GIOVANNI VALCAVI

SELECTED LEGAL WRITINGS

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On company law

Introduction

This volume brings together a selection of the most significant legal writings by the author, published in the most important Italian legal journals in fifty years of study and thought, on the topics of civil liability, monetary obligations and interest.

It also contains his writings on open-end guarantees which anticipated the recent legislative abrogation, those on industrial inventions, regarding the requisites of originality and extrinsic novelty and lastly, those on the agreement of forfeiture.

These studies were previously collected in «L'espressione monetaria nella responsabilità civile e altri saggi» [Monetary expression in civil liability and other essays] published by Cedam in 1994, with a preface by Prof. Alberto Trabucchi. These studies are completed here by the more recent analyses and thought of the author on «Juridical causation» and, after the introduction of the euro in Italy, those on the distinction between the dogmatic category of the credits of value and those of credits in currency, which he constantly opposed in a series of publications.

This first part is followed by the most significant writings published by the author in out most important journals, on subjects of civil procedural law.

They were collected in 1994 and again published by Cedam in the book «Problemi attuali e prospettive di riforma nel processo civile» [Current problems and perspectives of reform in the civil trial], which was prefaced by Prof. Enrico Allorio who is remembered by the author for their relations which lasted until recent years.

This part is also completed by the proposals for the reform of the civil trial, put forward by the author in the Tarzia Ministerial Committee, on the reform of the trial, and inspired by the principles of liberalization, which were recently taken up again by the Vaccarella Ministerial Commission.

The author has also recently learned that one of his previous fully motivated bills of law which introduces the civil liability of judges for erroneous decisions affected by fraud or negligence and taken up by subsequent parliamentarians, has reached the competent committee of Senators for their examination.

The last part brings together the most significant writings, again by the author, published in the Rivista di Diritto Fallimentare [Journal of Bank-

ruptcy Law]. Prof. Giuseppe Ragusa Maggiore, who unfortunately passed away recently, invited him to sit on the Editorial Committee of this journal.

The publication of this selection of legal writings is dedicated to the memory of this illustrious teacher and friend.

GIOVANNI VALCAVI

Varese, 26th April 2005

Preface by Prof. Alberto Trabucchi

Valcavi: on hearing this name, you would expect to find a discussion of monetary problems in the book. Currency is effectively discussed here, but so are other subjects and indeed this collection of experiences and studies is not the mere reproduction of previous articles and notes by the author.

The title that I would have preferred for the volume would have been different: « The old and the new in the experience of a modern jurist ». This is a wider subject because, whilst the studies on currency, evaluation and quantitative expressions form the most conspicuous part, other subjects which are discussed here in the broader context of property law are no less interesting.

Old and new: browsing through these pages, an outline can be found to follow a vast in-depth experience which remains alive in our interest, but it has also been the author's wish to offer today's research, for each subject discussed, a new definition that revives the information and offers the questions in topical terms. The informative introductions to the discussion of each set of subjects offer a useful expression of every possible modern critical reference.

To express the vastness of the interests that are expressed here, including outside the recurrent theme, it is sufficient, by way of example, to mention some topics, chosen from those which are still the object of great significance in the life of the law: the open-end guarantee or the limits to the prohibition of the agreement of forfeiture.

However, as mentioned from the beginning, Valcavi must be considered above all as a master in monetary matters for his studies which coincided with the variations of the effective values involved as the restrictive laws of the currency market followed on one another. Case law, continually changing, has found in him an attentive commentator and the criticism and proposals from the countless studies he has published in various journals may be thought to have had an influence on the contemporary legal mind. We can also say, browsing through the pages of this book, that the reader will not fail to notice the unconcealed but deserved satisfaction the author expresses when pointing out that some of his arguments, which were strongly and not always

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From: « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

pacifically championed, were concretely enacted, in subsequent case law on in the statutory law on the matter. For example, the increase of the legal rate of interest, which doubled in virtue of a rule, which we could call extravagant, can be related to the strong and repeated criticism of the insufficient consideration of the effective values involved at the mercy of unjustified delays. More recently, the author will have been able to observe that his theories have also been applied in the new fundamental agreements on the cost of labour and on pensions.

The very title the author has given to this book refers us to an original ideal of great significance, money being the instrument each system uses to measure values in the general context of responsibility: speaking of the monetary expression of civil liability, the latter is to be taken in a wider meaning which includes every function for satisfactory resolution to be obtained following the infringement of a right.

I am always fond of remembering that Carnelutti often raised his powerful voice to admonish the jurisprudentialists, complaining that we do not assert ourselves enough in the making of new laws; he maintained that, if anything, the activity of proposing legislation should take precedence over the other aspects of interpreting and applying current law. In this book, Valcavi shows that he is not insensitive to this type of vocation; in the few months when he sat in the Senate, he wanted to contribute immediately to bringing about a vast plan of clarification and progress and in the appendix we can find a concise indication of this vocation which he immediately enacted. At a time like the present, of major reforms, especially in company law, his experience in the world both of business and banking, to which he appears to have devoted enthusiasm and attention, led him to at least rekindle the activity of producing laws and the reader finds confirmation of this impassioned work comparing the proposals described in the last part of the book with the most recent reforms. for an adjustment to article 1219 of the Civil Code, to ensure that every reference to the ancient, but obsolete, principle expressed with the words «in illiquidis non fit mora» *was cancelled.*

As we have already remarked on the significance recognized by the author in relation to the various problems affected by monetary upheavals with the more general vision of civil liability, it is particularly meaningful to note that the interesting collection of bills of law opens with an appeal Well constructed in the distribution of the subject, the book we are presenting here can be rightly indicated as a model of effective contribution to what the life of the law can expect, with great significance, from our most lively and learned practitioners.

Padua, 11th July 1993

ALBERTO TRABUCCHI

Some notes on risk, the impact of default and *perpetuatio obligationis*

1. – One of the concepts that has been attracting the growing attention of scholars in recent years is that of risk (1).

As of today, this phenomenon does not appear to have been adequately studied or even classified in legal literature.

The definition of risk has recently been stated as follows: « risk is the economic consequence of an uncertain event » (2). However, this phrase does not appear totally satisfactory.

What in fact emerges as significant is not so much the uncertainty of the event on which the economic consequence depends, but rather the uncertainty of the latter in itself.

From this point of view, in my opinion it appears preferable to stress that the essence of the risk is made up of the uncertainty of keeping what one has or of suffering damage, rather than acquiring an increase, or vice versa.

The risk we are discussing belongs indisputably to the order of economic phenomena and therefore it is a question of legal risk, in the sense that the economic risk is considered here from the point of view of its « having to be, i.e. who has the burden of it is forced by need to undergo it ».

The risk may concern the party who is the holder of an existing juridical position, such as the owner of a commodity or its future holder, such as the party who is entitled to receive that commodity from his debtor.

From « L'Espressione monetaria nella responsabilità civile », Cedam, 1994.

(1) G. ALPA, *Rischio*, Enciclopedia del diritto 1989, vol. 40, pp. 1144 ff; Idem. *Rischio contrattuale* in *Noviss. Dig.*, appendix, Turin 1986, Vol. VI, pp. 863 ff.; M. BESSONE, *Adempimento e rischio contrattuale*, Milan, 1975; ALPA-BESSONE-ROPPO, *Rischio contrattuale e autonomia privata*, Naples, 1982: R. NICOLÒ, *Alea*, Enciclopedia del diritto, Milan, 1958, I, pp. 1024 ff.; C. CARAVELLI, *Alea*, *Nuovo Digesto italiano*, I, Turin. 1937; G. DI GIANDOMENICO, Il contratto e l'alea, Padua, 1987, pp. 7 ff.; A. D'ANGELO, Contratto ed operazione economica, Giappicchelli 1992, pp. 296 ff.; G. GORLA, *Del rischio e pericolo nelle obbligazioni*, Padua, 1934, pp. 19 ff.; C.M. BIANCA, *Dell'inadempimento delle obbligazioni*, Milan, 1979, pp. 108 ff.

(2) V. CALANDRA, *Delle obbligazioni*, in *Trattato Scialoja e Branca*, Bologna, 1966, under art. 1893, pp. 235 ff.; G. ALPA, *Rischio, Enciclopedia del diritto*, 1989, vol. 40, p. 1146.

It may be instantaneous in nature or require a certain duration in time, as is the case when it is a deferred, continued or periodic obligation (3).

In the case in which the risk is inherent to an obligation, it may be divided into contract risk and tortious risk.

Regarding contract risk, it is argued (4) whether it refers to the contract or to the obligation which arises from it.

In my opinion, however, this is a false problem, because in one case it regards the risk for a commitment to be taken (5), whilst in the other, that of a commitment which has already been taken.

The first aspect raises the delicate problem of the relationship between contract risk and the agreement (6), which is still a topic to be explored and examined in depth.

The difference between the risk inherent to the obligation and that taken at the time of the transaction is part of the things that happen naturally.

The risk that is taken can be onés own or of another, as in the hypothesis of a contract of guarantee and in particular in a contract of surety or an insurance contract (7).

We said above that one aspect of the risk is the uncertainty of being able to keep what one had, understood in the physical meaning or, more typically, in its economic value, and thus it can be lost or increased. In particular, this is the risk of the owner of an asset to which the general rule of « res perit domino » refers.

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(3) The author of the entry on « risk » in *the Enciclopedia Italiana di Scienze, lettere ed arti*, Treccani, vol. XXIX, p. 420, discusses static and dynamic risks from a different point of view.

(4) In the sense that risk is inherent to the contract: G. PACCHIONI, *Obbligazioni*, Milan, 1898, p. 344, no. 1; in the sense that it is inherent to the obligations: G. GORLA, *Dal rischio e pericolo nelle obbligazioni*, Padua, 1934, p. 49 and 50.

(5) With reference to the legal transaction, G.C. GRAZIOLA, in *Enciclopedia Europea*, Garzanti, vol. IV, entry on *Rischio*, p. 754, defines risk as « the conditions in which a subject makes a choice or takes a decision and when every single decision is associated with a multiplicity of consequences, each of which corresponds to the realization of a particular state of the world ».

(6) For a recent history of the concept of agreement and the relative bibliography: see L. FERRIGNO, *Contratto ed impresa*, Padua, 1985, I, pp. 115 ff. In the sense that the concept of agreement has for some time been in difficulty and that it is identified at the level of distribution of the risks agreed by the parties: M. BESSONE, *Adempimento e rischio contrattuale*, Milan, 1975, pp. 207 ff., 227, 258 ff., 262, 268 ff., 273 ff., 258 ff.; ROPPO, *Il Contratto*, Bologna, 1977, pp. 175 ff., A. D'ANGELO, *Contratto ed operazione economica*, Turin, 1992, p. 291 and others tend to identify the agreement with the economic transaction itself, which recalls the concept of risk.

(7) In contracts of guarantee or insurance, the guarantor or the insurer covers the risk of others, both in keeping what the insured possesses and releasing the guaranteed party from a risk taken. One of the largest problems recently raised in legal literature and in case law concerns the determinability of the guaranteed risk and the nullity of open-end guarantees due to the indeterminability of the object, i.e. of the other's guaranteed risk: G. VALCAVI, *Se ed entro quali limiti la fideiussione omnibus sia invalida, Foro it.*, 1985, I, 507, Idem., *Sulla fideiussione bancaria ed i suoi limiti, Foro it.*, 1990, I, pp. 558 ff.

The continuous changes in the economic values of commodities explains the basis of the cliché that keeping what one has is one of the most difficult things to do.

Thus, the subject who has a liquid capital expressed for example in legal tender or in foreign currency. will undergo the effect of its inert and conservative behaviour if the capital has not been changed in time into a more stable currency.

Similarly, the holder of a commodity will be affected by its depreciation if the investment is kept unchanged, rather than promptly selling it off.

There is a particular application of the « res perit domino » principle in the particular case of articles 1376, 1378, 1465 Civil Code due to the real effects of the contract, through the rule of « res perit ei qui adquirit ».

The risk becomes more evident in the relations of obligations with a deferred, continuous or periodic due date, which have a *genus* as their object.

Here the debtor bears the risk of physical deterioration, either because he has the commodity to be supplied in his capital, because *res perit domino* or because he has to procure it *aliunde* to supply it to his creditor, because *et genus nunquam perit et casum sentit debitor*. On the contrary, the economic variation of the expected performance is in favour or to the charge of the creditor of the same, and with it the greater or lesser onerousness or advantageousness of the same with respect to the owed or owing supply. Therefore, in the final analysis, the reciprocal risk of the business, as a whole, is at the charge or in favour of the parties.

The matter of excessive onerousness, which is the cause of termination of the contract, in the case contemplated by article 1467 Civil Code, where the service due has become excessively onerous due to the occurrence of extraordinary and unforeseeable events, is fitting here (8).

Even more pertinent here is the topic concerning the normal risk of the contract which – in my opinion – requires further study and examination (9).

A complete discussion on risk necessarily also brings in that on the remedies at the disposal of the parties to limit the risk and maximize the result.

These are put options, in which the risk is limited by the call options, the futures, call options and put options (10), omitting the replacement purchases and sales of buy to cover.

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(8) Boselli, *La risoluzione del contratto per eccessiva onerosità*. Turin, 1952, pp. 171 ff., 221 ff.; Mirabelli, *La rescissione del contratto*, Naples, 1951, pp. 239 ff.

(9) Boselli, *Rischio, alea ed alea normale del contratto* in *Riv. trim. dir.*, and *Proc. civ.*, 1948, p. 769; G. Di Giandomenico, *op. cit.*, pp. 249 ff.

(10) On call options and on put option, see Dizionario di Banca e Borsa, Milan, 1979, under the respective entries « dont », « premio », « on call » and « put ».

Much more space must obviously be reserved for the subject of wagering contracts and in contrast with non-wagering ones than that allowed by these brief notes.

2. – A subject which is to be attentively remedied is that of the impact of the default on the risk.

The Italian Civil Code disciplines it under article 1221, as far as the default of debtor is concerned (11). The law is generally interpreted in the sense that the risk in on the defaulting debtor, as a consequence of a hypothetical perpetuity of the obligation to supply the thing due, depending on the default.

On the other hand, the creditor, during the default of the debtor, would remain harmless from the risk and would only have the chance of gaining, because he would continue being entitled to the fulfilment.

An interpretation of this kind appears totally erroneous.

The law must not be understood in the sense that the defaulting debtor is obliged to supply the thing owed, even after its deterioration and in spite of this, but rather that normally the defaulting debtor must prove the impossibility of consideration due to causes not attributable to him, as stated by article 1207, section 1, Civil Code, in a similar hypothesis.

In other words, this means that in the case in which the thing has deteriorated during the default of the vendor, the latter will not be entitled to claim payment of the price from the purchaser and must return to him the advances and payments received, therefore the unforeseen impossibility becomes the responsibility of the debtor.

As far as the creditor is concerned, carefully reading article 1221 Civil Code leads to considering that the default of the debtor does not produce the sterilization of the risk at the charge of the creditor, as one is generally led to believe.

The last part of section one of article 1221 Civil Code introduces the exception (with regard to the *species debita*) that where the debtor proves that « the object of the consideration would have deteriorated all the same with the creditor », if it had been stood, the loss is placed under the responsibility of the creditor, although the debtor is defaulting (12).

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(11) C.M. Bianca, *Dell'inadempimento delle obbligazioni*, cit. under articles 1219, 1220, 1221, 1222, pp. 183 ff., 232 ff.; A. Magazzù, *Mora del debitore*, in *Enciclopedia del diritto*, XXVI, pp. 934 ff.; U. Natoli and L. Bigliazzi-Geri, *Mora accipiendi e mora debendi*, Milan, 1975, pp. 223 ff.; M. Giorgianni, *L'inadempimento*, Milan, 1975, pp. 87 ff.; M. Barassi, *La teoria generale delle obbligazioni*, III, Milan, 1948, pp. 247 ff.; Ravazzoni, *Mora del debitore*, in *Noviss. Dig. it.*, X. Turin, 1964, pp. 904 ff.; A. Montel, *La mora del debitore*, Padua, 1930.

(12) The exception already admitted by classical Roman law (Ulp. Dog. 30, 47, 6) was generalized by Justinian.

In line with the preceding hypothesis, the defaulting vendor who must prove that the thing would have deteriorated in the same way with the purchaser, despite his no longer having to receive the thing, must pay its price all the same and can no longer claim the return of any amounts or advances paid.

The gravity of the risk which, whilst in the limited hypothesis considered, continues to be incumbent on the creditor, despite those who deem that the default of the debtor sterilizes the risk borne by the other party, cannot be underestimated here.

In this regard, it must be said that an authoritative interpretation has extended the scope of article 1221, section 1, Civil Code, from the physical deterioration to any event of an economic nature, i.e. to that in which « the consideration could not have been used by the creditor » (13).

The risk continues to be incumbent, in the final analysis, although exceptionally, on the creditor despite the default of the debtor, until he is discharged in the fullest sense, with its materialization, i.e. with the ascertainment that the promise is impossible or the termination of the contract, as we will be able to say below.

This aspect is one of the most neglected, both in legal literature and in case law, with the exception of some mention of the difficulties relative to the proof that the commodity would have deteriorated all the same with the creditor (14).

3. – Unlike default, the creditor becomes insensitive to the risk (to any risk) relative to the expected consideration on the *perpetuatio obligationis* occurring, vis-à-vis the debtor. Beyond what it may seem from the literal expression, the perpetuated obligation must not be understood as definitively fixing (perpetually) the constraint of performance of the primary obligation of the debtor to supply the thing and of the creditor to pay the price.

Nor can fixing the constraint of the debtor to supply (despite the impossibility that has come into being) the deteriorated commodity at the agreed price be understood, running the risk of the subsequent and undefined price variations, in the case of the purchase of a *species*, of that commodity at that price.

Here it must be remembered that due to the default (which is temporary) and can be paid off at any time, the risk of deterioration of a *species*

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(13) A. TRABUCCHI, G. CIAN, *Commentario breve al codice civile*, Padua, 1984, sub art. 1221, p. 816.

(14) C.M. BIANCA, *op. cit.*, Milan 1979, p. 238; P. PERLINGERI, *Codice civile annotato*, Turin, 19, sub art. 1221, pp. 59 ff.

debita is temporarily transferred from the creditor to the (defaulting) debtor.

Following the deterioration, the risk is definitively transferred from the creditor to the debtor in the sense that *casum sentit debitor*, with the consequence that the creditor is definitively released from the obligation of paying the price and the debtor is equally released from that of supplying the thing (it being *species perita*) but the latter must pay compensation for the loss existing at the time of the deterioration by way of liability (*perpetuatio obligationis*) (15).

In the final analysis, remaining with the case of the sale of a *species debita*, the defaulting vendor suffers the consequences of the loss of the commodity in the sense that he loses the right to claim the counter-consideration from the purchaser and must also pay him any greater value of the deteriorated commodity, with respect to the agreed price (by way of loss of profit), thus fixing, definitively, the reciprocal relationship.

This relationship becomes perpetual in the case of impossibility of performance.

The reciprocal risk of that defaulting vendor and of that purchaser is crystallized at that time, so that subsequently the parties run no further theoretical risk in relation to the primary performance, reciprocally expected and which has become impossible.

Following the materialization of the risk, the situation also becomes definitive in the sense that the creditor no longer runs the risk foreseen under article 1221, section 1, last part, Civil Code, and that is, that he may be summoned to bear the loss, because the commodity would have deteriorated all the same with him and the debtor (on his side) cannot further and for the remaining period of time, oppose any eventuality and the relative risk.

Obviously the creditor, after he has been released from his obligation towards the other party, and after the risk has become fixed at the time of the deterioration, can no longer claim any earnings from subsequent price increases of that commodity.

The materialization of the risk, following the *perpetuatio obligationis*, as I have written at an earlier date (16), and as has recently been correctly taught by the decision of 20th June 1990 no. 6200 of the Supreme Court, operates in the two directions, so that the parties become mutually insensi-

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(15) P. PERLINGERI, *op. cit., loc. ult. cit.*, and others agree that article 1221 Civil Code applies to the defaulting debtor of a *species* in the delivery of the thing, therefore this condition reverses on him the liability that otherwise would have been that of the purchaser in relation to the principle of *res perit domino*.

(16) G. VALCABI, *Intorno al concetto di perpetuatio obligationis, e al tempo di riferimento nella stima del danno da risoluzione per inadempienza contrattuale*, *Riv. dir. civ.*, 1992, II, p. 399: Id., *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, II, p. 34 ff.

tive to any subsequent positive or negative events of the reciprocally expected counter-consideration which must not be performed by them.

Each of these two parties (including the creditor) cannot fear any prejudice for the future nor hope to draw any advantage, for example, from the subsequent trend of prices and therefore from their increase or decrease.

It must be underlined here that the contract risk principally concerns the counter-performance which is expected from the other party and its economic link with the performance due, so that release from the mutual obligation determines the termination of the risk or rather, in the relations of liability, its materialization with reference to the time considered.

What has been stated here on the materialization of the risk and of *perpetuatio obligationis*, in the hypothesis of impossibility of performance can be repeated for the case of termination of the contract under article 1453 and ff. Civil Code.

Here, however, the effects of the pronouncement of termination are retroactive in accordance with article 1457 Civil Code at the time of the non-fulfilment, releasing both (i.e. the creditor and the debtor) from their reciprocal obligations and fixing at that time the loss for which compensation is to be paid.

In the termination for contractual non-fulfilment, the obligation is perpetuated and the risk is materialized at the time to which the effects of the termination are traced.

From this time, the parties must no longer fulfil their performance and they can no longer claim that of the other (due to the reciprocal release from their obligations) and thus neither of the two is sensitive to the risk relative to the reciprocally expected performance and no longer mutually due.

Obviously the risk relative to the commodity which previously was to have been supplied will be deemed, from that time, as at the expense or in favour of each party and, due to the retroactive effects of the termination, is once again at the disposal of its owner, according to the rule of *res perit domino*.

In a termination under article 1454 Civil Code, the perpetuation is enacted at the time when the contract is terminated after the expiry of the term stated in the invitation.

In the termination under article 1456 Civil Code, it will take place at the time when the rightful termination occurs.

Each party, after the termination, in the various forms shown above, will once again run the risk concerning the commodities that it must return to the other.

The obligation of return will have the same events as any obligation and thus in its turn will be affected by the consequences of the default and

any materialization of the risk and relative compensation for damage, of which we have spoken regarding the primary obligation.

The compensation that follows the materialization of the risk and the *perpetuatio obligationis* must be performed by the party that is obliged to the other with the relative additional costs.

On juridical causation in Civil Liability due to non-performance and unlawful conduct

1. – A few years ago, in the columns of this journal, I had the opportunity to meditate once again on this topic with an essay entitled « Intorno al rapporto di causalità nel torto civile » (1).

I have studied this subject in depth on various occasions as I am not convinced by the current opinion of the causal relationship in civil law which is borrowed from the authors of criminal law who do not distinguish the conception of legal causation from naturalistic causation.

The opinion that binds the action to the natural event that can explain at the most the *an debeatur* but does not link the fact (of omission or committed) with the loss, understood in the *an* and in the *quantum debeatur*, is widespread, even in civil law.

Underlying this dominant way of thinking there is the error of considering that man can emerge from himself and enter into direct contact with things and the natural phenomena that happen in time.

It forgets that causation does not exist in *rerum natura* (2) and is only a model of our mind, with which we usually link an antecedent to a consequence, on the basis of the frequency with which one anticipates the other (3).

From the continual observation of phenomena and of their representation, which occur in time, we obtain an inductive principle, which explains this succession (4).

Proceeding backwards, we make hypotheses and plausible diagnoses concerning the causal antecedent, which we verify using the deductive method (5).

From « Rivista di Diritto Civile » 2001, II, p. 409 ff.

(1) I refer, for completion, to my article: *Intorno al rapporto di causalità nel torto civile*, in *Riv. dir. civ.*, 1995, II, 481.

(2) G. Gorla, *Sulla così detta causalità giuridica: fatto dannoso e conseguenze*, in *Studi in onore di A. Cicu*, Milan 1951, 433.

(3) D. Hume, *Opere filosofiche*, Bari 1992, 63 ff.; Kant, *Critica della Ragion pura*, Milan 1995; PH. N. Johnson-Laird, *Modelli mentali*, Bologna 1983, 107.

(4) J. Stuart Mill, *Sistema di logica deduttiva e induttiva*, Turin 1988, 1, 457.

(5) G. Valcavi, *op. cit.*, 485.

The congruence of their results will confirm or exclude our initial hypothesis.

Causation, thus understood as a mental model, will therefore be applied to the successions in general of highly varied phenomena, natural, economic, social, juridical and so on and so forth.

2. – The concepts of juridical and material causation represent two different applications of the more general concept of causation.

Material causation, unlike juridical causation, is the model that links the conduct of man to the natural event, when the latter follows the former and is necessarily presumed.

This does not recur and cannot be surmised in all the cases in which man's conduct is not followed by a natural event, as in illegal conduct, in particular in the case of omission.

By way of example, breach of contract can be mentioned (art. 1453 Civil Code) and the omission of acts dictated by the laws.

The strained interpretation of those who, to keep the naturalistic model, conceive causation (6) in the omission, as the relationship that links the so-called omitted dutiful conduct to a natural event, that would be consequent to it, is not agreed with. It can never consist of the performance of the asset which would follow on the omitted duty.

Moreover, this opinion would end up by giving a reductive idea of the loss, which we will discuss shortly, in the cases in which it is circumscribed within the limits of what the ancients called « *circa rem* » (7) but not *extra rem*, and more in general of that understood today.

Juridical causation, unlike material causation, mentioned here, is, on the other hand, the model laid down by the legislator that concerns the succession of the phenomena, in the context of the case in point described and their ideal frequency (8).

The causal antecedent is not represented here by the mere conduct, but « by the fact » which is jointly the conduct and the natural event, when this exists or the conduct without the event when it does not exist.

Here the event is not the natural one which may not exist, as has been seen, but the juridical one, i.e. the « damage » which always exists (9).

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(6) F. Realmonte, *Il problema del rapporto di causalità nel risarcimento del danno nella responsabilità civile*, Milan 1967, p. 28, p. 42, p. 97, ff.; P. Trimarchi, *Causalità e danno*, Milan 1967, p. 14, p. 15, 19, 20.

(7) F. Pastori, *Gli istituti romanistica come storia e vita del diritto*, Milan 1992, 1042; S. Perozzi, *Istituzioni di diritto romano*, Rome 1928, II, 337.

(8) On this point the dispute between Gorla and Carnelutti is recalled, with regard to the criticisms of their respective idealistic position and of naive realism.

(9) For the loss as an event of illegal conduct, *inter alia*: Carnelutti, *Il reato e il danno*, Padua 1926, 19 ff.; G. Bettiol, *Diritto Penale*, Padua 1978, 304 ff.; G. Delitala, *Scritti di diritto*

This distinction has been known ever since the times of the classical Roman jurists who kept the « ruptio » of the damage distinct (10).

The damage is certainly a creation of our mind, i.e. it is an abstraction, no different from the fact and it is more particularly the infringement of that interest that should have prevailed and which on the contrary has been sacrificed.

The damage is certainly outside the fact or causal antecedent, because it represents its consequence, but it is inside the case in point described by the legislator, which includes the overall fact, the damage and the juridical cause.

The only thing that is outside the case in point is the penalty of the damage (11).

Some authors have emphasized the naturalistic event, up to the point of denying the reality of the damage or have degraded it to a mere quality of the natural event which, as has been seen, may not exist and which is, in any case, a different concept (12).

Nor do we agree with the opinion of those who deny the existence of loss of anticipated profit, because it would be a *non ens et nullae sunt causae non entis* (13).

We will have inside the fact the material causation between conduct and natural event and outside it, but in the case in point, we will have the juridical causation running between the fact and the loss. The juridical causation will co-exist here along with the material one.

Where, on the other hand, the antecedent consists of a fact of omission or more in general, conduct without an event, we will only have the material causation.

This observation explains the reason why the author of these lines does not accept the opinion of those writers who maintain the existence of a dual causal nexus, between the conduct and the natural event on the one hand and the event and the damage on the other (14).

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penale, Milan 1976, 126 ff.; A. ROCCO, *L'Oggetto del reato*, Rome 1932 and the authors quoted therein; F. CARRARA, *Programma di diritto criminale*, Florence 1907, 1, 193.

(10) C. FERRINI, *Enciclopedia Giuridica*, 1880-1890. *Danni (azioni di)*, 81 ff.: id. *Manuale delle Pandette*, Milan 1952, 457, ff. 576 ff.

(11) Cataudella, entry *Fattispecie* in *Enciclopedia del diritto*, Milan 1966, XVI, in the same sense the authors mentioned in note 9, C. MAIORCA. *Noviss. Digesto*, entry *Fatto giuridico - Fattispecie VII* no author but Turin 1961, p. 122; against P. NUVOLOSE, *Il sistema del diritto penale*, Padua 1982, 173.

(12) *Inter alia*: F. REALMONTE, *op. loc. cit.*

(13) V. CARBONE, *Il rapporto di causalità nella responsabilità civile*, Turin 1987, I, p. 139, id., *Il fatto dannoso nella responsabilità civile*, Naples 1967, p. 167.

(14) C.M. BIANCA, *Dell'inadempimento delle obbligazioni* in *Commentario Scialoja e Branca*, Bologna 1979 under art. 1223 Civil Code; V. CARBONE in *Danno e responsabilità*, 1996, p. 430 ff.; notes 37 and 39. That of the dual nexus is the dominant opinion in German legal literature; EN-

The consequence of juridical causation consists of and is one with the damage, understood in its quantum, because the dimension of the damage must be explained and related to the cause (15).

What has been said so far on the distinction in general between material and juridical causation, on their conceptual diversity and on their possible coexistence, in my opinion, can be considered valid both for civil and for criminal law, whilst returning more extensively to this on another occasion.

In material offences, the natural event does not require any explanation in the cases of murder, injury, damage and so on.

In formal offences, we have conduct without an event (articles 365, 674 section 2 etc. Criminal Code).

There is juridical causation between the fact-offence on the one hand and the criminal damage on the other.

However, the distinction between civil and criminal is represented by the different causal rules which have been specifically laid down by the legislator for the former by articles 1223 and 2056 of the Civil Code and for the other by articles 40 and 41 of the Criminal Code (16).

3. – It now has to be added that the identification of the material cause and of the juridical cause are based on different rules, regarding the ideal frequency of the succession of the phenomena deemed necessary or sufficient to recognise the relationship of cause and effect.

In material causation, which is juridically irrelevant, we must refer only to the methods and rules of the natural sciences.

The scientific method deems that a natural event is produced by a cause « when there is a constant succession without exceptions, between the two classes of phenomena, to which the concrete phenomena in question belong » (17).

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necerus-Lehman, *Recht der Schuddverhätnissen*, Tubingen, 1958; Cammerer, *Das Problem der Überholenden Kausalitat*, Karlsruhe 1962; Stoll, *Begriff und Grenzen der Vermogenschadens*, Heidelberg 1976; Grunsky in *Riv. crit. dir.* priv. 1982, 641. It is maintained in common law by Hart-Honorè, *Causation in law*, Oxford 1962, p. 79, note 15.

(15) On the other hand, for the causal relationship between non-performance, illegal behaviour and damage being one: in our legal literature the most notable are: Polacco, *Le obbligazioni*, Rome 1915, 588; Chironi, *Colpa extracontrattuale*, Turin 1966, II, 314, in French legal literature: Meazeaud Tunc, *Traité théorique et pratique de la responsabilité civile*, Paris 1963, II, 407; Savatier, *Traité de la responsabilité civile*, Paris 1959, II, 5. In common law: Prosser, *Handbook of the law of Torts*, St. Paul Minn., 1964, p. 240.

(16) In this sense, some of the many authors who put the damage quoted above in note 9, at the centre of the causation. In the sense, on the other hand, of the necessary link with a natural event, in criminal law; F. Stella, *La descrizione dell'evento*, Milan 1970, p. 45 ff.; Antolisei, *Il rapporto di causalità nel diritto penale*, Milan 1934; A. Santamaria, *Enciclopedia del diritto*, Milan 1966, XVI, entry *Evento*, p. 118 and ff.

(17) Amsterdamski, entry on *Causa-effetto* in *Enc. Einaudi* II, pp. 823, B. De Finetti, entry

This constant sequence without exceptions implies that the judgement of material causation must be susceptible to a counter-example, i.e. it can be «falsified» according to a well-known statement by Popper (18) for there to be a confirmation and therefore certainty.

This explains why a Judge will appoint an expert witness in the particular science to which the rules that he will apply belong, to recognise the causal relationship between conduct and the natural event.

The source, method and ideal frequency at the basis of the relationship of juridical causation, which is between the fact committed or omitted, mentioned above and the damage, which belong to the same legal case in point, described by the legislator and to which the punishment is correlated, are different.

The source is provided by the laws, fixed by the legislator and these must be followed, therefore the source is not represented by the natural sciences.

The ideal sequence of the phenomena of juridical causation is not constant without exceptions as in material causation, but is that which is based on normality and therefore is of the probabilistic type, which only indicates the number of favourable cases with respect to the possible ones.

The rule underlying juridical causation is therefore that of probability, which is inferred from the rules of experience which belong to the average cultural heritage of society.

The decision of probability, on the subjective level, is translated into that of foreseeability.

Both can be *a priori* or *a posteriori* with respect to the fact considered. The *a posteriori* probability includes the case under examination in the frequency and is known as Bayesian probability (19). The decision of *a posteriori* causation leads, on the subjective level, to the posthumous prognosis, compared to that of mere foreseeability which is *a priori*.

The confusion between juridical causation and material causation and the respective rules, is at the basis of the recent debate in the courtrooms, on whether reference should be made for both to scientific laws or to the laws on probability (20).

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on *Probabilità*, ibid., X, p. 1146 ff.: STUART MILL, *op. cit.*, p. 726; K. POPPER. *Logica della scoperta scientifica*, Turin 1970.

(18) K. POPPER, *Poscritto alla logica della scoperta scientifica*, Milan 1994, p. 293 ff., 313 ff., 357 ff.

(19) *Enciclopedia Einaudi III*, entry on *Caso-probabilità*, p. 672; DE FINETTI, *Teoria della probabilità*, Turin 1970, p. 78 ff.

(20) In recent decades, the probabilistic criterion has oscillated from the statistical one (Supreme Court III, 3rd June 1980, no. 3622) to that based on a rule of experience (Court of Cassation, 3rd March 1987 no. 1228) and lastly, to probable probability (Court of Cassation, 16th November 1993, no. 11, p. 287).

The theory of *condicio sine qua non* or of the equivalence of conditions, as an expression of the scientific method, is applicable to material causation, but is not so for juridical causation, where it would multiply the number of causal factors out of all proportion (21).

In theory the criterion of adequacy or normality could appear to correspond more with juridical causation. This criterion is based on the rules of probability and foreseeability, but on close examination it is also revealed as not immune from criticism (22).

The confusion is all the more clear in the opinions of legal literature and case law, according to which for material causation a decision of probability would be sufficient, in civil as in criminal proceedings, where the judge would be « authorized to have recourse to a series of tacit nomological assumptions and to take as present unknown or only guessed initial conditions ». This is because, reasoning otherwise, « the preventive-repressive aims in criminal law would be frustrated » (23). In material causation it

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(21) The theory of *condicio sine qua non*, inaugurated in criminal law by von Buri and in Italy by Yannini, dominates in today's criminal case law, where it is combined with the criterion of efficient causation, in the case of article 41 Criminal Code. However, it is typical of that sector of criminal law centred not on the damage but on the natural event where it appears the result of a series of concauses, of which the different causal efficacy cannot always be identified, as in traffic offences. In addition, it does not appear to have been adopted by the Italian system, even in criminal law, in the case of complicity in negligence where article 113 Criminal Code requires the author of the concause to have caused the conduct of others and the merger into one lawsuit (Criminal Court of Cassation, section IV, 21st April 1988 inter alia). This theory has been maintained in civil law by some authors such as RIMARCHI *Condicio sine qua non*, *causalità alternativa ipotetica e danno* in Riv. Trim., 1964, p. 1431 and assimilated in case law by Civil Court of Cassation 39th March 1985, no. 2231; Civil Court of Cassation 16th June 1984, no. 3619, *inter alia*. The author is also particularly critical of this theory in criminal law, because it is reduced only to a negative criterion suitable for excluding the causal nexus between unconditioning events and the natural event, but not positive to recognize the existence of the causal charge to natural events linked between them only to a *condicio sine qua non.* It is all the more inapplicabile in civil law where the relationship is between non-performance, illegal behaviour and the direct and immediate damage and not with the natural event.

(22) Many rulings such as Civil Court of Cassation 1st June 1991, no. 6172; Civil Court of Cassation 10th December 1982, no. 6761 and Civil Court of Cassation 14th April 1991 no. 2847 in our case law have been inspired by the different theory of adequate causation. This theory, taken from criminal law, has its origins in von Kries and has been acceoted by our most authoritative penalists such as Delitalam Bettiol, Carnelutti, Nuvolose and others. However, it is susceptible to criticism, in criminal law as well, because this criterion is reduced to a judgement of *a priori* prognosis and not *a posteriori* diagnosis of the natural event in the offences committed with an event. The author underlines that article 1223 Civil Code requires a direct and immediate link between non-performance, illegal behaviour and, in particular, the damage, Therefore, the criterion of efficient causaluty, with the damage, appears to have rgeater correspondence.

(23) Criminal Court of Cassation, section IV, 25th March 1975 in the Vajont case: Criminal Court of Cassation, section IV, 6th December 1990, in the Stava case, in Foro it., 1991, II, paragraph 36.

is not possible to make do with probabilistic decisions, all the more so *a priori*, but reference must be made to scientific rules.

Nor is it possible to agree with that trend that has recently come back into favour for juridical causation, according to which the so-called probable probability should be accepted (24). Here the decision of probability is degraded to that of mere possibility, i.e. to that of plausibility which is precisely that of anyone who forms a hypothesis but fails to verify its confutation, as must be the case in any causal search and assessment.

At this stage, clear disagreement is expressed with the opinion that accepts, in civil law, the model of causation, currently existing amongst criminal lawyers, which is imbalanced in favour of material causation to the detriment of juridical causation. From this point of view, articles 1218 and 2043 Civil Code cannot be considered a duplicative echo of articles 409 and 44 of the Criminal Code, whilst the terms of criminal causation must be reconsidered (25).

The causation of civil lawyers diverges, moreover, from that of the criminal lawyers, because it seeks out the nexus with the damage in the an and in the quantum, as stated in this decision and not only with the mere *an debeatur*, to apply the penalty, as in criminal law.

4. – The observations made so far on the priority of juridical causation with respect to material causation, of the damage with respect to the natural event, the anti-juridical fact as a whole, instead of the simple conduct (as the causal antecedent), are confirmed in the historical excursus of legal thought, from Roman law to the present day.

Roman jurists placed the damage and not the physical event at the centre of civil contract and tortious liability, i.e. on the one hand « omnis utilitas, quae circa rem consistit » (D 19.1, 21.3; D 19.2, 19.2; D9.2.21) and « damnum iniura datum » and not the physical event on the other.

This was the case whether the illegal fact was purposeful or not.

In the earliest phase, they emphasised purposeful conduct with a natural event and thus the physical contact of the agent with the thing (*corpore, corpori*). However, in this case too the jurists placed the *damnum* (or property damage) and not the *ruptio* (or physical event) at the centre of the causal relationship (26).

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(24) Court of Appeal, Genoa, 10th March 1997, *Il danno e responsabilità*, 1996 p. 470. For a general idea, K. POPPER, *Congetture e confutazioni*, Milan 1972, p. 36.

(25) RIMARCHI, *op. cit., loc. cit.*; F. REALMONTE, *op. cit., loc. cit.*; G. FERRINI, *Enciclopedia giuridica*, *Danni (azioni di) op. cit., loc. cit.*

(26) S. PEROZZI, *Istituzioni di diritto romano*, Milan 1928, II, p. 335; E. BETTI, *Diritto Romano*, Padua 1935, p. 417 ff.: G. PUGLIESE, *Istituzioni diritto romano*, Turin 1990, p. 605 ff.

Subsequently, purposeful conduct (*corpori* but not *corpore*) took on importance to which was granted action *in factum o utilis ad exemplam legis aquilae* (Gaius III, 219) (27).

In Justinian law, the compensation of damage which was neither *corpore* nor *corpori* was admitted and it has come down to us for all tortious damage. Moreover, the damage could be compensated only within the limits of the *duplum*.

In the final analysis, causation in Roman law was juridical and was not identified with material causation.

The causal relationship indicated above included loss and loss of anticipated profits, and the damage had to be a direct and immediate consequence of the illegal action (D 19.1.21.3 cit.).

Damage *circa rem* or intrinsic damage (*propter rem habitam*) were in themselves direct and immediate, as was the case of wine which became vinegar, due to a defective barrel or the slave who was killed after he had been named as heir. Similarly in tortious liability, the damage had to be a direct and immediate consequence.

Causal interruption was regulated by D 9.2.25.1 and 43.24.7.4. Alternative hypothetical causation was contemplated by D 19.210.1.

These principles passed on to the jurists of common law (including Bartolo and Donello) in whom the distinction between damage *circa rem* and damage *extra rem* was consolidated and where causation was confused with foreseeability.

It was still in favour in the time of Pothier but was then was abandoned « because it gave rise to too many contradictions, » so that Pacifici-Mazzoni, in his time, concluded that « the distinction has no place ».

5. – The spirit of modern times, characterized by *favor debitoris*, therefore damage by non-fulfilment, in juridical causation had to be justified by « una causa proxima et non remota » was expressed by Charles Dumoulin and above all by Pothier (28), whilst in criminal law it found an echo in Oertman and in Birkmeier (29).

The point of arrival of this process was the wording of art. 1151 of the Napoleonic Code, adopted by the French Council of State without discussion for its obviousness, whereby « in the case in which the non-performance comes from the intentional wrongdoing of the debtor, the damage and interest, relative to the loss suffered by the creditors and the gain of

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(27) POTHIER, *Traité des obligations*, Paris 1777, no. 1660, CHARLES DUMOULIN. *De eo quod interest* in *Opera Omnia*, Paris, 1681.

(28) OERTMANN, *Zur Leher Vom Kausalzusammennhang*, Tubingen 1886, p. 268.

(29) POTHIER, *op. cit., loc. cit.*, in the steps of Paul, who excluded the responsibility for the death of slaves by the debtor who had not supplied the wheat.

which it was deprived, must not be extended unless to what is an immediate and direct consequence of the non-fulfilment of the agreement. »

The method assimilated by this legislator was that of juridical causation which links the fact as a whole (purposeful or out of negligence) to the damage (whether actual damage or loss of anticipated profits) and not that of material causation (within the purposeful fact) which links the conduct with the natural event.

The formula adopted was clarified in the relationship of direct and immediate causation, from which that of indirect causation was to be excluded.

In this regard, the teaching of Pothier is particularly clear for whom, in the case of a cow stricken by the plague and that had infected the other animals in the barn which died, the damage deriving from the failure to cultivate the ground, the consequent lack of crops and the difficulties was to be excluded (30).

The damage corresponding to the value of the dead livestock or of the wine that has become vinegar was deemed to be direct following infection by the pestiferous cow or by the wine coming into contact with the defective barrel and was therefore liable to compensation, whilst the other was not because it was inconsequential damage.

A logic all of its own underlies article 1151 of the Napoleonic Code, in that if the inconsequential contractual damage were considered liable to compensation, the debtor's situation would have considerably worsened, despite the declared orientation of moderation towards the debtor, as the limit of the *duplum* of Justinian memory had been abolished.

French legal literature and case law subsequently extended the rule to tortious damage, perhaps straining the wording of the law (Demolombe, Ripert and, in the opposite direction, Aubry and Rau, Planiol, Esmein (31)).

Many French authors, from Marcadé to Zachariae, from Baudry-Lacantinerie to Demogue, Ripert, Duranton, Troplong, Savetier, Mazeau and Marty have written on the significance and scope of « direct and immediate damage » (32).

Marcadé concluded that direct and immediate damage must be understood as that which « derives directly from the malicious wrongdoing, as its

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(30) DEMOLOMBE, *Cours de code Napoléon*, Paris 1873, p. 268; RIPERT, *Traité de pratique de droit civil français*, Paris 1902, VI, no. 445. p. 352.

(31) On the undisputed acceptance of the wording in the French Council of State, see *Discussions du code Napoléopn dans les Conseils d'Etat*, Paris 1808, II, p. 264. On the authors mentioned: MARCADÈ, *Spiegazione del codice di Napoleone*, Palermo 1856, II, 1, p. 332 ff.; ZACHARIAE, *Corso di diritto civile*, Paris 188, II, p. 626, DEMOGUE, *Traité des obligations en général*, Paris 1932, no. 281, op. 316, ESMEIN, *Rev. Trim. droit civil*, 1934, p. 317; G. MARTY, *rev. cit., op. cit.*, 1939, P. 685; SAVATIER, *Théorie des obligations*, 1967, p. 285.

(32) GREGOIRE, *Le droit anglo-américain de la responsabilité civile*, Brussels no. 117, 119.

sole cause and which is so close to that there can be no interference from any other cause extraneous to the wrongdoing of the debtor».

Lalou said that «direct damage must be understood as that which has the sole cause in the fact producing the damage and indirect damage as that which emerges when there is a crime or nearly a crime».

Colmet de Santerre, with great sagacity of spirit, wrote that the law excluded that it was possible to proceed from «conjecture to conjecture» otherwise the debtor would also have ended up being responsible for the suicide of the creditor.

Much less clear was the orientation of French case law, with regard to which Esmein wrote that «the courts provided without a precise criterion, out of pure sentiment».

Article 1151 of the Napoleonic Code was taken up by article 1107 of the Spanish Civil Code, by article 2100 in the Mexican code, by article 1242 in the Sardinian code, by article 1105 in the code of the Kingdom of the Two Sicilies, by article 1124 in the Parma code and by article 1201 in the Estense code.

In German countries, article 1323 of the Austrian Civil Code and article 249 of the German code, unlike the legislations that were inspired by Pothier, did not introduce any limit for the causation, foreseeability and avoidability of the damage.

In Great Britain (the land of Hume and Mill), they went from the theory of foreseeability, defined in 1850 by Justice Pollock to that of the direct relationship in 1921 of the Appeals Court in the Re Polemis and Furness ruling and in 1961, they returned to the theory of foreseeability with the Overseas Tankship decision (33).

In countries with Common Law, an important work on causation is *Causation in Law* by H. H. Hart and Tony H. Honoré.

6. – The phrase of the relationship of «immediate and direct causation» between the fact and the damage of article 1151 of the Napoleonic Code has been translated into article 1229 of the Civil Code of 1865 and its significance became clear again, to the extent that there is no explanatory note in the ministerial report, in the parliamentary proceedings and in the commission of coordination that preceded it.

The phrase was to be identical with article 1223 in the present-day Civil Code.

It has turned out to be virtually irreplaceable, to indicate the sequence of every type of damage that also includes loss of anticipated profit.

How can the «loss of indirect earnings» be compensated, protecting what Dernburg called «the dreams of earning»?

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(33) H.L. Hart Honorè, *Causation in law*, Oxford, 1985, p. 93.

The phrase of direct and inconsequential damage encountered the favour of case law which extended it to tortious damage and of jurists such as Pacific Mazzoni, Giorgi, Ricci, Matteri and many others (34).

There were also critical voices who deemed it restrictive, Gabba and Chironi, in the footsteps of Sintenis and Windscheid, proposed replacing it by « necessary consequences ». Moreover, here it did not include the essence of the juridical causation because it was focused on the different requisite of non-avoidability, today codified by article 1227, section 2, Civil Code (35).

Coviello went even further and suggested deleting the words « direct and immediate » because it was absorbed by foreseeability (36). The author of these lines has observed earlier that the foreseeability Coviello was concerned with was that of the time of non-fulfilment, whilst article 1228 of that code referred to the moment of the formation of the contract as does the present-day article 1225 of the Civil Code.

This would have excessively limited the area of indemnifiable wilful damage and, on the contrary would have extended too far that of the negligent damage, with the consequences of wilful and negligent non-fulfilment becoming equal.

7. – The new legislator has aligned himself with the previous one, having taken for article 1223 Civil Code the same wording as article 1229 of the abrogated code, which places in the case to point the cause identified in the wrongful fact (which is identified in the non-fulfilment or in the delay) and the event in the damage, i.e. the loss suffered by the creditor and the loss of profit, as they are the direct and immediate consequence.

The wording adopted by this regulation, as by article 2056 Civil Code, in the wake of the previous article 1229, refers to legal and not material causation.

Committing tort, non-fulfilment or delay, are not significant in civil law in their physical reality as an action or omission but only in terms of a normative case in point, i.e. as committing an act that is prohibited or as the omission of an obligatory act.

We disagree with those who deem that the articles 1223-2056 Civil Code should be jointly considered and integrated with articles 40 and 41 of

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(34) PACIFICI MAZZONI, *Istituzioni di diritto civile*, Turin, IV, p. 488; GIORNI, *Teoria delle obbligazioni*, Florence 1924, II, P. 187 ff.; RICCI, *Corso teorico pratico di diritto civile*, Turin 1912, VI, p. 275; MATTEIM *Il codice civile italiano*, Venice 1874, IV, under article 1229, p. 317.

(35) GABBA, *Contributi alla teorica del danno e del risarcimento*, in *Nuove questioni del diritto civile*, Turin 1904; CHIRONI, *La colpa nel diritto civile odierno*, Turin 1879, p. 486.

(36) N. COVIELLO, *Intorno alla risarcibilità dei danni indiretti e mediati*, in Giur. It. 1897, I, sections 23 and ff.; D. MANDRIOLI, *Le conseguenze immediate e dirette dell'inadempimento doloso*, in *Riv. Dir. comm.*, 1921, I, p. 56.

the Criminal Code, because « there is no interruption between the various branches of law ».

In the civil case in point, material causation is of significance in the committed fact, as a link between the conduct and natural event considered as a whole, whilst that between the fact and the damage, represents the juridical causation, which will coexist with the former. This is also the only form of causation that can be hypothesized for facts of omission or mere conduct.

It has already been stated that the damage is an abstract-empirical representation, as the wrongful fact, which is its cause, and there can be no agreement with the opinion of those who go as far as to deny the existence of the loss of profit, because they are alleged to be abstractions. They are undisputable realities.

Nor can the damage be degraded to the level of a mere adjective of a natural event, which may not have occurred, as in facts of omission, and the wording used of « damaging event » is equivocal. The loss and loss of profit, which are the contents of the damage, are real phenomena.

Legal literature discusses the distinction between « damage-event » which is alleged to be within the case in point and « damage-consequence » which would lie outside it (37). The damage-consequence can be justified only by those who admit the indemnifiability of the inconsequential damage, which I do not agree with.

The so-called « unjust damage » is a pleonastic expression, because it is such in that it derives from a wrongful fact.

The opinion that would like to limit the damage to the conclusion of the *an debeatur* alone and not to the *quantum debeatur* as well, cannot be accepted. The *an debeatur* is only one step of the decision of causation, in the economy of the intellectual engagement of the judge.

Articles 12223 and 2056 of the Civil Code, considered jointly, have established that the link between the fact and the damage must be direct and immediate, like the previous legislators who adopted the rule « *in iure proxima et non remota causa spectator* ».

The causation of importance for law is that which complies with the text of the law, which also prevails over the probabilistic justification a posteriori, which we discussed earlier.

The critical observations by Gabba and Chironi on the expression « direct and immediate damage » were also recalled earlier, but there is no reason for these observations, after article 19 of the final bill by Grandi, which

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(37) For the damage event: Court of Cassation, all Divisions sitting together 27th February 1962 no. 390 in *Riv. Dir. civ.* 1963, II, p. 599, FORCHIELLI, *Il rapporto di causalità nell'illecito civile*, Padua 1960, p. 21; CARNELUTTI, *Perseverare diabolicum, Foro it.*, IV, paragraph 99. For the damage-consequence; G. GORLA, *op. cit.*, P. 433.

spoke of « necessary consequences » was dropped by the legislative assemblies which, overcoming these objections, restored the old expression whereby the causation relationship must be direct and immediate (38).

The adoption of the wording of article 1223 Civil Code shows the unchallengeable will of the current legislator.

The adjective « direct » indicates the relationship of consequentiality and logical univocity between the wrongful fact and the damage, as is the well-known case of the death of the infected livestock by the pestiferous cow or the wine that has turned into vinegar on contact with the defective barrel.

As for the criticism of the adjective « immediate », it is agreed that the physical event can take on a definitive form, following the development with the passing of time. Articles 1223 and 2056 Civil Code nevertheless pertain to the relationship between the fact, after its evolutive stabilization and the damage that must be direct and immediate.

We do not agree, as stated, with that opinion, however widespread and authoritative it may be, which replaces the legislative expression of the direct and immediate relationship with the meta-juridical one of the *condicio sine qua non*, which moreover would be combined with the criterion of effective causation, in the even that an interruptive fact were to intervene.

This theory also reveals its unacceptability, as in the case of the subject who knocks over or injures a person who subsequently dies, due to a fire in the hospital where he was admitted or an unlawful act by third parties, but is summoned to be responsible for the death.

Confirmation is again represented by the common opinion that requires the relationship of direct and immediate causation for the compensation *lucri cum damno.*

As far as the compensation of inconsequential damage is concerned, acknowledged in legal literature and in case law, where it is part of the logic of normality, it has to be observed that articles 1223 and 2056 Civil Code have excluded the general principle that *causa causae est causa causati* and that, furthermore, the limitation to normal inconsequential damage has no point, because an abnormal causation is of no significance for direct or for inconsequential damage (39).

As for the introduction of juridical causation, one significant conjecture is that expressed by article 1227, section 2, Civil Code, whereby that part of the damage which could be avoided by the creditor and did not avoid it cannot be indemnified (40).

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(38) See my *Intorno al rapporto di causalità nel torto civile*, *op. cit.*, p. 491, note 37.

(39) De Cupis, *Il danno*, Milan 1966m II, p. 200.

(40) Art. 1227, section 2, Civil Code, by placing at the responsibility of the damaged party the burden of avoiding the aggravation of the damage creates a factor of interruption of the re-

Summing up, we can conclude that the discipline of juridical causation is not only limited to the regulations as per articles 1223 and 2056 Civil Code, but on the subject of contracts it also includes articles 1218, 1225, 1227 section 2 and on tort, articles 2043, 2056, with reference to articles 1223 and 1227, section 2, Civil Code.

Also by the author on the same subject:

– « Intorno al rapporto di causalità nel torto civile » - In Rivista di Diritto Civile 1995, II, p. 481.

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lationship of causation under way, with regard to the development of the *quantum debeatur*, More in general on the interruption of the relationship of causation, see: U. GIULIANI BALESTRINO, *La cd interruzione del nesso causale, come fatto* normativo in *Scritti in memoria di R. Dell'Andro*, Bari 1994, p. 397.

On the foreseeability of damage from negligent breach of contract

1. – The decision claims the autonomy of the requisite of the foreseeability of the damage (compared to that concerning causation) and rediscovers its role as an « important limit to compensation ». Following an authoritative current of legal literature, it refers to the determination of the « amount of the damage » and not to the mere cause or the causation, as deemed in the past by some decisions.

The comprehension of these conclusions requires a detailed discussion.

In our system, compensation of contractual damage, unlike tort, is commensurate with what could be foreseen at the time the obligation arose, in the event in which it depends on negligent, rather than wilful, non-fulfilment. Article 1225 Civil Code, save some modifications (1), essentially repeats article 1150 of the Napoleonic Code and article 1228 of the code of 1865.

The importance of the requisite of foreseeability in our legal system can be seen by anyone observing that the non-fulfilment must be presumed as negligent, whilst wilful non-fulfilment must be specifically proven (2). Contractual damage, in other words, on the basis of the presumption mentioned above, should be liquidated, generally speaking, within the limit of

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From « *Il Foro italiano* », 1990, I, p. 1946 and ff., and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

This annotates the following court rule:

COURT OF CASSATION, section II, 26.5.1989 no. 2555, President Parisi, Reporting Judge Volpe, Public Prosecutor Visalli (Conclusions) Rosin vs. Morgante: « The decision on merit which, in establishing the compensation for the damage due to negligent non-fulfilment by the debtor, failed to examine the circumstances from the point of view of foreseeability, on the extent of the indemnifiable damage, must be quashed ».

(1) Unlike the previous ones, article 1225 Civil Code does not also refer to « what has been foreseen ».

(2) This is unanimously inferred from articles 1218 and 2697, section 1, Civil Code. In legal literature, *inter alia*: MESSINEO, *Manuale di diritto civile e commerciale*, Milan, 1954, III, §114, p. 319; TRABUCCHI-CIAN, *Commentario breve al codice civile*, Padua, 1984, pp. 810 ff.; DE CUPIS, *Il danno*, Milan, 1966, p. 170; GIORGIANNI, *L'inadempimento*, Milan, 1975, 0p. 229. In case law, for example, Court of Cassation, 19th February 1986, no. 1003, Foro it., Rep. 1986, under *Obbligazioni in genere*, no. 26,; 9th July 1984, no. 4020, id., *Rep*. 1984, entry *Contratto in genere*, no. 241.

the foreseeable. In practice, the opposite happens: it is totally indemnified, without even the problem of whether it depends on negligence or wilful action being even raised and whether it was foreseeable or not; as if it were, in general, damage due to wilful non-fulfilment.

The requisite of foreseeability generally appears marginalized and in the best of hypotheses is understood in an absolutely reductive way: as shown by the opinion which narrows down foreseeability to the cause or the causation and excludes from its context the « amount of damage ». We will dwell longer on this aspect.

The adjustment of the aim, made by the decision below, therefore appears important precisely because it rediscovers the importance of the limit of foreseeability.

2. – It is all the more opportune to ask first of all how the marginalization of the requisite of foreseeability has been possible and on what it depends in the practice of liquidation of contractual damage.

In the first place it must be attributed – in my opinion – to the influence of the legal tradition, dominant in legal literature and in case law, according to which our system is said to follow the objective of the total compensation of the damage (3). This is equivalent to forgetting that our system is inspired by the opposing principle of the indemnity of the damage « within specific limits » (articles 1225, 1227, second paragraph, and 2056, section 2, Civil Code). In this regard, it should be remembered that that part of the damage which could have been avoided (article 1227, second paragraph); is not indemnifiable; in our case, only the damage that could be foreseen at the time of the contract can be indemnified (article 1225); and lastly, the loss of profit must be liquidated « with fair appreciation of the circumstances as necessary » (article 2056, section 2).

The postulate of the entire compensation of the damage, although without any normative foundation, has nevertheless led our case law to debase these limits and thus to reduce avoidability to passive behaviour of mere expectation, and not active cooperation, to the replacement of the asset, where possible, and to practise the fair appreciation of the circumstances where necessary, in the liquidation of the loss of profits, only exceptionally and not usually.

This is also the case – as has been mentioned – of the limit of foreseeability, which is not taken into any account in practice or which, in the best of hypotheses, is understood in absolutely reductive terms (4).

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(3) The many decisions include; Court of Cassation, 12th January 1982, no. 132, *Foro it.*, *Rep.* 1982, entry *Danni civili*, no. 152; 25th October 1982, no. 5580, ibid., no. 149.

(4) An example of the orientation of the de facto domination comes from the Court of Pisa 18th March 1983, *Foro it.*, Rep. 1983, entry *Danni civili*, no. 46, according to which the foresee-

This way of operating ends up with the non-application of article 1225. Unlike other systems, which provide for unlimited and full compensation of the damage, both in the case of negligent and wilful non-fulfilment (5) or, on the contrary, it is only contemplated within the limit of the foreseeable also in the hypothesis of wilful non-fulfilment (6), our system links different compensation depending on which of the hypotheses is concerned. In this regard, it is worthwhile remembering that responsibility within the limit of the foreseeable, already contemplated by article 1228 Civil Code of 1865, was reintroduced under article 1225 of our code, after the wording of article 19 of the preliminary bill had been dropped which, on the contrary, codified the principle of the total compensation for the damage (7).

The devaluation of the limit of the foreseeable must in the second place be attributed to the reverse of perspective in virtue of which wilful action is presumed, whilst negligence should be proven. It is commonly deemed in legal literature that broad negligence or with foresight of the event must not be considered equivalent to wilfulness; the limit of foreseeability should be respected in this case as well (8). However, the policy is to a great extent nullified by the uncertain borders between wilfulness and negligence in breach of contract. This appears obvious where wilful non-fulfilment is understood when it is accompanied by the awareness of its illegal nature. Wilfulness thus described does not appear to be appreciably different from broad negligence or with foresight of the damaging consequences, leading to the perception of the absence of a precise demarcation between negligence and wilfulness. The awareness of unlawfulness operates on the level of representation and not, properly speaking, on the will. It is indeed plausible that the non-fulfilling party is aware that his behaviour is against the law and yet his non-fulfilment may be, in various ways, justified, as is the case for example, of the person who is in impossibility, although the non-fulfilment is guilty.

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able is to be understood in an absolutely rigorous and restrictive sense; for a reductive interpretation of artiche 1227 Civil Code, Court of Cassation 6th August 1983, no. 5274, with notes by VALCAVI and DI PAOLA id., 1984, I, p. 2819.

(5) Articles 249 of the German Civil Code and articles 99 and 103 of the Swiss code of obligations.

(6) Art. 74 of the Convention of the Hague, 1st July 1964, is in this sense.

(7) The quoted article 19 pf the preliminary bill, dropped by the new code, provided for « the obligation of the reinstatement of the financial situation » in which the damaged party would otherwise have found himself.

(8) The many in this sense include CIAN, in *Riv. dir. civ.*, 1963, II, p. 148; BARASSI, *Teoria generale delle obbligazioni*, Milan, 1948, III, p. 303; BIANCA in *Commentario Scialoja-Branca*, Bologna-Rome, 1979, under art. 1225, pp. 311 ff., Court of Cassation 10th December 1956, no. 4398, *Foro it.*, I, p. 389; *contra*, DE CUPIS, *Il danno*, Milan, 1966, I, p. 251, note 142.

Wilfulness must – in my opinion – be identified in intentional non-fulfilment, which cannot be presumed, but must be proven. Only the inexcusability of non-fulfilment can make it be presumed as wilful (9).

3. – Let us now go on to see the motivation whereby damage from non-fulfilment can be indemnified only within the limit of the foreseeable.

It does not appear doubtful that the legislator considered compensation here, within this limit, as the penalty in proportion to the lesser gravity of negligent non-fulfilment, compared to wilful non-fulfilment (10).

It is a question of a choice motivated by legislative policy, which cannot be questioned as such. It is coherent with the historic trend of modern legislators to limit the compensation of the damage and reveal the concern of decriminalizing compensation.

It also appears – as I have written elsewhere (11) – in harmony with the historical influence of the spirit of canonical law on modern legislations, the fundamental contribution of which consisted of avoiding usury of the creditor, on the one hand, and the penalty of the debtor on the other. The limits to compensation established in the case of wilful non-fulfilment as well (articles 1227, second paragraph, 2056, second paragraph) can be explained in this context. The essential and exclusive diversity of treatment of negligent non-fulfilment compared to wilful non-fulfilment is reduced to the respect of the limit of the foreseeable, with reference to the moment of the signature of the contract and more in general to when the obligation arose.

From this point of view, the attempt to anchor a reductive interpretation of the content of the « foreseeable » to the particular events of article 47 of the draft of the Napoleonic Code.

4. – Let us now examine the nature of the phenomenon that goes by the name of foresight and therefore, foreseeability. This implies some considerations of a general nature.

Every human activity – and this is exceedingly obvious – takes place between the past and the future. Man operates in the present, but is projected towards the future. From this point of view, it has to be admitted that man is forced each day to investigate the future to make any choice at

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(9) Inexcusability is an index of intentional intention, accompanied by the awareness of the illegality (wilfulness). There is negligence when, for example, the debtor challenges the obligation without being in the hypothesis as per art. 96 Code of Civil Procedure (intention without awareness of unlawfulness) or when he does not have the means to fulfil or whenm he forgets (where there is an absence of intentional intention).

(10) BIANCA, *cit.*, pp. 371 ff.

(11) VALCAVI, *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, II, p. 35; Id., *Indennizzo e lucro del creditore nel risarcimento del danno* in *Quadrimestre*, 1986, p. 681.

all and have any kind of behaviour. St. Paul's *omnes nos propetamus* (12) returns here opportunely. Foreseeing is none other than imagining future events on the basis of the experiences of the past and the relative rules, as they are kept in each person's memory or with another means. The set of these rules of experience represents the cultural heritage of the subject considered. It consists both of the memory of personal experiences as well as those acquired from the exterior, especially today, in a world dominated by the mass media.

Depending on whether the experiences of the past contemplated the sequence of events, considered with more or less statistical regularity and uniformity (*quod plerumque accidit*), we have the probability or the mere possibility of the occurrence of future events (13). It is all too evidence that foresight, if it concerns events in the medium or long term, appears in terms of less probability (14), compared to those in the short term. The relationship between individual or collective culture, as understood above, and practical behaviour (and thus between *gnosis* and *praxis*) is understood by Comte where he expressively wrote that « knowing is foreseeing ».

The foresight of every man depends on the quantity of rules of experience he has known, his readiness to seize on the present symptoms and the subsequent evolution in their light and, in conclusion, his wisdom and even his capacity to have presentiments. This characterizes the different prophetic temperament of each person, i.e. his character foreseeing the future and the different perspicacity and his wisdom in behaving.

Foresight can concern a wide variety of future events, whether of a natural or economic order or of another type and in particular the consequences of his actions or omissions or those of others and the inter-relation between causes, joint causes and events. Today economic foresight takes on particular importance nowadays, both because it concerns the general and the individual sphere, The foresight of the advantages and the losses that can derive from the implementation of negotiation or the non-fulfilment of a previously contracted obligation is part of this second type of economic foresight.

Foresight is one thing and expectation is something else (15), which concerns a usually favourable events for the person foreseeing it, in terms of great probability, almost being a wager on its occurrence in the future,

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(12) In *Letter to the Corinthians*, 14.

(13) From *Dizionario di filosofia*, Turin, 1971, entry *Previsione*, p. 693; from *Enciclopedia Einaudi*, I, 1977, entry *Anticipazione*, pp. 62 ff., as well as III, entry *Caso/Probabilità*, pp. 672 ff., and X, entry *Previsione e possibilità*, p. 1120, 1126.

(14) *Op. ult. cit.*, p. 1128.

(15) De Finetti, *Teoria della probabilità*, Turin, 1970, pp. 721 ff.; Gandolfo, *Metodi di dinamica economica*, Milan 1973, pp. 26 ff.; De Felice-Pelloni, Aspettative *razionali, teoria economica e politiche di stabilizzazione*, Milan, 1982, and bibliography quoted on pages 227 ff.

The difference between foreseen events and events that have occurred represents the risk, the intimate essence of which is made up of the unknown quantity to come about from the foreseen events. Man, when he acts on the basis of foresight, places a bet on the future and therefore contracts a risk.

Summing up, foresight can be defined as that phenomenon for which man anticipates, at the time considered, the probable or possible future events, on the basis of his knowledge of similar ones that have occurred in the past.

Let us now go on to identify the essence of foreseeability, to which article 1225 refers. This law concerns the foreseeable alone and not what has also been individually foreseen, as articles 1228 Civil Code of 1865 and 1150 of the Napoleonic Code did, to the contrary. Our system, therefore, does not attribute particular significance to the personal ability to foresee, whether it is greater or lesser than that of the average man (16). Individual foresight is normally translated into an a priori prognosis. Foreseeability, hypothesized by article 1225, is however than of the average man, with a normal cultural background and an unexceptional wisdom. The object of the foreseeable is given by the events that have occurred and in relation of effect to cause with the non-fulfilment. Foreseeable events which have not occurred or which are extraneous to the relationship of causation with the non-fulfilment are not of any importance. The scope of the foreseeable, according to article 1225, is therefore limited only to the damage from non-fulfilment that has occurred and that was foreseeable at the time of the contract.

In the final analysis, foreseeability is a decision of posthumous prognosis, with which the judge mentally refers back to the time of the contract, to establish which consequences produced by the non-fulfilment were foreseeable or not at that time by the average man (17). It is also that of the average non-fulfilling debtor, whilst elsewhere it concerns both contracting parties (18). lastly, it concerns – in my opinion – only the probably damaging consequences and not also those that are only probable (19).

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(16) In the sense of the compensation for damage which is foreseen although not ordinarily foreseeable, TRABUCCI-CIAN, *Commentario, cit.*, under art. 1225, p. 822.

(17) The expression is taken from V. HIPPEL, *Diritto penale*, II, pp. 144 ff.

(18) In the sense of abstract foreseeability, according to criteria of common experience of facts and normal circumstances, amongst the many Court of Cassation, 30th January 1985, no. 619, *Foro it., Rep*. 1985, entry *Previdenza sociale*, no. 495; 11th October 1983, no. 5896, *id., Rep*. 1983, under *Responsabilità civile*, no. 84; 28th May 1983, no. 3694 ibid., entry *Danni civili*, no. 44. in common law, less recent case law referred to the foreseeability of both contracting parties: see MONELLI, in *La vendita internazionale*, Milan, 1981, p. 255, no. 6.

(19) For a middle course, between possibility and probability: BARBERO, *Sistema istituzionale di diritto privato*, Milano, 1951, II, pp. 57 ff.

5. – The highest Court in Italy rightly underlines the autonomy of foreseeability compared to other concurrent requisites. The most important aspect concerns the distinction of foreseeability with respect to causation.

For a long time foreseeability was, in the history of law, confused with causation (the so-called intrinsic damage or *circa rem*). Even today, the conceptual borders are often still uncertain and undefined, both in legal literature and in case law (20). There is a frequent tendency to overlap the two criteria when stating that both would concern the same « normal consequences » that derive from non-fulfilment. With the difference that causation also concerns the most remote consequences, which could be indemnifiable according to article 1223, whilst article 1225 would act as an integrative limit of the former, reducing compensation to those of them which were foreseeable.

This opinion shows an erroneous way of understanding both the concept of causation and its limit; and risks extending indemnifiability to the remotest consequences. Article 1223, on the contrary, limits indemnifiability only to the direct and immediate consequences of the non-fulfilment and, even where indirect or mediated consequences are included, they must be exclusively of « normal consequences » (21). The « remote consequences » cannot be considered such (22). The reference to normal consequences postulates a conception of causation based on the principle of the « adequate causation » (23) and not on that of the *condicio sine qua non*, which in practice extends it infinitely.

This preamble must be followed by the observation that the consequences that are significant on the level of causation do not coincide with those that are significant at the level of foreseeability, because the areas of reference are different. The time concerned by causation differs from that concerning foreseeability. The time of reference of the former is made up of that of the non-fulfilment, whilst that of foreseeability is made up of the « time of the contractual agreement ».

Lastly, in the case of negligent non-fulfilment, those damaging consequences, which can normally be connected with non-fulfilment, which were also foreseeable at the time when the contract was formed, can be indemnified. Causation represents a priority *scrimen*; foreseeability is a further *scrimen*, which distinguishes the indemnifiable consequences, in the event of negligent non-fulfilment, with respect to wilful non-fulfilment. Obviously,

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(20) The Court of Cassation 3694/83 also recently incurred this confusion when it deemed the causation sufficient to assert the foreseeability of the damage.

(21) On the subject, *inter alia*, DE CUPIS in *Giur. it.*, 1983, I, p. 1, 1525.

(22) BELLINI is of the opposite opinion, *L'oggetto della prevedibilità del danno ai fini dell'art. 1225 c.c.*, in *Riv. dir. comm.*, 1954, II, p. 362, spec. 280.

(23) On adeguate causation, originating in V. HIPPEL and the relative elaborationin legal literature, MEZGER, *Diritto penale*, Padua, 1925, pp. 139 ff.

the consequences, although foreseeable at the time of the contract, but which however did not occur following the non-fulfilment, or which are not normal consequences of this, cannot be indemnified.

The intrinsic nature of the two opinions is also absolutely different. The causation comes under a post-vision or a posteriori opinion with regard to the non-fulfilment, whilst foreseeability is concretized in an opinion of posthumous prognosis, regarding the time when the contract was formed. The foresight, in turn, is distinguished from foreseeability because the former is an a priori prognosis, whilst the latter is a posthumous prognosis.

6. – The object of possible foresight can be any external event, for example human behaviour, a natural, social or economic event that interacts with man and the consequences that it triggers off.

The damage belongs – as has been stated – to the sphere of the economic consequences of the behaviour of the man and the interaction between man and widely varying phenomena, and in particular the increase or decrease of prices, the level of inflation, the behaviour of others, in particular of the damaged party and so on. Contractual damage can be defined « the damage of the interest of the creditor for the failed punctual performance of the asset owned to him by the debtor ».

Every asset may be sought after either for its usefulness (such as, for example, a raw material or a machine for an industrialist) or for its trading value (such as goods for a shopkeeper, used to operating on price differences). Thus the damage of the industrialist will not be limited to the loss or loss of profit relative to the trading value of that commodity, but will extend to the normal consequences of the lack of use of that commodity in the subsequent production phase in that industry. On the contrary, the shopkeeper's damage will mainly concern the variations between the price agreed of the goods and that following the non-fulfilment.

The commodity can consist of a *species* (i.e. non-fungible) or of a *genus* (i.e. replaceable). This is of great significance for the purposes of the absolution of the burden to avoid the worsening of the damage provided for by article 1227, section 2.

In short, the impossibility of replacing a *species* or, on the contrary, the failure to replace, although possible, a fungible asset or a delayed replacement and the relative price will have different consequences on the dimensions of the damage of the industrialist or the shopkeeper and on the relative compensation. In the case in point, the objection was that the vendor had sold the commodity to a third party and had not been collected by the purchaser, at a debased price, such as to request compensation deemed unforeseeable.

The damage discussed above corresponds to normal consequences, and not to the remote consequences of non-fulfilment. The foreseeability concerns, in the examples considered on the industrialist or of the shopkeeper, first of all the economic behaviour of the damaged party and thus the use that he would have made of that asset and presumable from its purpose of use, the type of professional activity of the other contracting party and in general, the information had at the time of the contract. It also extends to the different events that can come into a relationship of interaction and thus have an impact on its dimensions, such as, for example, the probable rise in process following natural events, of which there exist symptoms (drought) or social events (international tensions) or preference of the public and so on.

Foreseeability will extend to the normal forthcoming damaging consequences of the non-fulfilment, It will extend to the time of the damage and will not reach to the *tempus rei indicandae*, which is completely unforeseeable.

7. – Lastly, let us go on to the age-old dispute which has developed around the object of foreseeability: if it concerns the event or the damage, an abstract damage or, on the contrary, a concrete damage, the cause or the « amount of damage ».

Ley's begin by saying that the object of the foreseeable cannot be deemed the « event », in its naturalistic meaning, but the « damage ».

The literal meaning of the law is decisive here. Moreover, it has been correctly deemed in legal literature that the « damage is essential » in the offence, i.e. the damage or endangering of the protected interest, whilst the natural effect is only a « sign » or a way for that damage to be (24), or that the damage is a « consequence of the event » and is not identified with the same (25). In this sense, the Supreme Court recently (ruling no. 3352 of 18th July 1989), in a very insightful way, stated that the « damage is not the destruction of a thing or the loss of utility or enjoyment of the same » but the « economic damage » i.e. the loss of capital, on the basis of the principle of the *Differenztheorie* (26).

Let us now examine the basic dispute from which a long confrontation of contrasting opinions in Italian and French legal literature and case law has emerged. It concerns the problem if by object of foreseeability the ab-

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(24) G. DELITALA, *Il concetto di evento*, in *Scritti di diritto penale*, Milan, 1976, pp. 1221 ff. In the sense that foreseeability of the event is compatible with the unforeseeability of the damage, e.g. in tort: Court of Cassation 28th April 1979, no,. 2488, *Foro it.*, Rep. 1979, under *Responsabilità civile*, no. 70.

(25) BELLINI, *op. cit.*, p. 369.

(26) Court of Cassation, 18th July 1989, no. 3352, *Foro it., Mass.*, p. 492.

stract or the concrete damage must be understood, the cause or the causation of the damage or, on the contrary, the « amount of the damage ».

The opinion, which dominated for a long time, was that put forward by Chironi, Demolombe and others (27), according to which it is sufficient for the non-fulfilling party to foresee the « cause of the damage » to be responsible for the prejudice that has occurred. More recently, a variant has been suggested by Bellini in an extensive and valuable study (28), according to whom it is sufficient for the non-fulfilling party to foreseen the « causation » for him to be wholly responsible for the damage, as an event within the causation.

The opposite opinion maintained by Giorgi, Messineo, Bianca and others (29) is at the antipodes: according to this opinion, foreseeability also concerns the « amount of the damage » and is to be met within the limit in which it was foreseeable.

This last decision has now been accepted by the ruling under examination. It appears favourable to the author of these lines for the considerations that are given below.

It is opportune to start with examining the common foundations of the opinions which reduce foreseeability to the cause or to the causation of damage, without a quantitative dimension. It is clear that we are in the face of a restrictive interpretation of article 1225, understood as making foreseeability compatible with the principle of the total compensation of the damage, with respect to which it would be an exception.

This opinion is essentially resolved in not applying article 1225 in favour of the dogma of the total compensation of the damage. In this respect, it is opportune to recall here the importance given by Chironi to the older legislator's failure to accept a law favourable to moderation, to infer its consequence that the damage should be fully compensated. Even more expli-

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(27) CHIRONI, *Colpa contrattuale*, Turin, 1987, pp. 581 ff.; BARASSI, Teoria generale delle obbligazioni, Milan, 1948, III, p. 1213; L. COVIELLO, L'obbligazione negativa, Naples, 1934, II, p. 96. Case law includes: Court of Cassation, 7th December 1978, no. 5811, *Foro it., Rep.* 1978, entry *Danni civili*, no. 28; 21st October 1969, no. 3438, *id., Rep.* 1969, entry *Danni per inadempimento di contratto*, no. 5; 14th September 1963, no. 2510, *id.*, 1963, I, p. 2099.

(28) BELLINI, *op. cit.*, pp. 362 ff.; PERLINGIERI, *Commento al codice civile*, Turin, 1980, IV, pp. 64 ff.; DELL'UTRI, quoted in case law: Court of Cassation 23rd May 1972, no. 1600, *Foro it., Rep.* 1972, entry *Danni civili*, no. 47.

(29) GIORNI, *Teoria delle obbligazioni*, Florence, 1903, II, pp. 187 ff.; MESSINEO, *Manuale di diritto civile commerciale*, Milan, 1954, III, §115, pp. 338 ff.; BIANCA, *op. cit.*, pp. 318 ff.; French legal literature includes: AUBRY RAU, *Cours de droit civil français*, Paris 1871, IV, p. 105; PLANIOL-RIPERT, *Traité Elém.*, Paris 1949, pp. 492 ff.; H. and L. MAZEAUD, *Traité théorique et pratique de la responsabilité civile*, Paris, 1950, III, pp. 492 ff.

In case law, Court of Cassation, 28th April 1979, no. 2488, cit., Court of Appeal, Bologna, 30th March 1950, *Foro it., Rep.* 1950, entry *Responsabilità civile*, no. 216; Court of Cassation, 17th May 1939, no. 1678, *id.*, 1939, I, p. 1449.

citly, Bellini stressed « the need to limit at far as possible the character of exceptionality of the rule in article 1225 », with respect to « the general principle of law (articles 1218, 2043 Civil Code, articles 40, 185 of the Criminal Code), that the person who causes damage must procure the total compensation », independently of any consideration whatsoever of the psychological element of wilfulness or negligence (30). On these bases, foreseeability is excluded from extending to the amount of the damage.

These propositions cannot be agreed with because – as has been said – the dogma of the total compensation does not have positive bases and indeed clashes with the system adopted by our legislator, according to which the damage must be indemnified within certain limits and not fully (articles 1223, 1227 second paragraph, 2056, second paragraph). This is also valid in tortuous liability or wilful contractual liability.

On the other hand, article 1225 can, in this sense, be understood only as the exception which confirms the rule and has the distinctive character of contractual damage with respect to tortious damage.

We must also add that the existence of abstract damage, without quantitative dimensions, cannot even, in theory, be hypothesized. Damage – as has been stated – is damage of interest, that is an economic event and as such has a quantitative dimension. The damage, in other words, is by definition concrete and the *Differenztheorie* postulates an « amount of damage » out of necessity. The self-evident orientation of case law is moreover in this sense, according to which damage cannot be considered as existing, in itself and for itself, even although it had formed the object of a general ruling for the compensation of the damage. It is commonly held that the ascertainment of the effective existence of the damage in itself cannot be separated from its extent and that the general ruling is not equivalent to the ascertainment of the existence of damage, to any extent whatsoever (31). In the final analysis, the foreseeability of an abstract and not concrete damage, of damage itself, remote from the « amount of the damage » cannot be hypothesized.

The argument that article 1225 speaks in general about « damage » and not also about the « amount of damage » appears without significance. The theory that limits foreseeability to the cause of damage does not seem acceptable, in any way. It is not seriously questionable that the identification of a cause postulates that of the « amount of the damage » as is shown by the fact that the causation in the decision on the *an debeatur* is debased to

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(30) Bellini, *op. cit.*, pp. 372, 377 ff.

(31) Court of Cassation, 23rd January 1987, no. 645, *Foro it., Rep.* 1987, entry *Sentenza civile*, no. 64; 26th April 1977, no. 1556 and 5th May 1977, no. 1702, *id., Rep.* 1977, entry quoted nos. 66, 64. In the sense that the damage cannot be legally fractioned, Court of Cassation 20th March 1972, no. 839, *id.*, 1972, I, p. 2878.

a level of mere causal suitability (32). Moreover, the causations of a damage without a quantitative dimension are essentially reduced to this.

In this regard, it is stressed that the cause of the damage is represented by the non-fulfilment and must be distinguished from those interacting factors discussed at the beginning and which are the concurrent causes of the dimension of the damage.

Case law nevertheless states that « the existence of a concurrent cause in the production of the damaging event, by definition, is a problem relative to the quantum and, as such, is irrelevant in the decision on the *an debeatur*, because it has an influence exclusively on the extent of compensation (33).

It must also be said that the theory of « causation » is not acceptable as it postulates the indemnifiability of remote consequences, in contrast with the criterion of normality which underlies that of causation. The « causation », adopted by way of example by their champion, are chains of remote and mediated consequences (34).

8. – On the basis of what we have been saying, with regard to the indivisibility of the damage from its amount, we will conclude that foreseeability as per article 1225 extends to the quantitative dimension of the damage.

The circumstance that the possibility of foreseeing the normal circumstances of non-fulfilment is referred to the time of formation of the contract is equivalent to its traceability to the normal risk of the same. The foreseeability of the normal consequences of the non-fulfilment represents an expression of the normal risk, which the contracting party assumes, for the hypothesis of his non-fulfilment. Lastly, the objection that the « amount of the damage » cannot be foreseen with any accuracy remains to be discussed (35).

This observation can be overcome is we think that foreseeability concerns a « range of quantitative values » and not a precise amount. In this sense, the principal defender of the requisite of foreseeability, Pothier, was oriented in this sense, claiming the principle « in virtue of which a debtor who has not wilfully committed the non-fulfilment cannot be deemed obliged to indemnify damage from non-fulfilment, over and above the highest

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(32) Court of Cassation, 29th April 1983, no. 2965, Foro it., Rep. 1983, entry Sentenza civile, no. 72; Court of Cassation 1556/77, cit.

(33) Court of Cassation, 6th January 1983, no. 75, *Foro it.*, Rep. 1983, entry *Sentenza civile*, no. 75.

(34) It is recognised by BELLINI, *op. cit.*, P. 379, 380; also see Court of Cassation, 19th July 1982, no. 4236, *Foro it.*, Rep. 1982, entry *Previdenza sociale*, no. 121.

(35) *Inter alia*, Court of Cassation, 14th September 1963, no. 2510, *Foro it*, 1963, I, p. 2009.

sum he could have though of, that could have arisen », where it is a principle based on reason and natural equity (36).

In other words, the extent of the precept as per article 1225 is not translated into the proposition that the foreseeable « amount of the damage » in its precise amount can be indemnified, but rather the opposite, i.e. the unforeseeable « amount of damage » at the time of the formation of the contract cannot be indemnified. It had already been underlined in the past that this was a decision of posthumous prognosis in which the judge evaluates the normal consequences of non-fulfilment, ideally transferring it to the time of the contract.

The decision is of the eminently empirical type and is based on the holdings of judgements of experience of those who are to judge a posteriori. The best symptom of the unforeseeability of the « amount of the damage » is represented by the « surprising » character of the quantitative dimension of the damage for the person judging. Thus, for example, in the case of failure to supply raw material to the industrialist, discussed above, the damage from the termination of the contract will not take into account the stop in production, which lasted longer than foreseeable. Similarly, that due to the non-fulfilment of a purchaser of securities or goods cannot include the greater damage for an unforeseeable drop in prices. In the final analysis, foreseeability will concern the behaviour of others, the incidental events and the normal course of prices, therefore their sudden increase or exceptional drop by dimension and/or duration, the course of interest rates and inflation, with regard to the so-called flare ups of inflation, and so on, cannot be considered foreseeable.

The requisite of foreseeability postulates a compatible solution of the problem of determining the time of reference in the estimate of the damage. This time of reference is represented by that of the occurrence of the damage, whilst the subsequent one, for the delay with which the indemnity is given, can be compensated in terms of monetary interest. The adoption of other criteria, such as that of *tempus rei iudicandae*, or the theory of the credit of value, represent the negation of the requisite of foreseeability – as I have already written elsewhere – due to their automatism (37).

It is possible that the requisite as per article 1225 leads to abuses and results that are not in line with equity. The judge will pay here greater attention in checking that the default period, which matures day by day, has not been transformed in the meantime from negligent to wilful.

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(36) POTHIER, *Traité des obligations*, Paris, 1805, I, p. 88, 107.

(37) VALCAVI, *Il tempo di riferimento, cit.; Id., Indennizzo e lucro nel risarcimento del danno, cit.*

Lastly, foreseeability, representing a presupposition of a condition of the indemnifiable damage, will give rise to a challenge and not to an objection, in the proper sense, by the party summoned to indemnify.

The burden of proof of foreseeability, in the event of challenge, will be on the creditor of the compensation (38). This burden, moreover, is not destined to assume rigorous significance, because the evidence will mainly be made up of known circumstances and simple presumptions based on rules of common experience. The judge however – and what counts – must give an adequate reason for the existence of the foreseeability because this represents – as stated in this decision – an important limit to the compensation of the damage.

Reference is made to the above in

U. BRECCIA, *Le obbligazioni*, Milan, 1991, pp. 647, 658, 661.

(38) BIANCA, *op. cit.*, p. 386; PERLINGIERI, *op. loc. cit.*; Court of Cassation, 15th December 1984, no. 4480, *Foro it.*, Rep. 1954, entry *Danni per inadempimento di contratto*, no. 40.

Avoidability of the greater damage under Art. 1227, section 2, Civil Code, and replacement of the non-fulfilment

1. – The problem is to know whether the creditor is obliged to avoid the worsening of the damage, even with recourse (where possible) to an *aliunde* replacement of the non-fulfilled commodity, as when faced by a perspective price increase, such as to contain the indemnifiable damage, or whether he can take refuge in an inert expectation of the personal fulfilment of the debtor, summoning him to indemnify it.

Court of Cassation, section III, no. 2437/67 and, in its wake, many courts of merit (1) have, in my humble opinion, correctly answered that « if, having borne in mind the de facto circumstances, procuring the goods or services not fulfilled by the debtor in other ways, represents a measure required by ordinary diligence, to avoid or limit damage, the party that neglected taking this measure, cannot escape the consequences laid down by article 1227, section 2, Civil Code. »

Section II of the court, with this and other pronouncements (2), makes a revirement on the other hand, returning to its past conviction (3), but without an adequate critical reconsideration; thus, on the claimed apodictic « being a constant opinion of legal literature and case law », states that

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From « Il Foro italiano », 1984, I, p. 2820 and ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam, 1994.

This annotates the following rule:

COURT OF CASSATION, SECTION ii, 6.8.1983, NO. 5274, President Palazolo, Reporting Judge Anglani, Public Prosecutor La Valva (Conclusions): Soc. G.S.I. vs. Terminos: « The behaviour of the buyer who fails to purchase from others the goods, although easily available on the market, that the vendor was obliged to deliver under the contract cannot be considered negligent or at any rate not diligent. »

(1) Court of Cassation, 12th October 1967, no. 2437, *Foro it.*, 1968, I, 138; Court of Appeal of Bari, 2nd March 1979; Court of Appeal of Milan, 11th November 1977; Court of Appeal of Naples, 30th September 1977.

(2) Court of Cassation, 15th July 1982, no. 4174, *Foro it.*, Rep. 1982, entry *Danni civili*, no. 53; 26th January 1981, no. 578, ibid., no. 56.

(3) Court of Cassation, 21st October 1966, no. 2403, *Foro it., Rep.* 1966, entry *Danni per inadempimento di contratto*, no. 48; 19th February 1965, no. 275, id., *Rep.* 1965, entry *cit.* no. 61; 30th December 1964, no. 2984, id*., Rep.* 1964, entry cit. no. 8; 17th July 1963, no. 1597, id., Rep. 1963, entry cit., no. 55; 15th March 1961, entry cit., no. 33; 17th March 1960, no. 541, id., Rep. 1960, entry *Vendita*, no. 212.

« the creditor and the damaged party are obliged, in conformity with article 1227, section 2, only to correct behaviour aimed at circumscribing the prejudice suffered and to prevent its possible expansion, but not also to carrying out onerous and extraordinary activities such as the *aliunde* purchase of things or undertaking initiatives such as to entail sacrificed, with appreciable disbursements of money or taking on risks of any kind. »

It is opportune to say that the duty of the creditor to limit the prejudice is understood differently in other countries near us (4) in the senses that he is obliged to take diligent initiatives and that this opinion has also recently been textually taken by our legislator, on the termination of international sales, assimilating art. 84 of the Hague Convention of 1st July 1964 (5) and article 77 of the Vienna Convention of 11th April 1980 (6). However, the orientation expressed by the decision annotated here appears anachronistic, after more than forty years since the legislator motivated the introduction of the rule in question with a changed conception of responsibility, inspired by demands of « social solidarity » (7), which are pre-eminent with respect to an individualist conception which it declared superseded.

2. – It must be observed that the duty of cooperation under article 1227, section 2, Civil Code, generally regards every non-fulfilment which can be replaced. Usually the problem is reduced to that of whether there is the burden or not for the purchaser to replace the goods which have not been supplied by the seller; one aspect of the same problem is whether the seller is obliged or not to capitalize the goods which have not been collected by the buyer. The case of the creditor of sums of money which he had planned to invest and which are not returned to him by his debtor is similar, if, that is, that money must be replaced or not by other money

(4) In German law, the duty to mitigate damage by means of the cooperation of the creditor is sanctioned by §254, section 2, BGB; for German legal literature, see ENNECCERUS KIPP u. WOLFF, *Lehrbuch des Burgerlichen Rechts*, II, Tubingen, 1954, pp. 71 ff.; in Swiss law, see article 44 of the Code of Obligations and for legal literature, THUR, *Partie générale du code fédéral des obligations*, Lausanne, 1934, p. 90. This is also applied in French law; see: MAZEAUD and TUNC, *Traité théorique et pratique de la responsabilité civile*, II, Paris, 1958, p. 434 and bibliography quoted; in Spanish law, legal literature and case law agree (see SANTOZ BRIZ, *Derecho de daños*, Madrid, 1963, p. 66); for Anglo-Saxon law, the duty of the creditor to mitigate damage is a fundamental principle; see. CRISCUOLI, *Il dovere di mitigare il danno subito* (The duty of mitigation: a comparative approach), *in Riv. dir. civ.*, 1972, I, pp. 553 ff., with quotations on Anglo-Saxon case law and legal literature (notes 1, 2, 5 and 6).

(5) For article 88 of the Hague Convention of 1st July 1964, ratified with Law no. 816 of 21st June 1971, the creditor must take all the reasonable measures to mitigate the loss, whilst articles 84 and 85 provide for replacement.

(6) On article 77 of the Vienna Convention of 11th April 1980, on the burden of replacement, with extensive collations in foreign law, see F. MONELLI, *La responsabilità per danni*, in *La vendita internazionale*, Milan, 1981, pp. 262 ff.

(7) Report by the Minister of Justice on the book of obligations, pp. 30-34.

available to him or borrowed from third parties, thus limited the indemnity to the burden of the greater bank interest or whether he must ask his debtor to compensate him for the much more serious consequences of the lost business.

The basic problem, placed by law, is therefore whether the behaviour of the buyer who in the face, for example, of a foreseeable rise in prices for a certain duration, obstinately waits beyond a reasonable period of time for the delivery of the goods purchased from the seller or the seller who in the face of non-fulfilment by the buyer, lets prices drop or even lets the goods perish, instead of selling them off at a good price, is inspired by ordinary diligence. Remaining with the case of the creditor who has not been satisfied by sums of money, if he drops the planned business, with all the consequences, rather than replacing that money even recovering the greater costs, does this behaviour comply with ordinary diligence?

The answer to this new and ancient legal course by section II of the Supreme Court, is that the behaviour of the creditor who persists, beyond all time, in waiting for the personal fulfilment by his debtor and therefore to refund him with the greater damage that also derives from this wait must be deemed as conforming with ordinary diligence.

The annotated decision and the others by the same cliché assert that the law under examination only places the responsibility on the creditor to operate in such a way as to « limit his capital damage within the natural consequences of the fact of others » (Court of Cassation 570(80). The expression is so general and vague that it does not allow any positive indication to be obtained, with regard to the interpretative content. On the one hand, it seems to include any sort of activity of omission or purposeful activity by the creditor useful for limiting the capital prejudice and therefore also of initiative. However, immediately afterwards, limiting the scope of the limitation of the prejudice « to the natural consequences of the fact of others » and excluding that the creditor can take on any initiative that entails any disbursement of money or risk of any kind, identifies with doing nothing and in allowing prices to rise and with them the indemnifiable damage, the reasonable behaviour desired by the law.

This type of interpretation cannot be agreed with.

3. – The motivation of this opinion is that the creditor, although concerning things that are easily found on the market and therefore replaceable (8), is not obliged to replace them because this in itself represents a burdensome activity, as it entails disbursement of money or taking on risks

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(8) Court of Cassation, 2403/66, cit., above, note 3; in legal literature, on article 1227, see CIAN-TRABUCCHI, *Commentario breve sul codice civile*, Padua, 1984, pp. 823 ff.; BIANCA, *Inadempimento delle obbligazioni*, 2, in *Commentario*, edited by SCIALOJA and BRANCA, Bologna-Rome,

of some kind. We cannot understand how and why the activity of purchasing replacements of goods that are easily found on the market can be deemed a burdensome activity or persisting in waiting which could be vain or to arrive when no longer suited for the changed interests of the creditor is more burdensome. On the other hand, recourse to replacement is not itself and for itself a burdensome activity: it can be so in the limit of the hypothesis of goods that are difficult to find on the market, it has never been so in the cases examined of goods that are easily found. Everything depends on the concrete circumstances on which the ruling must be pronounced. The decision qualifies as burdensome the replacement purchase because it entails a disbursement of money. This will certainly be the case of a purchaser who has already anticipated the price to the non-fulfilling seller and does not have any other money or money to his credit, with which to make the replacement purchase. But, outside the extreme hypothesis, the equivalence of burdensomeness in itself of the replacement, such as to exclude it, and the necessary to disburse money, cannot be made. This is not the case of the buyer who is without money of his own or credit, nor is it the case of the intervening reduction of prices. The case where the buyer has not yet paid the price of the goods and must pay it on delivery can be hypothesized. The replacement purchase is resolved here in allocating the price that would have been due to the non-fulfilling seller from whom the replacement purchase is made. It will therefore depend on the concrete circumstances whether the replacement purchase can configure behaviour of ordinary diligence or not. This is translated into an evaluation of the concrete case in the light of the abstract precept of article 1227, section 2, which therefore is deemed to include any industrious initiative and not merely waiting, useful for the purpose of worsening the damage. What is said on the replacement purchase can be repeated for the sale on behalf of the non-fulfilling buyer by the seller and, more in general, for the replacement of money that has not been lent or returned by the debtor with other money he may have available, including on credit, and therefore with financial market costs. In essence, considering what I have written elsewhere (9), the law hypothesizes a type of creditor that « is prudent with his own and respectful of others and therefore of normal diligence in his business ». Our case law, moreover, where the actual creditor has replaced the asset or the money, or has monetized the goods that have not been collected or paid for by the buyer, admits that the creditor may make up for the differences, by the greater price paid, greater interest paid etc. In this

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1979, under art. 1227. DE CUPIS, *Fatti illeciti*, 2, in *Commentario, cit.*, 1971, under art. 2056; CRISCUOLI, *op. cit.*, P. 572 and the bibliography quoted therein.

(9) VALCAVI, *Rivalutazione monetaria od interessi di mercato?* (note to Court of Cassation 4th July 1979, no. 3776) in Foro it., 1980, p. 120.

case it is not hypothesized that he can claim more. Current case law thus does not realize that it ends up by rewarding the indolent creditor who has persisted, inertly waiting, with respect to the creditor who is diligent and prudent in his interests; this is a conclusion that infringes logic and the will of the legislator expressed in article 1227, section 2, Civil Code, for demands of greater social solidarity.

4. – The contrary opinion, making it the responsibility of the creditor to take any initiative aimed at reducing the damage, as well as the replacement, in accordance with article 1227, section 2, cannot be maintained even with the argument according to which our code contemplates replacement only as a right of the creditor (see articles 1515 and 1516 Civil Code) where a duty of exercising a right could not be hypothesized (10). It has been correctly observed (11) that the duty according to article 1227, section 2, is not a duty in the technical sense, but a burden. The creditor is free to have recourse or not to the replacement purchase, where there is coincidence of the normative scope, but he cannot claim to be compensated for the aggravation of the damage that he could have avoided with the replacement, which he did not make. On the other hand, articles 1515 and 1516 offer, in the opinion of he who writes these lines, a significant systematic argument in favour of the theory that includes the burden of replacement in the duty of cooperation of the creditor in accordance with article 1227, section 2. The laws quoted above leave the creditor free to have recourse or not to the coercive purchase or replacement purchase, but prescribe that, if he has recourse, he must do so « without delay », on pain of not being able to oppose the consequences to the debtor (12). The normative prescription « without delay » states once again the principle of the industrious solicitude pf the creditor in avoiding the worsening of the damage which is sanctioned by article 1227, section 2, as a systematic principle of our legal system.

Therefore, it cannot be seen how, on a point of principle, the duty to cooperation according to article 1227, section 2, can be reduced to mere passive behaviour and not, on the other hand, diligent as well and it cannot appear with the burden of replacement. The concrete evaluation of whether such replacement was proper is reserved to the judgement of prognosis,

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(10) DISTASO, in *Giur. Cass. civ.*, 1948, pp. 390 ff.; GRECO and COTTINO, *Vendita*, in *Commentario*, edited by SCIALOJA and BRANCA, Bologna-Rome, 1980, under articles 1515-1516; MIRABELLI, *Dei singoli contratti in Commentario* Utet, Turin, 1968, IV, pp. 158 ff.; RUBINO, *La compravendita*, Milan, 1962, pp. 963 ff.

(11) CRISCUOLI, *op. cit.*, pp. 582 ff; BONELLI, *op. cit.*, p. 263.

(12) The reason for the precept « without delay » has been identified in the need to avoid the profit of the creditor. On this point see VIVANTE, *Trattato di diritto commerciale*, Milan, 1926, pp. 192 ff,; RUBINO, *op. cit.*, p. 709.

retrospective of the judge. It is opportune to add that article 1227, section 2, places the responsibility on the creditor of behaviour that does not worsen the damage, not to reduce it as well (13). In the context of the concrete circumstances, when such an initiative should have been taken not to aggravate the damage, in the context of that indication of greater solicitude expressed by that « without delay » is also an evaluation reserved to the judge.

5. – The devaluation of the duty of cooperation of the creditor in accordance with article 1227, section 2, so that he is exonerated from the burden on taking initiatives that avoid the worsening of the damage and is, in essence, invited not to do anything, is part, in my humble opinion, of a broader subject.

Our legal system, unlike others (14), is inspired, as has already been observed (15), by criteria of moderation towards the debtor in compensation of the damage (16). These are key rules with regard to those that dispose equitable liquidation and not full settlement of the lost profits (articles 2056, section 2 and 1226, Civil Code) (17), the faculty reserved to the judge to impose equivalent compensation where the specific compensation is excessively onerous (article 2058, section 2, Civil Code), the non-indemnifiability of the avoidable worsening of the damage (article 1227, section 2) and lastly, article 1225 Civil Code which limits the compensation to what could be foreseen at the time of the contract, in all cases, of non-fulfilment, contractual fault, which then is the very general rule of all cases, as wilfulness has to be proven (18)ì. This fundamental orientation of our legal system does not appear to me to have been assimilated by that case law and legal literature (19) which continues to state that it pursues the full capital

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(13) The wording of article 1227, section 2, Civil Code, is in this sense, including on the basis of art. 23 of the preliminary draft.

(14) For the Swiss code of obligations, the debtor « is usually responsible for all faults » (article 99) and « is obliged to fully indemnify the damage » (article 97). On this point, see THUR, *op. cit.*, pp. 540 ff. The German code, which does not adopt the limit of foreseeable for negligent non-fulfilment, is in the same direction.

(15) CRISCUOLI, *op. cit.*, pp. 580 ff.

(16) Our present code has resource to the equitable criterion under articles 2056, section 2, Civil Code, 1226 Civil Code, if opposite conclusions were to be reached with respect to the traditional ones, which were based on the fact that art. 47 of the draft of the Napoleonic Code had been rejected, which prescribed moderation with regard to the debtor in relation to Pothier's teaching.

(17) BIANCA, *op. cit.*, pp. 387 ff.

(18) TRABUCCHI, *Istituzioni di diritto*, Padua, 1980, pp. 220, 569; MESSINEO, *Manuale di diritto civile e commerciale*, III, p. 1,2; MAJORCA, *Colpa civile*, entry in *Enciclopedia del diritto*, VII, pp. 565 ff. and bibliography quoted therein.

(19) In the sense of the full compensation of the capital of the damaged party, Court of Cassation 12th January 1982, no. 132, Foro it., Rep. 1982, entry *Danni civili*, no. 152; 6th Feb-

compensation of the damaged party. Thus, in the light of this orientation, inspired by the *favor creditoris*, the tendency is to liquidate fully and not equitably the loss of profits (20), no differently from the actual damage, and to relegate article 2058, section 2, Civil Code, to the extreme hypothesis in which the specific compensation would take place *maxima cum difficultate* (21); breach of contract is generally treated as wilful, as if the wilfulness were presumed and the negligence had to be proven, in which the problem regarding the limit of the foreseeable is rarely raised. And where this problem is put forward, article 1225 is devalued with reducing foreseeability to the occurrence of factors of damage and thus to the abstract variability of prices (22) and not to the quantitative contest, by approximation, of their variation (23), and therefore of the concrete damage foreseeable at the time of the contract. In this way, the damage is always foreseeable in its entirety; and the unforeseeable part of the damage ends up by being reduced to a rarely applied hypothesis.

The interpretation, criticized here, from article 1227, section 2, which has been stated here, fits into this context. This orientation shows that it has not been freed from the residues of a certain mentality which penalizes the defaulting debtor (24) and rewards the creditor, who not infrequently is treated with indulgence to the point of being concerned that allowing him profit. This way of understanding the problem of indemnity has its roots in a far-off period which is particularly evident in the old and new theories of *quanti plurimi* (25).

This becomes topical again in the continuing persistence of the orientation to estimate the damage with regard for the *tempus rei indicandae*,

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ruary 1982, no. 693, ibid., no. 151; 25th October 1982, no. 5580, ibid., no. 149, amongst the many. With this argument, the revaluation in the credits of value and in pecuniary obligations is justified.

(20) Court of Cassation, 4th September 1982, no. 4816, *Foro it., Rep.* 1982, entry *Danni civili*, no. 51; Court of Appeal of Milan, 7th July 1981, *ibid.*, no. 81.

(21) In the sense that the onerousness for the debtor is also out of proportion in excess with respect to the interest of the creditor, see DE CUPIS, in *Commentario*, edited by SCIALOJA and BRANCA, Bologna-Rome, 1971, under art. 2058, p. 145.

(22) Court of Appeal, Bologna, 30th March 1950, *Foro pad.*, 1950, II, p. 57; Court of Appeal Milan, 6th February 1951; Court of Appeal, Bologna, 14th November, 1953, amongst the many; for the status of the question and the bibliography, see BELLINI, *L'oggetto della prevedibilità del danno ai fini dell'art 1225 c.c.* in *Riv. dir. comm.*, 1954, II, pp. 302 ff.

(23) Thus, on the other hand, GIORNI, Teoria delle obbligazioni, Florencem 1903, pp. 185 ff.

(24) The traditional teaching is that the defaulting debtor does not deserve any consideration in the liquidation of the damage: see. SAVIGNY, *Sistema di diritto romano attuale*, VI § 275, p. 198.

(25) On the theories of *quanti plurimi* and for a review, see TEDESCHI, in Riv. dior. comm.; 1934, pp. 241 ff.; WINDSCHEID, *Diritto delle pandette*. §280, notes 15, 102, 103 and bibliography of the study of the Pandects.

where the concern to recognise for the creditor the increase in prices, which occurred between damage and decision (26). I have already criticized elsewhere the opinion that refers the estimate of the damage to the *tempus rei indicandae*, where there is no hesitation in having the creditor run the risk of a possible drop in prices (27) just to make him participate in the increase (28), like the theory of credits of value as well, which is a conception of estimate of the damage but only with an upward trend (29). The estimate of the damage on its occurrence is the solution that is drawn from the retroactivity of the effects of the termination of the contract in accordance with article 1453 Civil Code (30).

Therefore, far from giving an extremely reductive interpretation of article 1227, section 2, such as not to apply it, with the current arguments that it would be legitimized by the criterion that « the contractual bond continues until the pronouncement of termination » or that « the damage must be estimated with regard for the *tempus rei indicandae* », it must be recognized that a correct interpretation of article 1227, section 2, allows deeming these propositions unacceptable. The duty of cooperation of the creditor in accordance with article 1227, section 2, together with the limit of the foreseeable as per article 1225. shows that it is the pragmatic correction, desired by the legislator to ensure the necessary flexibility for the system and that allows distinguishing which damage, on its occurrence, and which subsequent damage, are concretely indemnifiable or not (31).

The problem of the subsequent discounting back of the compensation to the concrete repair differs from that of identification and estimate of the indemnifiable damage (32). It concerns the compensation of the further damage from delay in giving the monetary equivalent and finds its solution

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(26) This is the logic of the estimate of the damage with reference to the values of the decision, on which see TEDESCHI, *Il danno e il momento della sua determinazione*, in *Riv. dir. priv.*, 1933, I, pp. 263 ff.; by the same author see *Riv. dir. comm.*, 1934, 1, pp. 234-244: DE CUPIS, *Il danno*, Milan, 1966, 1, pp. 269 ff.

(27) VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, in *Foro it.*, 1981, I, p. 2114.

(28) id., op. loc. cit.

(29) id., op. loc. cit.

(30) id., op. loc. cit. Against the retroactivity in accordance with article 1458 Civil Code, the meaning of the importance that the contractual bond would continue to have until the pronouncement of termination is not understood, as stated by the Court of Cassation 12th October 1967, no. 2437, cit., above, note 1.

(31) With regard to the pragmatic corrective function of the rules on the duty of cooperation of the creditor in avoiding the damage and on foreseeability, in the system of art. 84 of the Hague Convention and article 77 of the Vienna Convention which assimilated, after serious discussion, the criterion of the reference to termination, see BONELLI, *op. cit.*, p. 265.

(32) Moreover, the supporters of the opinion of the estimate at the time of the decision or of the credits of value, leave open the period from the decision to the repair, see Court of Cassation 22nd June 1982, no. 3802, *Foro it., Rep.* 1982, entry *Danni civili*, no. 155.

not in updating the estimate to the new prices, but in the rule of current case law where the default is compatible with the illiquid credits (33) and that interest also matures in their regard (34) and, in short, in the application of the common rules on default of pecuniary obligations, such as article 1224, section 2, Civil Code, where the greater damage is given by the difference between the inadequate legal rate and that of the market (35). Deeming differently, the addition to the illiquid credit of the interest, indifferently whether from the request (interest which has an essential function of discount rate) (36) would be revealed as undue and inadmissible profit for the creditor.

Reference is made to the above in by:

DI PAOLA, *Il dovere di non aggravare il danno, spunti per la rilettura*, *Foro it.*, 1984, I, 2825, notes 2 and 3; A. LUMINOSO, *Della risoluzione per inadempimento*, in *Commentario Scialoja e Branca*, Bologna, 1990, pp. 260, 265, 266 notes 12, 14 and 16; V. MARICONDA, *L'art. 1227, 2° comma c.c. ed il rapporto di causalità*, *Il corriere giuridico*, 1990, p. 720; C. ROSSELLO, *Il danno evitabile*, Padua, 1990, pp. 85 and 97, notes 44 and 47.

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(33) In the sense that our system does not assimilate the principle of *illiquidis non fit mora*, amongst the many, see Court of Cassation 15th Aprril 1959, no. 1105, *Foro it., Rep*. 1959, entry *Obbligazioni e contratti*, no. 200; 12th January 1976, no. 73, id., Rep. 1977, entry *Obbligazioni in genere*, no. 42.

(34) In the sense of the date of effect of the interest on the illiquid credit, in the hypothesis of compensation of damage, from the date of the legal request, see amongst the many, Court of Cassation, 17th October 1962, no. 3014, Foro it., Rep. 1962, *entry Danni per inadempimento di contratto* no. 10; 25th June 1963, no. 1722, id., Rep. 1963, entry *Interessi*, no. 3; 5th December 1974, no. 3999, id., Rep. 1974, entry cit., no. 10; 31st January 1978, no. 451, id., Rep. 1978, entry cit., no. 17.

(35) G. VALCAVI, *Rivalutazione monetaria, cit*. above, note 9; as well as, by the same author, *La stima del danno nel tempo, con riguardo all'inflazione, alla variazione dei prezzi e all'interesse monetario*, in *Riv. dir. civ.*, 1981, pp. 332-341.

(36) KEYNES, *Occupazione, interessse, moneta*, Turin, 1947, pp. 145 ff.

On the time of reference in the evaluation of the damage

1. – In civil liability, the difference between values and prices, in the interval that goes from the due date of the obligation to the payment of the indemnity, has raised delicate economic problems of legislative policy regarding the solution, inspired more by equity, in the relations of responsibility between debtor and creditor. Thus, on the one hand, a possible decrease in prices between the due date, default and decision, has highlighted the problem of the indemnity in the sense of fixing it at a certain time, such as the due date, for example, the placing in default or the claim, protecting the creditor from the subsequent drop in prices.

The concern of ensuring the compensation is dominant here, stopping the contractual risk so that the creditor is not made to support a possible drop or more in general, the unknown quantity in the variation of prices.

This has been thought of by those who drew up the concept of the *perpetuatio obligationis* and stopped the evaluation of the damage on its occurrence (*dies obligationis*), at the start of the default *(tempus morae)* or the judicial claim (*tempus litis contestationis*).

Conversely, the possibility of an increase in prices, which is also the most frequent hypothesis, in practice has raised the problem of avoiding the debtor acquiring this profit, like an enrichment without cause or reward for his non-fulfilment, and to favour the creditor, who is thus invited to gain from it. Allowing this possibility for the creditor is justified with referring the evaluation to the *tempus rei judicandae*, i.e. « at the time when the evaluation is made » (Betti) (1), i.e. the « conjectural calculation of the presumable current value of the thing » which is like saying « on the basis of a hypothetical fulfilment at the time of the pronouncement », where the concern of « discounting back the value of the damage up to date on the pronouncement ».

This « discounting back » is done in a rudimentary way by taking the current value of that same thing.

From « Rivista di Diritto Civile », year XXXIII, 1987, p. 31 ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

(1) E. Betti, La *litis aestimatio in rapporto al tempo nelle varie specie di azioni e di giudizi*, Camerino, 1919, p. 26.

The shift of the evaluation to the time of pronouncement means that the same creditor runs the risk of a decrease, in the case of a drop in prices. This is commonly accepted by those authors and judges who, in the various legal systems, evaluate the damage with reference to the pronouncement.

To prevent this inconvenience, the advocates and legal systems based on the *quantum plurimi* have thus assured the creditor not only the possibility of the advantage in the case of a price increase, but also protecting him from a drop in prices and in which the influence of a conception, on the one hand punitive and on the other rewarding, is even more transparent.

2. – Let us now proceed with a historical and comparative excursus to better understand the dimensions and the terms of the problem.

In classic Roman law, the most authoritative legal literature (2) teaches that in judgements of strict law and in those of good faith, having as their object a genus, the term for fulfilment, if it had been agreed, was taken as the time of evaluation of the damage (D. 45, 1. 59; D. 13, 3, 4; D. 12, 1, 22; D. 13, 6, 5); in the case in which it had not yet been fixed, it was considered to be at the start of the default (*tempus morae*) or that of the judicial claim (*tempus litis contestationis, quanti ea res est*: D. 17, 1, 37; D 13, 3, 4) (3).

In the case of upward or downward variation of the price between the expiry of the term and the claim, in the judgements mentioned above of good faith having as their object a *genus*, the creditor could choose alternatively the greater price that had been reached by the commodity on the due date or on the claim (*quanti plurimi*).

In the judgements of good faith having, on the other hand, as their object a *species*, the evaluation was made with regard to the values of the time of the decision (*rej judicandae tempus*: D. 13, 6, 2, 2 Ulpianus 28 ad ed.; D. 19, 1 3, 3 Pomponius 9 ad Sab.) (4). The reference to the *tempus rej judicandae* was in a logic of indemnity, because in classic law interest on arrears was not recognized for the whole duration of the trial from the *litis contestatio* to the decision (5).

Any discrepancy between the *aestimatio rei* on the decision and the *id quod interest* was no longer an insurmountable obstacle, considering that,

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(2) E. Betti, *op. loc. cit.*, E. Betti, *Diritto romano*, Padua, 1935, pp. 515, 544, 568, 578. 582; P. Voci, *Risarcimento del danno e processo formulare nel diritto romano*, Milan, 1938, pp. 15 ff.; id. *Risarcimento e pena privata nel diritto romano classico*, Milan, 1939, p. 47.

(3) E. Betti, *La litis aestimatio*, cit., pp. 8, 10 ff.; id., *Diritto romano*, cit. pp. 566 ff., 570 ff.; P. Voci, *op. ult. cit.*, p. 20.

(4) E. Betti, *La litis aestimatio*, cit. pp. 12, 26 ff.

(5) P. Voci, *op. ult. cit.*, P. 13; G. Cervenca, *Contributo allo studio delle usure c.d. legali nel diritto romano*, Milan, 1969, pp. 205, 273, n. 127.

as observed by Siber (6), the esvaluation was made on the basis of the *quanti ea res erit* or of the *id quod interest*, depending on the type of formula used, therefore their equivalence was only tendential.

The same criterion as the *tempus rej judicandae* was also adopted for arbitrary actions, where the formula laid down that the judge ordered, before anything else, the return (*arbitratus de restituendo*) and fixed, in the absence, the equivalent (7). Here the *quanti ea res erit* was correlated to the deferred time of the hypothesized return of the asset, of which it was equivalent.

Tortious damage was evaluated, on the other hand, at the highest value that had been reached in the thirty days prior to the theft (D. 13, 1, 8 §1; D. 47, 2, 50) (8).

In post-classic and Justinian law, recourse to the *tempus rei judicandae* (9) was generalised in the *judicia bonae fidae*. In the case of a downward trend of prices, the creditor could choose the *quantus plurimi* between the *tempus morae* and that of the decision (D. 19, 1, 3 §3; D. 19, 1, 21 §3; D. 17, 1, 37).

The reference here to the prices of the decision had a justification because in it there was the principle of *in illiquidis non fit mora*. The impossibility of calculating the interest for late payment on the illiquid credit of compensation for the damage, made taking new prices on the decision inevitable, mainly with an upward trend, on the base of the evaluation, to discount back the indemnity paid late.

3. – In common law, Alciatus, Duarenus and Fabro (10) assumed at the basis of the evaluation of the damage the current values at the time of the decision of the judgements of good faith, if there was no default, and where it existed, that of the start of the default. In the judgement of strict law, the values in course at the time of the claim were taken.

Donellus (Comm. al D. 1, XII, chapter 1, 1, 22 um. 5, 19-21; XIII, chapter 1, 3 notes 12, 13 and 25) adopted the time of the claim in contractual lawsuits having as their object a *genus* and specified that here « there should be no regard for default » (11).

In the hypothesis of the default, there prevailed a conception inspired by a logic which was punitive for the debtor and rewarding for the creditor, with recourse to *quanti plurimi*.

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(6) H. Siber, *Romisches recht*, Leipzig, 1982, 2, p. 241; P. Voci, *op. cit.*, pp. 2, 16.

(7) M. Kaser, *Quanti ea res est, Münchener beitrage*, 1935, XXIII; pp. 182, 195; P. Voci, *op. ult. cit.*, p. 2, note 5. On the *judicia arbitraria* in general, E. Betti, *Diritto romano* cit., p. 579.

(8) P. Bonfante, *Istituzioni di diritto romano*, Milan, 1952, p. 448.

(9) P. Bonfante, *op. cit.*, p. 449; U. Ratti, in *Bollettino di diritto romano*, 1932, p. 169.

(10) Alciatus, *De eo quod interest*, Venice, 1589, v. V, ff. 4-14: F: Duarenus, *Commentaria in Digesta*, Lyon, 1583; I. Fabbro, *Commentaria in Istitutiones justinianeas*, Venice, 1532.

(11) H. Donellus, *Commentaria Juris civilis, Opera Omnia*, Lucca, 1752, book XXVI.

This was a direct consequence, from a certain point of view, of the principle of *in illiquidis non fit mora* which has been mentioned and which was dominant in Italy for so many centuries and is still dominant elsewhere and therefore of the concern of procuring for the creditor an advantage to replace the loss of interest on late payment, and froM another point of view, the opinion that the defaulting debtor deserves every punishment (12).

The choice was intensified by the glossers and by Bartolo (ad lege 22 of rebus creditis) with making the creditor the arbitrator of choosing the highest value that the thing had reached during the default period up to the current value of the decision (13).

Donellus maintained the same side (Comm, ad. D. 1, XII chapter 1, no. 22, no. 5, 19-21; XIII chapter III L. 3, no. 12, 13, 25) with regard to contractual lawsuits, which had as their object a *species*.

In statutory law, the recourse to the *quanti plurimi* during the period of default is transparent in more than one Statute, such as for example that of Pisa (Constit usu cap. XXXII, XXXIII and XXXIV).

Vinnius (Select juris qua est I chapter 39), Voet (Comm. ad, Pand. XIII, 3 3), Pacius (Conciliat cento 3 no. 72), Fanchineus (Controvers, 1, 2 chapter 74) and Saide (Decis, Frisiis, 1.3 chapter 4 def. 8) maintained that in the *stricti juris* decisions, in the case of default, the creditor could choose the *quanti plurimi* between the start of the default period and the *litis contestatio* and in the decisions of good faith, that between the start of the default period, the *litis contestatio* and the decision.

4. – Let us now contemplate the Roman situation mentioning the opinions that emerged in the German study of the Pandectists of the last century. Recourse to *quanti plurimi* during the period of default from an unlawful act was maintained by Puchta and Arndts, but criticized by Mommsen and by Sintenis (14). The evaluation of the contractual damage on the basis on the greatest quotation reached by that asset during the default period, up to the decision, which often also marked the highest value, was maintained by Madai. Schilling, Fritz (15). Savigny, Vangerow and Brinz however admitted the possibility for the debtor to prove that the creditor would not have sold at that price (16). Windscheid was also of

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(12) F.C. Savigny, *Sistema di diritto romano attuale*, Turin, 1896, VI §275, p. 198.

(13) Bartolo Da Sassoferrato, *Commentaria*, Venice, 1590, volume II, p. 165.

(14) T. Mommsen, *Lehre von interesse*, Brunswick, 1855, pp. 183, 208; C.F. Sintenis, *Prackt.gem.civilrecht.* Leipzig, 1868, II, §93, note 41; F.G. Puchta, Pandeckten, Leipzig, 1838, § 268.

(15) Madai, *Die Lehre von der mora*, Halle, 1835, § 45, p. 296.

(16) F.C. Savigny, *op. cit.*, §§ 275-278, pp. 240-260; Vangerow, *Pandekten*, Marburg, 1865-1876, v. 3, §588; A. Brinz, *Pandekten*, Erlangen, 1873, v. 2, § 273.

this mind, after having abandoned a side more favourable to the debtor (17).

Other authors have maintained that to recognize this greater price, the creditor, who complained of having suffered damage due to non-fulfilment of that asset, had to show and prove that « he would have sold it at that price » (thus Sintenis) if it had been delivered to him or at least that « he had the intention and opportunity of sale » (thus Unger) or at least the « opportunity of the sale » (thus Cohnfeldt) (18).

This means demanding from the creditor proof that he would have kept the investment in that asset until the time it reached its highest quotation, which often coincides with the « current value of the decision ».

The opinion of the Pandectists therefore, unlike their predecessors, with the exception of Madai, Schilling and Fritz, is no longer to grant to the creditor an arbitrary faculty of choosing the *quanti plurimi* in a criminal logic with regard to the defaulting debtor. Rather, they placed the emphasis on the indemnity, even if it were understood as the highest quotation reached in the meantime until the decision. The *quanti plurimi* was thus seen in terms of a presumption of investment in that asset until the time when it reaches the highest quotation, even if it were the current value at the time of the decision.

The advantage of the rise in prices was therefore attributed to the creditor as the result of a hypothesized disinvestment at that time if the asset had been delivered. This should have been equivalent to placing the creditor in the condition in which he would have been if he had not been wronged, i.e. compensating his damage.

It is clear that the advocates of the opinion that the creditor has to prove that he would have sold the asset at that price (Sintenis, Unger) are closes to the opinion of the compensation of the damage, whilst it is further away from that which presumes a realization at the higher price, with the burden of proof on the debtor that he would not have paid at that price (Savigny, Mommsen, Vengerow and Brinz).

5. – The Roman tradition, as we have seen, has ended up by privileging the *aestimatio rei* with respect to the *id quod interest*, in the compensation of damage, although having sensed the specific *differentia*.

The evaluation according to the prices of the decision, mainly on the increase, and in particular the *quanti plurimi*, are manifestations of the objective criterion, in a punitive logic with regard to the debtor. Canon law

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(17) B. WINDSCHEID, *Diritto delle pandette*, Turin, 1930, II, pp. 103, 104 and the bibliography quoted in note 15.

(18) COHNFELDT, *Die lehre von interesse nach Rom*, Recht, Leipzig, 1865, pp. 196.

and its interpreters moved in the opposing direction which had the *id quod interest* at its centre.

Canon law, concerned about not supporting usury, placed particular attention on distinguishing the actual damage from the loss of profits, the indemnifiability of which, when not excluded (19), was limited by particular caution and rigorous proof in order not to exceed in the loss of profits and therefore in usury. This inevitably presupposed the correct definition of the scope of the *id quod interest*, i.e. « of the ideal reconstruction of the situation in which the creditor would be, according to the ordinary course of events, if he had not suffered the damage ».

The loss of profit that could derive from goods or negotiations had to be evaluated net of the costs of custody and management, it had to take into account the uncertainty of the greater or lesser earning and also the possibility of losses, according to criteria of probability etc.

The greatest prudence was also advised with regard to evidence as « with a little money the trust of middlemen and notaries of the opportunities to invest was procured » and should have had as terms of comparison « the profit that the borrower would make, buying or respectively selling the goods for a greater or lesser price with regard to the loan » (20), which was the market interest.

The Rota fixed as the requisite of indemnifiability of loss of profit the previous notification of the creditor to the debtor of the type of investment chosen together with all the other requisites that, from the authority of Paulus de Castro, were defined « Castrensi » (21). The other Rotas, which followed the more moderate opinion of Ruinus, nevertheless recommended making deductions from that amount of money which although it appeared proven, both due to the uncertainty of the profit and because it was the result of a hypothetic calculation and not of investment and risk suffered (22).

The evaluation of the actual damage was also subject to special caution by the courts depending on the Roman Rota, where the creditor was asked to inform the debtor of the programme of investment and outlay, in the opinion of Mohedano. The existence of the default was subordinate to particularly severe proof.

Therefore the problem around which time the evaluation of the damage was to be referred was in absolutely different terms for canon law

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(19) C. Nani, *La teorie dell'id quod interest sotto l'influenza della legislazione e delle dottrine canoniche*, in Archivio Serafini, 1876, pp. 223, 229, note 3.

(20) G.B. De Luca, *Il dottor volgare*, Rome, 1673, pp. 406, 409.

(21) C. Nani, *op. cit.*, pp. 224. 226, note 1.

(22) C. Nani, *op. cit.*, pp. 217-221. 226, n. 2.

with respect to common law and was necessarily based on the time when the damage occurred.

We must underline here the modern conception of this law on this subject, which is so often overlooked, and derived from the awareness to avoid usury of the creditor and the effort to decriminalize the compensation. The absence of any reference to *tempus rei judicandae* or to the *quanti plurimi* must be seen from this point of view.

6. – The teaching of Pothier (23) and the fundamental orientation of modern legislations that the damage is indemnifiable within certain limits are to be considered in the line of development with canon law.

It is a dominant opinion in modern law that compensation is based on the *id quod interest* and not on the *aestimatio rei* (24).

Generally the axiom that our and other legal systems pursue the objective of total compensation for the damage, even at a distance in time is usually emphasized, such as to draw the most onerous conclusions for the debtor (25).

This postulate contradicts the precise limits of indemnifiability set by today's legislators.

The damage that can be avoided (26), the damage that depends on the concurrence of the victim, the negligent contractual damage foreseeable at the time the contract was entered into (27) cannot be indemnified.

The loss of profits must be liquidated taking into account the circumstances of the case, i.e. with moderation (28). Legislators tend to accentuate the limits of indemnifiability. This objectively limits indemnifiability to the sphere of the closest damage.

7. – Legal literature and contemporary case law in European countries have however, in my opinion, lingered on a much more backward line than that of the legislators, The influence of Romanistic culture is transparent.

This is so, although in theory the principle that only the *id quod interest* forms the object of compensation, in practice, recourse to *aestimatio rei*

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(23) POTHIER, *Traité des obligations*, Paris, 1764, *notes 159 and 172.*

(24) *As in Italy, inter alia e.g. A.* DE CUPIS, *Il danno*, Milan, 1966, note 45 and bibliography therein.

(25) Court of Cassation, 12th January 1982, no. 132, *in Rep. Foro. it.*, 1982, entry *Danni civili*, no. 152; Court of Cassation, 6th February 1982, no. 693, *ibidem*, no. 151, of the many.

(26) Art. 1227, section 2, Civil Code, coherently with the solidaristic principle stated by the *Relazione min. al c.c.* nos. 30-34; in Germany §254, section 2, BGB; Switzerland, art. 34 code of obligations; it is also included in French and Spanish law.

(27) Art. 1225, Civil Code; art. 1150 French Civil Code and art. 1107, Spanish Civil Code.

(28) Art. 2056, section 2, Civil Code; also 252, section 2, BGB. POTHIER's teaching was in the line of moderation, *op. cit.*, no. 168 which was transfused into article 47 of the bill of the Napoleonic Code, but was not included.

continues to be privileged, such as when the damage is liquidated according to the prizes in force on the decision.

The limits mentioned above as indicative of the temporal scope of the damage close to its occurrence are in turn understood in a reductive and misleading way.

Foreseeability would thus not extend to the quantity, although approximate of the damage, because it would in any case be foreseeable that prices vary (29). Similarly, avoiding the damage is not equivalent to actively sparing no effort until the asset that has been destroyed, has perished or gas not been given, is replaced but to assuming merely passive behaviour (30).

On these preliminary remarks, let us now go on to review the comparative picture of the dominant opinions in the legal literature and case law of various countries.

In *Germany*. The dominant principle in this country is that the calculation must be made on the basis of the current prices at the time when the damage is concretely indemnified.

From the procedural point of view, this is translated in assuming current prices and salaries at the time of the last debate in front of the judge of the facts; in this case the further development of the damage must be considered until the foreseeable payment of the indemnity. If, after the last debate, other damage occurs, the injured party can have them valorized with new proceedings and in the case of a decrease, can exercise a countercharge of enforcement (31). In some cases, however, the amount of the compensation may be fixed according to circumstances prior to the indemnity. This is the case, for example, in which the damaged party has provided for the repair or the purchase of spare parts or it is an indemnity for business lost that should have taken place on a certain pre-established date or the hypothesis in which the development of the damage came to a final conclusion for other reasons.

As for interest, according to §290 BGB, if the object has been lost during the default period or it cannot be returned for other reasons, the creditor is entitled to legal interest of 4% on the amount of the damage from

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(29) For a review see BELLINI, *L'oggetto della prevedibilità del danno*, in *Riv. dir. comm.*, 1954, II, pp. 302 ff, For the extension to the *quantum:* C.M. BIANCA, *Dell'inadempimento delle obbligazioni*, in *Commentario del codice civile* edited by Scialoja and Branca, Book Four, *Delle obbligazioni* (articles 1218-1229[2]), Bologna-Rome, 1979, under article 1225, p. 389, note 8; A. DE CUPIS, *Il danaro*, cit., pp. 345 ff.

(30) Amongst the many, Court of Civil Cassation, 6th August 1983, no. 5274. in *Foro it.*, 1984, I, charter 2819; Court of Civil Cassation, 15th July 1982, no. 4174, in *Rep. Foro it.*, 1982, under *Danni civili*, no. 53.

(31) GRUNSKY, *Münchener-Kommentar*, Munich, 1985, vor 249 BGB Rnr. 124 ff,; PALANDT, Munich, 1985, 249, no. 9; STAUDINGER, Berlin, 1983, § 249 BGB Rur. 238 ff.; GLOSSER, *Der Zeitpunkt der Schadens Bemessung im Deliktsrecht*, Freiburg, 1977.

the time on which the definition of the value is based: §§ 288, 290 and 849 BGB (32).

In the event of theft or defect of an object, the injured person can claim legal interest on the amount to be replaced from the time when the reduced value has been determined. This is generally the time of the action of damaging event. A higher claim is not excluded.

In *France.* Less recent orientation evaluated the damage with reference to the values at the time of its occurrence (33).

The case law dominant following the decisions of 24th March 1942 of the Chambre de Requêtes, 15th July 1943 and 12th January 1948 of the Cour de Cassation, included the opposite side of prices and salaries at the time of the decision, concluding that the « indemnité nécessaire pour compenser le préjudice doit être calculé sur la valeur de dommage au jour du jugement » (34).

The same criterion is followed by the most authoritative legal literature., Mazeaud, Savatier and Lalou (35), amongst many authors, assumed the prices at the time of the decision, whether increasing or decreasing (*hausse* and *baisse de prix*), but with the corrective that in the case of a price decrease, the creditor can prove that he would have sold beforehand at a higher price, to obtain the indemnity of the greater damage from delay (Mazeaud, no. 2423-4. Savatier, no. 603). This is because: « a perdu sa chance de vendre ses titres aux cours pratiqués entre le vol et le jugement » and this loss of chance must be indemnified (36).

The opinion that indulged the *quanti plurimi* is thus indirectly proposed once again.

The same conclusion is adopted on damage in a foreign currency where reference is made to the exchange rate on the payment (37). The default interest is made to take effect coherently from the decision (LALOU, *op. cit.*, no. 73, MAZEAUD, *op. cit.*, no. 2247), However, the opinion of indexing the damage to the cost of life is not followed, as it is in Italy, in the credits of value.

Reference to the time of the decision and the starting date of the default interest from the decision are due *in primis* to the attributive character

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(32) Of the many, BAUMBACH, DUDEN, HOPT, Munich, 1985, §352, 252, BGB.

(33) Case law quoted in H. and L. MAZEAUD, in *Traité théorique et pratique de la responsabilité civile*, Paris, 1950, nos. 2420-8.

(34) H. and L. MAZEAUD, *op. cit.*, p. 544.

(35) H. and L. MAZEAUD, *op. cit.*, nos. 2420-6, 2421, 2423, 2423-9; R. SAVATIER, *Traité de la responsabilité civile en droit français*, Paris, 1951, II, p. 602; H. LALOU, *Traité pratique de la responsabilité civile*, Paris, 1962, no. 181.

(36) In this sense, MAZEAUD, op. cit., nos. 2423-5, speaks of supplementary damage.

(37) R. SAVATIER, op. cit., p. 605; H. and L. MAZEAUS, op. cit. nos. 2423.13 ff.; H. LALOU, op. cit., no. 186 and case law quoted therein.

and not simply declaratory nature of that part of the pronouncement that liquidates the damage (LALOU, *op. cit.*, no. 73, MAZEAUD, *op. cit.*, no. 2261, SAVATERI, *op. cit.*, no. 602).

The opinion that the damage is unique and invariable from the decision is prevalent (MAZEAUD, *op. cit.*, no. 2420-14) and that the variation in prices, deemed in itself and per se foreseeable, does not entail any change of the damage. In this regard, the following has been written: « le dommage, lui, n'a pas varié, il est toujours la perte de cet objet », whilst « sa valeur seule a changé » (MAZEAUD, *op. cit.*, nos. 2422 and 2435-5).

However, some correctives are introduced which undermine the coherence of the theory of principle. Thus, where the damaged party has repaired the damage on his own, he must report how much he spent (38), and in the case that he underwent permanent invalidity, and subsequently dies due to an independent reason, the amount must be based on the salary at the time of death and not at the time of the decision (39).

Lastly, interest takes effect from the claim and are defined as compensatory and not from late payment, exaggerating in the profit of the damaged party.

In *Belgium*. The Cour de Cassation has dropped the older reference to the time of the damage and has adopted that at the decision (40).

In *Spain*. Case law assumes as the time of reference *il tiempo de ejercicio de la acción*. i.e. of the claim (41).

The time on the decision is not proposed as it is deemed irreconcilable with the principle as per article 359 of the Code of Procedure of congruency between decision and claim.

In general, interest for late payment does not take effect from the claim, because « *no existe mora cuando la cantidad solecitada resulta illiquida* » (42). This postulate is currently subject to critical revision by legal literature (J. Santos Briz, L. Diez-Picazo) which is however inclined to take effect from the claim (43).

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(38) H. and L: MAZEAUD, op. cit., pp. 2432-2. and case law quoted therein in notes 2 and 3; SAVATIER, op. cit., no. 606.

(39) H. and L. MAZEAUD, op. cit., 2419, However, in principle, the salary on the decision is assumed; MAZEAUD, op. cit., no. 2421; H. LALOU, op. cit., no. 181.

(40) Belgian Court of Cassation, 7th February 1946, in MAZEAUD, op. cit., nos, 2480-8, note 21.

(41) Supreme Court, 30th October 1956 and consolidated case law, in J. SANTOS BRIZ, *La responsabilidad civil en derecho sostantivo y procesal*, Madrid, 1981, p. 289.

(42) Supreme Court, 28th February 1975 and 12th July 1973, in J. SANTOS BRIZ, *op. cit.*, pp. 343 ff.

(43) L. DIEZ-PICAZO and ANTONIMO GILLON, *Sistema de derecho civil*, Madrid, 1978, II, p. 157; ALBALADEJO, Derecho civil, II, Derecho des obligationes, Barcelona, 1980, §32, p. 179.

A part of more recent legal literature (J. Santos Briz, L. Diez-Picazo) and case law, under Italian influence, is now advocating the introduction of the category of credits of value (44).

This category is defined as that where « el dinero funciona como un equivalente de otros bienes o de otros servicios » (45) and not as a nominal means of exchange, There is an inclination to add the interest from the claim to the monetary revaluation, as in Italy, thus duplicating the compensation, which exceeds in the profit (46).

In *Great Britain*. Case law and legal literature take as reference the prices and salaries on the day of non-fulfilment, (Philips v. Ward, 1956, J.W.L. 471) or of the damage or subsequent damage (see authors quoted by Mazeaud, no. 2358 no. 2).

In the *United States of America*. Reference is made to the day of the damage or of the subsequent damage, taking into account the devaluation of money (see HARPER AND JAMES, vol. II, § 25; RITA HAUSER, Breach of Contracts Damages during inflation, 23, Tulane Law Rev. 307. 322, 1959, quoted by Mazeaud and Tunc, II, p. 567, note 21).

In Canada. Case law is based on the values and salaries in force on the non-fulfilment or the unlawful action (47). The law of 21st February 1957 introduced into the civil code of Quebec article 1056 under which interest takes effect from the judicial claim, thus superseding the *in illiquidis non fit mora* principle.

In *Switzerland*. The damage is evaluated on its occurrence, to which are added the interest and the greater damage from late payment under article 116 Code of Obligations. Obligations in foreign currency are expressed in Swiss francs and any later differences in the exchange rate are liquidated only as a damage from late payment where it is proven that it would have changed (48).

In *the international conventions of the Hague of 1st July 1964 and Vienna of 11th April 1980*. Article 84.1 of the Hague Convention and article 76 of the Vienna Convention include the criterion, in the case of damage from contractual termination, to refer to current prices at the time of the termination of the contract and not that when the contract could have been terminated. This is equivalent, approximately, to that of the claim.

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(44) J. SANTOS BRIZ, *op. cit.*, pp. 289 ff.; decision of 20th May 1977, 1st Supreme Court, ibidem, p. 343.

(45) L. DIEZ-PICAZO, *Fundamentos del derecho civil patrimonial*, Madrid, 1983, I, pp. 464-477.

(46) Thus SANTOS BRIZ, *op. cit.*, p. 315.

(47) P. AZARO, *Jurisprudence et doctrine canadiennes en matière de resonsabilité civile* (supplement to the treatise of H. LALOU, Paris, 1962, p. 18).

(48) Swiss Federal Court *in Raccolta decisioni*, 1960, II, p. 340; 1947, II, p. 193; 1946, II, p. 380, F. BOLLA, *Repertorio di giurisprudenza patria*, 1936, p. 472; SCHNITZER, *Manuale di diritto privato della Svizzera*[3]. p. 667.

The solution gave rise to lively debate at the conference of Vienna and the Chairman criticized it because it would have encouraged the terminating party to speculate on the damage of the other. However, it has been observed that the corrective should be applied to exclude the greater avoidable damage for example with more prompt replacement.

The opinion of legal literature is appreciable, which takes into account the « beneficial costs » in the calculation of the damage in general (49) whilst that favourable to the exchange rate on payment.

8. – Now let us go on to see the orientations that have been established in Italy.

At the time of the civil code of 1865, case law oscillated between the evaluation of the damage, especially if contractual, according to the value that the service had at the time of non-fulfilment (50) and that at the time of recovery. In particular, this opinion prevailed where the creditor, instead of termination, had claimed and obtained the sentence on non-fulfilment and this remained unperformed.

The calculation of permanent invalidity of the person was made on the current wage at the time the damage occurred. Legal interest, described as compensatory, for its clear function as evidence of discount of the indemnity and not as default, due to the principle of *in illiquidis non fit mora*, was added, for the period of non-fulfilment to liquidation.

In legal literature, Albertario, Ascoli, Brugi, Chironi, De Ruggiero and Stolfi (51) maintained that the evaluation should be made on the basis of the value of the thing at the time when it should have been given whilst others, including Tedeschi, referred to that of the decision.

The works by Tedeschi (52) stood out for the doctrinal apparatus and dogmatic coherence and influences subsequent legal literature. The problem of the exchange rate was also dealt with controversially, if on the due date or on payment, to which the delayed fulfilment of the foreign currency was to be commensurate (53).

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(49) F. MONELLI, *La responsabilità per danni*, in *La vendita internazionale, quaderno* no. 39 of *Giur. comm.*, Milan, 1981, pp. 265, note 36, 265-266, 281 ff., 291 ff.

(50) Court of Cassation, Florence, 11th December 1887. in *Rass. compl. Giur. sul c.c.*, Milan, 1923, p. 429, no. 204; Court of Appeal of Genoa, 13th March 1900, ibidem, p. 768. no. 5439.

(51) ALBERTARIO, *Monitore del tribunale*, 1910, p. 22; ASCOLI, *Codice civile annotato*, Milan, 1920, under article 1931, no. 81; BRUGI, *Istituzioni di diritto civile*, Milan, 1923, p. 265; CHIRONI, *Colpa extracontrattuale*, Milan, 1906, II, no. 434 bis, p. 369; *id. Colpa contrattuale*, pp. 584 ff.; N. STOLFI, *Diritto civile*, Milan, 1934, III, no. 353.

(52) TEDESCHI, *Il danno e il momento della sua determinazione*, in *Riv. dir. priv.*, 1933, I, p. 263 ff.; id., in *Riv. dir. comm.*, 1934, I, pp. 234-244.

(53) For a review of legal literature and case law, see G. VALCABI, *Il corso di cambio e il denaro da mora belle obbligazioni in moneta straniera*, *Rivista Dir. Civ.*, 1985, II, pp. 253 f., notes 5, 6 and 7.

The new legislator in 1942 did not intend to solve the basic problem, when he wrote: « the determination of the time has been left to legal literature and to case law, and to which there must be respect for the evaluation of the damage » (54).

The principle of *in illiquidis non fit mora* has been superseded by article 1219, section 1, Civil Code and article 1227 Civil Code has imposed on the creditor the burden of avoiding the worsening of the damage (55). The consequences of these precepts have not been perceived in all their extent with regard to our problem.

Dominant case law, based on the new Civil Code, has qualified compensation of damage as credit of value. It evaluates the damage on its occurrence and then re-evaluates it in relation to the subsequent monetary depreciation until liquidation (56).

In times closer to us, the alternative tendency to calculate the indemnity according to the prices and salaries (57) at the time of liquidation because – it has been deemed – the two methods reach the same practical result by different paths (58). The legal interest is also added which are subsequently described as compensatory and not defaulting, although the principle if *in illiquidis non fit mora* has been deemed totally superseded (59). It is calculated at times on the revalued capital (60) and at other times on the original capital (61).

The tendencies of our legal literature, on the other hand, are far more articulated and contrasting. The damage from an unlawful action has been evaluated with respect to its occurrence by Greco (62) and Peretti

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(54) *Relazione del Guardasigilli*, no. 721.

(55) In the sense that our legal system does not include the principle of *in illiquidis non fit mora*: amongst the many, Court of Civil Cassation, 12th January 1976, no. 73 in *Rep. Giur. it.*, 1976, section 2968, no. 282.

(56) Among the very many, Court of Civil Cassation, 28th February 1984, no. 142; Civil Cassation 6th February 1984, no. 890 in *Mass. Giust. civ.*, 1984, nos. 296 and 452.

(57) Court of Civil Cassation, 5th August 1982, no. 4297, in *Rep. Giur. it.*, 1092, under *Danni*, section 815, no. 55. For the reference to the fact: Court of Appeal of Genoa, 2nd September 1966; Court of Appeal of Genoa, 9th July 1946; Court of Appeal of Genoa, 4th March 1966, in *Rep. Giur. it*. 1944-47, under *Responsabilità civile*, nos. 192, 195 and 196.

(58) Court of Civil Cassation, 4th July 1979, no. 3814 in *Rep. Giust. civ.*, 1979, p. 732, no. 135.

(59) Court of Civil Cassation, 30th March 1985, no. 2240 in *Rep. Giust. civ.*, 1985, under *Danni*, section 731, no. 24.

(60) Court of Civil Cassation, 13th July 1983, no. 475 in *Mass. Giust. civ.*, 1983, no. 1677; Civil Cassation, all Divisions sitting together, 19th July 1977, no. 3216 in *Mass. Giust. civ.*, 1977, no. 1269.

(61) Court of Civil Cassation, 9th July 1984, no. 3992 in *Rep. Giur. it.*, 1984, section 2182, no. 272, amongst the many.

(62) P. Greco, *Debito pecuniario, debito di valore e svalutazione monetaria* in *Riv. dir. comm.*, 1947, II, p. 112.

Griva (63) but to its liquidation by Ascarelli (64), De Cupis (65) and Nicolò (66). Let us now go on to contractual damage. That due to termination for breach of contract has been calculated on the basis of current values on the non-fulfilment by Nicolò (67) and by Greco (68), on the judicial claim by Ascarelli (69), Mengoni (70), Raffaelli (71) and lastly, on the decision, by Mosco (72).

Ascarelli and Greco proceed with the subsequent monetary information (73). The damage from the fortuitous loss of the asset during the default period has been evaluated with respect to the time of loss by Mengoni and by Nicolò (74), but with respect to the decision by Ascarelli (75) who also evaluates the damage from failure to deliver the thing at the decision., after the sentence to fulfilment. He is moreover inclined to solutions inspired by the punitive logic of the *quanti plurimi* (76).

The monetary interest is unanimously added from the claim, and in deemed compensatory.

Lastly, the author of these lines has maintained that the damage should be evaluated, in general, with respect to the prices and salaries in course on its occurrence (77), whilst the subsequent delay with which the equivalent is made must be indemnified with recourse to the key rule of article 1224, sections 1 and 2, Civil Code, which is also applied to illiquid pecuniary obligations, because the criterion of *in illiquidis non fit mora* is no longer valid.

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(63) PERETTI GRIVA, *Momento di valutazione del danno nell'illecito aquiliano*, in *Giur. it.*, 1947, 1, 2, section 51 ff.

(64) T. ASCARELLI, *Obbligazioni pecuniarie*, in *Commentario del c.c.* edited by Scialoja and Branca, Book Four, *Delle obbligazioni* (articles 1277-1284), Bologna-Rome, 1963, under article 1279, no. 179, p. 522.

(65) A. DE CUPIS, op. cit., I, p. 269.

(66) R. NICOLÒ, *Gli effetti della svalutazione della moneta* in *Foro it.*, 1946, IV, section 50 ff.

(67) R. NICOLÒ, *op. cit.*, p. 51.

(68) P. GRECO, *op. loc. cit.*

(69) T. ASCARELLI, *op. cit.*, p. 526.

(70) MENGONI, *Rassegna critica della giurisprudenza*, in *Temi*, 1946, pp. 581 ff.

(71) G.A. RAFFAELLI, *Intorno al momento della determinazione del danno*, in *Foro pad.*, 1946, I, section 89 ff., id. in *Foro pad.*, 1946, I, section 553.

(72) MOSCO, *Effetti giuridici della svalutazione*, Milan, 1948, p. 83.

(73) P. ASCARELLI, *op. cit.*, p. 519; P. GRECO, *op. loc. cit.*

(74) MENGONI, *op. loc. cit.*; R. NICOLÒ, *op. cit.* section 51.

(75) T. ASCARELLI, *op. cit.*, p. 521, note 1 and p. 525.

(76) T. ASCARELLI, *op. cit.*, pp. 523, 531 and 532, where in note 1 he puts forward once again the distribution of presumptions and the burden of the contrary proof in a similar way to that proposed in the past by the Pandectists.

(77) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, in *Foro it.*, 1981, I, section 2112; id. *Evitabilità del maggior danno ex* art. 1227, 2° comma c.c. e rimpiazzo della prestazione non adempiuta, in *Foro it.*, 1984, I, section 2820; id. *Ancora sul maggior danno da mora nelle obbligazioni pecuniarie: interessi di mercato o rivalutazione monetaria*, in *Foro it.*, 1986, I, section 1540.

Thus, legal interest and the greater indemnity for late payment under article 1224, section 2, Civil Code, which is to be identified in the difference between the former and the normal yield of money (78) must be added to the capital of compensation. In this way, by adding to the original capital its subsequent normal monetary yield until payment, the damage is completely recovered.

9. – Let us now take as our starting point a critical examination of the foundation of the opinions that in the different legal systems they evaluate the damage according to current prices at times that are closer, in varying degrees, to the indemnity rather than its occurrence.

We will then go on to discuss the foundation of the opinions which, on the other hand, index the credits at the rate of monetary devaluation or revaluation (the so-called credits of value).

Lastly, a solution will be offered that better seems to correspond with the nature and various aspects of the problem of which Hubertus in the footsteps of Cujacius, wrote that « nihil est apud interpretes judicesque hac obscuritate celebrius » (79).

Let us begin with the first matter and start from the evaluation of the damage that consists of the theft, damage and non-delivery of an object.

The opinions that have been asserted have concluded by basing this evaluation of the current values at the time of the judicial claim and above all the decision. A significant role has been played in this respect by the principle of *in illiquidis non fit mora* which was widely dominant, including in Italy, until not very long ago.

It did not allow distinguishing the damage from non-fulfilment (or from an unlawful action) from that deriving from the delay in performing the equivalent and therefore hypothesizing a different and distinct compensation for each type of damage. This has led to them both becoming the same thing. This *way* of understanding the indemnity is rudimentary and is to be excluded, all the more so now that the *in illiquidis non fit mora* principle has been totally abandoned (80).

The opinions of those foreign jurists who deem that the damage is one from its occurrence to its liquidation and remains identical despite the variation in value must be interpreted in this light.

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(78) G. VALCAVI, *Rivalutazione monetaria o interessi di mercato*, in *Foro it.*, 1980, I, section 118; id., *La stima del danno nel tempo con riguardo alla inflazione alla variazione dei prezzi e all'interesse monetario*, in *Riv. Dir. Civ.*, 1981, II, pp. 332 ff.

(79) HUBERTUS, *Praelectiones iuris civilis*, Leipzig 1707, *Tit. de condict, tritic.*, 3, in TEDESCHI, *op. ult. cit.*, p. 242, note 2.

(80) H. and L. MAZEAUD, *op. cit.*, nos. 2420-11. 2420-15. 2421 and 2423.

Indeed it does not seem that a distinction can be made between damage and value, as the damage is essentially an economic value (81), so that its change modifies its extent and very existence. Thus, for example in the case of industrial shares, an increase in their value can be hypothesized as a loss of profits, whilst a loss in their value, because, for example, the company becomes insolvent, will mean that the damage cannot be said to be unchanged in the period of time. However, these propositions appear unacceptable. Here it has to be underlined that the damage depending directly on an unlawful action or non-fulfilment (by negligence or wilful) is one thing and another is damage caused by the delay with which the equivalent is made (mainly by negligence) and the rules and contents of the respective compensation are different.

As for the delay, the ordinary default indemnity of pecuniary obligations that is certainly also applied to illiquid credits for the abandonment of the principle mentioned above becomes significant. There cannot be agreement with the other opinion, according to which the creditor would be entitled to the value at the decision or to the greater intermediate quotation as he is entitled to the thing at any time. Indeed the logic ruling compensation of damage differs from that concerning the fulfilment of the thing owed and i.e. its specific performance (82), This is due for its specific usefulness, whatever its exchange value, either increasing or decreasing, whilst this is very significant in the compensation of the damage (83).

The choice of the creditor between specific fulfilment and compensation of the damage, where possible, is therefore not a homogeneous choice and it is virtually a choice between two different values referred to two different times (84). Stating it differently, the obligation of compensation would end up by being reduced to an alternative obligation with respect to that of fulfilment and if the pecuniary performance were more attractive than that in kind it would be equivalent to a *quanti plurimi.*

This way of seeing has some normative motivations only in those legal systems other than our own in which compensation can be claimed only after action has been taken unsuccessfully for fulfilment (85). Therefore the proposal of those authors who deem evaluating the damage on the decision in the case in which the damaged party has acted first of all for fulfil-

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(81) H. and L. MAZEAUD, *op. cit.*, no. 2389.

(82) The opinions of the advocates of the evaluation on the decision or of the *quanti plurimi* are based on this argument, However, for a critical note: G. TEDESCHI, in Riv. dir. comm., cit., p. 243.

(83) This differentiating element was already perceived by Roman jurists where they specified that fulfilment concerned the *omnis utilitas* of the thing, whilst compensation, on the other hand, concerned its exchange value (i.e. *quanti ea res est, eruit, fuit*).

(84) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, cit., loc. cit.*

(85) In Germany, §§ 288, *290 and 849 BGB.*

ment (86) cannot be accepted, because the reinstatement can be excluded by the judge, where it is considered excessively onerous under article 2058, section 2, Civil Code, so that the relative value does not represent a definite parameter of the indemnity.

Nor is the other justification according to which the creditor would wait for the indemnity to be able to repair the damage acceptable (87).

This theory is excluded by the duty of cooperation on the damaged party to avoid the worsening of the damage, codified by our and other legal systems and which extends to the prompt replacement of the asset.

The opposite opinion depreciates the duty of diligent solidarity to behaviour of mere expectation.

Similarly, the adoption of the current values on the decision is not justified by the basic reason of making the creditor participate in the benefit of their increase, instead of the debtor who otherwise would draw unjust advantage (88).

Their increase is purely virtual because they can be the same or even show a reduction. In the latter case, the damaged party would not even receive the equivalent of that thing which had been due to him in the past, let alone an indemnity, even only abstractly at a fixed arte, for the delay. Thus, in order to allow him to take part in its increase, he is encumbered with the unknown quantity of a decrease, subverting the rule of the transfer of the risk from the creditor as a consequence of the default with *perpetuatio obligationis*.

The jurists have been aware of this and have had recourse to the remedy of the *quantum plurimi*.

However, this opinion which is clearly inspired by a logic of reward for the creditor and punitive for the damaging party cannot be agreed with. It is inadequate where it leaves the damage uncovered for the period which goes from the time of the supposed disinvestment at the greater quotation to that of the concrete payment of the indemnity.

The fact that the interest is added in the end from the unlawful action (or from the claim, in contractual liability) is equivalent to recognizing its function as the irreplaceable evidence of temporal discount of illiquid credits as well, rather than the later variation of the values so that its result coincides with the more updated one of the thing that has been stolen, damaged and not fulfilled.

It remains to see whether the hypothesis that the debtor benefits from an increase in prices is aberrant or has some motivation.

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(86) T. ASCARELLI, op. cit., p. 523; I. MENGONI, *op. loc. cit.*

(87) F. MESSINEO, *Manuale di diritto civile e commerciale*, Milan, 1954, II, §§115, 257; G. TEDESCHI, in *Riv. dir. priv., cit.*, p. 263.

(88) This argument is found in TEDESCHI, in *Riv. dir. comm.*, cit., p. 245.

In my opinion, the circumstance that he cannot benefit from a decrease in prices justifies that he cannot be encumbered by a possible increase. Vice versa, it does not appear that the creditor can benefit from the increase, as he no longer runs the risk of their decrease.

This is part of the logic of that transfer of the risk to the debtor which is postulated in the *perpetuatio obligationis.*

At this point, it is worth extending the subject to the meaning to be given to the *perpetuatio obligationis*. This is usually understood as the mere crystallization of the object of the fulfilment due (89). In this way, the transfer of the risk is seem from the limited point of view of the res debita, so that this *numquam perit.*

Moreover, this way of seeing is excessively reductive.

The *perpetuatio obligationis*, in the opinion of this author, must, on the contrary, be understood as the materialization of the risk and that is, of the economic value of the fulfilment due (90). The insensitivity of the creditor to feel the loss of the thing due must be traced back tot his logic. The transfer of risk must be understood in both directions, so that in principle a drop in prices will not harm the creditor as an increase cannot be of benefit to him. In the same way, the debtor will not take advantage of their drop but nor will he be damaged by their increase.

What is said about prices is extended to any variation in values positively or negatively, as is the case of a company that records significant losses, such as to reduce its capital, even to zero, or vice versa, goes through a period of great prosperity.

The calculation of the subsequent losses or profits cannot influence the evaluation of the bad will or of the goodwill, i.e. of the damage, either at the expense or in favour of the creditor (91), nor can that opinion which would fix the evaluation at the time of the loss be accepted a fortiori (92).

In the light of these reflections, it does not appear that the debtor has an unjust advantage with not being encumbered by a further increase of the prices, thus to attribute it to the creditor who, conversely, no longer runs the risk of their decline. The opposite way of understanding ends up by not becoming free of the difficulties of the *quanti plurimi* which is a typically criminal conception and as such to be rejected.

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(89) This is how it is understood by QUADRI, *Le clausole monetario*, Milan, 1981, pp. 146 ff.; FAVARA *in Foro it.*, 1954, I, section 742. For a more general indication, M: BIANCHI FOSSATI VANZETTI, *Perpetuatio obligationis*, Padua, 1979m pp. 4 ff.

(90) Also: F. CARNELUTTI in *Riv. dir. comm.*, 1929, I, pp. 47 and 50; G. VALCANI, *Il corso di cambio e il danno da mora, cit.*, in *Riv. Dir. Civ.*, 1985, II, p. 258; R. DE RUGGIERO, *Istituzioni di diritto civile*, Messina, 1967m III, p. 138; PESTALOZZA, in *Giur. it.*, 1946, I. 2, section 364.

(91) For notes in this respect, L. GUATRI, *La valutazione delle aziende*, Milan, 1984.

(92) MENGONI, *op. loc. cit.*; T. ASCARELLI, *op. cit.*, p. 521, note 1 and p. 525.

10. – On a closer examination of the dominant opinions at various times and even today, as mentioned above, in my opinion, they have in common the basic error of privileging the *aestimatio rei* over the *id quod* interest, in which, the essence of the damage and its correct compensation has always rested for ever, by common opinion. Here it has to be recalled that the *id quod* interest is the difference in monetary terms resulting from the comparison between the financial situation in which the damaged party would have found himself, according to the normal course of events, if he had not suffered the wrong and that in which he finds himself due to this (93).

The *aestimatio rei*, on the other hand, is translated in the price, which is then the instantaneous value of that good at that time considering that, as Seneca said, *pretium enim pro-tempore est.*

It cannot be excluded in theory that sometimes the compensation calculated according to the interest corresponds with the objective value of a given thing; if anything however, this occurs by occasion correspondence and not by coincidence of the criteria (94).

With respect to the Roman expressions, it has been written that, whilst in the *quanti ea res est*, the occasional convergence of the two criteria was much more probable, the interest and the real *rei aestimatio* tended to assume an antithetic position as time went on.

It is quickly said how the results of the use of wither of these criteria are discordant, even wishing to take the same price of the same time as reference. For example, take the price at *the tempus rei judicandae*, supposing it has increased with respect to that of the non-fulfilment.

The method of *eastimatio rei* will lead to calculating the indemnity based on this price.

In the case on the other hand of using the criteria of the *id quod interest*, the performance of that asset will be hypothesized at the due time, the subsequent preservation of the investment of that asset will be supposed until the time of the decision (which must be proven by the damaged party) and lastly from that gross gain the costs of keeping it and the financial burden that would have had an impact *medio tempore* on that investment must be deducted (95). Any capital gain, net of costs, as has been stated, will be recorded only as loss of profit from gain-capital, the result of an investment, hypothesized with that certain duration (all to be proven)

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(93) The D*ifferenztheorie* is commonly accepted in the various legal systems, including the Anglo-Saxon ones; see F. Betti, *Id quod interest*, in *Noviss. Digesto it.*, VIII, n.d. but Turin, 1975, p. 133; A. De Cupis, *Il danno, cit.*, pp. 49 ff. In this sense, the loss of profit is defined by §252, section 2, of the German BGB.

(94) G. Pugliese, in *Foro it.*, 1944, I, section 578 ff.

(95) The canonists, including G.B. De Luca, *op. loc. cit.*, gave their attention to the depuration of costs.

and not as a past actual loss, evaluated according to the current values of the decision.

This aspect has been understood by Mengoni where, with regard to the proposal to indemnify the destruction or the loss of a ling by an unlawful action, on the basis of the price at the decision, excluded that the loss of profits can be further calculated, as it « is already incorporated » in the current price (96).

An investment from a period prior to the decision is postulated by those who hypothesize, in the case of a decrease in prices, a disinvestment at a greater earlier price (both presumed as *quanti plurimi* and proven), It ranges for the whole of the period of time in which this greater quotation can, in theory, take place, i.e. from the non-fulfilment to the decision. Here too the erroneousness of the *aestimatio rei* will be seen, where this hypothesizes the value of the thing at the time of a hypothetical delayed fulfilment at the decision, rather than as the price of disinvestment of an asset purchased from the time in which the fulfilment was expected and subsequently kept until hypothesizing its availability.

With this the comparison between the present situation and that resulting from the ideal construction, according to the natural order of things, if the wrong had not intervened, is omitted.

Any capital gain is thus not seen in its intimate essence as hypothetical loss of profit and is badly interpreted as a new and more updated value of the actual loss, The examination of the « costs-benefits » of this investment and its realization gains fundamental importance.

The analysis of the situation in which the damaged party would have been highlights what would have happened: *a*) with certain costs (financial charges relative to the counter-performance due, spent for preservation, maintenance and so on); *b*) with certain benefits (increase of the exchange value, the results of the thing, net of the costs of production); *c*) with a certain risk that the damaged party wanted and wants to run (such as that from the variability of prices). This last element deserves a special mention (97).

In the risk against the possibility of gaining, there is that of losing, which represents its equivalent. here the logic of acting at onés own risk, in which self-responsibility is concretized and on which imputability is based, is concretized. In the end, as in the case of prices that have already been quoted, the uncertainty which is essential for the risk is absent.

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(96) L. MENGONI, *op. loc. cit.*

(97) Loss of profit has been correctly identified in the difference between proceeds and costs by the Court of Civil cassation, 28th October, 1975, no. 3619 in *Rep. Giust. civ.*, 1075, p. 734, no. 115.

From this point of view the criterion of the *aestimatio rei* appears t be erroneous, as it ends up by calculating the present-day value of the supposed investment in that asset, but without deducting the costs that would have been borne *medio tempore* due to it and without taking any account of the risk.

This gross and not net calculation of the costs is transformed into a profit in favour of the damaged party and a penalty for the debtor. The same can be said for those who attribute the benefit of the rise in prices, although net of costs, to he who acts for the termination of the contract who this refuses running the further risk. All this was correctly understood by the ancient canonists, with the concern of not indulging usury, from Pothier and the subsequent legislators who, as our art. 2056, section 2, Civil Code, prescribed moderation in the liquidation of loss of profits unlike the actual loss.

11. – Let us now go on to see the meaning, in the framework indicated above, the evaluation of the damage with respect to a different time and after its occurrence, i.e. at the time of its decision or the indemnity or the claim.

The adoption of any of these times is equivalent to codifying that that investment in that asset would have lasted a priori respectively until the decision or the indemnity or the claim and the disinvestment and relative result would have occurred according to the current values and prices at the desired time. That is, the determination of the damage, its time and its value no longer depend on the evidence of the damaged party or the ideal reconstruction of the hypothetical situation to be compared, but they are solved according to the abstract pattern desired and imposed a priori on everyone, including the damaged party.

It is fairly obvious that any capital gain from an increase in the value of the prices, current at the chosen time, cannot be attributed to the damaged party, except as loss of profit of that investment, which is supposed up to that time.

However, the examination of its « costs-benefits » is incomprehensibly set aside, so that the lack of earnings is calculated gross of costs.

However, the values and prices can be on the downturn or equal at the time of the decision (of the indemnity or of the claim) with respect to that when the thing should have been fulfilled. There appears no doubt that the examination of the « costs-benefits » of the presumed a priori investment, with that duration, with the result of worsening the calculation, should also be carried out.

From this picture any concern for the « risk » appears totally neglected and, what is worse, the rule of *perpetuatio obligationis* appears in total contradiction.

As it is foreseeable that the damaged party states that he would not have kept that investment, with that duration and with that result, inevitably we end up falling into the suggestions of the criminal logic of the *quanti plurimi.*

Or, which is the same thing, granting to the damaged party proving, with hindsight, that he would have kept the investment for as long as necessary to close with a profit or even with greater profit, Nor is any attention paid to the fact that he should give proof of the calculation of the « costs-benefits » therefore in the end, he is also exonerated from the proof of the same average earning.

The rule of the transfer of risk thus ends up by being understood haltingly, as the transfer of the possibility of losing and the continuation of the possibility of earning. It is needless to say how this is in contrast, first of all with the rule as per our article 1223 Civil Code and then with the procedural rules on the burden of proof and on the correspondence of what is requested and pronounced, justly highlighted by Spanish jurists.

It is hardly the case to observe that the picture implicit in the choice of the time of the evaluation is also solved in an a priori presumption that the damage was foreseeable and not avoidable. It is presumed by the criticised opinion that the debtor could foresee the economic behaviour of the creditor and he would have kept that investment, for that period of time, and would have made the disinvestment at the level of the prices desired. And as this should also be foreseeable, we are exonerated from proof in this regard, ever since the times of Pothier, through the axiom that each person can foresee that prices vary in abstract and that the quantity of the damage does not have to be foreseen (98). This represents a rather obvious forcing of the concept. In my opinion, however, with this way of seeing and these discussions, the non-application of the rule whereby the damage must be foreseeable ends up by being codified.

The same must be said for the other requisite that the worsening of the damage could not have been avoided (article 1227, section 2, Civil Code). The fact that the picture mentioned above, adopts, for the purposes of the evaluation, the values current with the decision (or the indemnity or the claim) is also equivalent to recognizing that that risk, of that extent, could not be avoided. In this way, the duty of cooperation of the creditor cannot be reduced to behaviour of merely waiting and being understood as depriving the content of precept, in accordance with article 1227, section 2, Civil Code.

The criticized opinion then ends up by adding to its calculations the interest which it defines compensatory. The reason why cannot be under-

(98) Foreseeability concerns the overall economic behaviour and the relative presumable result that also postulate san evaluation is the variation in prices is not anomalous.

stood. In principle, it grants a liquid pecuniary credit. This requisite of liquidity apparently does not recur in the obligation of compensation of the damage which, if pecuniary as well – as I firmly state – is however illiquid.

The coherence of the dominant opinion that even, against all evidence, denies the pecuniary character of the obligation is not understood, only then to add this monetary interest.

The definition of its compensatory character represents, from this point of view, one more recognition, in principle, of the function of evidence of discount of the values in time, reserved to monetary interest.

However, at this point, we cannot see the point of adopting greater current values and prices subsequently to discount the damage at the decision, indemnity or claim and add compensatory interest, thus duplicating the discount. In this sense, greater coherence was shown in Roman law and today, by those who do not add monetary interest. Above, values and prices were mentioned indifferently, although the latter were accentuated. It is opportune to say that similar considerations can also be repeated, as such, for the variations of the intrinsic values of the goods.

12. – It now seems the case to add that none of the various times proposed (decision, indemnity, claim) appears to have in itself a real justification.

In actual fact, for those striving to make the value of the damage coincide with that of the indemnity, acting on the closest prices to the latter, a greater justification would be to recognise, as do German legal literature and case law, the time at which the compensation is concretely made.

They admit that the creditor can claim in a subsequent proceeding the difference originated from the increase in prices after the last oral debate of the second degree and the debtor can object in turn to a decrease through a counter-charge of enforcement (99).

It does not appear, due to what has been said above, that we can agree with this choice, unless by admitting an eternal *querelle* that ends up by questioning the authority of the final decision. All the more so, we cannot understand the justification of times which are so far removed both from the indemnity and from the occurrence of the damage, as are those of the claim and of the decision. Nor do they appear harmonized by the rules of the proceedings to which they are relative.

Let us start with the claim.

It is the criterion which is used, as has been seen, in classic and common Roman law, by recourse to the *quanti ea res est*, and it is still used today in Spanish law and by some of our jurists, with regard to the damage due to termination of a contract. It is motivated with the remark that the

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(99) PALANDT, *op. loc. cit.*; GRUNSKY, *op. loc. cit.*

time of the claim is generally deemed decisive in every jurisdictional proceeding and in particular the non-fulfilment can be said to be truly final only after the claim for termination has been put forward, which precludes any further fulfilment (100).

This criterion is rather arbitrary because the creditor, choosing the time in which to put forward the judicial claim, also ends up by choosing the value of the thing on which the evaluation is based. It goes in the direction of all the objections of principle, even relative to the interval between the occurrence of the damage and the claim. In the case in which the claim is put forward when the development of the damage is still in progress, this reference is even ill-timed. It leaves uncovered the indemnity for the period that goes from the claim to the fulfilment of the indemnity.

The recourse here to the stratagem of calculating the compensatory interest is symptomatic of the fragility of the grounds on which it is based as this presupposes the recognition to the credit of the pecuniary character and, to the interest, of its function as discounting the values.

Let us now examine the opinion that assumes the time of the decision (*tempus rei judicandae*, *quanti ea res erit*).

In general, this choice is justified by remarks that it is alleged to transform the credit into money and to have am attributive and not declaratory character (Savatier, Lalou, Mazeaud etc.).

These propositions do not appear well-founded, because the equivalent credit is, by definition, pecuniary in the beginning, although illiquid, and does not become so due to the decision, which is any case is not recognised as having a constituent character (101).

The decision is generally identified with that of the second degree of jurisdiction.

This choice is wrong here by defect because it is a decision of the second degree of jurisdiction and therefore not final. However, it is also wrong by excess because the judge cannot automatically acquire information on current values at the time in which he issues his decision, let alone the costs-benefits, and the duration of the investment. The parties must provide him with the evidence.

At this stage, the time of the decision ends up by being identified with the lat time when, in theory, the parties can offer evidence. Very opportunely, on the procedural level, German legal literature fixes this time with that of the last oral debate before the judge of the facts and not of the de-

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(100) T. ASCARELLI, *op. cit.*, p. 526;: L: MENGONI, *op. loc. cit.*

(101) On the declaratory character of the decision, CHIOVENDA, *Principii di diritto processuale*, Naples, 1923, p. 174; CARNELUTTI, *Sistema di diritto processuale civile*, Padua, 1936, I, p. 149. The declaratory character is also acknowledged by H. and L. MAZEAUD, *op. cit.*, no. 2261, which however recognizes an attributive element in the enforcement.

cision. It would correspond, in our system, to the pre-trial conference of the pleadings of the appeal trial under art. 352 of the Code of Civil Procedure; however, how a procedural hearing of this kind can be justified to anchor the evaluation of the damage is difficult to understand.

Even if the evidence were established at this pre-trial conference, it will certainly not be admitted and examined until later.

In our proceedings, the possibility of having « in real time » the rate of values, their acquisition for the enquiry and the liquidation of the damage has to be excluded. The result therefore is the absence of coincidence of the aforementioned times, therefore pushing forward the assumption and even more so the decision, the values can certainly not be current values, but of the past, and none of them is more significant that that of the occurrence of the fact.

This is particularly obvious is the frequent cases when the liquidation presupposes that expertises have been carried out. Chasing after values and prices, which are increasingly updated, would means the perennial need for increasingly new expertises and evidence on the new values and thus a permanent pre-trial activity.

It is hardly necessary to point out that in our legal system, the admission of new evidence at the appeal stage is not the rule, but the exception and definitely concerns facts and values previous and outside the proceedings.

The reference of the evaluation of the last and most updated prices and values thus ends up by subverting all the known procedural rules and makes the institutions of the estimatory oath pointless, which would become irreconcilable with the search for new values (102).

More in general, it must however be said that consequences that are penalizing for the party, although limited to the rise in prices, do not seem to justify coordinating the protection of rights and the duration of the proceeding, which belongs to the sphere of public activity. The damaging party who opposes in bad faith, which is the hypothesis contemplated by article 96 Code of Civil Procedure is a different matter. In this case, the judge can also, when he so deems, condemn the damaging party who opposes in bad faith, to liquidate the difference with the higher current prices and values at the end of the proceedings. This will be a penalty inflicted in a specific hypothesis. It must be excluded from ordinary practice, as unacceptable generalizations cannot be proceeded with.

13. – The evaluation at the prices and exchange rate of the decision and, a fortiori, the payment, can not longer be accepted in the compensa-

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(102) On the compatibility of new evidence with the estimatory oath. G. LESIONA, *Teoria delle prove*, Florence, 1985, pp. 451 and 555.

tion of damage in a foreign currency, as I have already maintained in what I wrote for this journal. It neglects article 1278 Civil Code and the damaged party thus runs the double risk of a drop in prices and of the exchange rate, in contrast with the *perpetuatio obligationis* (103).

Nor can there be recourse to the contrived mechanism of converting the foreign currency into Lira, then to be re-evaluated (104), because the foreigner cannot hold and spend Italian Lira with a domestic account, so that the domestic indexes do not concern him. Here too the distinction between indemnity of the basic damage, according to the evaluation and the exchange rate on its occurrence, and that of the default, in terms of interest and any difference in the exchange rate, is the only one allowed.

14. – The capitalization of the permanent damage to the person on the basis of the current income (wages, salary etc.) at the time of the decision is similarly erroneous (105). This criterion is not acceptable. Calculating temporary invalidity, for example for the salary existing at the time of the damaging event, and the permanent one on its decision, does not seem justified.

The salary or income at the time of the decision is influenced by the widely varying contingencies of a general nature which concern the conditions of supply and demand on the labour market, at that time. It is influenced in particular, all the more so, by the personal conditions of the subject concerned.

It is well known that as time goes on, some categories increase and others decrease their income capacity, depending on widely varying factors related to the organization of work, trade union relations, the technological process and the growth or recession of production in general.

In the face of inflation as well, some categories regressed, others advanced, so that it has wrongly been deemed that the calculation on the basis of the salary on the decision is equivalent to that of the time of the damaging fact, subsequently revalued.

All the more so, the income of the aggrieved person at the time of the decision who could be unemployed, a pensioner and so on, does not appear significant. The lessened capacity of income on the basis of the lesser capacity for work at that time should be discounted, where it does not appear useable for the desired purposes.

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(103) Cf. G. VALCAVI, *Il corso di cambio, cit.*, pp. 256 ff., 263 ff., 266.

(104) Contrary to this, G. CAMPEIS, A. DE PAULI, *La r.c. dello straniero*, Milan, 1982, pp. 392 ff., 406 ff., 416 ff. and case law quoted on p. 421. For the *quanti plurimi*, Court of Civil Cassation, 16th May 1981, no. 3239 in *Foro it.*, 1982, I, section 779.

(105) Amongst the many, Court of Civil Cassation, 11th August \983, no. 5351, in *Mass. Giust. civ.*, 1983, no. 1894.

Income, where it does not appear diminished, would be a parametric base unsuitable for the permanent loss of earning, Usually the calculation is made on the basis of the salary at the time of the decision, whilst for the rest of the life, reference is made to the time of the damaging event (106). The result is equivalent to the one that would be obtained supposing that the damaged party, at the time of the damaging event, enjoyed the highest income that he will have, on the contrary, at a considerable distance, on the decision.

The coherent calculation should be based on homogeneous data, such as the salary and residual life referred equally to the damaging event or to the decision.

The current opinion is that if the injured party died for an independent cause before the decision, the salary at the time of death must be considered (107). This contradicts the theory of the principle.

From what has been said here, it will be noted that the salary at the decision, to be significant, postulates that the damaged party must not be dead, nor in the meantime have become unemployed, retired, further disabled, does not belong to categories that have gone down in the scale of retribution and so on.

In short, it is a criterion that ends up by being excessively hypothetical. It therefore appears much more plausible and rational to refer to the income (wages, salary etc.) and to residual life. at the time when the damage occurred (108).

15. – Let us now go on to the other criteria which goes by the name of « credit of value » and which, to tell the truth, is dominant only in Italy. It is reduced, as has been stated, to evaluating the damage on its occurrence and in subsequently adjusting the monetary yardstick to the decision, positively or negatively, depending on whether there is inflation or deflation (109).

The choice of this time once again raises the problem, which has already been seen, of whether it is justified or not to refer to a decision that is not final, rather than to the final judgment or the indemnity.

The theoretical construction is concretized in supposing am abstract and fixed value of the assets (i.e. not monetary) to which a amount of

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(106) Court of Civil Cassation, 11th January 1969, in *Mass. Giust. civ.*, 1969, no. 29; F. MASTROPAOLO, *Il risarcimento del danno alla salute*, Naples, 1983, p. 394, note 165 f., which also criticises the incoherence of case law.

(107) Court of Civil Cassation, 7th July 1979, no. 3900 in *Mass. giust. civ.*, 1979, no. 1714, amongst the many.

(108) In this sense, most recently Court of Civil Cassation, 9th August 1982, no. 2192 in Arch, Giur. civ., 1983, p. 76.

(109) T. ASCARELLI, *op. cit.*, pp. 441 ff., 508 ff.

money (i.e. a monetary value) corresponds and which is changing according to its purchasing power and thus an *aestimatio* distinct from the *taxatio* (110).

This way of seeing, as I have written elsewhere (111), has no grounds. The intrinsic value of goods in changing, even independently of the rate of money.

This is the case, considered above, of the industrial shares which lose value following company losses or of a thing, although not used, which in economically depreciated, with the mere and inexorable passing of time. due to our preference for new, rather than old, things.

The extrinsic value inevitably varies with the varying of that of the asset taken as the parameter.

The asset which can be recognized as having an unchanging value in time is, by definition, money, die to the nominalistic principle, which always makes it equal to itself, and therefore – as Savigny (112) wrote – is the only truly abstract value.

Due to the unlimited options that accompany it, due to the absence of costs of storage, due to the temporal income, easy to calculate, due to the general preference for liquidity, it is the universal yardstick of the value of all assets, i.e. the common instrument of counting (113). From this point of view, we can conclude that in modern economy, every value is essentially monetary.

We cannot agree with the criticized opinion which, on the other hand, places the value, as the foundation, the price of the money in terms of goods and therefore its purchasing power.

Hypothesizing a fixed and unchanging purchasing power in time is a metaphysical abstraction, as the prices relative to goods vary between themselves and thus hypothesizing a money with a stable purchasing power.

Nor is a single price relative to the money imaginable, but as many prices as there are goods, which is the monetary price, seen from the reverse.

The comparative examination of the purchasing powers at different times, is reduced – looking closely – to that of the various prices of « replacement for new » of the goods, at the times considered and i.e. « at instantaneous values » which do not take into account costs of storage, the various yields and so on that a hypothetical transfer in time of the goods must suppose.

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(110) T. Ascarelli, *op. cit.*, p. 457.

(111) G. Valcavi, *Riflessioni sui c.d. crediti di valore, cit*. section 2112; id. *Ancora sul maggior danno di mora nelle obbligazioni pecuniarie, cit.*, section 1540 ff.

(112) F.C. Savigny, *Le obbligazioni*, Turin, 1912m I, §40, p. 377; §41, p. 395.

(113) J.M. Keynes, *Opere*, Turin, 1978, p. 389.

Here the opinion expressed by a great economist of the 19th century like Marshall must be recalled, according to whom « measuring the purchasing power of money is not only impracticable, but unthinkable » (114).

The real « reservoir of purchasing power » – as L. Einaudi well wrote (115) – is made up of money itself.

The most recent studies on the importance and on the role of stock and balances of money, have highlighted how, far from hypothesizing a flight from money, this preserves its function as a « reservoir of values », even in a period of inflation (116). This has been shown clearly at a time close to us, by the « new inflation » (stagflation, slumpflation) characterized by a high liquidity of the system and by the drop in demand and by an irregular trend of the prices of securities and commodities (117).

The theory of the « credit of value » is in any case inapplicable to a damaged party resident abroad who, due to the currency prohibitions, cannot even spend often in the country, so that the reference to the domestic purchasing power would translate into a clearly strained interpretation (118).

The criterion is absolutely inadequate even with respect to a damaged party who is resident in the country.

It is well known that there are multiple indices and which diverge widely, with regard to the same commodities m as of industrial prices, the wholesale trade, the retail trade and so on. The advocates of the value conception arbitrarily identify the abstract purchasing power in the index of retail prices of the limited basket of goods, for consumption by families of blue or white collar workers (119).

A generalization of this kind, which is already unacceptable in the light of logic, is now also to be denied in the light of the decision of the Court of Cassation of 5th April 1986, no. 2368, which, although with respect to the greater damage from default in the pecuniary obligations, has excluded that such an investment and the consequent loss of purchasing power by anybody (such as an economic operator, a common saver or an occasional creditor) can be presumed (120).

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(114) MARSHALL, *Opere*, Turin, 1972, pp. 136, 137, 227, 356-9.

(115) L. EINAUDI, *Della moneta serbatoio dei valori*, in *Riv. di storia economica*, 1939, pp. 133 ff.

(116) DON. PATINKIN, *Moneta, interesse e prezzi*, Padua, 1977, pp. 17, 26-30, 45 ff., 128, 222 ff., 253 ff., 407 ff.

(117) RUOZI, *Inflazione, risparmio ed aziende di credito*, Milan, 1973, pp. 538 ff. In the sense that inflation is not equiproportional: TREVITHICK, *Inflazione*, Milan, 1979, pp. 17-23.

(118) G. VALCAVI, *Se il credito del lavoratore estero-residente sia rivalutabile*, in *Riv. Dir. Civ.*, 1984, II, p. 504,; id., *Il corso di cambio e il danno da mora, cit., loc. cit.*

(119) Court of Civil Cassation, all divisions sitting together, 23rd November 1985, no. 5815 in *Rep. Giust. civ.*, 1985, no. 186, p. 749.

(120) In *Foro it.*, 1986, I, section 1265.

The circumstance that it has correctly relegated the monetary revaluation, as mentioned, to the marginal hypothesis of the modest consumer (blue collar worker, a pensioner etc.) leads to excluding a fortiori, as I have already said elsewhere, that an abstract and general category fo credits, such as those of value, can be built up.

The extension of the automatic revaluation to the credit of compensation for damage (as more in general on each hypothesis which is put into that category) also appears completely incompatible with the systematic basic principles of our legal system, therefore it is to be rejected.

In this way it infringes the nominalistic principle which must be considered applicable to illiquid pecuniary credits, no less than to liquid ones (121). The criterion of revaluation does not take into any account and neglects the principles on default and its consequences.

Re-evaluation is applied automatically whether there is default by the debtor or not, or even if it is the creditor who is in default. This is the case in which the debtor has made a real offer of an amount which is the end in congruous or an advance that is refused (122).

Similarly, the debtor in default will not undergo any consequence in the event that the rate of inflation were nil.

In the event of an increase in the purchasing power of the money – which is a prospect which must also be increasingly considered theoretically and it is already the reality in some countries (123) – the debtor, even in default will owe an indemnity of less than the amount originally due. Thus the damaged party will not even recover the same nominal amount that he has lost or that he has spent, to anticipate the repair of the damage.

To remedy this type of contradiction, the advocates of these opinions have recourse to monetary interest, defined by some (124) as default interest and by the majority as compensatory (125). This clearly contradicts the premises of the distinction between credits of value and credits of currency and is solved in recognising that monetary interest has an irreplaceable function as the rate of time-discounting of the values in time to the detriment of the re-evaluation.

This criterion is not even compatible with articles 1225 and 1227 Civil Code, unless the evolution of the rate of inflation is always given as foresee-

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(121) F. PESTALOZZA, in *Giur. it.*, 1946, 1, 2, section 353 ff.

(122) U. NATOLI-BIGLIAZZI-GERI, *op. cit.*, pp. 89 ff.; FLAZEA, *L'offerta reale e la liberazione del debitore*, Milan, 1947. In these cases, case law excludes the default of the debtor, includine under article 1227, section 2, Civil Code.

(123) Currently in Germany it is thus; in Italy the index of wholesale prices has been of no value (*Corriere della Sera*, 15th May, 1986).

(124) T. ASCARELLI, *op. cit.*, no. 179, p. 534; Court of Civil Cassation, 26th April 1984, no. 2626, in *Giur. it.*, 1985, I, 1, section 500.

(125) Amongst the many, Court of Civil Cassation, 13th July 1983, no. 4759, in *Mass. Giust. civ.*, 1983, p. 1677.

able and the above damage as not avoidable, even by the damaged party that has already concretely repaired the damage with his own means (126).

The rapid decrease of inflation, currently in progress, makes the theoretical construction of credits of value increasingly anachronistic, whilst the perspective of deflation make the perspectives of a negative correction of the amount of compensation to the detriment of the damaged party increasingly possible.

16. – Let us now draw the conclusions of all this and try to offer the type of solution that best meets the legal logic and the various substantial and procedural aspects of our subject.

There does not appear to be any doubt that we have to start from the fundamental distinction between damage from an unlawful action or from non-fulfilment (malicious or negligent) and damage due to the delay with which the equivalent is made (mainly negligent).

They are different and – as has been said – require different indemnities. The comparative examination of the ideal situation in which the damaged party would have been and, on the other hand, that which occurred, allows identifying two types of damage, with absolutely different times.

On the one hand, there is the damage caused by the wrongdoing and the economic dimension of which is inseparably related with the capital of the damaged party as it is (and it cannot be otherwise) according to the values of the time when it occurs. This is the *quod interest*, which can be hypothesized, in the case of immediate indemnity.

On the other hand, for the case in which this is delayed, there is the default damage, which goes from the time when the indemnity ought to have been paid to when it is actually paid.

This distinction, in our law, is codified by article 1219, section no. 1, Civil Code, where it rules that the damaging party is in default from the illegal action. It is like saying that from that time he also owes the default indemnity.

The fact that the damage has been considered as one and indistinct, from its occurrence to the various and uncertain times proposed (decision., indemnity, claim) depends – as mentioned above – on the principle that has reigned almost until the present that *in illiquidis non fit mora*. The principle deemed, by a well known ruling of the Court of Cassation in Rome (127), « a fossil of medieval tradition » is still operative today in many

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(126) The reason why the amounts spent by the damaged party are considered credits of value and not of currency cannot be understood. Amongst the many; Court of Civil Cassation, 6th July, 1983, no. 4558, in *Rep. Giur. it.*, 1983, section 931, no. 203.

(127) Court of Cassation, Rome, 26th May 1903, reporting judge Mortasa, in G.C. Messa, L'obbligazione degli interessi, Milan, 1932, p. 234.

countries (128). Whilst in Italy, although superseded, it continues to exercise, although at cryptotype level (129), an influence, especially with regard to our subject, due to cultural tradition.

The adoption of the current values in the different subjects considered above (with recourse to *quanti plurimi* in the case of a decrease and attributing profit in the case of a rise) depends on the failure to identify this interest of the damaged party, damaged by the delay. as completely different interest from that damaged, on the other hand, by an unlawful act or by non-fulfilment, which previously occurred.

The theory of the credits of value can be traced back tot his cryptotype and which – as was said – is incompatible with the principles on default and however which could remedy its negative consequences, although from a different point of view of value.

Linked to the principle of *in illiquidis non fit mora*, there is obviously the problem of interest, whether it is considered default or compensatory. The opinions of those jurists and the decisions which do not calculate the interest for the whole period until the decision are coherent with the premiss from which they start (130).

The same cannot be said in Italy for that chorus of opinions that calculate the interest from the claim, sometimes even on the revalued capital, whether they are described as default (131) or compensatory, to obviate the inadequacy of the accepted criteria of evaluation of the damage.

The abandonment of the principle of *in illiquidis non fit mora* is now generally acknowledged in our law, so that it no longer represents a theoretical obstacle to distinguish the two different types of damage.

In this general framework, we can now deal more analytically with their different times of reference in order to measure the different indemnity, Let's start with the time of the basic damage, which comes from the illegal act or from non-fulfilment, The damage consists of a loss or a loss of earnings (132), is essentially a negative economic event and not a simple natural occurrence.

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(128) It is recognized as in force by Spanish law. See amongst the many Supreme Court, 27th April 1978, 28th June 1978 and 11th Dcember 1978, in ALBALADEJO, *op. cit.*, §32, p. 179.

(129) U. NATOLI and L. BIGLIANNI GERI put forward reservations in *Mora accipiendi e mora debendi*, Milan, 1975, pp. 242 ff.

(130) Thus Court of Civil Cassation, 12th February 1979, no. 4053 in Foro it., 1979, under *Interessi*, no. 18 and, *incidenter*, Constitutional Court, 22nd April 1980, no. 60 in *Foro it.*, I, section 1249.

(131) The different date of effect from the claim of from the illegal act in the two different types of damage is justified by the different time of start of the default yet incomprehensibly a default nature is denied to the interest. Court of Civil Cassation, 25th October 1983, no. 558; Court of Civil Cassation, 4th December 1982, no. 6643 in *Mass. Giust. civ.*, 1982, nos. 1921 and 2241.

(132) J.C. TOBEÑAS, *Derecho civil español comun y foral*, Madrid, 1986, III, p. 243, notes

Whenever one of us, an expert, a judge, with a decision, evaluates damage, he makes a decision which is critical but also historical (133), in the sense that a dimension is given to that event, according to the economic values of the time in which it occurs. The procedural rules which impose on the plaintiff the burden of the claim (article 99 Code of Civil Procedure) and that of adducing the proof of the amount of the damage as well from the introductory act of the proceedings (articles 115 and 163, no. 5, Code of Civil Procedure), the subsequent preclusions, any sworn evaluation (article 241 Code of Civil Procedure), the correspondence between what is requested and pronounced (article 112, Code of Civil Procedure), situate the historical nature of the damage and its economic dimension, at a time before the start of the lawsuit and i.e. when the damage occurred.

It also corresponds to the time of the hypothetical favourable situation which could not occur due to the wrongdoing, i.e. the *id quod interest* damaged by the same.

This way of seeing is coherent with the *perpetuatio obligationis* (article 1221 Civil Code) of which mention has been made.

The combined use of the various further indices of identification of the indemnifiable damage, offered by substantial law (articles 1223, 1225 and 1227 Civil Code) then allows refining the temporal localization of the damage and the extent of its dimension.

The time of reference could in theory be identified with that of the unlawful act and non-fulfilment (134) or default (135) or the negative economic event, i.e. the actual damage and the loss of profit (136).

The time of default, in our law, coincides with that of the unlawful action or non-fulfilment in the *portables* obligations (article 1219, section 2, nos. 1 and 3, Civil Code) and is absorbed by the subsequent non-fulfilment in the *querables* obligations (137), as from this point of view, it does not appear to have significant autonomy.

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that unlike the actual damage, the loss of profits « partecipa de todas las vaguedades e incertidumbres proprias de los conceptos imaginarios ».

(133) F. CARNELUTTI, *Teoria generale del diritto*, Rome, 1951, pp. 371 ff. There is both historical and critical evidence: F. CARNELUTTI, *Sistema di diritto processuale*, cit. I, pp. 681, 685, 711.

(134) D. BARBERO, *Sistema di diritto privato*, I, no. 612, p. 709; Court of Civil Cassation, 15th May 1946, no. 590 in Mass. Foro it., 1946, section 143; French legal literature and case law in H. and L. MAZEAUD, *op. cit.*, no. 2253, notes 2,3,4 and 5.

(135) For the reference to the legal claim; DE RUGGIERO-MAORI, op. cit., II, p. 44.

(136) Amongst the many: CHIRONI, *Colpa extracontrattuale*, cit., loc. cit., G.A. RAFFAELLI, in Foro pad., 1946, I, section 89; Court of Civil Cassation, 14th January 1946, no. 31, in Foro it., 1944-46, I, section 1; Court of Appeal of Genoa, 2nd September 1946.; Court of Appeal of Genoa, 9th July 1946; Court of Appeal of Bologna, 11th August 1945, in *Rep. Giur. it.*, 1944-47, under *Resp. civ.* nos. 192, 195 and 198.

(137) Also U. NATOLI and L. BIGLIANZZI GERI, *op. cit.*, pp. 24 ff.

The unlawful act and non-fulfilment are more properly the causes of the damage rather than the damage itself. They are « upstream » if the economic consequences in which the damage is concretized and this is particularly obvious in the loss of profits.

The damage can have an evolution in time, as is the hypothesis of its subsequent worsening which can culminate in the loss of the commodity or in the death of the victim. There does not appear any doubt that the decisive moment is that of the damage, even in its evolutionary manifestations (138), and not of its cause, the process of which is presumed as exhausted, The time of the guilty conduct however is significant as that of the prior direct and immediate cause of the damage, as it is necessary in the seriation of the phenomena to identify the subsequent time of the damage, which is indemnifiable (article 1224 Civil Code).

In a system based on the principle of the total compensation of the damage, the matter should finish here.

Our legal system, contrary to what is commonly stated (139) is nevertheless inspired – as stated – by the opposite principle of the indemnity of the damage within certain limits (articles 1225, 1227 and 2056, section 2, Civil Code).

It must be remembered here that that part of the damage which could have been avoided (article 1227, section 2, Civil Code) or, in negligent non-fulfilment, only that part of the damage that could be foreseen at the time of the contract cannot be indemnified (article 1225, Civil Code).

We do not agree – and it is worth repeating it – with the current opinion that debases avoidability to a merely passive behaviour and not to active cooperation, up to the replacement of the commodity, insofar as it is possible, as it should be.

Nor is it acceptable that the foreseeability is reduced to the natural consequences and not also to the economic consequences (i.e. to the an and not to the quantum) of the negligent conduct or that it is discounted a priori, as when it is educed from the abstract variability in the two meanings of prices (140). Foreseeability must concern the favourable situation, which has not occurred due to the wrongdoing, as a whole, and i.e. the interest damaged in all its aspects, including its economic dimension, i.e. the damage.

This matter is of particular interest for the loss of profits where preventing the indemnifiability of the « dreams of earning », art. 2056, section 2, Civil Code, imposes a « fair appreciation of the circumstances of the

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(138) This opinion is accepted in the various legal system. In Italy: Court of Civil Cassation, 22nd January 1982, no. 442, in *Mass. Giust. Civ.*, 1982, p. 157, amongst the many.

(139) Amongst the many: Court of Cassation, 19th September 1985, no. 4710 in *Rep. Giust. civ.*, 1985, p. 748, no. 166.

(140) We do not agree with Court of Civil Cassation, 28th May 1983, no. 3694 in *Mass. Giust. civ.*, 1983, p. 1310, on the abstract character of foreseeability.

case». Here the foreseeability of the economic behaviour of the creditor that would have generated that profit and its dimensions must be taken into account.

The conclusion, in the light of all these remarks, is that the time of reference of the evaluation is that of the occurrence of the damage and stops where its worsening could have been avoided, and, as far as negligent non-fulfilment is concerned, reaches as far as where the damage could have been foreseen.

They thus represent the limits of reference of the indemnifiable damage to be concretely ascertained.

A fortiori, the damage cannot be evaluated at the decision, indemnity or claim, Whatever the distance between this opinion and the dominant view, it can be measured by saying that at present the damage is evaluated according to the indemnity, whilst here the proposition is to evaluate the indemnity according tot eh damage, within the limits in which it can be indemnified. The credit is certainly pecuniary, as it concerns the amount of money equivalent to the interest damaged by the unlawful action or by the non-fulfilment.

It is illiquid, in the sense that it requires liquidation for the amount of money to remain unquestionably fixed. The nominalistic principle is applied to all the pecuniary credits both liquid and illiquid and it is arbitrary to reduce it only to liquid ones. The equivalent credit, as mentioned, is therefore subject to the nominalistic principle, and cannot fail to be so. In this sense its current qualification as credit of value and the theoretical legitimization of the category is therefore refused.

17. – Let us now go on to discuss the further and different damage caused by the delay with which the equivalent is paid.

The damaged interest is that of being able to have the amount of money equivalent and it ranges for the whole duration of the negligent delay from the placing in default (which is of significance for these purposes) to that when the indemnity is concretely paid.

The debtor is in default in paying the equivalent from the non-fulfilment or from the unlawful act, as placing in default again is not necessary (141).

The compensation of the delay from delay, which is to be added to that due to an unlawful action or non-fulfilment, the object of the evalua-

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(141) The fact that the indemnity can be collected from its occurrence is also valid for the contractual damage and means that the damaging party is in default from that time, where it is deemed that the relative performance must be made to the address of the creditor, in accordance with article 1219, section 2, no. 3, Civil Code. Considering it differently, the default will take effect from the claim of indemnity in accordance with article 1219, section 1, Civil Code.

tion, takes place through the common ways of indemnity provided for pecuniary obligations, to which that of compensation for a monetary equivalent belongs, i.e. with recourse to the key rule of article 1224 Civil Code, of vast application to illiquid credits not less than to liquid credits. The fact that this has been limited until here to liquid credits is to be put into relation with the principle that has been abandoned and yet is still influential, at cryptotype level, as mentioned, Therefore the legal interest is due as default interest (142).

The rule is that illiquid credits do not produce interest,, with the exception of the case of default. It is hardly surprising that non-default interest presupposes liquid credits; this is the case of the interest as consideration for a liquid and collectable credit (article 1282, Civil Code) (143) and compensatory interest for a liquid and non-collectable credit (article 1499, Civil Code) (144).

Only the default justifies that an illiquid credit, like the compensation of damage, generates interest. This is explained by the fact that here the legislator has anticipated the collectability of the credit, to the time the damage occurred, so that the time necessary for its liquidation passes in damage of the damaging party rather than the damaged party (145).

The principle that the damaging party immediately owes the indemnity to the damaged party and is therefore defaulting by negligence until its occurrence (*mora ex re, mora quae inest*) has thus been codified for eminent reasons of legislative policy.

It is incomprehensible how the dominant opinion extends the compensatory interest from a liquid and collectable credit, under article 1499 Civil Code, to a credit which is illiquid and collectable, like that of the compensation of damage.

A credit of value is not suitable on its side to produce interest both because – as stated – the default is extraneous to it and because there is no relationship of homogeneity between them. The monetary interest is additional, proportional and periodic with respect to a pecuniary obligation and necessarily presupposes it (146).

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(142) The following agree on the default definition: MESSA, op. cit., p. 246; ASCARELLI, op. cit., pp. 340 ff.; DE CUPIS, op. cit., p. 487; GIORGIANNI, *L'inadempimento*, Milan, 1975, p. 163.

(143) The wording of article 1282 Civil Code has abandoned the tendency to extend the interest as a consideration to the illiquid credits which had emerged in article 17 of the draft.

(144) This is decisive with regard to the reference to the « price » under article 1499 Civil Code.

(145) This solution is the opposite to that underlying the principle of *in illiquidis non fit mora*, which had its origins in a passage by VENULEIUS, according to which *improbus non podest videri qui ignorat quantum solvere debeat.*

(146) In this sense, G.C. MESSA, *op. cit.*, p. 435.

The obligation for the damaging party to compensate the greater damage from default, under article 1224, section 2, Civil Code, also derives from the *mora quae inest* in paying the pecuniary indemnity, as is the case in every pecuniary obligation. This occurs within the limits in which it is foreseeable under article 1225 Civil Code, as it is normally negligent.

What is to be understood by this greater damage from default in pecuniary obligations is now a subject dealt with by abundant literature and case law (147).

It is however to be excluded that it can be identified in the loss of purchasing power of the money, for the reasons shown with regard to credits of value. The author has written extensively on this subject and in particular in this journal, 1981, II, pp. 332 ff.; to which reference should be made for a wider explanation. This greater damage, in my opinion, is to be identified in the possible difference between the rate of legal interest and that of the market.

The recovery of this difference, from this point of view, corresponds to a right of indemnity for the delay by the damaged party to which otherwise he could aspire within the very risky limits in which enrichment of the damaging party is proved under article 1207 Civil Code. This solution therefore represents the best protection of the damaged party, in line with *quod plerumque accidit* (148).

The total default damage is thus identified in the presumable loss of profits of a normal financial use or with the cost of replacing the money, i.e. the loan. It is made up of the normal remuneration of the saving (payable bank interest, dividends of public securities etc.) or, where replacement is proven to be necessary, by receivable interest.

At this point, we must also add that the market interest is notoriously influenced by the expectations of inflation and the various conditions of the demand for credit. It is therefore foreseeable and is not reasonably avoidable.

Now we have interest that is well above the rate of inflation (the so-called real positive interest) whilst until not very long ago we had interest below it (the so-called negative real interest) due to the exuberant liquidity. Today, summing the legal interest to the difference with respect to the greater rate of inflation, we have a measure below the *quod plerumque accidit*, whilst once it was exuberant.

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(147) On the question, from the many. R. NICOLÒ, op. loc. cit.; GRECO, op. cit., pp. 103 ff.; A. TORRENTE, in *Foro it.*, 1945, section 405; A. DE CUPIS, op. cit., p. 434; and recently R. PARDOLESI, in *Foro it.*, 1986, I, section 1265 ff.; A. AMATUCCI, in *Foro it.*, 1986, I, section 1273; G. VALCAVI, in *Foro it.*, 1986, I, section 1540.

(148) The reference to the market interest rate was already known in Justinian Roman law where it was up to the judge to determine the rate of interest according to the *mos regionis*: see CERVENCA, op. cit., p. 297, no. 8, p. 300.

It is easily foreseeable that, due to the rapid drop in inflation, the reference to the rate of inflation will be increasingly abandoned in favour of the market interest which also represents the price of money as time goes on. It thus covers the lesser value of the deferred liquidity with respect to that immediately available (the so-called *utilitas temporis*) in which the most reasonable parameter of reference is to be recognized.

This opinion has recently been accepted, in substance, by the joint sitting of the divisions of the Court of Cassation, with the ruling of 5th April 1986, to which reference should be made.

In the event that the damaged party is resident abroad and proves having suffered damage from the exchange rate. he will be entitled to the relative difference, as well as the normal yield of the money, in which he would have exchanged it.

18. – The conclusion of all this discussion is, in the final analysis, the following: there is correct compensation of the damage, adding to the capital corresponding to the equivalent of the damaged interest, evaluated according to the values current at the time of the damage, the normal subsequent monetary yield, under article 1224 Civil Code, that would have been realized by a risk-free financial investment for the whole period of default in fulfilling the relative pecuniary obligation.

In this way, the delay of the debtor is demotivated and the creditor is placed in the situation in which he would have been if he had collected the indemnity at the time the damage occurred and he has put it to normal non-risk monetary interest.

Reference is made to the above in:

F. Parrella, *Inadempimento del debito di valuta; analisi ragionata dell'evoluzione della giurisprudenza tra indirizzo teorico ed esigenze concrete*, in *Riv. dir. comm.le*, 1988m p. 69, note 12; M. Majenza, *Quantificazione dei danni patrimoniali e teoria della differenza*, *Il Corriere giuridico* 1989, p. 1202; V. De Lorenzi, *Obbligazione, Parte generale, sintesi di informazione*, in *Riv. dir. civ.*, 1990, p. 262; R. Pardolesi, *Crediti previdenziali, tutela differenziata e punitive damage*, in *Foro it.*, 1991, I, p. 1325; U. Breccia, *Le obbligazioni*, Milan, 1991, pp. 658, 661: A. Luminoso, *Della risoluzione per inadempimento*, in *Commentario Scialoja Branca*, Bologna, 1990, pp. 121, 219, 221, 257, 260, 266, 269, 270, 271, 272, 274, 276, 277, 281, 283, 288, 302, 313, 318; M.C. Dal Bosco, *Della compensazione giudiziale, ovvero di un'apparenza normative*, in *Riv. dir. civ.*, 1991, p. 754, note 12.

Also by the author on the same subject:

– «*Ancora sul tempo di riferimento nella stima del danno*» in Rivista di Diritto Civile, 1991.

– *Intorno al concetto di* perpetuatio obligationis *e al tempo di riferimento del risarcimento del danno da inadempienza contrattuale*, in Rivista Diritto Civile, 1992, II, 385 and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 293.
– «*Sulla natura dell'obbligo di restituzione e di quella di risarcimento del danno conseguenti alla risoluzione del contratto per inadempienza*», in Foro Padano, 1992, I, p. 53 and ff. and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 309.

On the compensation of the damage due to illegal conduct or non-fulfilment and that of the delay with which the indemnity is paid

1. – The decision under examination extends the question from the indemnity of an illegitimately expropriated commodity to the compensation of the damage in general.

In this respect, the decision makes a declaration of principle of extreme importance, where it states that, on the liquidation of damage, we do not find ourselves facing a single damage but two different damages, absolutely distinct from one another, and which also require different indemnities.

The first damage is that deriving from the illegal act or from the non-fulfilment, whilst the second is that deriving from the delay with which the indemnity is made.

In this regard, the Supreme Court correctly states « the full autonomy both from the conceptual point of view and the different positive discipline of the delay with respect to the non-fulfilment ».

The Court, in the case of an illegitimately expropriated commodity, identifies the basic damage « in the economic value of the lost commodity which must be evaluated « with regard to the time of the loss suffered ».

That deriving from the delay is correctly defined as the « diseconomy that weighs heavily on the creditor, due to the lack of prompt enjoyment of the equivalent in money of the damaged commodity ».

This is equivalent to evaluating, in general, the damage from the illegal action or from non-fulfilment, with respect to the time when it occurred and not to the decision (*res iudicandae tempus*).

From « Giurisprudenza italiana », 1991, I, 1, p. 1227 and ff, and from « L'Espressione monearia nella responsabilità civile », Cedam, 1994.

The above annotates the following decision:

COURT OF CASSATION, SECTION I, 20.6.1990, No. 6209, President Granata, Reporting Judge Carbone, Public Prosecutor Amirante: ANAS v. Scopelliti: « The damage from non-fulfilment must be liquidated with reference to the time at which it occurs and not tot hat of liquidation. The damage from delay consists of the loss of the *utilitas* that the creditor would have had from the sum due, in the place of the commodity if it had been promptly paid and must be fairly indemnified with legal interest and, in the case of the loss of purchasing power of the money, with revaluation. The interest must not be related to the final moment of the taxation, but to the different and subsequent changes of the periodic purchasing power. »

The damage from delay can be translated, to use the words of the Supreme Court, « in the loss of that *utilitas* that the creditor would have had from the sum originally due in place of the commodity » and covers the whole duration of the delay, until the indemnity is concretely made.

These propositions have a precedent in the decision of the Court of Rome, 22nd February 1988, in Foro it., 1989, I, p. 255, with note and references in Foro it., 1989, I, p. 1988.

This order of ideas is also agreed with by the author of these lines who anticipated it from as early as 1981 (1) and has studied it in depth and repeated in his subsequent writings (2).

This distinction between the two different types of damage (moreover that from delay is presumably negligent, unlike that from an illegal action or from non-fulfilment, because the latter may be wilful or negligent) does not represent the only merit of this decision.

The Supreme Court also felt the need to study in depth legal literature on conveyances, dominant in civil liability and correctly raised the problem of justification, in our legal system, of the so-called debt of value.

In this regard, that other motivation takes on great importance, stating « nobody wants to deny the empirical and casuistic origin of the category of the debt of value which, although opposed from the conceptual point of view, continues to show a considerable capacity of expansion, legitimizing the jurisprudential effectiveness on the ground ».

It appears very significant to those who are critical and have been so for some time, not only on the conceptual level, of this category – like the author of these lines – that the Supreme Court has abstained from taking the defences of this category on the dogmatic level.

We are increasingly convinced that a debt that has as its object an abstract value or an abstract money cannot by hypothesized which can be considered a yardstick of the legal tender, because, due to the nominalistic principle, *mensura* and *mensuratum* coincide.

In the same way, the fact that the debtor, who is not to find himself in default, has to pay re-valued money to the creditor appears at the antipodes of our system and this is even inconceivable if it is the creditor who is in default, for having refused the real offer of a sum which was then revealed as adequate.

The illiquid obligation – in our firm conviction – is a pecuniary obligation and is governed by its specific discipline.

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(1) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, in *Foro it.*, 1981, I, pp. 2112 ff.

(2) G. VALCAVI, *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, II, pp. 31 ff.; Id., *Indenizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, p. 681; Id., *Il problema degli interessi monetari nel risarcimento del danno*, in *Resp. civ. e prev.*, 1987, pp. 3 ff.; in *Foro it.*, 1986, I, pp. 1540 ff. and in ivi, 1988, I, pp. 2318 ff.

The only discount that can be hypothesized in time of the valued expressed in money is that represented by the calculation of the mere loss of profit of the quantity of money (*quod interest* according to the *quod plerumque accidit*) in the period under consideration.

the recourse to theoretical constructions of the type of that of the debt of value, could have its justification as an inescapable equitable remedy, in those systems and for those periods which had the experience of hyperinflation (and the related exaggeration of the normal yield of money during the delay) and however they did not have any other legal indemnity than the inadequate interest of 5%.

This was the emblematic case of Germany in the 1920s and many countries affected by hyperinflation (3).

A need of this kind no longer has any raison d'être after the introduction of a system of rules which admit « the compensation of the greater damage from default » and thus allow discounting the debt, on the basis of the overall normal yield of money (article 1224, section 2, Civil Code, article 106 Swiss Code of Obligations, article 1153 of the French Civil Code etc.).

The decision under examination, although not aware of it, also abandons on the same operating plan the « valoristic » method, where it is forced, even by equitable needs, to state that there has to be a « gradual re-evaluation » of the damage, for the period after its occurrence and not only from its occurrence to liquidation.

This is also in order to calculate the legal interest.

This is equivalent to attributing – as we shall say – the character of an indexed pecuniary debt to the obligation of compensation, rather than debt of value and however the solution remains unacceptable both because it is not legitimized by any rule and because it reaches results even greater than the same accumulation of re-evaluation and interest.

Going on to deal with monetary interest, the Supreme Court takes a step back with respect to the previous decision no. 3352 of 1989 (4), where it once again qualifies the interest as compensatory rather than default.

It also recognizes that this interest is not justified « by any rule » and is based only on equity.

This reference to equity appears to be a criterion, which is on the one hand too general, and on the other contrasting with the opposite solution of decision no. 5299 of 1989 (5) of the Divisions meeting in full which ex-

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(3) G. SCADUTO, *I debiti pecuniari e il deprezzamento monetario*, Milan, 1924, pp. 130 ff.; C.L. HOLTFRERICH, *L'inflazione tedesca*, 1914-23, Bari, 1989, p. 301.

(4) Court of Civil Cassation, 18th July 1989, no. 3352 in *Foro it.*, 1990, I, p. 933.

(5) Court of Cassation, all divisions sitting together, 1st December 1989, no. 5299, in *Foro it.*, 1990, I, p. 427.

cludes the accumulation of re-evaluation and interest, in the case of creditors of currency and even of a pensioner. The inequality of treatment and the virtual lack of constitutionality of such a criterion, undermine the reference of equity.

Due to the importance of the subjects covered, a discussion on all this that will not necessarily be brief is required.

2. – Let is begin from that part of the decision in which, after having correctly distinguished between the two types of damage, states that the damage due to unlawful action or non-fulfilment, must be evaluated according to the current values when it occurred.

The line of thought of the Supreme Court, in this respect, is unequivocal and peremptory.

With regard to a fact which although lent itself to liquidation inclined to *rei aestimatio*, it repeatedly stated that « the private individual is due to receive the economic value that must be attributed to the commodity at the time the loss occurred ».

And, in no uncertain terms, that the diseconomy « must be liquidated with reference not to the current value at the time of the liquidation but to the value as it was evaluated at the time when [the loss] occurred ».

Once and for all, this is tantamount to excluding the reference to the *tempus rei iudicandae.*

This order of ideas was anticipated by the author of these lines in « The time of reference in the evaluation of the damage » and other writings and reference should be made to their extensive motivations, obviously in line with this decision.

Moreover keeping the investment of the commodity in kind, seems a contradiction, such as to postulate the liquidation of the damage on the basis of the current prices on the decision and at the same time considered converted into a liquid sum, such as to legitimize the *medio-tempore* enjoyment of the legal interest for the delayed payment of the indemnity (6).

Recently, Luminoso has once again proposed in legal literature (especially with regard to the damage from contractual termination) the opinion favourable to fixing its evaluation at the time of the decision, even « tendentially ».

The remark has been made on the solution now accepted by the Supreme Court that it has not followed legal literature very much and is not very articulate, as it does not foresee a plurality of indications (7).

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(6) G. Valcavi, *L'indenizzo del mero lucro cessante come criterio generale di risarcimento del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, pp. 220 ff.

(7) A. Luminoso, *Il momento da prendere a base per la determinazione e la stima del danno da risoluzione*, in *Resp. civ. e prev.*, 1989, pp. 1072, 1075, note 21, 1078.

As if a solution of coherent application, based on the principle of non-contradiction were not to be preferred. This author infers from article 2058 Civil Code the rule that the damaged party is entitled to the equivalent calculated at the last moment because he would be entitled up to that time of the specific recovery. In particular, the contractual damage should be evaluated on the decision, because the majority of cases deal with commodities that would have remained (or so we should presume) in the capital of the damaged party until that time.

The exception would concern only the failed payment of money or commodity for instantaneous consumption, in which case the damage should be evaluated on its occurrence (8).

The unacceptability of this has been shown elsewhere by the author of these lines.

Here it is only the case of noting that not only it is arbitrarily supposed that the commodity would have remained until the decision in the capital of the damaged party, but even the value of replacement as new and, in addition, without costs of storage, without financial charges and even in contrast with the *perpetuatio obligationis* (9). This is absolutely different from the *quod plurenque accidit.*

Here it must be observed that the rule considered above is not inferable from article 2058 Civil Code because this rule only contemplates the right to compensation of the damage « by means of specific recovery » in the cases in which it is « possible » and is not « excessively onerous, with respect to that for its equivalent » (10). This is a completely different proposition compared to that which would attribute the right to « specific fulfilment » up to the decision, even after the request for the termination of the contract or the termination *ipso iure*, in contrast with article 1453, section 3, Civil Code.

This author has even put forth that an evaluation of the damage due to termination, referred to a time prior to the decision, would be « unjustly penalizing for the damaged party » because the termination does not eliminate the non-fulfilment. It has been said that this, despite the termination of the contract, « preserves and cannot fail to preserve its importance both for the past and for the future » (11).

This order of ideas is absolutely unacceptable.

Fulfilment does not necessarily always succeed in the interest of the creditor and consequently remaining obliged to the counter-supply beyond

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(8) A. Luminoso, *op. cit.*, pp. 1075 ff.

(9) G. Valcavi, *Il tempo di riferimento*, cit. in *Riv. dir. civ.*, 1987, II, pp. 44 ff.

(10) Trabucchi-Cian, *Commentario breve al codice civile*, under article 2058 Civil Code., p. 1435.

(11) Trabucchi-Cian, *Commentario breve al codice civile*. under article 2058, Civil Code., p. 1435.

a reasonable time. In the case that the fulfilment takes too long, with the consequent subjective and objective uncertain factors, although the economic value of the service could abstractly configure an advantage, the creditor could prefer the solution of being freed from the constraint of his obligation, rejecting the other's obligation and claiming compensation for the damage.

In short, the legal system leaves the creditor free to provide for his own interests, depending on what he prefers. What else can the legal system do, in the face of the non-fulfilment of the debtor except offer the creditor the remedy to suspend his service (*exceptio inadimpleti non est adimplendum*) and guarantee the possibility of choosing freedom from the commitments made and the compensation of the damage, alternatively to the action of fulfilment with the consequent costs and relative risk?

The conclusion therefore of taking its occurrence as the time of reference of the evaluation of the damage appears the only one that is acceptable and coherent with what is laid down by article 1223 Civil Code on indemnifiability of the direct and immediate consequences, article 1225 Civil Code on the foreseeability of the damage and its amount and article 1227, section 2, Civil Code, on the avoidability of the damage (12).

This criterion also appears the only one than can be hypothesized, with respect to the capital conception of the damage, according to the *Differenztheorie*, also considered that the damage can consists of the failure to enjoy the value of the use of the commodity and not necessarily in the loss or in the loss of earnings relative to its value of exchange.

3. – Let us now go on to that other part of the decision, which, after having correctly distinguished the damage due to unlawful action and from non-fulfilment (to be evaluated with reference to the time of its occurrence) from the damage subsequent to delay, then re-evaluates the first « to time-discount it on the decision ».

The legal interest is then added, as compensation for the damage from delayed payment.

This very contradictory and inadequate conclusion has been justified in the past by the different nature of the credits of value (to which the damage is alleged to belong), with respect to those of currency.

The legitimacy of this category has been opposed, of the conceptual level, by the author of these lines and the Supreme Court, showing that it was informed of it, not only did not openly assume its defences, but openly

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(12) G. Valcavi, *Evitabilità del maggior danno ex art. 1227, 2° comma, c.c., e rimpiazzo della prestazione non adempiuta*, in *Foro it.*, 1984, p. 2820; Id., *Sulla prevedibilità del danno da inadempienza colposa contrattuale*, in *Foro it.*, 1990, I, pp. 1846 ff.

takes into consideration the criticisms, where it states that « nobody wants to deny its empirical and casuistic origin ».

It has its origin in the period of hyperinflation in Germany after the First World War, from the attempt to remedy the inadequacy of legal interest against the flight from the Mark fixing the value of the non-pecuniary service with the theoretical justifications of « maintaining the base of the contractual service » or the « presupposition » of the « good faith » and in conclusion stating that the indemnity is « removed from the principle of nominal value » (13).

However, it is a given fact that the extreme fragility of this distinction and the attempt to give it theoretical dignity, soon appeared with the tendency to extend revaluation to pecuniary credits, with the nature of a mortgage (14), and was superseded by the subsequent phase of economic stabilization.

Today, in another country affected by hyperinflation, such as Brazil, indexation still concerns both the pecuniary service and the non-pecuniary counter-service, thus not distinguishing between the two (15).

On closer examination, the explanation of the concept of « debt of value » offered by its most authoritative advocate and by others, is resolved in a series of apodictic claims of principle.

Moreover, this does not appear defined in positive terms, but only by recourse to « merely negative » criteria such as those whether it is a question of « not subject to the principle of nominal value of money » (16), pr that « is not quantitatively pre-determined and i.e. is illiquid » (17) or it « becomes evident, in particular, in the case of the increase in the purchasing power of the money rather than its decrease » (18) or lastly whether it is a question of a debt of « abstract value » or of « purchasing power of money » (19).

It is hardly necessary to observe that in general the character of a debt of value is not given to that relative to the non-pecuniary counter-service where its value has been converted into a foreign currency (today the ob-

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(13) For bibliographical references on the theoretical justifications in German legal literature between the World Wars (respectively Oertmann. Rabel, Kruckmann, Nipperdey, Geiger, Walsmann and others) see G. SCADUTO, *I debiti pecuniari e il deprezzamento monetario*, Milan, 1924, pp. 147 ff. In case law: Supreme Court of the Reich, 21st September 1920, in C.L. HOLTFRERICH, *L'inflazione tedesca*, 1914-1923, Bari, pp. 301 ff.

(14) Supreme Court of the Reich, 28th November 1923 in C.L. HOLTFRERICH, *op. ult. cit.*, p. 318.

(15) There both the transactions of money or goods deferred in time are indexed to the bonds of the National Treasury.

(16) T. ASCARELLI,, *Le obbligazione pecuniarie*, Bologna, 1963, pp. 443, 558.

(17) T. ASCARELLI, op. cit., p. 472.

(18) T. ASCARELLI, op. cit., p. 445.

(19) T. ASCARELLI, op. cit., p. 457 ff.

ject of measures of currency deregulation) and which in itself has an obvious pecuniary character. Similarly, the generalized extension of re-evaluation by a phenomenon of hyperinflation to any variation of inflation and thus from the flight from money to the opposite one of the tendency to keep assets in a liquid form, despite the decrease of the purchasing value as happened at times close to us (stagflation, slumpflation) does not appear justifiable (20).

The ground where the concept of debt of value shows its absolute inadequacy concerns the obligation of compensation of damage from an unlawful action that has a sum of money as its object.

The obligations to return money, in the case of termination of a contract, are commonly held to be « debts of currency » when they concern the non-guilty party and « of value » when they concern the non-fulfilling party (21).

Debts consequent to pronouncements of nullity, annulment, rescission or price reduction are considered debts of currency (22). Similarly, it is known that the debt of the insurer with the insured is deemed a debt of value and not of currency (23), whilst on the contrary, that of general liability is considered a debt of currency (24).

The credit of the insurer with the damaged party is considered a credit of value (25), whilst that claimed back from the insured for the sums paid to the third party, would be credit of currency (26) and so on.

The reason for this different dogmatic classification and the different treatment of these hypotheses cannot be understood here. Similarly, the qualification of the damage, as a debit of value, on the presupposition that a distinction should be made here between *mensura* and *mensuratum* (27), which is also adopted by this decision, does not appear satisfactory as the

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(20) Amongst the many, DON PATINKIN, *Moneta, interessi e prezzi*, Padua, 1977, p. 17. 26 ff., 45 ff., 253 ff. and amongst the others, G. VALCAVI, *Rivalutazione monetaria o interessi di mercato?* in *Foro it.*, 1980, I, pp. 118 ff.; Id., *La stima del danno nel tempo con riguardo alla inflazione, alla variazione dei prezzi e all'interesse di mercato* in *Riv. dir. civ.*, 1981, II, pp. 332 ff.

(21) Court of Civil Cassation, 12th June 1987, no. 5143; id., 26th February 1986, no. 1203, in Riv. dir. civ., 1990, II, pp. 264 and 265.

(22) Court of Civil Cassation, 12th November 1986, no. 6636 in *Giur. it.*, 1987, I, pp. 1, 1852 ff.; id., 6th February 1989, no. 724, ivi, 1989, I, pp. 1, 1723.

(23) Court of Civil Cassation, 4th June 1987, no. 4883 in *Foro it.*, 1988, I, p. 503.

(24) Court of Civil Cassation, Full sitting of all divisions, 29th July 1983, nos. 5218, 5229, 5220, in *Riv. dir. civ.*, 1990, II, pp. 264, 265; Court of Civil Cassation, 5th July 1985, no. 4064, in *Foro it.*, 1985, I, p. 2588.

(25) Court of Civil Cassation, Full sitting of all divisions, 13th March 1987, no. 2639 in *Riv. dir. civ.*, 1990, II, pp. 264, 265.

(26) Court of Civil Cassation, Full sitting of all divisions, 13th March 1987, no. 2639 in *Foro it.*, 1987, I, p. 3262, Court of Civil Casation, 22nd February 1988 in *Giur. it.*, 1988, I, pp. 1, 1440 and ivi pp. 450 ff., 468 ff.

(27) T. ASCARELLI, *Le obbligazioni pecuniarie*, cit., pp. 450 ff. and 468 ff.

grounds for this presupposition should be proven, as in a system based on the principle of the nominal value, *mensura* and *mensuratum* coincide.

From a certain point of view, the distinction between *aestimatio* and *taxatio* is not acceptable because the former concerns the damage and the latter refers to its compensation and therefore to two different phenomena.

Lastly, the various hypotheses considered by legal literature, do not seem ot justify the construction of a single dogmatic category of debts of value because out legal system does not contemplate monetary re-evaluation, for any of them. but rather fixes a time for the evaluation of the damage (28).

4. – At this stage, let us look at the reasons adopted by the Supreme Court – even on an empirical and casuistic level – to justify the re-evaluation of the damage due to unlawful action and non-fulfilment, whilst legal interest should indemnify damage due to late payment. The decision states, in this regard, that « the re-evaluation is aimed at restoring the situation of the capital pf the private individual, placing him in the situation in which he would have been if the event had not occurred » and in short, « fulfils the technical function of exactly determining the object of the non-fulfilled service », or to put it better, « to time-discount it to the decision ». Unlike this, it attributed to the legal interest the function of covering the diseconomy of the damaged party, caused by the delay, and that is « by the loss of the *utilitas* that the creditor would have drawn from the sum originally due ».

However, these statements conceal the basic error of not realizing that the two remedies are called to compensate the same damage that originates in the delay. Once the specific indemnity has been correctly fixed, at the time of the occurrence of the damage (29), the subsequent re-evaluation and the interest essentially tend to eliminate the later diseconomy, caused by the delay with which the basic indemnity is paid. In this regard, this accumulation cannot fail to appear wrong, because the function of time-discounting the lesser value of a service deferred in time, is generally assigned to the monetary interest, and this is acknowledged in particular by this decision (30), where it described the interest as compensatory which means

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(28) Thus the time of the open succession in the hypothesis as pe art. 747 Civil Code, that of the present date under art. 948 Civil Code, the time of the expense and improvement under article 936 Civil Code, that of the redelivery of the dead stock in the hypothesis of art. 1640, of the live stock under article 1641 Civil Code as well as in that under art. 2163 Civil Code, that of the start of the grazing rights or of the division under art. 2181 Civil Code and so forth.

(29) This rule is drawn from the introduction of article 1219, section 2, no. 1, Civil Code, which reversed the old aphorism that in *illiquidis non fit mora* which dated back to an old passage by Venuelius.

(30) FISHER, *Opere*, Turin, 1974, pp. 814, 833, WICKSELL, *Opere*, Turin, 1977, p. 377; in this sense, although approximately, KEYNES, *Opere*, Turin, 1975, p. 253; on our subject G. VALCAVI, *Riflessioni sui c.d. crediti di valore*, cit. in *Foro it.*, 1981, p. 2117.

nothing other than attributing to them the function of time-discounting the equivalent due.

To realize this, it is necessary to consider the *quod interest* according to the *quod plerumque accidit* which represents the basic rule.

It does not appear that it can ordinarily be supposed that the damaged party would have once purchased or kept in his capital the commodity not performed or removed, such as to justify the time-discounting of its value and on the other hand he would also have had the availability of the pecuniary equivalent, such as to enjoy its yield during the delay and due to this. This accumulation of the time-discounting of the value of the commodity not performed or taken away, and the pecuniary equivalent in which it is concretized, is far from what would ordinarily have happened and contrasts with the distinction of the two different damages, on the contrary confusing one with the other.

From another point of view, the re-evaluation does not appear acceptable because it contradicts the postulate that the damage must be evaluated at the time of its occurrence. Indeed, the criterion is solved, although indirectly. in evaluating the damage « on the decision », instead of on its occurrence, although through the mediation of the changed level of prices and i.e., the current value of the money.

In conclusion, this is equivalent to evaluating the damage with regard to the *tempus rei judicandae.* The evaluation of the damage at the time of its occurrence, ends up by taking on the importance of a merely historical value, whilst the last one and that of the actual evaluation, would be made up of the value re-evaluated at the decision. What cannot be understood, according to this way of seeing, is the scope and role of interest.

On the other hand, recourse only to re-evaluation absolutely does not appear possible, because the height of this is variable and today it is also considerably below the normal yield of money that represents the *quod interest* according to the *quod plerumque accidit* (31). In another sense, however, recourse to legal interest of 5% alone could not and cannot appear adequate to cover the damage from late payment, in relation to the normal yield of money, and thus to time-discount the compensation of the damage from unlawful action or non-fulfilment.

In the past, the compensation of the greater damage contemplated by article 1224, section 2, Civil Code, was to obviate this inadequacy, on condition that this coincided with the normal yield of money and delay means default, as will be said.

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(31) For a comparison in this respect, G. VALCAVI, *L'indennizzo del mero lucro cessante come criterio general di risarcimento del danno da mora nelle obbligazioni pecuniarie*, in Foro it., 1990, I, p. 2220.

The modification recently contemplated by article 1284 Civil Code which increases the legal rate from 5 to 10% (32), makes the plausibility of the criticisms put forward above and the proposed solution even more apparent, unless wishing to procure for the damaged party an exaggerated profit rather than the mere indemnity, with the accumulation of the re-evaluation and the interest of 10%, without speaking of its possible calculation on the re-evaluated capital.

Nor does the different reasons underlying the re-evaluation by the Supreme Court seem acceptable, i.e. that it would be justified by equity. This is the same justification opposed by Ascarelli (33) and in certain ways close to that of good faith proposed at the time by Nipperdey (34).

The reference to equity not only appears too general, but also in contrast with the normal treatment for the ordinary creditor of money, which is not very different from that expected by the fulfilment of an illiquid obligation.

Here there is a reference to the recent decision by the Court with all the divisions sitting together (35), which excludes, for pecuniary obligations, the accumulation of what has been mentioned, as a source of profit and not of mere indemnity.

Lastly, the other reason, put forward by the Supreme Court in this decision, is not acceptable either, i.e. that it is a method that would have the virtue of being simple and practical. Even if one were not to think of the consequences that could derive from increasing legal interest to 10%, today this method appears excessively convoluted and confused, as shown by that passage in the decision which prescribes the calculation of the interest on the capital, gradually re-evaluated and therefore periodically.

This last proposition by the Supreme Court is equivalent to denying to the credit the quality of credit of value and rather qualifying it as indexed pecuniary credit, which is also not justified by the exclusion of the default in the same way.

Here, it is worthwhile recalling the distinction between credit of value and indexed credit which has already been underlined by Ascarelli (36), with an opinion contrary to that of Nussbaum (37).

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(32) Art. 1 of the modifications to the Code of Civil Procedure which has recently become law.

(33) ASCARELLI, *Le obbligazioni pecuniarie*, op. cit., p. 442.

(34) NIPPERDEY, *Kontrahierungzswang und diktierter Vertrag*, 1920, pp. 140 ff., as well as in DIZ, 1922, p. 659.

(35) Court of Civil Cassation, all divisions sitting together, 1st December 1989, no. 5299, *in Foro it.*, I, p. 427.

(36) T. ASCARELLI, *Le obbligazioni pecuniarie*, cit. pp. 474 ff.

(37) NUSSBAUM, *Money in the law*, Chicago, 1939, pp. 180 ff.

This indexation of the compensation cannot be accepted, because it is not contemplated by any rule of law, let alone by any contractual source.

The conclusion therefore appears arbitrary.

5. – At this point, let us now go on to deal with the compensation of that diseconomy of the damaged party which is caused by delay. This is correctly identified in the failure to enjoy that *utilitas* that the creditor would otherwise have had, in the period of the delay, from the pecuniary equivalent, if this had been paid in time. This proposition, with which we agree - clearly shows that the function of discounting is proper to monetary interest and not monetary revaluation which, on the contrary, appears pleonastic.

Where however, we disagree with the decision under examination, is in the point where it relates the indemnifiable prejudice to the mere delay and not to default and thus qualifies the interest as compensatory and not default. The cases in which a delay separate from default can be hypothesized are absolutely marginal (38), and the prejudice can be indemnified only if it derives from a guilty and qualified delay, such as default. The start of the delay in paying the indemnity coincides with the start of the default, in the damage due to illegal action or non-fulfilment of *portables* obligations, under art. 1219, section 2, no. 1 and 3 Civil Code, whilst in the *querables* obligations, it starts from the written demand under art. 1219, section 1, Civil Code, which is referred to the mere will of the creditor. The compensation of the delay of delay is identified, in the final analysis, with that of default.

The Supreme Court recognizes in this decision that the addition of the so-called compensatory interest is not contemplated by any rule and that their justification can be identified only in equity. The reference to equity is this considered as fundamental both of the revaluation and of the so-called compensatory interest, This appears on the one hand too general and on the other, frankly excessive.

In this regard, we have to underline that the illiquid credits do not admit any other type of interest except default interest (39). On the contrary, the compensatory interest is proper of only liquid and uncollectible credits, under article 1499 Civil Code and liquid and collectable credits under article 1282 Civil Code. Above we mentioned that legal interest at 5% is absolutely inadequate to compensate the prejudice due to delay, according to criteria of normality. Legal interest is in fact less than the normal *utilitas* that the creditor would have gained from the equivalent, expressed in national currency during the monetary delay. The inadequacy is then obvious in the event that the damaged party resides abroad, in which any difference

(38) BIGLIAZZI-GERI, *Mora accipiendi e mora debendi*, Milan, 1975, pp. 229 ff.

(39) G. VALCAVI, *L'indennizzo del mero lucro cessante*, cit., in *Foro it.*, 1990, I, pp. 220 ff.

in exchange rate is to be recognised as well as the normal yield of the currency, into which he would have changed it.

The possibility of obtaining the compensation of the greater damage due to delay can by hypothesized only by recourse to article 1224, section 2, Civil Code. The Supreme Court excludes here the applicability of article 1224, section 2, Civil Code because it is not contemplated by article 2056 Civil Code. This remark however does not appear well-founded, because article 2056 Civil Code does not even contain a reference to section 1 of article 1224 Civil Code, which, on the contrary, is used by the decision under examination.

The greater damager as per article 1224, section 2, Civil Code. after the increase of the legal interest to 10%, can be identified in the possible difference between this and the current rate, due to its variable nature and in particular in that with interest on bank loans, for those who normally have recourse to these. Similarly, in the case in which the damaged party resides abroad, both any difference in the exchange rate during the default must also be taken into account and the normal yield of the currency into which he would have made the exchange.

In the final analysis, all this corresponds overall with the *quod interest* according to the *quod plreumque accidit.*

6. – Lastly, let us look at the results of the sum of the annual revaluation rate and the legal interest with respect to the normal yield of money. This sum has been calculated by the author at 22.58% for the period 1979-84, with respect to the normal yield of money equal to 17-09% and in different percentages, for the subsequent periods. The calculation of the legal interest on the revalued capital, leads to a percentage of 26.93% for the period 1979-83, with respect to that 17.09% of the normal yield considered in the same period, and in different and diverging percentages for the subsequent periods.

This decision shows that it is concerned with moderating this last clear excess, where it suggests the calculation of legal interest on a capital which is «gradually revalued».

In this regard, the Supreme Court writes that legal interest must be related to the value of the commodity at the time the damage occurred, «taking into consideration any subsequent changes in the purchasing power of the money until the time of the decision».

The calculation accepted by the Supreme Court is however greater than the same sum of the revaluation and legal interest.

The increase in legal interest from 5 to 10% exaggerates the results of these methods and shows, in short, how far these are wrong and unacceptable. It is hardly necessary here to consider that the sum of the current devaluation calculated on average at 6.5% and of legal interest, will lead to

an indemnity equal to 16.5% with respect to the normal yield of money, equal to 12.58% and the calculation of legal interest on a revalued capital is destined to procure an even more obvious profit.

All this, moreover, is considered net of taxes. To conclude, it appears to the author that the only acceptable criterion is to consider the creditor who is awaiting the fulfilment of a sum to be liquidated, in the same way as a pecuniary creditor and calculate the indemnity for the delay on the basis of the normal *quod interest* under article 1224, sections 1 and 2, Civil Code, which represents the only anchor of definite reference.

Lastly, this also corresponds to the general orientation today of the legislator that is contrary to the cost of living sliding scale and indexations.

Also by this author on the same subject:

– « *In material di criteri di liquidazione del danno in genere ed interessi monetari* » in *Foro Italiano* 1990, I, 933 and in *L'Espressione monetaria nella responsabilità civile*, Cedam, 1994, p. 269.

Monetary revaluation and market interest

1. – This decision offers a cue for a reconsideration *ab imis* of the problem concerning the relationships between inflation, debtor's default and pecuniary obligations.

The statement in the decision that the impact of monetary devaluation does not in itself configure juridical damage, indemnifiable as such, but only an event that can worsen the damage, is to be highlighted. This questions the same orientation, favourable to the revaluation of pecuniary credits, which seems completely appropriate to me.

We are living in a period marked by structural and inevitable inflation which at times is creeping at times galloping, of international bearing, which affects capitalist and socialist countries in the same measure (1). The real innovation of the « new inflation » is that is it not accompanied by a flight of money, as in traditional inflation (the 1923 crisis in Germany was memorable), but by a general inclination to keep great liquidity and a crisis of investments in general (stagflation, slumpflation) which recalls the crisis of the opposite type, i.e. liquidation of assets, as happened in 1929 (2). The high liquidity of the system – this is the other important innovation – means that the market interest of money have remained in recent years, close to this essay, in most countries, at a lower level than the rate of inflation, and even less so has there been room for remunera-

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From « Il Foro italiano », 1980, I, 118 and from « L'Espressione monetaria nella responsabilità civile », Cedam, 1994.

The abovee annotates the following decision:

COURT OF CASSATION, All civil divisions sitting together, 4.7.1979 no. 3776, President T. Novelli, Reporting Judge Scanzano, Public Prosecutor Berri; Izzo vs. Della Gatta: « In the case of non-fulfilment of the pecuniary obligation, the monetary devaluation that has occurred during the default of the debtor, does not justify automatic indemnity in the proportion of the devaluation, but an indemnity commensurate with the effective financial prejudice of the creditor in relation to the use that he would presumably have made of the money, if he had received it promptly, according to a personalized criterion of normality; and to this end every means of evidence may be used, including what is known from common experience and the presumptions inferable from the conditions and personal qualities of the creditor. »

(1) RUOZI, *Inflazione, risparmio, aziende di credito*, 1973, pp. 35 ff.; BAFFI, *Studi sulla moneta*, 1965.

(2) P.A. SAMUELSON, *Worldwide stag-flation*, in *The Morgan Guaranty Survey*, June 1974.

tion above it (3). It has top be added that the government measures aimed at slowing down inflation and at stimulating the economy, have produced effects that varied from recessive to inflationist. Prices tend to show a contrasting and unequal trend and are affected both by inflation and recession. Inflation has also produced, which is of some importance, a redistribution of income and wealth amongst the various social classes and economic categories and has an impact on monetary savings, that this decision correctly considers « an impressive phenomenon » (4). This shows how little the opinion that would have the debtor pay the inflationist cost, as a result of his default, is conciliated with such a complex reality. Monetary revaluation, the rate of which has been greater than that of market interest, is solved in obtaining for the creditor enrichment and in imposing a private penalty on the debtor. This goes much further than the need to restore the damage (*not less, but not more either*).

2. – Decision no. 3776/79 begins with excluding that automatic revaluation follows on the default on the basis of the assumption that this would transform the debt of currency into a debt of value, as had been deemed by the decision of section III, 30th November 1978, no. 5670 (Foro it., 1979, I, p. 15). This assumption has been rejected. However, it contained an aspect of truth, where it showed the fragility of the « distinction » between the two categories of debts. The « liquid » component, in my opinion, « belongs to the entire capital » as a value of the whole, indicates its « payability » as a margin of safety of the same invested component (5) – The default causes « a deceleration of the flow of liquidity » and thus creates greater immobility and finally a « lesser value of the capital, considered as a whole » (6).

In this sense, the debt of currency tends to be confused with the debt of value and the relative dogmatic border becomes imperceptible. The deceleration of the « flow of liquidity » certainly determines the greater da-

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(3) The indicators of May 1979 gave the following rates of inflation and interest at 6 months: Italy, inflation 13.7%, interest 2%; USA, inflation 10.2%, interest 10.7%; Switzerland, inflation 2.60%, interest 2%; France, inflation 10.1%, interest 9.5% and Germany, inflation 3.5%, interest 6%.

(4) RUOZI, op. cit., pp. 153 ff.; L. SPAVENTA, *Effetti distributivi del processo inflazionistico in Italia*, in *Moneta e credito*, 1973, no. 4; BAFFI, *Il risparmio in Italia oggi*, in *Bancaria*, February 1974.

(5) The default causes a reduction in the available liquidity, a lesser payability and a greater immobility of the entire capital: ATONA, *L'analisi psicologica del comportamento economico*, pp. 285-290.

(6) CODA and others, *Indici di bilancio e flussi finanziari*, 1979, pp. 80 f. It is known how important the degree of indebtedness, the degree of liquidity and self-financing of the company are.

mage under article 1224, section 2. Civil Code, which must be indemnified as we will say below.

However, the theory that from belonging to the category of debts of value the need for monetary revaluation is deduced is debatable in general terms. It appears simplistic to me to reduce the *quanti ea res erit* to the *quanti ea res fuit* revalued according to the cost of living, in a period dominated by inflation, but also by the drop in demand, a disputed trend of prices and by a redistribution of incomes and assets.

It is not uncommon that the revaluation of the historical income leads much further than that existing at the time of the decision, and this is stated with regard to a price of a commodity or service (7).

3. – The observations under 1, on the danger that the unaware revaluation of the consequences of the recession leads to a profit for the creditor, in the pecuniary obligations, concern the orientation that subordinates the revaluation to the evidence of an investment that was not made, although planned (8), that which is inferred from presumptions, linked mainly to personal or social qualities (9) and, in the last place and most recently, the most radical one that wanted it automatic (Court of Cassation no. 5670/78, cit.).

To tell the truth, there is only a different degree. the most prudent or the most driven, of an identical way of conceiving the damage under article 1224, section 2, Civil Code, as a damage from the proven or presumed failure to invest liquid capital. The damage from the failure to use money postulates, as a remedy for devaluation, the flight from liquidity, This was undoubtedly typical of traditional inflation, which was characterized by the disincentive to keep onés assets in liquid form and by a high inclination towards investment. However, the « new inflation » is, on the other hand, characterized by the inclination to keep a high liquidity and not to invest. The share quotations are dropping, prices have an unequal trend. In these difficult cases, is it perhaps possible to hypothesize as damage having kept onés assets in a liquid form and not having invested them, as the majority do despite the inflationist massacre?

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(7) The undulatory trend of the prices of commodities, the upswing and drop of the price of this or that commodity with respect to the average index, the rapid obsolescence of fashion and of technology is recalled here.

(8) Most recently, Court of Cassation, 19th October 1977, no. 4463, *Foro it.*, 1978, I, p. 336, with note by A. AMATUCCI; 13th April 1977, no. 1388, id., Rep. 1977, under *Danni civili*, nos. 58, 59; SANTILLI, id., 1978, I, p. 1530.

(9) For FRIEDMAN, Factors affecting the level of interest rate, Chicago 1968, interest rates are determined on the market by a prognosis that takes into account the effect of liquidity, that of income and the expectations of inflation.

The extreme proposal of decision no. 5670/78 was based on a doubly erroneous supposition, i.e., that each of us has a right to keep the purchasing power of the money and that, in any case, the creditor would have protected that money, if received in time, from devaluation. It thus naively transformed *iussu iudicis* our country into an island of monetary stability, in the context of a world agitated by the storms of inflation. This preserving the purchasing power of onés assets on the module of the cost of living is today an investment that has something miraculous about it, and certainly cannot rely on presumptions that are more or less conclusive, or to evidence that is hypothetical to a greater or lesser degree. In times, such as the present, of structural inflation, it is fitting to say that *pecunia, dum in usu vertitur; consumitur et deterioratur* (10).

4. – Decision no. 3776/79, after having excluded that monetary devaluation is in itself juridical damage, has the greater damage under article 1224, section 2, Civil Code, coincide with the presumable monetary gain that each *homo oeconomicus* draws from the systematic and repetitive way of using money, as is typical of his economic category. And as in the context of the same category, each *homo oeconomicus* would maintain his temperament and be successful, it is up to the judge to seek « personalized solutions » which use presumptions, based « on conditions and personal qualities and on the coherent ways of using money ». However, such a solution is unacceptable: referring to the « presumable monetary gain » is, on the one hand, the same thing and, on the other, much worse that revaluing *sic et simpliciter* on the basis of presumptions. Such a gain is much more than the monetary devaluation and would be achieved without any other risk than the burden of presumptions, Similarly, the debtors would be justified between them according to their luck of having a creditor who was more or less skilful and they would also have to pay for his way of being.

The « personalized decision » based on the professional qualities, on previous activity, on the market conditions (*sic*) is solved in venturing into the field of the debatable, in conjecturing personal earnings, in replacing the *iudicare iuxta alligata et probate* by free conviction (11). It is only too well known how income does not always correspond to professional qualities and how, if every economic category in the abstract has its systematic

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(10) The sentence by RAYMUNDI, *Summa*, chapter *De Usuris* G. 7, is reversed here.

(11) LAURENT, *Corso elementare di diritto civile*, II, under art. 1153 Napoleonic Code, n. 577, p. 455, already wrote that the evidence of the loss are very difficult because the money can be for a thousand uses and that the « uncertainty of the valuation would have caused endless and countless disputes therefore the law closes the source of these contestations by attributing the legal interest ».

and repetitive way of using money, the investment in itself, at a time of crisis in investments, is not synonymous with monetary gain.

The court has classified the creditors in a very simplistic way: the economic operator, the saver, the occasional creditor (sic), every other creditor in general (sic), the modest consumer, the rich person with compound uses etc. Browsing through the motivation of this decision, the borderline case of the creditor, exchanged as an average type, can be seen. Thus the average creditor is a man who has to sell his own assets to gain money or he has to renounce purchasing other goods due to a lack of money, he is an entrepreneur who mainly uses his own money and hardly ever that of others, his accounting books are up to date, who is so lacking in savings and credit that he has to borrow money « at excessively onerous conditions, i.e. usurers' conditions »; he is someone who « to put money in the bank he must never have had any and have won the money in a lottery ». Thus our case law ignores that in reality the average type of creditor is, on the contrary, a *homo oeconomicus* who normally has other savings and/or bank credits, he is a consumer who can buy on credit or in instalments, he is a financial broker who practices interest at the market rate and not usurious. Moreover, this at a time when there is an exuberance of liquidity offered cheaply and when the interest rates do not cover the rate of inflation.

Lastly, an average type of creditor, without any other money except that for which he is awaiting payment and however is inclined to investment, as the only escape from devaluation, at a time of crisis in investments and general inclination towards liquidity, does not seem configurable to me. This decision, referring to a presumable monetary gain, is wrong because: A) the compensation of the damage for those working at a loss and who has a more urgent need for money would be excluded. The economic operator who works with a balance or at a loss would not obtain the restoration of that damage which is far greater than that of who, working with a profit, has more money within reach. B) What should be shown, in addition, is not the gain but the impact of the credit on the formation of the gain, i.e. its marginal profitability.

In this regard, we must observe that the credit has a marginal profitability that is inversely proportional to the financial solidity of the creditor (index of success and operating capacity). The less an economic operators earns, the more he has an urgent need for money, the more he earns (and has credit and reserves) the less he is interested in the prompt payment of the credit.

Isn't an economically weak operator or in difficulty impatient to collect his credit and isn't he affected by a greater damage in the case of default? Isn't the greater tolerance in collecting credits perhaps an arm to consolidate onés clientele and acquire others at the expense of the impatient com-

petitor and in the long term isn't this a source of new business and therefore of gain?

5. – As said above, we now have to reconsider *ad imis* the relationships between default, damage and inflation to identify the greater damage under article 1224, section 2, Civil Code, and the adequate relief. The basic problem is that of attaining the objective of relieving the damage without enriching the debtor or creditor. The relativity is in the things: who speaks of effective reinstatement of the capital postulates a decision of value « when the dust has settled » as the saying goes, at a distance of time. Such a decision when the dust has settled would be possible if all the economic and market relationships were imbalanced by inflation in the same proportion and of their correction were possible with the same sign. It is not so. At this point, every damage becomes a damage which « cannot be proven in its precise amount », therefore the *aestimatio* by the judge must be inspired by concrete and penetrating criteria of equity under art. 1226 Civil Code. The *aestimatio* of the damage must moreover correspond with the following particular requirements: A) The damage to be indemnified must be the direct and immediate consequence of the *mora solvendi*, under article 1223 Civil Code. The delay in the fulfilment of the pecuniary obligations produces in the creditor the temporary privation of the expected cash. The direct and immediate consequence of the default is the *deceleration of the corresponding flow of liquidity*. B) The personal performance of the debtor is only instrumental for the creditor to receive the cash. Fungibility characterizes both the performance and its object. Money is the fungible and liquid asset, by definition. C) Our legal system does not want the creditor to have to wait for the performance of the debtor to become excessively onerous because of the long wait (articles 1125, 1226. 1467, 2056 Civil Code), but that he cooperates in not worsening the consequences, using ordinary diligence (articles 1227, 1515, 1516). It demands that the creditor is prudent in seeking his satisfaction and however considerate of the other party, so that he is not exposed to the rebuke of being a joint author of the greater avoidable damage. The creditor is therefore asked, considering the fungibility of money, to « cover himself in time », replacing the money not received, with the same amount borrowed from third parties: specifically realizing that « expectation of satisfaction » that comes after the « disappointed expectation of fulfilment » (12). Nor could he justify, under article 1227, section 2, Civil Code, having put before the satisfaction of the mere waiting of the activity, only instrumental, of the defaulting debtor.

The current bank interest is the « cost of replacement » or of « covering » the money, as a fungible asset, and restoring the condition and flow of liquidity.

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(12) BETTI, *Teoria generale delle obbligazioni*, 1953, II, pp. 35 ff., 55 ff.

The market interest, whether it is the « reward for using capital in any market » (13) or the « bonus of liquidity » (14), is regulated by the profit that can be obtained by the use of the capital on the money market, which is the only use that can be hypothesized for the purposes of damage from default under article 1223 Civil Code in pecuniary obligations (15). It takes into account the factor of inflation, within the limits of the market prognosis under article 1225 Civil Code and does not leave room for further compensation, except on pain of duplicating it, and at the same time, marks the normal degree of efficiency or of marginal profitability of the credit.

And as in the « new inflation », the interest rates recently do not incorporate all the rate of inflation, being affected by the exuberance of liquidity, it is also the lesser cost for the debtor under articles 2056, 1225 and 1467 Civil Code. *The greater damage under article 1224, section 2, Civil Code, is therefore represented by the difference between the legal rate and the market rate.*

The case law favourable to monetary revaluation supposes a market interest that is equal or superior to the rate of inflation (16): this is not so. It exchanges for the average type of creditor the borderline case of a person without any other money than the default credit and nevertheless inclined towards illiquid investment, as the only way out of devaluation, In these conditions, due to the subjective conditions hypothesized, the money is certainly infungible and the use in illiquid form, as well as unreasonable, is in contrast with the general inclination towards high liquidity, against the tendency of recession.

The court, without being aware of it, has focused the solution, where it wrote that the greater damage under article 1224, section 2, Civil Code, « is a direct consequence of the fact that the legal interest has remained fixed at a rate which, in times of considerable monetary devaluation, is solved in a prize for the defaulting debtor » « and is far less than that of the interest which are normally determined ».

The Court has made a diligent review of the greater interest of the tax credits, of State securities etc. and has referred to market interest, as the cost of recovering the money, where it mentions « the greater sacrifices sup-

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(13) MARSHALL, *Principi di economia*, 1972, pp. 150, 348, 695.

(14) KEYNES, *Occupazione, interesse, moneta* (Italian translation), 1947, pp. 145 ff., 197 ff.

(15) The direct damage, under article 1223 Civil Code, is only that of the use of liquidity in the credit market; that of failed investment in real commodities is in direct and mediated, considering the fungibility of the damage.

(16) Revaluating is translated into attributing the interest is a proportion equal to the index of devaluation. For confirmation; where the greater default interest already agreed under article 1224, section 1, Civil Code, were equal to or greater than the index of devaluation, the greater damage under article 1224, section 2, does not exist.

ported by the creditor for having had to otherwise procure the sum of which he awaited payment ». The solution in a nutshell is contained in these preambles: if the event that aggravates the damage comes from the anachronistic legal rate under article 1284 Civil Code, the greater damage under article 1224,, section 2, Civil Code is represented by the difference between the legal rate and the market rate, in the default period; it must be liquidated with this difference of interest and not by means of monetary revaluation. Such a conclusion holds good and this is not insignificant, the nominalistic principle under article 1277 Civil Code, relieves the damage, without enriching the creditor or the debtor, is an objective criterion and therefore equitable and not arbitrary.

6. – It is well known that the market interest rate is established at the point where the demand for investment is balances with the supply of saving (17), and thus the marginal productivity of the capital with the marginal disutility of the wait (18). At the base of the combination of supply and demand there are the rational expectations relative to the use of money and therefore the rate of inflation. The trend of the rate of bank interest is closely correlated to the rate of inflation; it is its thermometer and the market remedy. Indeed, it has been deemed that « for the general level of world prices », the only regulator is « bank interest ». The laws of the so-called inverse correlation have been devised by economists, with regard to the variation of the interest rates and prices of commodities.

According to the rule of direct correlation, the trend of prices pulls up the current rate of interest (19).

The singular coincidence of the acceleration of interest rates and the wholesale prices of commodities has been noticed. According to the so-called inverse correlation, the increase in the interest rates decelerates the increase of prices (20).

The market interest is the current interest, practised by banks for short term credit, in the creditor's town, in the default period. It may be equivalent to the best payable bank interest for the class of amount expressed by the credit or, in the case of an economic operator or evidence, including presumptive, to the most onerous receivable bank interest for the class of customer to which the creditor belongs.

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(17) CASSEL, *Nature and necessity of interest*, 1928, pp. 126 ff.

(18) CARTER, *Distribution of wealth*, 1922, chapter 6.

(19) FISHER, *The rate of interest*, New York, p. 1930, p. 85; FISHER, *Opere*, 1974, pp. 1150 ff.

(20) WICKSELL, *Interesse bancario come regolatore dei prezzi delle merci*, in *Nuova Collana di Economisti*, 1935, vol. 8.

It should be remembered that the Bank Syndicate can be taken as a basis for orientation.

7. – This solution also corresponds to a penetrating interpretation of article 1224, section 2, Civil Code. This rule liquidates the damage from default at the least through legal interest or in the greater proportion previously due. « The further compensation of the greater damage » remains valid. In this regard, we can wonder: did our legislator mean, in the default, to guarantee the stability of the money and ensure, with the legal rate, even a minimum of loss of profits, protected from devaluation? Or did he not guarantee at all the stability of the money (21), but limit himself to remedying the harm of devaluation, already contained in the wider damage due to the lack of availability of money, allowing determination of a greater judicial proportion of the interest with respect to that in the first section? It is the opinion of this author that the legislator, in article 1224, section 2, Civil Code, was more concerned with the induced phenomenon that the more inflation rises, the more interest rates rise. In essence, the legislator did not want to prejudice the right of the creditor to the difference between the default interest under article 1224, section 1, Civil Code, and the best market interest, the variation of which takes into account the greater rate of inflation in course. Nor will the greater interest, which the judge will consider, be added to the default interest under article 1224, section 1, Civil Code, except on pain of duplicating it, as the latter also compensates the damage from default in which the rate of inflation was contained, considered physiological by the normative expectation (22). Further confirmation of this interpretation is given by the last part of article 1224, section 2, Civil Code, which excludes the indemnifiability of the greater damage « if the amount of the default interest has been agreed ».

The meaning of the exclusion of those who have agreed on a specific proportion of default interest could not be understood, except by hypothesizing that the greater damage was for a greater proportion of interest and those who had already provided for themselves did not deserve protection, agreeing on a specific proportion of default interest. Anyone who would argue otherwise would show that they had a distorted idea of default interest under article 1225 section 1, Civil Code, which, instead of repairing the damage from default, should be understood as an advance on the loss of profits *net and not gross of monetary devaluation*.

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(21) The nominalistic principle under article 1227 Civil Code excludes such a guarantee of stability.

(22) On article 1231 c. 1865 cf., for all, ASCARELLI, in *Riv. dir. comm.*, 1930, p. 1379; in *Mon. trib.*, 1932, p. 81.

With this the legislator, in article 1224, section 1, Civil Code, would have been concerned with fixing a rate on the increase of the price of money, guaranteeing for the stable money interest of not less than 5%. despite the opinion of the economists that money in itself does not bear fruit, that t has a high premium of liquidity in which the cost of inflation is included (23). This interpretation appears incoherent with the market logic in the formation of interest under articles 1282 and 1284 Civil Code and would undermine the institutions of the loan and of the current account etc. Indeed, anyone who lends money with interest knows that it will be returned devalued.

Lastly, an impedimental systematic principle of the reference to market interest cannot be deduced from the need for written evidence under article 1284, section 3. The rule only wants to curb the agreements of usurious interest.

Article 1224, section 2, last part, on the other hand, does not require the written evidence in the stipulation of greater default interest that articles 1224, section 1 and 1284, section 1, considered jointly. This excludes that a systematic principle of this kind can be hypothesized.

8. – The opinion shown is reinforced by the disparity of the exchange rate with an inflationist differential between our currency and others. This is all the more topical now that the difference between the inflation in our country and others in the E.M.S. is greater than the most band of flexibility between the various currencies. We said above that inflation has an international character. We ask: why should the stability of the money and thus monetary revaluation to the creditor be guaranteed in Lira and not to the creditor with a clause on the exchange rate in a foreign currency on the base of the rate of inflation of that country?

The consequence would be that the creditor in Lira would earn more than the one in a foreign currency and that the indexation with a foreign currency would not have any meaning.

And why should our currency be an exception to the nominalistic principle with respect to the foreign currency?

Is this perhaps not possible due to further perturbations of the exchange rate? Isn't such discrimination unconstitutional? We have to bear in mind that in other countries such as France (Law no. 619 of 11th July 1975), the greater interest as per the discount rate is contemplated and not monetary revaluation.

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(23) A cautious and problematic mention in A. AMATUCCI, in Foro it., 1978, I, p. 310. There is the full quotation of a debenture when its dividend is equal to the market interest, This regards the correlation between interest and capital value. Interest on revalued capital infringes article 1283 Civil Code.

If we were to opt for the party of more or less occult revaluation for the debt in Lira the only conclusion would be that the best investment would be to have a credit in our currency and a solvable defaulting debtor, therefore which incentive there would be to demobilize such a valuable investment can be seen.

Reference is made to the above in:

A. TRABUCCHI, *La giurisprudenza di merito insiste sulla svalutazione come danno da mora*, in *Riv. dir. civ.*, 1980, II, pp. 191, 196, 199; B. INZITARI, *Profili in tema di interessi*, in *Credito e moneta*, 1992, p. 615, note 85, p. 629, note 111; ID., *La moneta*, p. 235, note 26, p. 248, note 53; M. TRIMARCHI, *Svalutazione monetaria e ritardo nell'adempimento di obbligazioni pecuniarie*, Milan, 1983, pp. 6, 36, 72, 74, 75; G. VISINTINI, *L'inadempimento delle obbligazioni*, in *Trattato di diritto privato*, vol. 9, Turin, 1984, p. 217, note 90; G. BERNARDI, *Sulla prova della quantificazione del danno da svalutazione monetaria*, in *Riv. dir. civ.*, 1984, p. 447, note 4; G. PANZARINIO, *Lo sconto dei crediti e dei titoli di credito*, Milan, 1985, p. 497, note 137; R. PARDOLESI, *Le Sezioni Unite su debiti di valuta ed inflazione: orgoglio (teorico) e pregiudizio economico*, in *Foro it.*, 1986, I, p. 1272; A. AMATUCCI, *Svalutazione monetaria, preoccupazione della Cassazione e principi non ancora enunciate in material di computo degli interessi*, in *Foro it.*, 1986, I, p. 1277, note 7; E. DEL PRATO, *Ritardo nell'adempimento delle obbligazioni pecuniarie: nesso tra inflazione e danno*, *Giur. it.*, 1986, I, 1, p. 224, note 35; M: EROLI, *Nominalismo e risarcimento nei debiti di valuta*, *Giur. it.*, 1986, I, 1, p. 1391; M. ANTINOZZI, *Diritto e pratica delle assicurazioni*, 1987, p. 364, note 3; P. TARTAGLIA, *Il risarcimento non automatico del danno da svalutazione e le categorie creditorie*, *Giust. civ.*, 1986, pp. 1611, 1612, notes 10 and 12; F.M. CERVELLI, *Ancora in tema di interesse nelle operazioni bancarie in conto corrente*, in *Giust. civ.*, 1987, p. 1302, note 22; S. DE MARINIS, *I più recenti sviluppi della giurisprudenza delle Sezioni Unite in tema di impresa e danno da svalutazione monetaria nelle obbligazioni pecuniarie*, *Riv. dir. comm.*, 1988, II, p. 300, note; T. CAVALIERE, *Nota in tema di risarcimento del danno da obbligazioni pecuniarie*, in *Giur. it.*, 1990, I, 1, pp. 764, 767; V. REBUFFAT, *Ipotesi di cumulabilità degli interessi moratori con la rivalutazione monetaria nella liquidazione del maggior danno nell'obbligazione pecuniaria*, *Giust. civ.*, 1990, p. 2116, note 3.

Also by the author on the same subject:

– «*La stima del danno nel tempo con riguardo all'inflazione, alla variazione dei prezzi e all'interesse monetario*», in Rivista di Diritto Civile, 1981, II, 332 and in L'espressione monetaria nella responsabilità civile, Cedam 1994 (from p. 53 to 78 Espressione Monetaria).

The indemnity of mere loss of profits as a general criterion of compensation of damage from default in pecuniary obligations

1. – The decision reviewed is in line with the orientation that has now justly become dominant and which has been authoritatively confirmed by the recent decision no. 5299/89 of the civil court, all divisions sitting together. It concludes correctly that legal interest and the whole rate of revaluation can be accumulated to compensate the damage from default in pecuniary obligations.

The pronouncement of the civil court, all divisions sitting together, deserves particular attention because it has concerned the emblematic case of a modest consumer (in the particular case, of a pensioner) who would probably have spent the payments of his pension (if he had received them punctually) on consumer goods. The reasoning of the court, from a certain point of view, is flawless. We cannot hypothesize that the pensioner would have spent that money on consumer goods, in order to benefit from the revaluation, and on the other hand he would also have saved it, to benefit from the interest. If we assume that he would have saved that money, in order to obtain compensation for the savings (i.e. interest), we must also hypothesize that he would normally have spent it on consumer goods, but at the level of new and higher prices of the deferred time of consumption.

Obviously, if this is valid for the pensioner, it is also generally valid for all. Indeed, it obeys elementary and inescapable criteria of economic logic, which remains – on close examination – the only instrument to rely on to identify the situation in which the creditor would have been, if the obligation had been promptly fulfilled (*Differenztheorie*).

The *quod plerumque accidit* does not allow us to consider that the creditor, in general, would have spent and saved the amount due at the same time if he had received it in time. This is the same as saying that the *quod*

This essay annotates the following decision:

COURT OF CASSATION, Labour section, 15.2.1990 no. 1133, President Menichino, Reporting Judge De Rosa, Public Prosecutor La Valva; Marcon vs. INPS (Italian Social Security): « *The claim of the pensioner who complains of the non-payment of legal interest on the amounts liquidated by way of revaluation for the late payment of the pension payments is to be dismissed.* »

interest cannot be identified together in the revaluation of the amount and in the monetary interest (1): the actual damage cannot be accumulated here with the loss of profits (2).

The possibility of surmising actual damage (for the loss of the purchasing power of the money) is excluded by the nominalistic principle contemplated by article 1277 Civil Code, which is too often ignored, for no reason. The hypothesis that can normally be configured of damage from non-fulfilment of an obligation which has as its object a sum of money, that is legal tender (both liquid since the origin or to be liquidated subsequently) is that of loss of profits, It coincides, according to the *quod plerumque accidit*, with the normal yield that the creditor would have drawn from a homogeneous use, i.e. financial without a character of risk.

The aforementioned « normal yield of the money » corresponds to the *quod interest* according to the *quod plerumque accidit*, that restores, in compliance with general economic rules, the situation that there would have been of the obligation had been promptly fulfilled, and is also in line with articles 1223, 1225, 1227 section 2 and 2056, section 2 Civil Code (3).

Monetary interest, in the varied range of rates, also allows personalizing the compensation. In general, it will correspond to the highest rate of fixed income (Treasury bonds or bank savings formulas), excluding the uses entailing risk in shares (4).

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(1) In the same sense, Court of Cassation, 14th January 1988, no. 260, *Foro it.*, 1988, I, 384 and with note by G. VALCAVI, ibid., 2318. The actual damage could be hypothesized only where it is proved by the creditor that he had to borrow the money, i.e. as a cost of replacement. In this case, however, the loss of profits is not indemnified. The accumulation of the actual damage and of the loss of profits, on the other hand, appears possible to hypothesize only with regard to a foreigner who also complains of the lowering of the exchange rate of our currency under article 1278 Civil Code, with respect to his currency, On this point, see VALCAVI. id., 1989, I, p. 1210.

(2) On art. 1224, section 2, Civil Code and the remedies for devaluation: Court of Cassation 4th July 1979, no. 3776, *Foro it.*, 1979, I, p. 2622, with note by PARDOLESI; 5th April 1986, no. 2368, id., 1986, I, p. 1265, with notes by PARDLESI and AMATUCCI, 1540, with note by VALCAVI and, 3034, with note by QUADRI, in legal literature: NICOLÒ, id., 1944-1946, id, pp. 41 ff.; PARDOLESI id., 1986, id., 1986, I, p. 1265; AMATUCCI, id., 1979, I, p. 1987, BIANCA, in *Giur. it.*, 1979, IV, p. 129; BERNARDI, in *Riv. dir. civ.*, 1984, II, p. 445; CAFFÈ in Foro it., 1979, I, p. 1985; DI MAJO, in *Giur. it.*, 1979, I, 1, p. 193; INZITARI, id., 1986, I, 1, p. 1161; TRABUCCHI, in *Riv. dir. civ.*, 1980, II, p. 195; TRIMARCHI, *Svalutazione monetaria e ritardo nell'adempimento delle obbligazioni pecuniarie*, Milan, 1983.

(3) For recourse to the indemnity of loss of profits in the case of the saver, see Court of Cassation, all sections sitting together, 5th April 1986, no. 2368, cit. On the other hand, as a general criterion of indemnity: VALCAVI, in Foro it., 1980, I, p. 129; Id., id., 1981, I, p. 2112; Id., id., in *Riv. dir. civ.*, 1981, II, p. 332; Id., in *Foro it.*, 1986, I, p. 1540; Id., in *Riv. dir. civ.*, 1987, II, pp. 31 ff.; Id. in *Quadrimestre*, 1986, pp. 681; Id., in Foro it., 1988, I, pp. 2318 ff.; Id., id., 1989, I, pp. 1988 ff. In the same sense, more recently in the USA, there has been recourse to market monetary interest as opportunity cost, KEIR and KEIR Business Lawyer, 1983, p. 129.

(4) This concerns fixed income and not variable income such as, for example, share investments due to their nature of risk. There is a mention in the opposite direction in AMATUCCI, in

2. – The logic of indemnities, based exclusively on the loss of profits, satisfied inalienable requirements of juridical and economic logic.

In the first place, it postulates a negligent delay and it is coherent with this, whilst the « value » logic does not take the « default » into consideration, placing itself, in the final analysis, outside the general principles of the system (5), and it also appears deeply contradictory where, on the one hand, it does not take the default into consideration and, on the other, it argues by analogy from the default *ex re*, on the illicit, to then generalize it, releasing it from this supposition. It also retraces the interest back to its function as compensation for the loss of profits, caused by the default, avoiding recourse to anomalous figures, such as, for example, the so-called compensatory interest, which obeys a logic of the type that is refused by today's case law.

In this regard, we record an unjustified extension from residual hypotheses, relative to liquid and non collectable credits (under article 1499 Civil Code) to illiquid credits which are however collectable (such as compensation of damage from non-fulfilment). This practice leads to duplicating the revaluation and the interest, to try and compensate the specific damage for the delay with which the indemnity « equivalent » to the damage is paid.

The recent decision no. 3352/89 of the Supreme Court has correctly recognized the default character of this interest. Legal interest, as per articles 1224, section 1 and 1284, Civil Code, considered jointly, far from exhausting the loss of profit deriving from the negligent delay – represents a fixed and presumed, not exhaustive, measure of the « loss of profits » which in its entirety must be integrated by the differential, with respect to the normal yield of the damage. This differential represents the »greater damage » under article 1224, section 2, Civil Code.

Moreover, the whole history of the legislative discussions that preceded fixing the legal rate of interest, from the Napoleonic Code onwards, is in this sense (6).

3. – From another point of view, recourse to the indemnity of the mere loss of profit (i.e. in terms of normal yield of money) also represents the only measure in line with the laws of economy. It is absolutely vain to

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Foro it., 1986, I, pp. 1273 ff. The normal use of savings today is in Treasury bonds or in public debt securities, due to the high return, and this also concerns asset management by banks for their clients.

(5) All the Divisions sitting together, whilst they exclude the automatic revaluation and the accumulation with interest, in the case of the pensioner, confirm it in favour of damaged parties in general (credits of value). They do not consider, however, that this leads to a profit and in any case to unjustified and generalized disparities of treatment.

(6) On the discussions on article 1153 of the Napoleonic Code before the French Council of State of the time,. VALCAVI in *Riv. dir. civ.*, 1981, II, p. 332, note 45.

search for the default damage in a decreased « value of money » because the latter, due to the unlimited options that accompany it and its nominal value, is an absolutely abstract yardstick. Illustrious economists have written in their time that the reserve of purchasing power is made up of the money itself (7) and that it is unthinkable to measure it differently (8). It therefore appears illusory to identify the « value » of the money in the index of a purchasing power, by its variable nature, fixing it in time (9). The default damage, on the contrary, consists more properly of the loss of profits and therefore – as mentioned – of that compensation which the creditor would normally have drawn from the saving of the sum considered, although having postponed the present expenditure to the future (here we speak of *utilitas temporis*, of time preference).

In our case, it is the normal compensation for that particular form of saving which is forcibly induced by the non-performance of the debtor.

Market interest (Treasury bonds, Treasury Credit Certificates, bank interest in the various forms) is established – as shown by economic studies – at the point where the demand for credit is balanced with the supply of the market and indemnifies the loss of profit, according to the *quod plerumque accidit* (10). It compensates, by absorption, every different depreciation consequent to the temporal deferment, it takes into account the most differing factors and i.e. the volume of liquidity, the expected inflation, the measures to cool down the economy, the exchange rates and so on (11). The solution based on the loss of profits, i.e. on the normal monetary interest, is the only one to have a real justification because it has its roots in economic reality, whilst the solution based on revaluation has an artificial and arbitrary character.

The importance attributed to the loss of profit, to the detriment of revaluation, has been concretely confirmed in the economic phenomena of our time and in the reciprocal connatural variability of the levels of prices of goods and monetary interest.

The most recent inflation has been characterized, for a lengthy period of the decade considered (1979-1983) by the absolutely new phenomenon of the drop in the demand for goods (stagflation, slumpflation) and, as a consequence, by a high tendency to keep savings in liquid form, despite the reduction in the money's purchasing power (the so-called « Harrod ef-

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(7) EINAUDI, in *Riv. storia economica*, 1939, pp. 133 ff.

(8) MARSHALL, *Opere*, Turin, 1972, pp. 136, 137, 227, 356-359.

(9) For a superseded historical precedent: L. EINAUDI, *La moneta immaginaria da Carlo Magno alla rivoluzione francese*, in *Riv. storia economica*, 1936; L. EINAUDI, R. BAHREL, A, V, JUDGES, *I prezzi in Europa dal XIII secolo ad oggi*, Turin, 1980, pp. 531 ff.

(10) The economists mentioned in VALCAVI, in *Foro it.*, 1980, I, p. 120, notes 13, 14, 17, 18, 19 and 20.

(11) VALCAVI in *Foro it.*, 1986, I, pp. 1540 ff.

fect») (12). Monetary interest, in this period, remained constantly below the rate of inflation.

On the other hand, in the period of time closer to us (1984-1989), following the stabilization of the purchasing power of the money, there has been the opposite phenomenon of an increase in the demand for commodities and a decrease in liquidity, with significant effects on monetary interest, which rose to levels considerably above the rate of inflation. This is represented by the following data:

Years	Normal yield of money (Treasury Bonds)	Rate of inflation	Prime rate
1979-83	17.09%	17.58%	19.66%
1984-85	14.15%	9.60%	17.11%
1986-88	11.08%	5.23%	13.22%
1989	12.58%	6.60%	13.83%

At the time of writing, the indemnity for the loss of profit, i.e. compensation for saving, is far above the measure of revaluation that should compensate the consumer. It must be added here that the solution based exclusively on the loss of profit allows a more homogenous and generalized indemnity too creditors and a more rational and convincing use of the assumptions. This also avoids those disparities of treatment, one of which was mentioned the ruling of 7th February 1990 of the Supreme Court, with the consequent problems of normative constitutionality.

4. – Let us now return to the case of default indemnity of our pensioner and the disparity of his treatment with respect to the other categories of creditors, which keeps up with the prohibition of the accumulation and legal interest, as the divisions sitting together correctly ruled.

The pensioner should therefore make do with the monetary revaluation only, i.e. a nominal increase of the sum due of 17.58% for the period 1979-83, of 9.60% for 1989-85, of 5.23% for 1986-88 and 6.60% for 1989.

The penalizing and discriminatory character of such a treatment to the detriment of such a vast category cannot fail to be seen.

Let us now consider the opposite conclusion, which was previously in favour and which allowed the accumulation of monetary revaluation and legal interest. Preliminarily, the fact that the sense in summing the monetary

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(12) The most recent studies on the importance and role of «reserves» and «monetary balances» in the period of recent inflation have shown how, far from hypothesizing a flight of money, as occurred in the 1920s, this has maintained, on the contrary, the function of a reserve of values. See DON PATINKIN, *Moneta, interessi e prezzi*, Padua, 1977, pp. 36-30, 45 ff., pp. 128, 222, 253 ff,, pp.. 40 ff.

revaluation to a share of the loss of profit equal to 5% cannot be seen must be recorded.

The accumulation of the revaluation and legal interest, compared for the periods considered with the parallel return of the public debt securities (especially the Treasury bonds), highlights however the following data:

Years	Normal yield of money (Treasury Bonds)	Accumulation of revaluation and legal interest	Prime rate
1979-83	17.09%	22.58%	19.66%
1984-85	14.15%	14.60%	17.11%
1986-88	11.08%	10.23%	13.22%
1989	12.58%	11.60%	13.83%

The accumulation here leads to a disproportionate profit of more than five points above the normal return on money for the period from 1979-83, whilst it is established below for the other periods. This leads to the conclusion that after the drop of the rate of inflation at today's levels, the accumulation in the last period remains under or at the limit of the normal return of money.

Let us now go on to compare the case of our pensioner with that in which there is automatic revaluation, with the addition of the legal interest calculated on the revalued capital (such as the credits from employment and those of value).

The first comparison to be made, for belonging to the same social sphere, concerns the pensioner and the employed worker who is protected by articles 429, section 3, Code of Civil Procedure considered jointly with 150 provisions of enactment Code of Civil Procedure. In the past, the author of these lines pointed out that the textual content of article 429, section 3, would not strictly speaking authorize an interpretation other than that laid down by article 1224, section 2, with the exclusion of the variant that here the default would operate *ex re*. And he also observed that revaluation, laid down by article 150 provisions of enactment, should be restricted only to the possibility that the rate of inflation were greater than legal interest and therefore that part of inflation that exceeds 5%.

This opinion had no follow-up. On the contrary, the opinion that proceeds with monetary revaluation in its entirety and legal interest is also added. calculated on the revalued capital, is dominant. This conclusion encounters the same remark of illogicality that underlies the prohibition of accumulation, stressed by case law today. In any case, a special anomalous character should be attributed to the regulation. The disparity of treatment between the pensioner and the employed worker has recently led, as mentioned, the labour section of the Supreme Court, with ruling of 7th February 19909, to raise a problem of constitutionality. However, it is foreseeable

that before long, employed workers will be complaining of the inadequacy of the treatment based on revaluation, instead of on the higher monetary interest, and to raise the same problems of disparity of treatment, for opposite reasons.

The same discourse, relative to the disparity of treatment, is to be made between the pensioner and whoever belongs to the category of creditors of value, on the one hand, and the damaged party, or those who belong in general to the evanescent category of credits of value, on the other.

In this case too, the legal interest on the revalued capital is added to the automatic revaluation, in its entirety. The inequalities end here to be dilated beyond all description, and take on dimensions of enormous bearing.

It is now time – in my opinion – to proceed with a critical review *ab imis* of these distinctions and dogmatic constructions which have no basis in the law and are based on some abused cryptotypes. The author of these lined refers the reader to what he wrote elsewhere (13).

Despite this, it is however fitting to compare the normal yield of money, for the periods considered, with the accumulation of revaluation and the interest on the revalued capital.

The resulting picture is as follows:

Years	Normal yield of money (Treasury Bonds)	Revaluation + legal interest on revalued capital	Prime rate
1979-83	17.09%	26.93%	19.66%
1984-85	14.15%	15.50%	17.11%
1986-88	11.08%	11.01%	13.22%
1989	12.58%	11.60%	13.83%

This comparison shows how the difference is magnified (almost ten percent) for the period 1979-83 and, on the other hand, for the later years, the accumulation is established on values at the limit or below the normal yield of money: this confirms the arbitrary nature of the solutions based on monetary revaluation and on the interest calculated on the revalued capital, and how the safe and reasonable point of reference for the default indemnity is made up only on the compensation of loss of profit, in terms of normal return of money.

This was recently noticed by article 1 of the bill of amendments to the Code of Civil procedure, approved by the Senate on 28th February 1990, which increases legal interest from 5% to 10%. Any solution based on fixedness is destined in time to be excessive or lacking with respect to market interest, due to its variable nature.

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(13) VALCAVI in *Riv. dir. civ.*, 1987, II, 56; Id., in *Quadrimestre*, 1986, II, pp. 681 ff.

The compensation of the greater damage from default, laid down by article 1224, section 2, Civil Code, would end up by losing any meaning insofar as the legal interest exceeds the market interest, whilst on the contrary the role of instrument of liaison of this rule has to be acknowledged with the *quod interest* according to the *quod plerumque accidit.*

5. – To conclude, we will say that the treatment of the pensioner, limited to revaluation alone, therefore appears very unjust.

The solution does not consist, however, of adding the legal interest to the revaluation, but of assuring for the pensioner the normal return of money, which in recent years is far greater even that the accumulation mentioned. To obtain this, it is sufficient for the pensioner to infer that he would not have spent, by saved the sum which was not received in due time, in order to appear as a saver or occasional creditor rather than as a consumer. Indeed, the sections sitting together recognize this treatment for the pensioner for the (larger) sums represented by the arrears, for which it appeared better to hypothesize that they were destined for saving, rather than the purchase of consumer goods. It is like saying that the same pensioner should have received an unequal treatment for the same sums of pension that he expects to receive, depending on their amount.

The case of the pensioner is also significant to verify the validity of the more general conclusion, according to which the *quod interest* of article 1224 should be identified in the normal return of money (or in its replacement cost if this has been borne).

It also represents the coherent remedy to indemnify the specific damage for the delay with which the indemnity is paid; this damage must absolutely be kept separate from the compensation of the other basic prejudice which arises from unlawful behaviour or non-fulfilment. The latter must be evaluated according to the current values of the time when it occurs.

Monetary interest also fulfils the function of linking the different values, expressed in money, existing at different times (the so-called discount rate).

This further shows how economic phenomena cannot be reduced to rigid patterns of pre-constituted dogmatic formulas; on the contrary, their validity must be tested on the test bench of economic reality. In conclusion, it is necessary to have great concern for the economic analysis of law, which cannot be ignored, especially on this subject.

Reference has been made to the above by:

A. LUMINOSO, *Risoluzione per inadempimento*, Commentario Scialoja and Branca, Bologna, 1990, p. 325, note 33; U. BRECCIA, *Le obbligazioni*, Milan, 1991, 340; P.

TARTAGLIA, *Il modesto consumatore va in pensione*, in *Foro it.*, CFTR, 1991, I, 1331.

Also by the author on the same subject:

– «*Sul risarcimento del maggior danno da mora*» in Foro italiano, 1986, I, 1540 and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 91 and ff.

The problem of monetary interest in compensation of the damage

1. – In recent years, the need for an in-depth analysis of the subject concerning monetary interest in general and the theoretical and practical correctness of their distinction into compensatory, equivalent interest and default interest, from the point of view of the identity or diversity of function has been underlined from several sides (1).

In particular, this need has been felt with regard to the compensation of the damage where, not only here (but also for example in the legal literature and case law of France, Spain and goodness knows how many other countries), legal interest justified as compensatory interest continues to be added.

This addition, on a theoretical level, does not allow fully verifying the adequacy or inadequacy, both by exaggeration and by default (2), of the criteria of evaluation of the damage, such as that based on the prices at the time of the decision or that based on automatic revaluation or devaluation, in correlation with the rate of inflation or deflation (the so-called credits of value).

On a practical level it often leads to magnifying the amount of compensation, with exasperations such as those of summing the compensatory and default interest (3), or calculating the interest on the revalued capital (4) or,

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From « Responsabilità civile e previdenza », 1987, I, p. 3 ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

(1) For example, PASANISI in the preface to the issue of the Lombardy section of AIDA dedicated to the Conference of 24th March 1982 on Devaluation and Insurance, speaks correctly of the « difficult march along the uncertain borders which divide default interest from equivalent and compensatory interest ». The existence of these borders is recalled into question by GIORGIANNI in *L'inadempimento*, Milan, 1975, p. 159 and by the decision of 22nd April 1980, no. 60 in *Foro it.*, 1980, I, section 1249 of the Constitutional Court where he mentioned an identical function seen from two different points of view.

(2) The sum of the interest and revaluation can be excessive or, on the contrary, lacking, in the case of deflation. The same can be said if the interest is added to the indemnity evaluated according to the prices at the time of the decision, depending on whether they are on the upswing or downturn.

(3) Court of Civil Cassation, 22nd September 1979, no. 4914, in *Rep. Giust. civ.*, 1979, see *Lavoro* p. 484.

(4) Court of Civil Cassation, 13th July, 1983, no. 4759, in *Mass. Giust. civ.*, 1983, no. 1677, amongst the many.

lastly, revaluing these (5). Now however, the drop of inflation to rates equal to or below legal interest (6), or even negative, as is happening in Germany and the perspective of a possible calculation in reverse of capital and interest, calculated on that, leads to reconsider the problem in new and wider terms.

In the end, many current propositions will have to be reviewed: this is via a better understanding of the economic phenomenon, in its various aspects, as the presupposition for an in-depth examination of the juridical phenomenon.

In my humble opinion, the road to follow and which we will strive to outline here, is still very long.

2. – It is opportune to say immediately that the analyses made by jurists on monetary interest are mainly of a descriptive nature and therefore underline the pecuniary, accessory, homogeneous, proportional and periodical nature of it (7).

The essence of monetary interest does not however seem to have been understood by them in its extent as when it is understood only as the profit for the use of capital and therefore assimilated to the natural profits of commodities depending on the current axiom on the normal profitability of money (8).

There is no reason to be surprised that this opinion ends up by leading to the consideration of the calculation of interest as always compulsory and, what is more, net of the rate of inflation.

This has a magnifying role in the compensatory interest and leads to consider legal interest, as real interest, i.e. above the rate of inflation (9).

This vision is however erroneous only if we consider that hoarded money does not produce a profit and, in a phase of inflation, undergoes the inexorable erosion of the purchasing power (10).

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(5) Court of Civil Cassation, 17th November 1979, no. 6004, in *Rep. Giust. civ.*, 1979, see *Lavoro*, p. 475.

(6) At present the rate of inflation is below the legal rate of interest. That relative to wholesale prices is nil (Corriere della Sera, 15th May, 1986).

(7) Including; MESSA, *L'obbligazione degli interessi e le sue fonti*, Milan, 1932, pp. 6, 19, 21, 23; LIBERTINI, in *Enciclopedia del diritto*, XXII, see *Interessi*, pp. 95 ff.; QUADRI, see *Interessi* in Trattato di dir. priv., Turin, 1984, vol, IX, p. 528.

(8) See for all the jurists linked to the axiom of the normal profitability of money: MESSINEO, *Manuale di diritto civile e commerciale*, Milan, 1954, II, §115, 345.

(9) Until some time ago, due to the so-called effect of exuberance of liquidity and the poor decade for credit, real interest was negative. Now, however, it is mainly positive. On the subject: a conference was held on 14th-15th September 1983 on real and nominal interest by the Society of Economists.

(10) It can therefore be said that *pecunia dum in usu vertitur; consumitur et deterioratur*.

The essence of interest has however been understood with great insight by modern economists, including Bohm-Bawerk in its nature of a phenomenon linked to credit and to pecuniary credit in particular and therefore to the lesser percentage use of a deferred payment of money compared to cash payment (11).

This includes the other characteristic concerning the premium of liquidity (12).

It is fairly obvious that interest (whether conventional or legal, compensatory or default) has its explanation in this lesser preference for available money on credit compared to that in cash and therefore represents the rate of discount.

This function of discounting the value performed by monetary interest is mainly understood by those who attribute to article 1499 Civil Code the significance of a general rule, aimed at rebalancing a deferred payment with respect to a cash payment.

A large factor of misunderstanding is represented by the difference between the legal rate and the market rate so that the legal rate seems something different compared to the ordinary rate.

The history of the relations between the legal rate and the normal rate shows how the height of the legal rate has its origin in that of the market rate, current at a time close to its codification (13).

That the legal rate, due to its fixedness, is destined to remain behind or exceed the normal rate, in a period of variation of the rates, is fairly obvious.

However, we now have to look at market interest, as the only normal rate of discount which ahs been mentioned (14).

Everybody knows that the legal rate has an exclusively supplementary effect.

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(11) BOHM-BAWERK, *The positive theory of capital*, London, 1891, p. 249.

(12) J.M. KEYNES, *Opere*, Turin, 1978.

(13) The legal rate of 5% was codified by article 1153 of the Napoleonic Code on the basis of that of the previously current market one; it was maintained by article 1231 of the 1865 Civil Code because it corresponded to that on short term credits in the 19th century and lastly by article 1284 in the present Civil Code with the motivation that it corresponded t the official discount rate in force from 1905. G. VALCAVI, *La stima del danno nel tempo con riguardo all'inflazione alla variazione dei prezzi ed ai tassi di mercato* in Riv. dir. civ., 1981, II, pp. 342 ff. and note 45. For the German experience: ROLL, *Die hohe der verzugszinsen DRK oktober 1973*, which contains wide proof of the correspondence of legal interest at 4% with the market interest in the last decades of the 19thc century until 1895, with particular attention to mortgage interests in Prussia and the average return of the German kingdom.

(14) This is the common opinion among economists. On the contrary, jurists seem to consider as the discount rate the legal interest, giving rise to discrepancies of value. thus LIBERTINI, *op. cit.*, p. 118.

What appears absolutely underestimated is the reference by our system to market interest and thus its normative value (15).

This is particularly transparent in the case in which the legal rate is less than the market rate.

Article 1224, section 2, Civil Code, in the case of default interest, and article 1207, section 2, Civil Code, in that of equivalent interest, allow recovering the difference between the legal rate and the market rate, identifying thus in the amount of the latter, that correctly due according to the *quod plerumque accidit*.

Indeed, the greater damage from default as per article 1224, section 2, Civil Code, is increasingly identified by case law, without other evidence that the use of presumptions, in the difference with interest on bank deposits, or with the return of public debt securities which the creditor would probably have drawn from the financial use of money, if received in time (16).

Similarly, as article 1207, section 2, Civil Code, establishes the rule that the debtor, although he were not in default, owes the creditor, even in default, the profit he has enjoyed, *medio-tempore*, and this can be presumed in the amount of that shown above, concern will have to be practically shown to the market rate, especially if higher than the legal rate (17).

It is now opportune to put forward one notion.

Market interest, as has been recently felt, including by case law (18), incorporates the inflationist expectations, in the context of the contingent conditions of the credit and savings market.

The usual remedy to obviate the inadequacy of legal interest, summing to it the rate of monetary devaluation, is equivalent to procuring a profit for the creditor, in that this operation exceeds the market interest.

Vice versa, insofar as it remains at a lower level, it will appear an inadequate indemnity.

In both hypotheses, as will be seen below, this is a proposal for an inexact remedy.

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(15) The valorization of normative references to the current yield of money is fairly recent, Thus, in addition to my work *Rivalutazione monetaria od interessi di mercato?* in *Foro it.*, 1980, I, p. 118; *Riflessioni sui crediti di valore sui crediti di valuta e sui tassi di interessi*, in *Foro it.*, 1981m I, p. 2112; *La stima del danno nel tempo, cit. loc. cit.; Ancora sul risarcimento del maggior danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1986, I, p. 1540, also AMATUCCI in *Foro it.*, 1986, I, p. 1273, R. PARDOLESI, *ibidem*, p. 1265.

(16) Thus, recently, Court of Civil Cassation, 5th April 1986, no. 2368, in *Foro it.*, 1986, I, p. 1265.

(17) The reference to the normal rate is the current one in German case law, as the greater damage from default: INZITARI, *Profili in tema di interessi, credito e moneta*, Milan, 1982, pp. 599 ff.

(18) Thus the Constitutional Court, 22nd April 1980, no. 60, in *Foro it.*, 1980, I, section 1249.

3. – Interest is usually classified into default and non-default, depending on whether the deferment of the pecuniary performance takes place or not *iniure* by the debtor, for the same to be placed in default (under the law, according to art. 1219, section 2, nos. 1 and 3 or on the request of the creditor under article 1219, section 1, Civil Code). They are regulated by article 1224 of our Code.

Default interest concerns a liquid or illiquid pecuniary credit that is already collectable (19).

Non-default interest is in turn distinguished, not without conflicting terminology, in equivalent and compensatory (20).

The former is regulated by article 1282 Civil Code and concerns the simple delay in the case of a liquid and collectable debt (21).

Compensatory interest is codified by article 1499 Civil Code and concerns a liquid credit that is not yet collectable (22).

Both therefore have as their object pecuniary liquid credits.

Legal literature and case law, through a straining of article 1499 Civil Code, have created a general category of compensatory interest extending the rule by analogy to illiquid credits, such as for example that of compensation of damage.

However, here there is no point of contact which justifies the analogy except a general reference to equity, in the case in which the debtor is in possession of sums owed to the creditor.

This appears frankly excessive.

At this stage, it is opportune to make a digression on the relationship between liquidity and collectability of the credit.

The opinion that a credit, to be collectable, must already have been liquidated is fairly common (23).

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(19) This is coherent with the abandonment of the principle of *illiquidis non fit mora*, by our legal system; Court of Civil Cassation, 20th May 1976, no. 1813 in *Rep. giur. it.*, 1976, p. 2968. no. 282 amongst the many.

(20) The terms of counterposition are considered old by GIORGIANNI, *op. cit.*, p. 146.

(21) In general, the requisite of the liquidità of the credit tends to be devalued for the non-default interest. This is wrong in the light of the abandonment by the orientation expressed by article 17 of the preliminary draft on the final draft of the code. See *Relazione al c.c.* no. 34.

(22) Compensatory interest for GIORGIANNI, *op. cit.*, p. 147, should be distinguished only by the non-collectabilty of the credit. GIORGIANNI, *op. cit., loc. cit.*, LIBERTINI, op. cit., p. 110, QUADRI, op. cit., p. 545 express the opinion that « the irrelevance of the liquidity of the credit tends to be obtained from the *ratio* ». This statement is in contrast with the reference to the « price » as per article 1499, Civil Code, synonymous with liquid credit.

(23) The motivation is inspired by the *favor debitoris* assimilated since the period of VENUELIUS, 1, 99, d. 50, 17, « non potest improbus videri qui ignorat sol vere debeat »: for wider references, E. ALBERTARIO, *Della decorrenza degli interessi sulle somme liquidate per danno aquiliano*, in *Monitore dei Trib.*, 1910, p. 22.

It is resolved by placing at the creditor's liability the time necessary for liquidation, during which the interest does not mature. This opinion is assimilated by the legislator for non-default interest.

Once this also concerned the default interest and the principle of *illiquidis non fit mora* was based on this foundation (24).

In more recent times, the legislator, not to undeservedly favour the debtor, to the detriment of the creditor, anticipated the collectability, so that the time necessary for the liquidation of the credit is placed at the liability of the debtor, by legislative choice (article 1219, section 23, no. 1, Civil Code).

This derogation however concerns default interest only and is justified by the negligent default of the debtor.

The hypothesis as per article 1499 Civil Code, and compensatory interest, lies outside this sphere, because it concerns a credit that is not only liquid but also, by definition of the law, not yet collectable (25).

We have said above that default interest postulates the placing in default by the creditor, where this does not come about by law.

From this time, the default interest succeeds the equivalent interest, in the case of a liquid credit, which is absorbed by the same.

However, with regard to this case, between equivalent and default interest, there is this significant difference, i.e. that the recovery of the difference between the legal rate and the market rate corresponds to a right of indemnity, in the case of default, whilst, with regard to the equivalent interest, it is interest, protected only by the return action from enrichment without cause under article 1207, section 2, Civil Code.

And lastly, a note on discipline must be allowed here.

It s is common to any type of interest, whether equivalent, compensatory or default.

Art. 1283 Civil Code thus applies to it, which concerns the prohibition of capitalization of interest and article 2948 Civil Code, which concerns the five-year limitation. The interest is also subject to ordinary income tax.

4. – Let us now go on to discuss the interest with regard to the indemnity.

The basic problem of compensation of the damage is the discount of the equivalent at the time of its concrete fulfilment, which occurs late with respect to the occurrence of the damage. Thus the temporal difference has to be covered.

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(24) It is however understandable that where there is default, the modern legislator has changed his mind by inaugurating the opposite principle codified by article 1219, section 2, no. 1, Civil Code, and thus indulging the *favor creditoris*. On the significance of this aspect, GIORGIANNI, *op. cit.*, p. 167.

(25) LIBERTINI, *op. cit.*, p. 100.

It ahs been said above that monetary interest generally has this function and that the normal discount rate is the current one of the market.

This should lead to the determination of the indemnity on the basis of the prices and values on the occurrence of the damage and therefore the subsequent addition of the interest correlated to the delay with which it is made.

Mention is also made above that the recovery of the difference between the legal rate and the market rate is possible, through the use of presumptions, under article 1224, section 2, Civil Code, in the case of default interest, under article 1207, section 3, Civil Code in the case of equivalent interest.

At this point, the subsequent discussion ought to take its cue from the analysis of this situation and the nature of these interests to go further ahead.

This opinion, sustained by the author of these lines, corresponds to the situation in which the damaged party would have been if he had collected in due time the indemnity and if he had invested in the forms of normal savings.

The picture of the dominant opinions in legal literature and in case law, not only Italian but also foreign, is however completely different.

In general, the indemnity is determined on the bases of the prices and values at the time of the second degree decision (*tempus res judicandae*) (26) or, when it is also evaluated with regard to the occurrence of the damage, it is then revalued at the time of the second degree decision (credit of value) (27).

Interest, which is described as compensatory, is then added to the amount thus determined, according to one or other of these criteria both in Italy (28) and elsewhere (29), by analogy under article 1499 Civil Code so

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(26) In case law, amongst the many: Court of Civil Cassation, 5th August, 1982, no. 4397, in *Rep. giur. it.*, 1982, p. 815, no. 55. In legal literature: TEDESCHI, *Il danno e il momento della sua determinazione*, in *Riv. dir. priv.*, 1933, I, pp. 263 ff.; Id., in *Riv. dir. comm.*, 1934, I, pp. 234-244. For tort damage: ASCARELLI, *Obbligazioni pecuniarie*, in *Comm. Scialoja and Branca*. no. 179; NICOLÒ, in Foro it., 1946, IV, p. 50, DE CUPIS, Il danno, Milan, 1970, p. 269 amongst the many, In French legal literature, amongst the many, H. and L. MAZEAUD, *Traité théorique et pratique de la responsabilité civile*, Paris, 1950, nos. 2420-6, 2420-8 and *ivi giuris, cit.*, pp. 2421, 2423.

(27) In case law, amongst the many: Court of Civil Cassation, 6th February 1984, no. 890, in Mass. Giust. civ., 1984, no. 296; in legal literature, P. ASCARELLI, *op. cit., loc. cit.*; P: GRECO, *Debito pecuniario, debito di valore e svalutazione monetaria*, in *Riv. dir. comm.*, 1947, II, pp. 112 ff.; R, NICOLÒ, *op. cit., loc. cit.*, DE CUPIS, loc. cit. In favour of this concession in Spain: Spanish Supreme Court, 28th February 1975, in SANTOS BRIZ, *La responsabilidad civil*, p. 343; l. DIEZ PICAZO, *Fundamentos de derecho civil patrimonial*, Madrid 1983, pp. 464, 477.

(28) Court of Civil Cassation, 14th December 1985, no. 6336, in *Rep. Giust. civ.*, 1985, see *Danni*, no. 28 amongst the many.

(29) In France, H. LALOU, Traité pratique de la responsabilité civile, Paris, 1962, no. 111, p. 66; in Spain: J. SANTOS BRIZ, *op. cit.*, p. 315.

that they would compensate the damaged party for the use that the damaging party would have made in the meantime of the capital owed to him.

This opinion ends up, however, by compensating the deferment of the payment of the indemnity twice and thus duplicates the discount of the damage in terms of prices and simultaneously of interest, as one of the two is superfluous.

It does not appear reasonable to suppose that the creditor would have, in the meantime, invested his capital, such as to obtain capital gain, and at the same time, would have kept it liquid, such as to produce interest.

Or by analogy by those who assimilate the theory of the credits of value, that the damaged party would probably have spent the capital in the basket of consumer goods at the time, on the prices of which the statistical index is based, such as to justify the hypothesis of the replacement consumption today at the current prices, and at the same time he would also have save, such as to produce interest.

This interest would on the contrary correspond to the financial cost of the supposed investment rather than to its profit.

Everyone feels thee that the functional justification of the monetary interest is questioned here. This makes sense – as was said – only as compensation for the delay with which that amount of money was paid, in which the indemnity is concretized, but determined on the basis of the prices and values on the occurrence of the damage.

Stating otherwise leads to excluding the calculation of the interest, as a mere surplus.

Thus becomes evident again for those who consider admissible the reference to the normal market interest and the difference between the legal rate and the market rate recoverable under article 1224, section 2, and 1207, section 2, Civil Code.

5. – Let us now examine how the problem of interest is raised with regard to the dominant opinion in Italy which considers the credit of compensation, as a credit of value and therefore revalues it.

Here a brief digression on this dogmatic construction based on the so-called credit of value is opportune, This does not appear in any way acceptable and founded to the author of these lines.

The credit of any damaged party is indexed to the prices relative to essential commodities for a working family and by reflection, the standard of living it has conquered, in a period of great social change, without such a use being indistinctly presumed by anybody (30).

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(30) Against a generalization of this kind, for pecuniary obligations: Court of Civil Cassation, 5th April 1986, no. 2368 cit.

As this concerned goods for instantaneous consumption, it does even seem possible to hypothesize, as we end up by imagining their perennial replacement, on the fixed basis of the prices of the past (31).

This investment, unlike every other, would take place furthermore without the financial charges and costs of maintenance required by any transfer of goods in time (32).

That this is a construction inspired by criminal logic is given by the fact that the damage is evaluated in an imaginary currency, with a stable purchasing power, instead of a currency with a legal settlement power (33).

This – as L. Einaudi wrote (34) – is the only « reservoir of the purchasing power », since, as Marshall notes in his time (35), it is not only unenforceable but unthinkable to measure the purchasing power otherwise. This is shown by new studies on the persistence and on the range of monetary reserves and balances in a period of inflation (36).

Revaluation ends up by operating automatically, independently of the default and even if it is the creditor that is in default, as in the case in which he has refused an offer of a sum of money which in the end appeared to be congruous, so that the principles of default would not be applicable to the credits of value (37).

This does not appear reconcilable with the basic rules of our legal system.

This construction is revealed from a certain point of view as strained and inadequate from another point of view, where it leads to revaluating the damage by a person residing abroad according to the domestic cost of living indexes where it is forbidden to hold currencies of an internal account (38).

The drop of inflation to values equal to the legal rate of interest and the perspective that it may even take on a negative dimension with the con-

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(31) The goods that make up the basket on which the ISTAT [Italian Institute for Statistics] index is based, are those for the consumption of a blue-collar and white-collar family and therefore perishable and which cannot be kept.

(32) In general the indemnity is liquidated on the basis of the prices on the decision, gross and not net of the costs, attributing an unreasonable profit.

(33) G. VALCAVI, *Riflessioni sui c.d. crediti di lavoro*, cit., loc. cit.

(34) L. EINAUDI, *Della moneta serbatoio di valori e di altri problemi monetari*, in *Riv. di storia economica*, 1939, p. 133.

(35) MARSHALL, *Opere*, Turin, 1972, pp. 136, 177, 227 and 356.

(36) DON PATINKIN, *Moneta, interessi e prezzi*, Padua, 1957, pp. 17, 26-30, 45 ff., 128, 222 ff., 407 ff.

(37) The credit of value is revalued from the time it arises to liquidation, independently of the default, Default interest does not follow as deemed by case law, but only equivalent interest.

(38) Law no. 476 of 6th June 1956; G. VALCAVI, Il corso di cambio ed il danno da mora nelle obbligazioni in moneta straneiera, in *Riv. dir. civ.*, 1985, II, pp. 253 ff.

sequence of a reverse calculation, shows the limits of the theoretical basis of such a criterion.

Monetary interest which is described, as stated, as « compensatory » as the « form part and parcel of the damage itself » is then commonly added to this automatic revaluation (39). The corollary is derived from this statement that, unlike default interest, compensatory interest can be automatically liquidated, even without a claim by the damaged party (40), and in this case they can even form the object of subsequent complaint, without meeting the preclusion regarding the new claims under article 345 Code of Civil Procedure (41).

They are calculated on the revalued capital on the presupposition that « from revaluation it represents a different cash expression of the same original damage » (42).

This calculation is not deemed as contrasting with the prohibition of capitalization of interest, because the latter would have an exceptional bearing and is limited to pecuniary credits so that it would not apply to credits of value (43).

Lastly, unlike default interest, compensatory interest has not been deemed as subject to income tax (44).

These propositions of the dominant case law essentially repeat those current in judgements at the time of the Civil Code of 1865, which in its time derived them from those formed in the Napoleonic Code.

The compensatory character of this interest is also thus deemed by French legal literature and case law.

Our legal literature does not agree with the evaluation on the compensatory and default character of the above interest.

First of all it is to be asked whether the credit of value generates interest and if that with the characteristics outlined by our case law is to be considered real interest. It seems correct to have to give a negative answer to this question.

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(39) Amongst the many: Court of Civil Cassatioin, 13th October 1979, no. 5352, in *Mass. Giust. civ.*, 1979, p. 2357; Court of Civil Cassation, 6th January 1984, no. 80 in *Mass. Giust. civ.*, 1984, no. 33, infers them from article 2056, section 2, Civil Code.

(40) Amongst the many: Court of Civil Cassation, 20th December 1976, no. 4694, in *Arch. civ.*, 1977, p. 251.

(41) Court of Civil Cassation, 18th September 1978, no. 4180 in Mass. Giust. civ., 1978, p. 1742.

(42) Court of Civil Cassation, all divisions sitting togetherm 19th July 1977, no. 3416 in Mass. Giust. civ., 1977, p. 1269; Court of Civil Cassation, 13th July 1983, no. 4759, in Mass. Giust, civ., 1983, p. 1677.

(43) Court of Civil Cassation, 12th September 1978, no. 4123, in Mass. Giust. civ., 1978, p. 1719 amongst the many.

(44) Court of Civil Cassation, 6th February 1970, no. 264, in Mass. Giust. civ., 1970, p. 151.

Indeed, a fundamental characteristic of the interest – as Messa noted in his time (45) – is that it is inherent to a pecuniary obligation and it is itself pecuniary.

It is recalled here that what is stated above with regard to its essential function aimed at expressing and obviating the lesser value of a deferred payment of money with respect to payment in cash and the premium of liquidity which is intrinsic to it.

The credit of value, as it is an absolutely different and alternative credit to the pecuniary one, therefore cannot generate monetary interest (46).

It will be observed how, in this regard, the further distinctive requisite of the homogeneity between the debt of value and the debt for interest is absent, such as to justify the latter.

The greatest elements of contrast are however offered by the anomalous discipline of this interest, on compensation of damage, as deemed by our case law with respect to ordinary interest.

This concerns the dominant statement that interest would be part and parcel of the damage, such as to justify its automatic liquidation and without the damaged party even having put forward a complaint against the decision that omitted or negated it.

The same must be said of the further current statement that, unlike ordinary interest, would not encounter the limits of the prohibition on capitalization of interest, nor would it be subject to income tax, because it would be inherent to credits of value rather than of currency, and therefore would represent a corollary of the previous statement on their nature as part and parcel of the compensation of the damage.

The other basic characteristic of the debt for interest is negated here, i.e. its autonomy with respect to interest for capital (47).

The additional character of interest with respect to the indemnity is also negated with this.

However, it must be deemed that the dominant assertion that this interest is part and parcel of the damage, and not addition, leads to negate, in short, that it is actual interest.

This is what those authors, who deem that legal interest is not in actual fact such, but corresponds to a lump-sum criterion of experience, to liquidate the damage, understand (48).

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(45) MESSA, *op. cit.*, p. 435.

(46) Thus MESSA, *op. cit., loc. cit.*; DE MARTINI, R*ivalutazione del danno da fatto illecito e danno per ritardato pagamento*, in *Giur. compl. Cass. Civ.*, 19651, pp. 1269 ff.; LIBERTINI, *op. cit.*, p. 120.

(47) Thus also QUADRI, *op. cit.*, p. 548.

(48) LIBERTINI *op. cit.*, p. 119, DE MARTINI, *op. cit., loc. cit.*

This opinion, significantly equivocal and general, cannot however be accepted because it leads to duplicating the indemnity, without being authorized and indeed, in contrast with article 21056 Civil Code (49).

The duplication of the compensation has been understood by those authors that have included it in the accumulation of the interest and the monetary revaluation (50).

It is fairly transparent, for what was said above, that adding the legal interest to revaluation leads to duplicating the indemnity for the delay, with which the equivalent has been paid.

In the final analysis, this is translated by arbitrarily considering due *ex post* real interest (51), equal to legal interest, differing from *the quod plerumque accidit*.

This is equivalent to procuring for the damaged party an unjustified profit. In these proportions, it really does not appear, in the light of logic, that this can be agreed with.

6. – It has been stated above that the sum of the interest on the indemnity is generally justified from the point of view that it would be « compensatory interest ».

That this dogmatic description is a compulsory path for those who consider the credit of the damaged party a credit of value, derives from the remark mentioned above that the institution of default is considered extraneous to this type of credit and therefore it is without consequences.

Once the default character of the interest relative to a credit of value has been excluded, their justification only remains on the basis of the general equitable consideration of compensation due for the use of others' capital, i.e. as compensatory interest (52).

But this capital under discussion, as it is not of a default nature, does not seem to justify from this point of view either, the identification of the profits of its investment, with the pecuniary profits.

It seems rather that this is made up of the sole monetary revaluation, for those who accept this category of credits of value.

The compensatory nature of this interest is to be excluded for another series of reasons.

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(49) I use here the argument used by LIBERTINI, *op. cit., loc. cit.*, to exclude the applicability of article 1224, section 2, Civil Code, on compensation of damage.

(50) LIBERTINI, *op. cit.*, p. 119; QUADRI, *op. cit.*, p. 551; MICCIO in *Giur. compl. Cass. civ.*, p. 1951, I, p. 438 ff.: in this sense the current case law is disagreed with (for all, Court of Civil Cassation, 13th october 1979, no. 5352, in *Mass. Giust. civ.*, 1979, p. 2357) according to which revaluation is not accumulated with intrest because they are for different functions.

(51) This is the interest calculated afterwards above the rate of inflation.

(52) For a reference, amongst the many: QUADRI, *op. cit.*, p. 548; Court of Civil Cassation, 13th June 1972, no. 1853, in *Rep. Foro it.*, 1972, see Danni, p. 121.

It is generally justified by the reference by analogy with article 1499 Civil Code, the legitimacy of which has been currently questions in the past by Messa and others (53), considering the mandatory nature of in this particular instance and therefore not possible to be generalized.

However, we must exclude that there are the same details as the analogy.

Compensatory interest, for what has been stated above, is relative to a « liquid and uncollectible credit » as is that as per article 1499 Civil Code.

This does not appear in the credit of compensation which is by its very nature « illiquid and nevertheless collectable » under article 1219, section 2, no. 1 Civil Code.

Therefore a hypothesis of compensatory interest by analogy cannot be made for the illiquid and uncollectible credit of compensation for damage.

This credit, due to its characteristics of illiquidity and collectability, it cannot have any other interest but default interest, which is the only type that can be conjectured for this type of credit.

Many authors, from Messa to Ascarelli, from Bianca to Giorgianni and De Cupis agree on the default qualification of the interest relative to the credit of compensation for damage (54).

The default nature is moreover understood by the dominant case law, where it justifies the interest which it qualifies as compensatory as « compensation for the delay with which the equivalent is paid ».

This acknowledges it default quality and grounds.

The recourse to the compensatory point of view, moreover, finds its raison d'être in the time of the 1865 Code and the Napoleonic Code in the need to elude the *in illiquidis non fit mora* prohibition, which represented a theoretical obstacle to the recognition of its default nature.

Today, however, after the abandonment of this principle with article 1219, section 2, no. 1, Civil Code, no obstacle of the kind exists any longer.

This interest represents the indemnity of the specific damage from delay (mainly negligent) in paying the equivalent and not in the original damage, which derives from the unlawful conduct or from non-fulfilment (wilful or negligent).

The opinion that considers them making up part and parcel of the damage is the result of equivocation because it erroneously considers the damage from its occurrence to its liquidation as one.

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(53) MESSA, *op. cit.*, pp. 431 ff.

(54) MESSA, *op. cit.*, p. 246; ASCARELLI, *op. cit.*, pp. 536, 566 ff.; DIANCA, *Dell'inadempimento delle obbligazioni*, in *Comm. Scialoja e Branca*, Bologna, 1979, pp. 340 ff.; GIORGIANNI, *op. cit.*, pp. 163 ff.; DE CUPIS, op. cit., p. 487. However, it is not easy to understand how ASCARELLI and the other advocates of the credits of value quality the interest as default, considering the insignificance of the default for this type of credit.

It is fairly clear that there are two types of damage that are absolutely different by quality, nature and content: one – we repeat – is that deriving from the unlawful conduct or from non-fulfilment (wilful or negligent) and must be evaluated on the basis of the current values on its occurrence whereas the other concerned the damage dependent on the delay with which the equivalent was paid and concerns: the subsequent period (55).

The latter is therefore the default interest in the fulfilment of that pecuniary obligation which has as its project the sum of money in which the equivalent is concretized.

This type of obligation is not reduced to the liquid one, but also includes that being liquidated: what is important is that its object is made up of a sum of money.

The compensation for this default damage follows the rules of article 1224, Civil Code (56).

Only in this way can the addition of the interest, i.e. a pecuniary, homogeneous and additional benefit, with respect to the deferred one of the amount of money, which represents the capital due, be justified.

It has been stated above that article 1224, section 2, Civil Code, allows recovering the difference between the legal rate and the normal rate in the case of the default interest and article 1207, section, Civil Code, for the equivalent interest and by analogy the compensatory interest.

However, with this difference: this corresponds to a right of the damaged party, in the case of the default interest, whilst for the other type it is possible only in the sphere of the lesser protection to avoid the enrichment of the debtor. From this point of view as well, the default qualification of this interests protects the damaged party very differently.

The most important practical conclusion must be drawn at this point; this default interest is subject to the ordinary discipline that concerns every type of interest.

Therefore it must be claimed and it cannot be automatically liquidated and it is subject to the common preclusions, including that under article 345 Code of Civil Procedure. Similarly, it meets the limit of the prohibition of capitalization of interest as per article 1283 Civil Code; it is subject to limitation as per article 2948 no. 4, Civil Code, and the ordinary income taxes.

It is not accumulated with the monetary revaluation as it is additional to a pecuniary obligation, such as that of paying the indemnity, and not to the so-called debt of value.

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(55) The distinction is generally made in legal literature and in case law where the interest is motivated with the need to « avoid the prejudice deriving from the delayed achievement of the pecuniary equivalent » (Court of Civil Cassation, 20th December 1976, no. 4694, in *Arch. civ.*, 1977, p. 251, amongst the many). In legal literature, for all, GIORGIANNI, op. cit., p. 164.

(56) In the sense of the applicability of article 1224, Civil Code, GIORGIANNI, op. cit., p. 164.

7. – Let us now go on to another topic that concerns the time from when the interest begins to take effect.

The problem has had a different and conflicting solutions in the history of law and this is still the case. In Roman and common law, depending on the principle of *in liquidandis non fit mora*, the interest was not calculated until the decision.

Under the domain of the abrogated 1865 Code, whilst for contractual damage the interest took effect from the claim, for tort damage the interest gave rise to serious dispute.

The predominant opinion, especially in case law, deemed it compensatory and had it take effect from the unlawful conduct (57), another from the claim (58) and lastly a third, moreover authoritative, from the liquidation (59).

The new legislator, with article 1219, section 2, no. 1 Civil Code, codified the first criterion which was tantamount to deeming the damaging party in default ex re from the unlawful action.

This is also accepted by the dominant legal literature and case law today, according to which the interest has a retroactive effect from the unlawful action unlike the interest concerning the contractual damage which takes effect from the claim (60).

This interest is however calculated on the revalued amount or even on the estimated amount, based on the current values at the time of the decision.

This item undoubtedly gives rise to an excess indemnity in that it accumulates for the same period of time that reaches the decision, the revaluation or the intervening rise of the price of the commodity and the monetary interest.

This has induced an authoritative opinion to propose once again the theory that it would take effect only from the pronouncement (61).

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(57) CHIRONI, *La colpa nel diritto civile*, 1906, II, *Colpa extracontrattuale*, p. 342; MESSA, *op. cit.*, pp. 241-432: Court of Cassation of Rome, 16th April 1903; Court of Cassation of Milan, 6th December 1990; Court of Cassation, Turin, 20th December 1900; in *Rep. Monit. dei. Trib.*, 1898-1907. see *Interessi*, nos. 15, 19.

(58) Court of Cassation of Naples, 19th July 1907,, in *Monit. dei Trib.*, 1908, p. 87; Court of Cassation of Turin, 14th September 1986, in *Giur. torinese*, 1986, p. 772. In a critical sense, MESSA, *op. cit.*, p. 250.

(59) Amongst the many, Court of Cassation of Florence, 30th December 1911; Court of Cassation of Palermo, 31st December 1918, in *Rep. Monit. dei Trib.*, 1908-1923, p. 252, nos. 66, 68; in legal literature E. ALBERTARIO, op. cit., pp. 21.25. In a critical sense, MESSA, op. cit., p. 249.

(60) The different time of effect is justified by the remark that the default in the tort damage arises from the unlawful action, whereas in the contractual damage, from the claim. Thus for all, Court of Civil Cassation, 22nd January 1976, no. 185 in *Arch. civ.*, 1976, p. 466.

(61) Court of Civil Cassation, 12th July 1979, no. 4053, in *Rep. Foro it.*, 1979, see *Interessi*, no. 18 and incidentally Constitutional Court, 22nd April 1980, no. 60, in *Foro it.*, 1980, I, p. 1249.

The correct solution to the problem appears to me to be implicit in the default quality recognized in this interest and inferable from it.

It is very clear that the interest matures after and not before the time when the equivalent should have been paid and has not been.

This is in line with the accessory, proportional and periodic nature of interest.

This postulates that the time of determination of the indemnity is therefore prior and not posterior to that when the interest starts to take effect.

It will thus appear obvious how there cannot be the hypothesis that the interest – as is deemed – take effect from the unlawful action or from the claim. whilst the indemnity is evaluated on the subsequent decision or revalued on it.

Conversely, it will appear completely reasonable that the damage, on the other hand, is evaluated with reference to the values on its occurrence and the interest will take effect after it and that is, from the time when the damaged party is in default in giving the equivalent.

It is the opinion of the author of these lines that the problem of when the interest takes effect depends on the time when the equivalent should have been offered.

In conclusion, it should be coordinated with the problem that concerns the time of reference in the evaluation of the damage and harmonized with the controversial solution s, i.e. its occurrence (*quanti ea res fuit*), or the claim (*quanti ea res est*), or the decision (*quanti ea res erit*).

This causation has been understood with great insight under the domain of the abrogated 1865 Code by Albertario (62), by Giorgi (63), by Messa (64) and others, as well as by the abundant case law with regard to tort damage.

The correct solution for a complex series of reasons is – as stated – that of evaluating the damage on its occurrence, and having the interest take effect from the time the default arises.

As the damaging party is obliged to immediately indemnify, pursuant to article 1219, section 2, no. 1, Civil ode, there appears no doubt that the default interest must start to take effect from the unlawful action.

The problem must be posed in different but similar terms as far as contractual damage is concerned.

The current opinion – as has been seen – is that the interest takes effect from the judicial claim (65).

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(62) E. Albertario, *op. cit., loc. cit.*

(63) Giorgi, *Obbligazioni*, Florence, 1906, V, p. 346.

(64) Messa, op. cit., p. 435.

(65) Court of Cassation 12th April 1983, in *Mass. Giust. civ.*, 1983, p. 907 amongst the many.

It is not understood the logic behind this criterion.

It does not coincide with the start of the default which is of significance for the default interest nor with that in which the pecuniary benefit should have been fulfilled for the equivalent interest.

It has no normative grounds in our legal system.

This criterion has probably come down to us from the cultural tradition which formed around the wording of article 1153 of the Napoleonic Code which stated: « ils ne sont dûs que du jour de la demande ».

It is however even less comprehensible in our day, given that the same wording has been modified by « ils ne sont duûs que du jour de la summation de payer », thus replacing the judicial claim by the injunction of payment (66).

The correct criterion for the contractual damage is that of having the interest take effect from the time when the damaging party is in default.

The identification of this time is a *quaestio facti.*

The proposal put forward to consider the obligation of compensation as always « portable » under article 1182, section 3, Civil Code, and therefore responsible for this contractual damage in default until its start under article 1219, section 2, no. 3, Civil Code, appears seductive and yet schematic (67).

8. – It remains to be see how the interest is calculated.

It will be calculated on the pecuniary capital in which the equivalent amount due is concretized, in the same way as any default interest,

The obligation of indemnity is pecuniary and therefore subject to the nominalistic principle even if the exact amount will emerge from the judicial determination, as every illiquid pecuniary obligation.

The damaged party is entitled – as stated – to recover, pursuant to article 1224, section 2, Civil Code, the difference between the legal rate and the greater current market rate, which is the normal yield of any non-risky financial investment of savings in which it can be presumed that the damaged party would have invested his assets or, in the case of evidence, at the normal cost of bank loans. All this concretizes the situation in which the damaged party would have been according to the *quod plerumque accidit*, if he had received in time the equivalent to which he is entitled.

It also represents the correct compensation for the greater damage from defaule under article 1224, section 2, Civil Code, according to the more recent orientation of case law (68).

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(66) Thus modified by ordinance 59.148 of 7th January 1959, In the sense of the wording, QUADRI, op. cit., p. 541.

(67) QUADRI, op. cit., p. 540

(68) Court of Civil Cassation, 5th April, 1986, no. 2368, cit.

The dominant opinion that considers, on the other hand, the obligation as a debt of value, calculates the interest on the revalued amount.

The excessive indemnity to which this gives rise is before the eyes of all. It is concretized in supposing due the revalued amount from the unlawful action or from the claim, rather than as the result of the final quantification which takes place with the second degree decision.

This appears to be against every logic and no different from those who calculate the interest on the evaluated damage according to the current values at the time of the decision which is also equivalent to supposing such an indemnity due from the placing in default of this amount.

In principle, it must be added that adding the interest on the revaluation – as observed – is translated into calculating ex post real interest equal to 5%, not even real interest *ex antea* in this proportion, as it would be more justified by article 1225 Civil Code, for which the rate of inflation should be compensated within the limit of its foreseeability. This is justified through the unacceptable straining that the default non-fulfilment is always wilful and not negligent (69).

These calculations based on real interest have no normative grounds because the height of the legal rate concerns only the nominal interest which is thus magnified, subverting the rate established by article 1284 Civil Code (70).

For the same reasons, the more moderate opinion that calculates the interest on the capital as it is revalued rather than on that which is the object of the last revaluation does not appear acceptable. This criterion unlike the previous one preserves the periodic nature of the obligation of the interest, whilst the previous one was limited to respecting only the proportional nature.

However, this method also infringes the prohibition of capitalization of interest, which is the fundamental principle of our legal system.

All the more so, we cannot agree with the opinion that revalues the monetary inetrest.

Mention is made of this by:

DE LORENZI, *Obbligazioni, parte generale, sintesi di informazione, Riv. dir. civ.*, 1990, p. 262, note to Court of Civil Cassation, 10th September 1990, no. 9311, in *Giust. civ.*, 1991, p. 1528; P. CENDON, *Indice bibliografico e commento al codice civile*, Turin 1991, p. 2320.

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(69) Recently, M: EROLI, *Nominalismo e risarcimento nei debiti di valuta*, in *Giur. it.*, 1986, I, section 1394.

(70) In this way a normative operation is carried out in conflict with the wording.

Also by the author on the same subject:

– «*In tema di indennizzo e lucro del creditore; a proposito di interessi e rivalutazione monetaria*» in Foro italiano, 1988, I, 2318 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 341.
– «*A proposito del lucro del creditore nel risarcimento del danno in genere, sul tema degli interessi e della rivalutazione monetaria*», in Foro italiano, 1989, I, p. 1988 and ff. and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 349.
– «*Sul carattere moratorio degli interessi nel risarcimento del danno*» in Responsabilità Civile e Previdenza, 1990, II, p. 97 and ff., and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 353.

On the consequences of the increase of the legal rate of interest

1. – The recent increase of the legal interest to ten percent introduces a considerable factor of clarity in how the damage from default should be indemnified in pecuniary obligations and in particular what should be understood by « greater damage » pursuant to article 1224, section 2, Civil Code, This increase is also destined to make a decisive contribution to the critical revision of some current opinions, such as that which classifies the debt of compensation as a debt of value and thus ends up by accumulating the monetary revaluation and the legal interest, magnifying the result.

The best compass for orientation on this subject is represented by the border between mere indemnity and the profit of the creditor, with respect to the interest, based on the *quod plerumque accidit.* Any solution that turns into profit for the damaged party, instead of obtaining only compensation, can only appear erroneous (1).

The increase in legal interest that acquired, on the practical level, the importance of an invaluable test bench of the correctness of the current opinions and of the results of calculation they reach. Here, the motivation at the base of the orientation of case law which (when the legal rate was still at 5%) excluded the accumulation of revaluation and legal interest in

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From « Il Foro italiano », 1991, I, p. 873 and ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

This annotates the following decision:

COURT OF CASSATION, section I, 12.3.1990, no. 2013, President Vela, Reporting Judge Lipari, Public Prosecutor Donnarumma: Oratorio Salesiano v. ANAS: « *The damage from devaluation does not follow on automatically and immediately from the inflation invoked in the proceedings as a known fact, but must be examined, case by case, in the prejudice concretely suffered by that specific creditor for not having been able to promptly have the sum at the time of fulfilment* ».

(1) G. VALCAVI, *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, pp. 681 ff.; and also, by the same author, *L'indennizzo del mero lucro cessante come criterio generale di risarcimento del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, p. 2220; *Le obbligazioni in divisa straniera, il corso di cambio ed il maggiore danno da mora*, id., 1989, I, p. 1210; *In tema di indennizzo a lucro del creditore: a proposito di interessi e di rivalutazione monetaria*, id., 1988, I, p. 2318.

the compensation of the damage from default in pecuniary obligations, must be recalled (2).

We can begin by saying that, today, the « greater damage from default » cannot be identified in the differential between the legal rate and the rate of inflation. Indeed, legal interest is now equal to 10% and therefore exceeds the percentage of monetary devaluation, which is only equal to 6.5%, so that reference cannot be made to this to identify the « greater damage » with respect to legal interest. From this point of view, the division of creditors into different economic categories also appears excessive and amongst these that of the mere consumer appears superseded, which would allow making a reference to the rate of inflation.

In the final analysis, the increase in the rate of interest confirms the correctness of that orientation which – as stated – excludes the accumulation of monetary revaluation and legal interest. This accumulation would lead to a total yield equal to 16.5% (summing the rate of inflation, equal to 6.5% and legal interest at 10%), far above the normal yield of money. The latter is not equal to 12.5% gross for the Treasury Bonds (10.75% net) whilst that of bank certificates is equal to 10.625% (net 7.97%) and the average of bank deposits is 6.7% gross (4.7% net).

The percentage of 16.5% which would derive fro the accumulation of revaluation and the legal interest would even be greater than the normal price of bank loans, which is equal to 13% for the prime rate and 14.69% for loans with a greater risk. Without forgetting that these rates on bank loans are also reduced by the impact of taxes.

The decision, adopted when the legal rate was at 5%, shows all its limits and does not appear acceptable where it deems that the greater damage is to be identified case by case, according to the categories to which the creditors belong (3). To say the least, it does appear that a distinction can be made, for example, between consumer or occasional creditor and saver. Each creditor, moreover, will legitimately claim benefiting from the legal interest of 10%. which acts as an indemnity, presumed *iuris et de iure*, save the greater damage.

2. – The increase in the legal rate of interest also represents – in my opinion – the confirmation of how well-grounded the opinion is that identifies the greater damage under article 1224, section 2, in the differential be-

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(2) Cf. Court of Cassation, all Divisions sitting together, 1st December 1989, no. 7299, Foro it., 1990, I, p. 427, with a note by PARDOLESI and comment by DI MAJO, *Interessi e svalutazione tra risparmiatori e pensionati.*

(3) Cf. amongst others, Court of Cassation, all Divisions sitting together, 5th April 1986, no. 2368, Foro it., 1986, I, p. 1265. with observations by PARDOLESI, *Le Sezioni Unite su debiti di valuta e inflazione: orgoglio (teorico) e pregiudizio (economico).*

tween it and the greater one current on the market. The overall default damage must be identified here in the normal loss of profit that the creditor would obtain from a liquid investment (and that he want to keep liquid): the interest, according to the *quod plerumque accidit* (4).

From this point of view, the importance cannot be defined of the fact that the increase of legal interest from 5% to 10% has reduced the previous extent of the greater damage. By taking the legal interest to an amount closer to that of the market, the legislator has decided to decrease the differential mentioned and that had given rise to such serious disputes. The difference existing now is equal to 2.50%, rather than the previous 7.50%, comparing the new legal rate with the gross yield of Treasury bonds, equal to 12.5%.

The decision under review excludes, in *obiter*, a reference of this kind because it would entail a « normative operation » of increase of the legal rate, in order to balance it with that of the market. Such a statement does not appear acceptable because the reference to the current rate on the market is made, as it must be, by way of simple presumption (and therefore not *iuris et de iure*). It will obviously be up to the debtor to offer evidence to the contrary that the creditor would not have invested in Treasury Bonds but differently, for example in bank deposits or certificates which present a lower return. The « greater damage » can, on the other hand, be calculated on the basis of the cost of replacement of the money, i.e. from the point of view of the actual damage (prime rate or greater interest paid) where recourse to bank loans is proven. Moreover, it will be reduced by the impact on the income, as a tax deductible cost.

3. – Let us now go on to see the consequences that can be surmised, following the increase of the legal interest rate, for the case in which the debtor is in default, in giving foreign currency.

This debt can be classified, according to the dominant opinion in legal literature, as « value rate » or « effective rate ».

Let us start with the obligation in a value currency foreign currency, regulated by article 1278 Civil Code. In this case the debtor in default will have to pay or choose to do so in national currency – the corresponding amount at the exchange rate on the due date of the debt. To this, he must add any differential of the exchange rate, with respect to the exchange rate at the time of payment, between the foreign currency on the upswing, in

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(4) See the notes by VALCAVI, *L'indennizzo del mero lucro cessante, come criterio generale*, cit., *Ancora sul risarcimento del maggior danno da mora nelle obbligazioni pecuniarie; interessi di mercato o rivalutazione monetaria*, in *Foro it.*, 1986, I, p. 1540; *Rivalutazione monetaria od interesse di mercato?* id., 1980, I, p. 118; *La stima del danno nel tempo, con riguardo all'inflazione, alla variazione dei prezzi e all'interesse monetario*, in *Riv. dir. civ.*, 1981, II, p. 332.

which the creditor proves that he would have changed the amount, and the normal yield of the latter (5).

As far as the obligation in a foreign currency effective rate is concerned, there is reason to ask whether the new legal interest, equal to 10% should be applied.

To the writer it does not seem that this can be maintained, because out legal rate of interest concerns exclusively the national currency and not foreign currencies. for the latter reference must be made – as stated – top the normal loss of profit of the latter. The application of our rate of interest, to foreign currencies as well, would obtain evident profit for the creditor of the currency on the upswing, because the current rate of exchange already takes into account the differential of the monetary interests.

The addition of our interest of 10% to the foreign currency, instead of its own, possibly less, could be excessive and also cause distortional effects with regard to the ratio of exchange rate considered.

4. – Let us now examine the consequences of the increase of the legal rate of interest on credits from work.

The current opinion deems that these currents are indexed to the cost of living and legal interest should also be added, to be calculated on the revalued capital, with an overall result equal to 16.5% or even 17.5%, considerably above the normal yield or cost of replacement of the money. It has recently been maintained that this treatment would not imply the default of the debtor and this, if it were to recur, would also give rise to further compensation of the damage from default (6).

These opinions must be subjected to critical revision on the basis of the test bench represented by the border between the indemnity and the profit, regarding the economic consequences. In the first place, it must be noted that art. 429, section 3, Code of Civil Procedure and 150 provision of enactment Code of Civil Procedure, considered jointly, arose in an economic climate (completely different from the present one), with double-digit inflation, whilst legal interest was still at 5%, i.e. at a much lower rate than the rate of inflation. The precept as per art. 429, section 3, was therefore finalized at guaranteeing the greater rate of inflation with respect to the legal interest for the creditor.

At the time, the writer noted that the dominant orientation, which accumulated the revaluation and the legal interest, could not be deemed correct and that the credit could be revalued only for the part that exceeded

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(5) Cf. again by the same author, *Il corso di cambio e il danno da mora nelle obbligazioni in moneta straniera*, in *Riv. dir. civ.*, 1985, II, p. 251; *Le obbligazioni in divisa straniera*, cit., *In materia di liquidazione del danno di uno straniero*, in Foro it., 1989, I, p. 1619.

(6) Cf. MASSETANI, *Sui rapporti tra art. 1224 c.c. e art. 429, 3° comma, c.p.c.* in *Foro it.*, 1990, I, p. 3434.

the height of the legal interest. In the event in which the rule had prescribed an accumulation of this kind, it would have contemplated the addition, to the nominal capital, of the legal interest and of the « damage » (not of the greater damage) for the loss of the value of credit (7).

The calculation of the legal interest on the revalued capital must a fortiori be excluded, because the rule, in this case, would have provided, in the first place, for the compensation of the damage for the loss of the value of the credit and only subsequently the calculation of the legal interest. On the contrary, article 429, section 3, contemplates the addition of the legal interest as the first thing, and only subsequently the liquidation of any « greater damage » for the loss of the value of the credit.

We cannot agree with the opinion that this is an indexed credit and even released from the default, the restoration of which would even be added. It is a fact that the accumulation of legal interest and revaluation would clearly show the unconstitutionality of article 429, section 3. Indeed, there would be an unjustified disparity of treatment of the creditor of back wages to the detriment of the current one, for which the trend to progressively eliminate the indexing to the cost of living scale. This treatment could lead to an inequality between workers and between pensioners, and in general every other creditor.

The same considerations obviously also apply for similar rules that contemplate a similar accumulation of revaluation and interest; this is the case of credits of professionals and, more in general, of the self-employed (8).

5. – Lastly, let us go on to see the conclusions that can be drawn for the aforementioned increase of the legal interest with regard to the compensation of damage in general.

The current opinion revalues the credit and also adds the legal interest, calculated on the revalued capital. This leads to the annual percentage of 17.15% (with today's figures), which gives the damaged party a visible profit and not the mere restoration. From this point of view, the increase of the legal rate of interest represents the best confirmation of the erroneousness of the commonly accepted method and its justifications.

With regard to these, the classification of the credit of compensation as credit of value and not of currency, does not appear acceptable on the dogmatic level, for the reasons that the author of these lines stated in the contributions to which he refers the reader (9) and for the reservations on this regard by the Supreme Court itself.

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(7) Cf. VALCAVI, *La stima del danno nel tempo, con riguardo all'inflazione*, cit., p. 349 ff.

(8) Such as, amongst others, the common provision for the fees of lawyer and barrister, as per Ministerial decree no. 392 of 24th November 1990.

(9) Cf. VALCAVI, *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, II,

The latter, in its decision no. 6209 of 20th June 1990 (Foro it., 1990, I, p. 2808) literally wrote, in this regard: « no-one wants to deny the empirical and casuistic origin of the category of the credit of value which, although opposed from the conceptual point of view, continues to show a considerable expansive capacity », for its practical convenience as an instrument of calculation. Here, the fact that the Supreme Court was careful to take the defences of this category appears significant, on the dogmatic level, only to suggest a very complicated method of calculation, considering that the indemnity is revalued year by year and the interest has to be calculated on the capital as it is revalued (10).

Equally unacceptable is the other justification offered by the accumulation, which starts from the correct distinction between damage from unlawful action and from non-fulfilment (to be evaluated with reference to the time of its occurrence, excluding that at the decision) and the subsequent one for the diseconomy caused by the delay (with which the indemnity is offered) and nevertheless admits monetary revaluation because it would restore the situation of the capital prior to the damaging event, with the addition of the interest, which would indemnify the diseconomy due to the delay.

These propositions are vitiated by the fundamental error of not seeing that the two remedies, in the final analysis, are required to indemnify the same damage, which comes from the delay. Indeed, once the specific indemnity has been correctly fixed at the time the damage occurred, the subsequent revaluation and the interest both tend to eliminate the subsequent diseconomy due to the delay with which the basic indemnity is offered.

In this subject, reference has to be made to the fundamental rule of *quod interest* according to the *quod plerumque accidit*. In this regard, it does not appear that we can usually presume that the damaged party would have once acquired or kept in his capital the commodity not given or taken away (such as to justify the discount of its value) and also maintained the availability of the pecuniary equivalent (such as to enjoy its yield) during the delay.

In our system, an indexed credit cannot be conjectured, because indexation is not contemplated by any rule. Even les so can the accumulation of the revaluation and the legal interest be justified, on the basis of a general recourse to « equity », as the quoted decision 6209/90 did, because on

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p. 31; *In materia di criteri di liquidazione del danno in genere e di interessi monetari*, in *Foro it.*, 1990, I, p. 933; *Ancora sul risarcimento del maggior danno da mora*; cit., *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, id., 1981, I, 2112; *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre* 1986.

(10) On the contrary, the reference to the normal yield of money is far easier as the judge can refer to the data of the inter-bank agreements in force, always by way of presumption, and with the faculty of having recourse to equitable criteria, under article 1226, Civil Code and 2056. section 2, Civil Code.

the contrary the percentage of 17.5% a year provides a profit for the damaged party and shows a disparity of treatment with regard to any other creditor.

The solution of the fundamental problem, on compensation of damage in general, passes through the correct distinction of the two different types of damage; the damage from unlawful action or from non-fulfilment and the later one, depending on the delay with which the indemnity is given, The first damage must be evaluated with reference to the value of the commodity not given or removed, at the time when the damaging event occurs and not at the *tempus rei iudicandae*, as many maintained in the past. The different damage from delay in giving the indemnity has been correctly identified « in the loss of the *utilitas* that the creditor would have had from the sum of money originally due ». The compensation of this particular damage recalls the application of article 1224, sections 1 and 2, which is to be applied to every pecuniary obligation, whether liquid or illiquid, such as that under examination. The indemnity of an illiquid obligation also concerns « the loss of the *utilitas* that the creditor would have had from the sum originally due », i.e. the loss of profit of a pecuniary credit, such as is, in conclusion, the illiquid one.

To conclude, the erroneousness of the accumulation of revaluation and legal interest appears evident (all the more so, if calculated on the revalued credit). Rather the legal interest of 10% should be integrated with the greater damage as per section 2 of article 1224, to be identified in the differential with respect to the normal yield or cost of money.

Reference is made to the above by:

R. PARDOLESI, *Crediti previdenziali, tutela differenziale e punitive damage*, *Foro it.*, 1991, I, p. 1324; A. TODARO, *La rivalutazione delle prestazioni di previdenza sociale*, *Giust. civ.*, 1991, I, p. 2887, note 13; R. CARANTA, *La rivalutazione automatica dei crediti previdenziali: un arrêt de règlement della Corte Costituzionale*, in *Resp. civ. e previdenza*, 1991, p. 444, notes 3 and 15; G. D'AJETTI, R. FRASCA, E. MANZI, C. MIELE, *La riforma del processo civile, il giudice di primo grado*, Milan, 1991, I, p. 7, 9; P. TARTAGLIA, *Il modesto consumatore va in pensione*, *Foro it.*, 1991, I, 1331, note 16; B. INZITARI, *Le riforme della giustizia civile*, Turin, 1993, p. 21, note 26.

The problem of credits of currency, credits of value and monetary interest, on the arrival of the Euro

1. – The recent entry of our country into the European monetary system with the consequences, in the very near future, of the replacement of our old « Lira » (1) by the single currency, called the Euro, places the problems dealt with to date on pecuniary obligations in a new light with regard to the rates of interest and monetary inflation.

It induces a radical revision of many ideas which to date were current, such as that currently dominant of the distinction between credits of currency and credits of value and compensatory interest, alongside equivalent and default interest.

The arrival of the Euro means seeing in totally different terms from the current ones the problem of the default damage of our money, especially with regard to the other currencies of the countries belonging to the European monetary system, eliminating the difference of exchange rate and respective interests, as default damage.

The author of these lines, ever since 1980 (2), through a long series of essays, published periodically in juridical journals, is of the opinion, which to date has remained isolated, that the category of credits of value has no grounds on the dogmatic level and has no justification on the economic level.

In short, it is reduced to a normal credit of currency, which includes any obligation that is expressed and must be discharged in money, as such fungible and versatile for every use.

The means through which the payment of a quantity of money is adjusted in time, according to the economists, is monetary interest, which covers the lesser utility of a payment of money deferred in time with respect to the same in cash, due to our preference for an immediate payment rather than deferred (*utilitas temporis*, time preference) (3).

From « Rivista di Diritto Civile », 1999, II, p. 469 and ff.

(1) In addition to Italy, the other countries that signed the Treaty of Maastricht are Germay, France, Belgium, the Netherlands, Luxemburg, Spain, Portugal, Finland, Austria and Eire.

(2) G. VALCAVI, *Rivalutazione monetaria o interessi di mercato*, in *Foro it.*, 1980, I, section 118.

(3) BOHM-BAWERK, *The positive theory of capital*, London, 1891, p. 249 ff.; I. FISHER, *La*

Monetary interest is divided into a composite series, such as legal interest, standard interest, equivalent and default interest, omitting the marginal hypothesis of compensatory interest (4).

Interest rates and their amount, as is well known, are similarly different, as is the legal rate, the discount rate, the market rate, the rate on savings and loans (which include the Lombard rate, the prime rate, the top rate and so on).

The legal rate is that fixed by the law (article 1284, section 1, Civil Code) in the relations of private law, and is presumptively from the debtor with regard to the creditor.

The market rate is the cost or the normal yield of money which is that habitually established by the market, through its intermediaries and instruments and corresponds to the *id quod interest* according to the *quod plerumque accidit* of the ancient Romans (the so-called market rate).

It is not determined by law but by the market, on the basis of the different volumes and factors that influence the demand and supply and also the greater or lesser liquidity and the rate of monetary inflation.

In a market characterized by high liquidity, the market interest will obviously be less the greater the quantity of money that the savers offer the investors.

On the contrary, in a market characterized by poor liquidity, as occurs in phases of recession, the interest will be higher, because the demand of the investors is greater than the supply of the savers. Similarly, the interest will normally be higher in periods of accentuated inflation and the consequent inclination of the operators to request greater loans of money, to be converted in real commodities, trying to protect savings from the erosion of inflation.

Depending on the fact of whether the legal rate is lower than that of the market or the rate of inflation, the problem arises of the respective differentials.

The coverage of this differential, in the case of default, comes under the « greater damage from default » contemplated and disciplined by the legislator with article 1284 Civil Code.

A matter which deserves close attention in that of the relations between rate of devaluation of the money and market interest, on which we will dwell below.

It has to be said that the legal rate of interest, for over eighty years, from 1905 to 1990, was fixed by our legal system at 5% and this was moti-

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teoria dell'intresse determinata dalla impazienza di spendere il reddito e dalla opportunità di investirlo, in *Opere*, Turin, 1974, p. 799 ff., p. 814 ff., p. 836 ff., p. 854 ff.

(4) G. VALCAVI, Il problema degli interessi monetari nel risarcimento del danno, in Resp. civ. prev., 1987, I, p. 3 ff.

vated by the fact that the ancient legislator justified it with the fact that it corresponded to the rate of interest on credits practised for 50 years, from the Napoleonic period onwards, on the main European financial marketplaces (5).

Subsequently, from the end of 1990 to the end of 1996, it was raised to 10% (6), to then return to 5%, from early 1997 to the end of 1998 (7).

From 1st January 1999, it was reduced to 2.50% per annum.

2. – The century in which we are living has had at its epicentre the economic and juridical consequences on our money from inflation, which has been creeping or galloping, until it became hyperinflation (8).

Two different types of inflationist phenomena can be distinguished.

The first was that characterized by a drop in the purchasing power of money, such as occurred in the 1930s (9), and during the last World War (10), counter-balanced by a considerable increase in the market interest which in the medium term ended up by becoming equal to the rates of inflation.

The second was that which occurred in Italy in the period from 1979 to 1983, when there was the unusual combination of a high inflation at over 17% and significant liquidity due to the inclination of operators not to invest in real commodities and to keep their assets in liquid form, despite the loss due to inflation (stagflation, slumpflation), which was translated into interest rates on bank savings, below the rate of inflation, at 10% (11).

In this last period, the devaluation rates remained above the market interest, which did not recover the loss, due to the continuation of liquidity.

Afterwards, in the years from 1986 to 1992, inflation stabilized at levels between 5% and 6%.

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(5) The ministerial report on the Civil Code motivated maintaining the legal rate at 5% with the fact that it corresponded to the official rate of discount which had not changed from that figure since 1905. There had been extensive discussion on the legal rate at the French Council of State on articles 1153 and 1907 of the Napoleonic Code at the sitting on 11th Brumaire and 7th Pluviose in year 12. On the 1865 code, the Pisanelli Report to the Senate on Book III.

(6) See art. 11, 26th November 1990, no. 353.

(7) See art. 185,1, 23rd December 1996, no. 662.

(8) Amongst the others, TREVITHICK, Inflazione, Milan, 1979, pp. 17-23; RUOZI, *Inflazione, risparmio e aziende di credito*, Milan, 1973, p. 439 ff.; KEYNES, *Teoria generale dell'occupazione, dell'interesse della moneta*, Turin, 1978, p. 477 ff. See also G. VALCAVI, *La stima del danno nel tempo con riguardo all'inflazione, alla variazione dei prezzi e all'interesse monetario* in *Riv. dir. civ.*, 1981, II, p. 332 ff.

(9) Inflation grew by 80% between 1936 and 1940.

(10) The purchasing power of the Lira during the last war, between 1941 and 1945, dropped from 1038 to 44.80.

(11) On the so-called Harrod effect, see RUOZI, *op. cit.*, p. 538 ff.; see G. VALCAVI, *La stima del danno nel tempo con riguardo all'inflazione, alla variazione dei patti e all'interesse monetario*, in *Riv. dir. civ.*, 1981, II, p. 332 ff.

In those years, due also to the growing indebtedness of the State with its issues of public securities, the interest rates on bank savings remained considerably above the rates of inflation.

In the period 1986-1992, with an official discount rate which remained at around 13%, the rates of bank deposits oscillated between 9.5% and 7.5%, those of ordinary Treasury Bonds at 12 months between 13% and 14% and those on investments between 15% and 12% against a rate of inflation which in the period was stable at between 5% and 6%, as stated.

In the last three years, 1996-1998, against inflation which dropped from 3.9% to 1.5%, the rates of interest also remained far above it, although the official discount rate had dropped from 8% to 3%, the yields on ordinary Treasury Bonds at 12 months from 7% to 3.2% and prime rates on bank investments dropped from 10.5% to 7.5%.

The above leads to identifying in the normal market interest the only certain element at the economic level, due to the relative inadequacy of all the other rates, to which the damage from default in pecuniary obligations must be linked, the concept of which must not be reduced to the limited category of liquid obligations from the start but must also be extended to those which must be liquidated by a judge.

Such is the obligation of compensation of damage, which cannot be distorted by classifying it as a credit of value, the concept of which – as we will say – has no grounds in legal literature.

Pecuniary obligation means all the obligations that have money as their object, whether liquid from the origin or they become liquid following a decision.

The only damage from default that can be hypothesized for any pecuniary obligation, whether liquid or illiquid, and that has money as its object, which is regulated by the principle of its nominal value, is loss of profit (12).

Loss of profit of a pecuniary obligation corresponds to the monetary interest that compensates, according to criteria of normality, the lesser value of a payment of money deferred in time with respect to one inc ash, as we have previously written.

Pecuniary obligations are disciplined in each legal system by a consolidated and age-old discipline, which contemplates the compensation of the damage from default.

Both Italian law and the law in other countries have, as well as legal interest, the « compensation of the greater damage from default » (article 1224, section 2, Civil Code).

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(12) G. VALCAVI, *L'indennizzo del mero lucro cessante come criterio generale del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, section 2220.

In the years from the end of the 1970s to the early 1980s, when the rate of inflation exceeded monetary interest, a far-off decision, which has remained isolated, assumed the damage from inflation as actual damage of the obligation of money (13).

This theory was, however, deeply erroneous because it infringed the nominalistic principle, codified by article 1277 Civil Code, of the currency, whilst loss of profit is the only one compatible with it.

Only the indemnity for loss of profit, as well as corresponding to general principles of an economic nature (as has been seen earlier), has been corroborated by the evolution of rates of interest, well above inflation.

It is the leading criterion adopted by the exemplary and accurate decisions of 4th July, 1979, no. 3776 of our civil courts, all divisions sitting together (14) and subsequently confirmed, again by all the divisions sitting together of the Supreme Court of 5th July 1986, no. 8368 (15).

They correctly excluded that the damage from default should be identified in the phenomenon of inflation, but « in the presumable monetary gain which each economic man draws from the systematic and repetitive way of using money, typical of his economic category », and in particular, savers.

Even where the greater damage from default were considered from the point of view of the actual damage, our case law has correctly identified, given its replaceability and its versatility for every use, in the cost of replacement of the benefit that was not given, i.e. bank loans.

This represents a correct application of the burden of avoiding the greater damage with diligent behaviour, pursuant to article 1227, section 2, Civil Code (16).

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(13) Court of Cassation, 30th November 1978, no. 5678, in *Foro it.*, 1979, I, section 15 ff.

(14) Court of Cassation, all divisions sitting together, 4th July 1979, no. 3776, in *Foro it.*, 1980 I, section 118.

(15) See G. VALCAVI, *Le sezioni unite precisano i criteri da applicare nelle obbligazioni pecuniarie per il risarcimento dei danni da svalutazione*, in *Riv. dir. civ.*, 1986, II, p. 195.

(16) R. PARDOLESI, *Interessi moratori e maggior danno da svalutazione: appunti di analisi economica del diritto*, in Foro it., 1979, I, section 2622; A. AMATUCCI, *Certezza acquisita e dubbi residui in materia di incidenza della svalutazione monetaria sulla responsabilità del debitore*, in *Foro it.*, 1978, I, section 337. The two decisions of the Supreme Court, with all divisions sitting together, indicated above, differ due to the greater or lesser extent of the presumptive criteria which can be adopted as evidence. Since 1980 to date, the author of these lines has moved in the same direction through a long series of essays in the main journals which have annotated the various decisions. See G. VALCAVI, *Inflazione monetaria o interessi di mercato?* in *Foro it.*, 1980, I, section 118. *La stima del danno nel tempo, con riguardo all'inflazione, alla variazione dei prezzi e all'interesse monetario*, in *Riv. dir. civ.*, 1981, II, p. 392 ff.; *Ancora sul risarcimento del maggior danno da mora nelle obbligazioni pecuniarie: interessi di mercato o rivalutazione monetaria*, in *Foro it.*, 1986, I, section 15540 ff.; *L'indennizzo del mero lucro cessante come criterio generale del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, section 2220 ff.*; Sulle conseguenze dell'aumento del tasso legale di interesse*, in *Foro it.*, 1991, I, section 873 ff.; now collected in *L'espressione monetaria nella responsabilità civile*, with a preface by A. Trabucchi, Padua, 1994, p. 41 ff., p. 53 ff.,

The comparative evolution of the rates of interest and inflation as described earlier, has confirmed with the indefeasibility of the facts that occurred, the opinions stated above, which coincided with the conclusions of the economists.

The greater damage from default as per article 1224, section 2, Civil Code, will be identified at least in the differential between the legal interest and the greater bank interest for savings or as the cost of loans the entrepreneur must bear.

It also absorbs and makes up for the damage of inflation, because bank interest, as the famous economist Wicksell (17) said, is the supreme regulator of the prices of commodities, on any market whatsoever.

In recent years, our legislator has made these ideas his own, with perspicacity, through the new formulation of article 1284. section 1, Civil Code, with regard to the legal rate of interest (which is the least) where he had it depend on a measure by the Minister of the Treasury who, each year, establishes it « on the basis of the average annual gross yield of state securities with a duration of not more than twelve months and taking into account the rate of inflation recorded in the year » (18).

However, he leaves to be indemnified the greater damage from default that the creditor can prove, including with presumptive arguments, with the only limit of not infringing the prohibition of usurious interest, established by law no. 108 of 17th March 1996, which fixed it at 50% above the periodically recorded market rates.

In the past we have dealt with the damage from default in obligations in a foreign currency, in which article 1278, Civil Code, allows the debtor to pay in national currency at the rate of exchange on the due date; on that occasion the damage from default was identified in the case of the choice of the national currency that was going down with respect to the foreign currency, in the differential of the exchange rate with the latter and the monetary interest (19).

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p. 91 ff., p. 111., p. 121 ff. The accurate and insightful writings by R. Pardolesi and A. Amatucci who were amongst the first advocates of this order of ideas are also recalled here.

(17) WICKSELL, *Interesse monetario e prezzi dei beni*, Turin, 1977, p. 370 ff.

(18) Law no. 662 of 23rd December 1996 has modified the wording of article 1284, section 1, Civil Code, as well as reducing the rate from 10% to 5%.

(19) Previously the opinion that in obligations in foreign currency the exchange rate on payment rather than on the due date was to be assumed was the current opinion; Court of Cassation, 16th March 1978, no. 2691 in Foro it, m 1989, I, section 1210; CAMPEIS-DE PAOLI, *La responsabilità civile dello straniero*, Milan, 1982, p. 421 ff. ASCARELLI, *Obbligazioni pecuniarie in Commentario del cod. civ.* edited by Scialoja and Branca, Bologna, 1959, p. 441 ff., p. 457 ff., p. 508 ff., on the other hand, was inclined towards a revaluation of the damage as well as legal interest, in the event that the debtor chose to pay in our currency pursuant to article 1278 Civil Code. In this sense, G. VALCAVI, *Il corso di cambio ed il danno da mora nelle obbligazioni in moneta straniera* in *Riv. dir. civ.*, 1985, II, p. 251 f.; *Le obbligazioni in divisa straniera, il corse di cam-*

After the « Euro » comes into force in Italy, its legal rate of 2.5% will obviously be valid for the obligations that have as their object the new currency and the ductility of the new wording of article 1284, section 1, Civil Code, allows constant updating in the future as well.

Moreover, article 1224, section 2, Civil Code, will apply which establishes the indemnifiability « of the greater damage from default » and the prohibition of usurious rates, approved by the legislator with law no. 108 of 7th March 1996, which in Italy is therefore a law of public order.

The basic principle of the freedom of the parties to determine the standard rates of interest in the new currency will obviously remain intangible, as the classification of the rates in the default interest and equivalent rates on savings and loans will also remain.

By way of information, at the end of 1998 the rate obtainable by clients of leading banks on international markets showed a great convergence with those of the Lora with the other currencies in the European monetary system, because the ECU was as 2.80%, the Lira at 2.91%, the Mark and the French Franc at 2.80%, the Belgian Franc at 2.88% and the Peseta at 2.91%, i.e. approximately they were fundamentally equivalent (20).

The discount rate of the currencies of the countries belonging to this system varied around 3%.

As for the interest rates of the new « Euro » currency, the one practised to calculate the discount of bills of exchange by the main international banks oscillated between 2.75% and 3.25% and approximately were the Lombard rate, on securities that could be stood in lien at the clients' bank and the prime rate for loans to the best clients.

Also on the same date, the interbank rate in Euro (Euribor) oscillated between 3.22% and 3.05% and the one practised by London banks (Libor) oscillated between 3.20% and 3.084% (21).

Obviously the difference both of the exchange rate and of interest between our currency and that of the other countries belonging to the European system is destined to lose any value, whilst the indemnifiability of the difference between the Euro and the currencies outside our system, such as the dollar, the pound, the yen, the Swiss franc and the national currencies of the individual countries will remain.

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bio ed il maggior danno da mora, in Foro it., 1989, I, section 1210; In materia di liquidazione del danno subito dallo straniero, in *Foro it.*, 1989, I, section 1619; *Il danno da mora nelle obbligazioni in moneta straniera, nella attuale disciplina di liberalizzazione valutaria*, in this *Rivista*, 1992, II, p. 861 ff. and now in *L'espressione monetaria*, cit., p. 131 ff., p. 151 ff., p. 159 ff., p. 165 ff and p. 183 ff.

(20) See data from *Il Sole 24 Ore* of 5th January 1999.

(21) The Euribor rate at one week was quoted 3.294 and that at one year 3.259, the Libor rate from 3.25 to 3.19: again from Il Sole 24 Ore of 5th January 1999.

The Euro – as we are writing – one month from its introduction, has lost points of the exchange market with respect to the quotation of the dollar, due to the different expectations of economic growth and the different monetary interest.

Moreover, here the rules of international conventions will take on increasing importance.

3. – We have written above that the category of the so-called credits of value as well as that of the so-called compensatory interest are destined to be radically reviewed and no longer have any following in our country.

We have to start saying that the distinction between credits of currency and credits of value is not justified by any legislative rile and is exclusively from case law.

Credit of currency currently means only the pecuniary obligations that are liquid from the origin whilst the term « credit of value » usually refers to those other obligations which have to be liquidated by a judge, such as, for example, that of the compensation of damage (22).

I have written elsewhere that the concept of credit of value is in itself arbitrary, because it aims to indicate a pecuniary credit in an imaginary currency, which would not be supported by the principle of nominal value and would have, on the contrary, a stable purchasing power in time.

More precisely, it is a credit in an imaginary currency of which the purchasing power is considered stable, with the adjustment of the monetary yardstick according to the index numbers of its purchasing power for the families of blue – and white – collar workers, in the period of time considered (23).

The principal advocate of this category (24) distinguishes the *aestimatio* or evaluation of the commodity at the time the damage occurred from the *taxatio*, or the evaluation updated to the payment, recalculated on the basis of the index numbers of loss of purchasing power of the currency, as if it had kept the original one and this distinguishes the *mensura* from the *mensuratum*.

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(22) T. ASCARELLI, *Delle obbligazioni pecuniarie*, in *Commentario del cod. civ.*, edited by Scialoja and Branca 1979, Bologna, under article 1277, p. 94 ff., pp. 173-180 ff., p. 241 ff., p. 41 ff. The reason why the concept of pecuniary obligations is limited to those that are liquid in origin, whilst those to be liquidated in money are considered credits of value cannot be understood.

(23) ASCARELLI, op. cit., p. 444.

(24) ASCARELI, op. cit., p. 173, p. 180, p. 241 ff. The aforementioned construction which is based on the *aestimatio* on the occurrence of the damage and the *taxatio* on the decision is connected with those attempts by historians of economy who, like Wiebe, used a non-monetary yardstick (such as gold and Silver) to compare monetary values, prices and wages in different places and at different times. The artificiality of this method has been shown by L. EINAUDI, *Teoria della moneta immaginaria da Carlo Magno alla Rivoluzione francese*, in *Riv. storia econ.*, 1936.

The concept in itself of the credit of value made its first appearance for a brief period in 1923, in the Germany of the period that crossed an economic phase of flight from the Mark which the German jurists of the period tried to equitably remedy with fixing the value in time of a non-pecuniary payment with the theoretical justifications of the « preservation of the basis of the contractual payment » « of the presupposition », « of good faith », thus removing the indemnity from the principle of nominal value (25).

The extreme fragility of this distinction and of the attempt to give theoretical dignity appeared shortly afterwards with the extension of the revaluation of the pecuniary credits that were liquid in origin and was superseded by the subsequent phase of economic stabilization (26).

This category was imported to Italy, at the end of the last World War from far-off Brazil by the late Ascarelli who knew the hyperinflation of that country, which moreover is being repeated in times close to us (27).

He wanted to specify that the credit of value is not equivalent to the indexed credit, although it is not contemplated by any legislative rule, because the adjustment of the monetary yardstick had to be done, both in the case of the increase or decrease of the purchasing power of the currency.

We have tenaciously opposed this concept or category of credit of value, as moreover that of compensatory interest in a long series of articles (28).

The totally abstract nature of the concept of the category of credit of value and its incompatibility with fundamental principles, such as those concerning default, have been criticized in particular.

The monetary revaluation of damage is granted to the creditor, even in the case in which he is in default, as well as that in which he has refused the real offer from the damaging party of a sum which appears to be adequate at a later date (29).

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(25) This is the opinion of OERTMANN-BABEL-KRUCKMANN-NIPPER-DEY quoted by G. SCADUTO in *I debiti pecuniari e il deprezzamento monetario*, Milan, 1924, p. 147; in case law; Supreme Court of the Reich, 21st September 1920, in G.L. HOLTFRERICH, *L'inflazione tedesca 1914-1923*, Bari, 1989, p. 301 ff.

(26) Supreme Court of the Reich, 28th November 1923, in G.L. HOLTFRERICH, op. cit., p. 318.

(27) The transactions if goods and money in Brazil, even in recent times, took place in obligations of the national treasury, indexed to the cost of living.

(28) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, in *Foro it.*, 1981, I, section 2112; *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, p. 681 ff.; *Sul risarcimento del danno da illecito o da inadempienza e di quello per il ritardo con cui è prestato l'indennizzo* in *Giur. it.*, 1991, I, i, section 1227 ff., and now in *L'Espressione monetaria*, cit., p. 191 ff., p. 249 ff. and p. 279 ff.

(29) G. VALCAVI, *L'espressione monetaria nella responsabilità civile ed altri saggi*, Padua, 1994, p. 53 ff., p. 91 ff., p. 279 ff., p. 321 ff., p. 341 ff., p. 349 ff.

These criticisms have been accepted, although at a distance in time, by the important pronouncement of the Supreme Court of 20th June 1990, no. 6209, at the point in which it recognised *funditus* that « no-one wants to deny the empirical and casuistic origin of the category of the debt of value, which although opposed from the conceptual point of view, continues to show a considerable expansive capacity, becoming legitimate on the level of case law effectiveness (sic!) » (30).

This is tantamount to recognizing that the category of the credit of value has no dogmatic foundation and only has the nature of an empirical and equitable stratagem.

In another part of the grounds of this pronouncement, it states that « monetary revaluation represents only the discounting back of the debt of value so that the money is significant only as an expression of the purchasing power and not as the object of the service (sic!) ».

The adoption of the revaluation to discount back the damage is profoundly wrong because it confuses two different problems, that of the quantification of the entity of the damage and that of the time of reference of the evaluation.

It moves the time of reference from its occurrence to the *tempus rei iudicandae*, although the same pronouncement of the Supreme Bench indicated above peremptorily stated in another part that the « damage from non-fulfilment is to be liquidated with reference to the time in which it occurred and not to that of liquidation » (31).

This method also appears erroneous because it does not even assume the effective prices of the commodities at the time of the decision or of the payment, but only the comparison of the abstract statistical indexes of the prices (the so-called value of money).

This is a solution – as I have written elsewhere – only on the increase of prices, to the decision that also preserve from the drop that of the individual commodity that has not been supplied or has been destroyed or stolen (32).

The nodal point of the crisis of the equitable nature of this method is where its advocates add the legal interest to the revaluation or the revalued capital, as if in the presence of a debt in the common money supported by the nominalistic principle.

In this regard, the aforementioned enlightening decision of the Supreme Court has added that, having to add to the damage from unlawful action or form non-fulfilment, to be evaluated with regard to the time of its

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(30) In Riv. dir. civ., 1991, II, p. 67 ff.

(31) Court of Cassation, 18th July 1989, no. 3352, in *Foro it.*, 1990, I, section 933 ff.

(32) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi d'interesse*, in *Foro it.*, 1981, I, section 2112.

occurrence, that from the delay « for the loss of that *utilitas* that the creditor would have drawn from the sum originally due instead of the lost commodity, more closely linked to the concept of default », the latter ought to be indemnified in a proportion corresponding to the legal interest.

In this way, the decision contradictorily ended up by identifying the credit of value with that of currency as is represented « by the sum originally due instead of the lost commodity ».

The concept of compensatory interest has been erroneously extended from the marginal hypothesis of article 1499 Civil Code to each credit that has to be liquidated by the judge and has ended up by procuring for the damaged part, against all equity, a disproportionate profit, instead of the mere indemnity (33).

The author has observed that this sum of revaluation and interest represented an unjust duplication of the compensation of the damage from default although in different forms, for the same period of time in which the payment of the monetary compensation is deferred in time (34).

The legal interest has the function of discounting back in time all the values calculated in the currency and if the legal interest is inadequate with respect to the normal one, it should be integrated with the indemnity of the greater damage contemplated by article 1224, section 2, Civil Code, i.e. by the differential with respect to the normal market interest and not adding it to a different and greater purchasing power.

Dominant case law, with a long series of pronouncements, in the period until 1994, has ended up by calculating the legal interest, called compensatory, on the revalued capital.

The Supreme Court was aware of the disproportion of this profit with its pronouncement of 9th September 1994, no. 7943 (35) which corrected it, stating that the interest should take effect only from the judicial pronouncement, with which before it the creditor should have been satisfied by the last revaluation alone.

As, in the meantime, the latter had dropped to 5% or 6% and the legal interest had increased under the law to 10%, this solution could only be inadequate to compensate the damage from default.

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(33) G. VALCAVI, *Indennizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, p. 681 ff.

(34) G. VALCAVI, *Il problema degli interessi monetari nei risarcimenti del danno*, in *Resp. civ.*, 1987, I, p. 3; *In tema di d'indennizzo e lucro del creditore: a proposito di interessi e rivalutazione monetaria*, in *Foro it.*, 1988, I, section 2318 ff.; *A proposito del lucro del credito nel risarcimento del danno in genere*, in *Foro it.*, 1989, I, section 1988; *Sul carattere moratorio degli interessi nel risarcimento del danno*, in *Resp. civ.*, 1990, II, p. 97 ff. and, lastly, *Risarcimento del danno, interessi e rivalutazione*, in *Il danno*, 1996, p. 3, p.4, p.5 ff. and now in *L'espressione monetaria*, cit. p. 321 ff., p. 341 ff. and p. 349 ff.

(35) In *Foro it*, 1995, I, section 842.

All the Divisions of the Supreme Court sitting together, with the decision of 17th February 1995, no. 1712 (36) further adjusted their aim, establishing that the legal interest should not have been calculated on the last revalued capital but on that gradually revalued year by year and in addition, at a rate that was not necessarily the same as the egal rate (at that time still 10%) but also lower according to the evidence that the damaged party had produced for the loss of profit from the commodity in kind.

The Supreme Court again, with its subsequent decision of 19th May 1995, no. 5595 (37), finally approved that « alternative behaviour cannot be attributed to the creditor, such as, for example, that he would simultaneously have invested the sun in a commodity other than money (such as to claim its revaluation) and on the other hand he would have kept it liquid (such as to enjoy the monetary interest) ».

The decision came to the correct conclusion: « if the interest can be presumed, the preservation of the purchasing power cannot also be presumed, the legal interest is in no case due on the credit of value ».

The revaluation alone, which in the meantime had dropped to the rate of 5% whilst the legal interest for the whole of 1996 had remained at the level of 10% to then drop to 5%, therefore did not appear an adequate instrument.

Lastly, the legislator finally intervened to do justice to these categories.

With Law no. 662 of 23rd December, the legislator radically amended the wording of article 1284, section 1, Civil Code, concerning the formulation of the rate of legal interest (38).

It has abandoned the previous fixity of the legal rate, destined to be superseded or to remain behind with respect to the yield of money and the rate of inflation.

The new wording of article 1284, section 1, Civil Code, establishes that the legal rate is the flexible one which each year is adopted by a decree of the Ministry of the Treasury.

The measure, it is added, will be determined « on the basis of the annual gross yield of state securities with a duration of not more than twelve months and taking into consideration the rate of inflation recorded in the year ».

With these words, the legislator has acknowledged that the interest has the function of covering all aspects of the loss of the *utlitas temporis* of a deferred payment of money with respect to the same payment in cash.

The reference to the average gross yield of State securities highlights its essential nature of loss of profit.

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(36) In *Foro it.*, 1995, I, section 1470 ff., and in *Con. giur.*, 1995, 4, p. 462.

(37) In *Riv. dir. civ.*, 1996, p. 417.

(38) See art. 185 of Law no. 662 of 23rd December 1996.

With reference to the « rate of inflation recorded in the year », the legislator, in harmony with the conclusions of economists, has intended to say that the interest is the only instrument that remedies inflation.

The formula adopted therefore indicates that it is not allowed to sum the interest to the revaluation, under pain of duplicating the compensation of the same damage.

The so-called damage from inflation in therefore included in the greater damage which is indemnified by interest, pursuant to article 1284, section 1, Civil Code, because the legal rate is determined, taking into account the rate of inflation recorded in the previous year, as well as by the average of the gross yield of State securities.

With this reference to the rate of inflation, there is no more room for the credit of value. let alone for an additional calculation of compensatory interest.

The ministerial determination of the legal rate already takes into account – as has been seen – the rate of inflation which assumes the characteristics of an event included in the loss of *the utilitas temporis.*

Obviously the legal rate can be integrated – as has been seen – by the differential between it and the greater interest practised on the savings or loans market.

Following the introduction of the Euro, which has replaced our old « Lira », there is no longer any perspective for the continuation of these juridical constructions.

The category of credit of value is an exclusively Italian concept and unknown to the other countries in the European Monetary System (39).

With the arrival of the Euro, a credit of value in Euro cannot be surmised, on the basis of unknown statistical indexes of inflation of the whole area of the European Monetary System and in any case, inapplicable for the different countries.

How can there be recourse to the indexes of inflation in our country for a supranational currency such as the Euro?

The negative answer has now come from the facts, with their indefeasibility of reality and not only from the legislator through the new wording of article 1284, section 1, Civil Code.

4. – The disappearance of the categories of credit of compensatory interest must not lead our law experts to take an even more unreasonable step backwards, as would be the case in which they took the price or value of the individual commodity, existing at the time of the final decision, as

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(39) Only one current in Spanish legal literature (I.- DIEZ-PICAZO y ANTONIMO GILLON, Sistema de derecho civil, II, Madrid, 1978, p. 157) has defended the theory of credits of value, moreover without being greatly followed.

that to which to refer the evaluation of the damage, as an isolated decision of our Supreme Court has surmised as an alternative.

This erroneous conclusion cannot be justified with the attempt to be in harmony with the backward opinions that still today prevail in the systems of some important countries in the European Monetary System.

In this regard, it has to be said that in Germany (40), in France (41) and in Belgium (42) the value and the price of the individual commodity, which the debtor has not supplied or has destroyed or has stolen, at the time of the final decision or on payment, are habitually adopted by the legal literature and case law.

In Spain, on the other hand, the time of the claim is taken as the reference time (*el tiempo de ejercicio de la accion*) (43).

In other countries outside our monetary system, such as Great Britain and Switzerland, that of the occurrence of the damage is correctly taken (44).

This conclusion is the only one that complies with reason and has been advocated by ourselves with ample motivations (45).

This is also the criterion that was adopted by the important pronouncement of the Italian Supreme Court on 20t June 1990, no. 6209 and by those that followed it with the same orientation and now form consolidated case law that « the damage from non-fulfilment or from unlawful action with reference to the time at which it occurs and not to that of liquidation ».

This is the currently dominant opinion in our legal system.

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(40) In Germany, the calculation is made on the basis of the prices at the time when the damage is indemnified; GRUNSKY in PALANDT, *Münchener-Kommentar*, Munich, 1985, under article 249 BGB, 1985, no. 9 inter alia.

(41) In France, see H.L. MAZEAUD, in *Traité théorique et pratique de la responsabilité civile*, Paris, 1950, no. 2420-8 and the case law quoted on p. 544.

(42) Belgian Court of Cassation, 7th February 1946, in MAZEAUD, *op. cit.*, no. 2480-8, note 21.

(43) Supreme Court, 30th October 1956 and case law in J. SANTOS BRIZ, La responsabilidad civil in el derecho sustantivo y processal, Madrid, 1981, p. 289.

(44) F. BOLLA, *Repertorio di giurisprudenza patria*, 1936, p. 472.

(45) Cf. G. VALCAVI, *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, p. 31 ff; for the sake of completeness, please also refer to: *Ancora sul tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1991, II, p. 267; *Sul risarcimento del danno da illecito o da inadempienza e di quello per il ritardo con cui è prestato l'indennizzo*, in *Giur. it.*, 1991, I, 1, section 1227 ff.; *Intorno al concetto di* perpetuatio obligationis *e al tempo di riferimento del danno da inadempienza contrattuale*, in *Riv. dir. civ.*, 1992, II, p. 385 ff. and now in *L'espressione monetaria*, cit., p. 207 ff., p. 273 ff., p. 2790 ff., p. 293 ff., p. 309 ff.

Obligations in foreign currency (Art. 1278, 1279 Civil Code)

« The exchange rate and the damage from default in obligations in foreign currency » maintains that exclusive reference should be made to the exchange rate ion the due date according to article 1278 Civil Code, whilst the damage from default should be indemnified by the interest and any greater damage from the exchange rate in the event that the creditor proves that according to the *id quod plerumque accidit*, he would have exchanged the currency inferred in the obligation or paid in *facultate solutionis* into another, which was going up compared to the former.

In « The obligations in foreign currency, the exchange rate and the greater damage from default » also emphasised that the liquidation of the greater damage from the exchange rate depends on the proof that the creditor can give that he would normally have exchanged the currency that he had promptly been given into another, which would have shown an increase (this is the case for example of a creditor resident abroad).

The possible decrease of the foreign currency due with respect to that of legal tender should also be indemnified if the person who should have received the former had changed it into the latter (for example a creditor resident nationally).

The same conclusion is also valid for the damage from default in the obligations in foreign currencies with « effective exchange rate ».

Following the currency deregulation, the author published « The damage from default in obligations in foreign currency in the current discipline of currency deregulation », in which he maintained that it must be excluded that the creditor can claim the difference of the exchange rate, on the basis of a mere programme of investment adopted afterwards and not on the *quod interest* according to the *quod plerumque accidit.*

The dominant opinion in legal literature and in case law is that which takes as reference the exchange rate on payment; in this sense Court of Cassation, 16th March 1987, no. 2691.

From « *L'Espressione monetaria nella responsabilità civile* », Cedam 1994.

In « On liquidation of the damage of a foreigner », the author maintains that tort damage caused to a foreigner in our country, should be liquidated with the currency that is legal tender which any difference in the exchange rate of the foreign currency in which the damaged party would have changed it could be claimed, only by way of damage from default.

The author, disagreeing with Court of Cassation, Labour Division, 16th may 1981, 3239, in « If the credit of a foreign-resident worker has to be revalued under article 429, section 3, Code of Civil Procedure » excludes that this can be practised.

The various articles have had some echo in legal literature as can be seen from the bibliography indicated alongside each one.

Lastly, to make up for a legislative gap concerning the absence of determination of legal interest of an obligation in foreign currency, the author put forward in the 10th legislation at the Senate of the Republic, bill no. 2812, in which the it coincided with the official rate of discount of the currency considered.

It was presented again in the 11th Legislature with bill no. 50 to the Senate of the Republic and no. 1235 to the Chamber of Deputies.

The exchange rate and the damage from default in obligations in foreign currency

1. – Let us recall what article 1278 Civil Code established for the case that the effective payment of foreign currency is not agreed: « if the sum due is determined in a currency that is not legal tender in the State, the debtor has the faculty of paying in legal currency at the exchange rate of the due date and the place established for the payment ».

If the debtor pays late and the legal currency has declined in value in the meantime, there is the problem of whether the amount to be paid is to be calculated on the basis of the exchange rate on the due date or that on which the late payment is made.

Moreover, the foreign currency paid late can also have been depreciated in the meantime on the exchange market and the problem is not, on close examination, dissimilar.

The matter, in its most general terms, therefore concerns the rule of exchange rate from the point of view of the risk of its variation for the party that pays or receives the payment late.

In general, the subject is dealt with only in connection with the hypothesis in which the payment of the currency *in facultate* is made is delay and it has dropped in value with respect to the foreign currency and not with regard to the hypothesis in which it is the foreign currency which it is the foreign currency, paid late, that has dropped in value. As if the payment of the foreign currency, after the due date, were always to be considered exact, whilst it is not equal to the legal tender, because both leave the damage from default virtually uncovered.

The disarticulate way of raising the problem, whereby the specific fulfilment of the currency *in obligatione* would be synonymous with exact fulfilment, unlike that *in facultate*, leads to an unacceptable solution, because it protects the foreign creditor from the devaluation of the national currency, and not the national creditor from the devaluation of the foreign currency. The topic is unique and has to find a coherent and harmonious

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From « Rivista di Diritto Civile », 1985, II, p. 251 and ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

solution whether it is a question of obligations in foreign currency with « effective exchange rate » or « not effective », and in this case that the payment is made in legal or foreign currency.

At the basis of the present difficulties is the fact that the rule is taken of the exchange rate of late payment of the foreign currency and not prompt payment, with the conclusion that it codifies, against all logic, a profit or loss in favour or to the prejudice of the creditor with respect to the one it should have been.

The rule of the exchange rate on the due date can moreover allow the debtor a loss onerous performance of the service, with respect to the late payment, but this is not as significant as whether the late payment is translated or not into damage for the creditor, who is to be indemnified.

It is the case that the payment is made in the currency of the creditor, whether legal or foreign, and this is losing value with respect to that of the debtor which is increasing.

The subject offers the opportunity for reconsideration, with respect to legal literature and current decisions.

2. – Let us start off with the hypothesis, on which legal literature and case law have concentrated, of the depreciation of the legal currency *in facultate*, with respect to the foreign currency *in obligatione*, to then for on to the latter.

The reflections on one can also be used for the other. The best starting point is the state of opinions, under the previous and similar article 39 Code of Commerce, which are also important to understand those of the present article 1278 Civil Code.

The aspect which attracted and which still attracts the attention of authors and judges concerns the possibility that the debtor can take advantage of his non-fulfilment by paying in legal currency which has dropped in value compared to the foreign currency during the default period.

The fact that the debtor can draw profit from his non-fulfilment is considered contrary to the system and therefore there is a tendency to fix the opposite rule of the exchange rate on payment.

In this regard, we underline that the currency in *facultate solutionis* must be equivalent to that *in obligatione* (1) also at the time of effective payment, and the influence of the valoristic conception (2).

There has been an attempt to overcome the indisputable obstacle of the literal subject with observing that the reference to the exchange rate of

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(1) For a critical reference to the assumption of equivalence, MAZZONE, in Riv. dir. comm., 1922, I, p. 177. The theory of the credits of value is based on this equivalence.

(2) The principle of the nominal value also applies to the foreign currency. See VASSALLI in Riv. dir. comm., 1922, II, p. 260.

the due date was fixed in the supposition that the payment is punctual and not late (3). The exchange rate on the due date would thus be synonymous with the punctual payment and the more general rule of the exchange rate on payment should be drawn from this.

This opinion is in harmony with the solution generally accepted in the evaluation of the damage, which is updated to the new prices in course at the time of the decision, rather than those on the occurrence of the damage (4).

The adoption of the exchange rate on payment has also been theorized, for the probability of the increase in value of the foreign currency, as a lump-sum liquidation of the damage from default (5). The adoption of the exchange rate on payment, made from §244 BGB influenced older legal literature and case law, despite the grave disputes to which it gave rise (6). In the past, these opinions were opposed by those authors (7), who privileging the literal content of the rule, kept the reference to the exchange rate on the due date. It has been observed that in the case of depreciation of the foreign currency with respect to the legal currency, the rule of the exchange rate on payment is equivalent to authorizing the debtor to pay fewer Lira than those necessary on the due date, and therefore to codifying the non-indemnifiability of the damage from default (8) A profit of the

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(3) ASCOLI, in Riv. dir. civ., 1920, p. 404; Id., in Riv. dir. civ., 1921, p. 383: Id., in Riv. dir. civ. 1922, p. 296.

(4) MOMMSEN, *Die Lehre von dem Interesse*, Braunschweig, 1855, pp. 218 ff.; DERNBURG, *Pandette*, II, Italian translation, 1903, Berlin, p. 183; H. and L. MAZEAUD, *Traité théorique et pratique de la responsabilité civile*, III, Paris, 1939, p. 586: TEDESCHI, *Il danno e il momento della sua determinazione*, in *Riv. dir. priv.*, 1933, I, pp. 263 ff.; Id., in *Riv. dir. comm.*, 1934, I, pp. 234-244; PACCHIONI, *Dei delitti e quasi delitti*, Milan, 1940, p. 118; DE CUPIS, *Il danno*, Milan, 1979, I, pp. 269 ff.

(5) ASCOLI in *Riv. dir. civ.*, 1920, p. 404, Id., in *Riv. dir. civ.*, 1921, p. 383; Id. in *Riv. dir. civ.*, 1922, p. 296; COBIANCHI in *Riv. dir. comm.*, 1922, II, p. 67; GUIDI, in *Dir. e prat. comm.*, 1922, I, p. 22; COGLILO, in *Riv. dir. comm.*, 1922, II, p. 303. In case law, Court of Appeal, Genoa, 5th July 1919, in *Mon. trib.*, 1920, p. 597; Court of Appeal of Genoa, 19th May 1922, in *Foro it.*, 1922, II, Section 757.

(6) For a review, see VASSALLI, *op. cit.*, p. 254, note *b*). For the due date: SCHOLLMEYER-OERTMANN-KUHLENBECK-KOBEN, Kommentar zum BGB, §244, Berlin, 1914. For the day of payment, NUSSBAUM, Valutafragen, in Juristische Wochenschrift, 1920, p. 14; COSAK, Lehrb. d. Handelsrechts[5], 1900, no. 2, p. 136.

(7) For the due date, with regard to art. 39 Civil Code, cf. VIVANTE, Tratt. di dir. comm.., Milan, 1926, no. 1568, p. 63; VASSALLI, *op. cit.*; ASCARELLU, Studi giuridici sulla moneta, Milan, 1928, pp. 173, 190, 191; Mazzone, in Riv. dir. comm., 1922, I, p. 170 ff.; RAMELLA. in Riv. dir. comm., 1922, II, p. 60; OTTURI, in Mon. trib., 1921, p. 193. In case law, Court of Trieste, 25th October 1921, in Riv. diur. comm., 1922, II, p. 252. The exchange rate on the due date is that generally accepted in the various legislations. Thus article 37 of the German law on exchange rates of 1848, article 336 German Civil Code of 1861m article 336, section 2, general Austrian Civil Code, article 338, French Civil Code, article 296 Treaty of Versailles, §§d), s), treaty of San Germano. In Italy, article 228 1865 Civil Code, article 39, 1882 Civil Code.

(8) VASSALLI, op. loc. cit., MAZZONE, op. loc. cit., OTTURI, op. loc. cit.

creditor from an increase in value of the foreign currency is not justified by the general principles on the compensation of damage, whilst we do not see how the variation in the exchange rate can represent a lump-sum liquidation (9).

Some authors therefore concluded for the reference to the exchange rate on the due date and the indemnity of any subsequent devaluation of the legal currency, according to the general principles, deeming the limit of legal default interest, under article 1231 1865 Civil Code, not applicable to obligations in a foreign currency (10).

These opinions were not incorporated in the case law which was formed on article 39 of the Code of Commerce.

The preliminary draft of the book of obligations, under article 11, adopted the rule of the exchange rate on payment (11), deeming that the profit from any gain in value would compensate the damage from default (12), as otherwise the suppression of article 122 was proposed which contemplated compensation of the greater damage in pecuniary obligations (13).

In the final text of the code, there was a return to the exchange rate on the due date with article 1278 Civil Code and article 1224, section 2, codified the compensation of the greater damage from default. In his report, the Minister of Justice (14), considered the depreciation of the exchange rate as the greater damage.

3. – The prevalent opinion in the Civil Code currently in force is that expressed by Ascarelli (15), which contemplates reference to the exchange rate on payment, and not on the due date, in the event that the legal cur-

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(9) VASSALLI, op. cit., p. 255; MAZZONE op. cit., p. 175 criticize this point of view.

(10) TALLACHINI-MAZZONE, op. loc. cit., against ASCOLI, op. loc. cit.; VASSALLI, op. loc. cit.

(11) Article 11 of the preliminary draft adopted the rate of exchange on payment, following a similar solution of article 24 of the Italian-French draft, *Delle obbligazioni e contratti*, and article 303 of the D'Amelio draft. The report of the Royal Commission on the draft gave the motivation that this rule « corresponded to that which is the object due ».

(12) In this sense Asquini and others, at the meeting of 30h May 1940, of the Commission of the Legislative Assemblies, on the preliminary draft.

(13) Previously, article 343 of the Vivante draft of the Code of Trade also proposed the adoption f the exchange rate on the due date and the liquidation of the difference of the exchange rate only as the greater damage from default. ASCARELLI, in Studi giuridici sulla moneta, op. cit., p. 201, wrote as follows: « thus every discussion on the exchange rate was cut short, with the adoption of that on the due date, as suggested by equity and juridical logic. » The compensation of the greater damage in general had already been codified by §288, section 2, German Civil Code, by article 106 of the Swiss Code of Obligations and by case law based on §§283 and 284 of the abrogated German Code of Trade. For historical notes, see VASSALLI, op. cit., pp. 265, 266.

(14) Report of the Minister of Justice on the Civil Code, no. 36, p. 26.

(15) ASCARELLI, op. cit., nos. 134, 137, PP. 388, no. 3, 390 no. 1, 395, 396, 397 n. 3.

rency has been devalued in the meantime. The delay of the debtor cannot subject the creditor to the fate of a unit of measurement of values other than that of the debt, in the period prior to the due date. The conclusion is that « the debtor can pay in national currency the sum equivalent to the exchange rate on the day of payment of the foreign currency due, continuing to run the currency risk even after the due date that he ran before whilst, when he becomes defaulting, he must indemnify the damage derived from the impossibility of avoiding, through opportune investments, the loss of purchasing power of the unit of measurement adopted ».

Thus the compensation of the « greater damage » would be identified with that of the inflation damage of the foreign currency with the aberrant conclusion that in Italy in addition to the profit from the upswing of the exchange rate, the zeroing of its depreciation due to domestic inflation would also be guaranteed. The opinion has had a following, even recently, in legal literature (16).

The theory favourable to the exchange rate on the due date, save the indemnity of its subsequent depreciation with respect to the foreign currency, only as great damage to be proven, has been supported by authoritative jurists, with respect to the different case of obligations in foreign currency-value, i.e. in Italian currency with a clause of adjustment to a foreign currency (17).

Here too, however, others have maintained the recourse to the exchange rate of payment because it would not be equitable to claim from the creditor rigorous evidence of the damage (18). This feels the effects of a conception inspired by an unreasonable *favor creditoris*, which is at the base of the valoristic conception.

Dominant case law (19) deems that the defaulting debtor who pays legal currency under article 1278 Civil Code, which has been depreciated

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(16) BARASSI, *La teoria generale delle obbligazioni*, Milan, 1948, III, no. 246, pp. 81 ff.; DI STASO, under *Somma di denaro (debito di)*, in *Noviss. Digesto it.*, VXII, n.d., but Turin 1980, p. 879; DI MAJO, *Obbligazioni pecuniarie*, in *Enc. del dir.*, XXIX, n.d., but Milan, 1978, p. 281; PERLINGIERI, *Codice civile commentato*, Turin, 1980, under article 1278 Civil Code p. 183.

(17) ANDRIOLI, in *Foro it.*, 1955, I, section 320; ASQUINI in *Riv. dir. comm.*, 1955, II, pp. 257 ff.; CARBONETTO, under *Clausole di indicizzazione*, in *Diz. del dir. priv.*, edited by *Irti*, Milan, 1980, p. 145.

(18) Thus QUADRI, *Le clausole monetarie*, Milan, 1981, pp. 141, 146, 150 ff. In this sense, Court of Civil Cassation, 24th June 1980, no. 3971 in *Giust. civ.*, 1980, I, p. 2469.

(19) Courtof Cassation, 21sy June 1955, no. 1912 in *Giust. civ.*, 1955, I, p. 1823; Court of Civil Cassation, 24th January 1958, no. 178 in *Rep. giur. it.*, 1958, under *Moneta*, no. 7; Court of Cassation 16th June 1958, no. 178, ibidem no. 4; Court of Cassation 17th June 1959, no. 1888; Court of Cassation 17th April 1964, no. 929, in *Giust. civ.*, 1964, I, p. 1361. This orientation is essentially confirmed, extending it by analogy to the obligations with clause of adjustment to foreign currency. by Court of Cassation 24th June 1980, no. 3971, Quoted in antinomy, with what is deemed for the gold clauses. by Court of Cassation 27th April 1954, no. 1296, in Rep. *Foro it.*, 1954, section 1731, no. 10, criticized by ASCARELLI, *op. cit.*, no. 135, p. 393. This orientation is

during the delay must also pay the difference of the exchange rate, even if the creditor has not given evidence of having suffered damage. With this, the adoption of the exchange rate on payment is transparent.

On the other hand, it denies the importance of depreciation of the foreign currency with respect to the legal tender, as well as interest (20). This has been the object of criticism, because the problem is the same, whether the depreciation concerns the national currency or the foreign one (21). An exception has been made by case law for the credits of work of who lives abroad where the creditor is given the faculty of choosing between the exchange rate on payment or the conversion into national currency, at the exchange rate on the due date, then proceeding with monetary revaluation under art. 429, section 3, Code of Civil Procedure (22).

4. – The dominant opinion, to my mind, is not founded and is in conflict with the system currently in force. The choices of the legislator in 1942, on the other hand, are expressed by articles 1278 Civil Code and 1224, section 2, considered jointly; that is to day, reference has to be made to the exchange rate on the due date, and not on payment, and that subsequent depreciation of the national currency *in facultate*, will be indemnifiable only as a possible greater damage from default within the limits of articles 1223, 1225 and 1227 of the Civil Code.

The different pronouncements of dominant legal literature and case law do not resist a detailed critical examination. In the first place, there is the grave systematic disharmony whereby the depreciation of the foreign currency, during the delay, cannot be indemnified by the defaulting debtor unlike the national currency, where the choice has been made pursuant to article 1278 Civil Code. It is impossible to understand the reason why the law should protect the foreign creditor from the devaluation of the national currency and not, on the contrary, the Italian creditor from devaluation of the foreign currency.

Recourse to the exchange rate on payment shows not being able to give a systematic, and therefore global, answer to the problem of the damage from exchange rate during the default, and is not acceptable. The prevalent opinion in case law uses two weights and two measures depending on whether national currency or foreign currency is involved and cannot be agreed with.

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indirectly confirmed as one of the hypotheses of choice of the worker by Court of Cassation, Labour Division, 16th May 1981, no. 3239, in *Foro it.*, 1982, I, p. 779.

(20) Court of Cassation, 30th March 1966, no. 842 in *Giust. civ.*, 1966, I, p. 983.

(21) ASCARELLI, op. cit., no. 136, pp. 393 ff.

(22) Court of Cassation (Labour division), 16th May 1981, no. 3239, cit.

Similarly, the argument put forward by Ascoli and which has found great favour to date whereby the literal reference by the rule to the exchange rate on the due date should be interpreted as synonymous with punctual payment and, more in general exchange rate on payment, therefore even delayed, does not appear well-founded; it is both a strained interpretation and a contradiction (23).

There is no doubt that payment on the due date is synonymous with punctual payment, but we cannot see how this can be extended to include payment in short, even when delayed and how the rules of the exchange rate of the due date can be replaced by one that is diametrically the opposite.

German legal literature, with better logic, interpreted the reference to the exchange rate on payment of §244 BGB as synonymous of punctual payment and therefore on the due date, which is the reverse of what is maintained in Italy (24).

On the other hand in theory, it could make sense to infer the loss of the *facultas solutionis* from the non-punctual payment; however, it does not make sense to consider that the debtor maintains this *facultas* but at a different rate of exchange, i.e. at that on payment made late which, in the case of depreciation of the foreign currency, would be advantageous to him at the expense of the creditor.

The forfeiture of the *facultas* is not however authorized by any text of law, and article 1278 Civil Code must also be applied to late payment.

Indeed, the legal system, with article 1278 Civil Code, uses the advantage of the debtor and therefore its choice to fulfil a purpose of public interest, which goes beyond the due date of the obligation, and does not expire with it. It is in the public interest not to see the state wealth of foreign currency impoverished and to see it increased (25).

It is a different and more flexible way, yet with the same purpose as that of other legal systems which contemplate the compulsory conversion of the foreign currency into the legal tender (26). There is no reason why

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(23) VASSALLI, op. cit., p. 255, wrote on this subject by Ascoli that « it seems the subversion of every good criterion of exegesis »

(24) SCHOLLMEYER-OERTMAMM-KUHLENBECK-KOBER, cit. above in note 6.

(25) The public interest is at the basis of the Italian foreign currency regulations which arte strongly binding and criminally sanctioned. Royal Law Decree 8th December 1934 no. 1942, law Decree 6th June 1956, no. 476, Law 39th April 1976, no. 159, Law 8th October 1976, no. 689. see FAZIO, *Fondamenti economici della normativa valutaria*, in *Giust. valut. italiana*, Milan, 1981, pp. 20 ff.: see MERUSI, *Il regime delle value e l'offerta in cessione*, ibidem, pp. 415 ff.: OPPO, *Ordinamento valutario ed autonomia privata*, ibidem, pp. 346 ff.

(26) In the USA and Switzerland. In Switzerland, article 67 of the Federal Law on performance and the legal literature on article 232 of the law on Bankruptcy, rule that the credit has to be expressed in Swiss legal tender. Recently, see the decision of the Court of Lugano in the Interchange lawsuit. For notes of comparative law, see ASCARELLI, op. cit., no. 96, p. 308.

the *facultatas solutionis* finalized for the public interest, which is not temporary but permanent, as is that relative to the national currency reserves, with respect to which the private one is only mediated and instrumental, should be exercised in an accelerated term.

But let us return to the dominant opinion; it cannot be accepted on the nodal point, where it deems that the « creditor continues to run, during the default, the fate of the chosen unit of value », i.e. the risk of the exchange rate of the foreign currency. In my humble opinion, here there is a wrong application of the principle of the passage of the risk of the exchange rate from the creditor to the debtor, following the default, and a reversal of the very concept of *perpetuatio obligationis*. in the obligations in a foreign currency (27).

The *perpetuatio obligationis* materializes the contractual risk of the guiltless creditor at the time of the default, therefore from that moment the risk is passed on to the debtor, with the consequence that the latter will bear the cost of the depreciation and he will have the advantage of any appreciation (28). The current opinion, on the contrary, surmises that the creditor continues to run the contractual risk and thus the fates of the decline in value of the agreed currency. On the other hand, the creditor, in the case of a drop in value, cannot also claim the *quantum plurimi* on the due date, because this would be resolved in an obligation with the guarantee of the exchange rate (29) and is a theory that is not authorized by any rule.

The opinion reported here then leads to the conclusion that the creditor cannot avail himself again of the drop in value of the agreed foreign currency, but also in the possible hypothesis of an upswing, the defaulting debtor will receive an incentive to let more time pass, until there is the next drop in value, in order to speculate on the creditor, without encountering

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(27) On the *perpetuatio obligationis* as the materialization of the risk, M. BIANCHI FOSSATI VANZETTI, *Perpetuatio obligationis*, Padua, 1979, pp. 4 f. It is often misunderstood as perpetuation of the service, in its identity, without concern for the economic risk that it continues to run to the detriment and to the advantage of the creditor: in this sense, e.g.F AVARA, in Foro it., 1954, I, section 742, or, as perpetuation of the *debitum* in the context of contractual agreements as in QUADRI *Le clausole monetaria*, cit. pp. 146 ff. ANDRIOLI, in Foro it., 1955, I, section 321, correctly criticized the reference to the *perpetuatio obligationis* by Favara, observing how it does not make any sense for those who accept the valoristic conception, For the assimilation of the drop in price to the partial impossibility of the service, WINDSCHEID, *Diritto delle pandette*, Turin, 1930, II, §28, p. 103, note 5, although he solves the problem in the sense of the theory of the *quanti plurimi* in common law.

(28) This is a consequence of the fact that the non-fulfilment makes the time of the responsibility present (Haftung). On the transfer of the risk and in general on the *perpetuatio obligationis*, TRABUCCHI, Istituzioni di diritto civile[25], Padua, 1980. p. 538; BARASSI, *op. cit.*, III, pp. 247 ff., 369.

(29) ASCARELLI, op. cit., pp. 224, 225, 227 notes.

any adverse risk of exchange. The *perpetuatio o*bligationis, with the transfer of the risk with its pros and cons to the defaulting debtor, justifies the hypothesis that he can draw a profit from his non-fulfilment, if this is not accompanied by damage of the creditor, which, where existing, must in any case be indemnified.

On the other hand, the creditor could not draw a profit from the upswing of the exchange rate during the default period, as, if he had received the payment punctually in foreign currency, he should have changed it immediately at the Italian Exchange Bureau (30).

The exchange rate on the payment would thus make him only run the risk of loss and not of profit as well.

Lastly, it has been justly observed that two different orders of problems must be distinguished, those of the exchange rate under article 1278 Civil Code and that of the compensation of the greater damage from default under article 1224, section 2, Civil Code (31).

Those who claim solving this problem by adopting the exchange rate on payment, instead of on the due date, confuse two different orders of problems.

It is unthinkable to claim that the damage from default is indemnified in the equivalent of a possibility of earnings and losses that follow on the adoption of the exchange rate on payment.

The compensation of the damage must be effective and not hoped for (without mentioning the probability of further losses in the pessimistic hypothesis) and must take place within the limits of articles 1223, 1225 and 1227 Civil Code. The solution of the problem of compensation of the damage from default in the obligations in foreign currency, through the choice of this or that rate of exchange, therefore prevents the principles.

From this point of view, a lump-sum liquidation of the damage from default cannot be surmised, and in any case recourse to the exchange rate is an inappropriate choice for the purpose. Indeed, it is absolutely rare and totally by chance if the upswing in the exchange rate corresponds with the loss suffered, so as to compensate it; a possible drop in the exchange rate, which is instantaneous, does not allow hypothesizing the indemnity of the damage from default, which is a lasting damage (32).

The opinion interpreted by article 1278 Civil Code must be preferred, in the sense of the exchange rate on the due date for two further remarks.

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(30) The foreign currency must be exchanged within seven days at the Italian Exchange Bureau office according to art. 8 Law Decree of 6th June 1956, no. 476 Ministerial Decree of 6th May 1976.

(31) ASCARELLI, op. cit., no. 135, p. 390.

(32) Thus, criticizing the evaluation at the price of the decision of the damage to be compensated, VALCAVI, *Riflessioni sui c.d. crediti di valore, cui crediti di valuta e sui tassi di interesse*, in *Foro it.*, 1981, I, section 2114.

If the exchange rate on payment is adopted, the obligations « Not effective exchange rate » would lead to an identical result as that « with effective exchange rate », leaving the damage uncovered from depreciation of the foreign currency during the default.

In the second place, the adoption of the exchange rate on payment would not be applicable, for example, in the case in which the rate of exchange has been conventionally established, so that the variation of the exchange rate subsequent to the due date could be compensated only as greater damage from default, highlighting the systematic inadequacy of recourse to the exchange rate on payment.

It is to be concluded that the adoption of the value of the foreign currency at the time of payment, as a fixed parameter of that *in facultate*, is based on the erroneous presupposition that exact fulfilment is synonymous with payment of the agreed foreign currency, whatever its value, with respect to the due date, i.e. the specific fulfilment.

Recourse to the exchange rate of the payment is therefore solved in not applying article 1224, section 2, Civil Code, to the depreciation of the exchange rate of the obligations in foreign currency during default.

5. – I therefore consider that the dominant opinion, anchored as has been seen to the rate of exchange on payment, is not in line with the choices of our legislator.

The code currently in force gives the debtor the choice of paying in foreign currency or in national currency at the exchange rate of the due date, save the addition in either case of the indemnity of any depreciation of the exchange rate under article 1224, section 2, Civil Code. This indemnity must also be included in the obligations in foreign currency « effective rate of exchange ».

The gap between this solution and the current one will be understood, if one thinks that it could turn our to be much more onerous than the exchange value of the foreign currency at the time of payment. The debtor is asked to choose between fulfilment in legal tender at the exchange rate on the due date or in foreign currency. On the other hand, he cannot pay legal tender at the more favourable exchange rate, such as that of payment.

Any depreciation of the exchange rate of the national currency. if this has occurred, is not to be liquidated to any creditor of foreign currency, whether national or foreign, independently of the evidence of having suffered damage (33), but only within the limits in which the creditor proves that it has been translated into effective damage, direct under article 1223 Civil Code, foreseeable under article 1225 Civil Code, not avoidable under article 1227 Civil Code. Should the creditor, whether a national or resident

(33) Case law gives this motivation quoted in note 35 and in general legal literature.

in a third country, not prove this, or that from the rise in value of the currency he would have gained a profit, he will not have liquidated the difference of the exchange rate of the national currency that was given to him under article 1278 Civil Code, with respect to the foreign currency. The greater damage from default, where the oscillation of the exchange rate is not significant, will concern the common damage indemnifiable under article 1224, section 2, Civil Code.

The same is to be said for the late payment of foreign currency. Here the creditor is entitled to take action against the defaulting debtor for the loss of the exchange rate of the agreed foreign currency with respect to that in which he would have changed the money. if the payment had been made punctually. This will be presumed in the case of a creditor who resides in a country with different legal tender and increasing in value with respect to the agreed foreign currency.

There does not seem to be any doubt that our legislator has adopted the rule of he exchange rate on the due date for the case in which the debtor takes advantage of the *facultas solutionis*.

The unequivocal wording of article 1278 Civil Code and the rule of article 1224, section 2, Civil Code go in this direction therefore the literal argument and the systematic one converge univocally. This is comforted by the same remark that the wording of article 1278 Civil Code has restored the rule of the exchange rate on the due date, putting aside all the discussions and conflicting interpretations of legal literature and case law, on the identical wording of Article 39, Code of Commerce and abandoning the reference to the exchange rate on payment, which had been accepted by article 11 of the preliminary draft.

The adoption of the exchange rate on the due date has a logic all of its own.

The legal system, producing with article 1278 Civil Code a purpose of public interest, which will be further discussed below, has put the *facultas solutionis* to the choice of the debtor and not the creditor, as did, on the other hand, article 57 of the Bill of Exchange Act. The debtor will make his choice according to his advantage and thus will adopt the most advantageous solution for him, which will be that of paying in national currency, if in the meantime it drops in value with respect to the foreign currency or paying in foreign currency, if vice verse this were to drop in value with respect to the national currency.

The legislator, in giving the debtor the *facultas solutionis*, nevertheless wanted to keep the rule of the exact fulfilment of the obligation, which is the rule of the due date under article 1184 Civil Code.

If this rule had not been kept, or even if that of the exchange rate on payment had been adopted, the right of the creditor to the exact payment would have been at the mercy of the debtor who has the choice.

The legislator has kept the principle that it is the debtor that makes the choice, even after the due date, not having inflicted in this regard any limitation or forfeiture, but has taken care to avoid the creditor suffering damage, through the compensation, under article 1224, section 2. Our code, in short, takes care to preserve the damage but not that a profit from the exchange rate can be derived, due to the increase in value of the foreign currency during the default.

The *facultas solutionis*, under article 1278 Civil Code, can be exercised during the default, without exchange rate damage for the creditor or with exchange rate damage.

The foreign debtor will fulfil his obligation with the Italian creditor in legal tender, if it is depreciated; the Italian debtor will fulfil his to the foreign creditor in foreign currency it were depreciated with respect to the national currency. We can surmise here, for the sake of economy, that the foreign creditor resides in the country where the foreign currency is legal tender. In the case mentioned above, the debtor will make the choice that is best for him, as we have seen, but without causing any damage for the creditor. Neither the Italian creditor nor the foreign creditor will feel the effects of any damage from the exchange rate from having received, respectively, Italian currency or his own currency, as there is no need to change the money received into another currency.

The expectation, for example, of the Italian creditor to receive the agreed foreign currency, is not guaranteed, because the choice is given to the debtor.

The *facultas solutionis* can however be implemented, with damage to the creditor and the legal system takes care to provide for the indemnity under article 1224, section 2, Civil Code.

The foreign debtor will thus choose, depending on his interest, to fulfil the debt with the Italian creditor in the agreed foreign currency, if this were to drop in value with respect to the former and vice verse the Italian debtor will avail himself of article 1278 Civil Code, paying national currency to the foreign creditor if it were to be depreciated during the default period.

Our system has taken care, under article 1224, section 2, Civil Code, to preserve the compensation of the damage from default, without taking away from the debtor the right to choose, under article 1278 Civil Code. A reflection imposes itself here however: what has no logic at all it the adoption of the exchange rate on payment, maintained by dominant case law and legal literature. Indeed, the adoption of the exchange rate on payment subverts the rule of the exact fulfilment on the due date, the no less important one of the passage of risk to the debtor which is intrinsic with the *perpetuatio obligationis*, understood as the materialization of the exchange rate risk with the start of the default, and it also takes care to guarantee for the

creditor the possible profit from the exchange rate and not the compensation for damage. Indeed, this rule if accepted, would guarantee a profit for those who do not have to change the money and would leave the damage of the creditor who has to change the money without protection.

Establishing as the absolute rule an equivalence of exchange between money *in obligatione* and money *in facultate* at the time of payment, in the event of a drop in value of the foreign currency, the foreign debtor will pay the Italian creditor a lower value with respect to that of the due date.

Vice versa, in the event of an increase in the foreign currency, with respect to the Italian currency, the Italian creditor would receive a profit from the exchange rate even if the debtor were to avail himself of article 1278 Civil Code. In the first case, the Italian creditor will be affected by the damage of the depreciation of the foreign currency *in obligatione*, which would have avoided a punctual payment, without, furthermore, being able to rely on any compensation.

This would be an unindemnifiable damage, against all logic and equity, even more evident if, hypothesizing the exercise of article 1278 Civil Code, we compare the amount of legal tender that would have been received with the exchange rate of the due date, with the lesser amount that will result from the adoption of the exchange rate on payment.

In the second case, an inconceivable profit from the increase in value of the exchange rate would be guaranteed for the creditor.

The national creditor would certainly not have achieved this profit if he had promptly received the amount of legal tender at the exchange rate of the due date, or if he had received the agreed amount of foreign currency, which however, he would have had to change into Lira immediately, at the Italian Exchange Bureau. On the basis of the laws in force at the time of writing, an Italian is not allowed to keep positions in foreign currency or to freely convert the national currency into foreign currency. It is hardly necessary to add that the profit deriving from the rule of the exchange rate on payment is in clear conflict with the faculty of choice by the debtor. It was said at the start that the legislative choices are strongly influenced by the intention of using private initiative to reach ends of public interest. And, *in primis*, that of seeing the national currency reserve impoverished as little as possible and increased as much as possible. If the exchange rate on payment of the foreign currency had been chosen, the Italian debtor, in the event that it rose in value, and therefore of a drop in value of the national currency, would have been more burdened. This, in addition, in a clearly importing country as is Italy.

Vice versa, in the case of a drop in value of the foreign currency, the Italian creditor would have been damaged, without the possibility of any compensation. It is hardly necessary to recall the exchange policy of the time and the famous Quota 90 of the Pesaro speech.

The adoption of the exchange rate on the due date, in the case of subsequent depreciation of the national currency, under article 1278 Civil Code, is in the logic of the support given by every legal system to the exchange of its own currency.

The logic of the public interest in the case of depreciation, is to see the national currency go out at the highest price and to see foreign currency enter at the lowest price.

On first sight, it could appear that there is a public interest in the Italian creditor receiving foreign currency at an exchange rate on the upswing and this a possible profit on the exchange rate being guaranteed, which could then be translated into an increase in the national currency capital. On closer examination, this has not been the case with having kept article 1278 Civil Code. The public interest is to disincentivate the resident from speculating against the national currency and a possible way of speculating is to delay the collection of credit from the foreigner.

This is currently recognized as an element of disturbance of the national money on the currency market.

6. – Let us now go on to the obligations in foreign currency « effective rate » under articles 1279 Civil Code, and those under article 1278 Civil Code, in which the debtor does not avail himself of the *facultas* and pays the agreed foreign currency.

The loss of exchange rate that the creditor can prove having suffered during the default period, due to the depreciation of the foreign currency paid late, with respect to the money having legal tender in his country or of his usual outlay, is compensated under article 1224, section 2, Civil Code.

Here the dominant case law and legal literature are disagreed with.

Depreciation must be understood in its relationship with another currency; it can be a depreciation of the foreign currency in relation to Italian legal tender or another foreign currency, such as, for example, the case of an American creditor, of a sum agreed in German Marks and paid to him late by the Italian debtor.

Obviously this supposes the proof of a need, even virtual, of exchange.

The problem is posed differently depending on whether the rates of exchange are fixed or fluctuating, of controlled currency systems or free ones. The important rate of exchange will be that of the start of the default period. In the case of « effective rate » stipulation, under article 1279 Civil Code, the problem of profit of the creditor is not posed as it would be a consequence of the payment of the agreed foreign currency and the fact that the legal system did not give the debtor the remedy of self-protection of the *facultas solutionis*.

On the subject of compensation of the greater damage, in this case, all the principles and ordinary rules discussed regarding the other hypothesis as per article 1278 Civil Code will be applied. Here it is sufficient to have brought this particular problem back to the more general and unitary systematic features.

7. – We should now examine some specific problems on compensation of the greater damage from default under article 1224, section 2, Civil Code. every damage is indemnifiable insofar as it is the direct and immediate consequence of non-fulfilment, according to article 1223 Civil Code as it is foreseeable if it depends on negligence and not wilfulness under article 1225 Civil Code, and insofar as it is not avoidable under article 1227 Civil Code. These rules are virtually common to the various legal systems with some variations, which may even be significant as is the case, for example, of the limit of foreseeability which appears in some even where there is wilfulness.

A derogation of this kind has also been introduced in Italy with article 74 of the Hague Convention of 1st July 1964, ratified by Italy with Law no. 816 of 21st June 1971. on the sale of movable property.

It is necessary to dwell on the limit of the foreseeable linked to the negligent nature of the non-fulfilment. It is commonly considered that non-fulfilment is negligent when there is no wilfulness (34) and does not depend on fortuitousness or force majeure. Negligent non-fulfilment does not necessarily have to stay such; *in itinere*, it can be transformed into wilful, as essentially provided for by article 96 Code of Civil Procedure and in this case the limit of foreseeable no longer applied.

In actual fact, the party who non-fulfils negligently because, for example, he trusts in his reasons, may become aware along the way of the unlawful nature and persist in the default for selfish and emulative reasons, such as for example to take advantage of the inadequate sanction of default legal interest.

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(34) Wilfulness is generally understood as voluntariness in the non-fulfilment with the awareness of its unlawfulness. See TRABUCCHI, *Istituzioni di diritto civile*. cit., p. 220, 569, MESSINEO, *Manuale di diritto civile e commerciale*, III, I, p. 2; MAJORCA, entry *Colpa civile*, in Enc. del dir., n.d. but Milan, 1962, p. 565 and bibliography quoted. Using the most advanced results of criminal law literature, I would refer the discretionary criterion of wilfulness in non-fulfilment with respect to that of civil unlawfulness in the « wish not to fulfil or to delay the service due (general wilfulness) in order to procure an un just advantage with the damage of another party (specific wilfulness) ». This specific wilfulness, synonymous with bad faith, is something more than the mere awareness of unlawfulness and is totally absent in negligence. As a rule, negligence is answered form save evidence of wilfulness or fortuitousness and however, in everyday judicial practice, not taking the limit of the foreseeable into great consideration, the non-fulfilment ends up as being presumed as wilful.

The dispute around the object of the foreseeable and i.e. whether it concerns the damage and its coefficients in the abstract or the quantity of the damage is well known (35).

The compensation will also concern that part of the damage which could not be avoided, under article 1227, Civil Code, also with recourse to replacement in this case.

Going on to consider the type of indemnifiable damage, damage from inflation, unlike what is maintained by others, it does not seem indemnifiable, due to the worldwide dimensions of the phenomenon and the general aversion towards indexation (36). If it were accepted, it would make Italy the only country in the world where the stability of the domestic purchasing power of each currency, both ours and of others, would be guaranteed.

Nor does this damage appear indemnifiable for more general reasons (37), considering that the person resident abroad does not feel the effect of the erosion of the level of prices in a country where he does not live, does not spend and often he would even be prohibited from spending.

Let us now examine the depreciation of the exchange rate as the greater damage from default. This has generally been deemed, by foreign jurists and by our with regard to the exercise of the *facultas solutionis* under article 1278 Civil Code.

The opinion that this depreciation hypothesizes the greater damage from default under article 1224 section 2, Civil Code, has already been anticipated, including by the writer. In this sense, the pronouncement of the Report of the Minister of Justice on the Civil Code (no. 36) in the footsteps of article 434 of the Vivante-Mortara bill of the Code of Trade, which contained specific measure in this regard (38). The difference of exchange rate will start from the beginning of the default until fulfilment, remaining outside compensation from the due date until the start of the default period,

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(35) For a review of legal literature and case law, see BELLINI, *L'oggetto della prevedibilità del danno, ai fini dell'art, 1225 c.c.* in *Riv. dir. comm.*, 1954, II, pp. 302 ff. Inm the sense that foreseeability also concerns the amount of the damage, see MESSINEO, *Manuale di diritto civile e commerciale*, cit., III, §115, p. 338; BIANCA, *Dell'inadempimento delle obbligazioni*, in *Commentario del codice civile*, edited by Scialoja and Branca. *Libro quattro. Delle obbligazioni* (articles 1218-1229-2), Bologna, 1979, under art. 1225, p. 385, note 8.

(36) Each currency loses more or less purchasing power and the aversion to indexation is general, deemed the cause of new inflation, for example from the Radcliff report, see RUOZI, *Inflazione, risparmio e aziende di credito*, pp. 433, 434, 437, 483, 484, 475, 520. The discussion on our wage-linked cost-of living scale is therefore topical.

(37) VALCAVI, *La stima del danno nel tempo, con riguardo all'inflazione, alla variazione dei prezzi ed ai tassi di interesse*, in Riv. dir. civ., 1981, II, pp. 332 ff.; Id., *Rivalutazione monetaria o interessi di mercato?* In *Foro it*, 1980, I, section 118.

(38) The report of the Minister of Justice, under no. 36, p. 26, textually states « a greater damage can be compensated (for example, the difference of the exchange rate in debts in foreign currency) ».

but this is to be related to the way and the time with which the creditor exercises his self-protection, with the placing in default. We said above that in negligent non-fulfilment, the foreseeable damage is indemnifiable and it is debated whether it concerns the damage in itself or the amount of the damage; in the case under examination, this is solved in the problem if it is sufficient to be able to foresee that the exchange rates, like the prices, are variable in themselves or how far they can vary by approximation. In my opinion, the debtor must be able to foresee, in pursuance of article 1225 Civil Code, not only that the creditor would have changed the currency received from him into that other currency, but also that the former would have been depreciated with respect to the latter, as well as by how much at a maximum it could have depreciated, above which a devaluation is to be considered unforeseeable. That is, the amount of devaluation « expected » by operators and the mass media must be taken into account and the estimate varies depending on whether they are fixed or fluctuating exchange rates. The decision must necessarily be perspicacious in the circumstances of face, and wide use will be made of assumptions: it will thus be easy to assume, for example, that the creditor with legal tender other than that agreed will change it into his own and so on and so forth.

We have also seen at the beginning of this study that there are exchange rates for cash and forward exchange rates, Article 39 Code of Commerce textually referred to the exchange rate « on sight », i.e. for cash; this is no longer stated by article 1278 Civil Code although it could be stated as assumed.

If we accept the theory that foreseeability also concerns the amount of damage, the differential of the exchange rate on the forward market appears more indicative, with respect to that on the market for cash, which is a differential obtained a posteriori.

Here the agio and the disagio of a currency with respect to another, tend to coincide with the differential of the respective monetary interest (39), so that the default damage from depreciated currency tends to coincide with the highest rate of interest losing value, raising the problem of avoiding a duplication of compensation. We have also seen above that the compensation of the damage is to be limited to that which could not be avoided, pursuant to article 1227 Civil Code, also with recourse to a suitable replacement, in which case it would be limited to its cost. A typical operation of replacement which limits the exchange rate risk is that of forward selling a currency and also to forward purchase another one (40).

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(39) KEYNES, *La riforma monetaria*, Milan, 1975, pp. 90 ff.; FERRO, *Il mercato dei cambi a termine*, Padua, 1973, pp. 41 ff., 61 ff., 132 ff., 294 ff. 425 ff., 551 ff.

(40) We can mention the cover of the exchange rate risk with the various market operations such as swap contracts, engineered swap transactions, swap-swap operations, and option exchange contracts, see HEINZ RIEHL-RODRIGUEZ, *Il mercato dei cambi*, Bologna, 1983. pp. 155 ff., 197 ff., 255 ff.

The question of recourse to forward exchange rates, to evaluate the limits of foreseeability and the avoidability of damage, is full of meaning in the event that the creditor is used to operating on the exchange rate market. The internationalization of banks, the essential link for exchange rate transactions, makes available increasingly wide ranges of increasingly specialized services and consultancy in this regard. The matter must be further examined in detail, at least *de iure condendo*.

8. – Compensation of default damage is, in the last place, given by the default interest. It compensates the forced saving imposed by the debtor on the creditor with his default. It measures in a percentage the depreciation of a quantity of a given currency paid at a deferred time, with respect to the same paid in cash: i.e. it measures the *utilitas temporis*.

The yield of the currency is given by the nominal interest and not by the real one (41); today the latter is fairly general and typical is the present-day case of the dollar whilst a few years ago the real interest was negative.

There are different rates and families of interest rates; the current market one, the official discount rate etc.

The normal yield is that of the market; its standardized indications, although below the true figure, can be identified in the official discount rate, in the prime rate for investments and in the yield of public securities for saving.

The legal rate of interest, pursuant to article 1224, section 1, and 1284 Civil Code, anchored in the anachronistic rate of 5% deserves separate discussion. Elsewhere I have identified the greater damage from default pursuant to article 1224, section 2, Civil Code with regard to the legal tender, in the different between it and the current market rate, thus guaranteeing the normal remuneration for the money. It is licit to doubt that the legal interest rate is also inherent to the foreign currency (42). It must be considered that the legal rate of 5%, so inadequate for the legal tender, often appears at the limit far above the market interest for some foreign currencies (43). Reference to the market yield of the foreign currency or rather those standardized expressions of the same seem to be preferred, as does art, 83 of the Convention of the Hague which indicates it at one percent

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(41) Real interest is given by the percentage above the rate of inflation of the nominal interest.

(42) On the inapplicability of the legal rate of interest to the debt in foreign currency, on article 1231 of the 1865 Civil Code, see ASCARELLI, *Studi giuridici sulla moneta*, cit., p. 195, COBIANCHI, in *Riv. dir. comm.*, 1922, II, p. 67; MAZZONE, op. cit., p. 170; on the applicability, on the other hand, ASCOLI, op. loc. cit.; VASSALLI, op. loc. cit., PACCHIONI. op. loc. cit.

(43) The current nominal interest on the Swiss Franc is still 4.50%, on the German market it is 5.25%, on the yen it is 5.75%, on the Dutch florin it is 6%, gross and not net of the rate of inflation.

above the official discount rate. In this case, the interpretation we have offered for the national currency, with regard to article 1224, section 2, Civil Code, ends up by being similar to that of foreign currency: both would have in common the respective normal yield, during the default period. The compensatory interest pursuant to art. 1282 Civil Code will also be applicable to the foreign currency for the period that goes from the due date of the obligation to the placing in default and where there is a preference for recourse to the normal yield of the foreign currency rather than our national legal rate; thus there will be a standardized and rational discounting back of the pecuniary debt in foreign currency from the due date until the payment. It has also been said that the differential of the exchange rate will be taken into account, avoiding continuing to have recourse after revaluation to the interest of the currency that is losing value, which is normally higher than that gaining in value.

9. – The problem of obligations in Italian currency with a clause of adjustment of the foreign currency, for the period after the due date of the obligation, deserves separate consideration.

It arises in the event that the parties have not agreed on the operability of the clause of adjustment until the effective payment, but until the due date and seeking the wishes of the parties is the *quaestio facti* (44).

The solution appears implicit to me in the fact that it is an obligation in Italian currency therefore the adjustment to the foreign currency cannot go beyond the term agreed by the parties (45). An element of reinforcement in this sense can be taken from the conclusion for the face, similar from certain points of view, of the obligation, with an agreed rate of exchange, which stops on its due date.

The subsequent damage from default of this obligation will be indemnified in the same way as the common criteria under article 1224, section 2, Civil Code.

However, under the influence of the valoristic conception, it has recently been maintained (46) that in this case too the debt ought to continue to adjust to the exchange rate until payment.

It is worth observing that this could be a source of damage for the creditor, rather than an advantage, due to the hypothesis of the loss of value of this currency of reference.

It seems to me that this solution and its logic are to be rejected.

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(44) Thus correctly ASQUINI, op. cit., p. 445, Contra, QUADRI, op. cit., p. 121 and note 35 therein.

(45) ASQUINI, *op. loc. cit.*; ANDRIOLI, *op. loc. citt.*

(46) QUADRI, op. cit., pp. 141 ff., 152 ff. tends to solve the question according to the valoristic automatism.

Reference has been made to the above in:

G. CAMPEIS-A. DE PAOLI, *Il processo civile italiano e lo straniero*, Milan, 1986, p. 261, note 39; A. NIGRA, *Inadempimento di obbligazioni pecuniarie, due motive per riconoscere il cumulo tra interessi legali e rivalutazione monetaria*, in *Foro pad.*, 1989, II, p. 98; V. DE LORENZI, *Obbligazione, parte generale, sintesi di informazione*, in *Riv. dir. civ.*, 1990, p. 270; U. BRECCIA, *Le obbligazioni*, Milan, 1991, p. 310.

Also by the author on the same subject:

- « *Le obbligazioni in divisa straniera, il corso di cambio, ed il maggior danno da mora* » in Foro italiano, 1989, I, 1210 e in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 151.
- « *A quale corso di cambio si debba prestare la moneta in facultate solutionis ex* art. 1278 c.c. » in Giurisprudenza Italiana 1989, I, 2, p. 435 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 159.
- « *In material di liquidazione del danno subito da uno straniero* », in Foro italiano 1989, I, 1619, 435 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p.. 165.
- « *Se il credito di un lavoratore estero residente debba essere rivalutato* ex *art. 4299 comma 3 c.p.c.* » in Rivista Diritto Civile 1984, II, 504 and in L'Espressione monetaria nella responsabilità civile, Cedam 1995, p. 171.
- « *Il danno da mora nelle obbligazioni in moneta straniera nell'attuale disciplina di liberalizzazione valutaria* » in Rivista di Diritto Civile 1992, II, p. 861, and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 182.

On the prohibition of the agreement of forfeiture, the simulated sale for the purpose of guarantee and the trust agreement

1. – The decision of the Divisions sitting together textually confirms the previous one of the same bench, 1611/89 (1). The case decided is linear and does not offer any specificities of fact, which allows some reservations on the unequivocity and amplitude of the dictum, as Mariconda problematically suggested on the previous one (2).

The Divisions sitting together confirm here the recent orientation initiated by Court of Cassation 3800/83 and by others that followed (3) and supersede the isolated *revirement* of 8385/86 (4). They also conclude a

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From « Il Foro italiano », 1990, p. 205 ff. and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

The above annotates the following decision:

COURT OF CASSATION, All Divisions sitting together, 21.4.1989, no. 1907: President Brancaccio, Reporting Judge Meriggiola, Public Prosecutior E. Amatucci: Castiglione vs.. Leotta: « Both the sales for the purpose of guarantee in which the commodity is transferred in definitive property of the creditor in the case of failure to return the sum borrowed, but also sales in which the commodity is immediately transferred but with the determination clause in the hypothesis in which the vendor, by a certain date. returns to the purchaser the agreed amount are null because they are prohibited by art. 2744 Civil Code (with regard to the case in which the purchaser is the creditor and the amount has been previously paid by way of a loan). In the sales for the purpose of a guarantee, this arises due to the contract. as the transfer of the property find an objective justification in the purpose of the guarantee and the payment of the money does not represent payment of the price, but the performance of a loan, The transfer of the commodity does not reinstate the attribution to the purchaser, but the constitution of a position of unequally temporary guarantee despite appearances. The temporary nature represents a revealing element of the cause of guarantee and therefore of the diversity between the typical cause of contract and causal determination of the parties. The sale, legal in itself and not purely formal, takes on the figure of a contract in fraud of a statute (article 1344 Civil Code) ».

(1) In *Foro it.*, 1989, I, p. 1428, with sticky notes by V. MARICONDA and F. REAL MONTE.

(2) In *Foro it.*, 1989, I, p. 1429.

(3) In Foro it., 1984, I, p. 212, with note by MACARIO; in *Giur. it.*, 1984, I, 1, p. 1648. with note by DANUSSO; in *Giust. civ.*, 1983, I, p. 2953, with note by AZZARITI; in *Nuova giur. civ.*, 1985, I, p. 97, with note by Rocco,, This orientation has been confirmed by Court of Cassation 7271/83, *Foro it.*, 1984, I, p. 426; 3784/87, id., Rep. 1988, under *Patto commissorio*, no. 4; 46/88 id., 1988, I, p. 387.

(4) In *Foro it.*, 1987, I, p. 799.

lengthy dispute in that they deem compulsory the extensive interpretation of article 2744 Civil Code because it is not an exceptional rule but, on the contrary, expresses « a principle common to many institutions ».

The pronouncement has, in the case under examination, particular regard for the provisions of forfeiture which appear with regard to the so-called « occult » guarantees, as are sales for the purpose of guarantee. It confirms, unequivocally that the prohibition of the agreement of forfeiture includes both the sale for the purpose of guarantee, under suspensive condition, and those under the resolutive condition (such as sales with agreements of redemption, sale and return).

The diversity of the two contractual hypotheses as well as of the respective conditions, is justly deemed more apparent than real. In the first case, the sale (and the purchase) becomes final on the failure to return the loan; in the other, the purchase (and the sale) becomes final on the failure to return the price of redemption (which is none other than the same amount that was borrowed).

The Divisions sitting together are accurate when they underline that the two hypotheses are « expressions of the same reality ».

Their common fact is represented by their function of guaranteeing the credit until its reimbursement, which will occur alternatively with the *solutio* or with the foreseen final transfer of the commodity under guarantee.

The pronouncement correctly states that the two hypotheses are « dominated by the primary intention of guarantee » and that in both « the purpose pursued is not different ». Starting off from this preamble, the Court underlines that in these cases there is « an aware divergence between the practical purpose of guarantee, desired by the parties, and the typical cause of the sale » and this, as such, is to be deemed simulated, Here we have a correct and pertinent answer to the lengthy debate if the sale under resolutive condition (for the purpose of guarantee) is to be considered simulated (and the simulation is therefore to be deemed admissible) or whether it is real and of the fiduciary type.

If, by chance, one were to remain anchored to the contrary profile of a trust agreement, in any case the pronouncements *in obiter* of the decision would impose radically new conclusions, with regard to the very way of understanding it. Browsing through the motivation part of the decision under examination, what appear shaken from the foundations, and to be deemed utterly inadmissible is the Romanistic pattern of the trust *cum creditore*, accepted to date (5).

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(5) G. Messina, *Negozi fiduciari*, in *Scritti giuridici*, Milan, 1948, pp. 1-32. 52-101. 105-120; C. Grassetti, in *Riv. dir. comm.*, 1936, I, p. 345; N. Lipari, *Il negozio fiduciario*, Milan, 1964, pp. 334 ff.; R. Nitti, *Negozio fiduciario*, entry in *Novissimo digesto*, Turin, 1965, XI, p. 202; V. M. Rimarchi, *Negozio fiduciario*, entry in *Enciclopedia del diritto*, Milan, 1978, XXVIII,

This concerns the part of the decision which qualifies the transfer as « causal and not abstract ». The « cause » has been – as stated – correctly identified in « the internal agreement of guarantee, desired by the parties » and not in the *fiduciae causa*, abstractedly considered, which induced devaluing the internal agreement to a simple motive (6). The ownership, the transfer of which is surmised, is here understood as « temporary » and not « full and final » as always maintained previously. In any case, an agreement of the trust type is deemed, by the Divisions sitting together, totally illegal and null, from the point of view of the fraud in statute pursuant to article 1344 Civil Code (7).

2. – let us begin to see, more perspicaciously, the phenomenon that is contemplated by the prohibition of the agreement of forfeiture.

The agreement of forfeiture can be defined as the « agreement with which the debtor allocates the definitive ownership of a commodity under guarantee to his creditor, to satisfy by compensation (in all or in part) his debt, in the event of his non-fulfilment, without any estimate of its value, on the basis of those at the time ». It can concern a debt that is taken on simultaneously with the signature (*in continenti*) or has been taken on previously (*ex intervallo*). This often recurs in the hypothesis in which the debt, which arose previously, is extended (8).

The agreement of forfeiture necessarily concerns, as stated, the asset stood in guarantee of the credit, and not any other asset of the debtor's capital. Forfeiture, in legal literature, therefore has an accessory nature compared to the constraint of guarantee and, in conclusion, the agreement from which it has arisen. This appears evident in the case in which the asset forms the object of lien, mortgage or waiver of the use of real estate (so-called visible guarantees). The conceptual distinction is, on the other hand, much less perceptible in the so-called « secret » guarantees, such as sale for the purpose of guarantee, considered by this decision (9).

It has to be said, in this respect, that in general, « the sale for the purpose of guarantee » is not evident, and all the more so the forfeiture measure is kept secret. The apparent agreement is usually represented by the

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p. 32; G. Pugliese, in *Giur. Cass. Civ.*, 1945, II, p. 156; as well as *id.*, 1946, I, p. 87 and in *Riv. dir. civ.*, 1955, II, p. 1064. In the sense of German trust, A. De Martini, in *Giur. it.*, 1946, 1, 1, p. 321; U. Carnevali, in *Dizionario del diritto privato*, Milan, 1980, pp. 455 ff. and bibliography quoted therein. Critically, in general: S. Pugliatti, in *Riv. trim. dir. e proc. civ.*, 1950, pp. 298 ff.; M. Bianca, *Il divieto di patto commissorio*, Milan, 1957, p. 298.

(6) Grassetti, *op. cit.*, pp. 348, 353, 358-362, 363.372, 375-377.

(7) In this sense, also G. Pugliese in Giur. Cass. civ., 1946, I, pp. 87 ff.

(8) M. Bianca, in *Foro pad.*, 1958, I, p. 457, as well as *id.*, 1961, I, p. 49, and in *Riv. dir. civ.*, 1987, II, pp. 117 ff. (see also *Il divieto cit.*, pp. 79 ff).

(9) Amongst the many, Bianca, *op. ult. cit.*, pp. 114 ff.

pure and simple sale of an asset, from the debtor to the creditor. It will be the picture of the concrete circumstances in which the sale is placed, and thus the internal agreements made and the documentation of the parties that will reveal that the pure and simple sale has the nature of a simulation and the related forfeiture. This recurs clearly where the parties consider the debt subsequently alive with respect to the sale and the hypothetic compensation with the presumed price, and also calculate the further interest.

The distinction between a guarantee agreement and a forfeiture is, however, admissible in theory, in legal literature, in the hypothesis of a secret guarantee, where two agreements in a single context and not only one agreement are surmised.

The illegal nature (and not simply nullity) of the forfeiture entails the widest freedom of evidence, both oral and presumptive, between the parties, pursuant to article 1417 Civil Code. The matter concerns, as shown by this decision, both the stipulations of forfeitures under a suspensive condition, and that under a resolutive condition. In particular, it can be considered that the sale with an agreement of redemption has a nature of simulation and that under it there is a mortgage with an agreement of forfeiture. The fundamental characteristics of the forfeiture are represented:

A) by the fact that the asset destined to satisfy the debt is the one under guarantee (and not any asset of the debtor's property);

B) by the fact that the transfer takes place without any guarantee of a just evaluation of the asset, with regard to the time when it definitely becomes part of the creditor's property (10);

C) lastly, by the fact that the creditor does not purchase the asset concurrently with other possible purchasers (as theoretically takes place even in sales by auction).

These circumstances outline the danger that the creditor can be enriched to the detriment of the debtor and justify the social interest. It is also understandable why the so-called agreement of guarantee (with the connected evaluation of the asset) (11) has always been considered legal and lastly, how the so-called agreement of forfeiture is deemed null, with a compulsory effect and its conclusive epilogue (12).

3. – Let us now go on to consider the problem of principle concerning which interpretation is to be deemed preferable; this problem has been solved by the decision as favourable for the extensive interpretation.

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(10) The intervention by Gianquinto, in the session of 4th July 1940 on articles 690 and 691 of the preliminary draft of the Civil Code is significant in this sense.

(11) U. CARNEVALI, *Patto commissorio*, entry in *Enciclopedia del diritto*, Milan, 1982, XXXII, pp. 501, ff; BIANCA, op. cit., pp. 177 ff.

(12) Amongst the many: BIANCA, op. cit., pp. 177 ff.

The question is raised, under the previous Code, with regard to the extension of the prohibition of the agreement of forfeiture from the lien to the mortgage (which was not included). The dominant legal literature (13) and the older case law of the regional courts of cassation (14) were inclined towards the extensive interpretation. The Supreme Court, after the decision of the Divisions sitting together of 28th July 1923 (15), and Brugi (16), maintained, on the contrary, the restrictive side, on the basis of the claimed exceptional nature and the prohibition of the analogy inferable from article 4 of the general provisions of the time. This dispute arose again with the new code (which extended the prohibition to the mortgage and the agreement *ex intervallo*) with regard to sales for the purpose of guarantee. The restrictive theory. accepted by less recent case law, extended the prohibition to include the sale for the purpose of guarantee under a suspensive condition, but excluded it in the case of that under a resolutive condition (17). The new orientation followed on the decision of legitimacy 3800/83 and the dominant legal literature (18) declared they were, in principle, favourable to the extensive interpretation.

Now the Divisions sitting together put an end to the dispute on this point, stating, in no uncertain terms, that the literal interpretation must be totally rejected and has no grounds.

The motivation appears totally correct. The restrictive orientation, which was mentioned, is contradictory. The restrictive interpretation could have made sense if the prohibition had been limited to the hypothesis of the lien, mortgage and the waiver of the use of real estate, in accordance with articles 1963 and 2744 Civil Code. What appears incoherent is the opinion that extends the prohibition to the unforeseen case of the sale for the purpose of guarantee, under a suspensive condition (thus practising an extensive interpretation) whilst it recurs to the restrictive interpretation to exclude that under the resolutive condition.

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(13) G.P. CHIRONI, in *Riv. dir. comm.*., 1917, II, p. 708; E. ALBERTARIO, id., 1924, II, p. 233; E. BETTI. id., 1931. II, p. 688.

(14) Amongst the many: Cassation of Rome, 15th May 1914, Foro it., Rep. 1914, under *Mutuo*, no. 3; Cassation of Naples, 23rd February 1991, *id., Rep*. 1911, under cit. no. 6.

(15) In *Foro it.*, 1923, I, p. 935, and in *Riv. dir. comm*., 1924, II, 233, with note by ALBERTARIO.

(16) In *Riv. dir. comm*., 1929, II, p. 46.

(17) Amongst the many: Court of Cassation 6005/82, *Foro it.*, Rep. 1982, under *Patto commissorio*, no. 3; 2584/80, *id.*, Rep. 1980, entry *cit.*, no. 2; 1390/73, *id.*, Rep. 1973, entry *Vendita*, no. 80.

(18) F. CARNELUTTI, in *Riv. dir. proc.*, 1946, II, p. 156; BIANCA, *op. loc. cit.*, G. STOLFI, in *Foro pad.*, 1957, I, p. 767; DAL MAZZO, in *Riv. dir. comm.*, 1957, I, p. 80; ANDRIOLI, in *Commentario Scialoja-Branca*, Bologna-Tome, 1955, under art. 2744; and in general the commentators of Cassation 3800/83, cit.

Here we are judging by two totally different and unjustified standards. The Divisions sitting together continue to identify the *ratio* of the prohibition of the dual requirement to protect the economically weaker party against the possibility of a « moral coercion of the creditor » and on the other to protect the expectation with *par condicio* of the other creditors (19). This wording has not been considered completely satisfactory by some authors in the past (20). In actual fact, the admissibility of the agreement of guarantee shows that our legal system is concerned, in a less relative sense, with protecting, here, the *par condicio* (21). The investigation of the *ratio* must be examined in further detail. In particular, there is the problem of identifying that *ratio*, the last consequences of which are not solved in negating the freedom of the debtor and the creditor to give and receive something other than what is due, in accordance with article 1197 Civil Code, and is, on the contrary, reconcilable with this rule. Here it is a question of understanding the differential relationship between *cession in solutum*, valid in itself, and agreement of forfeiture, which, on the contrary, is invalid.

The matter deserves further attention.

It has been observed above that the forfeiture transfer only concerns the destination, to satisfy the credit, of that asset which is bound to its guarantee and not any other asset of the creditor's property. In the case under examination, the condition bound by the asset effectively limits the possibility of transferring it to third parties, at a higher price, because they are mistrustful and disincentivated from taking part in the purchase, so that this asset appears from the start destined to have, as inevitable purchaser and « at his conditions » only the creditor.

Our legal system, in these conditions, is concerned with preserving for the debtor, until the time when he has the asset (possibly even in favour of the creditor) the opportunities and possibilities to realizing that asset in an alternative way fro the third parties interested in the purchase, Our legislator does not exclude that the debtor can transfer that same asset, under art. 1197, to the creditor, but prohibits it from being used in this sense in advance or that it is transferred to the same, even as a possibility, because this would be equivalent to depriving him of contractual freedom. Freedom here is understood in the concrete meaning of making alternative choices and not in an abstract way.

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(19) F. Carnelutti, in *Riv. dir. comm.*, 1916, II, pp. 887 ff.

(20) It has correctly been observed that, for the purposes of the agreement of forfeiture, the fact that the value of the asset is greater than the loan and that concretely the creditor is advantaged to the detriment of the debtor, who could have recourse to remedy under article 1448 Civil Code, is insignificant.

(21) The agreement of guarantee legitimises the preferential satisfaction of the individual creditor to the detriment of the *par condicio.*

The *ratio* of the prohibition can, in short, be formulated as follows: the transfer of the asset under guarantee to the creditor must be an unequivocal expression of free will and the debtor must not be deprived until the last of the possibilities to sell this asset to third parties, The creditor can become a transferee in general terms exclusively on the basis of an evaluation.

The motivation of our Divisions sitting together, in this regard, is all the more perspicacious and accurate where it justifies the legislative protection with the need to avoid the owner-debtor being « deprived on the freedom to negotiate ». In this sense, the prohibition confirms and oversees contractual freedom and the ownership of the asset.

The motivation of the Divisions sitting together also appears perspicacious where it deems the principle « common to many institutions ». In general, in our system the transfer that disregards the evaluation of the asset is not favoured. Thus, article 2798 Civil Code contemplates the assignment of the asset in lien to the creditor exclusively « according to the evaluation to be made with expertise and according to the current price, if the commodity has a market price ».

Thus, in the enforcement, the assignment of the seized asset is admitted only after the first auction has not been attended and always at a minimum value bound to the basic price of the sale, although the new auction will be held at any offer (articles 506, 538, section 2, 536, section 2, Code of Civil Procedure). Similarly the assignment of real estate is contemplated only after the negative result of the sale and at a price bound to that of the evaluation (articles 588 and 589 Civil Code). The provisions of the discipline of the transfer of assets to creditors are in the same direction. It is surmised, in Italy, only as a *pro solvendo* transfer and not *pro soluto*, where the creditors are the holders of powers of administration and liquidation (articles 1977-89 Civil Code) with the control of the debtor, who is entitled in any case to any residue (articles 1982-83 Civil Code). The right to expropriate transferred assets continues to belong to the other previous creditors, To conclude, at this point, it will be understood that our legal system prohibits any agreement or document with which the asset, the object of guarantee for the possible satisfaction of the creditor, is destined because it intends to protect the residual freedom of the owner-debtor to dispose of the asset. It will also be noticed how the circumstance that this measure is subordinate to a suspensive condition rather than to a resolutive condition is irrelevant.

4. – In the context described above, it must be recognized that the sale for the purpose of guarantee configures an excessively significant hypothesis of the prohibited agreement of forfeiture. Indeed, it removes the asset from the disposing power of the owner-debtor, transforming it into a sort of

non-technical lien of the creditor and at the same time allocates it in advance to satisfy his credit reasons. In this regard, it is of little importance that the measure is subordinate to a suspensive or resolutive condition. From a certain point of view, this latter hypothesis has more reason to be prohibited, because here the residual freedom of the debtor to dispose of the asset is still less than the other and the asset is « immediately » considered the property of the creditor and destined to satisfy his credit. In this order of ideas, it is of little importance – as stated at the beginning – that the forfeiture transfer is surmised in literature as a trust agreement, « trust *cum creditor* » instead of as a prohibited unnamed contract. No justification of validity of an agreement, which is however illegal under article 1344 Civil Code, can be inferred from any qualification as trust (understood in the Romanistic meaning rather than in the Germanic meaning and vice versa) (22). In this sense, there is no virtue in the research if the sale with an agreement of redemption, for the purpose of guarantee, actually masks a forfeiture which is prohibited under a suspensive condition (23). Both hypotheses are prohibited. Moreover, they have in common the « absence of a price », the « purpose of guarantee », whilst the definitive ownership is acquired by the creditor only following the failure to return the amount paid previously.

The Divisions sitting together rightly state that in this type of agreement, « the payment does not represent payment of the price but the enforcement of a loan. whilst the transfer of the asset id the deed of incorporation of an undeniably temporary guarantee that may evolve, depending on whether the debtor fulfils or does not return the sum received. »

From another point of view, the decisions of the Supreme Court offer the interpreter a clear diagnostic element to distinguish the forfeiture under the resolutive condition, prohibited by the law, from the sale with agreement of redemption. in itself legal and valid under article 1500 ff. Civil Code. Here it is a question of seeing whether the sale with the agreement of redemption had, or not, a purpose of guarantee, because in this case the agreement must be concluded as having a forfeiture nature and therefore its consequent unlawfulness.

3. – It is now fitting to offer a contribution with a detailed examination of the complex problems that have developed around the sale with the purpose of guarantee in the past.

The fact that this agreement, which is however qualified in literature, has been considered by our Divisions sitting together in any case as unlawful and null, takes away practically all the value from the dispute. What im-

(22) PUGLIESE, in *Giul. Cass. civ.*, 1946, II, p. 87 ff.
(23) BIANCA, in *Foro pad.*, 1958, I, p. 456.

portance can the different theoretical classification of an agreement, which is in any case unlawful, have?

However, let us see, for the sake of completeness, what is involved. The sale with the purpose of guarantee can be realized through the use of a simulated agreement of sale in order to realize, in the immediate future, a function of guarantee and therefore in the event of non-fulfilment, a definitive transfer.

Let's start to see the importance to be given to this expression « guarantee ». First of all, it must be excluded that the creditor has, from this « guarantee » a pre-emptive right with regard to the other creditors, who will continued to be able to act with enforcement on that asset, according to their right and pre-emption. That is, the creditor does not have any real right of guarantee or pre-emption, in the common meaning with regard to third parties. In itself, this guarantee does not even attribute to the creditor the power of transferring the asset, let alone satisfying his credit, except under a specific authority, with an obligation of statement of account (24). The pre-emption that the creditor may enjoy with regard to third parties is merely factual, within the limit in which they will exchange the apparent ownership for real and will abstain from attacking him *in executivis*. This depends to a great extent – as noted at the time (25) – by the secrecy of the parties with regard to this appearance. In this sense it is correct to speak of « secret guarantee ».

The guarantee contemplated in our case, in favour of the creditor, essentially addresses the debtor-owner: the intention is to prevent him from disposing of the asset, thus removing it from the right of lien (in a non-technical sense) of each creditor on each asset of the debtor, that is a general guarantee correlated with the unlimited responsibility as per article 2740 Civil Code, The aim is to remove the asset from the power of the owner-debtor to dispose to the detriment of the creditor or at least to make its realization extremely difficult.

The term « guarantee, as was observed at the time (26), is used here in the meaning of « guarantee in an economic or pre-juridical meaning » or more properly as a « precautionary measure ».

It appears to hypothesize an anomalous form of attachment of assets, rather than judicial, in pursuance of articles 1798 ff. Civil Code (27). This agreement is not to be deemed, in itself, prohibited, so far as it is restricted to foreseeing the rise of the cautionary constraint and does not also con-

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(24) The absence of the obligation of a statement of account would transform it into an agreement of forfeiture.

(25) BIANCA, *Il divieto*, cit., pp. 114 ff, 243 ff.

(26) PUGLIATTI, *op. cit.*, pp. 306 ff.

(27) NICOLETTI in *Giust. civ.*, 1969, I, p. 1226; Court of Cassation 3252/57, *Foro it., Rep.* 1957, under *Sequestro*, no. 79.

template the transfer of the ownership of the asset to the creditor, in which the forfeiture is materialized.

This agreement appears, however, admissible in our legal system, because it does not contemplate the custody by the creditor, but only by a third party under article 1798 Civil Code.

The enactment of a bond of guarantee of this kind (in the sense of cautionary) can be achieved in the abstract through taking the asset out of the debtor's name and putting it into the creditor's name. This is the case of the use of the Germanic trust (28), coordinated with authority also in the interest of the creditor and therefore irrevocable pursuant to article 1723, section 2, Civil Code, or more generally with an accord of retention in the broadest sense (29).

The transfer of the name only (or formal ownership) of the asset from the debtor to the creditor with regard to third parties is admitted in our legal system, limitedly to securities, company shares and credit instruments by the laws of 23rd November 1939, no. 1966 and 13th April 1987 no. 148 on trust companies. In this case, the economic or substantial ownership (30) remains with the debtor. The transfer of the mere formal legitimization from the debtor to the creditor of the securities referred to above can serve a pure and simple function of guarantee. In this case, in itself, it does not come under the prohibition of the agreement of forfeiture, because its use is limited to this function of guarantee and does not extend to the transfer of the economic or substantial ownership of the asset.

If, on the contrary, this latter possibility, were to occur, there will be a very different hypothesis, and that is, a registration by way of guarantee, and the definitive transfer, i.e. an agreement of forfeiture. With regard to the securities mentioned above, this will occur not when the transfer is simply made in the shareholders' book, but when the full ownership is transferred (and also the economic ownership) by means of a contract note from the debtor to the creditor and satisfying the credit. This agreement forms a prohibited agreement of forfeiture, no different from any other hypothesis of sale with the purpose of guarantee which we will now discuss.

6. – What cannot be enacted in our legal system is the trust registration, for the purpose of guarantee, of real property from the debtor to the creditor.

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(28) This is possible in the case of trust registrations of company shares.

(29) BETTI, *op. cit.*, p. 705, mentions a standard retention in general. It is deemed illegal out of adversity to the agreement of forfeiture, in my opinion erroneously, by W. D'AVANZO, *Ritenzione*, entry in the *Novissimo digesto*, Turin, 1969, XVI, pp. 68, 172 ff.

(30) CARNEVALI, *op. loc. cit.*, CARIOTA-FERRARA. I negozi fiduciari, Padua, 1933, p. 85. The distinction is usual in Germanic and Swiss case law, where the agreement is subject to the rules of authority and where the trust accounts are not shown in the balance sheet.

This cannot, with all the more reason, occur through an agreement that makes a trust *cum* creditor, in the Romanistic sense (31).

To say the least, these trust transfers cannot be registered on the real property because they lie outside the *numerus clausus* of the hypotheses as per article 2643 Civil Code (32) and those identifiably due to an analogous effect on the basis of article 2645 Civil Code (33).

Both, as they cannot be registered, cannot take the real property out of the name of the owner-debtor and put it in the name of the creditor. They cannot absolve a function of guarantee, even in the precautionary sense as shown above.

Even less so can they be registered in their essence as dissimulated agreements, In the past, the sale under resolutive condition (with agreement of redemption, and sale back) for the purpose of guarantee was considered as a case of trust transfer of the Romanistic type. From this point of view, the accent has been placed on the exuberance of the means with respect to the purpose, on the fact that it would be real and true and not possible to be simulated, which would give rise to an unnamed contract for an abstract cause (*fiducae causa*) where the internal agreement would represent a simple reason, essentially without importance (34). This qualification in legal literature is not, in my opinion, acceptable and the Romanistic trust itself does not appear admissible in our legal system.

The matter discussed above, moreover, is resolved in a petition of principle, where part of the unproven preambles would show that it is a sale with an agreement of effective redemption and not simulated and that it would be valid because it would produce a Romanistic trust, admissible in our legal system.

In actual fact, the opinion that simulation is contrary to the sale with the agreement of redemption is to be rejected, because any agreement can be simulated (35). Here, we have to investigate, in other terms, whether the

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(31) Research has not revealed any trace of registrations in property registered of trust agreements or decisions in this respect. The decisions theoretically favourable to their admissibility do not go so far as to support their transcription.

(32) In this sense, amongst the many, PUGLIATTI, *op. cit.*, pp. 302 ff.

(33) G. MARICONDA, *La trascrizione*, in *Trattato* edited by RESCIGNO, 19, Turin, 1986, pp. 100 ff.

(34) In this sense and for the admissibility of the trust agreement, with the characteristics shown, in our legal system: Court of Cassation 5663/88 Foro it., 1989, I, p. 101; 56'/85, id., Rep. 1987, under *Contratto in genere*, no. 295; 6423/84, id., Rep. 1985; under *Simulazione civile*, no. 8, For the specific enforcement of the *pactum fiduciae* if Court of Cassation. all Divisions sitting together, 6478/84, id., 1985, I, p. 2325. with note by MAZZIA, We do not agree with this orientation which does not have any legislative support and – in my opinion – superseded by the decision under review.

(35) The opposite error is incurred when the lease-back is deemed to be equivalent to the agreement of forfeiture. Here, the evaluation of the purchased asset, the professional type carried

parties in their mutual relations have not wanted to buy or sell, but only to be guaranteed. An agreement between two parties, moreover, cannot lead to a real interposition, but only to a fictitious one. Clearly, it has to be excluded that a simulated agreement can produce the same effects that would derive from the same, if it were real and true. The opinion that places it in the context of a Romanistic type of trust reaches this contradictory result. However, we have to admit, with coherence, that the simulated vendor can claim the asset, his creditors can expropriate it, his possible bankruptcy assets can acquire it under pain of fraudulent bankruptcy (articles 216, section 1, no. 1 and section 3, Bankruptcy Law).

The decision of our Divisions sitting together shows that they are in this order of ideas in the part of the motivation in which it is observed that in the sale with an agreement of redemption, for the purposes of guarantee, there is an aware divergence between the primary intention of the parties and the typical cause of the sale (36). This is tantamount to stating its simulated nature.

The most valuable innovation of this decision – in my opinion – in precisely there where it liquidates the Romanistic trust in its characterizing aspects. This is in those parts which consider the transfer of the asset as causal and not abstract (or *fiduciae causa*) and the internal agreement between the parties as the cause of the agreement and not its simple reason (37). The other part also assumes importance where it is excluded that there can be a definitive transfer here of the full ownership, of the type similar to that Romanistic *mancipatio*, whilst at the most, and on the contrary, that of a temporary ownership can be surmised (38). The only trust admissible in our legal system, limitedly to the cases in which it is allowed, and with definite exclusion of real property, is in definitive that concerning formal ownership (i.e. the trust of the Germanic type).

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out by the leasing company, the absence of a *causa credendi* do not authorize the generalization of such a conclusion. This does not exclude that there may be, with regard to specific circumstances, an agreement of forfeiture.

(36) For this poitn of view: E. BETTI, *Teoria generale del negozio giuridico*, Turin, 1943, pp. 248 ff.

(37) The trust agreement, admitted by the Swiss legal system, has been deemed causal (*causa mandati*) by the Swiss Federal Court, with the decision of 13th July 1973, which annulled that of 21st September 1971 of the Court of Lugano on the Bankruptcy proceedings of the Banca Vallugano and superseded the opposing orientation favourable to abstraction. Recently, article 30 of Legislative Decree no. 69 of 2nd March 1989, passed into Law no. 151 of 27th April 1989 was introduced in Italy, which subjects to taxation by the grantor the trust properties, registered in the name of others. This represents the last additional argument against the Romanistic trust.

(38) On temporary ownership, M. ALLARA, *La proprietà temporanea*, in *Il circolo giuridico*, 1930, pp. 69 ff.; U. NATALI, *La proprietà*, Milan, 1962, pp. 145-154; PELOSI, *La proprietà risolubile*, Milan, 1975.

7. – After this digression, let us return to the sale for the purpose of guarantee of real property.

As the property has to be taken out of the name of the owner-debtor and put in the name of the creditor, it is inevitable to have recourse to an apparent agreement that can be registered, the most usual form of which is the simulated sale. However, because it is simulated, it is destined not to produce, in theory, any effect of transfer and this the ownership remains with the seller and the creditor does not become the owner.

The simulation and the consequent absence of effects nevertheless require time to be consecrated by a final judgement; in the meantime, the owner-debtor has « his hands tied » and is not free to dispose of the asset to third parties. This situation comes into the context of the *ratio* which is at the basis of the prohibition of the agreement of forfeiture.

In addition to the precautionary situation of mere fact, for there to be an agreement of forfeiture, the parties also have to agree on a possible definitive transfer of the asset to the creditor for the satisfaction of his credit. This transfer is virtually included in the sale for the purpose of guarantee and the disposal, although possible, of the asset to the creditor must be presumed until proven otherwise. The sale « therefore masks a forfeiture » which can be proven under article 1417 Civil Code, It is in fact pre-arranged with regard to the compensation with credit, guaranteed by the cautionary registration and not to the exchange of the asset for a price. From this point of view as well, the sale, in its effective part, is apparent and dissimulates an agreement of forfeiture. What certainly cannot be hypothesized, in our case, is an indirect agreement, because it would use a simulated agreement, as a means, in view of a further purpose (39).

Drawing a conclusion, at this point, cannot fail to state that the agreement masked as a sale for the purpose of guarantee, whether subordinate to suspensive or resolutive condition, in its unitary physiognomy (i.e. absorbing the function of guarantee and of satisfying the credit) is made up of the agreement of forfeiture as per the case in point prohibited by article 2744 Civil Code and according to the *ratio* identified above.

Reference to the above is made in:

L. Barbieri, *Codice civile commentato*, Giuffrè, 1991, p. 237, p. 247 (where he disagrees with my theory of the inapplicability of trust agreements to real property); C.M. Bianca, *La vendita e la permuta*, Turin 1993, I, p. 686. note 15; G. Gitti, *Diritto del patto commissiorio ecc.*, in *Riv. trim. dir. e proc. civ.*, 1993, I, p. 461, note 9.

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(39) The in direct agreement presupposes that the agreement-means is real and not simulated.

If and within which limits the open-end guarantee is invalid

1. – Once again the Court of Cassation has categorically confirmed the validity of the open-end guarantee.

Against so much certainty, there still remains a huge area of perplexity, shown by the frequency with which the question is raised. This depends on the fact that the state of opinions does not seem, in my humble opinion, the most satisfying; and beyond the opposition of radical theories, the subject deserves new detailed examination and more perspicacious thought. This should hopefully occur in a short period of time and this essay aims to offer a contribution for a new mediation on the subject.

The problem is usually solved with an exclusive regard for banking activity and the guarantees and trust of these corporations, which give life to economic development. However, this presents a major limit because the problem must be set in its most general terms, i.e. whoever is the guaranteed creditor and whatever subjective guarantee or trust it encourages. The problem must be approached with regard to the contractual model in itself, as an institution of common law and not a particular category of business. From the specificity of certain motivations, there comes the suspicion that the solution could be different if the guaranteed creditor were any subject. And this would not be fair or coherent.

2. – The main distinctive features of the open-end guarantee are given by the fact that it guarantees unlimitedly any credit not only in the present, but also in the future, not only direct, but also direct. with a given debtor, even for guarantees stood by him, in the future to the same creditor to guarantee third parties. A further characteristic note is given by the fact

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From « Il Foro italiano », 1985, I, p. 507 and ff. ad from « L'Espressione monetaria nella responsabiltà civile », Cedam 1994.

The above annotates the following decision:

COURT OF CASSATION. Section I, 31.8.1984, no. 4738, President Sandulli, Reportiong Judge Racchi, Public Prosecutor Caristo (Company bankruptcy). INCES v. Credito Lombardo: « The guarantee stood generally in favour of a bank (so-called open-end guarantee) in guarantee of any present and future obligation of the guaranteed debtor is not null by indeterminacy or indeterminableness of the object. The open-end guarantee that contemplates the waiver of the guarantor to forfeiture under article 1957, Civil Code, is not null. »

that the guarantor dispenses the creditor beforehand of the duties of prudence and diligence implicit in articles 1956 and 1957 Civil Code and the duty of information.

The most striking fact is that the guarantor thus assumes any risk of any entity that the creditor, even in the future, may have him rum, with giving credit to the debtor without any consent or authorization (1).

This aspect does not seem to be surmountable with the argument suggested by some of the pronouncements that the guarantor is often interested, directly or through mediation, in the credit obtained from the debtor. Finding a perennial association of interests such as to justify a permanent community of fates, moreover in a one-way direction, of the guarantor and of the guaranteed debtor is a strained interpretation, in the case in which the debtor stands a guarantee through a bond of marriage (2), kinship or friendship (3) or a non-totalitarian shareholder and often not even a director of a company (4). Even where the guarantor is a shareholder and director, it is not certain that he will remain so during the evolution of the guaranteed relationship, nor that there is a harmony of interests or that the mechanism guarantees for the wish shown in the interest of the debtor company holding some consideration of his contrary interest as a guarantor, as the antagonism of interest is in the things. In general, it is not a good rule to transform the limited liability of shareholders into the unlimited one, such as to distort the essence of the modern company of capital (5). The faculty of recession from the guarantee is not even an adequate remedy to a consequence of the kind mentioned above, because until that time the guarantor will respond for every extension of the risk that has been added in the meantime and often the revocation ensues the counter-productive effect of being immediately summoned to return, without extension, the borrowed sums. It is unimaginable how the guarantor, against such an harrow-

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(1) Also G. Stolfi, *In tema di fideiussione generale*, in Riv. dir. civ., 1972, I, pp. 529 ff.

(2) On this point see the review in Rascio, *Fideiussione « omnibus »* in *Dizionario del diritto privato*, edited by N. Irti, *Diritto civile*, Milan, 1980, I, pp. 389 ff. With reference to the guarantee stood by a spouse: Court of Cassation, 15th January 1973, no. 118, *Foro it.*, Rep. 1073, under *Fideiussione*, no. 4.

(3) With a parent: Court of Cassation, 11th October 1960, no. 2647, *Foro it.*, Rep. 1960, under Fideiussione, no. 19, in full in *Banca, borsa, ecc.*, 1960, II, p. 506; and a sister: Court of Florence, 17th December 1962, *Foro it.*, Rep. 1963, entry cit., no. 21.

(4) The minority shareholder often does not decide and is not even informed, although a guarantor. With regard to this particular case: Court of Cassation, 28th April 1975. no. 1631, *Foro it.*, Rep. 1975, entry *Fideiussione*, no. 15.

(5) This is far less appreciable with respect to that of the shareholders of a partnership, which is unlimited towards all creditors and not towards some, such as banks, as in our case. Here, everything is resolved in a race against time to guarantee a chronological precedence on injunctions and mortgage registrations, only then to try to achieve an extension of guarantee, under threats of bankruptcy and revocations.

ing perspective, is induced to leave things as they are and also to run the further risks that the creditor will deem have him run, as he is now the arbitrator of his fate.

3. – The validity of the agreement is evaluated in general and also by the decision under the unlimited profile of a possible nullity due to the indeterminacy or not of the object under article 1346 Civil Code and the potestative character or not of the guaranteed creditor, to extend the risk covered by the guarantor (6).

The validity of the dispensation of the creditor from the limits under articles 1956 and 1957 Civil Code and from the implicit duties of prudence and diligence on which we will dwell below, is taken for granted, from this decision as from others.

The open-end guarantee would in any case be legitimate, according to the decision. even from the different point of view of an independent contract of guarantee, the admissibility of which in our legal system is confirmed.

To follow the order of these subjects, we will begin with that relative to the determinability of the object. The Court, after having said that guarantee can be stood for future debts under article 1938 Civil Code, states precisely that these must. however, be at least determinable if not determined. This is translated into the determinability of the risk of others that the guarantor assumed at his own responsibility and from which the guaranteed party wants to be held harmless, and which is the object of this, as of every agreement of guarantee.

There is no doubt that the risk for non-fulfilment of future debts, must be determined or determinable, equally to the latter: in insurance as well, and even in gambling, the risk is never indeterminable (7).

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(6) The decision above confirms the decision of the Court of Appeal of Milan on 23rd 1982, which in its turn reformed that of the Court of Milan of 6th September 1979, i.e. the decision that had declared null and void the open-end guarantee remained isolated. The validity of this type of guarantee is confirmed, by consolidated case law; Court of Cassation, 5th January 1981, no. 23, *Foro it.*, 1981, I, p. 704; 27th January 1979, no. 615, id., Rep. 1979, under *Fideiussione*, no. 8; 1631/75; 6th February 1975; no. 438, id., Rep. 1975, entry cit., no. 17, amongst the many. On the subject in legal literature: FRAGALI, *Fideiussione*, entry in *Enciclopedia del diritto*, Milan, 1968, XVII, pp. 346 ff.; Id., in *Commentario* edited by Scialoja and Branca, Bologna-Rome, 1962, under articles 1936, 1959; Id., *La fideiussione* generale, in *Banca borse ecc.*, 1971, I, p. 321; RAVAZZONI, *La fideiussione*, Milan, 1967; Id., *Fideiussione*, entry in *Novissimo digesto*, Turin, 1961, VII, p. 274; RESCIGNO, *Il problema della validità delle fideiussioni cosiddette «omnibus»*, in *Banca, borsa ecc.*, 1972, II, p. 92; STOLFI, cit.; DE MARCO SPARANO, *La fideiussione bancaria*, Milan, 1978; SALVESTRONI, *La solidarietà fideiussoria*, Padua, 1977; RASCIO, cit., MACCARONE, *Contratto autonomo di garanzia*, in *Dizionari*, cit., *Diritto commerciale*, Milan, 1981, III, p 379; PORTALE. *Fideiussione e «Garantieverlrag»* in *Le operazioni bancarie*, Milan, 1978, II, p. 1054.

(7) Thus J. HUIZINGA, *Homo ludens*, Turin, 1982, p. 60; VALSECCHI, *Il gioco e la scommessa*,

The Court correctly states that these future debts, of which the risk for non-fulfilment is the question, must be determinable on the basis of a criterion previously agreed by the parties, and capable of « identifying in a rigorously objective way the principle relationship of obligation ». One example in the banking field, in this respect, is given by the guarantee given in guarantee of a letter of credit still to be granted and yet being opened on the basis of a request that has already been put forward. The credit here is future, because it will rise only after the credit has been granted and its use, and yet it is objectively determinable with reference to the request which will also act as a maximum amount.

But can the same be said of a general reference to some unknown credits, for which credit lines, which will be requested and granted in the future, of which nothing is known and that is if, when and for which amounts they will be as in the case of the open-end guarantee?

The court, in line with its constant orientation, replied affirmatively, saying that « the object of the guarantee as far as future debts are concerned, is determinable here *per relationem*, with referent to the object of the obligations which will be taken on towards the bank by the guaranteed debtor » (8). There cannot be agreement with this order of ideas, in my opinion. A general reference « to all the obligations that will arise for the principal debtor! cannot make up a criterion of determination *per relationem*. This is a blank reference to future debts that are to determine themselves and therefore a fine petition of principle. The decision then takes on, as an element of reference for the determinability of this future debt (and of the risk of its non-fulfilment taken on by the guarantor), the content of the juridical agreement from which the aforementioned debt derives. A first remark concerns the time when this determinability must recur. There can be no doubt that both the debt and the risk must be determinable at the present, i.e. at the time when the guarantee is stood (now for them) and not be determinable in the future and when the agreement exists, with that content from which that debt and that risk will arise (then for then).

There must therefore be this requisite in the present, when the guarantee is stood and not in the future, when it operates (argued in accordance with articles 1225, 1346, 1467 Civil Code) (9).

The error in the current opinion is that of understanding the determinability as a mere judgement *a posteriori*, therefore it always recurs, and not

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Milan 1954, pp. 30-32: V. CALANDRA in *Commentario* edited by Scialoja and Branca, Bologna-Rome, 1966, under article 1898, pp. 264 ff.

(8) Amongst the many, Court of Cassation, 4th March 1981, no. 1262, *Foro it.*, Rep. 1981, under Fideiussione, no. 15; Court of Cassation, 23/81 and 615/79 where the concept of determinability is so vague as to write that « in some way (sic!) the limit of the obligation has to be determined ».

(9) Also STOLFI, *op. cit.*, pp. 532, 533, 534 and 537.

as a judgement of posthumous prognosis *ex antea* (i.e. referred to the conclusion of the contract of guarantee) as it must be. This means that the operation of determination *per relationem* will be formulated afterwards. but the determinability must recur beforehand, as is the case of every decision of prognosis. From this point of view, the future determinable debts only in the future, with reference to agreements which will come into existence even at hypothetical level only in the future, cannot be said to be determinable at the present (10).

A further remark is given by the fact that the criterion of determination of the vicarious performance of that foreseen as non-fulfilled by the debtor can be admitted, the hypothetical content of the future related agreement, which is the source of the principal debt. on condition that it is a concrete and specific hypothesis which is neither vague nor indetermined, as such previously agreed by the parties of the contract of guarantee.

The object of the guarantee must otherwise be deemed indeterminable if the hypothesis of the related contract to which it refers, is at the present (11).

Stating otherwise, it cannot be seen what the criterion previous agreed by the parties deemed capable of « identifying in a rigorously objective way » the principle obligation relationship, ends up as being.

The Court, having crossed the threshold, pushes further ahead in the field of indeterminability, to textually write: « the concept of determinability of the guarantee does not entail implications of a subjective or psychological character in the sense that the guarantee has to know, foresee or imagine the guaranteed debt ». How can a credit that cannot even be imagined be said to be determinable? The best confirmation of determinability – and it is evident – is given by the fact that the guaranteed debt can be foreseen or at least imagined by the guarantee who takes on the risk of the non-fulfilment. The guarantor must be able to evaluate the risk that he takes on and thus foresee the consequences of the commitment of harmlessness.

Here we touch on the nexus between determinability and foreseeability. It is hardly surprising that the normal risk of the contract and responsibility for damage from breach of contract in the limit of the foreseeability, also

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(10) For example, the Court of Cassation, 6th February 1975, no. 438, Foro it., 1976, I, p. 2474 cannot be approved where it concludes from the postulate identity of the object of the guarantee and of the principal obligation: « as the indetermination of the object of the guarantee can be inferred only if that of the principal obligation is indeterminable ». This is not valid for the future debt the determinability of which is postponed to the time of the agreement that will give rise to it, whilst that of the guarantee must be anticipated to the time of the contract of guarantee and therefore the parties of the guarantee agreement have to have agreed in advance on the hypothesis of the future agreement, with which content, they refer to.

(11) With respect to the connection between the agreement of guarantee and the principal agreement: G. SCHIZZEROTTO, *Il collegamento negoziale*, Naples, 1983, pp. 119, 121.

understood on the quantitative level if there is negligence and not wilfulness, are correlated terms and that they integrate reciprocally, This is also at the basis of the private self-responsibility in which acting at onés own risk and in the broad sense of impuliability is materialized.

The determinability of the risk is translated into the foreseeability of the consequences.

4. – Let us now go on to see if the guarantee in question reveals a potestative character or not.

It is licit to wonder whether the guarantee « for credits at will of the other parties » (12) according to the phrase *si quoties et quantum Sempronio credere volueris fidejubeo* produces a potestative commitment or not. The decision, in line with the previous ones of the same Court (13) excludes it because giving credit and receiving it would not configure such an activity. Here it is understood that the potestative commitment in equivalent to that referred to the arbitrator of the guaranteed creditor, without even the motivation of a calculation of convenience (14), i.e. on a whim.

This theory is not acceptable because it is excessively reductive. There is a potestative character, in my opinion, generally where a subject is in conditions to have to undergo the effects of the will of the counterpart, according to his mere interest. It is decisive that the person making the choice can make it according to his mere and exclusive interest, determining consequences for another summoned to undergo them. The choice at whim is an aspect of the unquestionableness of a potestative character and is the limit hypothesis. In the case according to article 1355 Civil Code, it is understood in the latter meaning because, as the obliged parties invested with it, he may at the most aim at the freedom from the commitment taken without further consequences, in order to recognize in general its validity, unless the exercise of the whim is not contemplated. The case in which the choice is put ad libitum of the creditor is different, as in the guarantee, because he could extend the commitment of others disproportionately accord-

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(12) Here, considering the gratuitousness, the onerousness does not even act as a counterweight to discretion, as in the so-called supply at will; CORRADO, *La somministrazione*, Turin. 1959, p. 60, note 3.

(13) See, for example, Court of Cassation 23/81.

(14) The error here lines in identifying « potestative » with « merely potestative » i.e. with naked will », « to want or not to want the contract », « unmotivated wish », « beyond every game of interest and convenience », changing it from article 13555 Civil Code (amongst the many Court of Cassation, 3rd October 1973, no. 2484, Foro it., Rep. 1973, entry *Contratto in genere*, p. 625; 2nd September 1971, no. 2602 id., Rep. 1971, entry cit., no. 219(Such a reductive interpretation is not considered as having a meaning, in article 1355, only because the potestative nature is referred here to the debtor and not to the creditor, as is the case of the guarantee, where potestative has to be understood as the agreement referred to the wishes of the creditor, without any other limitation that his mere interest.

ing to his own interest. Invalidity occurs here due to the consequences that derive from the arbitration.

Giving credit in itself is of course not a merely potestative activity with regard to the subjects of the credit relationship who are free to contract it or not, but, on the other hand, it is with regard to the guarantor, at their mercy. Nor does it appear that the guaranteed debtor can describe himself as a third party for the purposes of the delegated *arbitrium*, as can be read in some decisions, as he is the main party interested in extending the context of the guarantee, according to his requirements and his investment and work plans.

5. – These and other pronouncements seem, finally, to exclude the potestative character with the specific argument that the banking activity is alleged to be a precise activity (15). It is too specific to be conclusive in a more general sense. The theory would then have some grounds if granting the credit were to be described as a « precise activity » according to juridical rules and not only technical ones, aimed at the mere interest of the bank (16). Our legal system does not have rules that give a « precise » character to the decision to give credit and prevent its abusive concession (17); the supervision of the public inspectorate is too general to be of significance, without mentioning the perplexities on the making the public and the private bankers equivalent (18).

It is however the logic of giving credit on the basis of a guarantee to exclude that the third party can be guaranteed the containment of the fu-

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(15) Amongst the others, Court of Cassation 615/79; Court of Cassation 23/81.

(16) Even article 218 Bankruptcy Law is understood as having the sole aim of the interest of those granting credit. p. nuvolose, *Il diritto penale del fallimento*, Padua, 1966, p. 405; U. GIULIANI, *La bancarotta*, Milan, 1983, pp. 416 ff.

(17) The excessively general rules as per articles 35, section 2, letters c and d, and article 87 Banking law do not have a meaningful bearing. The debate on the tortious liability of the bank for the abusive concession of credit to damaged third parties, as is admitted in France and in Belgium, is still open. At present, de iure condito the prohibition of abusively granting credit is excluded, as a source of liability towards third parties, although it operates at the level of self-responsibility under article 1227 Civil Code with respect to article 1176, section 2 Civil Code, as well as operating with regard to those third parties who are the guarantors in relation to the special rule of article 1956 Civil Code which has introduced a penalty of private law. On the wider debate in progress on the tortious liability for the abusive granting of credit, see *Funzione bancaria, rischio e responsabilità della banca*, Proceedings of the Conference in Sienna, June 1980; R. CLARIZIA, in *Banca, borsa ecc.*, 1976, I, p. 361; A. NIGRO, in *Giur. comm.*, 1981, I, p. 287; C.M. PRATIS, id.., 1982, I, p. 841.

On the incriminability of the abuse of granting credit, see article 10 of the draft bill approved by the Senate on 21st April 1982. This indicates, however, the growing importance of the public interest.

(18) Court of Cassation, 10th October 1981, Carfi, Foro it., 1981, II, p. 553, with a note by F. CAPRIGLIONE.

ture credit within the limits of what the debtor is worth and no more. The guarantee extends the capacity of indebtedness of the debtor to the conformity of the guarantor. The banker gives credit adjusting himself as necessary on the capital of the guarantee to assess that risk of insolvency that with the indexes of profitability of the ratio gives the proportion of his interest. How can he, at one and the same time, guarantee for the guarantor that the future extensions of credit take into account only what the debtor deserves and not also what the should deserve by the guarantee stood? And how can that open-ended guarantee that due to the numerous dispensations under articles 1955, 1956 and 1957 Civil Code, seems rather oriented in the other direction, be considered finalized for a « precise » concession of credit?

All this appears too contradictory. We certainly do not want to underestimate here the rules of great professionalism and the corpus of regulatory rules supervised by the bank inspectors. However, these rules are for the interest of those granting credit and not those who guarantee it. The fact that they are not observed is shown by the « overlapping » into which the real management of credit is translated every day and which is the main cause of the exaggeration of banking disputes.

The activity that is punished by the revocations of payments, made ont eh return of this « overlapping » (19), and with regard to article 1957 Civil Code, that would deal with forfeiture on available rights, the discipline of which can be modified by the parties under article 2968 Civil Code (20) can certainly not be considered « precise ».

This shows the inadequacy of the subject.

6. – At this stage, let us examine whether articles 1955, 1956 and 1957 can be derogated.

In general the tendency is that they cannot be derogated, maintaining that it is in the faculty of the parties to distribute the risk in a different way from the legal one (21). However, these derogations distort the typical cause of the guarantee, where a justification is offered, from the point of view of an atypical contract (22) or independent contract of guarantee (23).

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(19) Court of Cassation, 18th October, no. 5413. Foro it., 1983, I, p. 69; 29th October 1983; no. 6430, id., Rep. 1983, under *Fallimento*, no. 336.

(20) Court of Cassation, 1631/75; 7th August 1967, no. 2104, *Foro it.*, 1968, I, p. 493 and in *Banca, borsa ecc.*, 1967, II, p. 520. with note by FAVARA, amongst the many.

(21) FRAGALI, entry *Fideiussione*, cit., p. 496; RAVAZZONI, entry *Fideiussione*, cit., p. 56; Cassation 18th October 1960, no. 2811, *Foro it.*, Rep. 1960, entry *Fideiussione*, no. 34; 11th January 1983, no. 183 id., Rep. 1983, entry cit., no. 27; 9th August 1983, no. 5310, ibid. no. 32.

(22) Amongst the others, S. MACCARONE, *La fideiussione bancaria come contratto atipico*, in *Le garanzie reali e personali nei contratti bancari*, Milan, 1976, p. 154. Elsewhere (*Contratto auton-*

The rules under articles 1955, 1956 and 1957 are, on the other hand, in my opinion, compulsory and of public order and any agreement to the contrary is null. They are certainly there to protect the guarantee from the guaranteed creditor.

However, these precepts are not exhausted in the protection of those specific interests of the guarantor that are put at risk by the contrary conduct of articles 1955, 1956 and 1957, but rather they transcend them and oversee the public interest for the respect of the social values of conduct (articles 1175, 1176, section 2, 1227, sections 1 and 2, Civil Code).

Articles 1955, 1956 and 1957 are not limited, as it would be otherwise, to inflicting the non-liability of the guarantor for that part in which the subrogation cannot take place under article 1955 (24) or for that part of the risk run in full awareness by the creditor and exuberant with respect to the financial conditions of the debtor under article 1956 (25) or for that part of the debt which cannot be recovered due to the late and negligent pursuit of the debtor under article 1957 (26).

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omo, cit., p. 395) he considers the open-end guarantee as an atypical hypothesis of the autonomous contract of guarantee.

(23) PORTALE, *Fideiussione e «Garantievertrag»* cit., p. 1052; MACCARONE, *op. ult. cit.*, p. 388.

(24) As it would be if it did not have a nature concerning sanctions.

(25) The impossibility for the creditor to avail himself on the guarantor for the insolvency of the new credit granted in a condition of aggravated risk derives from article 1227, section 1, with reference to the transgression of the due prudence of the *bonus argentarius*, under article 1170, section 2, Civil Code. A banker's sating is «not to run after lost money, not to lose more money» – but article 1956 Civil Code goes further, where «the guarantor for the future obligation is discharged for the whole and not only for the part that he has uncautiously been granted as new credit», as Appe reveals, Bologna, 13th September 1975. *Foro it.*, Rep. 1975, under Fideiussione, no. 22. This profile of a penalty of private law corresponds to the intention of the legislator (ministerial report on the Civil Code under article 766= «as responsibility for the transgression of an obligation of conduct not to give credit», i.e. as a sanction for the abusive granting of credit to those third parties who are the guarantors. Article 1956 Civil Code is a new rule with respect to the code of 1865 and the Chairman of the Legislative Commission, on article 731 of the Ministerial draft, notes that «this article will give rise to many disputes, but it is fair from a moral point of view.» A prior dispensation from the duty of not abusively granting credit nor from the duty of prudence, diligence and self-responsibility under article 1227 Civil Code is not conjecturable. There can be a waiver subsequent to the rights deriving from the discharge, not waiver prior to the discharge.

(26) Failure to pursue the principal debtor in itself would legitimise the failure of recoupment within the limit of the avoidable damage under article 1227, section 2, Civil Code. This is absorbed here by the more serious sanction under article 1957, Civil Code, not susceptible to prior waiver, that also configures a case of penalty of private law, for the infringement of the duty of diligence in taking action against the principal debtor, within the six months from the due date and of diligence in cultivating the subsequent requests, so that the guarantor remains bound, «only as strictly necessary» (U. SAKVESTRONI, *op. cit.*, p. 104). The deemed compatibility of article 1957 with the joint character of the guarantee obligation (Cassation, 2nd March 1976, no. 688), *Foro it.*, Rep. 1976. entry *Fideiussione*, no. 19) shows the inadequacy of the current conception based on forfeiture.

These go beyond these limits and sanction the redemption of the guarantee with the total discharge of the guarantor from all liability for every risk. The sanction is coordinated with the infringement of the duty of correctness and good faith, under article 1175 Civil Code as the report by the Minister of Justice on the Civil Code (27) specified. This is a private penalty under the law which is added to a series of cases (28) where the transgressor has to undergo a disadvantage greater than the advantage which he obtains from the infringement and conversely undamaged, he has an advantage which is greater than the surmised damage. Their aim at provoking a certain type of conduct, such as that wished by the legal model and in which the duty of good faith is performed, is transparent. A prior dispensation from the duty of correctness does not seen conjecturable in the exercise of the law, as it certainly belongs to the public order, to good habits, just as there can be no prior dispensation from the duties of prudence and diligence under article 1176 and that of cooperation article 1227, as Emilio Betti taught (29).

To go into the details of the individual rules, article 1955 is deemed a law that is not available (30).

Article 256 protects the guarantor, in the case of worsening of the risk, as article 1898, section 2, Civil Code, protects the insurer and article 1476 Civil Code the contracting party: the rules are stored in the *rebus suc stantibus*. Here article 1856 inflicts freedom of the guarantor from every risk for punishing the creditor who has granted credit to a debtor, without special authorization, with the awareness of the changed conditions of the debtor, Article 2956 punishes wilful behaviour with a private penalty *ope iuris*; negligence with foresight of the event, which is the most serious type of infringement of articles 1175 and 1187 section 2.

As far as article 1957 is concerned, it is to be excluded that it is reduced to inflicting a forfeiture. the discipline of which would be amendable for the parties. The rule, in this case, would have included the perpetuation of the guarantee once the requests for credit had been put forward within six months from the due date of the obligation. This is not so because the rule adds the infliction of the discharge of the guarantor, if the creditor « does not have them with continued diligence ». This shows that we are not in the presence of forfeiture but of a penalty for negative social values of conduct, including procedural conduct.

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(27) Ministerial report on the Civil Code, under no. 766.

(28) E. Moscati, *Pena di diritto privato*, entry in *Enciclopedia del diritto*, Milan, 1982, XXXII, pp. 770, 773, 775, 778, 779, 783. A certain series of cases is shown on page 779 such as the forfeiture of the benefit of the term, the benefit of inventory etc.

(29) E. Betti, *Teoria generale delle obbligazion*, Milan, 1953 I, pp-, 105, 136, 151.

(30) U. Salestroni, *La solidarietà finanziaria*, cit., p. 52.

7. – Lastly, let us see whether the open-end guarantee is legitimate from the point of view of the independent contract of guarantee or at least of an atypical contract and if they admissible agreements in our legal system. The autonomous contract of guarantee is a residual figure recurring in the exclusive sphere of international contracts for large public works (31). We cannot see how it is possible to generalize the type. Even in its field, this guarantee is still limited to a maximum amount or to precise earnings, so that in our case, we end up by constructing in the abstract a contract other than the one to which reference is made.

In any case, we do not understand the reasons why our legal system should appreciate, in accordance with article 1322, section w, Civil Code, how socially significant such a special type of guarantee is.

It really does not seem that it is possible to recognize the reason in a public interest on the promotion of credit which, without those compulsory limits of precision (32), would transform it into easy credit and therefore a squandering of wealth.

This guarantee, however it is described, as an autonomous contract of guarantee or an atypical contract, is at the antipodes of the basic principles of our legal system and of our custom which is materialized in « acting at onés own risk » and not « at the risk of others » (33). This is at the base of our system of responsibility and private responsibility which is translated into responding for oneself and is based on imputablity (34).

The hypothesis of responsibility for others' facts are residual and even where they are contemplated by articles 2047, 2048 and 2049, they are always reduced to hypotheses of negligent omissions of onés own with respect to duties of supervising others and are materialized in acts by omission. The guarantee we are discussing, if hypothetically valid as an autonomous or atypical contract, would inaugurate a subversive turning point or would codify a different system based on acting « at the risk of others » which, at present, in incompatible with our legal system and with our customs.

These new figures of guarantee do not appear acceptable, precisely where they want to put aside those limits that express disfavour for guaran-

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(31) On the aforementioned contract, amongst the many, PORTALE, *op. cit.*, m pp. 1045 ff., and the bibliography on p. 1075. The admissibility of the institution is controversial in the various legal systems: see MACCARONE, *op. cit.*, pp. 385.388 to which we refer the reader for other aspects as well.

(32) RASCIO, *op. cit.*, p. 387, 457.

(33) E. BETTI, Diritto rmano, Padua, 1935, pp. 258, 385, 411 and 412;Id., *Teoria generale del negozio giuridico*, Turin 1943, p. 104. dified the fault towards ourselves and article 2043 Civil Code towards others.

(34) S. PUGLIATTI, *Autoresponsabilità*, entry in the *Enciclopedia del diritto*, Milan, 1959, IV, pp. 453, 464, correctly identifies how art. 1227 codified the fault towards ourselves and article 2043 Civil Code towards others.

tees with the ruinous consequences, the problem of which dates back to the times of Solomon (35). In this we disagree with the decision.

8. – Let us now draw the conclusions of all this.

Those who oppose the open-end guarantee, which is a radically null and void contract, in each part, so that the guarantor would be totally discharged are generally supported.

The adoption of an autonomous guarantee or atypical contract certainly leads to a conclusion of this kind. However, this is not the opinion of the author of this note, who deems that a classification other than that of the guarantee contract can be given to the agreement.

Article 1419 Civil Code has to be correctly applied in which the saying *utile per inutile non vitiatur* is materialized, thus distinguishing the valid part from the invalid part of the open-end guarantee. We cannot assume that the contracting parties would have entered into the guarantee only if even future unimaginable debts had been guaranteed or put to the potestative nature of others. The commitment of guarantee will thus be valid for the present determined or determinable debts and for the future determinable ones with reference to a request for credit already put forward or to concrete hypotheses or specific operations or within the limit of a certain maximum amount and so on, contemplated in the contract of surety.

No account will be taken of the prior waivers to articles 1955, 1956 and 1957. and thus the special authorization to give credit under article1956 will be requested under article 1956 and the debtor will be pursued within the period and the diligence according to article 1957.

9. – The conclusion we have reached de iure conduto, could appear in first sight as unfavourable to a deserving category of businesses, the banks.

They like nothing better however, than what contributes to valorizing their essence, or to put it better, the soul that distinguishes the banker from who he is not, i.e. the calculation of the risk and the passion of the risk calculated.

Reference is made to the above in:

Foro it., 1986, I, p. 835, note 1, note to Legnano Magistrates' Court, 13th June 1985; see MARICONDA, *Sulla fideiussione e sul contratto autonoma di garanzia*, *Il Corriere Giuridico*, 1987, p. 1157; V. MARICONDA, *Fideiussione omnibus e principio di buona fede: la Cassazione a confronto*, *Foro it.*, 1989, I, pp. 3104, 3105, note 7: M. CORONA, *Ancora sulla validità della c.d. clausola estensiva della fideiussione omnibus*, *Giust. cir.* 1989, pp. 2169, 2173 notes 3 and 17; M. JACUANIELLO-BRUGGI, *La*

(35) CAMPOGRANDE, Trattato della fideiussione, Ruri, 1902, p. 2.

fideiussione omnibus inossidabile Cassazione ed i nuovi modelli ABI, *Giur. it.*, 1989, I, 1, p. 1745; M. OLGIATI, *Si acuisce il contratto tra giudici di merito e Cassazione in tema di fidejussione omnibus*, *Giur. comm.le*, 1989, p. 578, note 20; A. DE MAJO, *La fidejussione omnibus ed il limite della buona fede*, 1989, pp. 2753, 4792, 3756; E. GABRIELLI, *Il pegno anomalo*, Padua p. 50, 1990, M. JACUANIELLO-BRUFFI, *Fideiussione omnibus; chi ha paura dell'art 1956 c.c.*, in *Giur. It.* 1990, 2, pp. 474, 479, 482, notes 68 and 82; M. VALIGNIANI, *Fideiussione bancaria e buona fede*, *Giur. it.*, 1990, 1,2, p. 1138; M. ROMANO, *Validità della fideiussione omnibus in funzione della agevolazione del credito*, in *Giur. it.*, 1990, I, 2, p. 831, note; GIANLUCA SICCHIERO, *L'engineering, la Joint venture, i contratti di informatica*, *I contratti atipici di garanzia.* Turin, 1991, pp. 167, 168, 171, 172, 177, 184, 192; P. TARTAGLIA, *Limiti alla fideiussione omnibus e disciplina della transparency bancaria*, *Foro it.*, 1992, 1, p. 1397, note 1; p. 1398, note 18; *Giust. civ.*, 1990, p. 404, note 1, note to Court of Cassation, 20th July, no. 2287.

Also by the author on the same subject:

- «*Ancora a proposito della validità della fideiussione omnibus con riguardo ai nostri moduli bancari*», in Foro Italiano, 1988, I, p. 1947 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 387.
- «*Sulla fideiussione bancaria e i suoi limiti*». Published in Foro Italiano 1990, I and in L'Espressione Monetaria nella responsabilità civile, Cedam 1994, p. 395.
- «*Sulla inadeguatezza del principio di buona fede a proteggere il fideiussore*», in Giurisprudenza Italiana 1990, I, 1, p. 622 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 409.
- «*Sulla inderogabilità dell'art. 1957 c.c.*» in Giurisprudenza Italiana 1990. I, 1, p. 460 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 415.
- «*Sulle nullità ope legis delle fideiussioni omnibus e sulle relative conseguenze*», in Foro Italiano 1992, I, p. 791 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 421.
- «*Sul carattere interpretativo della norma che vieta la fideiussione omnibus e sulla sua applicazione retrospettiva alle liti pendenti*», in Foro Italiano 1993, I, 2171 and in L'Espressione monetaria nella responsabilità civile, Cedam 1994, p. 429.

On the concepts of intrinsic novelty and originality in the new discipline for industrial inventions

1. – About forty years ago, in the pervious work, I excluded that the sale of a machine without an agreement of secrecy (and thus the communication by the previous discoverer to a third or the infringement of the obligation of secrecy by the person who had participated in it by the inventor) induced in itself the pre-disclosure of the invention that is a cause of nullity of industrial patent rights.

On the contrary, I concluded that investigations had to be carried out on the effective dimension taken on by the circulation of the inventive idea in society and that it should be considered divulged only when that invention has spread to such an extent that it can be considered as having become part of the cultural heritage of the class of operators interested in it.

In the final analysis, I observed that we should only be concerned about the divulgation in reality and not about that potential or virtual divulgation and thus the invention had to be shared by an undetermined number of people, whilst that limited to only one or a few third parties considered in isolation and remaining such, would have at the most allowed the purchase of the pre-use by them, obviously with the contribution of the suitable circumstances.

This opinion of the author of these lines remained isolated for the subsequent period and until the Presidential Decree no. 338 of 22nd June 1979, whilst both legal literature and case law continued to deem pre-divulged the invention that had been notified even to only a single third person due to specific information they had obtained or the purchase of a machine without the agreement of secrecy of the previous inventor. The article mentioned at the start outlined a picture of the then current opinions on the subject and it must be referred to for more information.

At the basis of this strongly rooted opinion, there is a concept of the extrinsic novelty that is so absolute and so individualistic as to appear in

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From « Rivista di diritto industriale » 1993 and from « L'Espressione monetaria nella responsabilità civile », Cedam 1994.

conflict with the very idea of divulgation (or awareness) as it is perceived by common sense.

From an equally absolute and individualistic point of view, authors and judges have also considered the other requisite of the intrinsic novelty or originality which has been deemed synonymous with a « contribution of technical progress, which objectifies a creative intellectual work ».

In this way, we have ended up (still at the time of law 1127/39 previously in force) not to understand in a perspicacious way the nexus between the two hypotheses of novelty (extrinsic and intrinsic) although there were those who intuited that they were in front of « coordinated and mutually integrating aspects of a complex and substantially unique requisite » (1).

This was made evident by the error of perspective, where the relationship between the two aspects of the novelty was summarized by legal literature and case law with the formula « what is original is not always new and what is new is not always original » (2).

Following that distant study, the author of these lines further studied in depth the concepts of originality, of divulgation and the respective relationships.

On that occasion, he realized that he had to attribute to them not an absolute meaning but a relative one, i.e. referred necessarily « to our culture » (Kohler) or better still, to the cultural heritage of the class of operators interested in the invention.

The logic of the legal system was, by its firm conviction, that of provoking divulgation of those inventive ideas that would otherwise have been destined to remain individual and reserved, thus procuring an enrichment of the common cultural heritage through the concession of exclusivity by way of an incentive reward.

From this point of view, the absence of public interest in protecting a well-known invention, i.e. already divulged, can be understood.

A divulged idea is synonymous with that belonging to the common cultural heritage. This concept postulates a widespread and not limited knowledge of the invention.

Similarly – in his opinion – originality was not to be understood with reference to the moral paternity or intellectual labour of the inventor, as a prize of his individual merit, as had been understood in the past. The invention was, on the other hand, to be considered original, even in the ab-

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(1) Eula, *Rassegna della Giurisprudenza della Corte Suprema in material di privative industriali*, in *Riv. dir. comm.*, 1946, I, 1, pp. 2 ff.

(2) Benedicenti, *Rassegna di giurisprudenza della Corte Suprema in materia di privativa industriale, (1957-1954)* in *Riv. dir. comm*,. 1956, I, pp. 470 ff., 472; Court of Civil Cassation, 20th May 1950, no. 1299.

sence of these requisites, where it did not appear as a rather obvious implication of the cultural heritage to which it referred.

At this stage, it will be understood how the previous formula which summarized the relationship between the two aspects (extrinsic and intrinsic) of the novelty, was not correct and the formula: « what is well-known is never original, what is not well-known may or may not be original » appeared to be more accurate.

The author of these lines matured this order of ideas at a period now far off in time, shortly after that far-off study and as a development of the same.

He subsequently had the fortune of seeing his ideas codified by articles 14 and 16 of Presidential Decree no. 338 of 22nd June 1979 in the context of the recent European standard (3).

2. – The new discipline continues to require, as in the past, novelty (in the two aspects of originality and lack of divulgation) so that the invention can be patented, but it fixes their concepts in very precise terms.

Art. 14, section 1, presidential Decree 339/79 establishes that the invention which is not divulged is that « which is not included in the state of the art ». Section 2 defines the context of this state of the art which is wording equivalent to that of the cultural heritage of the experts of the sector, Art. 16 further on in turns specifies that there is originality where « the invention is not evident from the state of the art ».

Both requisites not only appear as two aspects of the same concept of novelty, but they have the common reference to the state of the art.

What, must be seen is whether the invention was explicitly or implicitly part of the common cultural heritage when the application for patent was filed.

It is from this that the correctness of the conclusion that « the well-known invention is never original » and vice versa that the original invention presupposes that it is not well known » will be inferred.

3. – The innovative character of the recent standard shows however that it is not included where, as is the case of our case law, an invention continues to be considered pre-divulged of which only one example has been transferred to third parties, without any obligation of secrecy.

This shows the need to further examine in detail the subject and some of its premises of a general nature.

It must be pointed out that the progress of science (which makes up such a large part of humanity) is based on the circulation of products of

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(3) See art. 54. no. 1 and 2 Code of European patents.

the individual culture in the context of society and on the phenomenon of their absorption by the collective culture. Individual culture although very often is presented as backward with respect to the collective culture (and it will indicate the degree of ignorance of the individual) can sometimes overtake it (as is the case of geniuses or exceptional talents). The invention undoubtedly represents a product of individual culture.

The legal system, when it protects original works and thus reserves industrial patent rights for it, does not aim as its primary objective that of ensuring the property for its author, but rather to stimulate the enrichment of the collective culture through individual work and, in short, the osmosis between them. This explains the reasons why the patent is granted to the person who is the first to file the application and not the person who is the previous discoverer in absolute and why the requisites of extrinsic novelty and originality of the invention are essentially referred to the collective culture.

At this stage, it is opportune to analyse the phenomenon that goes by the name of the circulation of the inventive idea in society. This, as long as it is in the pure state of *res cogitate*, can be kept by the thinking subject, with that ephemeral medium which is the memory (where it is sufficient for the author to lose his memory for the idea to disappear) and is not susceptible, as such, to communication and divulgation to third parties (4).

It is all too obvious that the inventive idea, to be preserved by its author and so that it can circulate, must be fixed in a given object (the machine in which it materializes, a drawing, an oral or written speech, a formula etc.).

The inventive idea, like every idea, as it is fixed in a given object, acquires an autonomy including with regard to the thought that conceived it. The given object can provoke a creation of identical content, at a distance of time, in the same author and obviously in other subjects who were first unaware of and in this case it serves the function of a representative medium of the idea (5). This is the case of the industrial machine, of a manuscript, of a book, or a drawing or of a recorded tape.

The representative capacity of the medium can be adequate or not at all: thus some brief notes may rekindle the idea in the author or spark it off in third parties and, if incomplete, not show it at all in any of them. The case of a drawing or of a written or spoken speech is similar, of which the code of interpretation is more or less known or completely unknown.

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(4) A classic example of an inventor who took his inventive secret to the grave, without confiding it in others, was Gerolamo Segato, for the process of petrification of corpses.

(5) This is not the same idea of Tom who transfers to Dick so that the first no longer has it (as in the movable asset) but it is an idea conceived by Dick and with an identical content to that conceived by Tom which can be said to have been transferred from one to another only in a figurative way.

The possession of the representative medium and its circulation entails the same phenomenon for the inventive idea. The circulation of the idea, however, can be autonomous from the first: it is sufficient too read the drawing or the book and not necessarily its purchase as well (6).

The medium of representation, as it provokes a conception of identical content in subjects who were ignorant of it, absolves the function of the means of communication.

The inventive idea, once it has been objectified, as stated, is destined to leave the individual sphere of its author and spread to those who become aware of it and thus it enriches their cultural heritage (and not only that). They can even apply for the patent for that same invention if it has not already formed the object of any prior application.

The inventor can risk being receded by them as well as by an independent discoverer, who had the same idea come to mind (7). This explains the interest of the inventor in keeping for himself and not communicating to others the invention and the medium which represents it, i.e. keeping secret the invention he has discovered, at least until the time to which priority is referred.

4. – Depending on whether the invention is protected from the public knowledge of third parties, or has entered into circulation and the extent of this, it may be said to be at the stage of « secrecy » or be known to a narrow circle of individuals or enter the public domain, i.e. divulged.

Let's begin with some notes on the « secret ».

The invention that is kept for himself by the person who knows it and is concealed from strangers may be said to be « secret » (8). It is not sufficient for the invention to be kept secret: it must also not be other wise known (9).

The secret can be absolute (top secret) or relative.

It can end with its revelation to those who should not know or with the acquisition of its news by a stranger, due to an activity of espionage (10).

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(6) G.G.F. HEGEL, *Lineamenti di filosofia del diritto*, Bari, 1913, p. 74.

(7) The application for the patent right of the inventor may be preceded by that not only of an autonomous discoverer, but also by the person in whom the inventor confided the inventive idea.

(8) U. RUFFOLO, Segreto (in Dir. priv.) Enciclopedia del diritto, Milan, 1989, vol. 41, pp. 1015 ff. and Bibliography on pp. 1027 ff. The secret is the result of human conduct. i.e. of « keeping secret ».

(9) In this sense, keeping a known inventive secret is commonly called « an open secret ».

(10) Espionage does not imply divulgation because those who learn of it this way are normally interested that others, especially if competitors, do not learn of it.

The secret can be classified in different ways according to the base of interest it protects (11). It can also concern the means of communication between the initiated, such as a conventional language (secret code), the environment in which the protected commodity is kept (secret archives), the group of people (secret service) and so on.

Keeping the « secret » in itself excludes the invention becoming well known.

The case where the inventor (or the autonomous discoverer) reveals to a third party pr to a specific number of people the inventive idea, with a pact of secrecy or, on the contrary, without any limit of confidentiality, can be surmised.

In both cases, the effective dimensions reached by the diffusion of the news of the invention in society are to be sought together with the cultural heritage (individual or collective) which has been enriched by the information.

We have to consider that the communication with a pact of secrecy, in itself does not exclude the formation of a process of divulgation which is the cause of nullity of a patent.

A phenomenon of this kind was described in the past in a very expressive way in « The Betrothed » Chapter XI, by Manzonu, where he wrote: « One of the greatest consolations of this life is friendship and one of the consolations of friendship is that having someone in whom to confide a secret. Now, friends do not comes in twos like a bridal couple; each one, generally speaking has more than one friend, which forms a chain, the end of which nobody can find. So when a friend has that consolation of placing a secret in the breast of another, he gives him the desire to seek the same consolation as well. He begs him, *don't tell anyone: on such a condition, who took it in the strict sense of the word would immediately cut off the course of the consolations, But the general practice has wanted that you only oblige not to confide the secret, unless it is to an equally trusted friend and setting the same condition. Thus, from trusted friend to trusted friend, the secret travels down that immense chain, so that it reaches the ears that the first person who had spoken had not intended it ever to reach.* Normally, it would have been on a long journey, if each person had only two friends; the one who tells him and the one to who to tell the secret. But there are privileged men who have hundreds of friends and when the secret has reached one of these men, the journey of the secret travels quickly and multiplies, so that it is no longer possible to follow its trace ».

Similarly, communication by the inventor or an autonomous discovered, to a determined number of third parties, without any constraint of

(11) Therefore we have a secret of State, military secrecy, bank secrecy, company secrecy, professional secrecy etc.

confidentiality, is not enough in itself to hypothesize a state of pre-divulgation, unless it is followed by a diffusion of the news, such as to consider it has entered the public domain. In the case shown above, what must be considered enriched by the information is the individual cultural heritage and not the collective one.

On the contrary. where there will be effective and extensive diffusion of the news of the invention to an indeterminate number of people, it must be considered as having become accessible to the public, we will have divulgation and the idea must now be considered well known.

These concepts should have been fully applied under the Royal Decree of 29th June 1939 which required as a requisite for a valid patent, the absence of pre-divulgation (which is by definition a phenomenon of extensive diffusion) and not that the invention had been kept secret from everybody whatsoever.

On the contrary. as seen in the previous work, our legal literature and case law (12), under the influence of French literature (13), moving from an individualistic and absolute conception, identified divulgation with the failure of keeping it secret and denying importance to the dimensions of the diffusion of the information which, on the contrary, appears essential.

The disclosure of an invention, without a constraint of secrecy, according to this dominant orientation, was equivalent to divulgation.

In greater detail, it has to be said that the authors and judges distinguished the disclosure coming from the inventor, who had to be presumed by way of confidentiality and that from an autonomous discoverer, which must be presumed by way of advertising.

The first case excluded that the disclosure by the inventor was equivalent to divulgation, whilst on the contrary, this was asserted in the second case.

With regard to the hypothesis of the sale of even only one or very few examples, without the constraint of secrecy, case law, even in the last few years before the reform of 1979, confirmed, unfortunately, the unfavour-

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(12) Amongst the many works on this subject: BONELLI, *Privative per invenzione industriale, Noviss. Dig.*, Turin, 1957, XIII, p. 899 ff.; G. BAVETTA, *Invenzioni industriali* in *Encicl. del diritto*, Milan,. 1972, XXII, pp. 642 ff.; GRECO e VERCELLONE, *Le invenzioni ed i modelli industriali* in *Trattato di dir. civ.*, UTET 1968; ASCARELLI, *Teoria della concorrenza e dei beni immateriali*, Milan, 1960; R. CORRADO, *Opere dell'ingegno, Privative industriali*, Milan, 1061, p. 62, GHIRON, *Corso di diritto industriale*, Rome, 1948, II, p. 106; AULETTA MANGINI, *Opere dell'ingegno ed invenzioni industriali (Commentario* Scialoja and Branca) Bologna, 1987, p. 67. M. ROTONDI, *Diritto industriale*, Milan, 1942, pp. 182-183; RAMELLA, *Trattato della proprietà industriale*, Rome, 1909, I, p. 599.

(13) Amongst the most significant texts: BEDARRIDE, *Commentaire des lois sur les brevets d'invention*, Paris, 1878-94, no. 375, pp. 362-263; OUILLET, *Traité théorique ety pratique des brevets d'invention et de contrefaçon industrielle*, Paris, 1909, nos. 371-445; PICARD and OLIN, *Traité des brevets et de cotrefaçon industrielle*, Paris, 1869, no. 137.

able prior orientation, attributing to this sale the significance of a potential divulgation.

The following decisions are in this orientation: Court of Milan, 25th July 1977 in *Giur. annotate di dir. ind.*, 1980. 481; Court of Milan, 1st June 1973; Court of Bologna, 21st February 1973 in *Giur. Dir ind.*, 1973, 735, 440 as well as Court of Mantua, 27th March 1971, ibidem, 1972, 105, Court of Genoa, 29th April 1971; Court of Varese, 11th August 1971.

Only an isolated decision of the Court of Appeal of Catania of 15th July 1974 in Giur. Dir. ind., 1974, p. 1000 stated that the sale of only two examples did not represent divulgation.

Legal literature moved along the same line of thought as case law.

5. – Although a restrictive interpretation of the extrinsic novelty, as has been seen above, was not founded before the 1979 reform, it now appears in open contrast with the new European rule which came into force following the Presidential Decree no. 838 of 22nd June 1979 and the fundamental aspects of which were outlined at the beginning.

In particular, it has been said that article 14 refers to the « state of the art » which is synonymous with the common cultural heritage of the experts of the sector and the contents of which are described by the rule extensively and precisely.

We saw at the beginning that the logic underlying the extrinsic novelty of our legal system lies in the public interest in acquiring for the public domain what would otherwise be destined to belong exclusively to the reserved and individual sphere of the inventor.

It is only too obvious that such public interest does not exist in the case of a well known invention and this explains the nullity of a patent that had been granted to protect it.

The existence of the referred public interest is, on the other hand, undeniable in the case of those inventions in which the information has entered only the individual heritage of people other than the inventor and has remained in these individual spheres afterwards as well, without being well known, i.e. entering the heritage of the collective knowledge and utility.

It cannot be argued that the spirit and the letter of the new law are in this direction.

Between the oldest wording of article 3 of Royal Decree of 30th October 1859 which considered « new the invention that had not been divulged » and the present-day one of articles 14 and 15, according to which the invention is new that « is not comprised in the state of the art » there is a succession of wordings, each with a specific difference to be understood.

The « state of the art » compared with the previous one, cannot be understood other than as the epilogue and conclusion of the divulgation itself, admitted and not granted that the latter can be understood as the synonym

of a process of divulgation, existing. since the disclosure by the inventor. We will return shortly to the nearing of the new law.

However, it is worth saying straight away that the meaning of articles 14 and 15 of the 1979 reform, does not seem to me to have been understood by the present day legal literature and case law. It is possible to read in literature, where there is no radical correction of orientation with respect to the previous opinions (14) that « in general the problems that the concept of divulgation raised for the previous case law are proposed in the same terms, after the reform of 1979 » (15).

As for case law, the majority of the decisions move along the lines of the previous one and thus deems that the sale of a machine to a third party without the obligation of confidentiality, entails the divulgation no differently from the disclosure without the obligation of secrecy.

In this sense: Court of Milan, 19th November 1981; Court of Appeal of Milan, 21st June 1982; Court of Milan, 25th October 1984, in *Giur. annotate di dir. ind, Rep. sist.*, 1972-1987, 2, 1.1.2.

More recently, the Court of Milan with the decision of 6th October 1988 in *Giur. annotata di dir. ind.*, 1988, p. 773 textually wrote: « there exists predivulgation of the invention when before the filing of the application one example of the product has been sold which, although closed and very compact. can be, although not easily, seen. »

This order of ideas is – in my opinion – at the antipodes of articles 14 and 15 of Presidential Decree no. 838 of 22nd June 1979 considered jointly.

The new rule, mentioned above, has decidedly superseded the previous problems.

The « state of the art » concerns the invention belonging to the common heritage of knowledge and collective utility and this supposes that divulgation is now effective and present and no longer only potential and virtual.

Remarks on the danger of divulgation is to be excluded whilst the observations on effective divulgation are to be given exclusive importance. All the previous problems and the presumption on the revelations that would be to be classified by way of secret, if originating with the inventor or, on the contrary, advertising, if originating with the autonomous discoverer, must be understood as superseded. Article 14, where in detail it specifies

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(14) Even in the recent editions of books on the subject, legal literature still states that personal divulgation of the invention is sufficient, that it even only has to be disclosed to only one person and that the circulation of the idea with the obligation of secrecy does not give rise to divulgation. AULETTA-MANGINI, *loc. cit.*, p. 67. AMMENDOLA, *Invenzione, marchio, opera dell'ingegno*. Milan, 1977. p. 219; GRECO-VERCELLONE, *op. cit.*, 1, PP. 118, 355; SENA, *I diritti sulle invenzioni e sui modelli industriali*, Milan, 1984, p. 124, note 57.

(15) SENA, *op. cit.*, p. 123.

tat « the state of the art » is made up of everything that has been made accessible to the public. by means of an oral or written description or the use of one or more media in the territory of the state or abroad, establishes without a doubt that the dimensions of diffusion of the news of the invention take on importance.

There will be divulgation where the addressee of the revelation is n indeterminate number of people whilst at the opposite extreme, it is to be denied that it will concern a cultural circle of one or more people, individually considered and not the common cultural heritage of the operators of the sector. so as to be « accessible to the public ».

6. – We will now go on to the part that concerns the other requisite, i.e. the originality (or intrinsic novelty).

In the past it was considered from the point of view of an important contribution to technical progress, which objectifies the creative intellectual labour of the inventor (16). The subjective reference does not appear essential for the concept of originality, because the right to the patent is not so much for the person who proves that they are the father of the inventive idea, but who can prove the invention is in their hands. These are the cases of the heir of the inventor, the transferee, the employer for the invention by the employee, of who learnt of the invention by (licit or illicit) disclosure and, in the past, of the imported patent.

Moreover, the discovery may be the result of a difficult creative activity by the author who was unaware that it had previously been discovered by others or that was not other wise known.

Subsequently, a part of case law, reductively understood originality as the equivalent of merely contributing technical progress (17), whilst another part of case law and legal literature (18) unanimously identified it in the invention that an « average technician of the sector would not have been able to produce ». At a later date an orientation of synthesis became asserted at a later period (the so-called dualistic conception of originality) (19).

Lastly, following the new rule, in the context of the European one, article 16 of Presidential Decree no. 838 of 22nd June 1979 reached the con-

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(16) EULA, *op. loc. cit.*

(17) Court of Appeal, Milan, 29th September 1981; Court of Milan, 26th June 1975; Court of Rome, 5th November 1974; Court of Appeal, Milan, 29th May 1973; Court of Appeal, Bologna, 11th April 1973.

(18) Court of Milan, 23rd July 1974, Court of Milan 29th September 1980; Court of Vicenza 9th November 1974; Court of Appeal of Turin, 13th July 1972; Court of Milan, 23rd January 1972; and in literature SENA, op. cit., P. 139; AULETTA-MANGINI, *op. cit.*, p. 42, amongst the others.

(19) Court of Civil Cassation 83/6435; Court of Appeal Turin, 13th July 1972; Court of Milan, 23rd July 1984.

clusion of defining the original invention, as that which « is not evidence from the state of the art, for an expert of the sector ».

Only the value of « index of evidence » is attributed to mere technical progress, considered in itself and for itself.

The new legislator shows here that he understands originality as « a novelty relative to our culture » and more specifically in the sense which Kohler supported in his time.

He defined as « original » that discovery which does not entail logical implication or the development of pre-existing cognitions considered in themselves or due to their coordination. What comes under this heading cannot be called original.

The « start of the art » to which the new dictate refers, has been correctly deemed as « all the cognitions of the average technician in the sector to which the invention belongs. The invention which does not represent a logical implication or the development of the cognitions of the average operation in the sector under consideration must therefore be deemed « original » (20).

Case law, as a whole, correctly interprets the rule and this numerous decisions have deemed original that invention which represents an improvement to the pre-existing technique. a solution of a problem above the reach of the average technician (Court of Civil Cassation, 5th September 1990, no. 9143; Court of Civil Cassation, 14th April 1988, no. 2965; Court of Civil Cassation, 8th April 1982, no. 2168; Court of Civil Cassation, 16th October 1980, no. 5570; Court of Appeal of Rome, 1st February 1988; Court of Modena, 19th May 1988 etc.).

7. – As for the relationship between extrinsic novelty and intrinsic novelty, it was – as stated – erroneously summarized by the Court of Civil Cassation of 20th May 1950 no. 1209 in the wording « what is original is not always new and what is new is always original ». The author of these lines has observed above that this is relationship should have been correctly expressed with the words « what is known is never original, what is not known, may or may not be original ».

The relationship between the two types of novelty is still not understood and is misunderstood as in the case of the Court of Civil Cassation, 9th November 1987, no. 8263 where it states that « the requisite of extrinsic novelty is confirmed after the positive ascertainment of the intrinsic novelty » in the legal literature, according to Franzosi (21), according to whom the distinction between the two types of novelty is superfluous because « the extrinsic novelty is necessarily included in the intrinsic novelty ».

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(20) Di Castaldo, *L'originalità nell'invenzione*, pp. 69 ff.

(21) Franzosi, *L'invenzione*, pp. 46 ff.

These are erroneous statements, which reverse the correct relationship, because it does not appear questionable that the ascertainment of the extrinsic novelty is preliminary and priority compared to the intrinsic one, as the search for the original nature of a well known or pre-divulged invention appears pointless.

This shows, in my opinion, that the intimate essence of the two types of novelty that represent two subsequent degrees of differentiation of the discovery with respect to the technological capital have still not been understood.

Also by the author on the same subject:

– «*Se la vendita di una macchina senza patto di segretezza prima della domanda di privative induca alla divulgazione ex art. 1559 R.D. 29/07/1939 no. 127*», in *Foro Padano* 1954, III, p. 161 and in L'Espressione monetaria nella responsabilità civile» Cedam 1994, p. 484.

On the problem concerning the modification of the exchange rate in the conversion of convertible bonds into shares, after the reduction of the share capital due to losses, pursuant to Art. 2420 bis, section 6, Civil Code

1. – The author of these lines resumes discussion, after the essay published in *Riv. dir. civ.*, 1983, II, 485, on this problem which has not yet found a solution, let alone satisfactory from case law and to which legal literature has given an unsatisfactory answer, with wide consensus, but unjustified in my opinion.

It is substantiated in the question of what meaning to give to article 2420 bis, section6, which literally reads: « In the cases of capital increase, by means of allocation of reserve and reduction of capital for losses, the exchange rate is modified in proportion to the proportion of the increase or reduction ».

Dominant legal literature (1) maintains that in the case in which the share capital is reduced due to losses and with it the nominal value of the shares in circulation, the owner of the convertible bonds also undergoes the consequences of the reduction and receives the same quantity of shares promised at the time, with a nominal value reduced due to the losses.

On the contrary, in that study written so long ago, this writer maintained with conviction the theory that the convertible bondholder, who has not yet requested conversion, bearing in mind section four, is entitled to receive the different greater quantity of shares with a reduced nominal value, the product of which with the latter is equal to the nominal value of the convertible bonds in his possession. In practice, if, following the reduction of the share capital due to losses, the share capital is halved and with it the

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From « Diritto Fallimentare e delle Società Commerciali », 2001, no. 1.

(1) In this sense: BUONOCORE, *Le obbligazioni convertibili in azioni nella legge di riforma*, in *Giur. comm.*, 1974. I, 724; R. CAVALLO BORGIA, *Le obbligazioni convertibili in azioni*, Milan, 1978, p. 166 ff., note 77; B. COLUSSI, *Problemi delle obbligazioni convertibili in azioni*, in *Riv. dir. civ.*, 1974. I. 606; F. FERRARA, *Gli imprenditori e le società*, Milan, 1974, p. 560; R. NOBILI-M. VITALE, *La riforma delle società per azioni*, Milan, 1974. pp. 254 ff., F. FAZZUTTI, *Obbligazioni convertibili e modifica del rapporto di cambio*, in *Giur. comm.*, 1977, I, 928.

nominal value of the shares in circulation, the bondholder creditor will receive a double quantity of the shares with the nominal value halved.

This solution has remained isolated and has not been followed by the authors who have subsequently dealt with the subject without, moreover, adding any convincing element in support of the dominant opinion (2).

We are returning to this subject here, convinced that the dominant opinion is contrary to the literal and logical interpretation of the rule under examination and the further reflections that show how the opinion put forward in the past represents the strictest application of the law.

2. – Article 2420 bis, section 1, Civil Code, established that the Extraordinary Meeting that decided on the issue of the bonds convertible into shares, « determines the rate of exchange and the conditions and subsequent section two adds that it decides on the increase of the share capital for an amount corresponding to the nominal value of the shares to be attributed in conversion ».

Section five also provides that the company cannot reduce the surplus capital.

Section six, as seen, prescribes that « in the event of reduction due to losses », the exchange rate is modified, in proportion to the extent of the reduction ».

The exchange rate and the conditions for conversion decided by the Meeting that issued them are shown specifically by the certificate of the convertible bond, as in possession of the convertible creditor.

The dominant legal literature, which on the other hand want to assign to the convertible bond the same number of shares, but with a reduced nominal value, is translated into the modification *in peius* of the conversion rate originally decided by the Meeting and promised to creditors. That is, it reverses the provision of the last part of section six, where it lays down that the rate of conversion must be modified « in proportion to the extent of the reduction ».

The modification of the rate must be inversely proportional to the reduction due to losses and the company is obliged to distribute that quantity of shares with the reduced value due to losses, the product of which is equal to the value of the stake it was entitled to originally.

The holder of the convertible bonds is entitled to have, in the exchange rate, a stake which has a nominal value equal to that of the bonds as originally promised.

The company has no right not to fulfil the obligation it contracted.

The capital increase, decided at the time of the issue of the convertible bonds, in accordance with section three, is insensitive to the reduction, be-

(2) P. Casella, *Le obbligazioni convertibili in azioni*, Milan, 1983, p. 140 ff.

cause it is only future and virtual. unlike that existing and circulating of the shareholders, therefore, susceptible to the reduction.

The convertible bondholder therefore has the right to receive that quantity of shares with the nominal value, fixed when the reduction was decided, which corresponds to the nominal value of the bonds, in his possession and which he will change into shares.

Those of a different opinion are making a great confusion between the circulation share capital, in the possession of the shareholders after the reduction due to losses and that which results from the decision to increase the share capital in accordance with article 2420 bis section 3, which is virtual and only for the holders of the convertible bonds.

Moreover, the holders of the circulating shares are directly or indirectly chargeable, as a source of appointment of the company management, for the operating choices, which have given rise to the losses.

Dominant literature that wants to subject the convertible bonds to the losses as well, on condition that the right of conversion has not been exercised before the resolution of reduction, must be rejected on the basis of the contents of section six, which provides literally « that the exchange rate is modified in proportion to the extent of the reduction ».

This is, therefore, a modification of the exchange rate in favour of the bondholders and more specifically of a modification that is inversely proportional to the reduction for losses which was decided and must weigh only on the shareholders.

The opposite dominant opinion attributes to the literal contents of the rule the opposite meaning, not of a modification but of keeping the merely quantitative ratio of the shares with the halved nominal value of the convertible bonds.

The company, with the resolution to issue the convertible bonds and increase the capital reserved for the creditors, has taken on the commitment and is obliged to give them shares for a certain value and ensure for them a conversion rate such as to exhaust the entire capital increase reserved exclusively for the bondholders.

The capital increase decided, in accordance with section three, cannot, on the other hand, be revoked or modified to the detriment of the convertible creditors because it is part of the Articles of Association of the company and is mentioned as a commitment on the circulating certificate of the bond security, as a commitment of the issuing company bearing in mind section seven of article 2420 bis.

A distinction must be made between the capital of a company that is existing and circulating after the decision of reduction, the future increase reserved to the bondholders and the circulating shares from those that are only of future issue.

3. – Our legal literature repeatedly states the argument that, if the intention is to protect the bondholder from losses, in the modification of the exchange rate, as we have shown, the convertible bondholder would be advantaged by the losses of the company with an upheaval of the ratio between the shareholder and himself.

The theory is unfounded. The bondholder has no advantage from losses but is only protected because the losses are not attributable to him, not even directly.

Those who think otherwise would give an advantage against every logic from the losses to the shareholders who are collectively responsible for the operating decisions of the directors they have appointed to the detriment of the bondholders.

Is it perhaps fair that the holder of the shares in circulation takes advantage of the losses of the company for which he is indirectly responsible, at the expense of the company and the convertible creditor?

The company is certainly bound to guarantee to the bondholder the stake corresponding to the right of conversion assured with the decision of issue and therefore to fulfil it. However, it also has its own interest to keep the perspective of the flow of the capital increase in accordance with article 2420 bis, section 2, Civil Code, reserved for the convertible creditors.

This interest is all the more significant the greater the losses, as is the case that reduce the capital to zero.

The dominant opinion ends up by protecting the interests of the shareholders against every logic to the detriment of the company and its survival and the convertible bondholders.

It codifies the principle that the company fails to fulfil the obligations contracted with the decision of issue, with its own damage with respect to the bondholders.

The fact that only the shareholders undergo the reduction due to losses, as well as for the reason show, is because it is a consequence of the incidence of their risk.

Why should the decision of reduction due to losses be extended to the capital increase, which does not yet exist and therefore for the time being only virtual and why ask the convertible bondholder to support it although he is extraneous to the legal affairs of the company. He is not advantaged but only protected fro the losses that otherwise would make his credit inconvertible.

This is a mere consequence of the decision of issue and the capital increase to which the modification of the Articles of Association of the company and the mention of the obligation on the bond certificate correspond.

The dominant opinion, opposed here, ends up by violating the dual limit of the net equity and the respect of the nominal value.

A fundamental argument that reinforces the opinion maintained here is given by the provision of article 2412 Civil Code.

It provides that not only the company, which has issued the obligations, cannot reduce the share capital except in proportion to the reimbursed bonds, but also « in the case of reductions due to losses, the legal reserve must continue to be calculated, on the basis of the value of the share capital existing at the time of issue ».

This is until the « amount of the share capital and the legal reserve are equal to the amount of the bonds in circulations ».

Reading this rule does not appear to legitimize the equivalent opinion in literature.

Lastly, the circumstance that a reduction of the capital cannot even be decided that were deemed surplus is another subject due to the non-modifiability of the exchange rate in *peius* for the bond.

4. – The advocates of the opinion opposed here, justify it at last with the argument that the convertible bondholders would, in accordance with article 2420 bis, section six, benefit from any capital increase that were ordered therefore, according to reasons of symmetry, they would take part in the losses, in the exchange rate, if they were to convert their credit instruments into shares.

The provision must be understood as referred to the normal hypothesis that the increase is for allocation to the reserves.

This takes place in particular when the reserves are allocated to cover losses.

This argument reinforces the opposing conclusion maintained by the writer, in the sense that the convertible creditor is protected from the consequences of a use of the reserves to cover losses, on the shareholder's instructions.

Even where the capital increase were provided « due to allocation of the reserves » not to cover the losses, the extension of the benefit to the convertible bondholders aims to protect them from decisions of the shareholders that would be detrimental to their interests.

The reserves are not available to the detriment of the convertible bondholders because they also belong to the latter virtually.

The rule materializes the equity situation of the company at the time of the issue of the bond and like article 2412 Civil Code protects the convertible creditor from a deterioration in the conditions of conversion which is decided by the shareholder, as according to article 2420 bis, section five, Civil Code.

This protection of the bondholder's interests is in line with all the guarantees for its rights and interests, including by articles 2413, 2414 and 2415 ff. of the Civil Code.

This set of rules from the Civil Code has the purpose of protecting the convertible bondholder from shareholders' decisions to his detriment.

The protection offered moreover, meets the fact that the bondholder, even non-convertible, in accordance with article 2413 Civil Code has the right to obtain the guarantees contemplated and to benefit from the power of the meeting of the bondholders, laid down by articles 2415 ff. Civil Code.

The power conferred on the bondholders, who hold one twentieth of the securities issued and not reimbursed, to call the bondholder's meeting allows them to be able to prevent and block any resolution to their detriment that that might be adopted by the shareholders.

The theory according to which the convertible bondholder, protected from education due to losses, obviously applies, with all the more reason in the case of reducing the share capital to zero due to losses.

Lastly, it must be said that what has been stated is valid only for the convertible bondholder who has not requested and obtained in advance the conversion before the decision to reduce the reserves due to losses were adopted.

He now becomes a shareholder like all the others and over him there hangs the risk of resolutions for the reduction of capital, which is not for the bondholder who has not converted his credit instruments into shares.

3. – Lastly, some may object that our legislator, with this discipline could have excessively penalized the shareholder and rewarded the bondholders.

Leaving aside the chargeability, even indirect, to the shareholders of the losses following on the management implemented by the directors they chose and, in any case, from the logic of the risk on the circulating shares. it is not correct to hypothesize it against the bondholders.

Our coordination grants the shareholders, protecting their interests of the bondholders as well, the remedy provided by article 2447 Civil Code.

Under this rule, in the event of losses in excess of one-third of the share capital and in the hypothesis that this drops below the legal limit, the Directors must « call the Meeting without delay to pass resolution on the reduction of capital and *its simultaneous increase* ».

Beyond this specific hypothesis, with general bearing, in the sense that the shareholder who wants to keep his share in capital at the amount it was on the issue of the bonds and not undergo the modification in *peius* in favour of the convertible creditors, he can have recourse to a refund of capital to absorb the losses.

This is to be considered for the shareholders only, of simultaneous with the reduction.

In conclusion, the convertible bondholder, as he does not suffer the losses, he cannot benefit from the increase or refund of the capital, that could be deliberated and performed by the shareholders to cover them.

Also by the author on the same subject:

– «*Modifica del rapporto di cambio delle obbligazioni convertibili e riduzione per perdite del capitale sociale*», in Rivista del diritto civile, 1983, II, p. 485 and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994 p. 463.

The election of Company directors and its invalidity

1. – *Introduction*. – An important subject, which sometimes does not appear to have been discussed entirely is that of the elections and appointment of Company Directors, whether of corporations or cooperatives.

The author of these lines aims to complete the study with a series of thoughts, which also come from lengthy personal experience as Chairman and Director of companies, together with his sensibility as a jurist.

He recalls here that a large class of professional is developing who take and active part in meetings, in a role of defence or with a critical attitude, often showing skills and insight and orienting the opinions of the Shareholders.

The importance of the topic needs no commentary, when we think that the choice of the men invited to form the management is destined to influence the life of the companies and the fate of the corporations.

The Shareholders' decision that appoints the Directors follows a series of operations which precede it and form with it, to use a well known legal expression, « a procedural model fact situation ».

This term indicates that we are in the presence of a series of related and coordinated acts with specific functional characteristics, each of which influences the next one and gives rise to sequence of phases, which we will discuss.

2. – *The discipline*. – It is opportune to start with a summary of the normative sources of the various rules, which concretely discipline the procedure of appointing Directors, bearing in mind the specific diversity of the type of company (for example joint stock corporations or limited liability companies or cooperatives) where they will be.

The normative sources we have mentioned in hierarchical order are:

A) First of all general law such as that of the Civil Code which dictates some lines of discipline from article 2363 to article 2383 Civil Code for companies with share capital and from article 2532 to article 2535 Civil Code for cooperative companies, which play a significant role in Italy in important sectors such as the credit societies, in the credit sector.

From « Il Diritto Fallimentare e delle Società Commerciali », 2001, no. 1.

The general discipline is often completed by specific laws, issued by the legislator to ensure a balanced representation of the minorities at least in companies that have shares listed on the Stock Exchange, as has recently been the case of the Draghi law.

These laws are also supplemented by the specific instructions on the subject issued by the Italian national Securities' Commission and the Stock Exchange, again for companies with listed shares.

B) A further source of rules is the Memorandum of Association of each company.

For example, we have Memorandums of Association in which it is the Board of Directors that elects the Chairman, the Deputy Chairman and the Executive Committee or the managing Director, whilst in others the Shareholders' Meeting appoints the Chairman and one or two Deputy Chairmen (1) or of the Executive Committee.

C) Some companies have Rules of the Shareholders' meetings (2), which discipline the electoral operations for the appointment of Directors and in this case it represents a normative source.

D) Another source of rules is represented by the Shareholders' Agreements, as is the case in which they bind some groups of control of the majority of the capital or a share of reference.

One of the best known examples is that of the voting trust of Mediobanca and other public companies such as Assicurazioni Generali.

E) Another source is the practice or customs in use in the company which are valid as they are referred to by Shareholders' Agreements or are spontaneously observed until they are changed.

F) Lastly, in the absence of specific sources, some rules are taken for interpretation from the systematic principles of the public electoral system, by way of analogy.

This recalls the orientation expressed by the legitimate court some time ago.

3. – *The phases of the proceedings.* – Let us now go on to describe the various phases of the proceedings to appoint the Directors.

The rule of article 2388 Civil Code according to which the Shareholders' Meeting appoints the Directors, is deemed compulsory by legal literature and case law with the exclusion of new Directors who can be appointed by the subscribers on the deed of incorporation, in accordance with article 2383 Civil Code or by co-optation by remaining Directors if some of them are no longer in office, in accordance with article 2386 Civil Code (3).

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(1) This is the case of the Memorandum of Association of the Banca Popolare di Milano.

(2) This is the case of the Banca Popolare di Novara.

(3) Court of Cassation, 23rd January 1965, no. 136 *in Foro it.*, 1965, I, 427; Court of Cat-

Article 2368, section 1, Civil Code, provides that the Deed of Incorporation can establish particular rules for the appointment to company positions but this is reduced to special rules that discipline the Shareholders' Meeting, the majority quorums or the voting systems, to guarantee a possible representation for the minority (4).

The clause that attributes the appointment of the Directors to a limited number of Shareholders is generally deemed null and void (5).

4. – The election by the Shareholders' Meeting – The election by the Shareholders of the Directors takes place with the choice of the Directors from several different candidates by the Shareholders at their meeting.

The various phases of this proceeding are described here:

The convocation of the Shareholders' Meeting

The Meeting for the election of the Directors must be called first of all by the legitimized and competent body, such as the Board of Directors in accordance with article 2363, 2366 Civil Code, and in its absence by the Board of Auditors and if requested by the minority, by the President of the Court of Law in accordance with article 2367 Civil Code.

With the publication of the notice of convocation, the proceedings for the Shareholders' meeting start (Court of Civil Cassation, 2nd August 1977, no. 3422, in Riv. Società, 1977, II, 76, 77).

Failure to call the meeting with the aforementioned notice and according to the prevailing orientation of literature is a cause for non-existence of the resolutions (6).

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ania, 23rd July 1965, in *Dir. fall.*, 1965, II, 940; Court of Appeal of Milan, 27th August 1969 in *Giur. It.*, 1970, I, 2, 546; Court of Milan, 29th January 1982, in *Giur. Comm.*, 1983, II, 125 amongst the many.

In literature; MINERVINI, *Gli amministratori delle società per azioni*, Milan 1956, p. 14; MIGNOLI-NOBILI, *Enc. di Diritto*, entry *Amministratori di società*, in *Enc. Dir.*, I, Milan, 1954; FERRI, *Le società*, Turin, 1971, p. 492; COTTINO, *Diritto commerciale*, Padua, 1976, p. 881; FRE, *La società per azioni*, in *Commentario al codice civile* by Scialoja and Branca, under art. 2364 and 2389; SCALFI, in *Riv. Società*, 1971, p. 40.

(4) PEDUCCI-PACCHI, in *Riv. Società* 1976, 606; BIGIAVI, in *Riv. Dir. Civ*. 1956, 1023; SCALFI, *Riv. società*, 1971, p. 40.

(5) Court of Appeal, Milan, 27th August 1969; COTTINO, *Diritto commerciale*, p. 660; FERRI, *Le società*, p. 498.

(6) Court of Civil Cassation, 28th November 1981, no. 6340 in *Giur. comm.*, 1982, II, 424; *Court of Civil Cassation*, 25th January 1865, no. 136 in *Foro it.*, I, 1599; Court of Civil Cassation, 20th April 1961, no. 886 in *Foro it.*, 1961, I, 1711.

In literature; GIANATTASIO, in Giust, civ. 1961, I, 1305; CANDIAN in *Temi*, 1955, p. 69; ASCARELLI, *Riv. dir. comm.*, 1950, I, p. 169, TRIMARCHI, *Riv. società* 1957, p. 451*; contra* ROMANO PAVONI, *Le deliberazioni* in *Foro Padano*, 1953, I, 59.

A meeting called by a subject without legitimization, such as for example a Director or a de facto Board, according to some decision is non-existent and such are its acts and resolutions).

The call of the Shareholders' Meeting by a single Director in office and not by the Board would also determine the annullability and not the nullity (Court of Civil Cassation, 2nd August 1977, no. 3422).

It is debatable in case law whether an irregular convocation of the Shareholders' Meeting determines its non-existence (Court of Appeal, Milam, 23rd July 1957 in Mass. Giur. Civ., 1957, 61) or its annullability (Court of Civil Cassation 23rd February 1965, no. 175, in Dir. Fall., 1965, II, 298).

A Shareholders' Meeting and the following resolutions adopted, in the event that the body competent to call the meeting met irregularly have also been deemed non-existent in case law.

This is the case of Directors, some of whom, have met, without a plenary convocation with the fair notice according to the Memorandum of Association or with recourse to urgent means of communication, here foreseen.

The case of meetings attended by a minority of the Board of Directors or Auditors but followed by a regular convocation of all its members, is different, on condition that the Memorandum of Association does not exclude it.

The convocation of the Shareholders is by a notice published in a specific organ of information designated by the law or the Memorandum of Association, such as the Official Journal, the Sheet of Legal Advertisements, with the due notice with respect to the day fixed for the Meeting, established by the Memorandum of Association or the Law.

In case law, there has been a decision that « failure to communicate the convocation to some Shareholders causes only the annullability and not the absolute nullity (Court of Naples, 9th July 1957).

It can and must be completed, where the Memorandum of Association or practice so provides, by a personalized notice to be sent to the Shareholders' addresses, indicating the date and the time of the Meeting, the venue and the agenda of the meeting and other information.

If the legal period between the notice and the Meeting has not been observed, the resolutions are deemed annullable (7).

A resolution by a Meeting on a topic that was not shown in the notice of call has been deemed valid and effective is not impugned in accordance with article 2377 Civil Code i.e. it is annullable (Court of Civil Cassation, 11th march 1977, no. 989).

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(7) Court of Appeal, Bari, 3rd January 1978, in *Dir. Fall*, 1978, II, 230; Court of Naples, 20th June 1979, in *Giur. comm.*, 1980, II, 569.

The Shareholders are invited to express to the company their wish to attend the Meeting sending it a request for an admission ticket, which is usually pre-printed, possibly with a form for a proxy to another Shareholder.

The Shareholders are sent any material for their identification, access and exercise of the right to vote (such as the admission ticket to the Meeting and the number of votes, including by proxy) which presents similarities with the voting card for public elections.

The admission ticket to the Meeting can be sent to the Shareholder's address or collected from the appointed office which deals with the organization of the Meeting, possibly with other electoral material.

The composition of the Meeting

Articles 2369, 2369 and 2369 bis of the Civil Code for the Extraordinary Meeting establish a quorum of presences of Shareholders that represent at least half of the share capital, excluding from the count the shares with a limited vote.

If the quorum is not reached, the Meeting has been deemed non-existent by the Court of Naples, 10th February 1958 in *Dir. giur.* 1958, 917.

Similarly, a Meeting attended by extraneous persons, whose number is decisive by means of the test for presence, is non-existent.

Voting on any subject must be immediately preceded by ascertaining that the Meeting has a regular quorum.

It has been stated that «the invalidities relative to the composition of the Meeting, as they protect the interest of the Shareholders and not of the company, entail only its annullability» (Court of Civil Cassation, 13th march 1975, no. 938 in *Giur. comm.*, 1976, II, 14).

It passes resolution with the absolute majority, save a higher majority, if contemplated by the Memorandum of Association.

The rules states «for the appointment to company offices, the Deed of Incorporation can establish special rules.»

The quorum for the Meeting to be validly formed has been deemed as fixed under penalty of non-existence of the Meeting (Court of Naples, 10th February 1958 in Dir. giur. 1958, p. 917).

Vase law has deemed that the ascertainment must immediately precede the voting on a specific topic and, in the absence of this ascertainment, the resolution is null and void (Court of Venice, 18th May 1959 in *Giur. It.*, I, p. 278).

Resolutions at the Ordinary Meetings in first convocation require the absolute majority, for those at Extraordinary Meetings, at least half of the share capital is required.

The presence at the meeting of persons extraneous to the company body and not otherwise legitimized, is a reason to deem the resolutions

non-existent, where they are decisive to reach the quorum of presences of annul it due to the absence of a quorum.

The candidates and their presentation

The candidates for the positions of Directors or Auditors, to be voted by the Shareholders, at the Meeting, can or must have certain requisites, established by the law or by the Memorandum of Association or by the regulations of the Meeting.

The most frequent legal requisites in accordance with art. 2382 Civil Code are that the candidate has reached majority (on condition that he is not authorized for trade) he is not incompetent, disqualified, bankrupt or sentenced to a penalty that entails disqualification, even on a temporary basis, from public offices or the incapacity to hold managerial positions.

In general, non-shareholders can also be appointed, unless otherwise decreed by the Memorandum of Association, as is often the case of the memorandum of Association of cooperatives, for example cooperative banks.

The possession of the quality of Shareholder gives the candidate a condition of moral credibility, showing that he is interested in the company and in its good governance.

Particular requisites of professionalism and reputation are required by the competent authorities of the government and Italian Securities' Commission for candidates for functions of Director, management and control in banks or financial corporations (article 14 of Draghi Law).

A further requisite for the resolution of the Meeting to be valid is that the candidate has not previously been revoked from the position, for serious irregularities by the judiciary (Court of Milan, 9th May 1991, in Giur. comm., 1992, 342).

The candidate usually becomes such when he is introduced by other shareholders or groups of shareholders, but he can also propose himself, spontaneously, or be voted by the shareholders without being introduced by anyone.

Introduction is therefore a possible but not necessary phase and can be omitted; the candidate doe not have to be introduced by anyone.

The group that suggests a candidate cam be large or only a single subject, with significant interests of less and so on.

In general in a public company and in credit societies, the candidate is accredited in that he is supported by a number of credible supporters.

The candidate, to become a Director, must be voted by the Shareholders at a Meeting and reach the quorum necessary and sufficient to be elected.

The shareholders have the right of active electorate and the candidates that of passive electorate, i.e. to be elected.

The voting and its methods in general

The vote is an expression of will expressed, directly or through a proxy, free and homogeneous, according to conventional standards, which are fixed by the chair of the Meeting or by the Meeting itself if nit by the memorandum of Association.

The ordinary Meeting can be convoked to vote on several topics and usually the person who chairs the meeting chooses the method, assisted by the Secretary and the scrutineers.

There can be a wide variety of objects, for example the discussion and approval of the Annual Report, the Directors' Report, the Auditors' Report and more in general the different motions put to the Meeting, such as, for example, the resolution of an action against the Directors.

Sometimes, the Chairman may chair the meeting, according to the Memorandum of Association, and not the person designated by the Shareholders.

The appointment of the Secretary and the scrutineers is usually proposed by the Chairman and the resolution taken by the Meeting.

The Meeting may establish that the person who is to act as Secretary must be a member of the Notaries' Board, as we will se below.

The vote is an expression of will expressed, directly or through a proxy, free and homogeneous and is expressed through standard conditions which are fixed by the Chair of the Meeting or by the Meeting itself, if not by the Memorandum of Association or regulations.

The vote must have, above all, an expressed form and cannot be tacit, or implicit or presumed (8).

A vote that is not expressed in a non-vote.

The cases are often monothematic, and the choice of the voters is simple, being translated into « yes », « no » or « I don't know ».

The vote can be expressed by raised hands, a ballot paper in a ballot box or in another way.

The voting methods can be different although the voting criterion has to be uniform.

There is an egalitarian or democratic vote if the shareholder is asked to express one vote per head.

This is adopted in the case in which voting is by raised hand, by standing and sitting, by separation in the room, by name call or by electronic device, in the case of crowded meetings (9).

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(8) « Implicit resolutions » are not admitted: Court of Civil Cassation 24.7.1968 no. 2672 in *Riv. dir. comm.*, 1969, II, 181; Ferro Luzzi in *Riv. dir. comm.*, 1969, II, 181; Ferro Luzzi, in *Riv. dir. comm.*, 1969, II, 181; Grisenti, in *Riv. soc.* 1968, 598.

(9) A Shareholders' Meeting of this kind was that of Credito Italiano in Genoa, a few years ago, which aroused opposition on validation.

In cooperative companies, where the vote per head is that in line with its characteristic as a partnership, there may be a pluri-vote, as stated, in the case of proxies received from other shareholders or the shareholder is the legal representative of minor children and so on.

In this case the shareholder will exercise several votes depending on the proxies given to him, within the limits of the statutory regulations, or of those of whom he is the legal representative.

The number of votes expressed on onés own account and by proxy can be indicated with a distinctive card that shows the number of votes the elector has and is shown by raised hand.

The egalitarian vote may also be discretionarily adopted by the Shareholders' Meetings of joint stock corporations, where usually the shareholder has the right to vote in proportion to the shares held on his own account and by proxy.

A company which is a shareholder in turn can hold shares on its own account or by proxy and the vote is exercised by its representative pro tempore or by a person with a power of attorney.

The voting may also be unequal, as in the case in which it is exercised by shareholders who have met for the quantity of shares owned or represented. This vote may be expressed with the voting system by name call, where the chair will acknowledge the expression of the vote and attribute importance according to the shares held by each.

A method which is more suitable for different shareholdings is that with the use of cards which also express the amount of votes of each voter.

Voting by Directors in particular

The appointment of Directors depends on a much more articulate vote which consists of choosing the people to be elected by the Shareholders' meeting than in the case of a monothematic vote as above.

The characteristics indicated above are evident.

The vote must therefore be expressed, direct or by means of a proxy and ensure the freedom of expression for the shareholder and be homogeneous.

It is a compulsory principle that the Directors' vote, whether for, against or abstained, must be expressed and cannot be tacit or presumed.

A vote that collects only votes against and abstentions must be considered non-existent and the abstentions, whilst the shareholders present who have not voted against or have abstained are presumed « by difference » as in favour.

This is a non-existent vote because it is not expressed and is only supposed by conjecture, like every tacit or implicit manifestation.

This is what has happened at the outcome of some Meetings, with the justification of overwhelming demands of speed (10) which would justify that compulsory juridical principles were not respected.

Another requisite is that the vote must correspond to an ineliminable freedom of choice by the shareholder and therefore he must be able to erase or replace the candidates proposed with persons of his choice.

A vote that is also not homogeneous is non-existent, as in the case where the shareholders in favour are asked to express their vote in a different way with respect to those against and the abstainers, outside the logic of a vote and second vote.

The memorandum of Association may contemplate special voting systems and in the absence of this, their choice is established by the Chairman and by the Meeting, Some Memorandums of Association contemplate other systems that ensure the representation of minorities on the Board of Directors and on the Board of Auditors.

The vote can be egalitarian, as in the case in which the shareholder is asked to express a vote per capita.

This is, as mentioned, by voting with a raised hand, sitting and standing, by separation of the Shareholders in the room, by name call and by ballots in the ballot-box.

In the case indicated, the Shareholder can express several votes. only when he is acting as a proxy for others or was the legal representative of incompetent people.

In this case, a hand is raised, holding, for example a card. with the number of the votes carried.

In the electoral system. based on the vote by quantity of shares, the shareholder places in the ballot boxes the ballot papers which the shareholder has filled in with the name of the chosen people and with the quantity of electoral votes, whilst those that are used to identify the voter are placed in another ballot box.

A Memorandum of Association of a joint stock corporation which contemplated the secret vote was deemed contrary in case law to the imperative rules (11).

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(10) A vote of this kind was erroneously considered existing and valid by the Court of Varese, 1st March 1999, no.75/99, unpublished.

(11) Court of Milan 21st June 1988 in *Giur. It.*, 1989, 1,2, 12; Court of Trieste, 26th September 1985, 60; Court of Milan 27th September 1982, in *Società* 1983, 638; Court of Appeal Florence, 14th January 1965 in *Foro it.*, 1, 317. Legal literature is divided; for admissibility; GRAZIANI, *Diritto delle società*, Naples 1963, p. 311 FRÈ, *Società per azioni* in *Commentario dal codice civile*, Scialoja and Brnaca, Bologna-Rome, 1982, p. 350; GALGANO, *La Società per azioni*, Padua 1984, p. 214; whereas for inadmissibility, ROMANO PAVONI, *Le delibere delle assemblee delle società*, Milan, 1951, p. 204; SENA *Il voto nelle assemblee delle società per azioni*, Milan, 1961, p. 425.

Case law that is inspired by the principle of guaranteeing the freedom of the Shareholder to choose the Director deems null and void the votes expressed on pre-printed papers of candidates who do not attract the attention of the shareholder to his freedom of vote and do not allow one name to be erased and replaced by another or a blank space alongside the name proposed, (see note 17).

Voting by forms that contain a list of candidates who cannot be replaced, i.e. who are blocked must therefore be deemed null and void.

Some decisions have deemed valid the vote of a list of candidates (12), on condition that they respect the freedom to replace candidates by others preferred by the shareholder.

In this case, the voter can erase or make preferences, where contemplated, in the list.

Other shareholders could suggest an alternative list of candidates and in this case the Directors who receive the highest number of votes, above the quorum, would be announced the Directors.

Some Memorandums of Association have special electoral systems and guarantee a proportional representation for minorities or reserve a lower number of seats for the majority.

Directors who have failed to collect votes in favour but also votes calculated by conjecture, with deducting from the number of shareholders present those who have only voted negatively or who have abstained are generally excluded from being considered elected.

This can be the case in which the Shareholders' Meeting is only asked to express by raised hand the votes against or abstentions and not the shareholders in favour. It is fundamental to ensure the freedom of choice for the shareholder.

One thing is voting, recording the votes is something else

The shareholders vote and the Chairman of the Meeting or his Secretary (the latter in particular by his certification at the extraordinary meetings) records the votes.

Recording the votes is not expressed at the vote but in the counting of the votes (and therefore in the number of hands raised, in the raised hands, the people sitting or standing, or in different parts of the room, or votes according to the actions corresponding to the possession of who votes).

At Meetings where there are very many shareholders and where the count appears complex, scrutineers are appointed from the start of the

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(12) Court of Civil Cassation, 19th October 1990, no. 10121; Court of Appeal, L'Aquila, 24th August 1998 in *Giur. it.* 1999, 1252 and in *Rassegna* 1999 p. 252; Court of Appeal, Bologna, 4th May 1992 in *Giur. Comm.*, 1993, II, 621; Court of Appeal, Turin, 11th February 1987 in *Giur. it.*, 1987, I, 2, 389; Court of Bari, 20th December 1988 in *Giur comm.*, 1989, II, 74.

Meeting and they are asked to collaborate with the Chairman. Recording may be electronic as that which is done with an electronic system.

The voting and recording are often confused as though they were a single phenomenon.

It is true that the vote appears with its recording by the Chair, the Secretary and, if applicable, the scrutineers, with the counting of the votes, whether by head or by shares. However, these are two distinct phenomena.

Recording the votes is often complex as when there are many cancellations and replacements.

It can last for several house, especially in the overcrowded meetings and requires several scrutineers .In the end, the votes are recorded in the Minutes of the Meeting, which shows the number of votes each candidate received.

It was correctly taught in the past that « the fact that the resolutions must be recorded in Minutes signed by the Chairman and the Secretary or notary must be understood as having fixed the need for the written form *ad substantium* » (Court of Civil Cassation, 26th June 1956, no. 2286, in Dir. fall. 1956, II, p. 699).

The two steps of recording and taking the minutes can be fixed autonomously. The minutes are analytic or synthetic.

The minutes of an Ordinary Meeting are considered synthetic, even when a Secretary-Notary draws them up, because it is a para-notarial deed and not a public deed.

In this case the Secretary attests – as we have said – only the declarations of the Chairman of the wishes of the Meeting through his words, but not the consistency of the Minutes with the facts expressed.

The Minutes of the Extraordinary Meeting are different, which must meet the requisites of notarial law under penalty of nullity.

To have the efficacy of a public deed, it must be immune from those defects which would render it null and void because, in this case, the Minutes could not attest the events and even be an action for fraud.

A vote that is not recorded and not recorded in the minutes gives rise of a proceeding of non-existent appointment, on the juridical level (Court of Civil Cassation, 28th November 1981, no. 6340).

The attachments, required by the Italian Securities' Commission, which have the names of those who have voted against or abstained, also make up part of the Minutes, in order to prove the legitimization of those who are interested in impugnment.

The list of votes in favour is not required because the problem is not raised of their legitimization to impugn the resolution.

The proclamation of the result

This is the task of the person chairing the Meeting and the Secretary who together draw up the Minutes with the proclamation; if there are scru-

tineers, they also sign the Minutes, although this is not necessary under penalty of non-existence of the resolutions.

The proclamation is not just the communication of the numerical result of the votes form against or abstentions, but consists of the solemn declaration of the person chairing the Meeting, that the potion has been approved or defeated according to the count of the votes in favour or against, made by the Chair and recorded in the Minutes.

In the case of the appointment of the Directors, those who have been elected are announced and often the first of the non-elected in the event that they have to succeed those who have been announced as elected if someone steps down from the position or is declared barred from the office. Usually the quorum necessary and the votes won by each are also announced.

Failure to announce the result and the election gives rise to the non-existence of the appointment.

5. – *The invalidities of the Meetings and resolutions*. – There are three types of invalidities: the most radical is non-existence, followed by nullity and lastly by annullability (13).

There is invalidity when the Meeting and the resolutions are not taken in conformity with the law and the Deed of Incorporation, as article 2377, section 2, Civil Code states.

A) There is *non-existence* when the procedure of forming the resolution is not followed or is interrupted due to an intervening positive or negative factor which prevents its materialization, depending on the aim.

An authoritative source has specified that there is non-existence when the procedural model fact situation does not have the essential requisites for the formation of a resolution attributable to the company, with the result of determining an apparent model fact situation which is not admissible in the juridical category of resolutions of Shareholders' Meetings, due to structural or functional inadequacy with respect to the normative model.

Amongst the various cases, it is constant case law that « the company resolution is non-existent » (14) when: *a*) there is no convocation of the Meeting: *b*) there is no vote; *c*) the majority required by the law has not been reached; *d*) the votes have not been recorded and no minutes taken (Court of Civil Cassation 24th January 1995, no. 835 cit.). *c*) the result is not announced.

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(13) BIGIAVI in *Riv. dir. civ.*, 1956, 1023.

(14) Court of Civil Cassation, 28th November 1981, no. 6340, Court of Milan 14th November 1977 in *Rep. Giust, Civ.*, 1979, II, p. 3397; Court of Milan 9th October 1975 in *Giur. comm*, 1976, II, o. 521 amongst the many.

A resolution that has been adopted and in which persons without the right of vote participated has also been deemed non-existent (15).

When there is no majority required by the law for there to be a vote has also been deemed non-existent (16).

B) On the other hand, there is nullity when there is the infringement of a rule inspired by the protection of the general interest and not of the individual shareholder who is the holder of the right of impugnment (17).

This is the case of a resolution adopted by a non-plenary Meeting which has been called and has been held with an infringement of the rules of law (18). Nullity is of two types, i.e. usual that is, prescriptible and which can be validated or at least which can be converted and exceptional, under art. 2379 Civil Code which is such « due to impossibility or illicitness of the object », i.e. not prescriptible and for which validation is not admissible.

It is not infrequent in legal literature in particular to reduce nullity to the latter conjecture, whilst the one that the rule under examination considers prescriptible and eligible for validation is generalized with effects that are identical to those of annullability.

This opinion – as I see it – is inexact, because the *genus* of nullity cannot be reduced to the *species* of nullity due to impossibility and illicitness of the object and the normal one merge with annullability.

This last hypothesis occurs when the overall result is debatable, because, for example, votes which are decisive for the overall result have been considered valid or null.

The resolution of the Meeting has been considered null and void when, although acknowledging the existence of votes against, the names of those in disagreement are not shown for the purposes of the faculty of impugnment (19).

The non-plenary Meeting that has been called or is held with infringement of the rules of law or of the memorandum of Association is also null and void (20).

C) All the resolutions that are not non-existent or null and void are annullable.

The hypotheses of annullability considered by case law are highly varied and do not appear to have a unifying criterion.

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(15) Court of Cassation, 8th November 1974, no. 3491 in *Giur. comm*, 1975, II, 305.

(16) Court of Civil Cassation, 24th January 1995, no. 835; Court of Civil Cassation 14th January 1993, no. 3403; Court of Milan, 23rd May 1993 in *Giur it.*, 1996, 808; Court of Civil Cassation, 4th March 1963, no. 511, in *Dir. Fall.*, 1963, II, 255, in *Giur. it.*, 1963, I, 1, 576.

(17) Court of Civil Cassation, 4th January 1996, no. 45 in *Dir. fall.*, 1966, II, 226.

(18) Court of Civil Cassation, 9th November 1974, no. 3421 in *Giur. comm*., 1975, II, 305,

(19) Court of Appeal, Milan, 24th September 1967, in Giur. it., 1968, I, 2, 236.

(20) Court of Milan, 3rd September 1990, in *Riv. Notar.*, 1991, II, 499.

For example, it has been decided that in general « defects relative to the formation of the Meeting as they protect the interests of the Shareholders and not of the company » entail annullability (21).

A Meeting called by only one Director if not by the Board of Directors and in general with an irregular convocation is annullable (22).

So is « a resolution of a Meeting that has been adopted on an object with is not indicated in the notice of call ».

A resolution taken by all the shareholders meeting in a venue other than that shown on the notice of call, although the Board of Auditors in absent, is also annullable (23).

« Defects relative to the formation of the Meeting as they protect the interests of the Sharheolders and not of the company » also entail annullability.

Also by this author on the same subject:

– « *Alcune osservazioni sulle linee del progetto Pajardi di riforma dell'amministrazione controllata e del concordato preventive* » in Problemi attuali e prospettive di riforma del processo civile, p. 435.

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(21) Court of Genoa, 22nd October 18987 in *Società* 1988, 392.

(22) Court of Milan, 3rd September 1990 in *Riv. notar*,. 1991, II, 499, Court of Appeal, Milan, 24th September 1967 in *Giur. it*, 1968, I, 2, 236; Court of Appeal Milan, 22nd October 1987 in *Società* 1988. 39: Court of Civil Cassation, 13th March 1975, no. 938 in *Giur. comm*. 1976, II, 14.

(23) Court of Civil Cassation 2nd August 1977, no. 3422; Court of Civil Cassation, 11th March 1977, no. 989, Court of Milan, 27th January 1986, in *Dir. Fall*. 1986, 623.

On the liability of de facto Directors towards the company and Shareholders

1. – The de facto director has managerial functions in a joint stock corporation, i.e. he takes decisions and acts in a managerial capacity in the name and on behalf of the company, without having being vested by a legally existing resolution on the basis of the law or the Memorandum of Association.

The category of non-existent resolutions, in addition to the broadly invalid ones (i.e. null and void or annullable) has now been admitted for some time by dominant case law both legitimately and on merit (1).

This same category is now also accepted by the prevalent legal literature (2), except for some critical voices which made themselves heard in the past (3).

The non-existent resolution is so defined!when an element making up the procedural model fact situation forming the resolution is absent, such as not to allow the start or cause the interruption of the necessary legal stages from the beginning to the end, with the result of determining an apparent model fact situation which cannot be subsumed into the juridical ca-

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From « Il Diritto Fallimentare e delle Società Commerciali » 2000, Part 1 - Literature

(1) The category of non-existence is now pacifically admitted: see Court of Civil Cassation, 14.1.1993 no. 403: Court of Civil Cassation 4.12.1990 no. 11609; Court of Civil Cassation 15.3.1980 no. 1768; Court of Civil Cassation, 1.4.1982 no. 2009; Court of Civil Cassation 11.3.1977 no. 989; Court of Civil Cassation 4.3.1963 no. 511. For a review of the decisions on merits: QUINTARELLI, *Le deliberazioni assembleari inesistenti di società per azioni*, in *Giur. comm.*, 1984, I, 1158 ff.

(2) In legal literature; L. FARENGA, « *La deliberazione di società come atto a struttura procedimentale e la teoria giuridica della inesistenza* » and bibliographies mentioned; RIMARCHI, Invalidità delle deliberazioni di assemblea di società per azioni, Milan 1957, p. 451 and ff.; GIANNATTASIO, Ancora *sulla inesistenza giuridica delle deliberazioni assembleari, Giust. civ.*, 1966, I, p. 490; ASCARELLI, *Inesistenza e nullità*, in *Riv. dir. proc.*, 1846, p. 61; RAGUSA-MAGGIORE, *La responsabilità degli amministratori*, Milan, 1969, 81; BORGIOLI, in Giur. comm. 1981, II, 699; FERRARA-CORSI, *Gli imprenditori*, Milano 1987, p. 489; G. COTTINO, *Diritto Commerciale*, I, Padua, 1993.

(3) FERRI, *Le società* in *Trattato di diritto civile* by Vassalli, Turin, 1987, p. 635 and ff.; MIGNOLI, *In tema di nullità e annullabilità delle delibere assembleari, in Riv. Società* 1948, I, 432; COTTINO, *Diritto commerciale*, I, 1987, p. 429.

tegory of resolutions due to structural and functional inadequacy, with respect to the model fact situation » (4).

The case in our case law is that referable to a resolution of a Shareholders' meeting but it could also be for any other joint resolution, as is the case of the appointment of the Executive Committee, by the Board of Directors.

Resolutions « passed by a body without the power to resolve » (5), « those adopted by a Shareholders' Meeting called by a non-legitimized body » (6) or by a « Board of Directors not correctly called » (7) or « by a Meeting meeting in a venue other than that shown in the notice of call » (8), or « where there was not a quorum » (9) or « where there has not been a vote » (10) or « if the quorum prescribed for voting has not been reached » (11) of « where the votes have been expressed in a non-homogeneous way » (12) or « in the event that minutes of the meeting have not been drawn up » (13) and so on and so forth have been deemed cases of non-existent resolutions.

A non-existent resolution appointing Directors has a chain reaction on the non-existence of the subsequent Shareholders' Meetings and resolutions that are called by the de facto but not rightfully entitled Directors, producing a « domino » effect.

The case in which the procedural model fact situation is affected by some defect which entails the nullity or the annulment of the Meeting's resolution is different with respect to the previous category.

In this latter case, as the annulment has its effects only *ex nunc*, the Director has to be considered *de jure* until the annulment.

The case in which the appointment of the Director is to be deemed null and void under article 2379 Civil Code is also different, because it forms the object of a pronouncement of ascertainment which operates *ex tunc.*

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(4) In this sense amongst the many: Court of Civil Cassation, 14.1.1993; Court of Civil Cassation 4.12.1990 no. 11609; Court of Cassation 15.3.1986 no. 1768 in *Giur. comm.* 1987, II, p. 83 and ff.; FERRO-LUZZI in *Contratti associative*, Milan 1976, p. 134 ff. amongst many others.

(5) Court of Civil Cassation, 1.10.1960 no. 2542 in *Giur. it.* 1961, I, 1 section 420.

(6) Court of Appeal, Brescia, 1.12.1965 in *Giust. Civ*, 1966, p. 1208.

(7) Court of Appeal, Milan, 23.7.1957 in *Rep. giur. it.* 1958, Società p. 90; Court of Rome, 13.7.1990 in *Riv. dir. comm.*, 1991, II, 197.

(8) Court of Civil Cassation, 14.1.1993, no. 403 in *Riv. dir. comm.*, 1993, II, 202.

(9) Court of Civil Cassation 13.1.1987 no. 133 in *Giur. it.*. 1987,, I, 1, 1724; Court of Milan, 24.9.1990 in *Riv. dir. comm..*, 1991, II, 243.

(10) Court of Civil Cassation 1.10.1960 no. 2542 in *Giur. it.*, 1961, I,1, 420.

(11) Court of Civil Cassation 20.4.1961 no. 511, Dir. fall., 1961. II, 783; Court of Cassation, 4.1.1966 no. 45 *Foro it.*, 1967, I, section 827; Court of Perugia, 22.4.1983 in *Società* 1984, 1335.

(12) Such is the case where the Meeting is to express votes in favour by raising hands and votes against and abstentions by ballot paper.

(13) Court of Civil Cassation 26.6.1956 no. 2286 in *Riv. dir. comm.*, 1958, II. p. 4.

In any case, the non-existent resolution of a Shareholders' Meeting cannot be an object of validation.

A different de factor director with respect to that shown above is that where the decisions are taken by an extraneous person who interferes with the management, with the tolerance of, in lieu of or in collaboration with the *de jure* Director.

2. – The de facto Director is equivalent in Italian criminal case law to the rightful director and therefore is fully subject to the prohibitions and penalties provided by criminal law for the acts committed by both (14).

A different solution would lead to considering that the criminally illicit activity by the de facto director is not an offence due to the absence of investiture in the position, unlike that existing in the rightful director and therefore the former would be unjustly exonerated of any criminal liability.

The dominant case law subjects the de factor director to criminal law in its substantial content and correctly deems that in criminal law, the liability is based on the effective management of the company which prevails over the formal one of taking on the office.

The individual model fact situations of offences are configured by criminal law, not according to the title, under which the activity of director is exercise but « according to the factual observation that the activity is concretely exercised ».

The same applies to the hypotheses of corporate and bankruptcy crimes, such as bankruptcy, false company misrepresentation, conflict of interests and so on and so forth.

The damaged company can take legal action against the Director, for the various corporate and bankruptcy crimes, including without a prior resolution of the Shareholders' Meeting to take the liability action against the de facto director.

The shareholder can also take legal action both in subrogation of the company and on his own account, as individually damaged as the pursuit of tortious liability for tort is guaranteed by article 2395 Civil Code.

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(14) Court of Criminal Cassation, 14th May 1993, defendant Delle Fave; Court of Criminal Cassation 29th December 1972, defendant Zito in Giust. pen., 1973. II, 591; Court of Criminal Cassation 5th December 1966, defendant Savoldo in Dir. fall., 1967, II, 974; Criminal Cassation 8th May 1964, defendant Esposito in Rep. Foro it., 1965, entry *Società* no. 220, 223, Criminal Cassation 1st July 1963, defendant De Angelis in Rep. Foro it., 1954, 246. In legal literature: ANTOLESI, *Manuale di diritto penale. I reati fallimentari*, Milan 1959, p. 109; ZUCCALA, *Il delitto di false comunicazioni sociale*, Padua 1954, p. 53, CONTI-BRUTI-LIBERATI, Il diritto penale nelle società commerciali, Milan 1971, p. 110; C. PEDRAZZI, *Gestione di impresa e responsabilità penale*, in *Società* 1962, p. 220; F. MONELLI, *La responsabilità dell'amministratore di fatto* in *Giur. comm.* 1984, p. 107; M. ABBIANI, *Gli amministratori di fatto delle società di capitali*, Milan, 1988. p. 200 and ff.

3. – Legal literature and case law also subject the de factor director to the civil tortious liability provided for the rightful director with motivations similar to criminal liability.

They have resource to the motivation that otherwise the de facto director would enjoy a protection of interests, contrary to the legal system for acts of negligent and wilful mismanagement he has performed, whilst those of the shareholder an the third party creditor would be without protection.

Legal literature and case law have attracted attention above all to damage caused by the de facto director for tortious liability.

However, the problem has not been covered by literature and case law in its unity with regard top damage from contractual and tortious liability.

The current opinions, according to the author of these lines, appear inadequate with respect to a problem that requires a detailed and articulated analysis of its multiform aspects.

A further problem is the legitimization of the damaged subject to take action against the de facto director.

Let us start with the tortious civil liability of the rightful director from which we will draw an analogy for a contribution to solving the problem of the application to the de facto director.

The criminal offence, caused by the aforementioned director, as stated, gives rise to tortious liability for civil damage suffered by the company and the shareholder.

The individual exercise by the shareholder of the action under article 2395 Civil Code to pursue the compensation of damage he has directly suffered, which are not the reflection of that caused to the company's capital by tortious liability is also generally admitted (15).

The author of these lines deems this interpretation excessively reductive, for a dual set of reasons.

First of all the limitation of the action by the shareholder under article 2395 Civil Code, only to the damage caused by the director for tortious liability does not appear justified.

It is generally argued by the legislative formula that refers to the shareholder who is « directly damaged » by the acts of the director therefore the indemnifiable damage is limited to direct damage and the reflected damage by the corporate capital is excluded and in short the damage suffered by the corporate share of the individual shareholder, even if caused by a wilful and negligent activity.

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(15) Court of Cassation 19.12.1985, no. 6493; Court of Civil Cassation 2.6.1989 in Giur. it. 1989, I, 1, Court of Civil Cassation 3.11.1983, no. 6469 in *Dir. fall.*, 1984, II, p. 250,: Court of Cassation 28.3.1996, no. 2850 in Società 1996, 1397; Court of Civil Cassation 4.4.1997, no. 2934; Court of Civil Cassation 3.7.1998 no. 6519. In this sense, there is also FERRI, *Le società*, Turin, 1985, p. 686; G. MINERVINI, *Gli amministratori di S.p.A.*, Padua 1969.

This interpretation reduces the individual action that can be accomplished under article 2395 Civil Code to an absolutely marginal conjecture.

To the writer, it does not appear justified by the term « direct damage » used by article 2395 Civil Code.

The formula is limited to stating that between the wilful conduct and negligent conduct of the director and the damage there must be a relationship of direct causation, as it is in articles 1223 and 2056 Civil Code, i.e. indicating a relationship of logical univocity, whilst the immediate term expresses that of a historical consequentiality (16).

It does not appear to the writer that from the adjective « direct » an argument can be drawn to reduce the sphere of the different types of shareholder's indemnifiable damage. only to those extraneous to his corporate share, whilst this is also a direct consequence, which comes under article 2403 Civil Code.

This does not mean that great caution must not be used to ascertain the tortious liability of a rightful director, who is assisted by a presumption of legitimacy of his work.

As I have said, it is questionable whether the damage suffered by the individual shareholder in his share in the corporate capital is not protected, although it is a reflection of that on the corporate capital, following the mismanagement, which represent tortious crime by the rightful director.

The interpretation referred, on the one side, is lacking because it would lead to excluding from tortious liability of the director, the damage suffered by the corporate share, also in the case in which the illicit conduct is a crime.

However, it is not questionable that the shareholder can assert his right to compensation for the specific damage which is suffered by his individual share, although a reflection of that suffered by the company.

The above concerned the rightful director.

The question regarding the tortious liability of the de facto rather than the rightful director appears much wider and at the same time different.

The de factor director is not assisted by the presumption of legitimacy of his work which cannot therefore be said to be finalized to pursuing the interest of the company and he must indemnify the company and the shareholders, following his negligent or wilful tortious behaviour.

The fact that he is a de factor director and the rightful director is absent means that the damage resulting from his conduct to the corporate capital and to the individual shareholding would be condemned otherwise not to be both indemnified, due to the absence of the legitimate company

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(16) G. VALCAVI, *Intorno al rapporto di causalità nel torto civile* in *Riv. dir. civ*, 1995, II, 481; Id., *Sulla causalità giuridica nella responsabilità civile* in « *Danno e responsabilità* » 1998, p. 1007 and ff.

body that must provide for this on the one hand and the erroneous interpretation that would aim to exclude the shareholding from the sphere of article 2395 Civil Code on the other.

The shareholder therefore has the right to directly take action against the de facto director under article 2395 Civil Code for the damage he has suffered by the negligent or wilful acts that generate tortious liability of the rightful directors and, a fortiori, of de facto directors, although depending on that suffered by the company to its capital.

It also has to be admitted that from individual action does not exclude the further aim of taking action for the damage caused by the de factor doctor to the company's capital, at least in subrogation of the same.

4. – Let us now go on to outlining a synthetic picture of the non-tortious civil liability of the directors of a joint stock company with regard to shareholders and creditors.

As far as the rightful directors are concerned, the discipline concerning them is laid down by article 2392 Civil Code which prescribes that they must fulfil the duties improvised by the law and by the Deed of Incorporation with the diligence of the principal which is the same ordinary diligence of a reasonable and prudent man and establishes that they must jointly respond for any damage caused.

The legal picture is also specified by article 1711 for which the consequences of acts which lie outside the limits of the appointment remain the responsibility of the principal and by article 1712 for which they must, in every case « without delay communicate the performance to the principal ».

The rightful directors, within the discretionary sphere of the decisions reserved to them, have a freedom in decision-making which may not be censured by a judge.

Their liability for damage obeys an objective paradigm where the Shareholders have to prove the wilful action or grave negligence. whilst the defendant directors have to produce the counter-proof of normality.

Liability for damage, deriving from a contract is limited to that ordinarily foreseeable, in accordance with article 1225 Civil Code.

An action of liability may only be taken by a resolution of the company's Shareholders' Meeting in accordance with article 2393 Civil Code or by article 2409 Code of Civil Procedure.

A dominant orientation in legal literature (17) and in case law (18) however although opposed by a minority opinion, excludes that the individual shareholder can carry out an action for negligence and damage under arti-

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(17) RAGUSA MAGGIORE, *La responsabilità degli amministratori*, cit. p. 93; MINERVINI *Gli amministratori* p. 363 ff.; COTTINO, *op. cit.*, I, p. 676.

(18) Court of Cassation 3.8.1988, no. 4817; Court of Cassation 6.1.1982 no. 14; Court of

cle 2395 Civil Code by way of contractual liability with regard to the damage he has suffered to his company share (19).

Let us now examine the different discipline of the liability of the de factor directors which is extraneous to the infringement of the *neminem ledere* principle, and compare it with contractual liability under article 2392 Civil Code of the rightful directors.

The author of these lines deems that contractual liability of the de factor directors to the company and shareholders is not configurable, by analogy with that of the rightful directors but only non-contractual liability is, although not coinciding and different from tortious liability which is reduced to the simple infringement of the prohibition of *neminem ledere*.

The de factor director is not bound to the company by an organic relationship and it cannot be surmised that he has the rights and obligations of the principal, with respect to which he has to answer for contractual liability.

This is inferred from article 1711 Civil Code, which contemplates that the consequences of acts, which lie outside the limits of the appointment, remain the responsibility of the principal, so as to answer for them on his own account.

A fortiori, the same conclusion must be reached where there is not even an appointment, as is the case of the de factor directors who are therefore not vested by a legally existing Shareholders' resolution.

Contractual liability of the de facto director is therefore not configurable from the point of view of the so-called de facto contractual relationship which « would assume a juridical significant, leaving aside the existence of the corresponding contractual model fact situation ».

We do not agree with the existence of a category of this kind because this assumption is based on a petition of principle and is absolutely general.

Recently there has been an attempt to overcome the obstacle of the lack of investiture of the de facto director in the position, with reference to the final part of article 1173 Civil Code, the contents of which have been strained by an inadmissible addition which was extraneous to the legislator.

The rule indicates amongst the sources of the obligations alongside the agreements and the illicit behaviour « any other fact suitable to producing them in conformity with the legal system » and it is argued that this would legitimize a claimed general category of de facto contractual relationships.

Cassation 16.11.1977 no. 5011; Court of Cassation 7.2.1974 no. 327; Court of Milan, 31.1.1983 in *Società*, 1984, 323: Court of Milan, 28.1.1980 in *Gur. com.*, 1981, II, p. 699.

(19) FRÈ, Società per azioni, p. 503 and ff.; MONELLI *Gli amministratori di società*, 1984m 323; Court of Milan 28.1.1980 in *Giur. Com.*, 1981, II, p. 699.

This appears inadmissible because the wording of article 1173 Civil Code, in the absence of a specific rule of the legal system, does not allow an opinion of this kind.

More recently, an isolated decision of legitimacy, with which we disagree (20), has referred to the institution of the management of others' business to try and justify the liability of the de factor director from a contractual pint of view. but the analogy is wrong.

The equivalence between the management of others' business and the relationship of the de facto director is inadmissible because the *utilis gestio* requires the impossibility of the *dominus* to provide for his interests and his non-awareness of the acts of the manager.

It concerns the case where the activity of the manager has as its object one or more individual operations, whilst this is not the case of the de facto director, whose activity is characterized not by individual acts of interference in the management but must continue for a significant period of time, with repeated acts typical of those of a company director being carried out (21).

The straining of the limits of a special and residual institution, such as *utilitas gestio* to draw the general justification of an entire category that lies outside the indicated institution must be rejected.

A conclusion of this kind is in contrast with the specific discipline of the institution of useful management.

Indeed, the *utilitas gestor* – admitted that he has been such – answers on his own account for his acts and obligations, where he acts against the prohibition of the party concerned, pursuant to article 2031, section 2, Civil Code.

We must therefore consider that the de facto director, acting without an appointment, acts against the consent of the company and the shareholders concerned, because the consent and the authorization must be expressed, according to the rules of the Memorandum of Association and the law, which are conditions for the existence of the procedural model fact situation and the resolutions and not arbitrarily supposed.

Surmising, moreover, an explicit prohibition of the parties concerned, with the consequences under article 2031, section 2, Civil Code, it could be sufficient for the shareholder, acting in subrogation of the company or not, to address a simple invitation to the de facto director to desist operating or a legal claim for legal ascertainment, which must be taken as events of ordinary occurrence.

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(20) Court of Civil Cassation 6.3.1999, no. 1925, President Cantillo, Reporting Judge Marziale, *Diritto e pratica della società* in *Il Sole 24 Ore* 8.11.1999 no. 20 with a note by A. Manzini

(21) A. MANZINI, Comment on the decision of the Court of Civil Cassation 6.3.1999 no. 1925 in *Diritto e pratica delle società*, cit. p. 47 and ff.

From this, we can also infer that the reference to the *utilis gestio* does not justify the profile of contractual responsibility between the company and the de facto director.

The quality of falsus procurator is more suitable for the de facto director, and a very recent decision attributes to the former the responsibility for damage from non-contractual liability although not reductively tortious.

The damage that is not indemnifiable within the limits of the foreseeability under article 1225 Civil Code derives from the exclusion of the contractual liability between de facto directors, company, shareholders and creditors concerned.

The fact that the de facto director does not enjoy a discretionary sphere of activity depends on this, on the basis of the paradigm of normality that would allow presuming the correctness, save the reverse burden of proof by the company and shareholders.

The trial judge can also censure this if carried out within the limits of normality.

Concluding, we deem that it is not possible to extend the contractual liability under articles 2392, 1710 and 1225 Civil Code to the de facto directors by analogy with rightful directors.

The opposite opinion, that infers the contractual liability of the de factor director from the *utilis gestio* or *the fictio* of a presumed appointment, similar to that of the rightful director, moreover ignoring article 1708 and its implications, is resolved in denying and contradicting the autonomous category of non-existent resolutions, with respect to those that are only invalid held by the dominant opinion and ends up by exonerating the de factor director from the extensive consequences of compensation of his acts.

5. – Let us now examine the logic and the amplitude of the civil liability of the de facto director with respect to the company, the Shareholders and the creditors.

Article 1708 Civil Code, as stated, places under the responsibility of the director of a company the consequences of his action when this lies outside the limits of the appointment.

By analogy, article 2031, section 2, Civil Code, refers to the *utilis gestio* to answer for his conduct, despite the prohibition of the party concerned.

It ahs been seen that these rules a fortiori justify the principle according to which the director who acts without a legally existing appointment must answer unlimitedly for the consequences of his decisions or acts.

This principle is an expression of the general rule that whoever acts, does so at his own risk.

This applies unconditionally to the de facto director.

An approach of this kind is the only one that respects the system that discourages initiatives of arbitrary replacement by subjects who are not le-

gitimized, who are in conflict with the current discipline inspired by the respect of rigorous legality and the interests of the investors, as is the case of a company with shares listed on the markets that are governed by rules protecting the rights of the minority, with public institutions of supervision, such as the Consob (Italian Securities Commission).

The conclusions reached that the de factor director acts at his own risk is also a rule balancing interests which sees, on the one hand, the obligation of the company to support the consequences of the acts of its de facto directors due to the principle of appearance which protects those who contacts with them in good faith and on the other, the right of the to take action against the de facto director for the consequences for which he is responsible.

The latter must, in every case, guarantee the company and the shareholders from losses and obligations, i.e. a profitable result and not a simple obligation of means, as the rightful director.

The erroneousness of the opinion that shapes the civil liability of the de factor responsibility on the mould of the contractual liability of the rightful directors is that it supposes the *fictio* of an appointment in advance, without taking into account that for the latter, where they operate outside the limits of the appointments, for indemnity a ratification of the party concerned under article 2932 Civil Code is necessary, which is not even deemed conjecturable for the de facto directors, according to the general principles.

The equivalence between the de facto and the rightful director cannot be based, a fortiori, on the orientation of criminal case law, because the criminal liability protects the public interest in preventing social alarm and punishing the culprit.

Lastly, the opinion that deems that the de factor director underlies the contractual liability under article 2392 Civil Code is denied by case law which deems that the responsibility of the *falsus procurat*or is tortious (22).

6. – Let us now see who can take action to obtain a pronouncement of liability of the de factor director and the formalities that have to be observed.

The company and its shareholders *utendo iuribus* are certainly legitimized.

A Shareholders' resolution the take the action of liability as provided for by articles 2393 and 2409 section 4 is not necessary in the case that the acts of mismanagement are performed by the rightful director.

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(22) For tortious liability of the *falsus procurator*: Court of Civil Cassation 19.9.2000, no. 12969; Court of Civil Cassation 16.1.1997, no. 6488.

The need for this resolution is closely linked with the presumption of legitimacy of the action of the latter, whilst this is not so for the de facto director.

This is inferred from the wording of article 2392, section 3, for which the shareholders' resolution has as effect the immediate revocation of the rightful director, whilst this has no meaning if referred to the de factor director.

The shareholders are legitimized to provide individually against the de facto director, who is liable, including with recourse to the protection as per article 2395 Civil Code.

This rule has a broad meaning and uses the interest of the shareholder to achieve the purpose of protecting the interest of the company in protecting the legality of its acts.

The subrogation function is *in re ipsa*, without the shareholder having to have recourse to the formal declaration of acting in subrogation.

In this sense, the author recalls a far-off decision of the Court of Law of Milan of 15th October 1987 (President Baldi – Reporting Judge Quadraro, published in *Giur. It.*, 1988, I, 2, 418) that perspicaciously stated that « a non-existent resolution can even be impugned by each shareholder individually who is interested in protecting the legality of the company acts ».

An admirable editorial note added: « if a juridical act or fact does not exist, it is not part of the system. It is not *tamquam non esset*, but simply *non est*. It is the general interest of the system and therefore of all, including in pursuance of art. 100 Code of Civil Procedure to remove the deceitful appearance avoiding that a simple reflection is exchanged for a reality which, precisely, does not exist, so that everybody and any shareholder should be legitimized to take action and only the intention of pure chicane could represent a limit to the initiative in this sense ».

Stating otherwise, as is the case of those who confuse de facto directors with rightful directors, the premises of the « non-existence of shareholders' resolutions » would be denied and superfluous and would end up by being identified simply with those that are simply annullable,

The subversion of the principle of law, that a non-existent resolution is not susceptible of being remedied in any way, would be illegitimately superseded by the aphorism *what is done is done!*

Regarding the orientation of some decisions on the merit which extend the limits of applicability of the arbitration clauses to corporate disputes

1. – Dominant case law of legitimacy and merit (1) teaches that « disputes that involve the interests of the company or infringe the laws to protect the collective interest of the shareholders or third parties cannot be subject to arbitration because these are ascertainments subtracted from the autonomy of the parties.

The prevalent legal literature is also in the same sense (2).

A principle of the kind has recently stated peremptorily for the objections of Annual Reports by Court of Civil Cassation, All divisions sitting together 21st February 2000 in Giur. It., 2000, I, II, 1210 and ff.

Case law of legitimacy also influences the operability of the arbitration clause, in the presence of a relationship with a plurality of parties, as is the corporate one, to the circumstance that the dispute has a bipolar nature, therefore the parties may be *a posteriori* grouped together in two centres of homogeneous and opposing interests (which is expressed by saying that the clause must have a binary nature) (3).

Corporate disputes, with a plurality of parties, which cannot be reduced to two homogeneous and opposing centres of interest, as a re the

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(1) For the decisions of legitimacy: Court of Civil Cassation 30th March 1998 no. 3322, Court of Civil Cassation 18th February 1988 in 1739 in *Società* 1988, p. 476 and ff.; for those on the merits, of the many, Court of Milan 4th June 1990 in Giur. It., 1991, I, II, 185, Court of Appeal of Milan, 11th February 1997 in *Società* 1997, p. 1149.

(2) SATTA, *Commentario al codice di procedura civile* IV, Milan 1959.1968 p. 206: SILINGARDI, *Il compromesso in arbitri nelle società di capitali*, Milan 1979; JAEGER, *Appunti sull'arbitrato e le società commerciali*, in *Giur. comm.*, 1990, I, p. 299 ff.; ROVELLI, *Competenza degli arbitri nella risoluzione delle controversie sociali in società*, 1991 p. 761; TETI, *L'arbitrato nelle società, Riv. Arbitrato*, 1993, 297 ff.; RUBINO, SANMARTANO in *Diritto dell'arbitrato*, Padua 194 p. 131 and ff,, DE FERRA, *Clausole arbitrali nel diritto delle società* in *Riv. arbitrato* 1995, p. 185 ff.

(3) MANDRIOLI, *Corso diritto procedurale civile*, Turin, 1995, III, 360 and ff. The many decisions include, Court of Civil Cassation 15th April 1998 no. 2983 in *Società* 1988, 585; Court of Civil Cassation 13th April 1998, no. 2940; Court of Naples, 18th December 1987 in *Società* 1999, 591.

« multipolar » proceedings, are not deemed subject to settlement and the clause is invalid and inapplicable.

This also explains the reason why there must be an odd number of arbiters and they are designated by the opposing centres of interest.

For some years, in open contrast with this prevalent case law, the Court of Law of Milan, with the decision of 4th June 1990 in Giur. It, 1991, I, II, 175 and ff., and others by the same Reporting Judge, inaugurated a turning point, which however has to date remained isolated.

The Court of Milan stated that corporate disputes are in general subject to settlement though regulated by rules of general interest ».

According to this orientation, the shareholder would be free to exercise his rights in the forms of law and according to the clauses of arbitration.

The same Court confirmed this turning point with a subsequent decision of 10.1.2000 in Giur. It. 2000, I, on Annual reports. The same Court of Milan, with the last decision 13.11.2001 no. 11132, which is commented here, went further, taking a great step ahead.

It took this isolated orientation to the extreme consequences, establishing the principle that all the disputes referring to rights in the abstract can be subject to settlement, with the exclusion of those that are not available die to the illegal nature of the contract and which, as such, cannot be settled in pursuance of article 1972 Civil Code.

All the corporate disputes would come within, according to this line, the sphere of application of the clause of arbitration, except disputes which cannot be settled due to the illegal nature of the contract.

As a consequence, the Court with the decision under review, declined its competence, as an ordinary judge, to a board of arbitrators, and deemed that the dispute it had been called to decide upon, could be subject to settlement.

It is opportune to specify here that, in the case in point, the plaintiff had impugned because a resolution by the Shareholders, simulated and non-existent, concerning a glaring increase of capital and had objected that the resolution of subsequent placement by the directors was non-existent because they had not met and that the payment of the capital increase was only apparent and had not come about.

The survival of the company depended on the outcome of the lawsuit because in the event of acceptance of the claim, it had to be considered wound up due to the heavy losses that it had encountered, if the capital increase had not been made.

The dispute in any case objected that the equity situation of the company met the principle of truth and this was an important part of the annual reports which in themselves were not subject to settlement by arbitrators, according to the decision shown above of our civil section, all divisions sitting in full no. 27/2000. This decision of the Court of Milan no.

11132/2001, with a contradictory motivation in dismissing the objection of incompetence taken in favour of the arbitration, for the part that concerned a series of impugned annual reports, confirmed that this was a subject of the exclusive competence of an ordinary judge.

A fortiori, by analogy, the same result should have been reached by the orientation that does not consider subject to settlement the disputes on the revocation of a capital increase and shareholders' resolutions on mergers and divisions of a company.

2. – The Court of Milan gives as the grounds of its orientation which generalizes to the majority of corporate disputes the applicability of the arbitration clauses, the need to ensure the greatest speed and efficacy of their definition, with respect to the long time needed today.

This *ratio*, whilst it concerns all civil proceedings, does not justify that the prevalent public interest for impartiality and the necessary consideration of the legal decisions be sacrificed to it (4), in a sector where the respect of the rules in those economic firms that have a corporate form is required.

The public interest sacrificed here with respect to that less important of speed, had motivated the legislator of the recent procedural reform to lay down a bench procedure instead of a judge sitting alone for this type of dispute.

The public interest with respect to the company rules is at the basis of the institution of the Consob (Italian Securities Commission) and its competences.

At a time of globalization of financial markets, which involve increasingly large spheres of savers and investors, the certainty of corporate rules is a primary condition of investments and therefore of the economic development of the country.

From this point of view, the orientation settle disputes by private arbitration appears clearly as a counter-trend and following an involutional line with respect to the objectives of legislative policy as commonly perceived.

The Court of Milan extends the possibility of settlement by arbitration of this type of dispute to the extreme limit under article 1972 Civil Code which lays down that agreements relative to illegal contracts cannot be settled.

This strained interpretation cannot be agreed with because it concerns a marginal and residual hypothesis, which is not susceptible to taking on the value of a principle of law.

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(4) Court of Civil Cassation 30th August 1999 no. 9157; Court of Appeal of Milan 6th November 1992 in *Società* 1993 781 and ff,; Court of Milan 4th June 1990 in *Giur. It.*, 1991 I, II 1175 which qualify impartiality as an essential principle of public order.

The limits of the possibility of settlement by arbitration are generally fixed by articles 806 and 808 Code of Civil Procedure and those they refer to of the impossibility of settlement of the rights by article 1966 Civil Code.

This last rule in the first section establishes the requisite that whoever settles has « the capacity to dispose of the rights the form the object of the dispute » and in the second section establishes « the nullity of the transaction if these rights by their nature or by provision of the law, are withdrawn from the availability of the parties ».

The reference to the non-possibility of settlement of the right in order to settle a dispute by arbitration appears to refer to the clauses of arbitration that provide for amicable composition instead of composition in court as the former configure hypotheses of agreements, the logic and result of which are in common with those of the transaction. From this point of view, the reference of impossibility of settlement of the dispute to the non-settlement of the rights appears inadequate.

The interpretation of article 1966 Civil Code has given rise to serious disputes by the experts of law.

It is well known that for some of them the first section refers to the capacity to act in a technical sense, whilst the second section concerns the legitimization of the settling party (5). For others, the first section also contemplates the legitimization whilst the second section would more properly concern a requisite of the object of settlement (6). Case law follows this line (Court of Civil Cassation 30th January 1990 no. 635 in Giu. It 1990, I, 1, 1102 inter alia). The second section establishes the nullity of the transaction if the rights « by their nature or by specific provision of the law are withdrawn from the availability of the parties ». Disputes on labour and social security, questions of state, personal separation of spouses and in general unavailable rights come under this category of disputes. In any case the circumstance that various hypotheses of the two sections of art. 1966 Civil Code configure cases of nullity, deprives significant from their distinction, for our purposes.

With an evident petition of principle, article 806 Code of Civil Procedure defines the disputes on rights that cannot be settled as not subject to settlement and article 1966 Civil Code the disputes concerning the rights withdrawn from the availability of the parties. It is fairly clear that the requisite for the party who wants to reach settlement by arbitration must have the availability of the right, coincides with his legitimization to be able to dispose of it exhaustively, therefore it is included in the second section.

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(5) PUGLIATTI, *Della transazione*, 1949, p. 466 ff.

(6) CARRESI, Transazione in *Noviss. Digest.*, 1973, 130 and ff., SANTORO PASSARELLI, *La transazione* 1975-1997; in this sense Court of Civil Cassation 16th February 1957 no. 565 in Foro It., 1958 I, 1758; Court of Civil Cassation 5th July 1993 no. 7319 in *Foro It.* 1995, I, 650.

The party who settles or reaches settlement by arbitration on his right, may not damage the same right to impugnment of other shareholders and in this case we see the phenomenon of the diffusion of rights amongst all those who are shareholders. In this hypothesis, they can obtain a profit but not be damaged by a judgement formed b strangers, according to the principle *res iudicata tertiis juvant sed non nocet.*

3. – Conditions of validity and operability of the arbitration clause, as stated above is that it has a binary character, i.e. the dispute is bipolar.

When there is a dispute with a plurality of parties, as is the case of a corporate dispute, the clause of arbitration, operates if *a posteriori* a spontaneous grouping of interests into two homogeneous and opposing groups is determined and therefore we have two parties.

It is not sufficient for the interests to be in abstract groupable into two homogenous poles, but the subjects must spontaneously decide to group together and designate an arbitrator of common trust. Forced grouping cannot be conjectured.

In the case in which different shareholders propose impugnment of shareholders' resolutions, with different arbitrators in their trust, there cannot be a meeting.

Nor can an autonomous intervention by a single shareholder be hypothesized in a pending proceeding, taken by others, if he wants a different arbitrator is to be appointed.

When there are more than two parties and there is not a spontaneous grouping, the arbitration proceedings cannot take place and recourse must be made to an ordinary judge.

The binary clause does not operate either when the company is added to the two opposing parties (alone or grouped together) as an autonomous pole of interest (7).

This is the case in which for example the shareholders' resolutions of incorporation and division (8), capital increases (9), revocation (10), approval of the annual report (11) and so on and so forth.

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(7) Court of Civil Cassation 15.4.1998 no. 2983; Court of Civil Cassation 13.4.1998 no. 2940; Court of Civil Cassation 18.2.1988 no. 1739; Court of Appeal of Milan, 4.6.1990 in *Giur. It.*, 1991, 1, 2, 175; op. cit. loc. cit.

(8) Court of Pescara 17th November 1992 in *Società* 1993, 528; RUBINO-SAMMARTANO, *op. cit.*, 131 and ff: Contra Court of Milan 2nd December 1992 in *Società* 1992, p. 631.

(9) The many include Court of Rome 25.7.1984, 492 with note by A. RORDORF, Deferibilità ad arbitri di controversie relative a deliberazioni assembleari in Società 1985; G. SIRINGARDI, *op. cit. loc. cit.*: Court of Como, 26.5.1989, 951; Court of Naples 6.3.1993, *Società* 1993, 982.

(10) Court of Lecce 3rd July 1997 in *Società* 1988, p. 636.

(11) SALARIA, *Competenza arbitrale controversie di bilancio* in *Società* 1989, p. 951; G.E. COLOMBO, *Bilancio di esercizio e consolidato*, Treatise *Società* VII, Turin 1991, p. 57 and ff.; COTTINO *Le società*, Padua 1999, p. 486 and 487; in case law Court of Civil Cassation, all divisions

This is not the case in the hypothesis in which the dispute has as its object the impugnment of a resolution, adopted by a Shareholders' Meeting, of which the defects objected to concern the convocation (12), the formation and functioning of the Shareholders' Meeting (13) and the formal legitimacy (14).

This occurs a fortiori when the defects determine the legal non-existence of the Shareholders' meeting and therefore of the resolution (15).

Similarly, the clause of arbitration cannot operate in the case in which an impugnment concerns a resolution that took a company action of liability against some directors, because this leads to a multipolar proceeding (16).

The same must be said if the dispute concerns the withdrawal of the exclusion of a partner in a partnership (17) which leads to the dissolution of the company or releases him from his unlimited responsibilities contracts contracted with the company.

4. – The orientation of the Court of Milan as above seems to have recently been taken by the legislator as his own with the law enacted under delegated power no. 366 of 3.10.2001 on the reform of company law.

It extends beyond all proportion the possibility of settlement by arbitration of company disputes.

Under article 12, section 3, the law states « the government must also provide for the possibility that the Memorandums of association of commercial companies contain clauses of arbitration even in departure from articles 806 and 808 of the Code of Civil procedure, for all or some of the company disputes as per section 1. In the event that the dispute concerns questions that cannot form the object of settlement, the clause of arbitration must refer to arbitration according to the law, with it remaining excluded that the judgement of equity and award can be impugned for infringement of the law ».

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sitting together 21st February 2000 in *Giur. It.*, 2000, 1, 2, 1210 ff.; Court of Civil Cassation 10th October 1962 mo. 2910,: Court of Padua 18th December 1986, *Società* 1986, 1092.

(12) Court of Pescara, 17th November 1992 *Società* 1993, 528 Court of Ascoli Piceno 4th October 1993, ibidem.

(13) Court of Appeal, Milan 11th February 1997, Società 1997, 1149; Court of Pavia,7th December 1987, Società 1988, 280; Court of Vicenza 7th October 1982, *Società* 1983, 1888.

(14) MARULLI *Impugnazione di delibere per vizi di forma e competenza degli arbitri in Società* 1993, 356; DE FERRA, *op. cit.*, p. 189; JAEGER, *op. cit.*, 124.

(15) G. VALCAVI in Riv. Dir. Fall. 2001, p. 88 ff., 99 ff.

(16) Court of Civil Cassation 18th February 1988, no. 1739 in *Società* 1988, 476 ff.; Court of Civil Cassation 15th April 1988 no. 2983 amongst others.

(17) Court of Civil Cassation 3rd August 1988 no 7814 *Società* 1988. 1135; Court of Trieste 12th December 1990 *Società* 1991, p. 818; Court of Rome, 26th March 1994 in *Riv. Arbitrato* 1995, p. 457.

Such a radical and hasty reform of the law on this subject arouses serious perplexities that it meets the public interest of the economy of the country.

Recourse to alternative justice in joint stock corporations or partnerships increases out of all proportion the costs and anticipations necessary to establish a proceeding and as such privileges those shareholders who have important interests, whilst it does not offer others (especially the minority shareholders) guarantees of necessary impartiality and an enforceable award, as for example in amicable settlements.

Arbitration still represents today an elitist phenomenon, which has not succeeded in entering the practice of economic contracts between producers, despite the recommendations of the authorities of the Chambers of Commerce.

The class of professional people, from whom to draw arbitrators is not very large and mostly revolves around the same people, who are called to alternate from one arbitration to another.

The clauses of arbitration at present are translated into the forecast of forms of protection which are often flattened on groups and supervising directors of the company, whose influence is exalted.

The normally short length of an arbitration offers little space for the assumption of evidence and for detailed pronouncements, so that under the urgency of the decision and the worry that the deadlines granted by the parties are running out, the normal practice induces summary judgements and confirms that « haste and quality are an ill-matched couple ».

This explains the poor preference of our partners and shareholders for this type of justice and explains the reason which these clauses often end up by disincentivating the choices of investors in the capital of the company.

The law enacted under delegate power also provides for other arbitration clauses, according to the law, extending them to disputes which have as their object rights than cannot form the object of settlement, and this represents a major limit to the general impugnment of company resolutions.

These normative provisions together with the recent reforms of unfair presentation of financial statements, which has become prosecutable with am action at law, and still today, subject to reduced suspension, certainly do not recommend our companies to investors of capital on a globalized financial market.

There is then the almost insolvable problem of reducing to a « binary » model a dispute with a plurality of parties, as is that of a company.

The disputes in which the company is involved, as an autonomous pole of present or potential interests, not having homogenous and conflicting interests or that choose different arbitrators, are « multipolar » and cannot be reduced to a bipolar model, neither can impugnments on divisions, incor-

porations, financial statements, revocation of directors and actions against directors' liability, taken by shareholders' meetings or by individual shareholders, in subrogation of the company.

In hypotheses of this type, the clause of arbitration cannot work.

If a Cooperative Bank can incorporate a bank existing in the form of a joint stock corporation

1. – By Cooperative Banks, we mean both credit societies, which are subject to the special discipline of article 29-30 of the Consolidated Body of Law no. 385 of 1993 and those regulated by articles 33-37 of the banking law. Both these banks have in common the per capita votes of the members, the clause of approval and the limit of their shareholding possession.

In Italy, credit societies had as their pioneer Luigi Luzzati and in general are larger that cooperative credit societies.

These are common in various countries, such as Germany, France and even Canada and Morocco.

They come under the Confédération du Crédit Populaire, which has its head office in Paris.

The cooperative banks are disciplined by articles 33-37 Consolidated Body of Law indicated and are distinguished from credit societies because, as well as the previous characteristics, they have to allocate a considerable share of their annual net profits to insurance funds.

In general they are smaller than the former and are particularly widespread in German-Austrian countries.

The name « banca popolare » in the company name is not always synonymous with the popular cooperative bank, regulated by articles 29/32 of the 1993 Consolidated Body of Law, because at times this only represents the name and distinguishes its historic origin, because in time it has been transformed from a cooperative into a joint stock corporation.

These banks are, to all intents and purposes, subject to the discipline of articles 23-25. 24-57 of the Civil Code and have nothing to do with the previously mentioned banks and their limitations.

The problem we are dealing with here is whether a real credit society can incorporate on which has, on the other hand, the form and legal structure of a joint stock corporation.

Under law previously in force, the problems was not disciplined by the law which did not contain any limitations or prohibitions in this regard.

From « Il Diritto Fallimentare e delle Società Commerciali, 2003, no. 1.

At the time of the law 127/1971, of an incorporation of a Bank, incorporated in the form of a joint stock company into a Cooperate credit society, OPPO, *Scritti Giuridici*, II, Padua, 1994; GALGANO, *Le società*, p. 474; MARASÀ in *Banca e borsa*, 1997, I, 2503; SERRA, *La trasformazione e la fusione delle società*, in *Trattato* edited by Rescigno, Turin, 1985, XVII, p. 315: TANTINI, *Trasformazione e fusione delle società*, in *Trattato* edited by Galgano, CAMPOBASSO, *Diritto commerciale, 2, Diritto delle società*, 1955. p. 543, DI SABATO, *Manuale delle società*, Turin 1995, p. 805 pronounced themselves against this. However, on the sense that the incorporation had to be approved unanimously by the members, COTTINO, *Diritto commerciale*. Padua, 1994, p. 866; CABRAS, *Le trasformazioni*, in *Trattato delle società per azioni* by Colombo and Portale, Turin, vol, VII, p. 1477.

Case law on the merits oscillated between the absolute rejection (Court of Naples, 17th July 1989 in Rep. Foro it., 90, *Società* 878) and the need for the consensus of all the members (Court of Verona, 11th June 1985, in *Foro it.*, 1986, no. 2316).

In the absence of a contrary provision in the law, many years ago there were some examples of incorporation of joint stock Banks into cooperative credit societies. These were those of the joint stock company Credito Varesino, previously belonging top the Ambrosiano-Calvi group into the Banca Popolare di Bergamo or the joint stock company Industria Gallaratese into the Banca Popolare di Lodi.

2. – This last incorporation which took place on 8th June 1992 under law 127/1971, was judged admissible, although the orientation to the contrary of legal literature and case law of the Supreme Court of Cassation in its decision of 14th July 1977 no. 6349 in *Foro it.*, 1998, I, 558.

However, the decision in its motivation under point 3.2 on page 561 specified that the decision referred exclusively to the case in point as it had occurred under the old law 127/71 and that it did not therefore apply to the cases which occurred after article 31, Consolidated Body of Law 385/93 came into force.

The motivation of the decision indicated, against the reference by the plaintiffs to legal literature and case law on the merits under the previous law as well as to art. 31 of Consolidated Body of Law 385/93, that wanted to have the meaning of an authentic interpretation of the previous law, rejected the retroactive applicability of art. 31 of the new Banking Law.

The decision then confirmed the full applicability, in all its strictness, of art. 31 subsequent to the coming into force of the new law.

The decision textually stated « the verification of the legitimacy and therefore of the validity of the resolution of incorporation must be made with reference to the laws in force at the time in which it was adopted (8th June 1992) and therefore provisions issued at a later date (such as those of

Law Decree no. 481 of 14th December 1992 and Law Decree no. 305 of 1st September) cannot for that purpose take on any significance».

In short, the decision of the Supreme Court confirmed that its *dictum* was regulated by the criterion of *tempus regit actum* and therefore law 385/93 applied only starting from when it came into force. It stated again that the incorporation of a bank existing as a joint stock corporation into a co-operate credit society cannot be hypothesized.

From the point of view of the reform of company law, the same conclusion must be reached.

Article 9 of the rules of enactment and transition, section B N of the table of the Legislative Decree approved by the Cabinet on 29th-30th September 2002 on the reform of company law states under article 223 *terdecies* «the rules in force on the date the law enacted under delegated powers continue to apply to the credit societies and agricultural consortia».

The problem could perhaps have been raised in a different way if, for credit societies a different discipline had been adopted that had accepted for them the statute of joint stock corporations of special law, with rules other than those existing.

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