles of Civil Law debt series),*Chinese Politics and Law University Press, 2002 edition, p. 274.

[120]Senmiao SUN, *Research on Tourism contract*, in *Dong Wu University Law Journal,* 1998, Vol.11 No 1, p. 8.

standard form launched in the Taiwan region stipulates that tourism business people is free from the liability of travel service assisted person in particular industry. Article 24 of the normally domestic contract in standard form stipulates: " during travelling period, because of the cases not attributable to the party B (tourism business people, the author indices) results in the damages of tourists when taking aircraft, ships, trains, rapid transit, cable cars and public transportation, it shall be directly charged of the tourism services provider for the part A (tourists, the author indices). However, party B should pay the attention of a kindhearted manager and help the part A to deal with it. “While Article 2o of the normally foreign contract in standard form provides:" party B (tourist business people) commission arrangements to foreign travel industry of tourism activity, due to the travel industry‘s violation of this contract or other illegal cases, the Party A (tourists) suffer damages, party B should be responsible for it the same as their own illegal act or breaching contract themselves .but it excluded the cases that it is designated by the Party A on its own or it can not select the travelling mandatory in very special circumstances. "

2.5. *The travel contract in fixed formed.*

Taiwan region is also fully aware that there is substantial violations of consumer protection acts in the using of the travel contract in fixed formed, so in order to stop this situation happens, in *Consumer Protection Act*, established by the consumer protection Commission of “legislature” the contract in fixed formed has been defined .It refers to the contract which the business operators provides the fixed terms as all or part of the contract content. The fixed terms in the contract refers to the contract terms which business operators draw up in advance in order to sign the same kind with the non-specific majority of consumers.[121]According to the characteristics of Travel contract, it is also a kind of contract in the fixed formed that the tourism

[121] Article 7 and Article 9 of *Consume Protection Act*.

business people lay down the contract items in advance for the frequent usage in the travelling contract signed with the tourists.

In order to prevent the Enterprises violates the principle of fairness when use the fixed contract item, in Article 27 of the Civil Code debt has been added to the provision for the inefficacy of the fixed contract terms ,it stipulates that according to the following situation, the terms of this part is invalid: " first, the reservation clause in the contract remove or alleviate the liability of the parties; two, increase the other party's liability; three, make the other party of the contract abandon the right or limit their exercise of their rights; four, and other items disadvantage the other party. " *Consume Protection Act* requires enterprise operators in usage of the fixed form terms should base on the principle of equality and mutual benefit, in case of doubt; they should have to do the interpretation in favor of consumers. [122]In the article 13 and article 14 of "implementation details of consume protection act" stipulate clearly the circumstances for the violation of the principle of good faith and the principle of equality.

In Taiwan, for industries in which there often occur disputes, such as real estate trade, insurance, tourism and so on, the fixed contract they used will be given the special care and attention of the authority organs.[123] N.1 of Article 11 of consumer protection act provides that: "central authority organ select specific industries, notice the matters which should be recorded or may not be recorded in the contract of fixed formed." At the same time, the Taiwan region" Department Of Transportation " Tourism Bureau has stipulated in twenty eighty's the matters which should been recorded in the tourism contract and then according to the provision of the Consumer Protection Act, add "the matters which should not been recorded in tourism contract "making further the protection of the tourism consumers. For the Tourism contract in fixed formed, although the matters which should be documented in the tourism contract not be included, the matters still become one part of the

[122] Article11 of *Consume Protection Act*.

[123] Rongha Lui, Zhijun Jiang and Jiheng Lin, *Q & A the fixed contract*, the culture of Shang and ZHOU Dynasty Co., Ltd., February 1995, p. 68.

tourism contract, travel agencies and travelers should be bounded by the matters; if the tourism contract records the matters which the notice does not allow to be contended, then this general provisions are invalid, visitors is not restrained and do not have the obligations of performing.[124]

The Domestic tourism contract in fixed formed of Taiwan region shall not include the following matters:

(1) travel itinerary, services, accommodation, transport, prices, catering, etc. shall not be recorded for reference purposes only or use other uncertain terms or words;

(2) the travel industry exclude the contents of the original publication of the advertisement and the liability for tourists ;

(3) rule out the possibility of arbitrary termination of visitors, rights terminate and to overcome the provisions of the competent authority or below the lowest standard of compensation for passengers;

(4) the agreement for unilaterally change the contract;

(5) In addition to the agreed travel cost, the tourism industry increase the travel cost in other ways or collect additional fare;

(6) Except of the agreement in contract or by the agreement of visitors ,the tourism industry make arrangement for shopping;

(7) exempt or reduce the obligation that the travel industry should fulfill stipulated in tourism management rules and in the tourism contract;

(8) any other agreement breaching of principles of honesty and credit and the principle of equality and all disadvantage for travelers;

(9) the agreement to exclude the tourism business people assuming the liability of the tourism auxiliary people.

It also provides the effectiveness of the partly invalidity of the terms of contract in fixed formed ,"the standard items of the contract in fixed formed, wholly

[124] Cihui Li, *Dealing with the Tourism Disputes,* Taipei Yangzhi cultural Co Ltd, October 2004, p.238.

or partly invalid item does not constitute the contract , excluding this part , the contract can also be set up, and other parts of this contract remain valid. However, when it is obviously unfair for the one party of the contract, the entire contract is null and void.[125]

2.6. *Tourism General Insurance System*

The General travel insurance system in Taiwan is set up by the Taiwan region Tourism Bureau of "department of transportation" and is approved application by the "Ministry of Finance" ,the implementation of its old system of the travel industry General insurance was enacted in 1994, the current implementation is 20 July 1, 2004 the new General travel industry insurance system is instituted by the Tourism Bureau of "department of transport" under Particle 53 of *the Rules of the Travel Industry Management ,* including liability of insurance and insurance for warranted perform : "the travel industry organize group travel, individual travel and business reception for foreign or mainland tourist groups, they should insure the liability insurance, "" the travel industry organize the passenger to travel abroad or domestic they should insure the insurance of perform." aim at the better protection of the rights and interests of tourists.

The coverage of Travel industry liability insurance is "the insured person in the insurance contract within the effective period of the travel arrangements or reception period, due to accidents of travel by the members of travelling group suffer physical injury, disability or death, in accordance with the regulations development of tourism and the travel Industry Rules, the insurers should bear the liability of compensation."

The coverage of the travel industry guaranty insurance is that applicant for insurance (the tourism business people, the author note),during the period of the

[125] The Article 16 of *Consumer Protection law.*

insurance ,after charging the insured people (tourists, The author note) for the tourism, due to financial problems the tourism business people is unable to fulfill the original contract to make travel arrangements or group travel can not leave or complete the full itinerary, which lead to all or part of the tour fare losses of the insured person , the Company is liable for the liability of compensation for the insured person according to the provisions of the insurance contracts.

2.7. *The liability for mental damage compensation of Tourism business person*

Prior to the amendment of Taiwan Civil law in 1999, there were for strict limits on the request of non-property damage, it should be based on the personal right damage and it should be legally defined, for example, in Article 194 about infringing other people's living right, No. 1,Article 195 about when suffer illegal infringement of personality rights and interests of others, it may request compensation for moral damage; but Article 227 of the “effectiveness of debt” the newly revised Civil Code (1999) inserts "non-performing debt of the debtor results in claimant’s damage of the personal right according to Article 193 ,Article 195 and Article 197,the debtor should undertake the liability of damage compensation", That is, under the situation of the debtor’s breaching of contract bring about the creditor’s damage of the personal right, it should be believed that the creditor may request compensation for moral damage.[126]

But there are also scholars who do not agree with this opinion, Taiwan scholar Zeng Shixiong considers whether the liability exist and how big the liability is arising from the breaching of contract should be decided by the aims and the contents of the contract. While under the usual contract it can not be explained

[126]ZeJian Wang , *Legal thought and jurisprudence of civil law,* Chinese Politics and Law University Press, 2000 edition, p. 116.

normally that the debtor‘s not fulfillment of the contract is enough to cause the danger of damages of the creditor’s life, body, freedom and reputation.[127]

The author believes that in accordance with the existing legal provisions of Taiwan region, it can be introduced that tourists when in tourism activity suffer from the personal right damages because the tourism business people breach the travel contract such as health, freedom, credit, privacy and so on, the tourists can request the tourism business people for the compensation for moral damage.

2.8. *Cases and judicial practice.*

2.81. *Case on the guarantee liability against defects of the tourism business people.*

Case: the fall of 1999, a travel agency of the Taipei City organized one activity ,named” ten days in west of the United States”, indicating that this travel compared with other tourist routes of the same ratio, is of the more high-quality, so it attracted 53 people attending. However, after arriving in the United States, the entire53 people of touring party and a team leader with the personal baggage all crowded in a tourist bus and were almost impossible to move; when traveling in San Francisco, the driver of tourist bus had lost his way, making the original arrangements of seven spots for the day only remaining three, the time wasting because of driver’s lost. The fifth day primly was scheduled to Grand Canyon National Park, but travel agents let the touring party go to Western Canyon，it did not match go the original contract , so after returned to Taiwan, the member of touring party took legal t proceedings to Taipei District Court, requesting the court judged that Travel Agency should compensate for loss.

After investigating and hearing Judge believe that the Travel Agency did not provide the necessary quality of tourism in accordance with the agreement, called

[127] Shixiong Zeng, *Principle of damage compensation*, Chinese Politics and Law University Press 2002 edition, p. 167.

incomplete service, that is breach of contract because of performing incompatible with the agreement, thus judged that Travel Agency lost the suit and must compensate for each member of the touring party.[128]

Foundation of the judging:

According to Article 514, Article 516 and Article 517 of *Civil Code*, tourism business people provide travel services which are rendered with the normal value and the agreed quality. the consumer's request the tourism business people to improve the service in order to achieve the value and quality level talked above, if tourism business people do not improve or can not improve, the tourists may required tourism business people to reduce costs; if is unable to achieve the desired objectives, the tourists may require the termination of the contract. At the same time, in accordance with the Article 36 of *the Travel Industry Management Rules* provides that:" ... ... foreign travel industry breach the contract, resulting in harming passengers rights, domestic tourism business people should be responsible for the compensation", Article 14 of *Foreign Travel Contract* provides that the level of the travel items such as food 、accommodation and transport should be in accordance with quest contract, unless there is because of the situation set in Article 19 and Article 20 , that is because of force majeure or the matter not attributable to the parties, then the tourism business people didn't in accordance with level agreed in the contract arrange the food、accommodation transportation and other travel or tourism projects, the tourists may request a penal sum for double the difference amount. In this case, tourism business people changed the travel content, without the situation for free of the duty, all of them are attributable to the reasons of the tourism business people, so the tourists can require a penal sum double the difference amount; if is because of the intentional infliction of tourism business people, tourists also can ask not above three times the difference amount.

[128] Cihui LI, *Dealing of Tourism Disputes,* Taipei Yangzhi cultural undertakings, Inc., October, 2004, p.238.

2.82. *Case on the liability of tourism business people for perform-assisted people and the effectiveness of standard terms in package-travel contract.*

The case of N.792 Judgment, super court, Taiwan, 1991 is a classical case on the package-travel contract before the amendment of Taiwan civil law of 1999, from the several changing of the sentence; we can see the disputes on the travel contract in judicial practice and the advancement for understanding the nature of the package-travel contract.

Case detail: Appellant Xu Peizhang and his wife Xu Meiying signed the contract with appellee A Travel Agency in September 25, 1987, taking part in tour groups organized by A Travel Agency in Kenya, Africa. They made the Agreement that the appellee A Travel Agency is responsible for transportation, room and eating during the travelling. Article 7 in the liability of Contract set out: "the action of the Travel Agency or his employment is not in accordance with the terms of this contract resulting in the damages of tourists, the Travel Agency should be responsible for the damages." October 10 in the same year, the Travel Agency travelled in Kenya when The employed driver of the car found fault at starting the trip, but because drivers was hurry on his way, driving so fast that it caused roll-over, with the result that the appellant was seriously injured, Xu Meiying subsequently died.

The appellant believe that the Appellee not pay the attention of a kindhearted managers and has culpable negligence which has led to the defective given of contract, in accordance with the relationship between non-performing debt and the infringing action , the travel agency shall bear liability for damage .so require appellee to pay funeral expenses and mental compensation.

The Appellee argued that: the nature of the travel contract singed between the appellant and the appellee is the commission-contract or brokerage contract. Trip in Kenya is commissioned by the travelers. The selected travel agency is one of the best domestic agencies in Kenya and the bus used by in this trip is in good condition, the

bus driver is carefully chosen by the travel agent and is qualified for this travelling. Although, during the travelling, several very small faults occurred, they have been ruled out in time. The accident is purely fortuitous, according to the investigation of Kenya police, there is no fault. After the accident, the team leader help deal with the aftermath and he has fulfilled the obligations of the trustee. At the same time, in accordance with column 2 in the travel contract offer and the quotation on the liability signed by the two sides, both of them agreed: " the airlines and other travel-related company or hotel in charge of the passengers' travel safety and the baggage, when come to the situation such as traffic delays, baggage loss or damages, the auxiliary bodies deal with the accident in accordance with the provisions of the contract and the delegation of the travel agency assist to resolve.[129]

Taiwan Court of First Instance (Taipei District Court Republic Year 77, N3347) believed that: "The travel contract is one kind of the non-typical contract; its nature is similar to undertaking contract or commission contract. The legal relationship between the two parties of the travel contract is the undertaking relationship. In accordance with the provisions of the lease, the defendant does not breach the contract , for the request of the infringement, the plaintiff does not give any proof to prove that the defendant have any fault , therefore, there is no reason to seek compensation. "

The plaintiff refused to accept the sentence and appealed to the Taiwan High Court No. 229 sentence of the Taiwan High Court (Republic Year 78) held that the appeal in unreasonable and should be dismissed. The reason is: " the appellant claims that the appellee does not fulfill the attention liability of a good manager and the appellee has gross negligence, in fact not only the appellee denied it, but also the appellant did not present sufficient evidence to suggest it; the travel agent does not has the right to command and supervise the driver and therefore it is can not in accordance with the provisions of Article 188 the Civil Code that by the appellee undertakes the joint liability for the employer; the appellant can not take the proof to

[129] Maoyong HUANG, *Hundred Election of Civil Law Case,* Chinese Politics and Law University Press, 2002 edition,p.3 - P.5.

prove that there is a certain causal relationship between the fault of the leader and the casualties involved in the case.

The appellant did not accept the judgment of second instance and appealed to the Taiwan" Supreme Court". He sued complementarily that the appellee breaches N.7 on the liability question of the travel contract: "the travel agent should take the liability of compensation if the travel agent or its employees make the travelers damaged due to not fulfill the terms of the travel contract."

The No. 16 judgment of "super court" (Republic Year 79) said: "the travel contract refers to the contract that tourism business people provides all travel-related content to tourists and visitor paid for it. So the provision of accommodation and transportation in the journey, if the tourism business people has authorize the third people to provide the service, with the exception of passengers have been directly signed the contract with this third people, the third people is the assistance of the tourism business people, if the tourists is infringed by the third people's willful or negligence, the tourism business people should assume the liability of compensation for damage."[130] It repealed the judgment of the Taiwan High Court and remanded for the new trial.

The Taiwan High Court is still dismissed the appellant's appeal. The reason is: "Although the employee is not limited to the people who give the services because of employment, but it must be objectively used by others and supervised by the employee, N.7 on the liability question of the travel contract: "the travel agent should take the liability of compensation if the travel agent or its employees make the travelers damaged due to not fulfill the terms of the travel contract." shall not be applied to the safety question when the visitors take the bus during the trip; in accordance with Article 2 and the provisions of article 21 of this contract,[131]the

[130] Zejian WANG, *Civil Law Doctrine and Cases Research* (7), Beijing Politics and Law University Press, 1998.

[131]Article2: "The airlines company and other travel company or hotel are directly responsible for the passengers on the safety of travelling and baggage problems, in case of traffic delays、baggage loss, accidents and other cases, it should be solved in accordance with the provisions set out by the undertaking agency, the team leader is responsible for assisting in dealing with the cases. "agreed

appellee is not liable for the compensation. The appellant argues that the travel contract is a unilateral contract, so request the interpretation favorable to visitors, but the contract is in line with the rules of contract management of the tourism industry, so it is not an ordinarily adherence contract. So it affirmed the original judgment.

The appellant still did not accept the change of the second instance and appealed to "Supreme Court", "Supreme Court" in its N. 792 judgment (Republic Year 80)held that: "the travel contract means that the travel operator provide all the relevant travel services to travelers, and passengers paid for it. So if the tourism operator has entrust others to provide the travel accommodation and transport, apart from visitors has the contractual acts with this provider, the travel operator should be held responsible for damages. from the tourism contract in fixed formed printed by the travel operator, while there are the items regarding the tourism operator is not responsible for the willful and negligence of its agent or the auxiliary person, tourists has no selection for the accommodation of on the trip, the type of transport, content, place, quality etc., the terms is in violation of public order, so it should be denied its effectiveness.[132]

3. *Hong Kong Special Administrative Region*

Hong Kong Special Administrative Region is economical developed、social stability、traffic convenience and at the same time has the advantages in geography and humanistic, so it is one of the traditionally important tourist market in the world,

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accidents, travel-related companies should be responsible directly to the passengers.

Article21:" the excluding of the responsibility and assistance: during the travelling, Party A (passenger) due to taking aircraft, vessel or bus or living in restaurants and hotels suffer from damages, The air, ship or vehicle company or the restaurants, hotels and other institutions who provide the services are directly responsible for the Party A, but the delegation leader should take the attention liability of the good people to assist the Party A in dealing with the cases. "

[132] "Civil Judgment paper of "highest" court" (4) 74, p77, quoted from: Shenlin ZHAN, *Study of the Civil Law and Judgments*, Yuanzhao Press (Taiwan), August 2003, p. 40.

the entry and emigrate number keep increase for many years, in 2007,the emigrate number is 8,068.160 person times,6.4% over the last year; The entry number is 2,816,920 person times, 11.6 over the last year, its main visitor source markets are China mainland (1,548,570 person times) and Taiwan region (223.870 person times).gross income is 1405.2 billion Hong Kong dollars.[133]

According to the provision of 1844's Hong Kong *Supreme Court Ordinance,* except of two circumstances-the law is not suitable for the local situation ;the local legislative organization has amended it, since the establishment of legislative bodies in Hong Kong (April 5, 1843), all the laws of the United kingdom which have been already in force is applicable to Hong Kong. In 1997, Hong Kong returns to China, and China in its "Hong Kong Basic Law" stated: "Hong Kong inhere independent judicial system will remain basically unchanged, Article 8 states that:" Hong Kong inhere laws, that is common law, law of equity, ordinances, subordinate legislation and customary law, in addition to the provision that offense this Law or have been amended by the legislature of the Hong Kong Special Administrative Region, shall be maintained. " [134]

Hong Kong region takes the application of British & US Law, which is due to historical and social factors, that is, follows the common law (common law), based on the jurisprudence of the judges .these precedents is very important for the operation of the Hong Kong courts and the understanding of the legal cases."Now we are the most-cited case is the cases of the United Kingdom, Hong Kong's own jurisprudence in the second, because, after all, Hong Kong is a small place which has not many cases and few authoritative judgments referring to the complex legal questions .in many cases, we need to find the legal interpretation in the cases of the United Kingdom.[135]

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[133] *The year book of china tourism* , China Tourism Bureau, china travel & tourism press,2008,10,p.337-338.

[134] Youjin WANG, *Know the Basic Law of Hong Kong Special Administrative Region*, Ming Pao Daily News Press (Hong Kong), January 1997, p. 53.

[135] Yang tie dong liang (Hong Kong): *the transformation of Hong Kong's legal system,* in *the legal issues on " one country, two systems* , Huang Bingkun(editor-in-chief), Joint Publishing Co., Ltd. (Hong Kong), July 1989, 74.

At the same time, Hong Kong constitutes a certain amount of statutory law on Travel Agency operating, principally including has Cap. 218, Laws of Hong Kong, *the Travel Agents Ordinance, 1985 travel business agents Ordinance draft, 1988 Travel Agents (Amendment) Ordinance draft* and *1993 Travel Agency Agents (Amendment) Ordinance*, introduced the October 15, 1993 etc., in accordance with its provisions, the Travel Agency must be members of the Association in order to obtain a business license to do the tourism industry, so that the special trade association management of the tourism business people is in favor of legitimate business of the Travel Agency

3.1. *The liability of compensation for mental damages*

The early United kingdom courts established the principal provision on the controversial matter of determining the compensation for moral damage to follow the means of through case and legislation of the common law, which provides that except because of the breach of contract, the other party of the contract suffer from the physical discomfort or inconvenience, it did not allow the parties of the contract to request compensation for mental damage for the reason of the breach of contract.[136]

The Article 353 of the United States *Restatement of Contract Law* (second edition) (as result of mental damages) provides that: "It is prohibited to request compensation for mental damage, unless the breach of contract causes bodily harm, or the contract or breach of the contract is so special that the serious damage becomes a easily happening result.[137]

Until 70's of the 20th century, the United Kingdom Appeal Court stipulated that for the two types of contracts: holiday contract and the contract which is aimed at making one party of contract free from annoyance and frustration, it is allowed to

[136] Sweet & Maxwell, *Chitty On Contracts*, London, 27thed 1994, paragraph 26 ... • 41.

[137] D Harris, *Remedies in Contract and Tort*, London: Widened and Nicolson, 1988, p.44—45.

request the compensation for the mental damages, that is the purpose of the two kinds of the contract both emphasizes the enjoyment of the spirit. For example Bingham put forward the standard of the "main objective" of contract as the judgment, saying that "the party in breach does not need to take the liability for any frustration, defeat, anxiety, pain, upset, nervous or angry of the innocent party of the contract caused by the breach of the contract. But if the main purpose of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, when the purpose of the contract is not reached or when the effect is opposite, the party of breaching the contract should bear the liability of compensation for this damages, As for situation belong to the typical exceptions, because of the breach of contract, the other party of the contract suffer from the physical discomfort or inconvenience, it should been judged that the delinquent party take the liability of compensation for the damage. ”

The most well-known cases in the United Kingdom of the non-property damage for the breach of contract is Jarvis v. Swan's Tour Ltd case. Lord Denning sentenced that the Travel Agency breaches the contract and bear legal liability of damage of the disappointment、pain、 dissatisfaction or frustration suffered from the plaintiff.

Case: the plaintiff who loved skiing, took part in winter tour during the Christmas holidays organized by the defendant (travel agencies), according to the company's relevant instructions, the regiment ensured that there are the parties held during the trip and there would be enough ski equipment and other attractive facilities in the tourism places, the plaintiff would be arranged in the hotel warmly like home; the defendant promised to the plaintiff that it would be a extremely happy phrase .but all the contents honored did not turn to realize, the plaintiff requested the defendant to compensate him for losses, including non-property damage.

The Court of First Instance only judged that the defendant paid the different amount between the cost of joining a tour group and the low-standard rooms, total of £ 63.45, non-property is not compensable. The plaintiff appealed to the Court of Appeal, the Vice president of Court of Appeal, Lord Denning, believed that: this case

was a proper case to judge the monetary compensation of the non-property damage for the plaintiff .the Reasons for judgments of Lord Denning was: it is usually considered in the case of breaching the contract, the compensation of non-property damage should be awarded.... Only when the plaintiff suffers the inconvenience of the body, can the court permit the plaintiff to put forward the request for the non-property damage..... Such restrictions shall be approved by the outdated and outmoded, in some appropriate cases; through the contract it could be given the compensation to the parties of the contract for the mental suffering, just as the request of non-property damages because of spiritual shock in act of tort. The vocation contract or other contract to provide recreation and enjoyment are such appropriate case. Because of the breach of contract, the other party of the contract feels disappointment, hardship, distress and frustration, the victim can request the compensation for non-property damages." Lord think in the vacation contract, the compensation of the damages must be given to those who suffered physical and psychological discomfort. After the people taking part in tour groups paid the fee, they should expect to gain the pleasure and enjoyment surpassing this cost. Accordingly, the Court of judged the defendant paid £125 to the plaintiff.[138]

If the purpose of a contract is to provide pleasure and，because of a breach ，it fails to do so，damages are recoverable，In Jarvis v. Swan's Tour Ltd travel agents were held liable to pay the plaintiff damages of £125 when a holiday costing £63.45 fell disastrously short of what was promised. The plaintiff would not be adequately compensated merely by giving him back his money. The only fortnight holiday he received, and to which he looked forward all the year, had been ruined.[139]

In the United Kingdom, Jarvis case created a precedent of the non-property damages for breach of contract; it is often be cited in many later cases in which the

[138] 1Q. B. 233; S. &T.485 (1973).

[139] J. C. Smith (John Cyril), *the law of contract*，Sweet & Maxwell Limited, London, p.199.

victim suffered non-property damages due to the breach of contract. [140]The plaintiff expectations need not necessarily be financial. In Jarvis v Swans Tours (1973) and Jackson v Horizon Holidays (1975), it was accepted that, in appropriate case, non-pecuniary losses, such as the loss of the expected enjoyment of a holiday, can be compensated for in a contract action.[141]"Where the very object of a contract is to provide pleasure, relaxation peace of mind or freedom from molestation or if the contrary result is procured instead .If the law did not cater for this exceptional category of cases it would be defective."[142] "Damage for loss of goodwill by a travel agent caused by the breach of a cruise ship-owner in cancelling reservations for accommodations on the ship is recoverable.[143]

3.2. The *liability of the travel Assistance people*

For example, the judge of the United Kingdom Privy Council in 1994 for Wong Mee Wan v Kwan Kin Travel Services Ltd and others is of great significance for the trials and judgments.

Case: The plaintiff's daughter bought a packed travel to visit Pak Tang Lake in China from the first defendant (Travel Agency). But when the 24-person tour arrived in the termination, the tour guide (the second defendant's employees) told them because they missed the ferry; they had to travel by a speedboat of the third defendant. The Speedboat the tour taking was operated by an inexperienced novice driver hired by the third defendant, he derived super speed and did not carefully observe the surrounding circumstances, so the speedboat crashed into a fishing boat and then

[140] Wang Liming, *Study on Contract Law- the compensation of damages for breach of contract and the compensation of mental damage*, the Chinese People's University Press, June 2003, p. 667.

[141] Richard Stone, *Contract Law* ,the Cavendish Q&A Series, Cavendish Publishing Limited, Great Britain,1992,235.

[142] Watts v Morrow, [1991]4 All ER 937 at 959-960.

[143] Anglo –Continental Holiday Ltd v Typaldos lines (London Ltd [1967] 2 Llogd's Rep 61 at 66.

capsized. The plaintiff's daughter and other passengers drowned and died. The plaintiff as the administrator of her daughter's heritage sued against the defendant's breach of contract and negligence on behalf of her daughter and other dependants and requested the compensation of the damages.

The different views of two degree Courts:

As the court of second instance ,the Hong Kong Court of Appeal believed that the original package tour does not include boats, the first defendant could not reasonably have foreseen the use of boats, so the first defendant do not need to assume the "primary" obligations of the contract for the plaintiff's daughter. The judger of this case , Penlington JA considered that: "the whole tour group members is clear on this point that he (the tourism business people) can not provide all their services, the tourism business people need to empower other companies to fulfill the part of his duties. It is intolerable to let the tourism business people take on the carrier's negligent liability located in other countries. "

The plaintiff appealed the case to the Britain Privy Council. The Privy Council quashed the reasons provided by the Court of Appeal and a number of precedents in opposition to a comprehensive security. Because the Privy Council believed : "First, the tourism contractor could obtain compensation from the sub-contractor - he can insert the relevant provisions in the contract signed with service provider; second, the package tour contractor can also take out an insurance policy, such as public liability insurance or product liability insurance; Third, the package tour contractor could add the appropriate exemption clause in the contract with the tourists ; Fourth, the tourists have no influence on contractual terms between the travel contractor and the third person. If because lacking of the proper attention causes the tourists suffer from infringement, the tourists have no right to counter the package tour contractor, they will have to conduct litigation in foreign countries, the difficulties involved in it are self-evident."[144]

It almost fixed the way of strict liability rules, establishing the principles of

[144] Trevor Atherton , *Tour Operator's Responsibility for Package Holidays :Common Law Takes the EC Directive Model Global*,(1996)Travel Law Journal,p92—94.

overall implied warranties of the tourism business person responsible for. But as a general principle, Package tour business people can be accepted from the liability of personal injury to consumers mainly caused by the negligence of the Foreign Service provider under the circumstance that the tourism business people do not have the negligence.[145]

3.3. *The Compensation Fund of Travel Industry, the quality security fund in Hong Kong region*

In order to protect the interests of travel consumers, according to the provision of *1985 travel business agents Ordinance draft* by the Hong Kong government, when the tourism business people gain its new license, it must pay the required amount of the guarantee fund for when the tourism business people is liable for the compensation to the tourists, but the tourists is sometimes unable to obtain compensation from the tourism business people, tourists can be paid by fund; *1993 Travel Agency Agents (Amendment) Ordinance* provides the establishment of the Travel Industry Compensation Fund s is to protect the tourists from impact of the closure of the Travel Agency. [146]Both of two systems are designed to protect the interests of tourists better.

4. *The Macao Special Administrative Region*

Macao's tourism industry began in the fifties, it is the major economic pillar of Macao, it can be seen clearly from one of a series of data following: According to the statistics of Macao Statistics and Census Division, since 1982, the reception of

[145] Thomas A. Dickerson ,*Tour Operators and Air Carriers: Modern Theories of liability*, Aviation Quarterly, Oct 1996 , p.2-3.

[146] Tao CHENG, *Comparative Study of Tourism, the Macao Foundation,* February 1998, p. 14.

visitors for many years is more than four million people, in 1988,the reception of the visitors reached 5,542,943 passengers, GDP more than five billion Macao dollars, accounting a quarter of the GDP in that year .in 1990 the tourism industry accounted for 29% of local production in Macao, ranking the first in Macao , until to 2007,according to the statistics announced by Macao statistical bureau, the entry number of 2007 is 2.699.290 person times, 22.7% over the last year, the visitors are mainly from China mainland(55.1%) and Hong Kong(30.3%),[147] the population of Macao is less than 500,000, but 12% of people have engaged in the tourism industry.[148]

Macao, like Hong Kong ,adopted the legal system of its sovereign state, but the difference is that the sovereign state of Macao, Portugal, belongs to the continental law system, so the existing legal system of Macao is of the characteristics of the Portuguese continental law system, since Macao has returned to China in 1997, Article 8 of *the Macao Special Administrative Region Basic Law of People's Republic of China* provides that the previous laws、decrees in force in Macao ... ..., except it contravene this law or the legislature of the Macao Special Administrative Region or other relevant authorities in accordance with legal procedures have modified, will be retained. “

Article 118 stipulates: "The Macao Special Administrative Region on its own in accordance with the overall interests, formulate policies of the local tourism and entertainment."[149]

In Macao's *Civil Code* ,it does not stipulate the specific travel contract, that is, the tourism contract exist as an innominate contract, it applies the general principles of the Civil Code, but in the Macao region, there are special decrees targeted on Travel Agency, for example, special chapter of the laws and regulations

[147] *Statistic Report on China*, in *the yearbook of china tourism*, China Tourism Bureau, China travel & tourism press, October, 2008, p.340-341.

[148] Tao CHENG, *Comparative Study of Tourism,* the Macao Foundation, February 1998, p. 15.

[149]Yunzhong YANG, *the explanation to the Macao Basic Law*, Macao Daily Press, March 1998, 155 and 172.

for the Travel Agency management, it mainly includes: Macao No. 25/93/M (May 31, 1993), specializing in travel agencies operating adjustment and Macao n. 163/93/M instructions, specializing in adjustment for licensing system of the activities of Travel Agency; Macao N.164/93/M Instructions (May 31, 1993) on the insurance system of Travel Agency, including the general and individual conditions for the sanction of the united insurance policy of Travel Agency Occupational civil liability and in August 28, 1995, Macao Government announced n. 244/95/M Instructions ,in which has approved the table of the professional civil liability insurance for the travel industry.

4.1. *The provision of civil law and the related laws*

Travel Contract in Macao *Civil Code* also belongs to the innominate contract, so it need to apply general principal provisions of the Civil Code and the relevant law, such as the principle of good faith in the civil law: "In fulfilling obligations and in the exercise of the corresponding rights, the parties should do with the principle of good faith . (section 2, Article 762 *Civil Code*); section 1,2 , Article 483 of *Civil Code* provides that the contractual liability is take the principle of liability without fault, such as in the liability of the breach of contract, breach of contract and the damage, this two elements are sufficient to constitute the liability, unless the law has special requirements.[150]

Section 1,Article 496 of the *Civil Code* also provides the non-property damage as the result of the serious injury , the damage must be protected by law. Non-property damage traditionally refer to the "mental damage", the reason for the mental damage is the victim suffer from the non-property damage, Due to the right (mainly the right personality) is impaired, so it causes physical and mental

[150] Jian MI, *Macao's law*, Chinese Friendship Press, September 1997, p. 58.

suffering.[151] It can be seen that in Macao's civil law, mental damage (mainly the personal right, but not limited to personal right) are available to gain the compensation for mental damage, which has left the space for the tourists to request the compensation for mental damage when they do not have the travelling enjoyment.

Macao's *Consumer Protection law* is No. 12/88/M *Decree* (June 13, 1988), Article 7 provides the consumers have the rights to ask equality and fidelity in the formation of contracts and the faithful have when signing the contract. such as section a stipulates that in order to prevent from abusing the contract with fixed form and using the irregular means to sell and propagate, which hinder the sober assessment of the contract provisions and the decision to enter into a contract, this is the format the provisions of the contract with the fixed form.

"Exemption clause can be understood only on the grounds of the reasons of public order or consumer protection, it taken the same approach as the approach which other countries gradually take on, in particular, when these provisions are included in adhesive contract (that is, the contracts with the fixed form, the author note). [152]All of these are the provisions about the contract with the fixed format; the application of it in the tourism contract is a favorable safeguard to protect tourists.

4.2. *Decree No. 25/93/M of the Macao Government*

4.21. The *definition of Travel Agency*

According to section 1, Article 1, the Macao Government *Decree* No. 28/93/M provides that – all the companies which registers in the region and operate their own business according to the rules and regulations, is known as the Travel Agency. Some scholars of Macao think: "Travel Agency is the Company engaging in tourist business

[151] Carlos Alberto da Mota Pinto, *Teoria Geral do Direito Civil*, Legal Translation office, Law School of Macao University, December 1999, 56-57.

[152] Carlos Alberto da Mota Pinto, *Teoria Geral do Direito Civil,* Legal Translation Office, Law School of Macao University December 1999, p.56-57.

operations and taking Travel Agency as its name.[153]

Moreover, according to Article 10 of the Macao Government *Decree* No. 25/93/M, it provides: in Macao operating the Travel Agency business must obtain the license granted by the Governor of Macao in accordance with the provisions of this Law and its rules and regulations, so the Travel Agency in Macao is the professional tour operators which must has the qualification to be engaged in the tourism business.

Therefore, the authors suggest that the travel agency in the Macao region is the special companies which are aimed to profit-making, obtain the business license in accordance with the law and provide a range of tourism services for.

4.22. *The liability of the Travel Agency and the system of guarantee and insurance.*

Chapter 3 of *Decree* No. 25/93/M specifically provides the liability system of the Travel Agency, Article 18 is the part of his liability, article 1: "Travel Agency is responsible directly to tourism customers for the agreement on the provision of services, but does not affect the exercise of the right to claim for the services companies providing the same kind of services." From it, we can see that the Travel Agency is responsible directly to the tourists for travel services provided by Tourism auxiliary people, manifesting the protection of the rights of tourists, this can remove troublesome that when the service provided by the travel auxiliary people is of defects, the tourists should overcome the tourism business people to request the compensation of tourism auxiliary people. At the same time, states: "but does not affect the exercise of the right to claim for the services companies providing the same kind of services." In this way, the rights of the tourism consumers are protected and give the tourism business people the rights to recovery, not increasing the burden of the tourism business people.

Article 2 provides: "If a number of tourism representative offices participate in the provision of services, they should take the joint and several liability, but does not

[153] Jian MI, *Macao's law*, Chinese Friendship Press, September 1997, p. 349.

affect to exercise the right to claim to the organizer or to travel agencies providing travel services." This provision can be seen that emerging in process of tourism, even if the liability is caused by the united services provided by a number of tourism auxiliary people, it also can be claimed the compensation to the tourism business people .

Travel Agency guarantees system and insurance system:

The first section of this chapter provides the Travel Agency guarantee system, and it is one of the compulsory elements for the Travel Agency to get the license. The purpose of Guarantee system is: "it is designed to ensure the Travel Agency and its supplementary facilities in operating business fulfill the obligations to customers." This is a system in order to protect the interests of tourism consumers ,it is a compulsory measures for the tourism business, that is, travel agents must fulfill its guarantee obligations to their customers and to guarantee assume all the liability for the acts done during the valid period of the guarantee, guarantees amounting to 300,000 macro dollar, the guaranteeing continues to be valid one year after the closure of the Travel Agency ,during this period, the travel agency is still responsible for the complaint of the debt which occurs before the closure..

Insurance system is stipulated in Article 24 and Article 25, it guarantee the professional civil liability arising from the operating of the tourism business people and its supplementary facilities ,the insurance has always been effective and continue to adjust. This insurance includes the acts and the non-acts of Travel Agency cause the personal, property and non-property losses of the customer or a third person, travel agencies need to bear civil liability for the loss. Including those extra costs paid by the tourist for the reason of that the tourism business people do not provide the agreed services、inadequate services or defective services . Section 2, Article 25 provides the exception from the liability: "Travel Agency in the provision of services, the damage or loss caused by the accident due to the use of non-proprietary transport is out of the insurance, but the assumption is that the transporter have effective insurance which the existing laws provided for him, they may be exempted from the

above-mentioned insurance.”The exemption of this requirement is to take the transporter bearing the compensation for the tourism consumer as a precondition, if the transporter do not have the insurance, that is, he is unable to bear the liability of tourists, the tourism business people can not be exempted from this liability ,it is based on protection of tourists’ interests , at the same time taking into account the balance of liability ,it is conducive to mitigate operational risks of tourism business people , maximum protecting the interests of tourists.

CAPITOLO III

THE DICIPLINE ON LIABILITY OF THE TRAVEL BUSINESS PEOPLE IN CINA

SOMMARY: 1. the package-tour contract and its organizer. –1.1. The definition of the package tour contracts. –1.2. The nature of the package tour contract. –1.3. The definition of the travel organizer in the package tour contract.–1.4. The judicial practice in China.2.– The warranty liability against defects of the Package tour organizer.–2.1 The definition and its imputation principle of the warranty liability against defects.–2.2 The warranty liability against defects of the travel organizer in package tour contract.–2.21. The application of the warranty liability against defects in package tour contract.–2.22 Imputation principles of warranty liability against defects.–2.23. The content of Warranty Liability against defects.– 2.24. Excuses free from the Warranty liabilities against defects.–2.3. The Judicial practice in china.–3. The liability of the travel organizer for the travel assistants.– 3.1.The liability of the travel organizer for the travel assistants in the package-tour contract..– 3.2. The relevant legislation and the doctrine in China. – 3.3. The judicial practice in China. – 4. The liability of the compensation for moral damage. – 4.1. The breach of contract and compensation for moral damage. – 4.2. The breakthrough in the compensation for mental damages of the package tour contract. – 4.3. The relevant legislation and the doctrine in china on the compensation of the spiritual damages. – 4.31. The relevant provisions of the existing legislation. –4.32. The relevant legal doctrines. – 4.4. The judicial practice in

China. – 5. The standard terms in the package tour contract and the protection of the consumers. – 5.1. The definition of the standard terms. – 5.2. Exemption terms in the package tour contract. – 5.3. The protection of the rights and interests of the tourists in the standard terms of the travel contract. – 5.31. The interpretation of the standard terms . – 5.32. The determination of the travel standard terms 5.33. The judicial practice in China. –5.4. The model contracts and Regulation for the travel standard contract. –5.41. The provisions of the model documents about the liabilities of the travel organizer. –5.42. The control of the travel standard contract. –6. The margin and the insurance liability of the travel organizer. –6.1. The Relative experience of other countries and regions. –6. 2. The insurance system of the travel organizers in china. –6.21. The quality margin system of the travel agency. –6.22. The insurance system of travel organizer –6.3. The judicial practice in China. –7. The relative legislations and their shortcomings on the liability of the travel organizer. –7.1. On the aspects of the laws . –7.2. The administration and department regulations . –7.3. The suggestion for the named travel contract.

Since 1978, with the implementation of China's reform and opening-up policy, China's tourism industry has achieved the strategic objectives of the big travel county in Asia, in accordance with China National Tourism Administration statistics, it show that the number of inbound tourism from overseas from 1,809,200 times in 1978 to 3169.48 in 1988 times and to 4638.65 times in 1995. [154]

In 2004 China's tourism industry has a comprehensive revitalization and has a breakthrough development, the number of inbound travelers is firstly more than that of Italy, becoming the number four in the world, the total revenues of tourism is 684 billion Yuan equivalent to 5.01 percent of the national GDP.

The World Tourism Organization has said for many times that in 2010 China will be known as the world's first tourist reception country and the fourth tourist exporting country, there will be 100 million people of China to travel. According to the usual growth rate of international tourism, the number of domestic tourism will

[154] National Tourism Administration and the China Securities Regulatory Commission, *the goal strategy of china travel insurance*, China Tourism Press, June 2008, p. 24.

reach 19.82 million in 2020 and the domestic tourism income will reach 3043.66 billion Yuan, equivalent to about 8.7 percent of the national GDP of 2020.[155]

1. *The package-tour contract and its organizer*

We carry out the studies on the liabilities of the travel organizer of the package-tour contract, firstly we should give the definition on and its organizer, it is the starting point to explore the liability of the package-tour organizer, because it is just through the package-tour Contract can the organizers and tourists be able to determine the relationship on the rights and obligations between the two sides of the package-tour Contract and the rights and obligations are reflected through the implementation of the specific content of the contract , it is also help us to define the scope the liability of the travel organizer better so as to protect the rights and interests of the tourism consumers and maintain a healthy and orderly development of the tourism industry .

1.1. *The definition of the package-tour contract*

Currently there are two types for the definition of the travel contract, they are called the broad definition and the narrow definition. The narrow travel contract only refers to the travel and visiting contract set out between the travel business man and the tourists; the broader sense of the travel contract includes the narrow travel contract and the contract of tourist-transportation, the contract of tourist-accommodation, and any other contracts related to the tourism activities.[156]

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[155]Fubin YANG, Yuling HAN, Tianxing WANG, *Essays on tourism law*, (1), China Tourism Press, July 2005, P.11 and P.130-131.

[156] Zhen TAN, Wei DONG (Editor-in-Chief), *Guide on the practical Operation of Tourism, actors, advertising, relocation, security and other unknown contract* ,China People's Public Security University Press, 2000, p. 6.

"The travel contracts are divided in two types, the broad sense and the narrow sense, the travel contract in the narrow sense is divided into the travel contract organized by the tourism intermediaries in accordance with the different provision of tourism services. The package-tour contract only refers to the travel contract that its content is a comprehensive range of travel services provided by the tourism business (travel agencies). Such as in "*Brussels International Convention on the Travel Contrac*t"(following called *Convention*), the travel contract is divided into the package-tour contract (organized travel contract) and the intermediary travel contract according to the tourism business's main activities. will be Tourism contract into, "The organized travel contract" means any travel contract that a party in accordance with the composite price (inclusive price) in their own name provides the integrated services including traffic, or the accommodation not affiliated the Traffic or any other services related to the other party;" the intermediary travel contract " means any contract which a person in accordance with the contract, in individual name with an appropriate remuneration, commitment to provide a travel contract organized others to the tourists or provide one or a number of individual services in order to make the other party complete the tourism or short-term resident.[157]

Japan in the Article 2 of its "standard terms of the travel industry" divides the travel contract into the sponsor-tour contract and the charge-tour contract. the sponsor-tour contract (package tour contract) refers to the tourism business plans in advance, provides the content about the tour destination, schedule, and the delivery of residential services that tourists can accept and stipulates the related issues of the price that the tourist should pay the travel business man for of tourism, then through advertising or other methods public is engaged in the recruitment of tourists and putting into practice. [158]The charge-tour contract" means the tourism business people is commissioned by tourists, through agents, intermediaries, agents, etc., is engaged in the activities of the arrangements of transport, accommodation and other tourism

[157] Section 1, 2, 3 article 1 of *Brussels International Convention on the Travel Contract*.
[158]Article 2 of *the Standard- Contract Terms of the Travel Industry*.

services acceptable to tourists. [159] In *Civil Code of the Democratic Republic of Germany*, the travel contract is concluded in order to arrange travel and vacation activities, including the tourism contract signed between tourists and the travel business people and the room and board contract signed between tourists and hotels, restaurants etc. [160] It can be seen that the travel contract in Germany is based on a broad definition.

China also does not have a specific tourism law, in contract law; the travel contract is taken as an unknown contract, in "the introduction to Contract Law of People's Republic of China and its important draft "the travel contract is defined as the contract that the travel agency provides tour services, tourists pay the charges for travel.[161]

In article 571 of *China Civil Code*: the proposed draft for the provisions of contract law " (specifies) promulgated to the public by the National People's Congress, the travel contract is defined as "the travel contract is that tourists pay delivery and travel agencies provide travel services. Travel services include the provision of travel services for visitors, the services of tour guide ,the services of visiting sight spots as well as incidental services of the restaurant, entertainment etc. "These two documents both define the travel contract in narrow sense, that is, the travel contract is total sum of travel services provided by travel business people(travel agents).

In article 1367 of *Draft of the China Civil Code* (Professor Wang Liming is editor-in-chief) the travel contract is defined in broad sense: "The travel contract is the travel business people provide tourism services, tourists pay for them, the contract generally include arrangements of tourism routes, provision of transportation, accommodation, catering ,tour guides and other related services. "[162]The providers of

[159]Article 2 of *the Orders of the Special Compensation*.

[160]Fei ZONG, *Civil Code of the Democratic Republic of the Germany,* article 5 Chapter 4, law press, 1982, P. 70-73.

[161] Legal Work Committee of NPC (national people' congress), the Introduction to the Contract law of the People's Republic of China and its Important Drafts, Law Press, 2000, p. 151.

[162]Liming WANG (editor-in-chief), *the suggestion draft of China Civil Code and its explanation*, china legal publishing house, November 2004, p. 213.

the travel contract are all the business people engaged in the tourism industry, not only the travel agency.

The travel contract in this article refers to the package tour contract in the narrow sense, that is by the travel organizer sign for the sum of a series of travel services .so in summary I think that the package tour contract can be defined as: "it signed between the travel organizer and tourist, the tourist pay a certain price for all the services prior to the travel, the travel organizer provides the sum of a series of travel services for tourists.

1.2. *The nature of the package tour contract*

In the package tour contract, the content of contract provided by travel organizer is the sum of a series of tourism services , its characteristics lies in its comprehensiveness, that is to say, single travel services such as accommodation, catering, transportation and others through the combination and arrangement of the travel organizer becomes a formation of a new independent travel product provided to tourists, "the Convention" stipulates that the contents of the package tour contract includes at least "transportation, accommodation or other related travel services" .The EN Directive No 90/314 also requires the content of package tour contract must include not less than the combination of the two factors arranged in advance of the travel - transportation and accommodation or transportation and other travel services not affiliated to transportation or accommodations. Therefore, it can be said that an important characteristics of package tour is that the travel organizer is responsible for the obligations of the organization; the organizational obligation constitutes the premise of the package tour contract, on this basis, then adding the request of not less than one main service factors.

Some scholars believe that the package contract is a well-known types of hybrid contracts such as Taiwan scholar Wang Zejian points out in the " judicial control on stereotypes of tourist leases ""In view of the content of the package travel contract included transport, accommodation, meals, guided tours, visits, etc., in Taiwan's existing law, the travel contract can be defined as the type of mixture contract

combined with different typical contracts.[163]because the content of the package tour contract is with the diversity of the travel services, including the overall planning, preparation, application for passport, as well as procedures for the travel, transportation, accommodation, catering, tour guide etc which can be respectively classified the typical contracts according to the civil law, such as commission, agents, passenger transport, the sale, lease, undertaking and so on.[164]

However, the package tour is different from the simple superposition of single travel services, each service is a link of the package tour, but each of these services alone can not directly face the tourists, because it is a wholly independent travel product that travel organizer provides to tourists, it is indivisible. that is to say, when because the problems of one single service affect the entire travel contract, it can not simply be applied the legal stipulation of " the contract of accommodation" or "the contract of transportation", because although the performance of the contract can not be only relied on the travel organizer , usually the travel services offered by assistant performers, However, due to they are the travel organizer and tourist who sign the travel contract, the travel organizer should be responsible for the whole contract and also for the service provided by the assistant performer to tourists. Taking the Package tour as a kind of mix-featured contract, it is in fact not see the travel organizer's most important obligations of organization, it leads to when the travel organizer breaches the travel contract, and it is difficult to ascertain his liabilities.

There are some other scholars take the travel contract as a kind of existing typical contract. Such as Taiwan Huang Yueqin believes that in the travel contract, the travel operators calculate for tourists, obtain rights in their own names and transfer to the tourists, so the travel contract is brokerage contract. The package tour contract is integrated by a number of the legal relationship, rather than a completely

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[163] Zhejiang Wang (Taiwan), *the civil theory and case study, the* Chinese University of Politics and Law Press, 1998, P.45.

[164]Ruizhu LIN, *Research on the travel contract and its stereotypes*, Master's thesis of, Institute of Law , Taiwan's National Chung Hsing University, June 84 years Republic of China ,P.75-76.

independent legal act.[165] Taiwan scholar Huang Maorong believes that the travel contract is a kind of undertaking contract providing comprehensive travel services, a lease contract, is mainly composed by the transportation, tour guides, accommodation, and catering, insurance and other related commission procedures.[166]But from situation that Germany and Taiwan put the travel contract after the undertaking contract, [167] not included in the undertaking contract, we can see that the travel contract indeed is similar in many ways to the undertaking contract, for example, the undertaker is responsible to the order of the custom for overall outcome provided by him, no matter whether the part of the commissioned work is completed by other people. The focus is mainly that the travel agency can assume the liabilities for warranty of defect, no matter whether they have fault, they should be responsible for the travel services. [168]So it can not be completely attributed to a wide range of types of contracts.

Article 251 of *China Contract* Law stipulates: "The undertaking contract is undertaker completes its work in accordance with the order of the customer, consigns the results of the work to customer and the customer pay for it." But after all the travel contract is different from the undertaking contract, such as the results of the undertaking contract are objects made to orders, because they are the physical structures, it is easy to judge whether they are up to mark of the contract agreement. but the target of the travel contract is to provide travel services, its ultimate purpose is the spiritual enjoyment of tourists, which is invisible, for example, if the contents of tourism is unchanged that let tourists visit the same attractions, but they are conducted in the dark conditions and the tourists are impossible to see clearly, tourists can not gain the enjoyment of the spirit, the travel contract loses its meaning. on the other side, When in the undertaking contract the undertaker breaches the contract, the customer

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[165]Yueqin HUANG, *Legal Analysis of Tourism disputes*, in Xinhe LIN, *comments on the modification of the 1999 Civil Code,* in *Hua Gang Law Review*, 1997, p.137.

[166] Maorong Huang (Taiwan), *Comments on some amended provisions of Taiwan Civil Debt Chapter*, in The Law Monthly, Vol. 50 No. 5, and p. 382.

[167] *The Germany Civil Code, Section* 9, Chapter 8, Vol.2 , *Taiwan Civil Code,* Article 514

[168] Huiyue XU (Taiwan), *Research on travel contract,* the doctoral thesis of Legal Institute, Taiwan's National Political University, January 77, the Republic of China, p. 3-11

ask the undertaker assume the liabilities through the ways of not paying for the work or requesting the undertaker to modify or do it again, but these ways can not be used in the travel contract, because in travel contract tourists have paid for the services in advance and the travel time can not be inverse back, and the rearrangement after the events does not have its original significance. Therefore, the travel contract can be and should be defined as a kind of independent contract different from any other types of contract in relevant laws.

1.3. *The definition of the travel organizer in the package tour contract*

International Union of Official Travel Organization (IUOTO) definite s tour operators (Tour operator) as "a sales enterprises, they prepare travel activities and resort before the request of the consumers , organize travel exchanging, book all kinds of is rooms in travel destinations, arrange for a variety of visiting, recreational activities, provides a full continuum of services (package tour), and pre-determines the price and date of departure and return, that is, sells travel products prepared through its own sales offices or travel agents to individual consumers or groups."[169]

Different countries have the different measures for the travel operators. They are 1.whether taking it as its career; 2.Whether the aim of activities is for profit; 3. Whether they are eligible for the travel business, that is, having the administrative status. In the European Union directive (following it is called *Directive*); the travel operator is called the organizer of tourism, that is, the people whose special profession is engaging in package tour.[170] In “Convention “the travel operator is defined as: "any person who is regularly or frequently engaged in package tour activities, no matter

[169] Mingbao LI (editor -in- chief), *The operation and management of travel agencies* , Economic Science Publishing House , August 2004, p. 8.

[170] Article 2*,* Section 2 of the EU *Directive.*

whether such activities are important for their business or no matter whether such activities are its career." [171]

The travel operator in *the Convention* is not required to take organization of package tours as its occupation, as long as he is regularly or frequently engaged in the activity. But it rules out the organizers who occasionally hold the package tour. Dr. Xu Huiyou of Taiwan does not agree with such division, "It is inappropriate that all of them are the organizers of the package tour, but they should be applied different laws depending on whether they are regularly or frequently engaged in travel organizing." [172] Section 1, Article 651a of *Germany Civil Code* states: "In accordance with the contract travel, the travel organizer is liable to provide all travel services to visitors, visitors have the liability to pay the travel costs agreed. " the provisions of Article 6511 about “Inquilinous residence of primary and secondary school" stipulates that when school organizes the students to study abroad, school should be taken as a travel organizer. Therefore, the Germany jurisdiction and common theory believe that the travel organizer are not held to the conditions of employment or profit, such as newspaper office who organizes the travel for readers , or secondary school who organizes the travel for students, they can be all called the travel organizer .[173]

The Convention does not require the travel organizer hold the purpose for profit, its consideration is mainly that in the scope of all the contracting party, it can in maximum extent let the travel organizers in its system of liabilities and it has a certain practical significance under the environment of the Convention. But I believe that the standard that the travel organizer is not for the purpose of profit runs counter to the ultimate goal of the package travel contract .because the characteristics of the package tour contract is that the travel services is a integrated and complex product ,the travel services are usually not provided by the travel organizer but by the

[171] Article 1, Section 5 of the *Convention*.

[172] Huiyou XU (Taiwan),*Research on travel contract, doctoral dissertation of law Institute* ,Taiwan's National Political University, January 77 of the Republic of China, p.3-11.

[173] Darmstadt District Court and Löwe, Münchener Kommentar Vor § 651a Rdnr 12 Thomas, Paland Einf.v § 651cff Rdnr, quoted from (Taiwan) kongzhong LIU, *the travel lease – concurrently talking about the Germany travel contract law* , in *Journal of Martial Law* , Vol.31, No. 2, p. 14.

assistant people to complete the tour, if such contract is defined to be free, then when there are defects in the contract or the package tour operators breaches the contract, it will be difficult to ascertain his liability and inability to ensure the rights and interests of tourists, from the concepts of the travel organizer in many counties, most of them define that tourists have to pay travel costs to the travel organizer, so for the purpose of profit should be the characteristics of the travel organizer.

There are two completely different views about whether the travel organizer should have the statutory qualifications, that is, with administrative status. One view adopts an open attitude that as long as their behavior in accordance with the nature of the characteristics of package tour, one party could be called the travel organizer regardless of whether they have a statutory professional qualifications, for example *the Convention* and *the German Civil Code* take this perspective, In order to reach the united liability system of the travel organizers, *the Convention* does not request the travel operators to be professional business or have administrative license for the business or have the purpose for profit, as long as they are regularly or frequently engaged in package tour activities, they can be called the travel organizer.[174]

Another view on the contrary puts forward strict requirements on qualifications for the travel business. Not having corresponding license, it shall not be allowed to engage in the relative activities of the tourism business. At present in many countries especially in the developed countries, it implements the management system of registration or approval for the travel agencies. in view of the package tour contract is often related to safety of tourists and property and its content is integrated and complex, the system of registration or approval is in favor of protection of the interests and rights of tourists, such as in the registration management system of *Japan's Travel agency Law* ,it adopts tourism market access policy for the travel operators, " the travel operators is in charge of applying for the registration from transport Minister ",[175] Law at the same time request travel agents to pay a certain

[174] Hyiyou XU (Taiwan), *Research on travel contract*, doctoral dissertation of law Institute, Taiwan's National Political University, January 77 of the Republic of China, p.3-11.

[175] Chapter 2 Article 3 of *Japan's Travel agency.*

margin, after registration in the required time the travel agencies is not bid the procedures of storing the margin, it can not carry out tourism services. Taiwan also adopts application and authorization system for the travel operator, solo after the tour operators have applied to visiting administration organs for approval, can they go through the company registration procedures in accordance with the law and exceed the travel business.[176]

China implements the approval system for travel agencies. For example, Article 2 of the new *Travel Agency Management Regulation* which is promulgated and performed in May 1, 2009 by The Central People' Government of the People's Republic of china states: "The travel agents are the enterprise that its business activities is to engage in the activities including attraction ,arrangements and reception of tourists, providing related travel services for the tourists and engage in national tourism business, immigration travel business and emigration travel business." At the same time it provides that travel agents who want to engage in the international tourism business should apply to the tourism administration organ of The Central People' Government of the People's Republic of china or the tourism departments under the Central People's Government of provinces, autonomous regions and municipality city entrusted by it. Travel agents who want to engage in domestic tourism business should apply for the auditing and authorization of tourism departments under the Central People's Government of provinces, autonomous regions and municipality city. [177]The new *Implementation details of Travel Agency Management Regulation* which is promulgated and performed in May 3, 2009 by National Tourism Administration of the People's Republic of china also provides that the concrete procedures and provisions of the application for the authorization .[178] The travel organizer in this article includes the travel agencies and other natural person, legal person or other entity that have the statutory qualifications to engage in the tour business. They are mainly travel agents, but currently in China there are many

[176] Article 21 of *Taiwan Visiting Development Regulation*

[177] Article 7 and Article 9 of *Travel Agency Management Regulation*

[178]Articles 8,9,10 of *Implementation details of Travel Agency Management Regulation.*

illegal tour operators and travel agencies engaged in the same or similar business, when there are disputes between them and tourists, whether they are applied related provisions of the travel contract is still controversy.

But I believe that since laws and regulations of China have make specific provisions, it should be complied with the provisions of the law, that is, the travel organizer must be permitted by the law, because the law give a high entry threshold for the travel and ask them to cover insurance .Once in the event of the travel organizer breaching contract, they have the ability to make compensation for the tourists, tourists can also choose the legal travel organizer having the statutory qualifications to ensure their own rights and interests; if the provisions about the travel contract can also be applied to the operators not obtaining the required qualifications ,it will encourage activities of illegal tour operators, so they should be applied to the Civil Code and other relevant provisions of the law; At the same time, from the view of protection of the entire travel industry and the rights and interests of tourists, the compulsory provision for qualification of the party in the travel contract is necessary, which will make the tourism industry develop healthily and stab lily.

In the actual travel business activities, it usually exists a phenomenon that the travel organizer often make the entire package tour contract as sub-contract to other travel agencies, then how to determine the travel organizer in practice is also of great significance. In Section 1, Article 27 of *Taiwan Travel Industry Management Regulations,* it provides that "travel operators organize the travel group on its own, except for having the written permission of the passenger; they shall not transfer the travel contract to other travel agencies."

In china, it is usually applied the general rules of *the Civil Code* and the Contract law the old *Implementation details of Travel Agency Management Regulation* (Dec 27, 2001) stipulates in article 54 that without the written agreement of the tourists, the travel organizers can not transfer the contract to others. Article 35 of the new *Implementation Details (*May 3, 2009) changes the written agreement of tourists to agreement of the tourists, for the consideration that there is no time or no

conditions in emergency circumstances during the travelling.[179] That is to say, in any cases before the travel organizers transfer the travel contract, they should gain the permission of the tourists, if without the permission of the tourists, the activities of transferring is ineffective, the travel organizer is still responsible for the whole travel contract.

1.4. *Judicial Practice*

Case: July 2007, Miss Song from Beijing attended travel activities of visiting Chengdu, Chongqing and other cities organized by Chengdu A travel agent and paid a deposit of 2,500 Yuan. A travel agency secretly transferred the group to the Chengdu B travel agency and Miss Song was uninformed, B travel agency again transferred these tourists to other who did nit have the travel qualification, this enterprise used a bus to transport these tourists which was not qualified for doing it. When this bus was running on the Chongqing Expressway, the screw of the right behind rear was broken and detached from the bus, with the result that the bus hit the guardrail of the road, killing one person and many people wounded, Miss Song was seriously injured, through the forensic identification, the degree of injured was level I. In November 2001, Miss Song sued A and B travel agents and other units to court for a total compensation of 322 million Yuan, including medical care and other claims. In court, both A and B travel agencies denied that they had the contractual relation with Miss Song and refused to assume the liability of compensation. At the same time, they believed that the accident should be deal with in accordance with traffic accidents.

Through the trail hearing, the First Intermediate People's Court of Chongqing city held that: Miss Song had paid the deposition to the travel agency, so the two sides constituted a contractual relationship of travelling, so it was essentially different from the ordinary traffic accident. After A travel agency had received the deposit under the circumstances that Miss Song was not informed, it transferred her to other travel agents. Therefore it should be responsible for this accident; at the same time B travel

[179] Jinliu LIU, *The travel contract*, china law press, January2004, 118.

agency was not in accordance with the agreed arrangements for the bus in advance, it should take the joint liabilities for the disable results caused by the traffic accident.

Court sentenced: A travel agent paid a total cost of 1,880,000 Yuan to Miss Song, including medical expenses, loss of working time costs, care cost, the spiritual compensation etc, B travel agencies assume joint liabilities.[180]Article 84 of *Contract Law* provides that: "the debtor transfer the whole or part of his obligations to the third people, it should be agreed by the creditor." Article 35 of *Implementation details of Travel Agency Management Regulation* (2009) stipulates:" without the agreement of the tourists, the travel organizer can not transfer the tourists to other people for arrangement and reception." from these provision, we can say that the travel organizer transfer the contract to other people, it must agreed by the tourist or it has no effectives on the tourists. Because one of the characters of the package tour is that the whole travel activities is directly affected by the qualification, reputation degree, financial status etc and the tourist select the travel activities on the consideration of the confidence for the travel organizer.

2. *The warranty liability against defects of the Package tour organizer.*

2.1. *The definition and its imputation principle of the warranty liability against defects.*

The warranty liability against defects originated from Roman law, there was the initial regulations in "Lex Duodecium tabularum" and "Corpus Juris Civilis"about the warranty liability against defects for the sales of defective material which has the warranty of quality. Later, the warranty liability against defects is used by Germany, France and other civil law countries in sales contract and gradually can be applied in

[180] Shanghai Tourism Management Committee, *Analysis of Travel Cases*, East China Normal University Press, July 2003, p. 20-21.

onerous contract, such as work contract and lease contract, becomes an independent system of liability to maintain the security of fair trading. The So-called the warranty liability against defects is that in the onerous contract the debtor should guarantee his rights integrated and qualified quality of the contract object. If the debtor violates this provision, then he should take the warranty liability against defects. It is based on implied warranty liability, that is, the parties at the conclusion of the contract have tacit recognition that the contract object should be complied with the terms of the contract or the standards of quality established by law; otherwise they must assume the corresponding liability.[181]The Warranty liabilities against defects include the warranty liability of goods and the warranty liability of rights. The warranty liability of goods Warranty objects refers that the seller takes the liability for defects of the loss or reduction in the usual effectiveness or in the value of the contract object. [182]The warranty liability of rights is that because the seller can not transfer all or part of the rights of property to the buyer or the rights of property transferred uncompleted, the seller should take the corresponding liabilities. [183]

The Warranty liability for defects refers to in the onerous contract the debtor guarantee his rights completed and the quality qualified of the contract object. If the debtor in violation of the obligations of such security, he should assume warranty liability against defects.[184] China *Contract Law* does not directly give the definition the warranty liability, but it can be seen in the provisions about the liability of breach of sales contract, it requests the seller to assume the warranty liability against defects. For example, the Article 153 of "Contract Law" stipulates: "The seller should give the contract object in accordance with the requirements of quality agreed. If there is explanation for the quality, the quality of the contract object should be in line with it. “This is the provision about the warranty liability against defects of sellers in sales

[181] Zhiyuan CUI, *The study on contractual liability*, Jilin University Press, 1992 edition, p.269.

[182] Zejian WANG, *legal thinking and examples of civil law - the basically theoretical system of the right to request ,* China University of Political Science Press, 2001,p. 104.

[183] Shangkun SHI, *Omni- theory on debt law*, China University of Political Science Press 2000, P.13.

[184] Liming Wang, *Theories on liability of breach of contract*, China University of Political Science 2000, p.199.

contract. Article 150 provides that: "the seller has the obligations to ensure that the third person shall not claim any rights to the buyer's for the contract object" This is the seller‘s the warranty liability against defects of rights, and if the delivery of the contract object does not meet the requirements of quality, the buyer can ask the seller to assume liability for breach of contract. [185]Sales contract of *Contract Law* firstly provides the warranty liability of the seller in the form of legislation. [186]It can be seen that the warranty liability against defects is as a form of general liability included in our liability system for breach of contract.

The warranty liability against defects takes the “no-fault liability principle” as its imputation principle, namely, the principle of strict liability, as long as the buyer can prove that the contract object given by the seller has the defects on the goods or on the rights, regardless of whether the seller has a subjective fault, unless the statutory exemption reason, the sellers should bear The warranty liability against defects. The fault includes the intention and the negligence. The intention refers that the actor clearly knows that their behavior will bring about adverse effects or damage to others, but still hopes or indulge the occurrence of adverse consequences or the damage result. Negligence is the attitude that one can know or should be aware that conduct will bring about adverse effects or damage to others, but because of the subjective negligence, he does not foresee or has foreseen but gullibly believe it possible to avoid, finally leading the damage results. So the basis of the principle of no-fault is not whether the parties have the intention or negligence, but on the basis of objectivity of damages or the activities of breach of contract.

2.2. *The warranty liability against defects of the travel organizer in package tour contract*

[185] Article 155 of *the contract law.*

[186] Shujing ZHANG, *the theories on the seller's warranty responsibility against defe*cts, in Journal of Wuhan University of Technology, N.2, 2001.

2.21. *The application of the warranty liability against defects in package tour contract.*

Article 651 C of *Germany Civil Code* as well as section 6 Article 514 of *Taiwan Civil Code* stipulates that the travel organizer should guarantee the overall travel product has the agreed quality, that is no loss or no reduction of normal or agreed value . So the travel flaw refers to all the objective and concrete defects different from the characteristics agreed in the contract. All the obstacles of the whole travel product or the individual travel product not caused by tourists can be called the travel defects.[187]

The warranty liability against defects of the travel organizer was initially stipulated in the travel contract chapter of the *West Germany Civil Code*(amended in 1979), because prior to its amendment of *the Civil Code*, the travel contract was taken as a kind of work contract by theory and juridical practice. Because the warranty liability against defects is an important principle of liability in work contract, it is naturally applied in the travel contract. but except some characteristics of the warranty liability against defects in the work contract, it has many unique features , for example in the *Germany Civil Code* ,it stipulates that tourists can correct the defects on his own if the travel organizer does not do it in the appropriate period of time ,and the tourists require the appropriate fee to travel organizer which can not be achieved in work contract, but this provision is of great significance in accordance with the characteristics that tourists actually participate in the enjoyment of the travel product; the travel contract of *Taiwan Civil Code* (amended in 1999) in some extent follows the provisions of *the German Civil Code* and in Japan in addition to the basic provisions on the liabilities of the travel organizer such as liability for damages it takes special compensation system as a mode of the warranty liability against defects in the package tour contract according to their national conditions. The warranty liabilities against defects applied in the travel contract has been recognized in these

[187] BGHZ97, 255; 100,157,180; MuechKomm / Wolter § 651cRz.4; RGRK / Recken Rz.11.

countries. Article 573 of *China Civil Code Draft* states: "The travel agents should provide travel services in line with standards of quality agreed upon in the travel contract. If not meeting the standards, travel agencies should be liable for it." Scholar Cui zhiyuan believes that the warranty liability against defects exists in the entire onerous contract except the labor contracts. Tourism activities are generally carried out in the places far away or unfamiliar, the tourists are in a weak position compared with the providers of tourism products no matter on the choice of product composition or master degree of the product. This requires the warranty liability against defects to guarantee. [188]

2.22. *Imputation principles of warranty liability against defects.*

Articles 107 and 117 of China *Contract Law* establishes the principle of no-fault liability, that is , regardless of whether the parties of the contract have the subjective faults, as long as there is a de facto breach of contract, it is necessary to assume liability for breach of contract, unless due to force majeure or other special provisions of law.[189]This shows that China *Contract Law* uses strict liability as a general imputation principle for breach of law.[190]

As a general imputation principle of contract, it can be applies to not only sales contract, but also other onerous contracts, because it bases on the consideration of the characteristics of onerous contract and protection of consumers , it can exempt troubles to adduce evidence of the other side of contract, and promote the effective implementation of the transaction. The principle of strict liability is the embodiment

[188]Jinliu LIU, *the travel Contract*, Law Press, 2004, p.155.

[189]Articles 107: "a party of contract does not fulfill its obligations of the contract or is not in conformity with its obligations of the contract agreed upon, he should take the liabilities of breach of contract thorough continuing to carry out the contract, taking remedial measures or paying damages and so on" Article 117: "Unable to perform the contract due to force majeure, it is partly or all exempted from liabilities according to the impact of force majeure, but except that the law has different provisions."

[190]Ying XING, *the responsibility of the breach of contract*, China legal publishing house 1999, p.22.

of the principle of equity which is the basic principles of the Civil Code on the creditor, because if taking the principle of fault liability, when the debtor breaks a contract without default, he do not need to take liability, the result is that the creditor, that is victims, should bear the burden of loss, the creditors has no subjective fault, so it is clearly unfair for the creditors. [191]

2.23. *The content of Warranty Liability against defects.*

According to the relevant provisions on liability for breach of contract of china and other countries, I believe that in the contract of package tour, the warranty liabilities of the travel organizer include:

A. Improvement of defects.

For the improvement of defective, section 2, Article 651 c of *Germany Civil Code* states: "... ... travelers can ask the travel organizer to correct defects, when the expenditure for correction is impropriate, the travel organizer can refuse to correct." Article 3: "The travel organizer does not correct the defects in an appropriate period of time, tourists can correct on his own and can require travel organizer to reimburse the necessary cost, if the travel organizer refuses to rectify or because of the special interests of tourists the defects should be corrected immediately, it does not need a specially limited period of time." Article 514 of *Taiwan Civil Law* stipulates that as long as tourism does not have the value or quality in according with the provisions of section 6 ,Article 514, the tourists can request the improvement for them ."in Article 107 of China Contract Law it is called "taking remedial measures ",so it can be reasoned out that when there are defects in the fulfillment of the travel organizers, travelers may request them to improve. for example, if the hotel for accommodation provided by the travel organizer does not meet the standards level agreed in the travel contract, travelers have the rights to require the travel organizer to change the hotel

[191] Chunxiu PEI, *the Theories on cases of the travel Law*, Hunan People's publishing House, February 2004, and p.85-86

meeting the agreed criteria; the arrangements of the travel organizer is not proper which makes the visiting impeded, travelers may required the travel organizer to provide an alternative plan for it. *the Germany Civil Code* also provides that a reasonable period of time the travel organizer does not take relief measures in response or there is no a limited period of time if tourists have the special interests, tourists can correct on their owns, the cost for correction is assumed by the travel organizer, but at the same time give the travel organizer the rights to refuse if the cost is over-high. This provision on the one side takes into account of the rights and interests of tourists, on the other side also consider the operating costs of the travel organizer. It gives sufficient consideration on the characteristics of temporality and timeliness of the travel contract. *Taiwan Civil La*w, however, does not provide the rights of the tourists to correct on their own or the rights of the travel organizers to refuse the over-high cost as the provisions of the Germany, it seems like a pity. [192]

B. the right to reduce the travel costs.

If the defects of Tourism contract can not be eliminated through the improvement, the tourists get the right to request the travel organizer to reduce travel costs. This is a common situation in travel contract. Article 651 d of *Germany Civil Code* provides: if there are defects in tourism during existing period of visiting, it should be reduced in travel costs in accordance with the standards of Article 472. Section 2, Article 514 of *Taiwan Civil Law* states: "The tourism business people does not improve or can not improve the defects, the tourists may request to reduce costs." the proportion of the reduction of travel cost is compared with the price of the travel costs without the defects. It does not need to be requested by the tourists, because it is the statutory warranty liability against defects. [193]There are no special provisions on the reduction of the cost in Chinese law, but in the legal practices of travel cases, there usually exist the phenomenon that the predetermined visiting spots decrease or the low-level of

[192] Xinhe LIN (Taiwan), *Comment on eight nominated leases additional to debt chapter of Civil Law*, in *Taiwan native Law Journal*, No. 9, April 2000,p. 14.

[193] GUO Lizhen (Taiwan), Present situation and development of Atypical lease - travel Contract, the Taiwan law Review, No. 27, Aug, 1997, p.42.

room and board, the judger sentences the travel organizer to assume the liability through the ways of refunding the price of the spot-tickets non carried out or the price difference between the price agreed and the price of the low-level on room and board.

C. Termination of the contract

Contract rescission is the situation that after the effective establishment of the contract, based on the statutory or agreed conditions or agreement of the two parties, rights and obligations of the contract disappear according to the meaning of one of the parties, including statutory rescission and agreed rescission.

The rescission of travel contract in this paper refers to the statutory rescission, that is, rescission of travel contract should meet the statutory conditions. Section 2 Article 651e of *Germany Civil Code* states: "because the statuary defects make the tourism obviously damaged, tourists need to send advanced notice of rescission to the travel organizer, but this notice must be sent through appropriate period in which the travel organizer still does not improve the defects.

Article 94 of China *Contract Law* states that:|(3) A party of contract delays implementation of the main debt, after exhortation in a reasonable period of time this party still does not fulfill; (4) a party delay performance of an obligation or other activities of breaches of contract which result in not achieving of the contract objects;

The other activities of breaches of contract include inappropriate fulfillment, That is, the defects of implementation of the contract objects. If the defects are not serious, they are usually remedied by the ways of reducing price, repairing or other means; only in the case of a serious defect can the contract is terminated.[194]The precondition of this principle applied in the travel contract is that the defects are sufficient serious, *the Germany Civil Law* says:" the statuary defects make the tourism obviously damaged," though the objects of the travel contract are travel services, the aim of tourism is spiritual enjoyment of tourists, so the level of the severity should be judged by the characteristics of the travel contract, for example, if the travelers can not see the maim visiting spots, the travelling loss its initial meaning, the tourists can

[194] Yuxing ZHANG, A brief talk on the exercised conditions of the contract rescission, The East Law Eyes, *http://www.dffy.com/faxuejieti/ms/200610/20061017202628.htm,17/10/2006.*

ask determine the travel contract, but at the same time giving the travel organizer a certain period of time is also necessary.

D. Compensation for loss

Article 651f of Germany civil law and section 2 article 514-7 of *Taiwan Civil Law* are both on Compensation for loss. It means if the defects are attributable to the travel organizer or his assistant people, the tourists may request compensation for damages in addition to the ways of the termination of the contract or reduction of the costs. Article 112 of China *Contract Law* stipulates: "The party of contract does not fulfill the contract or fulfill the contract not in conformity with the agreement, after having fulfilling their obligations or taking remedial measures, the other party still has the damages, he should pay for them." From this provision, we Can deduce that in our country there are two prerequisites for the travel operators' compensation for tourists' damages, one is that the travel organizer breaks of contract, regardless of whether the travel organizer has the fault; the other is that the travel organizer's default lead to the loss of tourists and this loss can not be remedied through other ways. But at the same time in *the General Principles of Civil Law* of and *Contract Law* ,they both provide the obligation of the creditor to take the necessary measures to prevent the expansion of the loss, otherwise, the debtor is therefore not assume compensation liability for damages because of breach of contract. [195]

2.24. *Excuses free from the Warranty liabilities against defects.*

[195] Article 114 of *General Principles of Civil Law* stats that one party is damaged because of breach of contract of the other party, he should take measures to prevent the expansion of the loss; if because of not take timely measures leas to expanding the loss, the debtor does not assume the compensation liabilities for the expansion of the loss." Article 119 of "Contract Law ":" after one party' breach of law, the creditor fails to take measures to prevent the expansion of loss, the creditor has the faults in the expansion of the loss , the debtor does not assume liabilities of breach of contract on the losses caused by the creditor' faults.

Excuses free from the liabilities refer to the provisions about conditions stipulated by the law or agreed by the parties that it does not need to assume liability for breach of contract, including the statutory cases of exemptions and the clauses of exemption agreed upon.

The statutory exemptions cases in china include force majeure and tourists' fault. Force majeure refers to the objective situation can not be foreseen, can not be avoided and can not be overcame. Article 107 of *General Principles of Civil Law* states: "because Force majeure causes the contract unable to be performed or the damages of others, it does not need to bear civil liability. Article 117, paragraph 1 OF "Contract Law ", states:" unable to perform the contract due to force majeure, according to the impact of force majeure, it is partly or all exempted from the liabilities. It mainly includes three situations: 1. natural disasters such as earthquakes, typhoons, etc.; 2.The government's actions, such as the promulgation of new laws and policies, the implementation of coercive measures, such as in martial law; 3. Social anomalies, such as war, strike, parade etc. The Travel operators can also exempt his liabilities through making the exemption clause agreed in the travel contract, but the laws have strict limits on it in *Contract Law* and *Consumer Protection Law* , that is, if the exemption clauses are in violation of the principles of fairness or good faith or the mandatory provisions of relevant department law, such exemption clauses do not have legally binding forces.

Because China lacks the sufficient norms on the travel contract, it induces the situation that in practice the travel organizers cheat the tourists through giving false information in the travel contract, letting them sign the travel contract under the situation of misled. The so-called Cheating means one of the parties deliberately tells another party the false information or deliberately conceals the true situation in order to make the other party give wrong expression of his meaning. In travel contract, the advertising and other activities of the travel agencies may affect the travel preferences of tourists, so further affecting their decision-making; the travel operators glorify the destination of visiting in the advertising, at the same time emphasis the excellent service, all of them making the potential tourists have a sense of identity and impel

them to make their travel decision.[196] *Consumer Protection Law* and *Management Regulations of Travel Agency* both stipulate that the travel operators should not mislead consumers through the cheating propaganda.[197]

When the travel organizer mislead the tourists to sign the travel contract due to the false propaganda, whether it is the fraud should be judged by its constitutive requirements, it require the deliberately subjective intention ,that is, the travel organizers who are full aware of not having a certain conditions, but still promise to tourists and implement objectively the cheating activities; the tourists come into the false and finally sign the travel contract with the travel organizers due to the cheating activities of the travel organizers, such as deliberately tells another party the false information or deliberately conceals the true situation, the objective of fraud, because fraud willfully false statement or concealing the fact that the real situation. If the fraud causes that the travel contract can not be performed or can not be properly performed, according to the relative laws of China, the tourists can cancel the travel contract and require the travel organizer pay two times of the price of the travel conduct. [198]Such as in a particular case, a travel agent signed a travel contract with the tourist Mr. Zhang for visiting a place, the agreement for hotel in the travel contract were that: during the period of the tourism, one night living in a four-star hotel and other three nights living in three-star hotel. But in the actual performance of the travel contract,

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[196]Chaoyang ZHANG, Fengxing XIANG, *the preliminary study of the impact of travel agency on behaviors of tourists*, in *Tourism Tribune*, Institute for Tourism Studies of the Beijing Union University, editorial board of Tourism Tribune in 2002, No. 3, p. 35.

[197]Article 19 of *Consumer Protection Act* stipulates:" operators should provide consumers with the real information about goods or services, it is forbidden to make cheating propaganda to misled consumes." Article 20 of Management *regulations of Travel agency* stipulates:" The travel agents should maintain legitimate rights and interests of Tourists and give truthful ,reliable information on travelling and services and can not make the wrong propaganda."

[198] Article 54 of *Contract Law* states: "one party lets the other party to sign the contract in the way of cheating when under the condition that the other party is contrary to his the true meaning, the contract is subject to be cancelled." article 49 of *Consumer Protection Act* provides that: "there are cheating activities in goods or services provided by the business operators, the business operators should pay the compensation of the damages in accordance with the requirements of consumers, the increased amount of compensation for consumers is one times of the price of the goods purchased by the consumers or the cost of services."

four-star hotel promised by the travel agent did not exist. Mr. Zhang one night lived in a hotel without star, one night stay in a two-star hotel, the other nights in three-star hotels. After the tourists returning to the starting places, he asked travel agents compensate for damages for the reason of cheating, under the condition of un-negotiated between two parties, Mr. Zhang complained to management department of the tourism for ask travel agents to return two times of travel cost.

Tourism Management Department received the complaint and immediately conducted an investigation and verified that in the region the highest level of the hotel was three-star hotels and there is no four-star hotel. Travel agency also acknowledged that it knew this situation in advance so finally only arranged the tourists to live in no-star hotel. Travel agency explained that at the beginning it promised the four-star hotel from the consideration of attracting the tourists to take part in tours to tourists; but one evening living in two-star hotel was caused by the breach of contract that the hotel of visiting place provisionally cancelled the reservation, the travel agency could only change the three-star hotel to two-star hotel. [199]

In this cases, there exists two defects, first is that the four-star hotel is changed to the hotel without star, the reason for it is the deliberate intention of travel agent, because the travel agent clearly know there is no four-star hotel in the visiting region, the promising for the four-star hotel only to attract the tourists, it is in accordance with all the conditions of fraud, so the management department judged the travel agent paid two times of the price of the four-star hotel to the tourists, but for the second defects ,

The changing to the two-star hotel was due to the violation the contract by the hotel, over the provenience of the travel agent, so the travel agent only paid the original price to the tourists.

2.3. *Judicial practice*

[199]Huiyue HUANG, *Practical Analysis on Dispute in the travel Contract,* China Tourism Press, May 2004,141 and 142.

The tour plan can not be achieved because the tour Guide changes the itinerary without authorization

One travel agent organized a dozen of tourists to travel in Beijing. In accordance with the travel plans, they visited the Great Wall in the next day of arriving in Beijing, but the tour guide under the condition of not consulting with the tourists, changed the trip of visiting the Great Wall without permission to the third day. On the night of the second day, a sudden heavy snow made the coach can not go to the Great Wall; the plan to visit the Great Wall was forced to be cancelled. After the tourists' returning, they request the travel agent compensate two times of the Great Wall tickets in accordance with the provisions.

Plaintiff believes that the causes of cancelling the plan to visiting the Great Wall is not caused by force majeure, but by breach of contract of travel agents. the provisions that "Travel agents maintains the right to adjust the itinerary under the premise of guaranteeing the trip un-decreased" is unfair and does not have the force of law, that is to say, such statements do not bind the travelers, the travel agent should be liable for it.

The travel agent said that the travel contract agreed between two sides has already stated between: "Travel agents maintains the right to adjust the itinerary under the premise of guaranteeing the trip un-decreased." In other words, travel agencies and tour guides have the right to adjust .Moreover; the abolition of plan to visit the Great Wall Tour is due to force majeure, not the fault of the travel agencies. Therefore, the travel agency agreed to refund the ticket price of the Great Wall, but refusing to compensate. So it leaded to dispute and litigation between the two sides.

The judge believed that through the trial hearing according the provisions of *Contract Law*, "force majeure" means "unforeseeable, unavoidable and insurmountable objective situation." On the surface, the direct cause of the cancellation of the plan to visit the Great Wall was due to the unexpected snow, it belongs to force majeure, but the reality is that as long as the tour guide performed the contract according to the original plan and did not arbitrarily change the itinerary, the

plan to visit the Great Wall can be completed before the arrival of the snow and it can avoid this disputes. So the plan to visiting the Great Wall was forced to cancel is because of man-made causes, changing the travel route without permission belonged to the breach of contract, travel agencies should assume this liability for it. that is ,it was assumed if the plan to visit the Great Wall was originally scheduled in the third day, the cancellation of travel plans was no doubt caused by force majeure and travel agencies only need be refund the attraction tickets and assumed no liability for the damages or if in the course of travel itineraries, in order to ,make the travelling more reasonable and convenient, after consultations between tour guide and tourists, the changing of the tour rout was agreed by all visitors, swapped the items of the second and third day in the original schedules, even if occurred the above abolition of the attractions, travel agencies only needed to refund attraction tickets and did not need to assume liability for compensation. Because in this case, the original contract was changed between the tour guides (travel agencies) and the tourists, it formed a new contractual relationship. For the provisions in the contract of travel signed by the two sides, “Travel agents maintains the right to adjust the itinerary under the premise of guaranteeing the trip un-decreased " was invalid because it is the standard terms ,in violation of the principles of the fairness and equipment. In accordance with the voluntary principle of the contract, in the process of the tourism, travel agencies and tourists both have the right to agree upon the rights and obligations of the two sides and on this basis to make changes. The key for changing of the travel contract was that it should be in accordance with legal procedures, gives fully respect for the views of both parties any party’ changing the itinerary without permission is a breach of contract.

In the travel contract, tourist consumers have a right to ask the travel operator to provide the travel services in accordance with the agreement of the tourist attractions, accommodation, transport arrangements, room and board, price, guide services etc. the travel operators changed the travel attractions and increased fees and charges without the consent of the consumer or did not provide attractions, accommodation, transport arrangements, price, total full time in accordance with the agreement ,the

travel consumers have the rights to terminate the contract and according to the actual situation asked refund partly or all the price, if it caused the damages, the travel consumers should also require the compensation for losses. According to "contract law", after the signing of the valid contract, two parties are bided by it, the non-performance, incomplete or improper fulfillment of the contract terms by any party without the just causes is the violation of the contract, one party had the right to request the other party who violated the contract to pay for the damages.

To sum up, the statement of travel agency did not work because it undermined the legitimate rights and interests of tourists, the changing of the travel itineraries was breach of contract, and the travel agency should assume the warranty liability against the defects.[200]

3. *The liability of the travel organizer for the travel assistants.*

3.1. *The liability of the travel organizer for the travel assistants in the package-tour contract.*

The characteristics of the Package-tour products are that the travel organizer give one overall travel product to the tourists in a prices, it embodies a principle of integrity. the overall travel product is composed of many different travel services, such as hotel accommodation, hotel dining, travelling transportation etc. they are often not provided by the travel organizer in person but given by the third peoples, if these different travel services caused the travel organizer's the breach of travel contract. Then to whom the tourists can ask compensation or whether the travel organizer should take liability for the third people who are directly related to the maintenance of the rights and interests of tourists and staying a controversy focus of doctrine in many States. On the one hand, it allows the travel package-tour operators

[200]Liyong Li, Wenjian Shi, *The judger say the case - the case on disputes of living consuming,* China Economic Publishing House, 1, May 2009,p.99-102.

not assume the liabilities with the reason that the shortcomings of the package-tour travel are not caused by them but by the third people who provide the services of the travel contract, on the other hand it creates obstacles for the tourists in their own names to independently raise a direct and effective lawsuit in respect of the third people.[201]

On the rising stages of the Package tour , because of lacking the relevant laws and regulations on package-tour contract , when there were defects in the travel organizer' performance of the package-tour contract because of the travel assistant people, the travel organizers often took the reason that they were only the middleman and agents of the travel services to waive their liabilities, but because there was no direct travel contractual relationship between tourists and tourism assistant person with the result that many tourists could not gain their appropriate compensation.

This issue was taken into account of in the establishing of Brussels International Convention on the travel contract and it first creatively provided the organization obligations of package tour organizers for the entire travel, that is, Article 15 of *the Convention* provides that the travel organizers entrust the third people to provide transport, accommodation or other travel or the other service related with the achievement of the travelling or short-term staying, they should take the liabilities for the damages caused by partly or overall un-fulfillment of the third people. At the same time it provided that if the travel organizers can prove that they have done the obligations to select the travel assistant peoples as a diligent travel organizer, they can waive the liability, it takes the principle of fault liability as the standard to judge the liability of travel organizer for the travel assistant people.

Later, the organization liability of the travel organizers was stipulated in *the German Civil Code* amended in 1979, it expressly prohibited the intermediate terms of the travel organizers, clearly stating the travel organizer should take liability of defects for the travelers no matter whether the defects ware caused by the travel organizer or by the travel assistant people and not taking the faults of the travel

[201] DAVID GRANT & STEPHEN MASON, *Holiday Law*, Sweet & Maxwell Limited, 100 Avenue Road, Swiss Cottage London NW3 3PF, p6.

organizers as the premise of their liabilities. For example, Article 278 of *the German Civil Code* stipulates that intention and negligence of the performance assistant people are regarded as his own intention and negligence of the debtor.[202]In other words, the liability of the travel assistant people can be taken as their own liability of the travel organizers, "since the employers use the assistant people for the purpose of expanding the scope of its business activities, that is, the division of labor for interests of themselves, then they should bear the risk arising it."[203]Article 224 of *Taiwan Civil Code* amended stipulates: "if the users or agents of the debtor have the intention or negligence in the performance and the debtors should bear the same liability as their own intention or negligence." it can be seen that the imputation principle of this liability is the principle of fault liability, in provisions of the travel contract chapter ,the promise of the organization obligation of the travel organizer for the assistant people is the travel organizer has the intention or negligence.

3.2. *Relevant legislation and the doctrine in China*

For lacking the related law and legislation on tourism, there are intense disputes on which kind of liabilities that the travel organizer should bear for the travel assistant people, they are mainly reflected in the two views: some scholars believe that in the contract of package tour, the travel organizer choose the assistant people to provide the services for the travel activities of tourists ,it is called "debt assumption", that is, compared with the creditors, "debt assumption" is a "in-house contract" between the third people and the debtor, it has nothing with the creditor and does not need the creditor's agreement. this principle applied in the travel contract embodies that the travel organizers select the travel assistant people to provide the service for achieve the travel contract, they are the organizer and the assistant people who sign

[202]Zhejiang WANG, *Theory and Case Study of the Civil Code* (6), China University of Political Science Press 1997, p. 64-66.

[203] Robert • Horn, Hein • Coats, Hans • G • les(Germany), *Introduction to Germany Civil law and Germany Commercial Law*, Chinese translation edition, translated by Chu Jian, China Encyclopedia Press, 1996, p. 124.

the contract about the provision of his travel services, tourists have no rights on the selection of the assistant people and no control on the services of the assistant people, there is no contractual relationship between them. The performances of services are according to the contract between the travel organizer and the assistant people, so the travel organizers should be directly responsible to the tourists for the breach of the contract caused by the travel assistant people. If the travel services do not have the value or quality agreed, the travel organizer should assume the same liabilities as liabilities himself. There are similar views in our legislation and legal practices.[204]

And other scholars believe that the travel contract is a kind of altruistic contract, that is, it is agreed by the parties of the contract that one party performs the payment of proceeds to the third people, the third people gains the rights to require directly for the payment of proceeds. In altruism Contract, the tourists are in fact in the status of the beneficiaries, when the third person does not perform or improperly perform, tourists can directly exercise their rights to request.[205]If taking the travel contract as the altruistic contract, then for the tourists, the travel organizer con the assistant people together take the joint liabilities for the travel contract, it is more conducive to the protection of the rights and interests of tourists. If regarding the tourists as the beneficiaries of altruistic contracts, the tourists can directly have the rights of requirement for the providers of prostrations, such as hotels, transportation companies etc.

The author believes that the third person who provides the concrete payment of proceeds involved in the travel, the legal nature of him is the assistant people of the travel agent to fulfill the travel contract. On the one hand, from the characteristics of the travel contract, the payment of proceeds in the tourism contract has the characteristic of the overall payment of proceeds. It Needs the aids of tourism hotels, transporting, attractions and other aspects in the course of the travelling, all of aids

[204]Chenger LIN, *Theories On the legal relationship in the travel contract*, in Yongqin SU, *Commemorating Papers for Review and Prospect about seventies years of Civil law,(*1) China University of Political Science and Law Press, 2002, p. 334.

[205] Senmiao SUN, Studies on the Tourism Contract, in Law Journal of Soochow University,(1),11 volumes 1998, p. 8.

should be regarded as the touristic payment of proceeds and all of the third people should be the persons who assist the travel agents to complete the task of tourism, they have the relations of the joint venture or contractual commission or other kinds of contractual relationship with travel agents. For example, when relationship between travel agents and transport companies is the relationship of trust contract, the behavior of transport enterprises is representative of travel agencies, in this cases there is no direct contractual relationship between travelers and transportation companies, so the third people can not be regarded as the debtor of the creditor of the tourism, namely travelers. It is based on the consideration of the interest balance between the parties to let Package tour organizer assumes the same liabilities as the liabilities of his own intention or negligence for the activities of the provides, employer or agent.[206]

On the other hand, from the point of the relativity of the contract, the third person should be the assistant people for performance. The relativity of the contract requires the rights and obligations of the contract can only be given to the parties or bidden on the parties, the contract can only constrain the parties of the contract, only the parties of the contract can ask compulsory execution of the contract. Article 65 of China Contract Law stipulates: "The parties have agreed that the third person perform their obligations to creditors, the third person does not performance of debt or performs the obligation inconsistent with the agreement, and the debtor should bear the liability for breach of contract to creditors." Article 121 of Contract Law states: one party's breach of contract is caused by the third people; he should bear the liability of breach of contract to each other. The dispute between the party and the third people should be solved in accordance with the law or in accordance with the solution agreed." It can be seen that in China the treatment for contract whose payment is provided by the third people is to require one party of the contract to take liabilities. This provision in fact recognizes that the travel agency person should be responsible for the fulfillment of the assistant people. The signing of the contract travel is between travel agencies and tourists, then the parties of the travel contract should be the travel organizer and tourist, no other people .the assumption of the

[206]Jinliu LIU, *the travel Contract*, law press, Jan 2004, p.192.

liabilities is also naturally occurs in the contract subjects. Article 37of Management Regulations of the travel agency states: "the travel agents who accept the commission cause damages to legitimate rights and interests of tourists, travel agencies who give the commission should be responsible for it. After The travel agent giving the commission having made compensation, it can pursue the recovery from the travel agents receiving commission. If damages to legitimate rights and interests of tourists are caused by negligence or intention of the travel agencies receiving commission, the travel agency should assume joint liabilities." The regulations make clear that the travel agency is responsible for the activities of their assistant people and in order to better protect the interests and rights of tourists, it stipulates when the assistant people has the faults for the damages, he should be also responsible for the damages with the travel agents which may let the assistant people more work-conserving.

Furthermore, it is in favor of saving manpower, material and financial resources in the procession of the tourists' request for damages. Because once the disputes of traveling occur, the first one the tourists can think of is the travel agency and just the travel agency can give the most positive and rapid compensation for the damage of tourists. In practice, generally speaking, the travel assistant people such as hotels, restaurants, transportation companies do not known the entire travel contract because they only sign the contract with the travel agency for one or several services, at the same time, tourists are unfamiliar with the contract signed between the travel agency and the assistant people. for example, if a person travels abroad, the national travel agency entrust partly services to the foreign travel agency, disputes comes out between the tourists and the foreign travel agency for its services, in this cases, it is not practical and reasonable to ask the tourists to go to foreign counties and overcome language barriers to seek compensation of travel .

The travel Regulations of Shanghai implemented in March 1, 2004 stipulates the obligations of the travel agency to pay the compensation first. [207]It clearly

[207] Article 39: "the travel contract can not be fulfilled or can not be overall fulfilled due to the reasons of other travel operators and it makes the damages of the tourists, the tourists have the right to

provides no matter whether the travel assistant people have the faults in the un-fulfillment of the travel contract due to their activities, the travel agency should first take the liabilities of compensation. Its purpose is to avoid the situation in the practice that the tourists can not obtain the compensation in time because the travel agency and the assistant people mutually shift off their liabilities. The obligation of the travel agency to pay the compensation first is neither a risk nor a burden, but a sharp way to develop new markets and creates performance. it also gives the reference meaning to the legislation of the tourism.[208]

3.3. *The judicial practice in China.*

Case 1: August 2002, Li Durun, the son of a Korean citizen, Mr. Li, travelled in the delegation organized by zhongbao International Travel agency to Guilin, Guangxi. There occurred the traffic accidents in the way of travelling; resulting in traumatic brain of Li Durun, after the emergency treatment in a local hospital, there was no improvement in the disease condition. Mr. Lee hired a helicopter to take Li Durun to South Korea for treatment, but because his injuries was too serious and then died. Mr. Li appealed to the court and requested the zhongBao International Travel agency, the driver Feng and driver Chen making troubles jointly compensated for the damages, including medical expenses, funeral expenses, fee for transfers of the hospitals, Li Durun's loss of income, the spiritual damages, a total loss of 1,838,000 Yuan; the zhongBao International Travel agency refunded the tour prices of 17,500 Yuan and bear litigation costs.

After the hearing and investigation, the court believed that the travel agency should provide the services to tourists in line with the need to effectively guarantee

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request travel agents to compensate for the damages. after his compensation, the travel agency has the right to pursue the liabilities of breach of the contract from the travel operators who let the contract unable to perform or unable to completely perform, "" the tourists buy the goods in the travelling shop agreed in the written contract, if the travelling shops dope in commodities, make adulteration, fudge up ,make inferior as superior, take the substandard products as qualified products or sell invalid or deteriorate goods, the tourists may ask the travel agents for compensation; after the compensation of the travel agency, it has the right to pursue the liabilities of breach of contract to sellers of the goods.

[208] Simin LIU, Please walk well, the obligations of the travel agency to pay the compensation first of the Tourism, in Journal of Chinese consumers, August 2004.p.23.

the physical security of tourists and the security of the property. When Li Durun participated in the touristic process of visiting Guilin, Guangxi organized by zhongbao international travel agency ,because of the driver driving the bus in the condition of breach of the regulation, it resulted in the head of Li deeply impacted and the death of Li Durun from brain injury. Although the perpetrators of traffic accidents was not the driver of the zhongBao International Travel agency International Travel agency, but the Guilin Meijing travel agency which was the work unit of the driver was as the travel assistant of the Zhongbao international travel agency, all its activities were to fulfill the obligation of the zhongBao International Travel agency. Thus, the zhongbao International Travel agency should take the obligation to guarantee the physical security of tourists and the security of the property. So the zhongBao International Travel agency should assume corresponding civil liabilities of compensation for medical expenses, transportation expenses, funeral expenses and mental damages.

On the expenditure of transfers of the hospitals for therapy in domestic Korean, because the hospital Chinese suggested that the Li Durun was in a critical condition that the injured person should not be moved and transferred to other places and the hospital had sufficient conditions for the treatment, therefore, the expenditure of transfers of the hospitals for therapy was not necessary. At the same time because Li duRun was a student without a job, so the Court did not support the request of Mr. Li for asking the zhongbao International Travel agency to pay the Li Durun's loss of work.

In 2005, the Beijing First Intermediate People's court made the sentence for disputes caused by the travel contract: zhongbao International Travel agency refunded the travel costs of 1875 Yuan paid by the Li Durun, paid □ 14,910,000 or the equivalent amount in RMB and a total of 234,000 Yuan for transportation costs and the spiritual damages. [209]

In this case, the travel contract singed by Korean Li Durun and zhongBao

[209]Fubin YANG, Tianxing WANG (editor-in-chief), *Legal Case on Travel* , China Tourism Press, August 2006, p.166-167.

International Travel agency has the nature of a package tour contract and the Zhongbao International Travel agency should assume the statutory obligation to guarantee the physical security of tourists and the security of the property in the way of the travelling as the package tour organizer, this travel accident is entirely due to The faults of driver Feng and driver Chen, though the driver Feng and driver Chen are not the staff of the zhongbao international travel agencies, but the court finds that driver Feng and driver Chen are the staff of Guilin Meijing Travel agency, their faults in the work are viewed as the faults of the Meijing travel agency .according to the provisions of article 65 of contract law:" The parties have agreed that the third person perform their obligations to creditors, the third person does not performance of debt or performs the obligation inconsistent with the agreement, and the debtor should bear the liability for breach of contract to creditors." the Meijing travel agency as the assistant people of the zhongbao International Travel agency, the zhongbao International Travel agency should take the liabilities of its assistant people as its own liabilities. On the one hand, the zhongbao international travel agency does not fulfill well its obligations of being a good manager, with enough caution in the selection of its travel assistant people who has the ability to protect the safety of tourists. At the same time, according to the provisions of article 121, one party's breach of contract is caused by the third people; he should bear the liability of breach of contract to each other. The dispute between the party and the third people should be solved in accordance with the law or in accordance with the solution agreed." After the zhongbao International Travel agency has taken the liabilities of breach of contract to the tourists, it can recover the compensation to the Guilin Meijing travel agency in accordance with the relevant agreements between them.

This case also involves the question that how can the tourist in package tour contract protect the rights of themselves when there is a concurrence between the liability for breach of contract and the liability of infringement, because in this case the driver Feng and driver Chen give a direct violation of the personal rights and the property rights, but there is no direct contractual relationship between them, the tourists can only ask them to compensate in the reason of infringement liability, at

the same time there is a direct contractual relationship between tourists and the zhongbao International Travel agency, but it does not violates the personal rights and the property rights, so the tourists may also only require the International Travel agency to take the liability of breach of contract in accordance with the travel contract. article 122 of general principles of civil law China stipulates: "when one party of the contract is damaged by the breach of contract of the other party, the injured party has the rights to select one way to require the other party to assume the liability of breach of contract according to the contract law or the liability of infringement according to the requirement of other laws." that is to say, tourists can only choose one of them to protect their own rights, if choosing one, then another right of request is attributable to be eliminated . That the Tourists choose which claims to protect their interests is based on the different situations of the cases. Because the imputation principles of the liability are different for liability of breach of contract and the liability of infringement, the imputation principles of liability of breach of contract is the principle of no-fault liability, as long as one the tourists can prove that the other party of contract breaches the contract, he can request the other party to take the liability of breach of contract. But the imputation principles of the liability of infringement is the principles of fault liability ,it need the tourists give the proof to prove that the travel agency has the faults in the infringement and sometimes it is very difficult for the tourists; but at the same time in accordance with the provisions of existing laws in our country, the liability of breach of contract does not include personal injury and compensation for the spiritual damages they can only be required in liability of infringement. In this case, although there is a contractual relation between the tourists and travel agencies, but the tourists still select the rights of request of infringement from the perspective of the better protection of the rights and interests of themselves.

Case 2: Hotel in violation of the commitments, travel agencies responsible for it.

In July 15, 2006, Mr. Liu of city H and his wife with their son participated in the five days visiting along seaside during the summer organized by M travel agency of city H, According to the content of the activities provided by travel agency, the

tourists would visit three city coastal along seaside, city P, City Y and City W. tourists comparably satisfied the arrangements of travel agencies in city P and city Y. However, during the period in the city M, the situation deteriorated sharply. First of all, the two-star hotel scheduled by the travel agency of city M has been transferred to the tourists of other travel agency by the hotel without authorization. In order to solve the accommodation of tourists, M travel agency contacted in emergency with a self-called the equivalent of a two-star hotel in the outskirts which let the entire travelling delay 2 hours, visitors did not enter in the room until 22:30.

The family of Liu has been arranged in a standard room added with a children's bed. After entering in the room, the family found that the water of bathroom shower was not hot and it could not take a shower, the air-conditioning was old and stale, it sent a lot of noise, because it was in the summer when the weather was very hot, if not opening the window and not using the air-conditioning, the room would be very hot; but if opening the windows, there was the harassment of mosquito, these circumstances made the family difficult to sleep. So Mr.Liu asked the hotel to resolve this question or change room for them, the hotel said that due to the later entrance of the tourists , the hot water has been used up by the tourists who came in the hotel early and all the rooms have been lived ,so it could not change the room for them. It made the entire family sleep badly. The next day they did not have a good visiting. Three days later, Mr.Liu complained to the management department of tourism for the compensation due to the reason that the M travel agency did not well arrange the hotel service for them.[210]

In this case, though the activity of the hotel, assistant people the M travel agency, can not be seen by the M travel agency and the M travel agency has no faults for it, but because the hotel is selected by the travel agency, the tourists have no controlling on the hotel, so the travel agency should take the liability of breach of the travel contract caused by the impropriate fulfillment of the hotel.

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[210] Zhi LIANG, Hong LI, Hongfei LIU, *the selection and analysis of the travel complaints and the accidental cases of travel, china* tourism education press, Jan, 2009, p.120-122.

So the related management department of H City believes that the travel agency breaches the contract and it should refund the different prices of the rooms and give the compensation of 20 percents of the entire travel price to Mr. Liu.

4. *The liability of the compensation for moral damage.*

4.1. *The breach of contract and compensation for moral damage*.

With regard to the provisions of non-property damage it originated in the enactment of *the German Civil Code* in 1900, in section 1,Article253,847, 130 1of the German Civil Code, it was called as the "non-property damage", Article 1382 of *the French Civil Code* only says it as damage(damage), Article 28 of *the Swiss Civil Code* uses the concept of "solatium" (Genugtung), article 710 of *Japan Civil Code* adopts "the damages out of property damage ",China refers it as the "moral damage." Although different countries have divers names for non-property damage me, but it basically refers to a kind of intangible property, out of damages for the obligation of property, it is physiological, psychological and spiritual pain (such as anxiety, despairing , frustration, sadness, lack of interests), which also covers damage to the spiritual interests and other non-property damage (such as the compensation of non-property damages as a result of infringing the personal interests and the rights of intellectual property etc.). [211]

Taiwan scholars Mr. Zeng Shixiong believe that non-property damage and moral damage is basically the same concept, non-property damage explained in the narrow way, "non-property damage", "solatium" " the damage of spirit " in judgments or doctrines " it can rarely be seen a difference of them. " [212]Therefore, this article in accordance with China's doctorial and judicial practice calls non-property damage

[211] Liming WANG, *Research on Civil and Commercial Law - a number of issues on the compensation for the moral damages* (4), Law Press, china, Dec.2001, p. 741.

[212] Shixiong ZENG (Taiwan), *Theory on the compensation of damages*, the Chinese University of Politics and Law Press, 2001, p. 293.

as the damage of the spirit; takes the non-property damage as the moral damages, it means that the loss of the spiritual interests is up to a certain extent ,such as in the mind, in the physiology, in the mental and so on. At present, many countries in the legislation strictly limits the scope of the compensation for spiritual damages, it is strictly limited to the proceedings of infringement, opposing the requirement of compensation for spiritual damages through the proceedings of breach of contract, The main reasons for their objections is that it violates the principles of equal value repayment, predictability of the interests and the exceeding expansion of the discretionary power of the judgers.

The States of common law system initially established the general principles that the spiritual damages could not be applied in the proceedings of contract. “Article 341 of *the First Restatement of Contract Law* of The United States in 1933 stipulated: "in The acts of breach of contract, the compensation of the spiritual damages will not be supported, unless the breach of contract is extremely irresponsible or irrespective of the consequences and causes the bodily harm, the defendant has reason to foresee that this action will result in the spiritual damages in addition to the accident when he signs the contract. “It strictly limited the spiritual damages in the breach of contract only when it was caused by the personal injury. the English courts established the principles of the compensation of the spiritual damages could not be asked in the proceeding of breach of contract through a well-known case, the Addis v. Gramophone Co. Ltd. cases, the reason is that non-property damage (non-pecuniary loss) can not be reasonably foreseen when the parties sign the contract.

The traditional theory in the countries of *the Civil Law* also attribute the compensation of the spiritual damages to the scope of infringement law and it can not be extended to the scope of liabilities of breach of contract. Article 253 of *the German Civil Code* in 1900 has raised the provisions with regard to “non-property damage”: "victims whose damages are non-property damages can request the monetary compensation only limited to cases having been stipulated by law.” it makes a very

narrow scope in which the victims can require the compensation of spiritual damages in the proceeding of breach of contract. [213]

4.2. *The breakthrough of the compensation for mental damages in the package tour contract.*

With the development of society, the spiritual needs of people is paid by increasing emphasis, but in the field of contract law, " the primary purpose of the compensation for damages in breach of contract is to compensate the plaintiff, rather than to punish the defendant, the so-called compensation is for property damage (pecuniary loss). [214]

But in some special types of contract, especially the main purpose of contract is for the spiritual enjoyment. It frequently occurs that although the spiritual enjoyment has been injured, it is unable to obtain compensation for the spiritual enjoyment which has caused controversy among peoples, in such circumstances, the United Kingdom in cases of Jarvis v. Swan's Tour Ltd firstly constructed non-property damage could be required in the proceeding of breach of contract.[215]judger Lord Denning believed that in the, vacation contract or other contract for the purpose of entertainment and enjoyment of leisure, the parties could be given compensation for mental pain through a contract, just as the compensation for non-property damages could be requested for spiritual shocks in infringements, the breach of contract caused the disappointment, hardship, distress and frustration of the other party, as a result the victim could get compensation of non-property damage. Later in 1987, Judger Bingham put forward

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[213] the legal provisions on the request for non-property damage: section 1, article 847 on the infringement of the body or the health as well as the deprivation of physical liberty and other cases; section 2 on criminals violating morality unlawful acts on women or using fraud, threats or abusing affiliation to lure women to promise cohabitation out of marriage . Article 1300:" the woman's party with good conduct unbinds marriage relation with other party who cohabitates with other woman in accordance with the elements of articles 1298 or 1299 of the Civil Code of , the woman's party can also request the considerable monetary compensation for the causes of the non-property damages."

[214] G. H. Treitel, *The law of Contract*, 9th.ed, London, Sweet & Maxwell (1995), p845.

[215] Zejian Wang, *Theories of Civil law and studies on cases(7*), China University of Political Science and Law Press, 1998, p.144.

the standard of the "main objective" of contract as the judgment, saying that "the party in breach does not need to take the liability for any frustration, defeat, anxiety, pain, upset, nervous or angry of the innocent party of the contract caused by the breach of the contract. But if the main purpose of the contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, when the purpose of the contract is not reached or when the effect is opposite, the party of breaching the contract should bear the liability of compensation for this damages, As for situation belong to the typical exceptions, because of the breach of contract, the other party of the contract suffer from the physical discomfort or inconvenience, it should been judged that the delinquent party take the liability of compensation for the damage. ”

These principles are repeatedly cited as a basis for deciding a case in subsequent cases that the main purpose of the contract is the spiritual enjoyment. From these cases, it can be seen that it takes no compensation for the spiritual damages in breach of contract as the principle, but at the same time with the exception of giving the compensation for the spiritual damages in recent years among which appears the appropriate cases: "The purpose of the contract is to provide the enjoyment of peace and happiness" and” the parties could be given the spiritual compensation for the suffering through the holiday contract.”[216]In this kind of “the contract of the purpose”, expected interests are in fact the mental state (non-property status) of the non-defaulting party after the reality of this kind of contract. The travel contract is a typical contract of purpose. The tourists pay the price of travelling for the purpose of the achievement of the physical and mental pleasure through tourism .so the loss of tourism caused by breach of contract is not the paid price of the travelling but the damage on the purpose of the spiritual enjoyment achieved after the fulfillment of the travel contract.

Article 353 of *the Second Restatement of Contract Law (1981)* which has the guiding significance on the judging of cases in the United States is no longer as "the first restatement of contract law" unless special circumstances the moral damage can

[216] Xiao CHENG, *Breach of contract and non-property damages*, in Huixing LIANG (editor-in-chief), Series of Civil and Commercial Law,(2002) volume 25, Jinqiao Heritage Publishing Limited(Hong Kong), p. 73-85.

not be compensated caused by breach of contract but stipulates: "The compensation for the spiritual damages will be supported if the personal injuries caused by the breach of contract or the activities of breach of contract make the serious moral damages become a particularly possible result. The usual examples are the contract of the transportation of passengers, contract of receiving guests of hotel... ... in violation of these contracts may result in the special spiritual damage. Under the circumstances of in violation of other types of contract, it will occur more serious spiritual damage, such as the suddenly penniless or bankrupt of the victim as a result of breach of contract, but if the spiritual damages is a particular possibility of risk in this types of contracts, the request for compensation of the spiritual damages is not supported. "[217]

Although *the Second Restatement of Contract Law* still limit the compensation for the spiritual damages in a few types of contracts, but it has demonstrated that the judging standards for the compensation for the spiritual damages are no longer simply the classification of the contract, but also take a number of factors, such as the nature, content and the consequences of the contract, as the criteria for judging principles, leaving the space for the judging of later similar cases. In the subsequent case, the judgers have creatively expanded this spirit, such as the Colorado state court in 1984 in the cases of Adams v. Frontier Airlines Fed. Credit Union establish a major principle: the spiritual damages of the result of breach of contract can not be compensated, but there are two exceptions: (1) Depending the types of contracts, that is, contracts have the individuals or the specific nature that the spiritual damages have been foreseen when the contracts are signed; (2) seeing the act the party breaching the contract, that is, the party is deliberate and extremely irresponsible. Pecuniary loss as the result of a breach of contract almost invariably causes some form and degree of mental distress."[218]

After World War II, Germany courts have tried to create the scope of application of general personality through the way of commercializing the

[217] Charles L. Knapp & Nathen M. Crystal, *Problems in Contract Law* [M], New York: Litt le, Brown and Company, (1998) p.978.

[218] Adams v. Frontier Airlines Fed, *Credit Union*, 691 P.2d 352, 354 (Colo. App.), 1984.

non-property damage and analogize its application in the rights of reputation, the right to privacy and so on. The so-called " commercialization of non-property damage " refers to the interests purchased in the way of money in all transactions (for example the enjoyment of pleasure, conformability, convenience), based on the concept of transaction, the interests have the value of property and thus their damage from infringement should be the property damage, the victim can request monetary compensation in order to be reinstatement. [219]The travel contract is just this type of contract that the tourists pay the travel price in order to get the spiritual enjoyment through the fulfillment of tourism, the commercialization of the non-property damage undoubtedly let the request of compensation of non-property damages possible in the package tour contract .in this context, the Germany court carried out its attempting on this aspect in 1956 in the case of travelling on sea, the case as following: The plaintiff was scheduled with his wife to travel abroad by ship during the holiday for 18 days in March 27, 1953 from his residential location R, and in advance he had taken the suitcases carrying the clothing to the inspection of custom in March 23 the same year in his residential location, but because of the negligence of examiner A, in the procession of delivering the suitcase to R ,it was detained for verification because another customs official B mistakenly believed that there is the existence of flaws in the customs clearance procedures, only after being checked correct can the Customs and Excise Department continued to deliver the baggage, but these pieces of luggage did not reach the plaintiffs until April 7.so the plaintiffs claimed that due to the delayed arrival of the luggage, the plaintiff could not replace their clothing normally and required the defendant (the Customs)to compensate for the losses caused by it.[220]

The court of the second instance of this case held that, the defendant should be responsible for the delayed luggage, this delaying made the plaintiff and his wife

[219] Zejian WANG, *the monetary compensation for the time wasting and non-property damage*, in T*heories of civil law and Studies of Cases* (7), China University of Political Science Press, 1998, p. 138.

[220] BGH NJW1956, 1234, in Zejian WANG, *the monetary compensation for the time wasting and non-property damage,* in Theories of civil law and Studies of Cases (7), China University of Political Science Press, 1998, p.140.

could not change their clothes normally, the leisure of plaintiff gained through the travelling was hurt, this was a kind of property damage. Therefore the defendant should compensate the plaintiff for one hundred marks and his wife for 200 marks. The defendant appealed to the court of the third instance for the reason that the damages suffered by the plaintiff was property damage rather than the non-property damage, the Federal Court rejected the defendant's appeal. "Federal Court believes that the enjoyment originally gained in the sea travelling on the cost of 1800 marks was subjected to impaired and derived. It does not mean the values of non-property damages or the spiritual enjoyment are violated, but the existence of the property damage, because the enjoyment has been commercialized. In a word, if the payment should be paid by considerable property, thus it constitutes the property damage due to the deprivation of this enjoyment. [221]

On the basis of a series of cases in the judicial practice in which the courts made the breakthroughs for article 253 of Germany Civil Code about the compensation for the spiritual damages ,it particularly added the travel contract (Reisevertrag)in the part seven" work contract and the similar contracts" when *the Germany Civil Code* was amendment in 1979. The second section of article 651f provides " Tourism can not goes on or is obviously damaged, tourists can request appropriate monetary compensation for the meaningless passing of the vacation time ".Although until today there is still a controversy on that the breach of travel contract is property damage or non-property damage, but the emergence of this legal provisions, in fact, gives the legal basis to give the compensation of the spiritual damages in the travel contract in judicial practice and it is an important complement for the Article 253 of *the German Civil Code*.

The judicial system of Taiwan imitates the model of Germany. On the provisions of compensation for the spiritual damages, it adds section 1, Article 227 in the "Claims of effectiveness" of the Taiwan Civil Code, the addition of " the personal right of the creditor is injured by the debtor's un-performance of the debt, permitting

[221] Shixiong ZENG (Taiwan), *the principles of damage-compensation law,* China University of Political Science agency, October 2001, p.298.

to apply provisions of articles 193-195 and the 197, the debtor is responsible for the compensation of the spiritual damages." This refers only under the circumstances that the personal rights are injured can it require the compensation of spiritual damages which strictly limits the scope of compensation; but in Taiwan when it amends its the Civil Code in May 5, 2000for the addition of the "Tourism Contract" chapter, in which article 514 provides that: "due to the reasons of the travel business people, the tourism is not carried out in accordance with the agreement of the travel contract, passengers can request compensation in accordance with a considerable amount of money for the waste of his time, but the daily amount of compensation shall not exceeds the average daily amount of the total cost of the travelling received by the travel business people. "It can be said to be a special provision made for the temporary characteristics of the tourism contract. The meaningless passing of the travel time makes the travelling loss the value of the spiritual enjoyment and results in the suffering of the tourists lacking of the spiritual pleasure. General theories of Taiwan believe that the damage of wasting time is a kind of the spiritual damages. It Can be seen that in Taiwan the view that the compensation the spiritual damages caused by the violation of Tourism contract can be requested is obviously supported by the legal provisions.[222]

The non-property damages were not supported in the field of contract law in the early days of France. French Supreme Court in 1931 divided the limit of non-property damage, holding that the compensation of non-property damages can not be asked. However, the principles were confirmed by the cases from 1833 as the following: the applications of the provisions on the compensation of non-property damages are not different from these on compensation of property damages, the basic provisions of them is article 1382 which states that: "The actors causing the damages to other people as the result of their faults are responsible for the compensation, expressing great magnanimity for the compensation for moral damage in a large number of cases, no matter it is because of breach of contract or infringements, the

[222] Chenger LIN (Taiwan): *On the legal nature of the tourism contract, in the memorial*, in *Papers for Review and Prospect on seventies of the civil law* (1), Yuan Zhao Press 2000, p. 405.

compensation can be sued as long as it has the mental damages. One reason for this lies in the fact that in France the compensation of the spiritual damages in infringement can be freely brought up and there are a considerable numbers of cross-cutting between the liability of infringement and the liability of the breach of contract. [223]for example, the court of French recognized the compensation of the non-property damage as a result of the disappointment for the of the family group photo, as well as the cases of giving the compensation of the non-property damage for the immense spiritual grief of the death of the horse caused by the breach of contract. [224]there is another case that a valuable dog of Steel wool and shorten legs was killed by a wolf dog .the owner of dog of Steel wool and shorten legs was paid by 2000 francs as the compensation of the spiritual damages on the grounds that the victim had great feeling for it.[225]This shows that in the development of civil law of France, the legal provisions are flexibly used in the judicial practice on the compensation of the spiritual damages which makes the non-property damages in the breach of law possible.

The civil law of Japan makes the similar provisions article 710 as article 1382 of *French Civil Law*, although whether the compensation of spiritual damages can be requested in the breach of contract is not obviously stipulated, but we can see from its specific provisions that it does not distinguish breach of contract or infringement in the procession of putting forward the compensation of spiritual damages.[226]That is to say that, in Japanese civil law, there is no difference in the scopes of the compensation for the un-fulfillment and infringement, both including property and non-property damage.[227] In addition, article 9.501 of the principles of European contract law by Commission on European contract law in 1996 also expresses its

[223] Liming WANG, *Studies of Contract Law,* China People's University Press, 2001, p. 667.

[224] Xiao CHENG, *Breach of contract and non-property damage,* in Huixing LIANG (editor-in-chief), *Theories on Civil and Commercial Law, 2002*, volume 25, Jinqiao culture Publishing Ltd., 2002, p. 77.

[225] Qiyang SHI (Taiwan), t*he suggestions on the correction of the system of compensation for the spiritual damage With regard to the violations of personal rights*, in Yubo ZHENG (editor-in-chief), *the selected papers on the general principles of civil code*, p.394.

[226] Article 710 of Japanese civil law provides that: "In addition to the circumstances of the infringement of physical freedom or rights of the reputation, in the case of the actors damaging the others' rights of property, if it causes the property damages, shall be compensated. That is, in Japan, China and France, the victims can require the compensation

[227] JIA Tengyiliang (Japan), *Illegal acts*, p. 48. quoted from Shixiong ZENG ,*Theories on the way of the compensation of modern damages,* 1996 San Min Book Co.,Ltd. p. 15.

supporting on the compensation of the non-material injuries as a result of breach of contract, it states: "for the damages caused by the non-performance of the other party which can not exempted from the liabilities in accordance with article 3.108 ,the victims have the right to obtain compensation, the compensation includes: 1. non-pecuniary loss (non-pecuniary loss) ... .

To sum up, no matter in countries of continental law system or common law system, for the compensation of the spiritual damages ,it has experienced a procession that at the first the compensation of the spiritual damages was wholly denied in the lawsuit of breach of contract and strictly limited it in the lawsuit of infringement ,later the compensation the spiritual damages can be requested in a limited kinds of contracts and up to today , whether in academic area or in judicial practice, both show a tendency of giving the expanding interpretation and application on the compensation of the spiritual damages in the breach of contract, blurring the boundaries between breach of contract and infringement, all of these different ways represent the integration of the theories of the breach of contract and infringement. [228]It indicates that from the start, it only pays attention economic benefits then gradually on the remedies of damages of the human's important emotional needs; it is a important progress in human society.

4.3. *The relevant legislation and the doctrine in china on the compensation of the spiritual damages*.

4.31. *The relevant provisions of existing legislation*

The relevant provisions on the compensation of the spiritual damages in our country are mainly in article 120 of *the General Principles of Civil Law People's*

[228] Annotation, Mental Anguish Damages in Service Contracts, 54 A, LR4th 901 (1987), from Douglas J. Whaley, Paying for the Agony, The Recovery of Emotional Distress Damages in Contract Actions, 26 Suffolk ULRev.941.

Republic of China enacted in 1986 ", it provides that when the citizen's rights of name, portrait, reputation, honor are infringed upon, the citizen have the rights to request stop infringement, restore the reputation, eliminate the impact, can ask the apology and compensation for damages. However, the scope of compensation of the damages are limited to only four kinds of violations of the personal rights which can be called very narrow, although this kind of "damages" in the academic is believed including the spiritual damage, but is generally believed that the premise for this compensation is that it is requested in the lawsuit of infringement.[229]Article 2 of the interpretation of a number of issues about the determining the responsibilities of the compensation of the spiritual damages in infringement announced by the Supreme People's Court In March 10, 2001 provides that :"because of the action of violation of the community, the public interest, public morality, others' privacy or other personal interests, the victims appeal the people's court to seek compensation for moral damage on the grounds of infringement, the people's court shall accept it in accordance with the law. "This is considered to make the scope of the compensation of the spiritual damage from the initial four kinds of personal rights to "other personal interests", such a broad concept, that is as long as there are violations of the personal interests recognized by the law, they can all be sued in the name of the compensation of moral damage. It significantly broaden the scope of the personal rights of article 120, outlining any non-talked issues on the protection of the personal interests, any personal interests which are not expressly provided in the law, as long as they need to be protected in accordance with the law can be summed up in this scope.[230]

At the same time article 4 of this interpretation also provides the right of request for the compensation of the spiritual damage of the special item' impairment:" a particularly symbolic commemorative items is permanently lost or destroyed due to the violations of rights, the owner of goods appeal to the people's court to seek compensation for moral damage in the name of infringement, the people's court shall accepted in accordance with the law, "which also is a major breakthrough for article 2,

[229]Jiafu WANG (editor-in-chief), *Claims of civil law,* law press (china) 1991,p. 247.
[230] Jinliu LIU, *Tourism Contract*, law press, January 2004, p. 217.

breaking the people's inherent concept that the compensation of spiritual damages the right person can only be brought up for the reason of the violation of the personal rights, including damages of the specific property in the reasons to request the moral damage, it is a great progress for the system of the compensation for the spiritual damages. But at the same time we should see that, although the scope for the compensation for the moral damage is gradually expanded, but they can only be brought up in the lawsuit of infringement, there is no regulations which stipulate the compensation of the spiritual damages can be requested in the lawsuit of breach of contract in China, it can be seen also the provisions of article 122 of *Contract Law*: if there is the spirit damage, it can only be brought up in the lawsuit of infringement to ask for compensation. In the lawsuit of breach of contract, it can only be requested the compensation for property damage.[231]It only permits the parties of the contract to choose one way to raise the lawsuit, according to this provision; the compensation of the spiritual damages can not be applied in the lawsuit of breach of contract.[232]

It can be seen that in our existing laws, the scope for the compensation for moral damage was limited to the responsibilities of infringement; there is no explicitly legal support for the request of the compensation of the spirit damages.

4.32. *The relevant legal doctrine*

So, whether it can be said that because there is no legal provisions providing the compensation of the spiritual damages in the lawsuit of breach of contract ,the spiritual damages do not exist in the breach of contract? From the relevant doctrine and judicial practice of China, the answer is no. The traditional view of the *Civil Law* that the spiritual damages can be compensated as the result of infringement is on the

[231] Article 122 of *Contract Law*,"when due to the breach of a party, the property and personal rights of the other party of the contract are injured, the victim has the rights to choose the way of asking the delinquent party to assume the responsibility of the breach of law in accordance with this law or assume the responsibility of infringement in accordance with other legal requirements ".

[232] Jiachen LIU, *the understanding and application of the new system of Contract Law*, People's Court Press 1999, p. 208.

basis of a strict distinction between the liability for breach of contract and the liability for infringement, that is, the civil liability of breach of contract is purely a liability of property which does not involve the liability of the non-property, the liability of infringement includes both the liability of the property and liability of non-property. "[233]However, It should be noted that the scope of the rights to request compensation for moral damage have been from only for the reason of the injured material personal rights such as the human rights to also having expanded its scope to the injured spiritual personal rights in a lot of countries. The strengthening protection on the spiritual interests is better embodied in the provision and cases that give the compensation for the spiritual damages in violation of some kinds of specific contracts. The travel contract is just this typical kind of contract whose purpose is for the spiritual interests. In the package tour contract, the tourists pay for the cost of travel and tourism business people provide the tourist services, all of these are for letting the tourists obtain the spiritual enjoyment and pleasure, this is undeniable. Therefore, the Chinese scholars believe that the exchanging of money and materials is only the means to achieve such spiritual consumption and if travel business people do not perform or do not fully perform in according with the travel contracts, it will definitely lead to the damages of tourists' mental health.[234]

It is entirely reasonable and necessary to the contractual relief for the spirit damages result in the violation of the travel contract. Article 113 of *Contract Law* provides that the liability for breach of contract must follow the principle of the predictability of damage. If this kind of damage could not have been foreseen in the formation of contracts, it can not be paid.[235] But the "foresee-ability" of the loss

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[233] Zhenshan YANG (editor-in-chief), *Civil Law Courses of china*, the Chinese University of Politics and Law Press 1995,p. 608

[234] Honglei YU, *Discusses on the dealing of the disputes in the travel contract cases,* in "the application of the law", National Judges college, Mar. 2001, p. 37.

[235] Article 113 of *Contract Law* states: "the compensation for the damages of the breach of contract assumed by The negative side of the contract should be equivalent to the damage caused by the breach of contract for breach of contract should, including the interests acquired after the fulfillment of the contract, but it can not exceed the amount of damages caused by the breach of contract that the negative side of the contract has foreseen or should foresee in signing the contract."

focuses on the general traditional sense in terms of the contract, that is, the main purpose of the contract is to obtain the material benefits. so in this kind of contract, the moral damage caused by the breach of the contract can not be foreseen by the two sides when signing the contract, if the spiritual damages are also included in the compensation for damages of breach of contract, it is unreasonable, "because the moral damage is difficult to foresee by the parties in the formation of contracts, at the same time such damages are also difficult to be determined by the money, so the victim can not be compensated based on the lawsuit of contract. "It will form the tremendous risks for the parties of the contract when they are in the formation of contracts.[236]

However, in some of the emerging interest in the spirit of the contract was for the purpose of the contract, in particular, the main purpose of the contract is the spirit of enjoyment, such as in the travel contract, the "predictability" has become a possibility, that is, " the compensation of non-property damages are principally not allowed, but it exceptionally allows the creditors to request the compensation for non-property damages in the situation of liability concurrences between the liability of breach of contract and the liability of infringement as well as in the situation that the non-property damages which are easily caused can be anticipated by the general concept in some special kinds of contracts. For these special kinds of contracts which easily lead to the non-property damages anticipated by the general concepts, they can be developed and typified by the cases and the doctrines."[237]Thus, in China existing laws, there is no provision prohibits the relieves to the spiritual damages of breach of contract, the obstacles are not in the legal aspects, but in the existing concepts, taking the compensation for the spiritual damages as a basis for the distinction of the liability of infringement and liability of breach of contract is only a theoretical result.[238]

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[236] Liming WANG, *Theories on the liability for breach of contract*, the Chinese People's University Press 2000, p. 400 and p. 566

[237] Shiyuan HAN, *the non-property damages and the contractual liability,* in *Law Science Magazine*, Beijing Law Society, No.6, 1998, p.28 and p.30.

[238] Xiaojun ZHANG, *the breach of contract and the compensation for moral damages*, in *Studies on case*s, the people's court press N.3 2004, p.l48.

Some scholars hold that because there is the liability concurrences, so it is no needs for the stipulation about compensation for moral damage, "because Article 122 of the *Contract Law* stipulates liability concurrences between the liability of breach of contract and the liability of infringement, it allows the parties to choose one of them to institute a proceeding, the victims may ask compensation for moral damage through the lawsuit of infringement which can protect their interests well. "[239]The prerequisite for the existence of this provision in China is that only when the injuring performance infringe the personal interests of the parties and there is no damages to the contractual interests can the victims require the compensation for moral damage, but when the injuring performance does not cause the physical damages of parties and only results in damages of spiritual interests of the contract, the victims can not ask the compensation for moral damage through the infringement proceeding. Especially in such contract as the package tour contract whose main purpose is the mental enjoyment, the damages of the spiritual interests usually occur because of the breach of contract, it makes the compensation for moral damage in package tour contract become a problem. For example in one case, there are fifteen tourists sited for a travelling organized by Hainan China Youth Travel agency, because there is a very serious infectious tourists in the travel group, it caused serious panic among the entire team, resulting in huge damage to the spiritual interests, but when the fifteen tourists requested the travel agency to compensate for the spiritual damages due to in violation of the travel contract, they did not receive the support of the court which can been said a pity.[240]

We should see that in the existing provisions of relevant laws, it seems to leave the space for compensation of the spirit damages in the package tour contract, such as article 111 of *the General Principles of Civil Law* states: "one party does not fulfill its obligations under the contract or the performance of the obligations of the

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[239]Liming WANG, *Theories on liabilities for breach of contra*ct, People's University of china Press, 2000, p. 400

[240] The supreme people's court of the People's Republic of china*, Selection of cases of the people's courts,* (N.3 of year 2002*)*, and people' court press, Apr.2003, p.179-186.

contract does not meet the conditions of the agreement, the other party has the right to request the fulfillment or carry out remedial measures, and has the right to demand compensation for damages." Article 112 of *Contract Law* stipulates:" one party does not fulfill its obligations under the contract or the performance of the obligations of the contract does not meet the conditions of the agreement, there are still other losses of counterpart after having fulfilled the obligation or taken other measures, they should be compensated.", article 112 is called the principle of full compensation. Some scholars believed that the "other damages" can be given the expended interpretation"," it could be interpreted also including the compensation for moral damage." [241]At the same time, the article 81 of *China's Civil Code:* the proposed draft for the provisions of contract chapter "(General principles) drafted by the Legislative Research Group of the Chinese Civil Code is a embodiment of the theoretical requirement for taking the compensation of the spiritual damages into liability of breach of contract, it stipulates that the rights of request for damages in breach of contract include the request for the non-property losses. [242]

That non-material losses are incorporated into the contractual liability system not only can be said to be a major progress in aspect of the contractual responsibilities, but also complies with the overall world's trends on this issue, such as there are many provisions about giving the contractual relief to the spiritual damages in a number of general principles of international contractual law. [243]Then, the

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[241] Jingqiang YE, *the spiritual damages caused by the breach of contract*, in Liming WANG (editor-in-chief), *Controversial issues on the theories of Civil and Commercial Law – the compensation for moral damage,* the People's University of china Press 2004, p.297.

[242] the Article 81 of "China's Civil Code: the proposed draft for the provisions of contract chapter "(General principles) provides that: "one party of the contract makes the damages to the other party in the breach of contract, the other party has the right to ask for compensation, but with the exemption of being exempted from the responsibilities in accordance with the special agreement or with the provision of the law. The compensation which can be obtained in addition to the compensation for the property losses also include: (a) the non-property damage; (b) the loss reasonably take place in the future.

[243] The provision of article 7-4-2 (full compensation) of *General Principles of International Commercial Contracts* (1994) of International Institute for the Unification of Private (Rome) provides: "(1) the injured party is entitled the rights to request full compensation of the damages as a result of non-performance . These damages not only include any loss suffered by the party, but also include any earnings deprived of. (2) The damages can be non-pecuniary damages, for example, including physical or psychological pain. The Notes of (2) provides the non-pecuniary damage can also

greatest challenges for the compensation of the spiritual damages in package tour contract are how to determine that the violation of travel contract engenders the spiritual damages in the legal sense and how to judge the standards of the compensation., because of the absence of the concrete provisions on this aspect, so it mainly rely on the discretionary power of judges to determine in the legal practice which will undoubtedly bring a lot of difference. I think, first of all, should recognize the existence of moral damages in the package tour contract, because only package tour contract takes the travelling pleasure as its the purpose of signing contract, in the agency travel contract, the compensation for the spiritual damages of breach of contract can not be requested. [244]

Secondly, it can not say that because the main purpose of the package tour contract is the spiritual enjoyment, once there is the violation of the contract, the compensation of the spiritual damages can be requested. "The mental suffering caused by the loss of travelling pleasure must have the considerable certainty believed by the normal people, only the existence of this standard can guarantee the objectivity of the existence of moral damage." [245]The mental damages belong to the loss of amenities caused by the violation of the contract whose purpose is for the enjoyment and pleasure.[246]It must be requested that this damages of the spiritual interests must reach a certain level of seriousness ,that is, the purpose of the package tour contract is severely damaged, such as the cases of "the death accompanying the travelling" noted above , for the common violations of the travel contract, such as the levels of the star-hotel are not in accordance with the agreement and the little discomfort of the passengers caused by un-thoughtful services of tour guides ,they can not be requested the compensation of the spiritual damages; and the standards for the amount of

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be compensated .they may be the grief and the pain or the loss of some happiness and sense of beauty which promote the lives.

[244] Lifu NIU, *Talking about the compensation question for the spiritual damages in travel contracts*, in *Tourism Tribune*, N.8, 2006

[245]Jinliu LIU, *Tourism Contract*, the law press, January 2004, p. 229.

[246]Xiao CHENG, *the Breach of Contract and non-property damages*, in Lixin YANG, *the controversial issues on Theories of Civil and Commercial Law – the compensation for moral damage,* the People's University of china Press 2004, p. 298.

compensation of the moral damages should also reflect the propitiating and compensating effectiveness for the victims. at the same time they should be taken into account in the punitive amount for the breach of contract of travel agencies that subjective malicious level of the travel agency, it's practically bearing capacity, etc., because if the amount of the penalty of breach of contract beyond the operating conditions of travel agency, it will curb the enthusiasm of practitioners of the entire tourism industry, so it is a issue that needs the comprehensive weighs, also needs the support of the relevant provisions of the laws and the right discretion of judges.

4.4. *The Judicial practice in china:*

Case 1: January 2000, Mr. Feng and his wife signed a package-tour contract with China straits travel agency for an eight-day and seven-night in Singapore, Malaysia. The undertaker Mr. Wang later told the couples that the 11,600 Yuan of the contract paid by Mr. Feng had transferred to china Merchants International Travel Corporation, so the couples should travelling with its group. January 22 in the same year, China Merchants International Travel Corporation (later renamed the China Merchants International Travel Corporation) issued the couples by the receipt of the invoice about the price of the travelling. January 24, they arrived at the airport on time for a departure and clearance, later boarded on the plane together with the other 14 members. After the replacement of airplane in Singapore in half-way of the travelling, they arrived in City P of Malaysia. But then there occurred the scenery unexpected that the Malaysian immigration authorities refused the couples to enter in the name of their unqualified visa. Then they were repatriated to Singapore and later were deported back to Beijing by Singapore Airlines. The most painful things that Mr. Feng could not accepted are that there was no one to pay attention to them and to help them in a foreign country, they just looked like illegal immigration, before they could see Malaysia, they had been sent back to china. What made them angrier was that after returning home, the travel company and travel agency did not link with them and

paid no attention for their encountering. As a consumer, they requested the china straits travel agency and the China Merchants International Travel Corporation compensated for their economic and mental losses.

China straits travel agency held that the undertaker Mr. Wang who signed the travelling contract with couples was not its undertaker; it was a fake travel agents in the name of China straits travel agency to cheat the consumers and it was investigated and dealt with the relevant authorities, so the real China straits travel agency should not be responsible for the loss of the couples.

The China Merchants International Travel Corporation who received the travelling fee of Mr. Xiang Feng and his wife also believed that it should not be responsible for the losses of the couples. Because the reason why Mr Fung and his wife had been repatriated was that their visas were invalid, the problems were the visas of the couples not the company's management and the company had negotiated with the couples for numerous times for finding a settlement after the returning of the couples, but because there was too great differences between them, the problem had not been resolved.

After hearings, The Beijing Chaoyang District Court believed that the travelling contract signed between the couples and the Mr. Wang who seized the name of the china Straits travel agency is invalid because it was not the conduct of the china straits travel agency. The China Merchants International Travel Corporation had received the travelling fee of the couples and actually provided the travelling services to the couples, it was just because the negligent and irresponsible work of the China Merchants International Travel Corporation in management which led to the incident, so the court sentenced that the China Merchants International Travel Corporation returned 11,600 Yuan of travelling fee to the plaintiff and compensated the plaintiff 40,000 Yuan for moral damage. [247]

The court does not explain the reason for the request of the compensation of the spiritual damages, but it believes that the defendant breaks the travel contract; the

[247] *The rule of law at Beijing,* March 14, 2001, in Liang DONG, *Assessment on the cases of service contract*, China Economic Publishing House, June 2005, p.125-126.

compensation of the spiritual damages is caused by the breach of the contract, according to the reason of the plaintiff, due to the acts of the defendant's violation of the travel contract, they just look like illegal immigration, he suffers great despairs ,loneliness and other painfulness in a foreign country, it infringes the purpose of the travel contract to gain the pleasures and enjoyments, so the compensation for the spiritual damages can be seen as the remedies for the special spiritual interests of the tourist in the package tour contract.

Case 2: August 15, 2003, Mr.Zhang signed a pack tour contract with the defendant, the travel agency A, for travelling in city Rizhao. After the signing of the contract, Mr. Zhang paid the travelling fee. But a traffic accident occurred on one section of the highway during the Tourism and Mr. Zhang died. Through the identification of the accident, the driver of the travelling bus hired by the defendant assumed the full liability for the accident. After the incident, Zhang's wife and parents as the plaintiff claimed : the defendant did not fulfill its liability of guaranteeing Zhang's personal safety and his life in the organization of tourism, which resulted in the death of Zhang, the three plaintiffs as Mr. Zhang's close relatives had paid a certain expenditures and were subjected to a tremendous painfulness of sprites in dealing with Zhang's funeral, so they asked the defendant to pay a total of 175,794 for compensation for medical expenses, funeral expenses, death benefits and other expenses and in addition of 50,000 Yuan for the spiritual damages.

Court believed that the package tour contract is that the travel organizer planed trips for visitors, scheduled accommodations, transportations and other travel services for visitors, assigned leader to lead tourists to travel and give the accompanying service and passengers paid for them, including passenger transportation contracts, service contracts and the contents of a number of contracts. The defendant in the provision of tourism services in the course of transportation, did not protect the safety of Zhang, constituted the breach of contract, it should take the liability of compensation for the damages in breach of contract. In view of Zhang having died, the three plaintiffs, as Zhang's close relatives claiming compensation was in

accordance with the law, the court supported the request of requiring the defendant to pay the plaintiffs for medical expenses, funeral expenses, death compensation for funeral expenses of transportation, accommodation and other demands of the reasonable costs of fees.

For the request of the plaintiff for the spiritual damages, the court held that: Article 107 of *Contract Law* states: "a party does not fulfill its obligations of the contract or does not fulfill its obligations in accordance with the contract agreed upon, he should take the responsibilities of breach of the contract in ways of continuing to carry out the contract, taking remedial measures or paying the compensation for losses etc.," the" loss "in this provision include not only the property damages but also the non-property damages ,that is ,the spiritual damages which can be applied in the breach of contract . This case, Zhang's sudden death meant the death of the son of his parents in their old age and the death of the husband of his wife in her young age, the three plaintiffs bore the great sufferings for losing their loved relative, a certain amount of monetary compensation, 45,000 Yuan, was given to the plaintiffs the in order to soothe the spiritual sufferings. After the first trial, both sides did not appeal to the second court. The Decision has come into force. [248]

In the above-mentioned case, the court, from the nature of the travel contract and taking the specificity of their travel interests into account, applied compensation of the spiritual damages in the liability of breach of contract. It is the embodiment of the concept of the essential justice of law and has a creative meaning in the legal practice.

Case 3:In April 26, 2002, eleven tourists including the plaintiffs Mr.Han and Mr.Zhang signed the national package tour contact of Sichuang province with the Y travel agency whose travelling places were the City GuiYang and waterfall yellow fruit trees.1, May of the same year, the plaintiffs took part in this travelling group. In

[248] Jing WANG (editor-in-chief), *Guides on claims for the travel accidents,* China legal Publishing Press, April 2009, p. 136-137.

the fifth day, the un-travelling bus which was provided by the Y travel agency and taken by the plaintiffs had a traffic accident during the procession from Chengdu to jinyang which made Mr.zhang, the husband of the plaintiff Han die and the plaintiffs Han and zhang injured. And the driver of the bus was wholly responsible for the traffic accident determined by the traffic policeman and the plaintiffs were not responsible for it. The plaintiff Han was finally evaluated as the ninth level of disability and the plaintiff Zhang were evaluated as the eighth disability by the hospital.

The plaintiffs held that the travel contract signed between the plaintiffs and the defendant was legally constituted, so the defendant has the liability to provide the travel services which can comply with requirements of guaranteeing the safety of property and personality, because of the defaults of the defendant in the fulfillment of the contract, the rights of property and personality were infringed, so appealed to court for the compensation for the property damages and the spiritual damages.

The court believed that the travel contract between the plaintiffs and the defendant was legally formed and the defendant Y travel agency should fulfill the travel contract according to the agreement reached in the travel contract. the defendant used the un-travelling bus to transfer the tourists in violation of the laws, the driver should be overall responsible for it, according to the provision of article 120 of the contract law, one party breaks the contract because of the reason of the third people, this party of the contract should assume the liability of breach of law to the other party, the defendant should paid the compensation for the loss of the plaintiffs caused by the breach of the contract. In this case, the plaintiff took the lawsuit of breach of the contract and at the time asked the defendant to assume the liability for spiritual damages. The way of liability of the breach of contract was usually in the way of property liability, but it did not expel the possibility to assume the way of non-property liability such as the compensation for the spiritual damages. the spiritual painfulness of The plaintiffs of this case was obvious, the travel contract between the plaintiffs and the defendant belonged to the contract whose purpose were the spiritual interests such as providing the physical and psychical pleasures and tranquility; the

defendant's violation of the travel contract had the legal causal relationship with the damages suffered by the plaintiffs, so the court gave the support for the request of the compensation for the spiritual damages of the plaintiffs and the mount of payment for the spiritual damages were 124651.17 Yuan.[249]

The specialty of this case is that the court supports the request of the compensation for the spiritual damages in the lawsuit of contract, it is not often seen in the legal practice of china, because there is no relative provision of the law and the more special aspect of this case is that court pays attention on the purpose and character of the travel contract, whose purpose were the spiritual interests such as providing the physical and psychical pleasures and tranquility, so giving the support for the request of the compensation for the spiritual damages in the breach of travel contract, it can be seen that the more consideration of the court giving to this case is for the protection of the spiritual damages ,and not to deny it simply by the standard of whether it is the lawsuit of infringement or the lawsuit of breach of law, embodiment a humanistic cares, owning the creating sense and reference meaning to other courts' adjudications.

5. *The standard terms in the package tour contract and the protection of consumers.*

5.1. *The definition of the standard terms.*

The emergence of the standard terms (or the standard contracts) was due to the rapid economic development of the world, with the emergence of a number of large-scale monopolistic enterprises, they often had to repeatedly use the contractual terms with the same type and content in their business, the standard terms came into formation. different countries have the different names for it, such as in Germany it is

[249]Jinliu LIU, Comments on one hundreds cases on the national and international tourism disputes, China Tavel & Tourism press, Jul 2008, p.349-354.

called the general contract (trading) terms, (allgemeine Geschaftsbedingungen); in France and Japan, it is known as contract of the adhesion (contrat d'adhesion); in England, the Hong Kong Special Administrative Region and Taiwan, it is given the name of the standard form contract; in the Macao Special Administrative Region and Portugal, they use the definition of inserted contract for it. In the mainland of china, it is general designated as the standard terms.

The first provision about the standard terms is in article 24 of *Consumer Protection law* of People's Republic of China in October 31, 1993, but it does not give a specific definition for it. The article 39 of "*Contract Law*" interprets the meaning of the standard terms, that is, "the standard terms are the terms which are formulated by one party of the contract in advance for the purpose of repeatedly uses and are not in consultation with the other party in the formation of contracts." Chinese scholar Zhang Xinbao believes that: "the standard terms refer to the all provisions provided by one party of the contract(usually by the sellers or the service providers) to all the terms, the other party (customers) can only accept all of them or refuse all of them, there is no room for the bargaining . "[250]

This shows that no matter the theories or the legal provisions, all of them believe that the characteristics of the standard terms are unilateral and before-handed. Just these characteristics make the standard terms have the advantages of greatly improving efficiency and saving the cost, so the standard terms are widely used in commercial activities.

Tourism activities occupy an important position in the current economic activities; the characteristics of tourism determine that tourism operators need to sign a large number of the travel contract of the same contents in the tourism activities with the tourists which require the tour operators to establish the terms of the contract in advance for the usage of signing with to the non-specific majority of tourists. The facts also prove that the standard terms used in the tourism industry can enhance the security of transactions, define business risk and legal risk beforehand, identify and

[250]Xinbao ZHANG, the research on the basic problems of the standard contract, in cases journal of Law, Institute of law. China, N.6 1989, p. 44.

predict the potential legal liabilities and take the terms of the contract to prevent the occurrence of risks. [251]the benefits of the standard terms in the package tour contract can not cover up the growing manifested questions, mainly reflected in:

First of all, in violation of the principle of freedom of contract: because the standard terms of the travel contract are unilaterally set up by the travel organizers, not negotiating with the tourists, so it is different from general principles for the establishment of contract that it must base on the agreement of the views between the contractual parties. So the travel business people often take advantage of the conditions that they can unilateral construct the terms of the travel contract in advance to add a lot of unfair terms for tourists in the travel contract. The constructors of the standard contract often exclude the application of legal norms in the formulation of the terms of the travel contract.[252]

The travel standard terms are attached to the entire tourism activities; tourists either take it or leave it, tourists often in a compromise position, losing the opportunities to consult with the travel organizers on the standard terms of the contract.

Secondly, it is in violations of the most fundamental principles of the *Civil Law* - the fairness and justness. Tourists as a non-professional people, are not familiar with the tourism projects purchased which impacts the determination of the tourists, it gives the travel organizer the opportunity to abuse the standard terms of the travel contract through the ways of adding very professional tourism terms in the contract in order to let the visitors have the uncertain or wrong understanding and grasping for the specific words of the standard terms in the travel contract, the travel organizers as well as set the standard terms unfavorable to tourists by the ways of not easily being detected by the tourists such as the adoption of printing the standard terms in the very small words etc., and even provide many false information to deceive the

[251] Haopeng SU, the *research on the fixed-type contract –-taking the protection for the interests of consumers as the center",* in *Journal of comparative law*, China university of political science and law, No.2 1998, p. 119.

[252]Zhen LIU, *the theories and its application of the standard contract,* in *Journal of North China University of Technology Beijing china ,* North China University of Technology Beijing china, NO.12 2002, p. 12.

travel consumers in the standard terms. All of them essentially infringe the basic principle of freedom and the principle of good faith of contract.

Finally, the unreasonable assumption of the risks between the two sides of the travel contract. Because tourism is a form contract in advance to develop the tourism business people, so business people can travel to their advantage to carry out the risk allocation can be an exemption clause to circumvent the risk of their own business, or even increase the risk of tourists, business people such as tourism the provision of tourism benefits through no fault of the third person is not liable and so on.

5.2. *Exemption terms in the package tour contract.*

A very prominent activity of the travel organizer to damage the interests of consumers is often the use of exemption clauses to absolve themselves of liability or the liability to increase tourists to exclude their obligations or the rights of tourists to make unfair to the provisions of tourists.

The so-called exemption terms: " they are the terms which aim at restricting, waiving or modifying the arising of some certain unforeseen circumstances in order to exempt or limit the legal responsibilities, obligations and the means of relief between the parties of the contract." [253] According to different natures of the exemption terms, they are divided into the exemption terms to exclude liability of the contract and the exemption terms to exclude liability of infringement. The exemption terms to exclude liability of the contract can exempt the liability assumed by the party who provides the exemption terms when he has the activities of breach of law, at the same time they can also limit the usage of the other party's rights in accordance with the contract or limit the relief to the other party in the way of stipulating the maximum amount of compensation. [254]

For example it is stipulated in the travel contract that the travel organizer in the

[253]Chuanli WANG*, the exemption terms in the standard contract*, in *Law Review, Wuhan* University, No. 1, 1988, p. 53.

[254]Jinliu LIU, *Tourism Contract,* the legal publishing house, January 2004, p.267.

necessary conditions has the rights to adjust the contents of the journey based on the specific circumstances; some exemption terms not only rule out the contractual liability but also exclude the liability of infringement, such as in the contractual terms, it is said that the travel organizer is not responsible for all the liability of all the damages of the travelers due to the reason of the activities of service providers. That is to say, whether the breach of the travel contract or the infringement of the travel organizer on the traveler are as a result of the reasons of the provider of the travel services, the tourism business people is all exempted the relative responsibilities due to the exemption terms. The travel organizer also provides the maximum amount of compensation to limit their liability in the tourism contract such as a travel agency in the travel contract states: "The travel agency pays for the damages of the goods carried with the tourists according to their actual loss. But each of them shall not exceed 200 Yuan, one tourist has more than one item damaged, the total amount of compensation shall not exceed 1,000 Yuan.

Another popular way that the travel organizers expels their responsibilities is that tourist operators add the intermediary terms in the travel contract, that is, the travel organizers define themselves in the intermediary position between the tourists and the providers of the travel services ,therefore, the travel organizers are not responsible for the faults of the providers. For example, the provisions of the travel contract stipulate that the problems of accommodation in the process of tourism are resolved by the hotels, the travel organizer is not responsible for them."

These exemption terms in the travel contract do not serve the purpose of contract law to increase transaction efficiency and reduce costs as well as to encourage the parties to the transaction, but on the contrary, they make the tourists in a very disadvantageous position, disrupting the normal orders of the development of the tourism industry, So we must enhance the regulations for the exemption terms in the travel contract.

5.3. *The protection of the rights and interests of the tourists in the standard terms of the travel contract.*

The relative provisions about the standard terms in China can be seen in the provisions of the article 3 and article 4 of *General Principles of Civil Law* about the basic principles of equality and voluntaries , fairness and equal value repayment , the provisions of article 39-41 of *Contract Law* and the provisions of article 24 of *the Law of the Protection of Consumer's the rights and interests* about the rules for the inserting the standard terms in the contract, the types of invalid terms and how to interpret the standard terms in disputes etc.

5.31. *The interpretation of the standard terms.*

Before the identification of the effectiveness of the standard terms in the package tour contract, we should confirm the methods of the interpretation for the standard terms. The article 5 of *the law of general contract terms* of Germany states: "The contents of the general contract terms are in doubt, the provider of the provisions should take the adverse interests. Article 1162 of *The French Civil Code* stipulates: "If there are doubts in Contract; it should give the explanation adverse to creditors and in favor of the debtor." The article 1370 of *Italian Civil Code* provides that: "when the terms are uncertainty, it should make the favorable explanation for customers and make a negative interpretation for producers of the terms." section 2, article 11 of *Consumer Protection law* of Taiwan region states: "if in the condition of having any doubts for the terms of the standard contract, they should be explained in favor of consumers." Article 41 of *China Contract Law* stipulates:" there are disputes in the understanding of the standard terms, they should be interpreted in accordance with the generally understanding; if there are more than two explanations for the standard terms, it should make the interpretation adversary to the party who provides the contract; if standard terms are inconsistent with the normal contract terms, the normal contract terms should be adopted." It is precisely because of the characteristics that

the standard terms are unilateral and made in advance, the other party of the contract can not change them and only choose them, the scholar Su Haopeng believes that the interpretation of the standard contract should be made fair for both of the parties of the contract and in some particular circumstances, they should be made more conducive to the opposite party of the contract. [255]In order to protect the interests of parties of the contract, achieve basic purpose of the regulation of the standard terms of the contract, maintain the contractual justices," the interpretation should be characteristic with objectiveness and justices."[256]

The interpretation of the standard terms should be strict limited, from the starting point of the fairness and justices, for the standard terms which are ambiguous, vague in meaning or unclear in the applied scope, they should be interpreted in accordance with the "narrowest" explanations and they can not be blindly expended, analogized and complemented. The article 29 of the ordinance of the travel agency stipulates that : "if the travel contract signed by the travel agency and the tourists is uncertain or having the disputes in the understanding of the standard terms, they should interpreted in the normal understanding; if there are more than two explanation for the standard terms, they should be interpreted conductive to the tourists; if the standard terms are inconsistent with the non-standard terms, it should adopts the non-standard terms."

Therefore the interpretation of the disputed standard terms in the package tour contract should specifically observe three principles following:

1. First of all, it should be given an explanation according to the general understanding. The so-called generally understanding means that the level of awareness is made by the understanding of the majority of ordinary consumers and the reasonable expectations in line with the ordinary consumers, "the interpretation of the standard contracts is not in the users' positions or is not determined by the

[255]Haopeng SU, *the researched on the standard contract -- taking the protection of consumers as the center, i*n *Journal of comparative law*, China University of political science and law, N. 2, 1998, p. 125.

[256]Yueqin HUANG, *the collection of papers on the private law,* the Taiwan century bookstore, 1980, p. 130.

situations of the individual opposite party, but usually takes the valuable interests of the ordinary people and their possibilities of awareness or understanding as its standards of interpretation."[257]Because the travel contract is not constructed for the individual consumer, but for the repeated application by the majority of non-specific tourism consumers, if the terms of the travel contract are interpreted in the unique and individual environments, then it is unfair for the majority of tourists, so it should seek the achievement of a uniformed interpretation for the majority of tourism consumers.

Secondly, if there exist more than two kinds of the interpretations, it should make the interpretation adversary to the travel organizers who provide the standard terms. Article 46 of "the General Principles of International Commercial Contracts" stipulates: "If the terms of the contract are ambiguous provided by one party of the contract, it should make the adverse explanation for the opposite party." The reason of the adverse explanation for the travel organizers is basically because as the party providing the travel standard terms, he has the liability to provide the travel standard terms in clear meaning in order to facilitate the understanding of tourists, if the vague meanings of the travel standard terms provided by the travel organizers led to more than two kinds of the interpretation, the travel organizers should be responsible for the risks caused by it. For example, in one case, January 20, 1999 Liu participated in a activity of travelling in Province Yunnan for eight days organized by A travel agency .Liu singed a travel standard contract "travel agreement" provided by A travel agency , according to the terms of the contract and paid 3490 Yuan as the travel costs in which it stipulated that the travelers should pay the a kind of the fee "the cost of drugs and books for emigration" by themselves during the travelling.("the cost of drugs and books for emigration" is a fee required by the Government of Myanmar which is needed to pay when entering Myanmar, including the Immigration Information and immunology medicine, the writer notes). However, in the third day of the journey when the tourists reached the border of China and Myanmar and made the emigration clearance, the travel agency led Liu to pay 100 Yuan of "the border transfer permit fee" and 12 Yuan of "the cost of drugs and

[257]Jun DU, *the researched on the standard contract*, the masses Press, May 2001, p. 279.

books for emigration", the Total cost of them are 112 Yuan, but Liu believed that , in accordance with the agreement of the contract ,he only needed to pay an 12 Yuan of "the cost of drugs and books for emigration" , 100 Yuan of "the border transfer permit fee" was not included in "the cost of drugs and books for emigration" of the contract, it should be paid by the travel agency. But the travel agency held that "the cost of drugs and books for emigration" included both "the cost of drugs and books for emigration" and "the border transfer fee". In order to complete the trip, Liu had to make a compromise and paid for both of them. When the travelling ended and Liu came back to Shanghai, Liu appealed to the court to ask the travel agency to refund the delivery of 100 Yuan for "the border transfer permit fee". The court held that the tourist and the travel agency who provided the this standard term gave two different explanations for the standard terms of the travel contract, "the cost of drugs and books for emigration", it should made an explanation adversary for the travel agency, that is ,it should adopt the interpretation of the tourist, not including "the border transfer permit fee", so decreed the travel agency to refund Liu 's the delivery of 100 Yuan for "the border transfer permit fee." [258]

3. When the standard terms are inconsistent with the non-standard terms, it should take the non-standard terms as the norms. The so-called non-standard terms of contracts are the general provisions of the contract, the formation of them is under the premise that the parties of the contract have reached the agreement of their views, compared with the standard terms formed unilaterally by one party of the contract, the non-standard terms are more in line with the true meaning of the parties and have the effectiveness of priority.

5.32. *The determination of the travel standard terms.*

[258] http://newtravel.chinavista.com/handbook_detail.php?hbid=11,www.travelvista.com,20,Apil 2009.

The effectiveness of the contract, also known as the legal effectiveness of the contract, refer to coercive power is owned by the contract established in accordance with the law which can bind the parties of the contract as well as the third peoples. [259]the determination of the effectiveness of the travel contract, in particular, the determination of the effectiveness of the exemption terms is direct related to the protection of the rights and interests of tourism consumers, in China it determines the effectiveness of the standard term of travel contract mainly in accordance with the following several aspects :

1. in violation of the fundamental principles of the *Civil Law*.

The principle of fairness and good faith of *Civil law* are the most fundamental guiding principles in the modern civil laws, known as the "the imperial principle". It can prevent a party to the contract to use its dominant position to make unfair terms in the standard contract and then maintain the interests and rights of both two parties of the contract. Article 3 of EU's "the guiding principles of the unfair terms in the consumer contract" provides that:" the terms of the contract without the individual consultation are in violation of requirements for the principle of good faith, resulting in a significant imbalance of the rights and obligations between the parties and damaging the interests of consumers, they should be seen as the unfair terms. "In *the General Terms of the Contract Law* of Germany, it also establishes taking whether in violation of the principle of good faith as the standards of determination for the contractual standard terms. In article 4 of *China's General Principles of Civil Law* and in article 5 of *Contract Law* the parties are both required to follow the principle of fairness. [260]

At the same time, article 6 of *China's Contract Law* states: "when the parties of the contract exercise and fulfill their obligations, they should follow the principle of good faith and should not have the fraud activities." The so-called principle of good faith refers to that when the civil subjects engage in the civil activities, they should be

[259] Jianyuan CUI, *Contract Law,* the law press, August 1998, p. 77.

[260]Article 4 of *General Principles of Civil Law* states: "Civil activities should be guided by the principle of fairness." Article 5 of *Contract Law* : "the parties should be guided by the principle of equity to determine the rights and obligations of both parties."

honest and trustworthy, carry out their obligations in the goodwill way and shall not abuse the rights and avoiding the provisions of the law or their obligations of the contract.[261]The performances of violating the principle of fairness and good faith in travel standard terms are following:

A. the standard terms in violation of the equality and mutual benefit: that is, it is required that the payments of proceeds and the expected payments of proceeds between the travel organizer and the tourists are equivalent, as well as the travel organizer and the tourists should reasonably share the risks and the obligations of the travel contracts. for example, in section 3 of article 8 in a travel standard contract signed by M travel agency and tourists ,it stated that: "If Party A(tourists) give up league membership, Party A can inform Party B(M travel agency) to rescind the travel contract before the starting of the tourism activities, but Party A should assume the necessary costs of travel expenses having been paid by Party B for arranging this travelling and has to bear the liquidated damages in accordance with the following standards: informing party B three days to one day before the starting of the travelling ,Party A should pay 50% of the residual amount after all travel expenses having been deducted from the necessary costs of travel expenses having been paid by Party B for arranging this travelling ."However, it not stipulates any provisions about the requirements of the travel agency when it cancels the travel itineraries which obviously make the imbalance of the responsibilities between the travel agency and the tourists, increasing the burden on the tourists. In the condition of tourists having informed the travel agency in advance for their withdrawals of the travel activities, it still not only asks the tourists to assume the costs having paid by the travel agency, but also requires the tourists bear the liquidated damages which is obviously unfair because it in fact increases the risks of the tourists.

B. it hinders the achievement of the main purpose of the travel contract. The main purpose of the travel contract is difficult to achieve because the standard terms limit the main rights or obligations of the travel contract, they are constructive in

[261] Liming WANG, Jianyuan CUI, *New Theories of Contract Law • the General principle*s, China University of Political Science press, December 1996, p. 116.

breaking the principle of good faith. The main purpose of the travel is that the tourists obtain the spiritual enjoyment through the payment of proceeds of the travel contract. The reflections of hindering the achievement of the main purpose of the travel contract in some travel standard terms are that the travel agency professes in the standard terms that it is not responsible for the fault of all the third people who provide the travelling payment of proceeds during the travelling activities, the third people is directly responsible for its fault to the tourists. But it should be seen that the characteristics of the package tour contract are that although a lot of tourism payments of proceeds are provided by the third people ,but the travel agency is the organizer of the package tour and signs the package tour contract with the tourists ,the travel organizer excludes the liability for the faults of the third people in fact equal to escape its important obligation of organization ,it is unfair for the tourists because although the practical payments of proceeds are not provided in person by the travel agency, but as the organizer of the package tour, it has the obligation to select the special travel assistant people to complete, the tourists have no controlling on the them, if this kind of risks are transferred to the tourists ,it will makes the entire travelling activities in the uncertain condition and directly results in the un-fulfillment of the travel activities. “If only taking the travel organizer as the intermediary between the tourists and the third people providing the payments of proceeds, it will make it difficult to obtain the compensation of many damage matters of the tourist during the travelling activities, the purpose of the travel contract can not be guaranteed.[262]

Article 71 and article 72 of Taiwan *Civil Code* provides that the legal acts which are in violation of the mandatory or prohibited regulation as well as contrary to public orders or good customs are invalid; article 247-1 states the standard terms are invalid “if they are obviously unfair according to their situations.” article 54 of China’s *Contract Law* provides that: "For the obviously unfair contract, the parties may request the revocation of the contract, but the revocation of the obviously unfair terms does not affect the validity of other provisions of the contract.

2. in violation of the compulsory provisions of laws and regulations

[262]Jinliu LIU, *Tourism Cont*ract, the law press, January 2004, p.290

The compulsory provisions of the law refer to the provisions that the two sides can not make the agreement upon them and must follow the legal provisions. In China now there is no specific law on tourism, so it needs to be applied to the requirements of *General Principles of Civil Law*, Contract *Law* and *Consumer Protection Law* and other relative regulations about tourism. Article 40 of China's *Contract Law* provides that: "the standard terms have the conditions consistent with the provisions article 52 and article 53 of this law or the party providing the standard terms exempt its responsibilities and increase the responsibilities of the opposite party, excludes the main rights of the opposite party, they are ineffective and invalid." Article 53 of "contract law" provides that: "the following exemption terms are invalid: (1) causing personal injury of the opposite side; (2) causing the property damages of the opposite party due to intention or gross negligence or intentional;

A. It is invalid if having the conditions stipulated by article 52 of *Contract Law*.

Article 52 of *Contract Law* provides that: "the standard terms which have one of the following circumstances are invalid: one party signing the contract with the way of fraud, coercion to damage the national interests; the parties maliciously colluding to harm interests of the state, collectives or the third parties; using the legitimate form to cover up illegal purposes; harming the public interests of the society; in violation of mandatory provisions of the laws and administrative regulations." The violations of mandatory provisions of laws and regulations in the travel practice are usually that the travel organizer contravenes the mandatory provisions of regulations on tourism not to cover the travel accident insurance for the tourists, resulting in the situation that the tourists can not gain the compensation when they suffer personal and property damages during the travelling activities. The travel organizers often refute that they have covered the travel liability insurance. But the court holds that travel liability insurance and travel accident insurance are two different kinds of insurance, in accordance with the mandatory requirements of China's relevant laws and regulations, both of two insurance are the responsibilities of the travel organizers, so determines the travel organizers contravene the mandatory provisions and should pay the compensation for tourists.

B the exemption terms for the personal damages and property damages caused by the intention or gross negligence are invalid

C. the standard terms in which the party providing the standard terms exempts their responsibilities, increases the responsibilities of the other party, excludes the main rights of the opposite party and their own main obligations are invalid.

Now there is no yet the specific provision of law on the standard terms. But some local regulations have formulated the independent provisions about this aspect. For example the articles 8,9,10 and 11 of "the supervision methods on the standard term in the contract of Nanjing city" performed in April 1, 2007 separately provide a variety of different situations of the invalid content which "remove or reduce the liability of the provider", "increase the liability of the other party " and "remove the main rights of the other party" etc.[263]

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[263] Article 8 the standard terms in the contract can not contain the following contents which exempt or decrease the responsibilities of the provider of the standard terms.

(A) The responsibility of personal injury caused by the other party;

(B) the responsibility of the property damages caused by gross negligence or intention of the other party;

(C) the guarantee or warranty responsibilities assumed for the goods or services provided;

(D) the other responsibilities assumed in accordance with the law.

Article 9 the standard terms of the contract shall not contain the following content to expand the rights of the provider:

(A) the provider has the rights to arbitrarily changed, rescind, suspend, terminate the performance of the contract;

(B) goods or services provided by the provider have the unreasonable price increasing, the opposite party should continue to carry out the provisions of the contract;

(C) the provider has the right to unilaterally interpret the contract;

(D) the other content in violation of laws and regulations to expand the rights of the provider.

Article 10 the standard terms of the contract shall not contain the following the content that increase the responsibilities of the opposite party:

(A) the amount of the liquidated damages or the compensation for damages bore by the opposite party is more than a reasonable amount;

(B) the risk responsibility of the opposite party which should be assumed by provider;

(C) the other elements in violation of laws and regulations to increase the responsibility of the opposite party.

Article 11 the standard terms of the contract shall not contain the following content which exclude the rights of the opposite party:

(A) the right to changes, revoke or terminate the contract in accordance with the law;

(B) the right suspend or refuse the performance of the contract in accordance with the law or

5.4. *Judicial practice:*

In the fallowing case, the travel agency excludes the main rights of the tourists in the standard terms of the package tour contract.

Jiang Limin entered for a travel group in September 24, 2006 which was called the travelling of five days in Beautiful Yunnan during the period of the national day of china organized by HONGHU International Travel agency of Guangzhou city. At the same day Jiang Liming signed on the travel standard contract provided by the travel agency and paid 3650 Yuan as the total cost of the travelling. In accordance with the contractual agreement, the tourism projects included Stone Forest of Kunming city, Lijiang ancient city and so on. But in the day of travelling in Stone Forest of Kunming city, the tour guides Miss zhang suddenly informed the visitors that since during the national days, Stone Forest of Kunming city was burst with the tourists, so she decided to cancel the tourism project of Stone Forest of Kunming city, considerable changing to visit the Kunming World Exposition Garden with the equal price of tickets. At that time, the plaintiff Jiang Liming and other tourists argued that the Stone Forest of Kunming city was the representation in the attractions of Yunnan Province. Not travelling in Stone Forest indeed meant not travelling in Yunnan. However, ultimately, visitors had no choices by to accept the changing by Miss Zhang, giving up the travelling project of Stone Forest and changing to travel in the Kunming World Exposition Garden. When the tourists came back to Guangzhou, the plaintiff and other visitors requested the HONGHU travel agency to pay the compensation, believing that the activities of travel agency were in breach of contract. But the HONGHU travel agency argued that it had made the statement in the travel contract that: the travel agency had the rights to adjust the travel itinerary in the premise that the number of the travelling projects were ensured to unreduced. Therefore, the travel

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the;

(C) the right to request for payment of liquidated damages or the compensation for the damages;

(D) the right to institute legal proceedings or arbitration on contractual dispute;

(E) the other rights enjoyed in accordance with the law.

agency did not constitute a breach of contract and should not assume liability for damages. The parties had consulted on this issue for several times but could reach a agreement, so Jiang Limin appeal to the court to ask the HONGHU travel agency assume the responsibilities of compensation.

The plaintiff Jiang Limin believed that it had been agreed upon in the travel contract that the tourism projects included the Stone Forest of Kunming, Lijiang and other tourism projects in the tourism process, the travel agency should not changed the visit projects without authorization. Yunnan Stone Forest was a representative of the travelling attractions in Yunnan province, not visiting the beautiful scenery of the Stone Forest in Yunnan Province during this trip was a big regret. Honghu travel agency should therefore assume the responsibilities of compensation for the damages of the tourists.

The defendant HONGHU travel agency believed that in the process in the tourism, the travel agency and tour guide had the rights to adjust the itinerary and this point had been noted to the tourists before the travelling starting and the visitors had known it , the activity of changing the project of the "Stone Forest in Kunming" to the project of "Kunming World Exposition Garden " which had the same price of the tickets was done by the travel agency in accordance with the agreement of the travel contract and they did not constitute a breach of contract, so the travel agency did not have any liability for it.

Guangzhou city Court held that according to the article 39 of *Contract Law* interprets the meaning of the standard terms, that is, "the standard terms are the terms which are formulated by one party of the contract in advance for the purpose of repeatedly uses and are not in consultation with the other party in the formation of contracts. So the contract terms in the travel contract signed by the plaintiff Jiang Liming and the defendant Guangzhou HONGHU International Travel agency in September 24, 2006 that the travel agency had the rights to adjust the travel itinerary in the premise that the number of the travelling projects were ensured to unreduced" were the standard terms in the travel contract. At the same time according to Article 40 of China's *Contract Law* provides that: "the standard terms have the conditions

consistent with the provisions article 52 of this law or the party providing the standard terms exempt its responsibilities increase the responsibilities of the opposite party, excludes the main rights of the opposite party, they are ineffective and invalid." Therefore, the activities of the defendant HONGHU travel agency to change the visiting project without authorities had constituted a breach of contract and should bear the liability of breach of the travel contract according to law.

To sum up, according to the provisions of article 39, article 40 and article 41 of *Contract Law*, the verdict is as follows: HONGHU Travel agency paid the plaintiff Jiang Limin 500 Yuan as the compensation for the damages. the Legal costs in this case was also assumed by the defendant HONGHU Travel agency.[264]

There is a contradiction between article 40 and article 39 and article 53 in China's *Contract Law* on the provisions of the standard terms, because they exist different criteria for the effectiveness of the exemption terms .in accordance with the provisions of article 39 and article 53. [265]

It can be understood that as long as a party has provided the standard terms should follow the principle of equity to determine the rights and obligations between the parties and has taken reasonable manners to draw the attention of the opposite party on the exclusion or limitation terms of their responsibilities and has made the description of the standard terms in accordance with the each other's request, and the provision of the standard terms do not belong to the exemption of the responsibilities of personal injury or the property damages of the other party due to the gross negligence or intention, the exemption terms are in force; but in accordance with the provisions of article 40 of *Contract Law*, in matter in any conditions ,as long as the

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[264] Xingu Mei, Yonghe Chen, *the Practical Q & A on the contractual disputes and the refined analysis of cases,* Law Press, May 2008, p.223-224.

[265] Article 39 of *Contract Law* states that:" using the standard terms to constitute the contract, the party who provides the standard terms should follow the principle of equity to determine the rights and obligations between the parties and take reasonable manners to draw the attention of the opposite party on the exclusion or limitation terms of their responsibilities and make the description of the standard terms in accordance with the each other's request." Article 53 of "contract law" provides that: "the following exemption terms are invalid: (1) causing personal injury of the opposite side; (2) causing the property damages of the opposite party due to intention or gross negligence or intentional.

standard terms stipulated by one party which exempt its responsibilities , increase the other party's liability or exclude the main rights and obligations of the other party, the provisions are invalid. This contradiction has brought confusion for the specific usage of the provisions in the judicial practice. Therefore, some scholars believe that the same, on the one hand it believes that the exemption terms in principle are effective, but on the other hand, it also provides that any standard terms which exempt responsibilities are invalid, it is clear that article 40 itself is contradictive, at the same time, article 40 and article 39 is also not coordinated, which is a direct conflict and is very typically logical confusion.[266]

5.4. *The model contracts and Regulation for the travel standard contract.*

5.41. *The provision on the responsibilities of the travel organizer in the model documents.*

The model contracts for the travel standard contract refer to the contractual model formulated by the relevant state authorities and referenced by the travel organizer in the formulation of the travel standard contract. Therefore, some scholars in China believe that the model contract only a reference for both parties in signing the travel standard contract, having no mandatory binding on the parties. [267]However, the travel model contract is formulated by the highest administrative organs for the management of the travel contract - the National Tourism Administration of China and also in Taiwan; there is the authorization system of the travel standard contract by the relative Tourism Administration Organs. So this travel model contract may make tremendous impacts on the parties of the travel contract. From this standpoint, the

[266]Huixing LIANG, *the successes and the deficiencies of Contract Law,* in *Peking University law Journal*,(N.1), 2000.

[267]Liming WANG, *Comments on the provisions about the standard terms in Contract Law*, in *Tribunal of Politics Science and Law,* China University of political science and law,(n.6), 1999, p. 5.

National Tourism Administration who formulates the travel standard contract should be cautious in the formulation of the travel standard contract in order to play a very good model role under the circumstance of the considerable lack of laws and regulations in connection with the travel standard contracts.

Section 7, article 12 of "the model contract for domestic package travel delegation " issued by China National Tourism Administration states: " when the personal injury and property loss of Party A (tourists) when taking the flight, ships, trains, Bus, subway, cable, cable cars and other public transport during the travelling are not due to the reason of Party B (travel organizer), Party B should assists Party A to request the compensation for the damages to the providers of the travel services." This term refers actually that travel organizer is not responsible for the fault of the provider of the travel transportation services and only need to assist tourists to request the compensation to them. But the travel organizer provides the overall payment of proceeds to the tourists and selects the special providers of the travel services, the tourists have no controlling on the actions of the services providers and there is no contract between the tourists and the services providers. So if it requests the tourists to ask the compensation of damages to the services providers, it is very difficult and unfair for the tourists, on the contrary, the travel organizer has the special service contract with the tourism service providers, so he is superior to the tourists in the way and in the status of seeking relief. [268]

Recently in some areas of china they have leadingly made some progress in regulation about the travel model contract. For example Guangdong Province in 1997 has firstly used the travel standard model contract and the detail norms to regulate the responsible standard terms ; from 2001 when Shanghai promoted the usage of the travel standard model contract, the contractual disputes between the tourists and the travel operators have a significant decreasing and in January 1, 2004 it has also introduced the use of the new tourism standard model contracts, the implementation of the new model contract combines with the emergence of new problems in tourism

[268]Ruizhu LIN, *the travel contract and the research on its standardization*", Master's thesis of Institute of Law of Taiwan National Chung Hsing University, June ,years 84 of the Republic of China, p. 143.

market of this year, making the focus changes and additions in the protection of legitimate rights and interests of tourists, , the "special informed content" included makes the right of the tourists and the responsibilities of the travel organizers clearly. [269]

5.42. *The control of the travel standard contract*.

For the Control of the travel standard contract, there are generally three ways taken by different counties:

1. the Legislative control:

The legislative control is the most fundamental way on travel standard contract. It is the foundation of the judicial control and administrative control. [270]Many countries now have a variety of legislation ways to control the travel standard contract, such as the development of specialized standard contract law to control, such as " of the general contract provisions law " of Germany, *the Unfair Contract Terms Law* of the United Kingdom in 1977 and the *Consumer Protection law* of Taiwan in 1994 etc are all stipulated for the standard contract. Contract, such as formatting, and Germany, " because the provisions of the "general contract terms law" are so specific, detailed can it can be called a paragon of such laws and regulations. [271]

All of these are conducive to the protection of consumers. The legislation of our country ,however are comparatively principal and simple, the application of them is with a great flexibility and they are usually used in the typical contract such as in the insurance contract and transportation contract etc., the travel contract also has a lot of the characteristics of their own, relying only on the provisions of these principles is obviously unable to meet the requirements of the interests of consumers of tourism, it

[269]*Wen Hui newspaper*, January 9, 2004, cited from *the dynamics of tourism industry*, Tourism Industry Association of Beijing, Beijing Tourism Association and Tourism Tribune magazine press, No. 2, 2004, p. 6-7.

[270] Zongrong LIU*, the special issues of papers on the standard contracts,* Taiwan Sanmin bookstore, 1988, p. 96.

[271]Jun DU, *Researches on the standard contract*, the masses Press, 2000, p. 348.

is very difficult for the tourists to protect their rights and interests which requires China to strengthen the enactment of the law about the tourism industry, especially on the travel standard contract.

2. Judicial control: it refers to the judging process of the courts in determining the effectiveness of terms in the travel standard contract. Judicial control is not only the General Orders of many countries, but also the most primitive form contract and the ultimate means of control.[272] Judicial control is mainly in two ways: 1. In accordance with the provisions of relevant laws, 2. the discretion of Judges. Because of the absences of the relevant laws and regulations on the standard contracts, it results that in the judicial practice the most way used by the judges is discretion, so the likes and dislikes of individual judge play a significant role in the trial which can not guarantee the unity of the legal application.

3. The Administrative control:

The Administrative control is the method which is used earliest in the various ways of control. [273] It mainly has three ways, namely, pre-auditing system, pre-consultation system and afterwards supervision system. Japan adopts pre-auditing system on the control of the standard contract, that is, for the standard terms of specific industry, only after through the reviews of the executive organs in charge of managing the standard contracts can they be used in the practice, otherwise the goods can not be sold and the service can not be provided in accordance with the terms of the contract .to provide goods services. And China's Taiwan region, section 3, article 17 of Taiwan *Consumer Protection law* take the afterwards supervision system to manage the standard contracts, it stipulates that if the enterprise uses the standard contract in its business, its competent authorities may conduct supervision and inspection at any time; *the Consumer Protection Law* also stipulates that :the "central" competent authority may select some specific industries, notice the matters which should be recorded and should not be recorded. Even if the enterprise does not record them in the contract, they also constitute one party of the contract. this principle

[272]Jun DU, *Researches on the standard contract*, the masses Press, 2000, p. 362.
[273]Yueqin HUANG (Taiwan), *Issues of private law*, Taiwan century bookstore 1980, p. 142.

applied in the travel industry is the article 47 of *the Tourism Development Ordinance about the managing rules of the travel industry*, the article 23 of the rules stipulates the matters must recorded in the travel standard contract and article 24 provides that the travel contract signed between the travel business people and tourists is taken as having been approved by the Tourism Bureau of the Ministry.

There is no the review-system by the executive organs on the travel contract in china, so the travel standard contract can not be pre-examined or examined afterwards in our country .but the article 12 of "the supervision methods on the standard term in the contract of Nanjing city" implemented in April 1,2007 stipulates that if the standard terms are used in the travel contract, the provider takes the contract to the industrial and commercial administration departments for keeping the record in the 30 days from the usage of the contract." it can be said a new attempt in this area and can give a better supervision on the travel standard contract.

6. *The margin and the insurance liability of the travel organizer*.

The Package tour is through a series of tourism activities , and in the whole of the tourism activities , no matter for the travel organizer or for the tourists, there are certain risks, such travel risks are associated with the whole process of the travelling and have a direct impact on the effectiveness of the package tourism. The study data on its overseas tourism of Transportation Corporation of Japan shows that there will be a people died in each 60,000 people travelling outside the country. The other study indicates that in every year there are about 100,000 times of deaths and injuries among the tourists in the world. [274]

If Travel agency should protect the safety of life and property of tourists in the tourism activities and protect the legitimate rights and interests of travel consumers un

[274] National Tourism Administration, the China Securities Regulatory Commission, *the goals and strategies of china travel insurance*, China Tourism Press, June 2008, p. 24.

infringed, it is necessary to assume the business risk, but it simply relies on the travel agency's own attention and efforts , it is clear that the risks can not be fully avoided, then, the introduction of The margin and the insurance liability system of the travel organizer can help the tourism business people shift one part of the risks of the travel business and help the tourism business people assume the loss of lives and property of the tourists because of, the faults of the travel organizers; and the travel accident insurance is the compensation for the loss of tourists not due to the reasons of the travel organizers and is a supplement for the liability insurance of the travel agency. Both of them play a very good protection of all the rights and interests of tourists.

6.1. *The Relative experience of other countries and regions*.

Many counties of developed tourism industry all require the tourism organizer to buy a certain amount of liability insurance and deposit a certain amount of margin as a prerequisite for its normal operating conditions. for example, the United States and Canada clearly provides that the travel tour operators must insure the minimum amount of one million dollars in general liability for carrying out their travelling profession in order to protect the rights and interests of tourists, for some tourism activities containing special risk contents such as mountain climbing, sports, etc., the travel operator need to insure the general liability whose coverage is broader or the travel agency is not eligible to engage in this kind of the tourism business.

In Asia, Japan is through the mandatory requirement for the travel agencies to deposit operating margin and the "the run-length margin" to protect the rights and interests of tourists, Japan's *New Tourism Law* stipulates: "The operating margin is that the travel agency pre-storages one part of their the property at the national to protect tourists or transportation, accommodation not to suffer from the loss in the transaction with the travel agencies.[275]"the run-length margin" is the compensation to the creditors and for the "important changes in the journey" occurring in tourism

[275]Yue XU, *Japan's new tourism law and its thinking*, in *Travel Tribune*, Tourism Institute of Beijing Union University , N.1, 1997, p. 53.

activities.” Except from the force majeure, no matter whether the damages are due to the intention or the negligence of travel operators, it must give the tourists a certain amount of financial compensation. Taiwan's liability insurance and performance bond insurance provided by the local government are the statutory travel insurance of the travel operators in order to guarantee the compensation for the loss of the tourists whether occurred in the course of travelling or in the condition that the tourism operators can not compensate for the tourists’ loss due to their financial problems.[276]

Hong Kong Special Administrative Region of China does not take the way of insure to the insurance companies, but through the establishment of a special compensation fund, it stipulates that all the travel agencies organizing the package tour group must pay the equivalent of 0.3% of the travelling group fee paid by the travelers as the project funds, as long as the travelers participate in the travelling group which has paid the 0.3% of the travelling group fee paid by the travelers as the project funds, they can be protected by this funds. When Travel agency receives tourists to participate in the tour groups and charges the travelling fee, it must give the receipt with the stamp duty to the tourists , the stamp duty is for the compensation fund ,0.3 percents of the travelling group fee, it is a statutory duty for the travel agency, if the tourists have the pecuniary losses because of the bankruptcy of the travel agency, they may obtain the compensation from the Fund equivalent to 90% of the amount of the loss , including the deposit and the full cost of tour received by travel agencies. the benefits of setting up the special security fund are that it can avoided deficiencies that the amount of compensation of the liability insurance insured by the travel agency is not sufficient to make up for the loss of tourists, as long as the tourists to participate in the tours guaranteed by the fund, regardless of how much the amount of fee is, the traveler all can gain 90% of the compensation, it

[276]Article 53 of *Taiwan the governing rules of the travel industry* provides that the statutory travel insurance includes the liability insurance and performance bond insurance: "the travel industry organizes the group travel, travel of individual tourist and receive the business of the visiting groups abroad or from the mainland of China ,the travel business operators should insure the liability insurance, "" the travel industry deals with the abroad or domestic tourism business of the passengers ,it should insure performance bond insurance. "

can be said to maximize the maintenance of the interests of the tourists. Another characteristic insurance system of Hong Kong Special Administrative Region for the protection the rights and interests of tourists is the "the emergency rescue fund for package-tour contingency" which provide the timely financial assistance to the family members of the injured or dead tourists, the maximum amount of 1, 80,000, Hong Kong dollars. It is an aid program called "regardless of the liability", the fee is from the "Travel Industry Compensation Fund." The characteristic of it is that it does not care that who is responsible for the damages, the purpose is that when the tourists are injured or dead during the travelling, it will give immediate helps to them, its starting point is the protection of personal rights and interests of tourists. [277]

6. 2. *China's insurance system of the travel organizer*

6.21. *The quality margin system of travel agency.*

The quality margin of travel agency is also known as the quality margin system of the travel operators, *the Interim Regulations on the Quality Margin of Travel Agency* and *Implementing Details of Interim Regulations on the Quality Margin of Travel Agency* issued in 1995 by the China National Tourism Administration both stipulate on the quality margin of travel agency. Section 1, article 2 of "implementing details of interim regulations on the quality margin of travel agency states: " The quality margin of travel agency is the special fund paid by travel agency, managed by the tourism administration departments and used for the protection of the rights and interests of tourists." It gives the protection of the rights of tourists when the travel agency can not afford the compensation or do not assume liability in accordance with the law. The amount of the quality margin of travel

[277]Hong Kong Tourist Association and the Consumer Council, National Tourism Administration, *the China Securities Regulatory Commission, the goals and strategies of china travel insurance*, China Tourism Press, June 2008, p.18-19.

agency is provided in article 3 of “interim regulations on the quality margin of travel agency ": “1. attraction and reception of the international travel business is 600,000 Yuan; 2. reception of international business is 300,000 Yuan; 3.operation of domestic business is 100,000 Yuan.”

Article 2 of *Interim Regulations on the Quality Margin of Travel Agency* provides the scope of its application: 1. the economic rights and interests of tourists are damaged by tourism service not meeting the quality standards agreed in the travel contract due to the faults of travel agency; 2. the economic rights and interests of tourists are damaged by tourism service of travel agency not meeting the national or industry standards; 3. the loss of travel expenses pre-paid by tourists due to the bankruptcy of the travel agency; 4. the other cases identified by National Tourism Administration . As well as in the condition that when the travel agencies that harm the legitimate interests of tourists conformed by the people's court judgments, rulings and other legal instruments coming into force ,the travel agency can not afford the compensation to the tourists, The quality margin of travel agency is taken to bear the liability of compensation for the tourists. "Interim Measures for the quality margin compensation of travel agency” has also made provisions for it.[278]In addition, in the "tentative standards for the quality margin compensation of travel agency " ,it lists more than ten kinds of specific types of compensation cases, Such as travel agency in advance to terminate the contract, the qualified tour guides ,making the tourists to delay the airplane, unqualified foods, unqualified transportation and so on.

The purpose of the "tentative standards for the quality margin compensation of travel agency " is for the protection of the rights and interests of the tourists, however, it is a pity that there are many flaws in its compensation standards which make it can not well protect the legitimate rights and interests of tourists . For example, article 4 of” tentative standards for The quality margin compensation of travel agency "states

[278] Article 4 of *Interim Measures for The quality margin compensation of travel agency*: " The quality margin of travel agency travel compensates for 1. the economic rights and interests of tourists are damaged by tourism service not meeting the quality standards agreed in the travel contract due to the faults of travel agency; 2. The economic rights and interests of tourists are damaged by tourism service of Travel agency not meeting the national or industry standards; 3. the loss of travel expenses pre-paid by tourists due to the bankruptcy of the travel agency;

that: "after the acceptation of the tourists' advance payment by the travel agency, due to the reasons of travel agency, the travelling are cancelled, the travel agency should inform the tourists three days ahead of schedule (the emigration travelling is seven days ahead of schedule), or assume compensation liability for breach of contract and pay 10% of the advance payment to tourists as compensation. "This provision on the surface is a punishment on the breach of contract of the tourism organizer and is to uphold the interests of tourists, but when after taking a careful analysis of it , we can see that it is in fact violate the relative spirit of the provisions of the *Contract Law* of China ,because *Contract Law* stipulates that the contract established in accordance with the law has the legal effectives and it can not be arbitrarily rescinded , or else they shall bear the liability of breach of contract. However," the "tentative standards for the quality margin compensation of travel agency "provides that as long as the travel agency has informed the tourists three days ahead of the travelling starting, they can remove the liability for breach of contract. It in fact give the travel organizer the reason of arbitrarily terminating the contract and at the same time it has no provision about the rights of the tourists to rescind the contract, so it is extremely unfair; At the same time, even if the travel organizer cancels the travel contract in three days ahead of the trip starting, the compensation for tourists is only 10% of the amount of the advances payment, such amount of compensation is reasonable or not? If the travel organizer really rescinds the travelling just before the start of the travelling, its impacts on the tourists is tremendous, apart from the economic loss (the cost for tourism paid by the tourists), and even the spiritual disappointment and pain and so on.[279]

Because the important characteristic of tourism is in its timeliness, tourists have carefully carried out the management and selection of travel time prior to participating in a tourism activities , the travel organizer cancels the travel contract just ahead of the trip starting, the compensation for tourists is only 10% of the amount of the advances payment, but for tourists it possible means the loss of the entire trip, because it is very difficult for the tourists in a very short period of time to renewably

[279]Jinliu LIU, *Travel Contract*, the law press, January 2004, p. 287.

choose a travel agency for the same travel activity, especially in the time of the tourism peak season. Therefore, the 10% amount of advance payment can not be a real compensation for the loss of the tourist due to the breach of the contract of cancelling the travelling just ahead of the starting; the legitimate rights and interests of tourists have not been effectively protected.

Article 10 of "tentative standards for the quality margin compensation of travel agency "stipulates that: " the situation that the quality of the food does not match the price of the food in the restaurants arranged by the travel agency is because of the reason of the restaurants, the travel agency should pay 20% of food fee as the compensation to the tourists." This provision is also a essential violation of the principle of compensates of the *Contract Law* and entirely divorces from the essence of the contract's performance , because if during the tourism activities the quality of food and drink provided by the restaurant is seriously inconsistent with the contract and the tourists can only request a maximum of 20% of the food fee as compensation for the damages which can not make up for tourists actual loss; at the same time, China's *Contract Law* provides that the two sides of the contract can carry out agreement on the liquidated damages in advance, and after the actual breach of contract, make the adjustments on the amount of the liquidated damages based on the specific conditions which embody the principle of contractual autonomy. [280]If the amount of liquidated damages is set by others in advance, it in fact deprives the rights to sign the contract between the parties of the contract, and is a contravention of the free spirit of contract initiated by *Contract Law*.[281]

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[280] Article 114 of *Contract Law* provides:" the parties can make the agreement that when one party violates the law, he should a certain amount of liquidated damages to the other party based on the conditions of breach of contract and also can make the agreement the calculation ways for the damage compensation caused by the breach of contract .

If the agreed liquidated damages are lower than the loss caused, the parties may request the people's court or arbitration body to increase it; if If the agreed liquidated damages is too much higher than the loss caused, the parties may request the people's court or arbitration body to appropriately reduce it.

[281]Huiyue HUANG, *the practical analysis on the Disputes of the travel Contract*, China Tourism Press, May 2004, p. 266.

6.22. *The insurance system of travel organizer.*

China's statutory insurance system of travel organizer began in October 15, 1996 , the article 21 of *the Management Regulations of Travel agency* promulgated by the central People's government: "the travel agency organizing the tourism should insure the travel accident insurance for tourist and ensure the services provided in line with the requirements of protecting personal and property safety of tourists... ... ", it takes the travel accident insurance as the statutory duty of the travel agency into the legal provisions. Article 2 of *Interim Provisions about Travel Agency Handling the Travel Accident Insurance* issued by the National Tourism Administration In September 1, 1997 states that the travel accident insurance refers to the insurance activity that during the travel agency organizes the travel team to visit, for the purpose of the protection of the rights and interests of tourists, pay insurance costs to insurance companies on behalf of tourists , once the tourists during tourism have the accidents, the insurance company pays insurance premiums to travelers according to the agreement of the insurance contract. The travel accident insurance is stipulated in article 4 of *Interim Provisions about Travel Agency Handling the Travel Accident Insurance* as a statutory duty of the travel agency.[282]However, in practice, it has been found that even if the travel agency has insured the travel accident insurance for the tourists, it still can not well transfer the operating risks of the travel organizers, it is mainly manifested in when the loss of the tourists is due to the travel organizer does not fulfill its obligation of guaranteeing protect personal and property safety of tourists as a result of the faults of the travel agency.

According to this situation, the China National Tourism Administration in September 1, 2001 issued *the Provisions about the Travel Agency Insuring the Liability Insurance of the Travel Agency*, it provides that the travel agencies must insure the liability insurance of travel agency when it is engaged in tourism activities".

[282] Article 4 of *Interim Provisions about Travel Agency Handling the Travel Accident Insurance:* "the travel agency organizes the team to travel; it must handle the travel accident insurance for tourists."

Article 51 of *the Implementation Details for the Management Regulation of Travel Agency* in December 26, 2001 makes the same stipulation that the liability insurance is the statutory insurance for the travel agency.[283]So the liability insurance of travel agency is established by the laws as a statutory insurance of the travel agency substituting the travel accident insurance. The travel accident insurance is no longer a statutory insurance. [284]

In the provisions of new *the Management Regulations of Travel agency* performed in May 1, 2009 and "the implementation details about the Management Regulations of Travel agency" performed in May 1, 2009, they confirm that the liability insurance of travel agency is the statutory insurance for the travel agency, the travel agency only suggests the tourists to buy the travel accident insurance. [285]

The so-called liability insurance refers to the insurance contract is set up for the subject that the insured person should bear the liability of compensation for the third people in accordance with the law. [286]In "The matters which should be recorded and should not be recorded of the travel standard contract of Taiwan", the travelling fee of the number 5 of the matters which should be recorded includes the insurance fee.

The liability insurance takes the insured person's the civil compensation liability for damages as the insurance subject, in order to provide economic security for the loss of interests due to the fulfillment of the insured person's the civil

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[283] Article 51 of *Implementation details for the Management regulation of Travel Agency* states: " the travel agencies must insure the liability insurance of travel agency when it is engaged in tourism activities"

[284] http://old.cnta.gov.cn/22-zcfg/2j/. March 26, 2002, the central People's government has made the interpretation for the Article 21 of "the Management Regulations of Travel agency", the meaning of "the travel accident insurance" in the Article 21:" "the travel agency organizing the tourism should insure the travel accident insurance for tourist and ensure the services provided in line with the requirements of protecting personal and property safety of tourists... ... "Is that the travel agency the travel agency organizing the tourism should insure the liability insurance of travel agency for tourist.

[285] Article 38 of *the Management Regulations of Travel agency* performed in May 1, 2009:"the travel agency should insure the liability insurance of travel agency." Article 40 of *the implementation details about the Management Regulations of Travel agency* performed in May 1, 2009 states that:" in order to reduce the damages of the tourists caused by the accidents risk such as the natural disasters etc, the travel agency may suggest the tourists to buy the travel accident insurance."

[286]Hailin ZOU, *the theories on the liability insurance,* the law Press, 1999, p. 30

compensation liability for damages .the liability insurance usually belongs to the property insurance.[287]The promise of the compensation is that the personal or property damages of tourists are due to the fault of the travel organizers. Article 3 of China's *the Provision of the Travel Agency Insuring the Liability Insurance* states: "the liability insurance of the travel agency refers that the travel agency pay premiums to the insurance companies in accordance with the agreement of the insurance contract and the insurance companies assume the liability of paying the insurance fee for the liability of the travel agency for the damages the personal or property damages suffered by tourists during the operating the travel business activities. The coverage of the liability insurance: 1.the liability of personal injury and death of tourists; 2. the compensation liability of traffic costs and medical costs caused by the treatment of tourist; 3. the compensation liability of the death dealing of tourists and the repatriation expenses of dead body; 4. the cost for the necessary rescue of the tourists including the reasonable costs and expenses of transportation, food and accommodation requiring to disburse during the visit of close relatives, the reasonable costs and expenses disbursed due to the travel delay, etc. when it is necessary; 5. the compensation liability arising from loss, damage or theft of tourists' baggage liability; 6, the cost of litigation arising from disputes about the responsibilities of the travel agency; 7, other insurance liability agreed by travel agents and insurance company. Travel is not responsible for the situation: "... ... the personal and property damages occur in the period after the tourists' auto-stop of the activities arranged by the travel agency or in period of not participating in the activities agreed by the two sides but in the proper motion activities."

For the two conditions of the exemption of the responsibilities of the travel agency above, the first one is better to understand, that is, the damages occur after the tourists' auto-stop of the activities arranged by the travel agency, that is, in the period that the contract between the tourists and the travel agency has determined, damages did not occur in the tourism contract period, the tourism operators can be exempted

[287]Weidong XU*, Insurance Law*, Jilin People's Publishing House, 1994, p. 349.

from the liability. However, in the second case, there is a big controversy. Because although the damages occur when the tourists are in proper motion activity, but it still in the period of tourism, the tourists usually are not familiar with the conditions of the travelling places, When the damages of the tourists are caused by the reason that the travel agency does not give the enough reminding and introduction to the tourists, and even the tour guide does not do this work, it means that tourists the travel agency should assume the compensation liability for the personal and property damages of the tourists. [288]

There is still a problem that the liability insurance of the travel agency can not completely transfer its operational risks .because the article 10 of "the provision of the travel agency insuring the liability insurance " states that:" the limitation of the compensation liability for one person in domestic tourism is 80,000 Yuan, the limitation of the compensation liability for one person in inbound tourism and outbound tourism is 160,000 Yuan; the limit of the compensation liability for one domestic travel agency in every accident and in one year is a total of two million Yuan, the limit of the compensation liability for one international travel agency in every accident and in one year is a total of four million Yuan. "However, in practice, the amount of the compensation for the damages of the tourists caused by the travel operators is often much higher than the limited amount. taking the domestic tourism as an example, the limited amount of the compensation for one person is a maximum of 80,000 Yuan, but in serious personal damage cases, this amount of compensation is not enough, because the provisions of relevant laws in China provide that the personal damages often includes compensation for the medical expenses, loss of working time, the spiritual damages and so on. The part which is beyond 80,000 Yuan must be borne by the travel agency. For example in a case, Mr. Li of city A with his nine friends enrolled in a tour group visiting in city B organized by travel agency A, when the travel group arrived in the city B , they were accepted by the travel agency B, and travel agency B hired a coach from company C, there occurred a accident in the way

[288]Huiyue HUANG, the practical analysis on the disputes of the travel contract, China Tourism Press, May 2004, p. 309.

to the visiting spots, resulting in all members of the team were injured, some tourists were permanent disable, after checking , the cause of the accident was entirely caused by the illegal driving of drivers, and finally the court judged that travel agency assumed the total compensation for the loss, the tourists slightly injured gained the compensation of 30,000-50,000 Yuan, the young tourists with severely injured was awarded 1.3 million Yuan, while another old tourist seriously injured gained 700,000 Yuan, including 100,000 compensation for moral damage. [289]

In this case every tourists of the entire team met with varying degrees of personal injuries, the travel operators need to make compensation for each person, the compensation of this case has accounted for the limited insurance amount of one full year, and so if new travel accident occurs, the travel operator should assume the compensation responsibilities on itself.

From the above analysis we can see that the travel liability insurance is not a panacea, it can partly share the liability of the travel organizers, but it can not replace the liability of the travel organizers. therefore, on the one hand, we should further improve the relevant types of travel insurance with the continuous development of the tourism industry and widen the coverage of travel insurance to give the travel organizers and tourists more protection; but on the other hand ,it also requires the travel operators to improve their own professional knowledge, strong their self-awareness of the risk, no matter in the organization of the travelling or in selection of the auxiliary people, they should be careful, responsible and truly take the protection of the rights and interests of tourists in the first place; for example some travel agency ,from the perspective of protecting the rights and interests of tourists, insure the third person liability insurance for the tourists in addition to the liability insurance and accident insurance, excellently guarantee the smooth conducting of the tourism business.

[289]Jialu ZHOU: *the theories on typical travel cases*, Shandong Science and Technology Press, January 2005, p. 85-86.

6.3. *Judicial practice:*

Case: 20 Sep, 2003 the plaintiff Wang and his wife Cao signed the package tour contract with Shanghai CM international travel agency to participate in the Hong Kong- Macao travelling for four nights and five days organized by Shanghai CM international travel agency. It was agreed in the emigration travel contract that Shanghai CM international travel agency insured the travel accident insurance for the visits who participated this travelling and the travelling group fee had included the insurance fee. After the establishment of the travel contract, all the 39 tourists of this group including the plaintiff Wang and his wife Cao started their Hong Kong-Macao visiting.

25, Sep.2003, because the arrangement of the travelling was too compact that Cao was faint in Macao in the afternoon, through the emergency treatment of the local hospital, Cao was dead. The reason causing the death of Cao was intracranial hemorrhage proved by the "the certificate of the death" of Macao special administration government. And CM travel agency only insured the liability insurance of travel agency to Shanghai Yangpu branch-company of the china people's insurance company and at the same time the defendant CM travel agency did not insure the emigration travel accident insurance for all the visits of the relative travel contract.

The plaintiff Wang believed that: he had paid a lot of money for dealing the emergency treatment of his wife Cao. But when he asked the CM travel agency for the accident insurance, he was told that the CM travel agency did not insure the travel accident insurance for Cao which resulted in the loss of the expectation. This activity of the CM travel agency has broken the travel contract and infringed the rights and interests of the tourists, so it should assume the liability of the compensation. He appealed to court for the 30,000 Yuan compensation by the CM travel agency.

The defendant CM travel agency argued that: according to the interpretation made by the central People's government for the article 21 of "the Management Regulations of Travel agency", the meaning of "the travel accident insurance" in the article 21:" "the travel agency organizing the tourism should insure the travel accident insurance for tourist and ensure the services provided in line with the requirements of

protecting personal and property safety of tourists... ... “Is that the travel agency the travel agency organizing the tourism should insure the liability insurance of travel agency for tourist.” so the “travel accident insurance” agreed in the travel contract referred to the liability insurance of travel agency and not the travel accident insurance, the defendant has insured the liability insurance of the travel agency for the tourists. It can be reasoned out that the travel agency only suggests the tourists to buy the travel accident insurance, the tourists should insured the travel accident insurance on their owns.

The court believed that: according to the liability insurance of travel agency was stipulated in " Provisions about travel agency handling the travel accident insurance" as a statutory duty of the travel agency, the insured people was the travel agency and the insured interests was interests of the travel agency. When the personal and property damages of the tourists were caused by the reason of the travel agency during the travel business, the insurance company substituting the travel agency was responsible for it and dispersed the risks of the travel agency in its business. However the insured people in the travel accident insurance of the tourists were the tourists and the insured interests were the personal and property interests of the tourists. We could see that the liability insurance of travel agency and the travel accident insurance of the tourists were two different kinds of the insurances.

According to section 1,article 125 the “contract law “ of our country: “ when the parties of the contract have the disputes for the meaning of the contract terms, their real meanings should be confirmed in accordance with words used in the contract, the relative words of the contract, the purpose of the contract, the trading customs and the principle of the honesty and credit.” the interpretation according to the words’ meaning was still the fundamental method to explain the meanings of the contract terms. The “the travel accident insurance of the tourists” in section 6 ,article 2 of the travel contract agreed obviously expressed that the travel agency had the contractual liability to insure the travel accident insurance of the tourists for the tourists and it was not the liability insurance of travel agency for its own. Just because that the liability insurance of travel agency was to guarantee the business risks of the

travel agency, so the expense of this fee was should counted in the business cost of the travel agency just like the housing rent ,water and electric, communication etc. and could not be separately listed in the travelling fee. According to the article 16 of “Provisions about travel agency handling the travel accident insurance" of national tourism administration:” the fee of travel agency handling the travel accident insurance can not be separately listed in the selling price, the defendant CM travel agency as a enterprise specially engaging in the travel business should learn about it, handling “the travel accident insurance of the tourists” for the tourists non only has been listed in the words’ meaning ,but also it has been noted that the total travelling price included the fee of the travel accident insurance of the tourists, this can explained that the insurance in the travel contract was the travel accident insurance of the tourists not the liability insurance of travel agency from anther side, so it should be standardized by the agreement of the travel contract.

In summary, the defendant did not fulfill the obligation to insure the emigration travel accident insurance of the tourists for Cao according to the agreement of the travel contract which resulted in the loss of the insurance interests of expectation of the plaintiff, the two had the casual relationship, and the defendant should take the responding civil liability. So judged the defendant Shanghai CM international travel agency compensated the plaintiff 50,000 Yuan.[290]

In this case, if the death of the tourist is due to reason of himself and is not caused by the unreasonable arrangement of the travel agency, the travel agency should not be responsible for it, so whether the travel agency break the travel contract of not insuring the emigration travel accident insurance of the tourists for the tourist becomes the key of this case. Just as what the court has said, the emigration travel accident insurance of the tourists and the liability insurance of travel agency are two different kinds of the insurances, the purpose and the insured people are different. If the travel agency does not fulfill the contract, the tourist only can request it to compensate for the damages according to the contract, but having no the rights to

[290]Jinliu LIU, *Comments on one hundreds cases on the national and international tourism disputes*, china travel& tourism press, Jul 2008, p.371-376.

request the insurance money of the liability insurance of travel agency, so "the accident insurance" in the travel contract can not be the liability insurance of travel agency, because the liability insurance of travel agency is a kind of the statutory insurance for the travel agency, it is the obligation of the travel agency which does not need the agreement of the tourists.

7. *The relative legislations and their shortcomings on the liability of the travel organizer.*

Now when we look at many countries of the well-developed tourism industry in the world, most of them has set up the specifically provisions on the responsibilities of the travel organizer though different kinds of ways. Some countries stipulate the specific provisions on the responsibilities of the travel organizer in its *Civil Law*, such as in *the German Civil Code*, there are the special provisions on the responsibilities of the travel organizer in the chapter of the travel contract; Taiwan also follows the practice of Germany , in its *Civil Code*, the rights and obligations of both parties of the travel contract are listed in the chapter of travel contract .some countries have taken the way of designing the special basic Law for the development of tourism, for example from June 1963, Japan issued in succession a series of laws and regulations on the tourism ,such as the *Japan Tourism Basic Law* and its supporting regulations *the Standards Terms of the Japanese Travel Industry* and others, formulating a relatively complete travel laws system, the French *Travel Act* promulgated in 1959 and Belgium's *Travel Act* promulgated in 1965 . And even in the common law countries have also developed the Basic Law for the tourism industry development, such as the United States as early as in 1979 has formulated the *National Tourism Policy Act* and the United Kingdom also issued the *Travel Law* to guide the trial of the case. All of countries above have formed a very sound and mature unity of the tourism legal system which takes the travel basic law as the center and a series of laws and regulations as its supporting.

The flourishing development of China's tourism began in the reform and opening up in 1978, the state promulgated a series of policies to promote the development of various undertakings, and the tourism industry as a pillar industry of China's economy has entered a rapid development path. The earliest legislative on tourism in China was in August 23, 1982, the establishment of the first tourism administration departments-"National Tourism Administration of the People's Republic of China" and in 1985 it promulgated the first administrative regulations of the tourist- "Provisional Regulations on the Management of Travel Agency" which is after was revised to the name of " the Management Regulations of Travel Agency" in October 15, 1996, and in succession they enact a series of department rules, including “Implementation Details for the Management Regulation of Travel Agency” and the "Interim Regulations on The Quality Margin of Travel Agency " and "Implementing Details of Interim Regulations on the Quality Margin of Travel Agency “issued in 1995. On the aspect about the development of the local travel regulations, Hainan province has promulgated the first local travel regulations -"Tourism Management Regulations of Hainan Province." in June 22,1995, making a great attempt in the regulation of the activities of the travel organizer and the protection of the rights and interests of the tourists.

But it should be seen that the travel legislation of china is in confusion because it is inconsistent with the domestic flourishing development of tourism in China. The lack of a unified basic law for the tourism industry leads to the legislation of the department and the local legislation have no legal foundation. It brings the disorders in the establishment of the unified legal system for the tourism industry. The travel contract still belongs to the scope of the atypical contract, it can only apply the relevant general rules of the fundamental law ,for example *General Principles of Civil Law, Contract Law* and *the Consumer’s Rights and Interests Protection Law* and so on, without a basic law as a guide , the administrative regulations, departmental regulations and local laws and regulations are set up separately, resulting in the contradictions between the provisions, especially with regard to the liability of tourism operators .in December 11, 2001,China' has entered into the world trade

organization(WTO) which means that the laws and regulations of the various economic sectors in China have the all round connection with other countries in the world, tourism as an important economic component of China need to match with the provision of the WTO ,and the main principles of WTO is to the unity of the laws, Article 6 of *the General Agreement on Trade and Services* about domestic regulations points out: " in the sector having made the commitments, each member should ensure that the general application of the measures affecting trade and services are implemented in a reasonable, objective and fair manner. But laws and regulations about the restrictions in terms of Tourism market access of China as well as the action that government, enterprises are accustomed to use internal documents and policies in place of laws, regulations are all have a big gap with the requirements of WTO.[291]

7.1. *On the aspects of the laws.*

On aspects of tourism Basic law, National People Congress Standing Committee of China in 1982 has tried to develop a independent basic law of tourism industry - Tourism *Law of People's Republic of China* from 1982 it began to make the drafting of this law, the law is being in the condition of the amendment. Even until today, it has not been promulgated and implemented; the main reason is due to the complicated relationships of travel contract and the relevant disputes existing in academic circles.

Before the promulgation of the *Contract Law* of People's Republic of China in March 15, 1999 by the Ninth National People's Congress, it has tries two times to insert the travel contract into the areas of contract law as a typical contract, the first time was in the drafting process of the *Contract Law,* that is, the travel contract as a independent chapter (the Number 26 chapter) was set up in the fourth version of opinion soliciting draft of the *Contract Law draft* published in May 14, 1997

[291]Yuling HAN, *Brief theories on the Tourism legislation of China,* in Fubin YANG, Yuling HANG, Tianxing WANG , *Book series on Tourism Law,(1),*China Tourism Press, July 2005, p.16.

whose the nine provisions stipulated the basic content of the travel contract including the liability for breach of contract of the tourism operators as well as the definition of travel contracts, the contract form, the main provisions and its changes of the travel contract.[292]

But unfortunately the chapter of the travel contract finally was not written into the *Contract Law*. Just like what the scholar Mr. Liang Huixing points out: "It's like that there is no perfect thing in the world, the unified contract law is also not perfect, there are many deficiencies and regrets in it. First of all, the content about a number of the contract specifics which should be provided are not stipulated in the contract law, ... the part removed also include the partnership contract, the savings contract, the settlement contract and tourism contract etc, leaving too many regrets in the unity and perfection of our trading rules in the market. [293]

The Second attempt in the drafting process of the Chinese *Civil Code*, the travel contract as the Number 27 chapter is stipulated in the contract volume of *the Civil Code* (indoor version)in the September 2002 ,it can been seen that the legislators had paid great attention on the travel contract. this chapter contained the total content of articles 15 ,comparing with the travel contract previous in the draft of the contract law ,it has made great progress, including the rights and obligations of tourists, the transfer of rights and obligations of the contract, the changing and rescission of travel contracts, in particular the provisions about the liability of travel agency were even more perfect, its outstanding performance are in two aspects: the first is on liability for breach of contract of the travel organizer, in article 3,it stipulated: "The travel agency should provide the travel services in line with the quality standards agreed in travel contract . If the travel services provided do not meet the quality standard of the travel contract, the travel agency should be liable for the compensation of damages. " it identified that the travel organizer should be responsible for the whole travel

[292] Civil Law Office, the legal affair committee of National People's Congress Standing Committee, *the introduction to the "contract law of People's Republic of China Republic" and its important draft,* law Press, 2000, p. 151-152.

[293]Huixing LIANG, *The unified contract law: the success and the shortcomings,* China Law Science, china law society, No. 3 1999, p. 15.

contract to tourists, irrespective of the actual providers of travel services which put an end to the situation that the travel organizer took the reason that the providers of the actual travel services was not him but the travel assistant people to remove his liability of compensation ,and at the same time, it can be deduced from this provision that the travel organizer assumes the responsible by the principle of liability without fault of the non-faults, that is, the principle of strict liability , as long as the travel organizers are in violation of tourism contract, they should take the liability for the tourists, regardless of whether the travel organizer have the faults, which is of great significance to protect the rights and interests of tourists; the other side is in Article 15.[294]

It provided the liability of the travel organizer for the spiritual damages of the tourists of which the second section states: "tourists can require the compensation for moral damage to the travel agency if the tourists can not immigrate or emigrate due to the reason that the travel agency have the defectives in the immigration and emigration clearance." that is, it takes the time delaying in the procedures of immigration and emigration into the scope of spiritual damages and is breakthrough for the provisions of china civil law about that the compensation for moral damages can be requested only when the personal rights and interests are injured. It can be said to be with the characteristics of travel contract, because the tourism activities has characteristic of the continuity in time, if one part of the time is delayed ,it will affects the effectiveness of the entire tourism activities and it also reflects the purpose of the tourism activities - the spiritual enjoyment.

However, in this chapter, the shortcomings of the provisions on the liability of the travel organizer is obvious ,the provisions on the liability of the travel organizer is very vague and there are contradictions between the upper provisions and lower

[294] Article 15 of *the Contract Volume of the Civil Code (indoor version)*: "in the following circumstances, they can be requested to the travel agency for the spiritual damages caused by the personal, liberal damages and wasted times of tourists: (a) personal injury suffered by tourists for the reasons of travel agency; (b) the visitors in custody, detention, repatriation due to the defects in immigration clearance by travel agency; (c) the serious damages to visitors' health caused by the defects in transportation, accommodation, catering and others.

provisions ,they are reflected in the following aspects:

First, the absence of the important system on the travel organizer.

The character of the travel product provided by the travel organizer in the package tour is that it is a integrated products composed by a variety of single travel service, the travel organizer is responsible for the entire travel product provided by him to all tourists .the obligation of organization can be said the most fundamental obligation of the travel organizer, if it does not stipulate the obligation of organization of the travel organizer, it is equal to take the travel organizer as the agent of the travel services ,then it is difficult to ascertain the liability of the travel organizer for the organization obligation which should be taken by the travel organizer. for example if the whole travelling is affected by the defects in the convergence of tourism services during the process of the truism, it belongs to the organization liability of the travel organizer , but the travel organizer can take the reason that the specific services has not defects to avoid the assumption of the liability.

Second, the provisions of the responsibilities are not specific enough.

Article 3 the contract volume of *the Civil Code* (indoor version) can be seen as the provision on the guarantee liability against defects of the travel organizer, it states: “The travel agency should provide the travel services in line with the quality standards agreed in travel contract. If the travel services provided do not meet the quality standard of the travel contract, the travel agency should be liable for the compensation of damages. “And article 12 stipulates:" the travel agency should assume the liability the physical damages of Passengers during the travelling, but with the exception that the damage was caused by the intention or gross negligence of tourists. ";section 3 of article 15 stipulates for the moral damages that the defects in the transport, accommodation, catering and others cause serious damages to the health of the visitors, tourists can ask for compensation for moral damages. Although they all make the provision on the responsibilities of the travel organizer, they do not give the specific calculation methods for compensation and the standards for judging the meaning of serious damages which leaves the space for provoking the controversy in the juridical practice.

Third, there exist the contradictions between the upper and lower provisions on the liability of the travel organizer. The article 3 of the Civil Code (indoor version) can be seen as the provision on the guarantee liability against defects of the travel organizer, it states: “The travel agency should provide the travel services in line with the quality standards agreed in travel contract. If the travel services provided do not meet the quality standard of the travel contract, the travel agency should be liable for the compensation of damages. “.it can be reasoned out that the travel organizer assumes the guarantee liability against defects in the principle of non-fault liability, that is, no matter whether the travel organizer has the faults for the defects, he should all be responsible for them. But in article 13, it provides that: “the travel agency has the faults for the property damages of passengers during the period of the tourism; he should be liable for it." It is to say that the travel organizer assumes the liability in the principle of fault liability; the two provisions are obviously mutual contradiction.

At present, the liability of the travel organizer can only be applied by the general principle of *Contract Law*, and *General Principles of Civil Law* and the provisions about the consumer protection in the *Consumer’s Rights and Interests Protection Law*. Because the tourism consumption is a kind of the life consumption, so the damages of tourists due to the disputes of the travel contract should be regulated and adjusted by the *Consumer’s Rights and Interests Protection Law*. [295]These legal provisions can not meet the needs of the travel contract because the travel contract as a special form of contract, the subject of the contract has the character of complexity, including not only products but also services, and it often requires a number of assistant people to provide the services to complete the performance of the travel contract, if these contents rely only on the general and principal provisions of the law to adjust, it is clearly too broad and can not effectively protect the legitimate rights and interests of tourists.

[295]Xinyong CHEN, Zuoqian HOU, Fubin YANG , *the legal guarantee for The development of the tourism industry,* Intellectual Property Publishing House, August 2007, p.3.

7.2. *Administration and department regulations*.

In the newly revised the state council's administrative regulations –the *Management Regulations of the Travel Agency* (1,May,2009) and National tourism administration's department regulation- *Implementation Details for Management Regulations of the Travel Agency*(3,May 2009),they newly increase many provisions on the interpretation of the travel standard terms ,the liability of the travel organizer for the assistant people etc, making the important supplement to the relative regulations adding a series of the supporting department regulations- the *Interim Regulations on the Quality Margin of Travel Agency* and "Implementing details of Interim Regulations on The quality margin of travel agency "issued in 1995 by the China National Tourism Administration-it forms the management system for the travel operators that takes *the Management Regulations of the Travel Agency* as the center and other regulations as assistance to regulate the activities of the travel operators. But we should see that these regulations is only limited to the scope of the administration, it can not play the role of the substantive law of the tourism industry. because the individual laws and regulations of the travel industry such as *the Management Regulations of the Travel Agency* is or the administrative regulations promulgated by travel management department or the local regulations promulgated by the local government for the governing the travel market, the starting point and foothold of them is without exception on the standardization and the management of the tourism industry by the administrative departments. [296]

It is precisely because that it is made from the perspective of the industry management rather than the protection of the rights and interests of tourists ,so it has very limited regulation on the development of civil and commercial activities of tourism; At the same time, *the Management Regulations of the Travel Agency* is an administrative rule which can be applied to very limited scope, this is one of the important reasons why in the disputes of the travel business and the judicial practice

[296] Xinyong CHEN, Zuoqian HOU and Fubin YANG, *the legal guarantee for The development of the tourism industry,* Intellectual Property Publishing House, August 2007, p.4.

of ascertaining the liability of the travel agency, *the Management Regulations of the Travel Agency* is not be used as the private law code to protect the activities and the results of the tourists. [297]It is only taken as the judicial reference not as the substantive law applicable to justice judges in ascertaining the liability of the travel organizer in the package tour contract and in the protection of the interests and rights of tourists.

7.3. *The suggestion for the named travel contract.*

In summary, from the analysis above, we expect that the travel contract can be given its name as quickly as possible no matter from the prospective of the characteristics of the travel contract or from prospective of the needs of the judicial practice, the main reasons for the named travel contract are following:

1. It can improve the predictability of trial

In the course of implementation of the travel contract, if there are disputes takes place between the parties of the travel contract, as the legislations have made the distribution on the rights and obligations of the travel organizer and the tourists, so the parties can foresee all the available results of the court, the parties of the transaction may also easily calculate the cost of preventing the breach of contract and breach of contract.[298]

2. It can bind the activities of the travel organizer and protect the rights and interests of the tourists.

Now the cases that the travel organizer usually infringe the rights and

[297]Guoqing CHENG, *Introduction to China National Tourism Law,* China Ocean University Press, china ocean university press, August, 2008, p. 405.

[298] Lihong NING, *the researches on the travel contract,* in Huixing LING, the *Series of Civil and Commercial Law " (V. 22),* the Golden Bridge Publishing (Hong Kong) Limited Company, 2002, p. 28.

interests of the tourists due to the absence of the relative provisions about the obligations and the responsibilities of the travel organizer, it is also resulted that the tourists can not gain the compensation for their damages which are caused by the reasons of the travel organizer. Only let the travel contract named can the obligations and the responsibilities of the travel organizer be detailed stipulated in it, such as the obligation of organization, the guarantee liability against defects, and the liability of the compensation for the spiritual damages and so on. All of them take the named travel contract as a promise.

3. It can also economize the transaction costs.

The travel contract are often repeat used in the travel business, if the legislation has make detailed provisions on the rights and obligations of the parties of the tourism contract , the tourism operators and visitors do not have to consume the cost in the consultations about the essential points and the non-essential points for the establishment of the contract during the process of setting up the travel contract, the two sides of the travel contract have only to take the statutory allocation of rights and obligations as the foundation to make the addition and subtraction of the agreement .[299]

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[299]Yongqin SU, *the enforcement of the country inn the autonomy of private law*, in *Memorial papers Collection on the review and prospect of Civil Code's seventies years,* the Chinese University of Politics and Law Press, 2001, p. 29.

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