On the time of reference in the evaluation of the damage

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(67) R. NICOLÒ, *op. cit.*, p. 51.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Moreover, this way of seeing is excessively reductive.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Let us start with the claim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(127) Court of Cassation, Rome, 26th May 1903, reporting judge Mortasa, in G.C. Messa, L'obbligazione degli interessi, Milan, 1932, p. 234.

countries (128). Whilst in Italy, although superseded, it continues to exercise, although at cryptotype level (129), an influence, especially with regard to our subject, due to cultural tradition.

The adoption of the current values in the different subjects considered above (with recourse to *quanti plurimi* in the case of a decrease and attributing profit in the case of a rise) depends on the failure to identify this interest of the damaged party, damaged by the delay. as completely different interest from that damaged, on the other hand, by an unlawful act or by non-fulfilment, which previously occurred.

The theory of the credits of value can be traced back tot his cryptotype and which – as was said – is incompatible with the principles on default and however which could remedy its negative consequences, although from a different point of view of value.

Linked to the principle of *in illiquidis non fit mora*, there is obviously the problem of interest, whether it is considered default or compensatory. The opinions of those jurists and the decisions which do not calculate the interest for the whole period until the decision are coherent with the premiss from which they start (130).

The same cannot be said in Italy for that chorus of opinions that calculate the interest from the claim, sometimes even on the revalued capital, whether they are described as default (131) or compensatory, to obviate the inadequacy of the accepted criteria of evaluation of the damage.

The abandonment of the principle of *in illiquidis non fit mora* is now generally acknowledged in our law, so that it no longer represents a theoretical obstacle to distinguish the two different types of damage.

In this general framework, we can now deal more analytically with their different times of reference in order to measure the different indemnity, Let's start with the time of the basic damage, which comes from the illegal act or from non-fulfilment, The damage consists of a loss or a loss of earnings (132), is essentially a negative economic event and not a simple natural occurrence.

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(128) It is recognized as in force by Spanish law. See amongst the many Supreme Court, 27th April 1978, 28th June 1978 and 11th Dcember 1978, in ALBALADEJO, *op. cit.*, §32, p. 179.

(129) U. NATOLI and L. BIGLIANNI GERI put forward reservations in *Mora accipiendi e mora debendi*, Milan, 1975, pp. 242 ff.

(130) Thus Court of Civil Cassation, 12th February 1979, no. 4053 in Foro it., 1979, under *Interessi*, no. 18 and, *incidenter*, Constitutional Court, 22nd April 1980, no. 60 in *Foro it.*, I, section 1249.

(131) The different date of effect from the claim of from the illegal act in the two different types of damage is justified by the different time of start of the default yet incomprehensibly a default nature is denied to the interest. Court of Civil Cassation, 25th October 1983, no. 558; Court of Civil Cassation, 4th December 1982, no. 6643 in *Mass. Giust. civ.*, 1982, nos. 1921 and 2241.

(132) J.C. TOBEÑAS, *Derecho civil español comun y foral*, Madrid, 1986, III, p. 243, notes

Whenever one of us, an expert, a judge, with a decision, evaluates damage, he makes a decision which is critical but also historical (133), in the sense that a dimension is given to that event, according to the economic values of the time in which it occurs. The procedural rules which impose on the plaintiff the burden of the claim (article 99 Code of Civil Procedure) and that of adducing the proof of the amount of the damage as well from the introductory act of the proceedings (articles 115 and 163, no. 5, Code of Civil Procedure), the subsequent preclusions, any sworn evaluation (article 241 Code of Civil Procedure), the correspondence between what is requested and pronounced (article 112, Code of Civil Procedure), situate the historical nature of the damage and its economic dimension, at a time before the start of the lawsuit and i.e. when the damage occurred.

It also corresponds to the time of the hypothetical favourable situation which could not occur due to the wrongdoing, i.e. the *id quod interest* damaged by the same.

This way of seeing is coherent with the *perpetuatio obligationis* (article 1221 Civil Code) of which mention has been made.

The combined use of the various further indices of identification of the indemnifiable damage, offered by substantial law (articles 1223, 1225 and 1227 Civil Code) then allows refining the temporal localization of the damage and the extent of its dimension.

The time of reference could in theory be identified with that of the unlawful act and non-fulfilment (134) or default (135) or the negative economic event, i.e. the actual damage and the loss of profit (136).

The time of default, in our law, coincides with that of the unlawful action or non-fulfilment in the *portables* obligations (article 1219, section 2, nos. 1 and 3, Civil Code) and is absorbed by the subsequent non-fulfilment in the *querables* obligations (137), as from this point of view, it does not appear to have significant autonomy.

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that unlike the actual damage, the loss of profits « partecipa de todas las vaguedades e incertidumbres proprias de los conceptos imaginarios ».

(133) F. CARNELUTTI, *Teoria generale del diritto*, Rome, 1951, pp. 371 ff. There is both historical and critical evidence: F. CARNELUTTI, *Sistema di diritto processuale*, cit. I, pp. 681, 685, 711.

(134) D. BARBERO, *Sistema di diritto privato*, I, no. 612, p. 709; Court of Civil Cassation, 15th May 1946, no. 590 in Mass. Foro it., 1946, section 143; French legal literature and case law in H. and L. MAZEAUD, *op. cit.*, no. 2253, notes 2,3,4 and 5.

(135) For the reference to the legal claim; DE RUGGIERO-MAORI, op. cit., II, p. 44.

(136) Amongst the many: CHIRONI, *Colpa extracontrattuale*, cit., loc. cit., G.A. RAFFAELLI, in Foro pad., 1946, I, section 89; Court of Civil Cassation, 14th January 1946, no. 31, in Foro it., 1944-46, I, section 1; Court of Appeal of Genoa, 2nd September 1946.; Court of Appeal of Genoa, 9th July 1946; Court of Appeal of Bologna, 11th August 1945, in *Rep. Giur. it.*, 1944-47, under *Resp. civ.* nos. 192, 195 and 198.

(137) Also U. NATOLI and L. BIGLIANZZI GERI, *op. cit.*, pp. 24 ff.

The unlawful act and non-fulfilment are more properly the causes of the damage rather than the damage itself. They are « upstream » if the economic consequences in which the damage is concretized and this is particularly obvious in the loss of profits.

The damage can have an evolution in time, as is the hypothesis of its subsequent worsening which can culminate in the loss of the commodity or in the death of the victim. There does not appear any doubt that the decisive moment is that of the damage, even in its evolutionary manifestations (138), and not of its cause, the process of which is presumed as exhausted, The time of the guilty conduct however is significant as that of the prior direct and immediate cause of the damage, as it is necessary in the seriation of the phenomena to identify the subsequent time of the damage, which is indemnifiable (article 1224 Civil Code).

In a system based on the principle of the total compensation of the damage, the matter should finish here.

Our legal system, contrary to what is commonly stated (139) is nevertheless inspired – as stated – by the opposite principle of the indemnity of the damage within certain limits (articles 1225, 1227 and 2056, section 2, Civil Code).

It must be remembered here that that part of the damage which could have been avoided (article 1227, section 2, Civil Code) or, in negligent non-fulfilment, only that part of the damage that could be foreseen at the time of the contract cannot be indemnified (article 1225, Civil Code).

We do not agree – and it is worth repeating it – with the current opinion that debases avoidability to a merely passive behaviour and not to active cooperation, up to the replacement of the commodity, insofar as it is possible, as it should be.

Nor is it acceptable that the foreseeability is reduced to the natural consequences and not also to the economic consequences (i.e. to the an and not to the quantum) of the negligent conduct or that it is discounted a priori, as when it is educed from the abstract variability in the two meanings of prices (140). Foreseeability must concern the favourable situation, which has not occurred due to the wrongdoing, as a whole, and i.e. the interest damaged in all its aspects, including its economic dimension, i.e. the damage.

This matter is of particular interest for the loss of profits where preventing the indemnifiability of the « dreams of earning », art. 2056, section 2, Civil Code, imposes a « fair appreciation of the circumstances of the

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(138) This opinion is accepted in the various legal system. In Italy: Court of Civil Cassation, 22nd January 1982, no. 442, in *Mass. Giust. Civ.*, 1982, p. 157, amongst the many.

(139) Amongst the many: Court of Cassation, 19th September 1985, no. 4710 in *Rep. Giust. civ.*, 1985, p. 748, no. 166.

(140) We do not agree with Court of Civil Cassation, 28th May 1983, no. 3694 in *Mass. Giust. civ.*, 1983, p. 1310, on the abstract character of foreseeability.

case». Here the foreseeability of the economic behaviour of the creditor that would have generated that profit and its dimensions must be taken into account.

The conclusion, in the light of all these remarks, is that the time of reference of the evaluation is that of the occurrence of the damage and stops where its worsening could have been avoided, and, as far as negligent non-fulfilment is concerned, reaches as far as where the damage could have been foreseen.

They thus represent the limits of reference of the indemnifiable damage to be concretely ascertained.

A fortiori, the damage cannot be evaluated at the decision, indemnity or claim, Whatever the distance between this opinion and the dominant view, it can be measured by saying that at present the damage is evaluated according to the indemnity, whilst here the proposition is to evaluate the indemnity according tot eh damage, within the limits in which it can be indemnified. The credit is certainly pecuniary, as it concerns the amount of money equivalent to the interest damaged by the unlawful action or by the non-fulfilment.

It is illiquid, in the sense that it requires liquidation for the amount of money to remain unquestionably fixed. The nominalistic principle is applied to all the pecuniary credits both liquid and illiquid and it is arbitrary to reduce it only to liquid ones. The equivalent credit, as mentioned, is therefore subject to the nominalistic principle, and cannot fail to be so. In this sense its current qualification as credit of value and the theoretical legitimization of the category is therefore refused.

17. – Let us now go on to discuss the further and different damage caused by the delay with which the equivalent is paid.

The damaged interest is that of being able to have the amount of money equivalent and it ranges for the whole duration of the negligent delay from the placing in default (which is of significance for these purposes) to that when the indemnity is concretely paid.

The debtor is in default in paying the equivalent from the non-fulfilment or from the unlawful act, as placing in default again is not necessary (141).

The compensation of the delay from delay, which is to be added to that due to an unlawful action or non-fulfilment, the object of the evalua-

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(141) The fact that the indemnity can be collected from its occurrence is also valid for the contractual damage and means that the damaging party is in default from that time, where it is deemed that the relative performance must be made to the address of the creditor, in accordance with article 1219, section 2, no. 3, Civil Code. Considering it differently, the default will take effect from the claim of indemnity in accordance with article 1219, section 1, Civil Code.

tion, takes place through the common ways of indemnity provided for pecuniary obligations, to which that of compensation for a monetary equivalent belongs, i.e. with recourse to the key rule of article 1224 Civil Code, of vast application to illiquid credits not less than to liquid credits. The fact that this has been limited until here to liquid credits is to be put into relation with the principle that has been abandoned and yet is still influential, at cryptotype level, as mentioned, Therefore the legal interest is due as default interest (142).

The rule is that illiquid credits do not produce interest,, with the exception of the case of default. It is hardly surprising that non-default interest presupposes liquid credits; this is the case of the interest as consideration for a liquid and collectable credit (article 1282, Civil Code) (143) and compensatory interest for a liquid and non-collectable credit (article 1499, Civil Code) (144).

Only the default justifies that an illiquid credit, like the compensation of damage, generates interest. This is explained by the fact that here the legislator has anticipated the collectability of the credit, to the time the damage occurred, so that the time necessary for its liquidation passes in damage of the damaging party rather than the damaged party (145).

The principle that the damaging party immediately owes the indemnity to the damaged party and is therefore defaulting by negligence until its occurrence (*mora ex re, mora quae inest*) has thus been codified for eminent reasons of legislative policy.

It is incomprehensible how the dominant opinion extends the compensatory interest from a liquid and collectable credit, under article 1499 Civil Code, to a credit which is illiquid and collectable, like that of the compensation of damage.

A credit of value is not suitable on its side to produce interest both because – as stated – the default is extraneous to it and because there is no relationship of homogeneity between them. The monetary interest is additional, proportional and periodic with respect to a pecuniary obligation and necessarily presupposes it (146).

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(142) The following agree on the default definition: MESSA, op. cit., p. 246; ASCARELLI, op. cit., pp. 340 ff.; DE CUPIS, op. cit., p. 487; GIORGIANNI, *L'inadempimento*, Milan, 1975, p. 163.

(143) The wording of article 1282 Civil Code has abandoned the tendency to extend the interest as a consideration to the illiquid credits which had emerged in article 17 of the draft.

(144) This is decisive with regard to the reference to the « price » under article 1499 Civil Code.

(145) This solution is the opposite to that underlying the principle of *in illiquidis non fit mora*, which had its origins in a passage by VENULEIUS, according to which *improbus non podest videri qui ignorat quantum solvere debeat.*

(146) In this sense, G.C. MESSA, *op. cit.*, p. 435.

The obligation for the damaging party to compensate the greater damage from default, under article 1224, section 2, Civil Code, also derives from the *mora quae inest* in paying the pecuniary indemnity, as is the case in every pecuniary obligation. This occurs within the limits in which it is foreseeable under article 1225 Civil Code, as it is normally negligent.

What is to be understood by this greater damage from default in pecuniary obligations is now a subject dealt with by abundant literature and case law (147).

It is however to be excluded that it can be identified in the loss of purchasing power of the money, for the reasons shown with regard to credits of value. The author has written extensively on this subject and in particular in this journal, 1981, II, pp. 332 ff.; to which reference should be made for a wider explanation. This greater damage, in my opinion, is to be identified in the possible difference between the rate of legal interest and that of the market.

The recovery of this difference, from this point of view, corresponds to a right of indemnity for the delay by the damaged party to which otherwise he could aspire within the very risky limits in which enrichment of the damaging party is proved under article 1207 Civil Code. This solution therefore represents the best protection of the damaged party, in line with *quod plerumque accidit* (148).

The total default damage is thus identified in the presumable loss of profits of a normal financial use or with the cost of replacing the money, i.e. the loan. It is made up of the normal remuneration of the saving (payable bank interest, dividends of public securities etc.) or, where replacement is proven to be necessary, by receivable interest.

At this point, we must also add that the market interest is notoriously influenced by the expectations of inflation and the various conditions of the demand for credit. It is therefore foreseeable and is not reasonably avoidable.

Now we have interest that is well above the rate of inflation (the so-called real positive interest) whilst until not very long ago we had interest below it (the so-called negative real interest) due to the exuberant liquidity. Today, summing the legal interest to the difference with respect to the greater rate of inflation, we have a measure below the *quod plerumque accidit*, whilst once it was exuberant.

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(147) On the question, from the many. R. NICOLÒ, op. loc. cit.; GRECO, op. cit., pp. 103 ff.; A. TORRENTE, in *Foro it.*, 1945, section 405; A. DE CUPIS, op. cit., p. 434; and recently R. PARDOLESI, in *Foro it.*, 1986, I, section 1265 ff.; A. AMATUCCI, in *Foro it.*, 1986, I, section 1273; G. VALCAVI, in *Foro it.*, 1986, I, section 1540.

(148) The reference to the market interest rate was already known in Justinian Roman law where it was up to the judge to determine the rate of interest according to the *mos regionis*: see CERVENCA, op. cit., p. 297, no. 8, p. 300.

It is easily foreseeable that, due to the rapid drop in inflation, the reference to the rate of inflation will be increasingly abandoned in favour of the market interest which also represents the price of money as time goes on. It thus covers the lesser value of the deferred liquidity with respect to that immediately available (the so-called *utilitas temporis*) in which the most reasonable parameter of reference is to be recognized.

This opinion has recently been accepted, in substance, by the joint sitting of the divisions of the Court of Cassation, with the ruling of 5th April 1986, to which reference should be made.

In the event that the damaged party is resident abroad and proves having suffered damage from the exchange rate. he will be entitled to the relative difference, as well as the normal yield of the money, in which he would have exchanged it.

18. – The conclusion of all this discussion is, in the final analysis, the following: there is correct compensation of the damage, adding to the capital corresponding to the equivalent of the damaged interest, evaluated according to the values current at the time of the damage, the normal subsequent monetary yield, under article 1224 Civil Code, that would have been realized by a risk-free financial investment for the whole period of default in fulfilling the relative pecuniary obligation.

In this way, the delay of the debtor is demotivated and the creditor is placed in the situation in which he would have been if he had collected the indemnity at the time the damage occurred and he has put it to normal non-risk monetary interest.

Reference is made to the above in:

F. Parrella, *Inadempimento del debito di valuta; analisi ragionata dell'evoluzione della giurisprudenza tra indirizzo teorico ed esigenze concrete*, in *Riv. dir. comm.le*, 1988m p. 69, note 12; M. Majenza, *Quantificazione dei danni patrimoniali e teoria della differenza*, *Il Corriere giuridico* 1989, p. 1202; V. De Lorenzi, *Obbligazione, Parte generale, sintesi di informazione*, in *Riv. dir. civ.*, 1990, p. 262; R. Pardolesi, *Crediti previdenziali, tutela differenziata e punitive damage*, in *Foro it.*, 1991, I, p. 1325; U. Breccia, *Le obbligazioni*, Milan, 1991, pp. 658, 661: A. Luminoso, *Della risoluzione per inadempimento*, in *Commentario Scialoja Branca*, Bologna, 1990, pp. 121, 219, 221, 257, 260, 266, 269, 270, 271, 272, 274, 276, 277, 281, 283, 288, 302, 313, 318; M.C. Dal Bosco, *Della compensazione giudiziale, ovvero di un'apparenza normative*, in *Riv. dir. civ.*, 1991, p. 754, note 12.

Also by the author on the same subject:

– «*Ancora sul tempo di riferimento nella stima del danno*» in Rivista di Diritto Civile, 1991.

– *Intorno al concetto di* perpetuatio obligationis *e al tempo di riferimento del risarcimento del danno da inadempienza contrattuale*, in Rivista Diritto Civile, 1992, II, 385 and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 293.
– «*Sulla natura dell'obbligo di restituzione e di quella di risarcimento del danno conseguenti alla risoluzione del contratto per inadempienza*», in Foro Padano, 1992, I, p. 53 and ff. and in L'Espressione monetaria nella responsabilità civile, Cedam, 1994, p. 309.