

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

---

## **The Recovery of Non-Pecuniary Loss in European Contract Law**

This is the first comprehensive work to capture the rise of moral damages (non-pecuniary loss) in European contract law through a historical and comparative analysis. Unique features of this study include the first classification scheme of the systems into liberal, moderate, and conservative regimes; a taxonomy of non-pecuniary loss drawn from a European-wide jurisprudence; and a comprehensive bibliography of the subject. As a leading academic, the author has provided precise and practical insights on Europe's leading cases, which will be of interest to academic researchers and practitioners alike.

VERNON VALENTINE PALMER is Thomas Pickles Professor of Law at Tulane University and is Co-Director of the Eason-Weinmann Center for International and Comparative Law.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

---

## The Common Core of European Private Law

### *General Editors*

Mauro Bussani, University of Trieste and University of Macao,  
Faculty of Law

Ugo Mattei, University of Turin and University of California,  
Hastings College of Law

### *Honorary Editor*

Rodolfo Sacco, University of Turin

### *Editorial Board*

James Gordley, W.R. Irby Chair in Law, Tulane University Law School

Antonio Gambaro, Professor of Law, University of Milan

Franz Werro, University of Freiburg and Georgetown  
University Law Center

For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

*A list of books in the series can be found at the end of this volume.*

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

# **The Recovery of Non-Pecuniary Loss in European Contract Law**

---

*Edited by*

Vernon Valentine Palmer



**CAMBRIDGE**  
UNIVERSITY PRESS

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

**CAMBRIDGE**  
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781107098626](http://www.cambridge.org/9781107098626)

© Vernon Valentine Palmer 2015

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2015

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

Palmer, Vernon V.

The recovery of non-pecuniary loss in European contract law / Vernon V. Palmer.  
pages cm. – (The common core of European private law)

ISBN 978-1-107-09862-6 (hardback)

1. Moral damages (Civil law) – Europe. 2. Breach of contract – Europe. I. Title.

KJC1627.P35 2015

346.402'2–dc23

2015007838

ISBN 978-1-107-09862-6 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>List of contributors</i>	page vii
<i>General editors' preface</i>	ix
<i>Preface</i>	xi
<i>Relevant Statutory and Codified Provisions (in Translation)</i>	xiii
<i>List of Abbreviations</i>	lxvi
 General introduction	 1
VERNON VALENTINE PALMER	
 <b>Part I: The rise of non-pecuniary damage in European law</b>	  21
1 Trapped in categories: On the history of compensation for immaterial damages in European contract law	23
NILS JANSEN	
2 Moral damages in the age of codification	43
VERNON VALENTINE PALMER	
3 The French awakening in the nineteenth century	58
VERNON VALENTINE PALMER	
4 English law: The search for non-pecuniary damages in a "historical system"	77
VERNON VALENTINE PALMER	

<b>Part II: The recovery of non-pecuniary loss in modern contract law</b>	<b>93</b>
5 European contractual regimes: The contemporary approaches	95
VERNON VALENTINE PALMER	
6 Questionnaire, national reports and commentary: The comparative evidence	111
6.1 Nothing to wear	111
6.2 Undelivered message	162
6.3 One child too many	197
6.4 Requiem for a stallion	226
6.5 Gentleman seeking a quiet life	249
6.6 Maribel's car	272
6.7 A flooded flat	293
6.8 Young architect on the rise	314
6.9 Harsh dismissal	337
6.10 Wasted vacation	358
6.11 An invalid's anxieties	380
7 Conclusions and observations	398
VERNON VALENTINE PALMER	
<i>Appendix: Preliminary taxonomy and glossary of moral damages</i>	406
VERNON VALENTINE PALMER	
<i>General Bibliography</i>	419
<i>Index</i>	445

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

## Contributors

VALENTINA BINEVA, Advocate, Bulgarian Bar Association

EUGENIA DACORONIA, Associate Professor of Civil Law, Faculty of Law, University of Athens

ESTHER ENGELHARD, Associate Professor of Private Law, University of Utrecht

BEATRIZ GREGORACI FERNÁNDEZ, Senior Lecturer in Civil Law, Universidad Autónoma de Madrid

MARTA INFANTINO, Post-Doctoral Fellow, University of Trieste, Italy

NILS JANSEN, Professor of Roman and European Private Law, Director of the Institute of Legal History, University of Munster, Germany

ERNST KARNER, Professor of Private Law, University of Vienna; Acting Director of the Institute for European Tort Law, Austrian Academy of Sciences and University of Graz, Austria

DOROTA LECZYKIEWICZ, DPhil MSt (Oxford), Leverhulme Trust Early Career Fellow, Faculty of Law, University of Oxford, and Fellow by Special Election, Trinity College, Oxford.

ADELAIDE MENEZES LEITÃO, Professor, Law Faculty, Lisbon University

KRASSIMIR MITEV, Associate Professor Faculty of Law, Paisiy Hilendarski University of Plovdiv

TOMASZ PAJOR, Professor of Law, University of Łódź

VERNON VALENTINE PALMER, Thomas Pickles Professor of Law, Tulane University; Co-Director, Eason Weinmann Center for International and Comparative Law

SOLENE ROWAN, Associate Professor of Law, the London School of Economics and Political Science

JOEL SAMUELSSON, Associate Professor of Private Law, Uppsala University

BARBARA C. STEININGER, Assistant Professor, Institute for European Tort Law, Austrian Academy of Sciences and University of Graz, Austria

FLORIAN WAGNER-VON PAPP, Reader in Law, University College London, Faculty of Laws

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

---



Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

## General editors' preface

This is the fourteenth book in the series The Common Core of European Private Law published as part of the Cambridge Studies in International and Comparative Law. The project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The methodology used in the Trento project is novel. By making use of case studies, it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the Common Core Project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the Common Core Project is also a precious asset of knowledge and legitimization for any such normative enterprise.

We must thank the editors and contributors to these first published results. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The Italian Ministry of Scientific Research is funding the project, having

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

X GENERAL EDITORS' PREFACE

recognized it as “research of national interest.” The International University College of Turin with the Compagnia di San Paolo and the Consiglio Nazionale del Notariato allow us to organize the General Meetings. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Program. The University of Turin, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law, the Centro Studi di Diritto Comparato of Trieste, have all contributed to the funding of this project. Last but not least, we must thank all those involved in our ongoing Trento projects in contract law, property, tort, and other areas whose results will be the subject of future published volumes.

Our home page on the Internet is at <http://www.iuctorino.it>. There you can follow our progress in mapping the common core of European private law.

General Editors

*Mauro Bussani, University of Trieste,*

*Ugo Mattei,*

*University of Turin and University of California,*

*Hastings College of Law*

Honorary Editor

*Rudolfo Sacco, University of Turin*

Late Honorary Editor

*Rudolf B. Schlesinger, Cornell University – University of*

*California, Hastings*

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

## Preface

This book with its unique focus – the recovery of non-pecuniary loss in European contract law – has proved to be a fascinating and enlightening field of research. Speaking personally, I hope that it helps us understand how and why European law reached its present state, and to appreciate the remarkable rise of non-pecuniary damage in European contract law today.

The recovery of immaterial damage in the field of delict is, of course, an everyday occurrence. Non-pecuniary awards flourish in tort and may be considered the rule rather than the exception. The picture is, however, otherwise in the field of contract. In some European systems, the recovery of “moral” or non-pecuniary damage *ex contractu* is not permitted; in others, it is allowed only exceptionally or only when specifically authorized by legislation. In certain national systems, contractual awards are apparently freely permitted, though the award levels are not generous. Through historical research, we have attempted to bring to light the background of this situation in the modern law, and through the Common Core’s case study methodology, we have sought to present the modern law in greater detail. We have attempted to pinpoint, distinguish, and compare the national differences and similarities, and ultimately to classify national approaches into some kind of intelligible order.

This wide study takes into account twelve European systems. It began in 2009 and has taken nearly six years to reach publication. It confirms once again that broad international and comparative efforts are complex, time consuming, and presuppose the good will of many scholars. In the latter respect, we were particularly blessed. I have many people to thank, but first and foremost I must thank my colleagues, the fifteen contributing scholars from around Europe whose

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

xii

P R E F A C E

kindness and expertise made the project enjoyable and fruitful. These are Ernst Karner and Barbara C. Steininger (Austria), Krassimir Mitev and Valentina Bineva (Bulgaria), Solène Rowan (France), Florian Wagner-von Papp (Germany), Eugenia Dacoronia (Greece), Esther Engelhard (The Netherlands), Marta Infantino (Italy), Tomasz Pajor (Poland), Adelaide Menezes Leitão (Portugal), Beatriz Gregoraci Fernández (Spain), Joel Samuelsson (Sweden), and Dorota Leczykiewicz (United Kingdom). I am also deeply grateful to Professor Nils Jansen (Germany) who contributed an entire chapter on the historical background of the subject. I am thankful to all for their friendship, diligence, patience, and timeliness, and for the discussions and exchanges from which I learned so much. It saddens me to report that during the course of this study our dear colleague, Professor Tomasz Pajor, passed away unexpectedly. He will be greatly missed.

My sincere thanks go to the general editors Mauro Bussani and Ugo Mattei, who founded the Common Core series, encouraged this particular research, and provided all concerned with the inspiration to undertake it. I also owe a special debt of gratitude to my research assistants at Tulane, Olivia Philipp, Justine Palacios, and Michael Razeeq, for their invaluable assistance over the past two years. Finally, I wish to thank Tulane University and the Tulane Law School for support of every kind, and the Eason Weinmann Center for International and Comparative Law of Tulane University for the special financial assistance that allowed the research team to meet in person in Turin, Italy, to discuss the project.

Vernon Valentine Palmer

*New Orleans**November 2014*

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

## Relevant Statutory and Codified Provisions (in Translation)

### France

#### *Article 1137 of the Civil Code:*

The obligation to be vigilant in caring for the thing, whether the agreement has as its object an advantage for one of the parties or whether it has as its object their common advantage, requires him who is responsible therefor to bring all the care of a good father of a family.

This obligation is more or less extensive relative to certain contracts, whose effects in this regard are explained under the Titles which concern them.

#### *Art. 1147 of the Civil Code:*

A debtor is judged liable for the payment of damages, either by reason of the inexecution of the obligation or by reason of delay in the execution, whenever he does not prove that the inexecution came from an outside cause (*cause étrangère*) which cannot be imputed to him, and further that there was no bad faith on his part.

#### *Art. 1149 of the Civil Code:*

Damages due to a creditor are, in general, the loss which he incurred and the gain of which he was deprived, apart from the hereinafter exceptions and modifications.

#### *Art. 1150 of the Civil Code:*

A debtor is held only to damages which were foreseen or which could have been foreseen at the time of the contract, when the obligation is not executed due to fraud (*dol*).

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

xiv

RELEVANT STATUTORY AND CODIFIED PROVISIONS

*Art. 1382 of the Civil Code:*

Every act whatever of man which causes damage to another obliges him by whose fault it occurred to repair it.

*Art. 1610 of the Civil Code:*

If the seller fails to make delivery within the time agreed between the parties, the buyer may, at his choice, demand rescission of the sale or to be put in possession, if the delay resulted only from an act of the seller.

*Art. 1611 of the Civil Code:*

In all cases, the seller is to be liable for damages if a prejudice results to the buyer from failure of delivery in the time agreed.

*Art. 1719 of the Civil Code:*

The lessor is obligated, by the nature of the contract, and without there being need of any particular stipulation:

1. To deliver to the lessee the thing leased;
2. To maintain such thing in condition to serve the use for which it was rented;
3. To provide peaceful enjoyment to the lessee for the duration of the lease;
4. To assure also the permanence and quality of plantings.

*Art. 1720 of the Civil Code:*

The lessor is required to deliver the thing in a good state of repair in all respects.

He must make, throughout the duration of the lease, all repairs which may become necessary, other than those to be made by the tenant.

*Art. 1927 of the Civil Code:*

The depositary must observe, in the keeping of the thing, the same care that he observes in the keeping of things which belong to him.

*Art. 1928 of the Civil Code:*

The provision of the preceding Article is to be applied with greater strictness:

1. If the depositary himself offered to receive the thing;
2. If pay was stipulated for the keeping;

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

3. If the deposit was made only in the interests of the depositary;
4. If it was agreed expressly that the depositary would answer for any kind of fault.

*Art. 6 of the “Law of the 6 July 1989 for the Improvement of the Relationship between Landlords and Tenants”:*

The lessor must provide the lessee with decent accommodations which contains no obvious risk to his physical safety or to his health, and which is habitable.

## Greece

*Greek Constitution*

### Article 5 § 1:

All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages.

### Art. 17 § 1:

Property is under the protection of the State; rights deriving therefrom, however, may not be exercised contrary to the public interest.

### Art. 24 § 1:

The protection of the natural and cultural environment constitutes a duty of the State and a right of every person. The State is bound to adopt special preventive or repressive measures for the preservation of the environment in the context of the principle of sustainable development. Matters pertaining to the protection of forests and forest expanses in general shall be regulated by law. The compilation of a forest registry constitutes an obligation of the State. Alteration of the use of forests and forest expanses is prohibited, except where agricultural development or other uses imposed for the public interest prevail for the benefit of the national economy.

### Art. 25 § 1:

The rights of the human being as an individual and as a member of the society and the principle of the welfare state rule of law are guaranteed by the State. All agents of the State shall be obliged to ensure the

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

unhindered and effective exercise thereof. These rights also apply to the relations between individuals to which they are appropriate. Restrictions of any kind which, according to the Constitution, may be imposed upon these rights, should be provided either directly by the Constitution or by statute, should a reservation exist in the latter's favour, and should respect the principle of proportionality.

§ 2. The recognition and protection of the fundamental and inalienable rights of man by the State aims at the achievement of social progress in freedom and justice.

§ 3. The abusive exercise of rights is not permitted.

§ 4. The State has the right to claim of all citizens to fulfil the duty of social and national solidarity.

### *Greek Civil Code*

#### Article 57:

##### *Right to one's personality.*

He who suffers an illegal invasion of his personality is entitled to ask for the cessation of the offence and for an injunction against the commission of the offence in the future. If the offence concerns the personality of a deceased, the right belongs to the spouse, descendants, ascendants, brothers and sisters and testamentary heirs. An additional claim for monetary compensation according to the provisions of delictual liability is not excluded.

#### Art. 58:

##### *Right to one's own name.*

If the right of a person to bear a name is disputed or if someone uses a name unlawfully, any person entitled to the name, may seek the cessation of the offence and its commission in the future. A claim for damages in accordance with the provisions of delictual liability is not excluded.

#### Art. 59:

In the cases of both previous articles the court may by its judgment, after the request of the person who has been offended and taking under consideration the type of the offence, also order the person responsible to furnish reparation of the moral harm suffered by the person offended. This reparation consists of the payment of a sum of money, of a publication or of any other appropriate measure in the circumstances.



Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

Art. 147:

*Declaration resulting from fraud.*

Whoever has been led by fraud into a declaration of the will has the right to ask for the annulment of the juridical act. If the declaration of will is addressed to someone else and the fraud was committed by a third party, the annulment can only be sought if the other party was aware or should have been aware of the fraud.

Art. 149:

The person who was the victim of fraud has the right, in addition to the annulment of the declaration of will, to ask for damages according to the general tort provisions.

Art. 281:

*Abuse of right.*

The exercise of a right is prohibited when it manifestly exceeds the limits dictated by good faith, or good morals, or the social or economic purpose of the right.

Art. 288:

The debtor is obliged to effect the performance as good faith requires, after consideration also of common usage.

Art. 299:

*Immaterial damage.*

For non-pecuniary damage, reparations in money shall be due only in the cases provided for by law.

Art. 341:

*Fixed date.*

If the fulfillment of the performance by a fixed date has been agreed upon, the debtor is in default by the mere elapse of the fixed date.

Art. 343:

*Consequences.*

The debtor in default, in addition to the delayed performance, is obliged to compensate the creditor for the damage he suffered because of the delay.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

xviii

RELEVANT STATUTORY AND CODIFIED PROVISIONS

**Art. 914:**

*Concept.*

A person who unlawfully and culpably causes damage to another shall be liable for damages.

**Art. 924:**

*Liability of the keeper of an animal.*

The keeper of an animal is liable for the damage caused by the animal to a third party. If the damage was caused by a domestic animal which is used for the profession, the guarding of the house or the nutrition of the keeper, the keeper is not liable if he proves that he is not burdened with any fault regarding the guarding and the supervision of the animal.

**Art. 928:**

*In case of cause of death.*

In case of the death of a person, the tortfeasor is obliged to pay the medical and funeral expenses to the person on whom the obligation of bearing such expenses lies according to the law. The tortfeasor is also obliged to pay damages to the person who is entitled by law to claim maintenance or the performance of services by the victim.

**Art. 929:**

*In case of injury to the body or health of a person.*

In case of injury to the body or health of a person, damages include, apart from the medical expenses and the damage already suffered, whatever the victim will be deprived of in the future or he will have to additionally spend because of the increase in his expenses. Damages must be also paid to the third party who was entitled by law to claim the performance of services by the victim and is now deprived of them.

**Art. 931:**

The disablement or disfigurement of the victim is particularly taken into consideration in the award of damages to be paid, if this disablement or disfigurement affects the victim's future.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)**Art. 932:***Reparation for non-pecuniary damage.*

In case of tort, independently from the damages for pecuniary damage, the court may award according to its judgment justifiable reparation in money for moral damage. This happens especially for the person who suffered an attack of his health, honor or chastity or who was deprived of his liberty. In case of the death of a person, this reparation in money may be adjudicated to the victim's family due to their distress and anxiety of mind.

*Introductory Law of the GCC***Art. 104:**

For acts or omissions of the organs of the State, which refer to private law legal relations or are related to private property, the State is liable according to the provisions of GCC on legal persons.

**Art. 105:**

The State is liable to pay damages for illegal actions or omissions of its organs during the exercise of the public authority entrusted to them, unless the action or omission was made in breach of a provision existing in favour of the general interest. The culpable organ is also jointly liable in parallel to the State, with the reservation of the special provisions for the liability of ministers.

**Art. 106:**

The provisions of the two previous articles for the liability of the State also apply for the liability of municipalities, communities or other legal persons of public law for actions or omissions of organs in their services.

*Consumer Protection Act*

Article 8 §1 of l. 2251/1994, as replaced by Art. 10§1 of l. 3587/2007:

The provider of services is liable for any pecuniary damage or moral harm illegally and culpably caused, by his act or omission, while providing his services to the consumer. By supplier of services is meant whoever, in the course of the exercise of a professional activity, supplies a service in an independent way.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

XX

RELEVANT STATUTORY AND CODIFIED PROVISIONS

## Italy

### *Civil Code Articles*

#### *Art. 1176:*

In performing obligations the debtor shall use the care expected from a reasonable person.

In performing obligations inherent to the exercise of a professional activity the standard of care shall be evaluated in consideration of the nature of the activity carried out.

#### *Art. 1218:*

The debtor who does not exactly render due performance is liable for damages unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him.

#### *Art. 2059:*

Non-patrimonial damages shall be awarded only in cases provided by law.

#### *Art. 2087:*

The entrepreneur is required to adopt measures necessary to protect the physical and mental well-being of employees in the exercise of the enterprise.

### *Italian Constitution*

#### *Art. 2:*

The Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled.

#### *Art. 13(1):*

Personal liberty is inviolable.

#### *Art. 29:*

The Republic recognises the rights of the family as a natural society founded on matrimony.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)*Art. 30(1):*

It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock.

*Art. 35(1):*

The Republic protects work in all its forms and practices.

*Consumer Code**Art. 93:*

1. Subject to the obligations provided for in the Article above, in the event of failure to perform or inadequate performance of the obligations assumed upon sale of the package, the organiser and retailer shall be required to pay damages, according to their respective liabilities, if they fail to prove that their partial or total failure to meet their contractual obligations was caused by impossibility to perform due to circumstances beyond their control.
2. If an organiser or retailer uses other service providers, he shall still be liable for damages arising to consumers, without prejudice to the right of the organiser and/or retailer to pursue those other suppliers of services.

*Art. 94:*

1. Damages for personal injury arising out of any partial or total failure to meet contractual obligations for services covered by a travel package tour may be paid up to the limits established by International Conventions thereon, of which Italy or the European Union are members, and in particular within the limits provided for by the Warsaw Convention dated 12 October 1929 on international air transport, implemented by Law no. 841 of 19 May 1932, the Berne Convention of 25 February 1961 on rail transport, implemented by Law no. 806 of 2 March 1963, and the Brussels Convention of 23 April 1970 (C.C.V.), implemented by Law no. 1084 of 27 December 1977, for all other possible liability of the organiser and/or vendor, as implemented in current enacted law or up to the limits established by further conventions, implemented in Italian legislation, of which members of the European Union or the European Union itself are part.
2. The right to compensation for damages shall expire three years after the traveller returns to his point of departure, save for the period of eighteen or twelve months with regard to failure to provide transport services included in the package, as covered by Article 2951 of the Civil Code.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

xxii

RELEVANT STATUTORY AND CODIFIED PROVISIONS

3. Any term establishing limits on compensation lower than that referred to at paragraph 1 shall be null and void.

*Art. 95:*

1. Contracting parties may agree in writing (always excepting the application of Article 1341 of the Civil Code and Articles 33–37 of the Code) to limitations to compensation for damages other than personal injury, arising out of partial or total failure to meet their contractual obligations in regard of services in a travel package tour.
2. If the limitation pursuant to paragraph 1 is lower than the amount provided for by Article 13 of the International Convention on Travel Contracts (C.C.V.) signed in Brussels on 23 April 1970, and implemented by Law no. 1084 of 27 December 1977, it shall be unenforceable.
3. Unless otherwise agreed, compensation for damages shall be allowed up to the limits provided for by Article 13 of the International Convention on Travel Contracts signed in Brussels on 23 April 1970 (and implemented by Law no. 1084 of 27 December 1977), and by Articles 1783–1786 of the Civil Code.
4. The right to compensation for damages shall expire one year after the traveller returns to the place of departure.

## **Portugal**

*Civil Code (1966)*

**Delict**

*Article 483:*

(General Principle)

1. Whoever, through willful misconduct or mere negligence, unlawfully infringes upon the rights of another person or any legal provision intended to protect interests of others, must compensate the injured party for damage arising from the violation.
2. The obligation to pay compensation independent of fault, arises only in cases specified by law.

*Art. 484:*

(Action injurious to personal standing or good name)

Whoever affirms or disseminates a fact capable of prejudicing the credit or the good name of any person, private individual, or collective, is responsible for the damage caused.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)*Art. 485:*

(Advice, recommendations or information)

1. Mere advice, recommendations or information do not confer liability on whoever gives it, even though there may be negligence on their part.
2. The obligation to compensate exists, however, when the responsibility for damages has been assumed, when there is a legal duty to give advice, recommendation or information and this has been done with negligence or intent to cause harm, or when the conduct of the agent constitutes a punishable act.

*Art. 486:*

(Omissions)

Mere omissions give rise to an obligation to compensate for damage when, regardless of other legal requirements, there is a duty, by law or by virtue of a legal act, not to undertake the omitted act.

*Art. 487:*

(Fault)

1. It is incumbent on the injured person to prove the fault of the person who caused the injury, unless there is a legal presumption of fault.
2. Fault is assessed, in the absence of other legal criterion, by reference to the diligence expected of a dutiful *paterfamilias*, in light of the circumstances of each case.

*Art. 494:*

(Limitation of indemnity in the case of mere negligence)

When the responsibility is based upon mere fault, the reparation will be able to be set, equitably, in a sum inferior to what would correspond to the actual damages, since the degree of culpability of agent, economic situation of the agent or the injured part and the others circumstances of the case justify it.

*Art. 496:*

(Non-pecuniary damage)

1. For the determination of compensation, regard must be had to non-pecuniary damage which, due to its seriousness, deserves protection of the law.
2. In the event of death of the victim, the right to compensation for non-material damage shall be available, jointly, to the spouse who is not legally separated and to the children or other descendants;

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

failing the latter, to the parents or other ascendants; and, finally, to the brothers sisters or nephews and nieces representing them.

3. The amount of compensation shall be fixed equitably by the court, having regard in any event to the circumstances mentioned in Art. 494; in the event of death, regard may be had not only to non-material damage suffered by the victim but also to such damage suffered by the persons entitled to compensation by virtue of the foregoing paragraph.

## Contract

*Art. 763:*

(Full performance)

1. Performance must be made fully and not in part, unless otherwise agreed upon by the parties or imposed by law or custom
2. The creditor has, however, the right to demand a partial performance; a demand for partial performance does not deprive the debtor of the opportunity to render full performance.

*Art. 798:*

(Liability of the debtor)

The debtor who knowingly fails to comply with his obligations is responsible for harm caused to the creditor.

*Art. 799:*

(Presumption of fault and assessment of fault)

1. It is incumbent on the debtor to prove the non-performance or defective performance of the obligation was not attributable to his own fault.
2. Fault is assessed in the terms applicable to civil liability.

*Art. 800:*

(Acts of the legal representatives or assistants)

1. The debtor is liable to the creditor for the acts of his legal representatives or of the people that he utilizes for the performance of an obligation, as if such acts were undertaken by the debtor.
2. Liability can be conventionally excluded or limited by way of prior agreement between the interested parties, provided that the exclusion or limitation does not include acts that represent a breach of duties established by rules of public order.



Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

*Art. 804:*

(General Principle)

1. Mere delay in performance creates for the debtor the obligation to compensate the creditor for damages caused.
2. The debtor is considered to be in delay when, for cause that may be imputed to him, the performance, if still possible, was not completed in due time.

*Art. 808:*

(Loss of interest of the creditor or refusal to perform)

1. If the creditor, as a consequence of delay, loses the interest that he had in performance of the obligation, or the performance was not rendered within the time reasonably established by the creditor, the obligation is considered for all purposes as not performed.
2. Loss of interest in the performance if assessed objectively.

## Spain

Civil Code Articles

*Article 1101:*

Those who, in the performance of their obligations, act with fraud, negligence, or delay, and those who act in contravention of the provisions of the obligation, are liable for the resulting damages.

*Art. 1102:*

Liability arising from fraud is exigible in all obligations. The waiver of the action to enforce it is null.

*Art. 1103:*

Liability arising from negligence is likewise exigible in the performance of all types of obligations, but it may be mitigated by the courts according to the circumstances of each particular case.

*Art. 1104:*

Fault or negligence on the part of the debtor consists in the failure to exercise the diligence demanded by the nature of the obligation and corresponding to the circumstances of the persons, time, and place.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

xxvi

RELEVANT STATUTORY AND CODIFIED PROVISIONS

When the obligation fails to stipulate the diligence that must be exercised in performing it, the diligence corresponding to a prudent administrator shall be observed.

*Art. 1105:*

Outside of the instances expressly mentioned in the law, and those stipulated in the obligation involved, no person shall be liable for events that could not have been foreseen or that, if foreseen, were inevitable.

*Art. 1106:*

Reparation in damages shall comprise not only the value of the loss sustained, but also that of the profits that the creditor failed to obtain, with the exception of the provisions set forth in the following articles.

*Art. 1107:*

The obligor in good faith is liable for damages that were foreseen, or were foreseeable, at the time the obligation was contracted, and for those that are a necessary consequence of the obligor's failure to perform.

In case of willful misconduct, the obligor shall be liable for all damages known to be derived from his failure to perform the obligation.

*Art. 1149:*

The divisibility or indivisibility of things that are the object of obligations having only one obligor and one obligee does not alter or modify the principles of Chapter 2 of this Title.

*Art. 1461:*

The seller must deliver and warrant the thing that is the object of the sale.

*Art. 1554:*

The lessor is obligated to:

1. Deliver to the lessee the thing that is the object of the contract.
2. Make thereon, during the lease, all necessary repairs in order to preserve it in a state that renders it fit for the use to which it was intended.
3. Maintain the lessee in the peaceful enjoyment of the lease during the entire term of the contract.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

RELEVANT STATUTORY AND CODIFIED PROVISIONS

xxvii

*Art. 1588:*

The execution of a work can be contracted with the stipulation that the builder will contribute only his work or industry, or that he will also furnish the materials.

*Art. 1589:*

If the builder obligated himself to furnish the materials, he shall bear the loss in case the construction is destroyed before being delivered, unless there has been delay in receiving it.

*Art. 1590:*

One who has obligated himself to furnish his work or industry only cannot demand any compensation if the construction is destroyed before delivery, unless there has been delay in receiving it, or unless the destruction arose from the poor quality of the materials, provided that he gave the owner due notice of this circumstance.

*Art. 1591:*

The contractor of a building that is ruined due to vices of construction is liable in damages if such ruin occurs within ten years from the completion of the construction. The architect directing the construction shall have the same liability, and for the same length of time, if the ruin is due to vices of the ground or defective direction.

If the cause was the noncompliance by the contractor with the conditions of the contract, the action for damages shall last fifteen years.

*Art. 1592:*

One who commits himself to execute a work by parts or measure, may demand that the owner receive it in parts, and pay therefor proportionately. The part paid for shall be presumed approved and received.

*Art. 1593:*

An architect or a contractor that, for a lump sum, undertakes the construction of a building, or any other work, to be done in accordance with a plan agreed upon with the owner of the ground, may not demand an increase in the price, even if the price of the materials or wages has increased; but he may do so when any change increasing the work is made in the plans, provided that the owner has given his authorization thereto.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

xxviii

RELEVANT STATUTORY AND CODIFIED PROVISIONS

*Art. 1594:*

The owner may desist at will from the construction of the work even after it has commenced, by indemnifying the contractor for all of his expenses and labour, and for profits he might have obtained from the same.

*Art. 1595:*

When a certain work has been entrusted to a person by reason of his personal qualifications, the contract is rescinded by the death of such person.

In such a case, the owner must pay to the heirs of the contractor, in proportion to the price agreed upon, the value of the part of the work executed, and that of the prepared materials, provided he may obtain some benefit from such materials.

The same rule shall be applied if the person who contracted to execute the work cannot finish it for any cause independent of his will.

*Art. 1596:*

The contractor is responsible for the work performed by the persons under his employ.

*Art. 1597:*

Those who furnish their labour and materials for a particular job undertaken by a contractor for a lump sum have no action against the owner, except for the amount that the owner may owe the contractor at the time suit is filed.

*Art. 1598:*

When it is agreed that the work is to be done to the satisfaction of the owner, in the absence of his acceptance the approval is considered to be reserved for the appropriate expert judgment.

If the person who is to approve the work is a third party, his decision shall be final.

*Art. 1599:*

In the absence of an agreement or custom to the contrary, the price for the work must be paid upon delivery.

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

RELEVANT STATUTORY AND CODIFIED PROVISIONS

xxix

*Art. 1600:*

One who has executed a work on a movable thing has the right to retain the same in pledge until he is paid therefor.

*Art. 1758:*

A deposit is constituted from the moment a person receives a thing belonging to another under the obligation of keeping and returning the same.

*Art. 1759:*

A deposit may be constituted judicially or extrajudicially.

*Art. 1760:*

Deposit is a gratuitous contract, in the absence of a contrary stipulation.

*Art. 1761:*

Only movable things may be the object of a contract of deposit.

*Art. 1762:*

Extrajudicial deposit is necessary or voluntary.

*Art. 1763:*

Voluntary deposit is the one made by consent of the depositor. A deposit may also be made by two or more persons, who believe themselves to be entitled to the thing given in deposit, by placing it in the hands of a third person, who is to deliver the thing, in the proper case, to the person to whom it belongs.

*Art. 1764:*

If a person having capacity to contract accepts a deposit made by one lacking capacity, the person accepting the deposit is subject to all the obligations of the depositary, and may be compelled to return the thing by the tutor, curator, or administrator of the person that made the deposit, and even by the depositor himself if he becomes capable.

*Art. 1765:*

If the deposit has been made by a capable person to one lacking capacity, the depositor shall only have a right to recover the thing deposited while it remains in the possession of the depositary, or to demand from

Cambridge University Press

978-1-107-09862-6 - The Recovery of Non-Pecuniary Loss in European Contract Law

Edited by Vernon Valentine Palmer

Frontmatter

[More information](#)

xxx

RELEVANT STATUTORY AND CODIFIED PROVISIONS

the latter payment of the amount by which he has enriched himself with the thing or with the price.

*Art. 1766:*

The depositary is obligated to keep the thing and return it to the depositor, or his assigns, or to the person designated in the contract when he is requested to do so. His liability with respect to the guarding and loss of the thing shall be governed by the provisions of Title I of this Book.

*Art. 1767:*

The depositary may not avail himself of the use of the thing deposited without express permission from the depositor.

Otherwise, he shall be liable in damages.

*Art. 1768:*

Where the depositary has permission to avail himself of or use the thing deposited the contract ceases to be one of deposit and becomes a loan or *commodatum*.

Permission is not presumed; its existence must be proven.

*Art. 1769:*

When the thing given in deposit is delivered closed and sealed the depositary is bound to return it in the same form, and he shall be liable in damages if the seal or lock is broken by his fault.

The depositary shall be presumed to be at fault in the absence of proof to the contrary.

Concerning the value of the thing deposited, when the forcible opening is chargeable to the depositary the statement by the depositor concerning value shall be accepted, in the absence of proof to the contrary.

*Art. 1770:*

The thing deposited shall be returned with all its products and accretions.

When the thing deposited is money the provisions of Article 1724 regarding the agent shall be applied to the depositary.

*Art. 1771:*

The depositary cannot demand that the depositor prove that he is the owner of the thing deposited.