ANALYSIS OF THE APPLICABLE LAW TO A PRIVATE SPACEFLIGHT CONTRACT UNDER THE LATEST CHINESE CONFLICT RULES LEGISLATION

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To date, China does not have a private commercial space transportation industry. However, it does have a potential consumer market. Assume that a Chinese space tourist suffers personal or property damage as a result of a private spaceflight and he/she or in the case of death, his/her estate will sue the space operator in mainland China., then the most recent conflict rules of China that entered into force on April 1, 2011 will apply. The present paper applies the Chinese conflict rules to a private spaceflight contract (PSC). It addresses the importance of the domestic conflict rules when a Chinese citizen becomes a space tourist. On one hand the paper discusses how a Chinese court should apply the existing domestic conflict rules in this "frontier". The paper also analyzes the difficulties which will arise in the law application process and provides the corresponding solutions. The author aims at building a uniform conflict rules regime to regulate the PSC. Specifically, this paper contains an analysis of the applicable law to the contracting capacity for a space operator, the applicable law to the legal effectiveness of a PSC and in particular with the effect of a waiver clause in a PSC. Meanwhile, the paper argues some traditional issues in private international law, such as characterization, the directly applicable law and public policy. Besides, the paper notes the significance to strike an appropriate balance between the "safety" and "promotion" value, which respectively embodies the interests of space tourists and space operator, while establishing an international or regional conflict rules regime. The final goal of this paper is to serve as the starting point of the discussion on the national conflict rules with regard to private spaceflight.

I. INTODUCTION

"The tide of space tourism waits for no law—but the rule of law must prevail in the exploration and use of outer space".[1] In recent years, there has been much research on the issues of the applicability of air law and space law, registration and jurisdiction, authorization, and liability etc. related to space tourism. This research has been predominantly conducted from the international law perspective. However, "the rule of law" should be consisted of not only international space law, but also international space private law (ISPL). ISPL is a body of legal norms comprising substantive rules and conflict rules regulating space activities connected with property and personal non-property relations complicated by a "foreign element".[2] Thus, a private spaceflight contract (PSC) should be regulated by the ISPL as long as it has "foreign element".

A PSC is the foundation of space tourism. Once the disputes or problems of a PSC occur, a court (or an arbitration agency) shall rely on certain legal norms to decide the jural relation contained in a PSC between a space tourist and a space operator. Assuming that this PSC has "foreign elements" (it is most likely to have them), and a conflict of laws might happen. Because on one hand, there will be many "connect points" involved, such as the nationality nation and the habitual residence of the tourist, the registration nation and the licensing nation of the space operator, the place of the contract is signed or performed, the place of court and a launching state etc. On the other hand, the legal norms coming from different "connecting

points" (countries) might have different rules as to the same legal issue, such as jurisdiction, the character of a PSC, the contracting capacity for the parties, the form of a PSC, the validity of a PSC and even the standard to define if a PSC has the "foreign elements". The question for the court is which law should apply to a PSC, namely, how to define the applicable law to a PSC.

Conflict rule is the guidance for a court to seek for the applicable law. However the conflict rules of almost all the countries are formulated regardless of space tourism. Thus difficulties will arise when space tourism "encounters" conflict rules.

On basis of the latest Chinese Conflict rules legislation (the LAL of China),[3] this paper focuses on discussing the applicable law to characterize a PSC, the applicable law to the contracting capacity for the space operator and the applicable law to the legal effectiveness of a PSC (especially to the effect of a waiver clause). The paper also analyzes some traditional issues in private international law, such as characterization, the directly applicable law and public policy. The paper states the disadvantages of the LAL of China when it applies to a PSC and suggests relevant solutions. Furthermore, the paper aims at building a uniform conflict rules regime to regulate the PSC.

II. THE APPLICABLE LAW TO THE CHARACTERIZATION OF A PRIVATE SPACEFLIGHT CONTRACT

II.I Characterization and the Character of a PSC.

The ultimate aim of "Characterization" or "Classification" is to determine which conflict rule of the forum shall apply to certain case. It is the natural and necessary start point for the analysis of any conflicts case. [4] Once a case had been characterized as sounding in tort or contract, for example, predetermined choice-of-law rules (conflict rules) would then refer to "the place of injury" or "to the place of the making of the contract". Thus characterization could determine the choice of conflict rules and affect the outcome of the litigation. [5]

Every legal system confers a particular legal character on the relationships regulated by law.[6] That is why there might be conflicts between the characterizations on basis of different legal systems. To date there are no unanimous opinion on the character of PSC among native laws, international law and relevant international documents. On basis of the analysis of the provisions on forum-selection clauses under the law of the European Union (EU), a commentator addressed that in general a PSC is a consumer contract. "Consumer contracts are concluded between two persons, only one of whom is acting outside his/her trade or profession [Art.15 (1)].[7] Thus, a contract between a suborbital operator, which is a commercial company, and a SFP [8]who flies for recreational purposes is a consumer contract" [9]In some circumstances, a PSC shall be deemed as a transportation contract. In the event of a PSC has "an inclusive price", "provide(s) for a combination of travel and accommodation [Art. 15(3)][10]", it shall be recognized as a transportation contract.[11]

Besides there has been some controversy about how to distinguish a spaceflight contract from an air flight contract in the absence of a clear defining point for the "boundary" between air space and outer space. [12] A clear legal distinction between these concepts should now be properly determined. [13] However, this paper here does not aim at an accurate, extensively acceptable conclusion about the character of a PSC, but tries to give a picture of application of conflict rules and other native laws related to characterizing a PSC.

The question here is which law shall apply to characterize a PSC legal disputes or problems. The prevailing opinion, established by Kahn and Bartin, recommends that the question should be answered by the *internal* law of the *forum*, [14] which is also adopted by Chinese latest conflict rules.

II.II the Potential Problem to Characterize a PSC According to the LAL of China

Article 8 of the LAL of China stipulates that "The characterization of foreign-related civil relations shall be determined by the law of forum".[15] Consistent with this stipulation, a Chinese court must apply concerned domestic law to define the character of a PSC. Assuming that if according to the forum law (China law), a PSC is characterized as a consumer contract, then a consumer-protection principle shall be considered while determine the applicable law to this PSC;[16]if it is defined as a space transportation contract, the general choice-of-law rules[17] in contract will apply and if it is considered as an air transportation contract (civil aviation contract), then the relevant international conventions at present must be taken into account. [18]

The question is there are no rules in China law about the character or definition of PSC. Thus the character of a PSC is still uncertain in spite of having the clear characterization rule. The uncertainty of the result of characterization "provides a vehicle for courts to avoid undesirable results, by re-characterizing a case, to which then existing choice-of-law rules would have pointed" . [19]As mentioned above, the different characterized PSC might have different conflict rules , different applicable laws to apply and different outcome. In some sense, a Chinese court has a comprehensive freedom to choose its favorite applicable law to a PSC through characterization, at the beginning of a case. The author calls it "*applicable law shopping*", which is totally different from "*forum shopping*", in that the latter is conducted by the parties of contract, but the former is conducted by courts.

II.III Solution

Whatever *applicable law shopping or forum shopping,* both of them will bring negative impact to solve the PSC disputes, in that there is always uncertainty involved in it.

As far as a domestic court is concerned, there must be a principle to guide the characterization of a PSC. In the author's opinion, this principle is to strike an appropriate balance between two key parameters, "safety" and "promotion" (Principle of Balance). A commentator stated that "(emerging) principles must strike a balance between providing certainty and appropriate minimum standards on the one hand, and the protection and encouragement of innovation on the other." [20] The "safety" aims at minimizing the potential or real damage/risk which will happen or happened to both the contract parties and the third party during a private spaceflight. "Promotion" means to maximize the profits brought by the commercial spaceflight industry. [21] From a government's perspective, generally speaking, "safety" requires strengthening regulation on the private spaceflight and "promotion" indicates to release regulation. Apparently they are two opposed values: "safety" and "promotion". These are reconcilable in a long-term sustainability development of outer space activities' perspective. "Safety" does not only mean the personal or property security, but also the safety of outer space or outer space activities. A safe, well regulated outer space is the precondition for developing the private space activities and industry. Meanwhile, only by promoting the private space industry can we get a long-term development of outer space activities. Therefore, the Principle of Balance should govern the legal issues in connection with a PSC including the characterization of a PSC.

Thus, when a national court decides the applicable law to the characterization of a PSC, it should seek for an appropriate balance between the value of safety and promotion.[22] Concretely speaking , a nation should neither always refuse to apply the law which will benefit for foreign space tourists nor always refuse to apply the law which will benefit the spaceflight industry of other countries. Obviously the former nation would be rich with space tourists, like China. The latter would flourish in spaceflight industry. The author called it a world-wide balance. Accordingly,

there's another kind of balance named native balance. Assume that a nation is both rich in space tourists and space flight services. In this circumstance, this nation must not keep changing the application of law with its favorite results, even through which it can maximize its national interests. In fact, the long-term national interests are built up on basis of international cooperation and a world-wide interests-balance. If used as a principle to characterize the PSC, then the balance of safety and promotion could be deemed as a new theory for characterization matters.

As mentioned above, to characterize certain facts, the prevailing doctrine is *lex fori.* Rabel and Beckett advocated a solution to be found by means of *comparative legal studies* and *analytical jurisprudence*.[23] Furthermore some argued that every legal rule shall take its classification from the legal system *to which it belongs*. This view hold that to examine the applicability of foreign law without reference to its classifications is to fail to look at foreign law as it is.[24] The doctrine of analytical jurisprudence is attractive. Its terminal target is to invent an exhaustive system of legal categories, [25]like a uniform substantive law system. However, it is not the best choice of a pragmatist because this could hardly be achieved without alternation in the laws themselves. The other two doctrines both lack flexibility compared with the balance of safety and promotion principle. The Principle of Balance is a little abstract to apply and it should be specified further. This principle is not limited to deal with characterization matters but fits for the whole process to solve the PSC disputes. This will be discussed in more detail below.

In fact, the final solution is indeed to set up international agreements about but not limited by the definition or character of the PSC, yet such possibility appears remote at present. In the author's opinion, the practical countermeasure against the negative impacts of the divergence is to formulate uniform conflict rules about characterizing a PSC among the nations concerned. This question will be postponed until the fourth part of the paper after contemplating other issues that will be relevant in determining how we should get the balance between "safety" and "promotion".

III THE APPLICABLE LAW TO THE CONTRACTING CAPACITY FOR PSC PARTIES

III.I Applicable Law to the Contracting Capacity

According to most of the contract laws in this world, the absence of or limited contracting capacity will lead to a void contract or a contract whose validity to be decided. The theories about applicable law to the contracting capacity include *lex domicilii*, as a "well-recognized principle of law", lex loci contractus and the proper law[26] in the objective sense. Despite of the differences, it is clear, at any rate, that the choice lies between these theories.[27]

In general, the parties of a PSC are the space tourist and the spaceflight operator, accordingly the analysis of applicable law to the contracting capacity for PSC parties should be divided into two parts. However, from a space (law) perspective the choice-of-law in contracting capacity for a space tourist is not as specialized as for a spaceflight operator. The former can apply the general principle which defines the applicable law to any kinds of contract. Whereas the latter will fall with some special legal issues in space law, such as registration and license. Considering this, the remainder of this part analysis will only deal with the choice-of-law in contracting capacity for a spaceflight operator.

III.II Potential Problems of the Application of the LAL of China to a PSC

Here's a hypothetical case: a Chinese tourist signed a spaceflight contract with Virgin Galactic[28], a space operator, which registration country is UK and the spacecraft is launched from Curaçao[29], an island in Dutch Antilles. The space port from which it is launched belongs to Space Experience Curaçao, a

Dutch company. [30] Under the Commercial Space Launch Act, Virgin Galactic shall require a US license.[31] The tourist sued Virgin Galactic because of a contract dispute in a Chinese court and then the court will apply the LAL of China to decide the applicable law to the relevant legal issues including the contracting capacity for Virgin Galactic.

According to the Art.14(1) of the LAL of China,[32] the capacity for civil rights and civil conduct of a legal person shall be determined by the law of its registration country. The contracting capacity is included in the capacity for civil rights and civil conducts. Art.14(2) further stipulates that if the place of registration and the main place of business of a legal person are different, the law of the main place of business can also apply.[33] According to the above conflict rules, the Chinese court could apply the law of the registration country of Virgin Galactic or the law of its main place of business alternatively.

As to a PSC, in most occasions, the country from whose territory a spacecraft is launched (launching country[34]) could be taken as the main place of business of the space operator. Thus in this case, the court will apply the law of UK or the law of Curacao to decide the contracting capacity of Virgin Galatic.

There are three questions should be noticed here. First, what kinds of laws in the registration country or the main place of business should the court apply? Second, is it proper to decide the applicable law alternatively? Third, is there any other country should be taken into account besides the registration country and main place of business?

As to a general contract, the applicable law to its contracting capacity should be kind of private substantive law, such as contract law, civil law and corporation law. However as to a PSC, the administrative law, such as special registration rules and license rules for a spaceflight operator or a spaceflight [35]must be taken into account at the same time, in that most of its clauses are mandatory. To break these rules, for example, to carry out private spaceflight or other space activities beyond the limit approved by the license, will make a PSC void, and even make the spaceflight operator itself be withdrew license of launching a space object. [36] Thus, the relevant administrative law should apply to the contracting capacity for a space operator.

There is a "directly applicable law" theory in Private International law, which is about the application of the mandatory rules of social law–"directly applicable law", which can apply in foreign-related cases regardless conflict rules.[37] In the author's opinion, the administrative rules in a native space law should be taken as the "directly applicable law".

In fact, the LAL of China has a "directly applicable law" clause, but it stipulates that only the mandatory rules of China could be directly applied. [38]A Chinese court has no responsibility to apply a foreign "directly applicable law". In this hypothetical case, the Chinese administrative law will not apply, in that this case is beyond the jurisdiction of the relevant Chinese administrative law. [39] Neither the administrative rules in the US nor the Netherland will reply, in that they are neither the registration country nor the main business place of Virgin Galatic. The question is should a foreign "directly applicable law" apply to a PSC? As far as the author is concerned, the answer is positive. If not, there will have negative influence on both juridical practice level and theory level. First, a Chinese court's judgment regardless of other countries' mandatory administrative laws will be difficult to acquire the recognition and enforcement of the courts in the corresponding countries, such as the US and the Netherland. [40] Second, to neglect the administrative law, wherever it comes from, is not apt to the "safety" goal from an international perspective. A "safety" goal requires strengthening regulation on a private spaceflight and obviously an administrative law of a country is an effective tool to accomplish this goal, in particularly when the country has a close connexion with a PSC. In fact, China also can benefit

through the strict administration on this contract, in that China is the nationality nation of the tourist, which might also contribute China to a "launching state", even if the connection is not so "close".

Thus, the directly applicable law should not be limited to the law of forum. In other words, a native court should admit the extraterritorial effect of the mandatory administrative rules in a foreign space law and should not apply the law alternatively, but should apply all the "directly applicable laws" simultaneously.

The subsequent question is what kinds of countries' administrative law should directly apply here? It has to be noted that the country whose administrative law is applied directly must have close connection with a PSC. [41] Then to what extent should a court define the "close connection"? In the author's opinion, this question should be considered on an international space law level. The standard to define "close connection" should be the same to define a "national activity" and a "launching state". It is stated in Article VI of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty") which requires states to supervise its national space activities whether such activity is carried out by governmental or non-governmental activities –which must encompass private spaceflight activity. According to the Convention on International Liability for Damage Caused by Space Objects (the "Liability Convention")a state is liable for any damage caused by any space objects launched from that state (or whose launch was procured by that state), including any private space objects. Therefore a nation in connection with the "national activity" or a state with respect to a "launching state" has the motive and requirement to set up administrative rules to regulate the private spaceflight activity. Through the administrative rules a nation can fulfill its international obligation of authorization and supervision and reduce the risk to bear international liability. Countries like these should be deemed as having the "close connection" with a PSC and their administrative law should apply to the contracting capacity of a space operator, regardless the place of court. A commentator addressed that (as to the SXC project[42]) "it will be clear that the US regulatory regime will become involved in various manners (including the export control issues…)."[43] From another perspective, it also indicates that the US could be defined as a launching state who has procured the launching in various manners.

It has to be noticed that the definitions of a "national activity" and "procure launching" are still open questions. This will not be discussed in this paper, but at least from this we can see the interaction between international space law and international space private law. Some fundamental legal problems in private law could only be solved on the international public law level.

In a conclusion, in the hypothetical case above, according to the exiting conflict rules, a China court will consider the administrative law of the UK and of the Curacao. Since there's no space legislation in Curacao so far, only the space law of UK will apply to the contracting capacity for Virgin Galic. However, as discussed above, the administrative rules of the UK, the US and the Netherland should also apply in the same time. Only consistent with all these mandatory rules can a Chinese court decide if Virgin Galactic has the capacity to perform a PSC or not.

III. III Solution

As to the uncertainty and conflicts in law application, an international uniform administrative law will always be the best and ultimate solution. However, as the reasons mention in the second part, to build such kind of legal regime is unsubstantial in short period. Therefore, the author suggests dealing with the applicable law to the contracting capacity for the parties on three levels.

On the domestic conflict law level, the "theory of

direct application" shall be adopted. A court should apply the "directly applicable law" of all the countries which have close connection with a PSC simultaneously. Otherwise, the outcome of litigation might be inconsistent if the place of court is changed. Furthermore, it is apt to the "safety" goal.

On the domestic administrative law level, a state which has a plan to develop private spaceflight industry shall accelerate to set up or improve the administrative law to fulfill its administration obligation under Art.VI of Outer Space Treaty.

On the uniform conflict law level, the "theory of directly applicable law" as we discussed above shall be confirmed in an international or regional level to assure the uniformity of application of law to the contracting capacity for the parties of a PSC and increase the safety of private space activity.

IV. THE APPLICABLE LAW TO THE LEGAL EFECTIVENESS OF A PFC

IV.I the Relevant Conflict Rules in the LAL of China

Differing from contracting capacity issues, which is always regulated by mandatory rules, the effectiveness of contract is often regulated by random/arbitrary norms. Thus most legal systems recognize the principle of party autonomy and the principal of most close connections. China is not an exception. In the LAL of China, there are three articles which separately stipulated the conflict rules for general contract, consumer contract and labor contract. As mentioned for several times in the second part, the characterization of a PSC is the precondition to decide which conflict rule shall apply.

If the court characterizes the PSC as a consumer contract, then the Art.42 shall apply. It stipulates that "the the legal effectiveness of Consumer contracts (in the event of absence of choice-of-law agreement between parties) shall apply the law of the consumer's habitual residence; the law of the place where the consumer receives the goods or service shall have the priority to apply according to the choice of consumer or if the operator doesn't engage in the relevant business activities in the consumer's habitual residence."[44] The primary principle is a unilateral party (consumer) autonomy which fully embodies the policies behind the relevant provisions, with special regard to the particularities of consumer protection. As to the "safety" and "promotion" value, it embodies the former. Besides the consumer's habitual residence and the place of receiving the goods or service act as the accessorial connect points in the absence of the consumer's autonomy will. As to a PSC, the place to receive the goods or service is hard to define. Most likely the place where a spacecraft is launched from could be an answer, at least part of the answers. In order to stimulate the local private spaceflight industry, the applicable law of the place where a spacecraft is launched from will tend to benefit for the space operator. Therefore the "place of receiving the goods or service", on the contrary, reflects the value of "promotion". As to the consumer's habitual residence, it could apply only if it is identical to the place of receiving the goods or service, therefore it doesn't affect the relation between "safety" and "promotion". To sum up, it seems that the balance of the "safety" and "promotion" is achieved by the Art.42. However it is not necessarily the case because of the unilateral party autonomy put the space operators in a very passive situation. Thus the Art. 42 benefits more for the "safety" than for the "promotion".

If the court deems the PSC as a transportation contract, [45] the general rule (Art. 41) will apply. According to Art.41, the parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes. If the parties have not made a choice, the law of habitual residence of one party whose fulfillment of obligation can most embody the contract's character or the law of the country to which the contract is most closely connected shall apply.[46] We should not take it for granted that it embodies the balance of "safety" and "promotion", in that the applicable law-selection

clause could be always contained in a formal contract which is provided by the space operator. Moreover, "the law of habitual residence of one party whose fulfillment of obligation can most embody the contract's character" is namely the law of the space operator's habitual residence. Because according to the doctrine of characteristic performance, the duty of performance can most embody the character of a contract. [47]In a PSC, space tourists have duty of payment, therefore the obligation fulfilled by the space operator is the characteristic performance. These two applicable laws mentioned above are both beneficial for the space operators. Art. 41 also confirmed the most closed connexion principle，which is helpful to seek for the balance of "safety" and "promotion" case by case. Considering the special character of a PSC, the different aspects of the legal effectiveness of a contract might apply different laws. In the author's opinion, the applicable law to a wavier clause should be considered separately, in that there will be mandatory rules involved.

IV.II The Applicable Law to a Wavier Clause of a PSC in Accord With China Law

To date the spaceflight activity is still full of risks, both for the space operator and the space tourist. "Liability and the ancillary financial risks are issues close to the heart of any commercial space tourism operator. [48] Given the private contractual nature-between the space operator and the tourist, "it is highly likely that carefully crafted exclusion of liability clauses for death and injury would have been included in the space tourism services agreement".[49] To a space tourist a wavier clause means the risk-undertaking, and to a space operator, it means the risk-reducing. To promote the local private (commercial) spaceflight industry, the positive attitude to a wavier clause will be given by the law of the place where a space operator's habitual residence locates and the law of the place where a space operator launches a spacecraft. Take the US law for example.

Under 51 U.S.C. 50914(b)(1), the licensee is required to make a reciprocal waivers of claims with its contractors, subcontractors and customers. [50] "While the FAA final rule makes it clear that a space flight participant is not a customer, the operator is not prevented from making a waiver of liability part of the agreement with a space flight participant except in cases of gross negligence. This is in line with section 7 (a.)(7) of the FAA Guidelines, which provide that the written informed consent to be signed by the space flight participant should not relieve the RLV operator of responsibility for gross negligence."[51] However the law of the space tourist's habitual residence may not admit this waiver clause's effect.

In a Chinese court, even if the US law is decided to be the applicable law to a PSC according either Art.41 or Art.42 of the LAL of China, it might not apply to the waiver clause because which may violate the public interest of China. Chinese contract law stipulates that "the following exception clauses in a contract shall be null and void: (1) those that cause personal injury to the other party; (2) those that cause property damages to the other party as result of deliberate intent or gross negligence." [52]Additionally the consumer protection law stipulates that "business operators must not set unfair and unreasonable regulations against consumers by the use of formal contract, circular, statement, shop or store notice and other means, or try to alleviate or avoid their civil responsibility they must bear for harming the legitimate rights and interests of consumers by resorting to the above means. Should formal contracts, circulars, statements and shop or store notices carry contents mentioned in the previous paragraph, the contents shall be null and void".[53] These compulsory rules shall be taken as a fundamental principle of justice and as a part of the public interest. According the Chinese contract law, a space operator should still be responsible for personal injury caused by it, even if it has no gross negligence. The consumer protection law also denies a waiver clause's effect.

IV.III Solution

The questions are, under the Principle of Balance, how to choose the applicable law to characterize a PFC and how to deal with the public policy with regard to the waiver clause.

From a domestic perspective, a Chinese court shall depend on the law of forum to characterize a PFC.[54] As aforementioned China has no definition about a PFC so far. In this situation the court should aim at a balance between "safety" and "promotion" on a macro level. First, the court could confirm that the character of a PSC is a consumer contract in order to protect the interests of space tourists. After all, the tourist has a weaker legal status than the operator and it is a basic principle in private international law to protect the legitimate interests of weak party. Meanwhile, as a compromise to the safety value, the waiver clause's effect could be determined by the law which benefits for the space operator, which is also apt to the freedom to contract. This means the relevant countries' public policy related to the validity of a waiver clause should not apply here. However, the same question in the third part of this paper would occur that if the place of court is changed, the outcome of litigation might be changed too. A court will apply its public policy to a waiver clause of a PFC just like it will apply its own administrative law to the contracting capacity to a space operator. Considering the "safety" value, we should confirm the significant function of the administrative law; therefore this paper argues to apply these administrative laws simultaneously to the contracting capacity of a PFC. However, considering the "promotion" value, the validity of a waiver clause should be confirmed, thus the related application of public policy should be limited. Furthermore, a waiver clause is always based on that "private passengers are able to make a fully informed decision when taking on the risk of suborbital flight". [55]Thus, to confirm the validity of a waiver clause does not mean the tourist's interest is neglected.

In order to achieve the consistent outcome of litigation in different courts, the author argues to put this limited application of public policy into a uniform conflict rule to regulate the validity of a waiver clause of a PFC.

Except for the waiver clause, others aspects he legal effectiveness of a PSC shall be determined by the party autonomy principle and by the most close connexion principle in the absence of an autonomy will.

V. CONCLUDING REMARKS

Several years ago a commentator stated "existing freedom of contract, equality of bargaining power, contract law, tort law, the law of obligations, insurance law, private international law, and the law of conflicts will be able to solve liability and other private law issues arising out of space tourism activities." [56]However, no matter how perfect substantive laws are, they could not apply if the conflict rules are ill.

As aforementioned, if a conflict rule is not designed according to a PSC's feet, then the uncertainty, vagueness, blindness and divergence related to the application of law will occur. This is beneficial for neither the "safety" value nor the "promotion" value, which is the exactly situation faced by the LAL of China.

To solve these problems, it is necessary to set up a uniform conflict rules on basis of striking an appropriate balance between "safety" and "promotion" value. It is significant to design specific conflict rules and theory guided by the "balance" principle, for example, to directly apply the relevant administrative law to the contracting capacity for a space operator simultaneously, to limit the application of public policy when deciding the effect of a waiver clause.

The final goal of this paper is to serve as the starting point of the discussion on the national conflict rules with regard to private spaceflight. There are many other legal issues needing further considerations on a private international law level, such as the

applicable law to the tort, the property, the intellectual property and even the marriage and family legal relations etc.

The era of private spaceflight is coming. Considering the tough and hard negotiation towards building an international uniform substantive rule or amending the existing international space conventions regime, it might be a pragmatic approach at present to develop the native administrative rules and on the other hand to set up a uniform conflict rule or at least to adjust the application of native conflict rules. Some may argue that it is not necessary to formulate an international substantive law or conflict law until the real space transportation is feasible. However, "law must precede man into space." [57] Maybe it is unrealistic for nations or international organization to design a special or amend the existing substantive and conflict rules regime just for a PSC or space tourism. But at least, the legal thinking and debates about the character, principle and specific rules of the law which will apply someday in the future must precede man into space. The final goal of this paper is to serve as the starting point of the discussion on the national conflict rules with regard to private spaceflight. There are many other legal issues needing further considerations, such as the applicable law to the tort, the property, the intellectual property and even the marriage and family legal relations etc.

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[1] Stephan Hobe, Gerardine Meishan Goh and Julia Neumann, *Space Tourism Activities-Emerging Challenges to Air and Space Law?* 33 J. SPACE. L. 373 (2007).

[2] *See* M. Yuzbashyan, 'regarding formation of the international space private law' (2008)51 *proceedings of the colloquium on the law of outer space* 10.

[3] Law of the Application of Law for Foreign-related Civil Relations of the Peoples Republic of China(promulgated by the Standing Comm. Nat'l People's Cong., October 28, 2010, effective April 1, 2011), available at http://www.china.com.cn/policy/txt/2010-10/29/content_21225950.htm.

[4] In general, the pervasive problems in Private International Law include characterization, renvoi, public policy, ascertainment of foreign law.

[5] Eugene F.Scoles, Peter Hay,Patrick J.Borchers, Symeon C. Symeonides, *Conflict of Laws,* 4nd edn,Thomson.1982.126.

[6] Martin Wolff, *Private International Law*, 2nd edn, Oxford at the Clarendon Press.1950.162.

[7] *See* Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 16 Jan. 2001, p. 0001 – 0023.

[8] Spaceflight Participants

[9] The author also argued the shortcoming of this classification. "However, a scientist who takes a suborbital flight to conduct experiments for the company or organization he/she works for is not a „consumer" under the Regulation." Michael Chatzipanagiotis, ' Forum-Selection Clauses in Suborbital Space Tourism Contracts and Eu-Law',(2010)53 *proceedings of the colloquium on the law of outer space* 6.

[10] *Id.*

[11] *Id.*

[12] *See* Steven Freeland, *Up, Up and... Back: The Emergence of Space Tourismand Its Impact on the International Law of Outer Space*,6 Chi. J. Int'l L. 1 2005-2006:7-9 ; Steven Freeland, *When Laws are not Enough---The Stalled Development of an Australian Space Launch Industr,* 8 U Western Sydney L Rev 79 (2004).con this question Hobe, Stephan, *Legal aspects of space tourism*, Neb.L.Rev. 2007, p. 439 (442-444); Malcolm N. Shaw, *InternationalLaw* 480 (Cambridge 5th ed 2003). For a discussion of the various theories regarding a demarcation between air space and outer space, *see* I.H. Ph. Diederiks-Verschoor, *An Introduction to Space Law* 17-21 (Kluwer Law 2d ed 1999) Stephan Hobe: *The legal regime for private space tourism activities—An overview,* Acta Astronautica(2010),Vol.66,P1593.

[13] *See* Steven Freeland, *Up, Up and... Back: The Emergence of Space Tourism and Its Impact on the International Law of Outer Space*,6 Chi. J. Int'l L. 1 2005-2006:6.

[14] The prevailing doctrine. *See supra* note 6, at 150..

[15] *See supra* note 3, art.8.

[16] *See supra* note 3, art.42.

[17] *See supra* note 3, art.41.The general choice-of-law rule reflects the party autonomy principle and the most connected principle, which will be discussed in more detail below.

[18] *See* on this question Hobe, Stephan, *Legal aspects of space tourism*, Neb.L.Rev. 2007, p. 439 (442-444).

[19] Martin Wolff, *supra* note 6, at 124.

[20] Steven Freeland, "The impact of space tourism on the international law of outer space"(2005)48 *proceedings of the colloquium on the law of outer space*179.

[21] The U.S. Space Transportation policy specifically states, the "U.S. Government must capitalize on the entre' preneurial spirit of the U.S. private sector", see U.S. Space Transportation Policy, Jan. 6, 2005, http://www.ostp.gov/htmlSpace-TransFactSheetJan2005.pdf (last visited Dec. 3, 2007). Quoted from Melanie Walker, *Suborbital Tourism Flights: An Overview of Some Regulatory Issues at the Interface of Air and Space Law*, 33 J. SPACE. L. 437,454 (2007).

[22] M. Yuzbashyan, *supra* note 2, at 1.

[23] The doctrine of analytical jurisprudence, *see supra* 6, at 153.

[24] Martin Wolff, *supra* 6, at 157.

[25] Martin Wolff, *supra* 6, at 154.

[26] *see* G.C.Cheshire, *Private International Law*, 7nd edn,London Butter Worths.1965.200.This theory holds that the capacity should be governed by the law that governs the contract, that is, the applicable law of contract.

[27] G.C.Cheshire, *supra* 26, at200.

[28] *See* http://www.virgingalactic.com/.

[29] *See* Frans G. von der Dunk, 'Sun, Sea, Sand … and Space: Launching Tourists into Outer Space from the Dutch Caribbean' (2010)53 *proceedings of the colloquium on the law of outer space.* See for further details http://spaceexperiencecuracao.com/.

[30] *Id.*

[31] *Id. "*Virgin Galactic is using the technology of Scaled Composites, a US company, brought into a separate daughter company The Space Company, a US company as well even if majority owned by Virgin Galactic. If therefore the US Secretary of Transportation, read the FAA's Office of Commercial Space Transportation (OCST),

would come to define "controlling interest" along the lines of such involvement of critical US-patented and US-owned technology, Virgin's operations might still require a US license under the Commercial Space Launch Act. " "This is without prejudice to the requirement for Virgin Galactic in any event to acquire an export license for the relevant technology under the US International Trade in Arms Regulations, the (in)famous ITARs. Cf. on the issue of ITARs in the context of private manned spaceflight " *see* http://en.wikipedia.org/wiki/The_Spaceship_Company; M.N. Gold, Lost in Space: A Practitioner's First-Hand Perspective on Reforming the U.S.'s Obsolete, Arrogant, and Counterproductive Export Control Regime for Space Related Systems and Technologies, 34 *Journal of Space Law* (2008), 163-85.

[32] *See supra* note 3, art.27.

[33] *Id.*

[34] The scope of a "Launching country" is narrower than "launching state", the more details will be discussed below.

[35] von der Dunk, *supra* note 29, at 12. "...the spaceflight operator itself will have a sufficiently elaborate license himself, …The licenses for spaceflights, by contrast, are likely to start out being granted on a one-by-one basis, on the assumption that the specific technology and operational know-how will change from launch to launch even with the same spaceflight operator."

[36] *Chinese law: Interim Measures on Administration of Licensing the Project of Launching Civil Space Objects, Order No.12 of the Commission of Science, Technology, and Industry for National Defense of the People's Republic of China,* 33 J. SPACE L. 442-456 (2007), at 446, art.16.

[37] Theory of direct application is the reflection of intervention in economy and society by the western states from the 20th century. The laws on restrictive trade practices, prices laws, import and export prohibitions, economic and political laws in so far as they effect the essential validity of the contract, administrative law, rules of tort or delict, competition law, etc.. See Marc Blessing, Impact of the Extraterritorial Application of Mandatory Rules, available at http://www.baerkarrer.ch/Downloads/disclaimer.php?f=%2FPublications%2F1009%2F4_3_9.pdf.

[38] *See supra* note 3, art.4.

[39] *See Chinese law: Interim Measures on Administration of Licensing the Project of Launching Civil Space Objects, Order No.12 of the Commission of Science, Technology, and Industry for National Defense of the People's Republic of China*, 33 J. SPACE L. 442-456 (2007), at 446, art.2,

[40] Martin Wolff, *See supra* note 6, at 244.

[41] S*ee* Andrea Bonomi, Mandatory Rules In International Law-The quest for uniformity of decisions in a global environment,Yearbook of Private International Law,Vol.I(1999),Holand,Kluwer Law International Press,2000.

[42] von der Dunk, *supra* note 29, at 5.

[43] von der Dunk, *supra* note 29, at 15.

[44] Law of the People's Republic of China on Protecting Consumers' Rights and Interests(promulgated by the Standing Comm. Nat'l People's Cong., October 31, 1993, effective January 1， 1994), available at http://www.law-lib.com/law/law_view.asp?id=246.

[45] If it is taken as an air transportation contract, then the court shall apply the relevant international aviation convention, which is not the subject the author will discuss. Therefore here the transportation contract is namely space transportation contract.

[46] *See supra* note 44, art.41.

[47] Martin Wolff, *supra* note 6, at 980.

[48] *See supra* note 1, at 367.

[49] Steven Freeland, *supra* note 13, at16.

[50] 51 U.S.C.§ 50914(b)(1).

[51] Stephan Hobe, *supra* note 1, at 370-371.

[52] He tong fa [Contract Law of the People's Republic of China], art. 53 (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective October 1, 1999), available at http://zhangxuesen.blshe.com/post/1441/423541.

[53] *See supra* note 44.

[54] *See supra* note 3, art.8.

[55] Mark J. Sundahl, NASA's Commercial Crew Transportation System Requirements and the FAA Human Spaceflight Regulations: A Study in Contrasts , (2011)54 *proceedings of the colloquium on the law of outer space.*

[56] P.P.C. Haanappel, 'space tourism: private law implications', (2008)51 *proceedings of the colloquium on the law of outer space* 36.

[57] Andrew G. Haley, *Space Age Presents Immediate Legal Problems,* 1 PROC COLLOQ. L. OUTER SAPCE 5 (Andrew G. Haley & Welf Heinrich eds., Wein, Springer, Verlag 1959).