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.