

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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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

(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

(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: SCHOLLMMEYER-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*⁷, 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-

(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 of 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

(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) Court of Cassation, 21st 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.

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

(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 are 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 valute 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

(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 obligationis*, 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.

(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 out 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 the 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 versa 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 if 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 versa 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 is 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.

(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 unjust 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,

(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 fact, 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).

(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 difference 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

(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.

(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. cit.*

(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.