

THE PROTECTION OF THE TOURIST PURPOSE AS A CAUSE OF THE CONTRACT*

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SUMMARY: 1.- The damage that can be compensated and the compensation; 2.- The injured legal asset: compensation for material damage and psychophysical damage; 3.- Comparative case-law analysis. The tourist package and contractual contingencies; 4.- The "tourist" interest in the Italian and Anglo-Saxon system; 5.- The responsibility of the tour operator and the dissolution of the contractual obligation.

1.- The damage that can be compensated and the compensation.

Some legal systems, such as the Spanish one, codified the definition of the case, others, such as the Swiss one, mentioned it as the cause of the obligation, other legal systems incorporated it into other institutions (Napoleonic Code, Austrian Code of 1811 and Portuguese Code of 1966), ignored it (German Code) or regulated it under the contract in general and under the regulation of other institutions (Italian Code¹).

The most recent rulings of the Jurisprudence of Legality, with regard to the definition of the case of the contract, have highlighted a progressive abandonment of the traditional "theory of the economic and social function of the contract" towards a more subjective interpretation of the case, understood as the individual economic function of the store, with significant repercussions also on the practical level, for example in admitting the validity of the so-called preliminary contract.

The cause of the contracts concluded by tourists, in addition to encompassing the pre-existing interest in their protection, is enriched by the various interests emerging from the negotiation operation that inspired and led them to conclude².

In other words, the tourist purpose, understood as that quid capable of shaping the concrete cause of the contract, is transversal with respect to the various types of contract relating to tourism and hospitality: all contracts relating to travel can be concluded for a purpose of pleasure.

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² A. Arlotta, *Il contratto di viaggio e le conseguenze del suo inadempimento: il danno da vacanza rovinata e l'overbooking*, in *Nuova giur. civ. comm.*, 2004.

This reconstruction is also confirmed by the most recent case law, which has highlighted the content and cause of "tourism" and the "purpose of the holiday and its damage".

Damage from a ruined holiday is the injury suffered by the tourist for not having been able to fully enjoy a holiday and/or the organized trip.

Holidays represent an opportunity for resting, amusement or time to celebrate an important moment of life (honeymoon), whose lack of enjoyment or alteration can cause stress and dissatisfaction³.

The damages suffered represent the privation of the entire enjoyment of the journey as a moment of pleasure.

Being forced to suffer the psychophysical distress of the lack of fruition is accompanied by the failure, in whole or in part, of the scheduled activities.

But what do we refer about when we talk about the causes of damage from ruined holiday? The main causes, without doubt, may be the excessive delays in flight departures, lack of departures for overbooking or cancellation of flights, lack of essential services in accommodation (water, electricity, etc.).

In addition, insufficient services guaranteed in the agreement, divergences between the real holiday spot and the one represented in the leaflets, unacceptable hotel accommodation; lack of the tourist facility, poor services due to the negligence of the travel organizer and therefore avoidable by the latter⁴.

Today new forms of damage are connected to these situations of discomfort: the new national tourism code identifies them as damages to people, damages to the luggage and assets, patrimonial damages (e.g., cruise cost, expenses incurred after the shipwreck), moral damages.

The first regulations on this subject date back to the legislation applied in Italy since 1995 with Legislative Decree 111/95, but only with Legislative Decree 79/2011 the national legal system has made explicit mention of it⁵.

The definition of damages for ruined holiday is mentioned in the art.47 of 79/2011.

The Code for Tourism art. 47, paragraph 1 establishes that <<In case of insolvency or wrong performance of the services included in the holiday package has minor importance under the art.1455 of the Civil Code, the tourist can claim compensation for the damage related to the holiday time spent unnecessarily and to the unrepeatable nature of the lost opportunity, in addition to the claim to the resolution of the agreement>>.

³ E. Bellisario, *Lo stralcio delle disposizioni sulle certificazioni di qualità dal codice del consumo: un'occasione perduta*, in *Eur. dir. priv.*, (2005), 1068 ss.

⁴ C. Benevolo, Grasso M., *Destinazioni e imprese turistiche*, Milano, 2019, 485.

⁵ C. Vacca, *La vacanza rovinata e la tutela dei diritti del fornitore dei servizi turistici*, in *Riv. dir. comm. e obbl.*, (1992), I, 913.

The innovation consists in the calculation of the damage in addition to an accident, directly related to an accident (food poisoning, smaller rooms or without the sight advertised), and taking into account that, due to such accidents and incidents, the customer could not enjoy the rest and relaxation expected.

Before the actualization of the Code, however, compensation for non-material damage was only granted in cases provided for by law as provided for by the art. 2059 C.C.⁶.

This meant that damage for ruined holiday could only be recognized in cases where the actual damage was a result of a violation of a right guaranteed by the judicial system.

Among the other innovations there is the duration of the right of compensation for the damage, prescribed in three years from the date of the return of the tourist from the holiday, except for the period of 18 or 12 months in respect of the non-performance of transport services included in the package, for which legislation applies the art. 2951 of the Civil Code⁷.

The expectation that people have when organize a trip for leisure purposes has always been a significant burden and, since this is closely related to the imaginary that a subject has of a place, the power of evocation has an important role in the decision-making process. In fact today the sales techniques are all oriented on the images of what will be possible to find once you reach the goal.

Increasingly perfect photos that evoke pristine landscapes or, video, potential experiences that you will be able to experience, today are the tools used to stimulate a consumer to buy a holiday package.

Travel expectations does not include, however, only the package that a person wants to buy, but also the image of himself that he has decided to experience.

To the perception of how a subject sees itself projected in a holiday, one can easily trace the type of expectation and the type of imagined experience.

Tourism satisfaction, therefore, is not the judgment of a moment, but a process that begins when you leave and generally ends with the return home, but it can also continue for an indefinite time whenever that experience is involved.

A satisfied tourist becomes an ambassador of the experience preserved in memories but today, thanks to social networks, it can be amplified in a way that is often uncontrollable.

On the other hand, a distress can cause a great deal of disappointment both for the active party and for the product seller which will be exposed to negative advertising and in addition, must compensate for the damage caused to the holiday.

⁶ G. Tassoni, *In tema di responsabilità derivante dal contratto di viaggio*, in *Resp. civ. prev.*, (1987), 454.

⁷ R. Di Napoli, *Risarcimento del danno da vacanza rovinata*, Rimini, 2011.

As a result of the adoption of the Consumer Code, compensation for damage caused by a ruined holiday has assumed greater importance, and above all legal and jurisprudential weight⁸.

The jurisprudence has taken many years to identify the right to obtain compensation for damages resulting from the inability to live a holiday period or for a holiday «ruined» by unforeseen events, difficulties and delays⁹.

The real starting point was undoubtedly the elaboration and publication of the Tourism Code but even some additional rules of the Code itself.

In the Consumer Code, not only was it clarified how the contract for the sale of a package tour and the requirements of the information brochure were concluded, but also the rules to follow for the disposal in case of impossibility of it. So the range of protection afforded to end consumers has therefore been broadened.

The art. 83 of the Consumer Code, provides and defines the various parties involved in the process of signing the agreement for the purchase of the package by the consumer, highlighting the rights and the tutelage of the latter.

Art. 84 recalls art. 2 of D.L. n° 111/95 focusing on the concept of tourist package and distinguishing it from the sale of a simple journey.

The regulation underlines that, in order to be able to speak tourist package, it is necessary to combine at least two elements between transport, accommodation and services (entertainment, excursions, guided tours and more).

According the Consumer Code, it is possible to disregard the presence of the transport service which, instead, is necessary for the configurability of a travel contract under the CCV.

The details of the parts of the agreement, as well as the general information on the passport and visa conditions applicable to nationals of the Member State of the European Union, are described in detail, with some indications for the release, the regulatory health requirements and some formalities for the travel, and in addition, a booklet about the activities and phases of the journey¹⁰.

Furthermore, the current regulations on the tourism market has been balanced and the consumer safeguard has also been strengthened.

The aim of the legislator is to operate in order to set clear reference points for a better coordination between the State and the Regions, within the sphere of their respective competences, reorganize and optimize the existing regulation.

⁸ A. Ferretti., *Danno da vacanza rovinata. Strumenti di tutela per il turista-consumatore*, *Quaderni del diritto*, *Altalex*, 2014.

⁹ C. Vacca, *La vacanza rovinata e la tutela dei diritti del fornitore dei servizi turistici*, in *Riv. dir. comm. e obbl.*, (1992), I, 913.

¹⁰ V. Franceschelli, F. Morandi, *Manuale di diritto del turismo*, Torino, 2019.

The code has been structured in different regulatory interventions.

The first part is about the state legislation on the organization and market of tourism, actuating the principles of delegation provided by Law 246/2005.

However the second part adopted the directive 2008/122/EC on timeshare agreements, long-term holiday products agreements and resale and exchange contracts pursuing the mandate contained in Community law 2009 (Law 96/2010)¹¹.

It is surely important to implement a part of the directive 2008/122/EC about the modifications to the discipline of shared ownership (art. 2) contained in the Consumer Code (D.L. n. 206 of 2005) which extends the scope of the implementation, and extending the definition of a timeshare agreement and providing additional types of agreement.

For the consumer new arrangements have been fixed for the fullness of pre-contractual information, for the minimum agreement content and for the extension of the right of withdrawal, eliminating the financial outlay for the consumer in the case of withdrawal. But the true revolution of the code is the express prediction of the refund for moral damage from ruined holiday.

2.- The injured legal asset: compensation for material damage and psychophysical damage.

The right to a holiday is an absolute value, as confirmed by the court of Reggio Emilia in its judgment 434/16.

The holidays, it has been emphasized by the court, represent a right, inviolable and indispensable, constitutionally guaranteed by art. 36 Cost., and must be considered not only as a period of rest from work, but also as a period in which it is certainly more possible for the worker to devote himself to family affections.

The goals of the holiday (rest, leisure, cultural enrichment, escape from everyday life) are also recognized in the Constitution, and precisely in the art. 2, where the inviolable rights of man are guaranteed, and in art. 36, that guarantees to workers the right to weekly rest and to the indispensable annual paid leave; so the lack of the fruition should lead to an economical compensation¹².

This interpretation may seem exaggerated, but if we analyze the cited articles in conjunction with art. 1174 c.c. which states that “the service which is the subject of the obligation must be capable of economic evaluation and must correspond to an interest, including non asset interest, of the creditor”, we are able to configure the damage from ruined holiday.

¹¹ E. Graziuso, *I nuovi contratti del turismo*, Milano, 2011.

¹² E. Guerinoni, *Danno da «vacanza rovinata» e art. 2059 c.c.*, in *Contratti*, 2001.

According to this interpretation, the damage could be understood as the loss suffered by the consumer/tourist due to the failure to obtain the benefits of the planned stay, influencing on the enjoyment and thus the psychological and subjective aspect¹³.

Damage from ruined holiday, in this sense, must be considered from the non-patrimonial point of view, so an extra-contractual refund (ex-art 2059 cc).

In this case <<the ruined holiday damage can be understood as that injury suffered by the tourist for not being able to fully enjoy the organized trip as an opportunity for recreation and/or rest or, more specifically (...) can only be understood as non-monetary injury (not resulting in economic loss, either in terms of emerging damage or in terms of lost profit, if you want to adopt the classic concept of property damage), not corporal and temporary, figure, therefore, very close to that of moral damage>>.

Even if it is understood as non-material damage, compensation still stems from the non-fulfillment of a contract, which raises a number of problems about the admission of its compensation.

The assertion that a ruined holiday can be subject to compensation does not mean that it is easy to obtain it¹⁴.

The doctrine debated a lot and some particular issues have been defined, i.e.: starting from art.2059 c.c. moral damage is settled only in cases established by law; the majority of the cases established by law coincides with the hypotheses of damage arising from crime, ex art. 185 c.p.; compensation for non-material damage in the case of a holiday contract shall be allowed only if the same failure also includes the details of a crime; ruined holiday damage, cannot be compensated as non-material damage when the failure to fulfill obligations does not include a criminal offence.

According to some scholars, the ruined holiday damage cannot be included in the property damage, because the failure to meet the recreational expectations arising from the conclusion of the travel agreement, constitutes a failure to fulfill a service which, on the basis of the contract, could be subject to economic assessment.

This type of interpretation has been developed because it is necessary to protect not only the consumer, but also all the actors, in order to avoid the case in which the tourist is not the counterparty's failure to fulfill its obligations and thus compensation.

For the sake of clarity, Reggio Emilia court judgment (2015) may be used as an example <<Non-patrimonial damage is the genus within it is possible (but not necessary) to distinguish subjective moral damage ('pretium doloris or doloris pecunia'), biological

¹³ Visintini G., voce *Responsabilità contrattuale ed extracontrattuale*, in *Enc. giur. Treccani*, XXVI, (Roma), 1991, 1.

¹⁴ M. E. La Torre, *Il turismo e le regole, riflessioni sul codice della normativa statale in materia di ordinamento e mercato del turismo*, in *Riv. sc. tur.*, (2011), 2, 41 ss.

damage (damage to the legal property "health", susceptible to medical examination) and the consequent damage to an interest of constitutional rank inherent to the person (traditionally referred to as "existential damage"); so ex-art. 2059 c.c. is refundable: any unjust injury of an interest inherent to the person, from which derive prejudices not susceptible to economic evaluation. If it is possible to use predetermined criteria (tables) when settling the various types of damage, with special reference to life-threatening damage, liquidation can only take place on an equitable basis, considering and evaluating the aspects of the specific case >>.¹⁵

Less complex is the imputation of moral damage as pointed out in a sentence of Locri's Court that points out that "(...) diminished range (or worst enamel) of the achievable activities that the victim finds himself carrying out after committing tort, compared to what he could have done where the fact did not take place" or, with others words, "the objectively detectable worsening of one's condition of existence" or, again, "the damage inherent in the limitations to the possibility of interacting with the outside world, be it understood as human relations (e.g. acquaintance with friends and relatives), either as a relation to external reality (e.g. going to certain places), or as a limitation to the performance of activities (e.g. hobbies, sports, cultural activities)" and, furthermore, the "injury of the relevant sphere the activities of the person considering the quantitative and qualitative limitation suffered in the possibilities of interacting with the outside"¹⁶.

In the same direction the recent 2020 judgment of the Court of Pisa, where it is reiterated that the equitable assessment of the damage, therefore, must not compensate for the inertia of the injured person, in the sense that if the injured person failed to prove useful elements for the determination of the damage, the court must take into account only the evidence or well-known.

The criterion of the court's equitable assessment of the damage does not, in fact, concern the delimitation of the damages that can be compensated and therefore the if but only the determination of the extent of the damage¹⁷.

It is possible therefore to affirm as the existential damage re-enters in the forecast of the art. 2059 c.c., whose limit would not operate as the property "holiday" is protected to art. 2 Cost. in the broad interpretation of which it enjoys today: the holiday would therefore be one of those activities in which the personality of the individual is manifested.

For an even more detailed interpretation, reference can be made to the judgment of the Third Chamber of the Court of Cassation.

The judgment in question will examine even more in detail the difference and application of the existential, moral and biological damage.

¹⁵ Trib. Reggio Emilia, sentenza n. 210 del 22.02.2015.

¹⁶ Trib. Locri, 6/10/2000 n. 462.

¹⁷ Trib. Pisa, 11/05/2020, n. 488.

With a judgment on September, 22nd 2015, n. 18611, the Cassation clarifies that the existential damage and the moral damage deserve an independent assessment with respect to the biological damage, and reiterates the inconsistency of a simple tabular assessment for the calculation of the sums due to repair the injury suffered by the victim.

At this point it is spontaneous to try to understand who is the subject called to refund in case of lack of “enjoyment” of the holiday.

According to the judgment of the Court of Cassation III section, judgment of 4 March 2010 n. 5189, the tour operator is obliged to compensate for the damage caused by a ruined holiday when the reality of the facts (sea polluted by hydrocarbons and dirty beach) does not reflect what is advertised.

Under the contract relating to an all inclusive package, the organized, the intermediary, or the seller assume specific obligations, especially of a qualitative nature, with regard to travel arrangements, hotel accommodation, level of services etc., which are exactly fulfilled¹⁸.

Therefore, if the service is not exactly performed, on the basis of an average criterion of diligence (art.1176, paragraph 1 c.c.), there is a contractual liability, except where the organizer or retailer does not provide adequate proof that they have failed to fulfill their obligations, in which case the purchaser shall be responsible for proving the damage obtained, the etiological link and thus reversal of the burden of proof.

The Consumer Code identifies and outlines the parties involved in the contractual relationship for the organization of a journey: the travel organizer, the person who is obliged, in his own name and for a flat-rate fee, to procure to third parties tourist packages, or offering to the tourist, also through a system of communication to distance, the possibility to realize autonomously and to purchase such combination¹⁹.

The intermediary is the person who, even if not professionally and non-profit-making, sells or undertakes to procure tours packages to third parties for a lump sum payment or individual unbundled tourist services; the tourist understood as the purchaser, the transferee of a tourist package or any person to be named, provided that he fulfills all the conditions required for the use of the service, on whose behalf the main contractor undertakes to purchase a package tour without remuneration.

It is important to underline how the organizer can sell travel packages directly or through a seller or through an intermediary, this may mean that the organizer of the journey is liable for non-compliance with the traveler, in the event that he does not provide the service requested by the traveler and accepted, not disclosing that, already at the time of

¹⁸ Cass. penale sez. III, 18 marzo 2010, n.19523.

¹⁹ M. Tripodi, *Il Codice del consumo, un primo commento*, in *Disc. comm. serv.*, (2011), 3, 19 ss.

conclusion of the contract, the traveler's request was incompatible with the standards of the proposed package.

The impossibility of engaging in recreational activities can also be caused by trauma or illness caused by unjust activities and therefore a source of compensation.

3.- Comparative case-law analysis. The tourist package and contractual contingencies.

In jurisprudence, the European Court of Justice has established for the first time that damages caused by a ruined holiday are recoverable²⁰.

The judgment concerns an Austrian case of tourist intoxication caused by salmonella. This poisoning was caused by the food served in the club.

The illness had continued even after the end of the stay, manifesting with fever for several days, circulatory problems, diarrhea and vomiting together with states of anxiety. Many other customers of the club had become ill, presenting the same symptoms.

The judge on first instance only acknowledged to the tourist an amount for physical suffering (Schmerzensgeld) caused by the food poisoning and rejecting the claim of that amount based on compensation for the non-material damage caused by the lack of enjoyment of the holiday («entgangene Urlaubsfreude»).

That court held that, even if the unpleasant feelings and negative impressions caused by the disappointment were to be classified as non-material damage under Austrian law, they could not be the subject of compensation, since no Austrian law expressly provides for the compensation of non-material damage of this nature.

The Landsgericht Linz, on appeal, shared the point of view of the court about Austrian law, but considered that the application of art. 5 could have led to a different solution²¹.

In this context, the Landesgericht cited the judgment of 16 July 1998 in Case C-355/96, *Silhouette International Schmied (Race p. I-4799, paragraph 36)*, in which the Court declared that: even if a directive itself cannot create obligations for an individual and cannot therefore be relied upon as such, when applying national law, a national court is required to interpret the provisions of national law in the light of the letter and purpose of the Directive in order to achieve the chased result²².

²⁰ C. Notarstefano, *Protection juridique des touristes et intégration européenne - Bilan et perspectives*, Bari, 1997.

²¹ I. Bläumauer: *Schadenersatz für entgangene Urlaubsfreude - ein Rechtsabenteuer!*, *Österreichisches Recht der Wirtschaft*, (2002), 271-273 (DE).

²² L. Zamagni, *Il danno da vacanza rovinata: prospettive interpretative alla luce della recente evoluzione giurisprudenziale*, in F. Roversi Monaco, M. Gola (a cura di), *Mercato, diritti e consumi: la tutela del turista consumatore*, Torino, 2008, 93.

The referring court observed, moreover, the German legislature had adopted rules on compensation for non-material damage in the event of a bankrupt or seriously affected journey and the German courts did indeed recognize such compensation.

Considering that art.5 of the legislation was not sufficiently precise to enable an indisputable conclusion with regards at non-material damage, the Landersgericht Linz decided to suspend the process and submitted to the Court the following preliminary issue: If the Art. 5 of the directive of the Council 90/314/EEC of 13 June 1990 on travel, holidays and tourist package, should be interpreted with the meaning that compensation is in principle due for claims for non-material damage».

The Italian jurisprudence has recognized the injury of the tourist's interest to fully enjoy the trip, resulting in the cause of non-patrimonial damage, in the face of very different defaults.

The Court of Cassation has only recently ruled on the merits of the judges whose first judgments date back to the mid-1990s.

Another interesting case of compensation for damaged holiday damage occurred in 2010 by the Supreme Court and concerned an accident suffered by a tourist.

In this case, the tourist during a trip in a motorboat on a river, suffered the amputation of some fingers of the left hand due to the collision with a sailboat.

For the purposes of compensation, the tour operator's failure to comply with the disclaimer provided for in Article 17 of the Brussels Convention, which excluded its liability in the event attributable to the consumer, or to a third party, the unpredictability or inevitability of the event, as well as the chance or force majeure²³.

To substantiate this decision the Supreme Court stresses that <<the company (the tour operator) is called, to answer for the legal consequences, including the compensation for non-material damage, the conduct of its employees and auxiliaries, which constitutes a crime and has been committed in the exercise of the tasks to which they are assigned >> (art. 185 P.C., art. 2049 and art. 2059 C.C.).

This sentence had been preceded, by the Supreme Court with a sentence of merit for a case, in which however was recognized the damage from vacation ruined for the injury suffered from a woman during an organized excursion, specifying that the damage must be compensated even if the service was qualified as optional.

In another case that dates back to 2008, the Cassation stated that the use of the sea and the beach, although it does not constitute a tourist service in the strict sense, is a prerequisite for the utility of the package and an essential part of the tourist service.

²³ P. Ziviz, *L'evoluzione del sistema risarcitorio del danno: modelli interpretativi a confronto*, in *Riv. crit. dir. priv.*, (1999), 61.

Tourism purpose, in fact, is the important reason of the contract because it connotes the concrete cause and also the extrinsic presuppositions, like the fruition of the environmental attractions, artistic or historical services make relevant and useful the services offered by the tour operator.

There is, in fact, the obligation of the organizer to prepare alternative solutions or to refund the difference between the value of the services provided and those provided (according to art. 91, paragraph 4, cod. cons.) even when the services are not available as a matter of fact not attributable to the tour operator.

A very emblematic case is a reference to a pronouncement of the Criminal Court, recognizing the damaged holiday prejudice resulting from the crime of sexual assault suffered by a minor if the incident also occurred at the end of the holiday, the same must be considered ruined not only in its final part but also as a memory²⁴.

The case-law analysis considered so far shows that in the first judgments it was stated that damage caused by a damaged holiday regardless of whether it was property or not, in other cases, compensation was denied because non-material damage was deemed to be limited to the criminal consequences of the unlawful activities of Aquila.

Other judgments have also shown that the damage caused by a ruined holiday was an exceptionally recoverable hypothesis in Italian law compared with that of the Community legal system, or an independent claim for damages.

In other cases, the case-law has ruled out non-material damage for reasons closely related to the chain of events.

Among the most interesting cases is the sentence of the small claims judge of Rome, in which it was excluded any compensation in the case of a slight delay in the arrival of the ship to the port of boarding, due to weather conditions and other minor inconveniences²⁵. The judge also asked the traveler for a minimum of adaptability, especially for trips to far-away countries, of different culture and economy from the European one.

4.- The "tourist" interest in the Italian and Anglo-Saxon system.

With the term holiday damage the Italian and foreign jurisprudence intended to define that prejudice suffered by the consumer/tourist for not being able to fully enjoy the organized trip as an opportunity for leisure and/or of rest, recognizing in such cases the possibility of compensation for non-material damage of a psychic, temporary nature.

²⁴ G. Malagoli, *Il nuovo codice del turismo, contenuti e garanzie*, in *Contr. impr. eur.*, (2011), 2, 813 ss.

²⁵ G. Malgieri, *Il punto sul danno da vacanza rovinata: certezza, novità, questioni aperte*, in *Danno resp.*, (2014), 3, 237 ss.

For the purposes of the discussion, the European Treaty, after Lisbon²⁶, finally provides for tourism as a matter for the European institutions, establishing effective measures to support tourism within the Community.

The growing interest in tourism and the need to regulate its provisions in a uniform way throughout Europe have prompted the Community bodies to take action in this area.

In this sense, the legislation of the Council of Ministers of the European Communities of 13 June 1990 (N. 90/314/EEC) has regulated travel, all inclusive holidays. The main purpose of the Community directive is to standardize the regulation of organized travel at European level, thus filling a gap left by the Brussels Convention.

To this primary purpose, the legislative intention to eliminate points of imbalance still existing between the subjective position of the operator and the consumer of the tourist service in the private regulation of mutual relations of the contractual terms.

The Directive requires the organizer and/or seller party to the agreement to provide sufficient evidence of the policies they have taken out in order to ensure, in the event of insolvency or bankruptcy, the reimbursement of funds deposited and the repatriation of the consumer (Art. 7). In addition, in order to strengthen consumer measures, the Directive states that "[...] Member States may adopt or maintain stricter provisions for the purposes of consumer protection" (Art. 8).

The first European legislation in this field provided for the right to compensation for damages, property and person in the event of failure or incorrect fulfillment of the obligations assumed by the sale of the package²⁷.

This is the expression of European legislation, and it was easy to include such vague and imprecise expression of damage that is not just property.

The EC Court of Justice itself interprets art. 5 of the directive 90/314/CEE, stating that <<it must be understood as meaning that the consumer has the right to compensation for the moral damage resulting from the failure or poor performance of the services provided during an all-inclusive journey >>.

Although the directive has tried to harmonize the legislation on property and property damage, the approval still remains complex, because in many cases we are confronted with fixed and predetermined compensation systems and other systems in which global regulation prevails and is adapted to the case in question.

²⁶ M. Xiol Bardaji, *Monetización de los daños por "vacaciones frustradas" en Derecho alemán y Derecho español*, in *InDret*, (2012), 4, 1 ss.

²⁷ B. Lundqvist, *Standardization under EU Competition Rules and US Antitrust Laws*, London, 2014.

In the German compensation system, for example, compensation for property damage is calculated in a very precise way and it is possible to refer to the overall and actual situation of the injured person.

On the contrary, in Spain such compensation is awarded on the basis of criteria laid down in the legal table which takes only marginal account of the actual situation of the injured person.

5.-The responsibility of the tour operator and the dissolution of the contractual obligation.

The law on compensation for ruined holiday damage is a very particular issue that finds different applications according to the country of origin of the consumer/tourist²⁸.

If on the one hand is enclosed the compensation for property damage, due to some error or lack (lost suitcase) different is the approach for the damage to be compensated for the problems related to the psychological or moral part.

In the United States, for example, the traveler is refunded for the damage caused to the emotional distress caused by the conditions of distress, and distress caused by the failure of the tour operator, especially in cases of wedding travels.

The same type of compensation is also accepted in the United Kingdom.

In the United Kingdom, the courts claim for refund for moral damage, especially in cases where there has been no correspondence between the level of the hotel service offered and proposed with that actually offered and in those in which the use of the services paid failed due to broken means of transport».

In a well-known judgment, it is pointed out that the failure to obtain what requested led to file an appeal by the plaintiff, which led to the judgment which can undoubtedly be considered, yesterday, as today, in the system of English Common Law as the leading case in matter of mental distress compensation following the breach of a tourist contract». Holiday compensation claims have been considered an exception to the rule, which states that damages cannot be claimed for breach of contract due to mental distress and disappointment, on the basis of the assumption that the whole purpose of a holiday contract is to provide entertainment and entertainment.

An interesting case is what was submitted to the attention of the English Court of Appeals, where a couple had arranged a cruise trip and had not achieved what they had promised. In June 2016, the Milner couple booked a trip to Queen Victoria's first world cruise, departing from Southampton on January 6, 2008 for a world tour, returning 106 days later.

²⁸ F. Romeo, *Il contratto di viaggio, tutele specifiche e risarcimento*, Padova, 2011, 3 ss.

They booked in advance to secure a cabin of their choice: a princess cabin, halfway to the starboard deck. Because of the bad weather, the floor slats in Mr. and Mrs. Milner's cabin flexed and vibrated causing a lot of noise.

According to what Mr. Miller said during the deposition for the judge, the noise and the nuisance prevented the two of them from sleeping for several nights, causing serious problems to Mrs. Milner's health.

To overcome these problems, the couple were assigned an inner cabin of lower class (an interior cabin without natural light on the lower deck, in which some of the comforts of the previous cabin were missing). In addition, clothing and personal belongings were left in the abandoned cabin²⁹.

After a stop in New York they returned to their cabin, but again in Los Angeles, the bad weather caused the same discomfort.

At the end of the trip they asked for a refund including compensation for the stress, anxiety, anguish, disappointment and loss of enjoyment to which they had been subjected, along with living expenses and unnecessary expenses.

During the hearing in their favor, the judge highlighted "high quality damage" for the failure to supply an extra luxury product and recognized them a full refund.

6.- The jurisprudential protection of the damage to the purpose of tourist pleasure.

Final observations.

There are numerous jurisprudential rulings which over time have contributed to the recognition of the category of holiday damage.

In fact, it is interesting to see how, according to the mentioned legislation, the judgments have changed before and after the Tourism Code³⁰.

The prevailing jurisprudential orientation provides only the demonstration of the non-fulfillment of the tour operator, and not the demonstration of the stress suffered, for the purpose of both moral and financial compensation.

The moral damage "from stress" is presumed, as it is inherent in the concept and purpose that the holiday assumes.

An interesting example before the introduction of the Tourism Code is the judgment of the Court of Monza, 22/06/2009, n. 1924.

The text states: damage from a ruined holiday can only be considered as a moral injury if it is resolved in the significant damage of a constitutionally protected personal interest

²⁹ E. M. Tripodi-Cardosi, *Il codice del turismo. Guida alla nuova disciplina, dopo il D. Lgs. 79/2011*, Rimini, 2011.

³⁰ S. Zunarelli, *La direttiva CEE n° 90/134 del 1990 concernente i viaggi, le vacanze ed i circuiti tutto compreso*, in G. Silingardi, V. Z. Zencovich, *La tutela del turista*, Napoli, 1993, 30.

(inviolable right of the person) under three conditions: the interests harmed have constitutional significance; the damage to the interest is serious, in the sense that the offence exceeds a minimum threshold of tolerability; the damage is not futile, that is to say, it does not consist in mere inconvenience, that is, in the violation of entirely imaginary rights, such as quality of life or happiness.

After the Code of Tourism it is interesting to take into account the judgment of the Court of Naples, sec. XII, 18/02/2013, n. 2195 where: the all-inclusive travel agreement has the aim of realizing the interest of the tourist/consumer in the completion of a trip for tourism or pleasure, so that all activities and services that are instrumental in the realization of the holiday purpose are essential³¹.

In particular, the fact that the tourist/consumer is accommodated, for a part of the period in a place of lower quality than the one he booked, at the time of the purchase and, for the remainder of the travel period, at this property, but still under renovation, with many of the promised services (gym, spa and swimming pool, equipped beach) not yet completed, decreases appreciably the utility that can be derived from the stay in the resort, giving rise to the case of the holiday ruined.

An interesting sentence, and perhaps one of the most recent is the one of the Court of Milano - sec. II civil - sentence n. 07.07.2020³².

The judgment is about the issue of holiday damage caused by indirect c.d.

Part of the jurisprudence tends to affirm with certainty the recognition of the non-material damage suffered by the family members of the tourist who is injured on holiday due to the fault of the tour operator or one of its auxiliaries, as not having been able to fully enjoy the holiday as an opportunity for recreation and rest, in accordance with one's expectations, is a waste of unnecessarily spent vacation time³³.

There is, therefore, a regular consequentiality between the two prejudices (physical damage of the husband and damage from ruined vacation for the remaining members of the family) within the meaning of art. 1223 C.C.

In this case, the damage caused by a ruined holiday for the tourist's companions who have been injured without being harmed, can be considered indirect from the point of view of the *eventus damni*.

In relation to the damage caused by a ruined holiday, understood as psychophysical discomfort resulting from the failure, in whole or in part, of the planned holiday, the assessment of the non-compliance also exhausts the evidence of the damage that must be directed.

³¹ L. Rossi Carleo, *Turismo organizzato e vacanza rovinata: la risarcibilità del danno*, in *Riv. dir. imp.*, (1995), 477 ss.

³² Trib. di Milano sez. IX del 07.07.2020 n. 3986.

³³ R. Santagata, *Diritto del turismo*, Torino, 2018.

To conclude our examination, we can say with certainty that the ruined holiday damage is one of the issues that still today fails to provide a linearity in the legislation.

If it is true that much has been done in recent years to protect consumers/ tourists, a lot remains to be done.

Until today, the jurisprudence is still not linear in the attribution of the damage and especially if the damage caused is directly attributable only to the tourist or even to the accompanying person.

The quantification may take place in an equitable sense, i.e. according to the discretion of the Judge, who must necessarily take into account some important elements, such as the unrepeatability of the trip, the subjective value attributed to the holiday by the consumer and the stress suffered due to inefficiencies.

Clearly there is a minimum threshold of inconvenience and damage, below which no compensation is provided, as this would conflict with the principles of fairness and good faith and balancing the opposing professional-consumer interests; it is the competence of the judge to ascertain, case by case, whether this threshold, constituted by the "tourist purpose", is exceeded or not.

In this direction, a recent ruling considers that the organizer and the seller of a tourist package assume, within the scope of business risk, an obligation of result towards the buyer. Therefore, their joint and several liability exists whenever there is a direct contractual liability of the service provider towards the consumer for the service rendered to him (or not rendered to him) and is not related to a lack of diligence in the choice of the service provider referred to the seller of the package makes use of, or the possibility of concretely checking the operating procedures in the execution of the service³⁴.

³⁴ Cass. civile sez. III, 23/04/2020, n.8124.