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

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

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

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

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

This annotates the following rule:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This type of interpretation cannot be agreed with.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reference is made to the above in by:

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

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

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

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

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