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## Legal liability of the tour operators on tourist contracts

Xuemin Zhong

Zhejiang University City College, (CHINA)

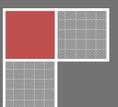
E-mail: 362195988@qq.com

### ABSTRACT

With the increasing development of the social economy and the improvement of people's living quality, tourism has become an important way for people to relax themselves and enjoy their leisure time. Studying legal liability of the tour operators, on one hand, can protect the travel consumers' legitimate rights. On the other hand, it can promote the resolution of travel disputes and the healthy development of the whole tourism industry in the long run. This paper mainly studies on the four aspects of the legal liability: the tour operator's contracting negligence liability, the flaw warranty liability and the liability of compensation for mental injury of default as well as the issues about which the third person needs to bear liability for involved in the tourism contract.

### KEYWORDS

Travel contract; Operator; Legal liability.



Reisevertrag, also called tourism contract, is the most basic legal document to standardize both parties' rights and obligations in an tourism contract. With the increasing development of the social economy and the improvement of people's living quality, tourism has become an important way for people to relax themselves and enjoy their leisure time. For the convenience of trip, most tourists choose to sign tourism contract with the travel agency. Up to now, tourist industry has become an important tertiary industry in China. However, the current laws and regulations about tourism are mostly related to the administrative laws and department regulations. They attach more importance to the adjustment of vertical legal relationship between government agencies and tourism operators and the stipulations for the tourism operator's function authority and level of responsibility. This kind of lagging legislative thoughts reflects the features of planned economy and exposes the problem of lacking awareness of the protection for tourism consumers' rights and interests in our country. So this kind of thoughts is no longer suitable for the development of tourist industry and our society. In this case, studying legal liability of the tour operators can promote the resolution of travel disputes and the healthy development of the whole tourism industry in the long run.

### **THE CONTRACTING FAULT LIABILITY OF THE TOUR OPERATOR**

Liability for Wrongs in Conclusion of Contract means that one side betrayals of trust leads to the profit loss of the other side, thus the former has to make up for the loss<sup>[1]</sup>. "Honesty and good faith" is the basic principle of civil law, which requests the parties to take up the responsibility of Subordinated Obligation whose name is pre-contractual duty when making a contract. When making a tourism contracts, the pre-contractual duty of tour operators has to include three aspects: first, the related regulations, laws issued by China on the content of our ads. The tour operators can't ballyhoo the public with false ads or use the expressions of uncertainty on purpose to a contract with people by misleading or cheating the tourists and the public. Second, The Quote of Travel offered by the travel agency has to accord with laws and regulations, and information projects must be complete and the content must be clearly true. What's more, the travel agency must promptly inform travelers of price changing. Third, most of the travel contracts are standard form contracts, so that the tour operators have to require detailed explanation of the contents of contract to the tourists before entering into a contract and the tour operators have the obligation to inform and remind of important matters. Otherwise, the tour operators have to abide the Responsibility of Contract Error.

There is no effect whether the tour operator does it on purpose or accidentally. As long as he violates the trust and breaks the relationship between the parties, then he will cause negligence. This shows that Liability for Wrongs in Conclusion of Contract of tour operators should execute no fault liability system instead of strict liability.

According to the opinions form Dr. Wang Liming, although culpa in contrahendo is an independent claim, it is an institution which assists contractual claims<sup>[2]</sup>. Because culpa in contrahendo merely compensates loss of trust interest which does not include the loss of Erfüllungsinteresse. And in the scope of compensation, it's usually less liable for breach of contract and tortious liability. In order to protect the interest of tourist, for the most part, if tourist can put in a claim which is based on Breaching Liability and Infringement Liability, there is no need to compensate base on Culpa in contrahendo, except the Breaching Liability and Infringement Liability do not come into existence like making a request of culpa in contrahendo at the conclusion of the contract stage or after the travel contract has been declared invalid.

### **TRAVEL AGENCY'S LIABILITY FOR WARRANTY AGAINST DEFECTS**

Warranty liability is a legal contract and is based on special requirements for consumers' special protection provisions, originated from Rome law. Warranty liability refers to the debtor of the paid contract who should guarantee the right of integrity and the subject matter of quality himself proposed<sup>[3]</sup>. If the debtor violates the security obligations, and then he is responsible for the warranty liability. Warranty liability consists of 2 parts, one is the warranty liability of rights and the other is the warranty liability of goods. The so-called the warranty liability of right refers to the debtor who should make sure his creditor gains his rights, and does not lose his subjects because of the third parties. Warranty of quality refers to the provisions that the debtor should guarantee that the quality of the things should be in conformity with the law and meet with the contract<sup>[4]</sup>. Traditional theory thinks that warranty liability exists in all kinds of onerous contract except for labor contract. And it also thinks that warranty liability is the liability without fault. Besides the situation that buyer is attributable to, as long as the seller delivers the subject matter of the defective, the seller shall bear the responsibility. In the travel contract, the warranty liability for tourism operator mainly refers to the liability for guaranteeing the goods or things. If the tourism products have defects, there will be 3 ways for tourism operator to take his responsibilities. The first way is that when the tour service does not have its general value and stipulated qualities, tourists can ask the travel agency to improve it. Also, it is the most important and basic way. The second way is that when the tourism operator does not have the ability to improve it or he refuses to improve, the tourists should ask them to reduce the costs. The third way is that if this defect causes the result that tourism's purpose cannot be achieved, tourists can dissolve the travel contract and make the tourism operator undertake a fundamental breach of contract responsibilities. In addition, when the attribution to the tourism operator causes the travel service loses its general value and qualities, tourism should ask for compensation for damages expect for asking for reducing costs or terminating contract. The warranty liability of travel contact is mainly manifested in four aspects: first, improve the defect. Travelers' aims of travelling are to relax and enjoy themselves. When the travel service which the travel agency provides is defective, the tourism can ask for improvement in order to make sure that the travel service meets the standard.

For example, if the guide travel agency sent does not have the occupation qualification, tourists have the rights to ask travel agency to provide a qualified tourist guide because the tourism contract is a consecutive contract. In order to continue it the travel agency must provide travel service. When the service he provides does not meet his general value and stipulated quality, tourism should ask the travel operator to improve it. But, it is impossible to remedy the past services which lack general value and stipulated quality. The tourism can only ask the operator to improve the parts which are not provided yet. In addition, the tourism can improve the defective services themselves. And they have the rights to request the necessary expenses. According to the regulations of German civil code, tourism can correct when the services are defective. Tourism can remedy the services themselves and request for necessary expenses if the travel operator does not remedy the services in a limited time. There in no need to set a deadline if the travel operators refuse to remedy or the tourists have particular interest in immediate remedy. Also, in order to balance the interests between the tourists and travel operator, the operator has the rights to refuse remedy if he has to pay a lot of extra money. Regarding the cost of improvement, it not only depends on the comparison between the cost and value but also the comparison between the cost and interests of the improvement. And the operators have the responsibility to explain why the expense is too high.

Second, right of claim on expense decreases. Tourism product is disposable and it doesn't have common value or due quality, thus tourists should in advance request the tourism operators to improve, and request expense to decrease when operators are unable or unwilling to improve. Furthermore, because of the repetitive impossibility of tour dealings, the flaws of tour service have been corrected though, they still ever exist referring to former tour dealings, and they may affect, to some extent, the value and the quality of tourism. Therefore, in existence of tourism, as long as there are any flaws, the right of claim on expense decrease is to be present. Surely, concerning the divergence of tourism flaws, in some offerings of flawed tour service, tourists should be given the responsibility to inform tourism operators who may be likely to have no awareness of it. For example, operators may not know the damage of articles at hotels before tourists check in, so under these circumstances, tourists have the duty to inform operators. But also, for some perceptible flaws, such as the transportation substituted normal vehicle for air-conditioning vehicle, even though the tourists are not informed, the operators are supposed to cut down tourism expense accordingly.

Third, the right to terminate contract. According to the primary principle of Contract Law, if one party does not carry out the contract, which deprives the opposite of right they deserve in the contract, then the opposite party can have the reason to terminate the contract. In the tour contract, it happens that the tour service is not well equipped with common value or due quality, so tourists are legally permitted to cease the contract if their request of improvement is not accepted or achieved at their will. And when tourists cease the contract for instance above, they will cause themselves in trouble. While the operators have the responsibility to send tourists back to the place of departure, and in the meanwhile, they have to pay the return trip for their own fault. To avoid needless loss to the operators if tourists make irrational excuses about the contract not having common value or due quality to cease the contract, tourists should be confined not to abusively cease the contract unless their problems are explicit far below the expectations.

Forth, compensation for property damage. Tourists can ask for compensation for property damage except for expense decrease or contract termination on the basis of operators' responsibility to cause the lack of common value or due quality. The guarantee liability about blemish of operators is no-fault liability, in other words, even the flaw made by operators about tour service is no-fault, tourists still need to request service improvement, expense decrease or contract termination. Under a circumstance similar to one of normal debt default, if the operators are reasoned for responsibility for incomplete payment, tourists can request compensation for damage. And this compensation of damage originally is one of incomplete payments, instead of a new right of request damage compensation. Therefore, after tourists carry out the right in terms of the rule of flaw payment attached to payment delay or payment default, they also need to request damage compensation referring to the part of damage on life, body autonomy, health, property and so on. In addition, this compensation should include one that is out of damage made by contract termination or made before the termination. This right for damage compensation exists as well as in expense decrease and contract termination in the meanwhile, that is, tourists can request damage compensation, expense decrease and contract termination for the ask for expense decrease concerning flaw in tour service. And what's more, tourists need not bear the burden of proof when they are asking for damage compensation, in the contrast, operators will bear it for this compensation is carried out of debt default.

### **TOURISM OPERATOR DEFAULT'S MENTAL INJURY COMPENSATION RESPONSIBILITY**

Tourist contract's strict flaw warranty liability requests travel operator to fulfill the contract according to the agreements of contract in order to ensure the integrity of the right and subject matter's quality. Tourist contract's essential character of pursuing spiritual enjoyment requests that tourists have a right to obtain indemnity when travel operator violates contractual obligations, which causes tourists' mental impairment and waste of time<sup>[5]</sup>.

Travel is a consuming behavior which is high level and views pursuing the spirit of joy and satisfaction as a purpose. Tourism activities' radical departure, the whole process and the final effect are all pointing to get spiritual enjoyments. This spiritual life is gained by enjoying the beauty, therefore, travel is a comprehensive aesthetic activity<sup>[6]</sup>. For travelers, the aim of travel is to satisfy their spiritual needs, specifically to get happiness and enjoyment and the pleasure of traveling.

As a result, travelers care more about maintaining their mental rights than general consumers. The process of traveling is a process to achieve this spirit consumption. Travel operator failing to perform or under-perform contracts is bound to travelers' damage of mental rights. Travel operator may not violate travelers' legitimate interest as average

consumers, however, it may violate travelers' mental rights, which would influence travelers' qualities of consumption to travel products<sup>[7]</sup>. The essence of mental injury compensation is to compensate victims for their loss of mental rights and punish the inflictors. If it is ensured when mental damages happen, no matter it is caused by infringement or breaking the contract, people should be compensated, which can protect the victims. Denying mental losses is caused by breaking the contract or refusing to give moral reparation. In an economic society, money has high value judgment criteria and is generally used to measure and ensure material property's and intangible property's value. If a society promises people's physical and psychological health, it should compensate for mental losses.

Although money cannot completely make up for victims' spiritual interests, it can make victims get mental enjoyment in other sides and regain victims' self-worth. In this case, money is one of the best way to make victims satisfy. The aim of compensation system for spiritual damage is to protect victims' mental moral integrity. In dispute for this special travel contract, we should follow the examples of other countries and areas to ensure that mental injury compensation is the main way to undertake the responsibility. When travelers ask for compensation to travel agency due to breach of tourism contract, it is not limited to the compensation of material damage, travelers can also ask for compensation of mental losses.

Although travel has spiritual value itself, tourism contract's object is the mental product which travelers provide, but it can't be considered that any behavior against tourism contract is bound to travelers' losses of mental enjoyment. Therefore, travelers can ask for mental injury compensation according to any defaults. We must strictly limit tourism contract's mental injury compensation, on the one hand, it can maintain travelers' benefit, on the other hand, it will not increase the trade cost. With the clear rules, we can improve tourism operator's degree of prediction of operational risk, promote the increase of quality and level of service, which would help the tourism in long-term development.

### **THE ISSUE IN THE TRAVEL CONTRACT WHICH INVOLVES THE THIRD PARTY PERFORMING THE RESPONSIBILITY**

In reality, there are many disputes caused by the third party, such as restaurants, hotels, transportation companies etc. Breaking contract so that travel benefits are not in conformity with the contract. Specific performance is: meals provided by restaurants have sanitation problems which cause tourists physical discomfort or food's shrinkage; the room reserved previously is Standard Room, but it becomes Common Room when tourists check in; passenger vehicle delays or the vehicles degrade, or facilities do not comply with the contract, etc.

These are not always caused by the tour operator, but caused by one specific project provider's deliberateness or clangers. This may causes the actual results of default, so the liability shall be borne by whom?

The reason for this problem in reality is that many services provided by the travel agencies needed a third party to complete. In the whole payment provided by the travel agencies, there is a possibility to make the whole payment appear flaws due to the third party, which causes that the travel agencies can't provide services in accordance with the provisions of the contract, forming the situation of travel agent default.

Thus, the situation of the travel agencies breaking the contract with tourists due to the third party is fairly common, and the responsibilities involved this is also important.

The legal nature of the third party that involves in the travel contract has two views in theory: one is the theory of "performance assistants". In this view, the catering, transport contract which is signed by travel agencies for tourists is, in fact, to perform the contract. If a tour operator's payment is paid by someone else, in addition to the passengers who have the contract behavior directly with the one that is the performance assistant of the travel agency, the deliberately or negligently infringing passengers behaviors of the travel agency are undertaken by the travel agency<sup>[8]</sup>. German scholars generally support the idea, and the Supreme Court in Taiwan also takes a position in the case. In this viewpoint, tour operator shall be responsible for the deliberate or negligently infringing passengers behaviors of his performance assistant.

The second viewpoint is the theory of "altruism the debtor in the contract". This viewpoint identifies the commercial contract which the third party participates in payment and signs up with the travel agency as altruism contract. The third party participating in the payment is considered as the debtor of altruism contract, and the passengers are identified as the beneficiary's position of altruism contract. If the third party fails to perform, passengers can directly exercise the right of claim. When the passengers get the right of claim of the third party, the third party also gets the right of pleading of travel agency for passengers at the same time. Scholars who hold this view believe that the altruism contract will have more advantages of protecting the interests of passengers. Regard the third party as a debtor in altruism contract, it can make the passengers directly request the third party in accordance with the contract to pay for the payment. When the third party breaches this contract, he will be subject to contract-breach responsibilities. Passengers can use this right when the third party wants to break these contracts. At the same time, it can be identified that the travel agency was in violation of the defect warranty obligations when the third party truly has the payment flaws. So in the cases when passengers fail from the third party, he can request the travel agency to undertake the liability for guaranteeing the drawbacks. In this case, due to no-fault liability, passengers don't need to bear the burden of proof and obtain compensation. This view holds that the passenger has the right of choice about who stands for the right, the third or travel agency, that is the passengers can directly claim the responsibilities of travel agency's failure in obeying the liability or for their breach of contract.

A majority of people support the view of "performance assistant" in tourist practice activity, what means that the legal nature of the third party who has been involved in the payments of travel contract (the provider of specific project payment) is the performance assistant of liability to the tour operator. To regard the business contract between travel agency

and the third party (which is responsible for the payment) as altruism contract, do not accord with the characteristics of the tourism contract, and are also not conducive to effective protection to the tourists. Tourism activities have the characteristics of nonresident, liquidity and the third party who has been involved in the payments always in other cities, which determines that it is extremely hard for the tourists to claim directly to the third person. The tourists have to afford the expense of transportation, litigation and lost income which affects their normal life, and the cost of lawsuit is very high, so the claim is not convenient and operable. Thus it not fully exerts the function of facilitating the altruism contract parties, nevertheless, it is more reasonable and convenient to profile it as performing the contract. For tourists, looking for the third party for claims often cannot solve in time, it is more realistic, reasonable and convenient to request the liability for breach of contract directly to the travel agency. When considering the responsibility, we must consider the actual disadvantaged position of individual tourists. In the case of disputes, we should properly increase the pressure of the travel agency, so as to better safeguard the tourists.

In conclusion, the travel contract should make travel agency be strictly liable for the performance assistant of liability, have a rational distribution of interests between the parties, and make travel agency choose the performance assistant of liability carefully. Meanwhile, in order to protect the interests of the tourists. In travel contract, in the case that it is because of the third party, the travel agency should be responsible for the breach of contract to tourists at first. After being responsible for the breach of contract, travel agency has the right of recouring against the third party, establishing a chain of responsibility for the breach of tourism contract in which the travel agency should be responsible for the breach of contract to tourists at first. And then the travel agency gets compensation from the third party. So it finally can protect the interests of tourists and travel agency, and promote the healthy development of tourism.

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