On the compensation of the damage due to illegal conduct or non-fulfilment and that of the delay with which the indemnity is paid

1. – The decision under examination extends the question from the indemnity of an illegitimately expropriated commodity to the compensation of the damage in general.

In this respect, the decision makes a declaration of principle of extreme importance, where it states that, on the liquidation of damage, we do not find ourselves facing a single damage but two different damages, absolutely distinct from one another, and which also require different indemnities.

The first damage is that deriving from the illegal act or from the non-fulfilment, whilst the second is that deriving from the delay with which the indemnity is made.

In this regard, the Supreme Court correctly states « the full autonomy both from the conceptual point of view and the different positive discipline of the delay with respect to the non-fulfilment ».

The Court, in the case of an illegitimately expropriated commodity, identifies the basic damage « in the economic value of the lost commodity which must be evaluated « with regard to the time of the loss suffered ».

That deriving from the delay is correctly defined as the « diseconomy that weighs heavily on the creditor, due to the lack of prompt enjoyment of the equivalent in money of the damaged commodity ».

This is equivalent to evaluating, in general, the damage from the illegal action or from non-fulfilment, with respect to the time when it occurred and not to the decision (*res iudicandae tempus*).

From « Giurisprudenza italiana », 1991, I, 1, p. 1227 and ff, and from « L'Espressione monearia nella responsabilità civile », Cedam, 1994.

The above annotates the following decision:

COURT OF CASSATION, SECTION I, 20.6.1990, No. 6209, President Granata, Reporting Judge Carbone, Public Prosecutor Amirante: ANAS v. Scopelliti: « The damage from non-fulfilment must be liquidated with reference to the time at which it occurs and not tot hat of liquidation. The damage from delay consists of the loss of the *utilitas* that the creditor would have had from the sum due, in the place of the commodity if it had been promptly paid and must be fairly indemnified with legal interest and, in the case of the loss of purchasing power of the money, with revaluation. The interest must not be related to the final moment of the taxation, but to the different and subsequent changes of the periodic purchasing power. »

The damage from delay can be translated, to use the words of the Supreme Court, « in the loss of that *utilitas* that the creditor would have had from the sum originally due in place of the commodity » and covers the whole duration of the delay, until the indemnity is concretely made.

These propositions have a precedent in the decision of the Court of Rome, 22nd February 1988, in Foro it., 1989, I, p. 255, with note and references in Foro it., 1989, I, p. 1988.

This order of ideas is also agreed with by the author of these lines who anticipated it from as early as 1981 (1) and has studied it in depth and repeated in his subsequent writings (2).

This distinction between the two different types of damage (moreover that from delay is presumably negligent, unlike that from an illegal action or from non-fulfilment, because the latter may be wilful or negligent) does not represent the only merit of this decision.

The Supreme Court also felt the need to study in depth legal literature on conveyances, dominant in civil liability and correctly raised the problem of justification, in our legal system, of the so-called debt of value.

In this regard, that other motivation takes on great importance, stating « nobody wants to deny the empirical and casuistic origin of the category of the debt of value which, although opposed from the conceptual point of view, continues to show a considerable capacity of expansion, legitimizing the jurisprudential effectiveness on the ground ».

It appears very significant to those who are critical and have been so for some time, not only on the conceptual level, of this category – like the author of these lines – that the Supreme Court has abstained from taking the defences of this category on the dogmatic level.

We are increasingly convinced that a debt that has as its object an abstract value or an abstract money cannot by hypothesized which can be considered a yardstick of the legal tender, because, due to the nominalistic principle, *mensura* and *mensuratum* coincide.

In the same way, the fact that the debtor, who is not to find himself in default, has to pay re-valued money to the creditor appears at the antipodes of our system and this is even inconceivable if it is the creditor who is in default, for having refused the real offer of a sum which was then revealed as adequate.

The illiquid obligation – in our firm conviction – is a pecuniary obligation and is governed by its specific discipline.

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(1) G. VALCAVI, *Riflessioni sui c.d. crediti di valore, sui crediti di valuta e sui tassi di interesse*, in *Foro it.*, 1981, I, pp. 2112 ff.

(2) G. VALCAVI, *Il tempo di riferimento nella stima del danno*, in *Riv. dir. civ.*, 1987, II, pp. 31 ff.; Id., *Indenizzo e lucro del creditore nella stima del danno*, in *Quadrimestre*, 1986, p. 681; Id., *Il problema degli interessi monetari nel risarcimento del danno*, in *Resp. civ. e prev.*, 1987, pp. 3 ff.; in *Foro it.*, 1986, I, pp. 1540 ff. and in ivi, 1988, I, pp. 2318 ff.

The only discount that can be hypothesized in time of the valued expressed in money is that represented by the calculation of the mere loss of profit of the quantity of money (*quod interest* according to the *quod plerumque accidit*) in the period under consideration.

the recourse to theoretical constructions of the type of that of the debt of value, could have its justification as an inescapable equitable remedy, in those systems and for those periods which had the experience of hyperinflation (and the related exaggeration of the normal yield of money during the delay) and however they did not have any other legal indemnity than the inadequate interest of 5%.

This was the emblematic case of Germany in the 1920s and many countries affected by hyperinflation (3).

A need of this kind no longer has any raison d'être after the introduction of a system of rules which admit « the compensation of the greater damage from default » and thus allow discounting the debt, on the basis of the overall normal yield of money (article 1224, section 2, Civil Code, article 106 Swiss Code of Obligations, article 1153 of the French Civil Code etc.).

The decision under examination, although not aware of it, also abandons on the same operating plan the « valoristic » method, where it is forced, even by equitable needs, to state that there has to be a « gradual re-evaluation » of the damage, for the period after its occurrence and not only from its occurrence to liquidation.

This is also in order to calculate the legal interest.

This is equivalent to attributing – as we shall say – the character of an indexed pecuniary debt to the obligation of compensation, rather than debt of value and however the solution remains unacceptable both because it is not legitimized by any rule and because it reaches results even greater than the same accumulation of re-evaluation and interest.

Going on to deal with monetary interest, the Supreme Court takes a step back with respect to the previous decision no. 3352 of 1989 (4), where it once again qualifies the interest as compensatory rather than default.

It also recognizes that this interest is not justified « by any rule » and is based only on equity.

This reference to equity appears to be a criterion, which is on the one hand too general, and on the other contrasting with the opposite solution of decision no. 5299 of 1989 (5) of the Divisions meeting in full which ex-

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(3) G. SCADUTO, *I debiti pecuniari e il deprezzamento monetario*, Milan, 1924, pp. 130 ff.; C.L. HOLTFRERICH, *L'inflazione tedesca*, 1914-23, Bari, 1989, p. 301.

(4) Court of Civil Cassation, 18th July 1989, no. 3352 in *Foro it.*, 1990, I, p. 933.

(5) Court of Cassation, all divisions sitting together, 1st December 1989, no. 5299, in *Foro it.*, 1990, I, p. 427.

cludes the accumulation of re-evaluation and interest, in the case of creditors of currency and even of a pensioner. The inequality of treatment and the virtual lack of constitutionality of such a criterion, undermine the reference of equity.

Due to the importance of the subjects covered, a discussion on all this that will not necessarily be brief is required.

2. – Let is begin from that part of the decision in which, after having correctly distinguished between the two types of damage, states that the damage due to unlawful action or non-fulfilment, must be evaluated according to the current values when it occurred.

The line of thought of the Supreme Court, in this respect, is unequivocal and peremptory.

With regard to a fact which although lent itself to liquidation inclined to *rei aestimatio*, it repeatedly stated that « the private individual is due to receive the economic value that must be attributed to the commodity at the time the loss occurred ».

And, in no uncertain terms, that the diseconomy « must be liquidated with reference not to the current value at the time of the liquidation but to the value as it was evaluated at the time when [the loss] occurred ».

Once and for all, this is tantamount to excluding the reference to the *tempus rei iudicandae.*

This order of ideas was anticipated by the author of these lines in « The time of reference in the evaluation of the damage » and other writings and reference should be made to their extensive motivations, obviously in line with this decision.

Moreover keeping the investment of the commodity in kind, seems a contradiction, such as to postulate the liquidation of the damage on the basis of the current prices on the decision and at the same time considered converted into a liquid sum, such as to legitimize the *medio-tempore* enjoyment of the legal interest for the delayed payment of the indemnity (6).

Recently, Luminoso has once again proposed in legal literature (especially with regard to the damage from contractual termination) the opinion favourable to fixing its evaluation at the time of the decision, even « tendentially ».

The remark has been made on the solution now accepted by the Supreme Court that it has not followed legal literature very much and is not very articulate, as it does not foresee a plurality of indications (7).

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(6) G. Valcavi, *L'indenizzo del mero lucro cessante come criterio generale di risarcimento del danno da mora nelle obbligazioni pecuniarie*, in *Foro it.*, 1990, I, pp. 220 ff.

(7) A. Luminoso, *Il momento da prendere a base per la determinazione e la stima del danno da risoluzione*, in *Resp. civ. e prev.*, 1989, pp. 1072, 1075, note 21, 1078.

As if a solution of coherent application, based on the principle of non-contradiction were not to be preferred. This author infers from article 2058 Civil Code the rule that the damaged party is entitled to the equivalent calculated at the last moment because he would be entitled up to that time of the specific recovery. In particular, the contractual damage should be evaluated on the decision, because the majority of cases deal with commodities that would have remained (or so we should presume) in the capital of the damaged party until that time.

The exception would concern only the failed payment of money or commodity for instantaneous consumption, in which case the damage should be evaluated on its occurrence (8).

The unacceptability of this has been shown elsewhere by the author of these lines.

Here it is only the case of noting that not only it is arbitrarily supposed that the commodity would have remained until the decision in the capital of the damaged party, but even the value of replacement as new and, in addition, without costs of storage, without financial charges and even in contrast with the *perpetuatio obligationis* (9). This is absolutely different from the *quod plurenque accidit.*

Here it must be observed that the rule considered above is not inferable from article 2058 Civil Code because this rule only contemplates the right to compensation of the damage « by means of specific recovery » in the cases in which it is « possible » and is not « excessively onerous, with respect to that for its equivalent » (10). This is a completely different proposition compared to that which would attribute the right to « specific fulfilment » up to the decision, even after the request for the termination of the contract or the termination *ipso iure*, in contrast with article 1453, section 3, Civil Code.

This author has even put forth that an evaluation of the damage due to termination, referred to a time prior to the decision, would be « unjustly penalizing for the damaged party » because the termination does not eliminate the non-fulfilment. It has been said that this, despite the termination of the contract, « preserves and cannot fail to preserve its importance both for the past and for the future » (11).

This order of ideas is absolutely unacceptable.

Fulfilment does not necessarily always succeed in the interest of the creditor and consequently remaining obliged to the counter-supply beyond

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(8) A. Luminoso, *op. cit.*, pp. 1075 ff.

(9) G. Valcavi, *Il tempo di riferimento*, cit. in *Riv. dir. civ.*, 1987, II, pp. 44 ff.

(10) Trabucchi-Cian, *Commentario breve al codice civile*, under article 2058 Civil Code., p. 1435.

(11) Trabucchi-Cian, *Commentario breve al codice civile*. under article 2058, Civil Code., p. 1435.

a reasonable time. In the case that the fulfilment takes too long, with the consequent subjective and objective uncertain factors, although the economic value of the service could abstractly configure an advantage, the creditor could prefer the solution of being freed from the constraint of his obligation, rejecting the other's obligation and claiming compensation for the damage.

In short, the legal system leaves the creditor free to provide for his own interests, depending on what he prefers. What else can the legal system do, in the face of the non-fulfilment of the debtor except offer the creditor the remedy to suspend his service (*exceptio inadimpleti non est adimplendum*) and guarantee the possibility of choosing freedom from the commitments made and the compensation of the damage, alternatively to the action of fulfilment with the consequent costs and relative risk?

The conclusion therefore of taking its occurrence as the time of reference of the evaluation of the damage appears the only one that is acceptable and coherent with what is laid down by article 1223 Civil Code on indemnifiability of the direct and immediate consequences, article 1225 Civil Code on the foreseeability of the damage and its amount and article 1227, section 2, Civil Code, on the avoidability of the damage (12).

This criterion also appears the only one than can be hypothesized, with respect to the capital conception of the damage, according to the *Differenztheorie*, also considered that the damage can consists of the failure to enjoy the value of the use of the commodity and not necessarily in the loss or in the loss of earnings relative to its value of exchange.

3. – Let us now go on to that other part of the decision, which, after having correctly distinguished the damage due to unlawful action and from non-fulfilment (to be evaluated with reference to the time of its occurrence) from the damage subsequent to delay, then re-evaluates the first « to time-discount it on the decision ».

The legal interest is then added, as compensation for the damage from delayed payment.

This very contradictory and inadequate conclusion has been justified in the past by the different nature of the credits of value (to which the damage is alleged to belong), with respect to those of currency.

The legitimacy of this category has been opposed, of the conceptual level, by the author of these lines and the Supreme Court, showing that it was informed of it, not only did not openly assume its defences, but openly

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(12) G. Valcavi, *Evitabilità del maggior danno ex art. 1227, 2° comma, c.c., e rimpiazzo della prestazione non adempiuta*, in *Foro it.*, 1984, p. 2820; Id., *Sulla prevedibilità del danno da inadempienza colposa contrattuale*, in *Foro it.*, 1990, I, pp. 1846 ff.

takes into consideration the criticisms, where it states that « nobody wants to deny its empirical and casuistic origin ».

It has its origin in the period of hyperinflation in Germany after the First World War, from the attempt to remedy the inadequacy of legal interest against the flight from the Mark fixing the value of the non-pecuniary service with the theoretical justifications of « maintaining the base of the contractual service » or the « presupposition » of the « good faith » and in conclusion stating that the indemnity is « removed from the principle of nominal value » (13).

However, it is a given fact that the extreme fragility of this distinction and the attempt to give it theoretical dignity, soon appeared with the tendency to extend revaluation to pecuniary credits, with the nature of a mortgage (14), and was superseded by the subsequent phase of economic stabilization.

Today, in another country affected by hyperinflation, such as Brazil, indexation still concerns both the pecuniary service and the non-pecuniary counter-service, thus not distinguishing between the two (15).

On closer examination, the explanation of the concept of « debt of value » offered by its most authoritative advocate and by others, is resolved in a series of apodictic claims of principle.

Moreover, this does not appear defined in positive terms, but only by recourse to « merely negative » criteria such as those whether it is a question of « not subject to the principle of nominal value of money » (16), pr that « is not quantitatively pre-determined and i.e. is illiquid » (17) or it « becomes evident, in particular, in the case of the increase in the purchasing power of the money rather than its decrease » (18) or lastly whether it is a question of a debt of « abstract value » or of « purchasing power of money » (19).

It is hardly necessary to observe that in general the character of a debt of value is not given to that relative to the non-pecuniary counter-service where its value has been converted into a foreign currency (today the ob-

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(13) For bibliographical references on the theoretical justifications in German legal literature between the World Wars (respectively Oertmann. Rabel, Kruckmann, Nipperdey, Geiger, Walsmann and others) see G. SCADUTO, *I debiti pecuniari e il deprezzamento monetario*, Milan, 1924, pp. 147 ff. In case law: Supreme Court of the Reich, 21st September 1920, in C.L. HOLTFRERICH, *L'inflazione tedesca*, 1914-1923, Bari, pp. 301 ff.

(14) Supreme Court of the Reich, 28th November 1923 in C.L. HOLTFRERICH, *op. ult. cit.*, p. 318.

(15) There both the transactions of money or goods deferred in time are indexed to the bonds of the National Treasury.

(16) T. ASCARELLI,, *Le obbligazione pecuniarie*, Bologna, 1963, pp. 443, 558.

(17) T. ASCARELLI, op. cit., p. 472.

(18) T. ASCARELLI, op. cit., p. 445.

(19) T. ASCARELLI, op. cit., p. 457 ff.

ject of measures of currency deregulation) and which in itself has an obvious pecuniary character. Similarly, the generalized extension of re-evaluation by a phenomenon of hyperinflation to any variation of inflation and thus from the flight from money to the opposite one of the tendency to keep assets in a liquid form, despite the decrease of the purchasing value as happened at times close to us (stagflation, slumpflation) does not appear justifiable (20).

The ground where the concept of debt of value shows its absolute inadequacy concerns the obligation of compensation of damage from an unlawful action that has a sum of money as its object.

The obligations to return money, in the case of termination of a contract, are commonly held to be « debts of currency » when they concern the non-guilty party and « of value » when they concern the non-fulfilling party (21).

Debts consequent to pronouncements of nullity, annulment, rescission or price reduction are considered debts of currency (22). Similarly, it is known that the debt of the insurer with the insured is deemed a debt of value and not of currency (23), whilst on the contrary, that of general liability is considered a debt of currency (24).

The credit of the insurer with the damaged party is considered a credit of value (25), whilst that claimed back from the insured for the sums paid to the third party, would be credit of currency (26) and so on.

The reason for this different dogmatic classification and the different treatment of these hypotheses cannot be understood here. Similarly, the qualification of the damage, as a debit of value, on the presupposition that a distinction should be made here between *mensura* and *mensuratum* (27), which is also adopted by this decision, does not appear satisfactory as the

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(20) Amongst the many, DON PATINKIN, *Moneta, interessi e prezzi*, Padua, 1977, p. 17. 26 ff., 45 ff., 253 ff. and amongst the others, G. VALCAVI, *Rivalutazione monetaria o interessi di mercato?* in *Foro it.*, 1980, I, pp. 118 ff.; Id., *La stima del danno nel tempo con riguardo alla inflazione, alla variazione dei prezzi e all'interesse di mercato* in *Riv. dir. civ.*, 1981, II, pp. 332 ff.

(21) Court of Civil Cassation, 12th June 1987, no. 5143; id., 26th February 1986, no. 1203, in Riv. dir. civ., 1990, II, pp. 264 and 265.

(22) Court of Civil Cassation, 12th November 1986, no. 6636 in *Giur. it.*, 1987, I, pp. 1, 1852 ff.; id., 6th February 1989, no. 724, ivi, 1989, I, pp. 1, 1723.

(23) Court of Civil Cassation, 4th June 1987, no. 4883 in *Foro it.*, 1988, I, p. 503.

(24) Court of Civil Cassation, Full sitting of all divisions, 29th July 1983, nos. 5218, 5229, 5220, in *Riv. dir. civ.*, 1990, II, pp. 264, 265; Court of Civil Cassation, 5th July 1985, no. 4064, in *Foro it.*, 1985, I, p. 2588.

(25) Court of Civil Cassation, Full sitting of all divisions, 13th March 1987, no. 2639 in *Riv. dir. civ.*, 1990, II, pp. 264, 265.

(26) Court of Civil Cassation, Full sitting of all divisions, 13th March 1987, no. 2639 in *Foro it.*, 1987, I, p. 3262, Court of Civil Casation, 22nd February 1988 in *Giur. it.*, 1988, I, pp. 1, 1440 and ivi pp. 450 ff., 468 ff.

(27) T. ASCARELLI, *Le obbligazioni pecuniarie*, cit., pp. 450 ff. and 468 ff.

grounds for this presupposition should be proven, as in a system based on the principle of the nominal value, *mensura* and *mensuratum* coincide.

From a certain point of view, the distinction between *aestimatio* and *taxatio* is not acceptable because the former concerns the damage and the latter refers to its compensation and therefore to two different phenomena.

Lastly, the various hypotheses considered by legal literature, do not seem ot justify the construction of a single dogmatic category of debts of value because out legal system does not contemplate monetary re-evaluation, for any of them. but rather fixes a time for the evaluation of the damage (28).

4. – At this stage, let us look at the reasons adopted by the Supreme Court – even on an empirical and casuistic level – to justify the re-evaluation of the damage due to unlawful action and non-fulfilment, whilst legal interest should indemnify damage due to late payment. The decision states, in this regard, that « the re-evaluation is aimed at restoring the situation of the capital pf the private individual, placing him in the situation in which he would have been if the event had not occurred » and in short, « fulfils the technical function of exactly determining the object of the non-fulfilled service », or to put it better, « to time-discount it to the decision ». Unlike this, it attributed to the legal interest the function of covering the diseconomy of the damaged party, caused by the delay, and that is « by the loss of the *utilitas* that the creditor would have drawn from the sum originally due ».

However, these statements conceal the basic error of not realizing that the two remedies are called to compensate the same damage that originates in the delay. Once the specific indemnity has been correctly fixed, at the time of the occurrence of the damage (29), the subsequent re-evaluation and the interest essentially tend to eliminate the later diseconomy, caused by the delay with which the basic indemnity is paid. In this regard, this accumulation cannot fail to appear wrong, because the function of time-discounting the lesser value of a service deferred in time, is generally assigned to the monetary interest, and this is acknowledged in particular by this decision (30), where it described the interest as compensatory which means

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(28) Thus the time of the open succession in the hypothesis as pe art. 747 Civil Code, that of the present date under art. 948 Civil Code, the time of the expense and improvement under article 936 Civil Code, that of the redelivery of the dead stock in the hypothesis of art. 1640, of the live stock under article 1641 Civil Code as well as in that under art. 2163 Civil Code, that of the start of the grazing rights or of the division under art. 2181 Civil Code and so forth.

(29) This rule is drawn from the introduction of article 1219, section 2, no. 1, Civil Code, which reversed the old aphorism that in *illiquidis non fit mora* which dated back to an old passage by Venuelius.

(30) FISHER, *Opere*, Turin, 1974, pp. 814, 833, WICKSELL, *Opere*, Turin, 1977, p. 377; in this sense, although approximately, KEYNES, *Opere*, Turin, 1975, p. 253; on our subject G. VALCAVI, *Riflessioni sui c.d. crediti di valore*, cit. in *Foro it.*, 1981, p. 2117.

nothing other than attributing to them the function of time-discounting the equivalent due.

To realize this, it is necessary to consider the *quod interest* according to the *quod plerumque accidit* which represents the basic rule.

It does not appear that it can ordinarily be supposed that the damaged party would have once purchased or kept in his capital the commodity not performed or removed, such as to justify the time-discounting of its value and on the other hand he would also have had the availability of the pecuniary equivalent, such as to enjoy its yield during the delay and due to this. This accumulation of the time-discounting of the value of the commodity not performed or taken away, and the pecuniary equivalent in which it is concretized, is far from what would ordinarily have happened and contrasts with the distinction of the two different damages, on the contrary confusing one with the other.

From another point of view, the re-evaluation does not appear acceptable because it contradicts the postulate that the damage must be evaluated at the time of its occurrence. Indeed, the criterion is solved, although indirectly. in evaluating the damage « on the decision », instead of on its occurrence, although through the mediation of the changed level of prices and i.e., the current value of the money.

In conclusion, this is equivalent to evaluating the damage with regard to the *tempus rei judicandae.* The evaluation of the damage at the time of its occurrence, ends up by taking on the importance of a merely historical value, whilst the last one and that of the actual evaluation, would be made up of the value re-evaluated at the decision. What cannot be understood, according to this way of seeing, is the scope and role of interest.

On the other hand, recourse only to re-evaluation absolutely does not appear possible, because the height of this is variable and today it is also considerably below the normal yield of money that represents the *quod interest* according to the *quod plerumque accidit* (31). In another sense, however, recourse to legal interest of 5% alone could not and cannot appear adequate to cover the damage from late payment, in relation to the normal yield of money, and thus to time-discount the compensation of the damage from unlawful action or non-fulfilment.

In the past, the compensation of the greater damage contemplated by article 1224, section 2, Civil Code, was to obviate this inadequacy, on condition that this coincided with the normal yield of money and delay means default, as will be said.

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(31) For a comparison in this respect, G. VALCAVI, *L'indennizzo del mero lucro cessante come criterio general di risarcimento del danno da mora nelle obbligazioni pecuniarie*, in Foro it., 1990, I, p. 2220.

The modification recently contemplated by article 1284 Civil Code which increases the legal rate from 5 to 10% (32), makes the plausibility of the criticisms put forward above and the proposed solution even more apparent, unless wishing to procure for the damaged party an exaggerated profit rather than the mere indemnity, with the accumulation of the re-evaluation and the interest of 10%, without speaking of its possible calculation on the re-evaluated capital.

Nor does the different reasons underlying the re-evaluation by the Supreme Court seem acceptable, i.e. that it would be justified by equity. This is the same justification opposed by Ascarelli (33) and in certain ways close to that of good faith proposed at the time by Nipperdey (34).

The reference to equity not only appears too general, but also in contrast with the normal treatment for the ordinary creditor of money, which is not very different from that expected by the fulfilment of an illiquid obligation.

Here there is a reference to the recent decision by the Court with all the divisions sitting together (35), which excludes, for pecuniary obligations, the accumulation of what has been mentioned, as a source of profit and not of mere indemnity.

Lastly, the other reason, put forward by the Supreme Court in this decision, is not acceptable either, i.e. that it is a method that would have the virtue of being simple and practical. Even if one were not to think of the consequences that could derive from increasing legal interest to 10%, today this method appears excessively convoluted and confused, as shown by that passage in the decision which prescribes the calculation of the interest on the capital, gradually re-evaluated and therefore periodically.

This last proposition by the Supreme Court is equivalent to denying to the credit the quality of credit of value and rather qualifying it as indexed pecuniary credit, which is also not justified by the exclusion of the default in the same way.

Here, it is worthwhile recalling the distinction between credit of value and indexed credit which has already been underlined by Ascarelli (36), with an opinion contrary to that of Nussbaum (37).

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(32) Art. 1 of the modifications to the Code of Civil Procedure which has recently become law.

(33) ASCARELLI, *Le obbligazioni pecuniarie*, op. cit., p. 442.

(34) NIPPERDEY, *Kontrahierungzswang und diktierter Vertrag*, 1920, pp. 140 ff., as well as in DIZ, 1922, p. 659.

(35) Court of Civil Cassation, all divisions sitting together, 1st December 1989, no. 5299, *in Foro it.*, I, p. 427.

(36) T. ASCARELLI, *Le obbligazioni pecuniarie*, cit. pp. 474 ff.

(37) NUSSBAUM, *Money in the law*, Chicago, 1939, pp. 180 ff.

This indexation of the compensation cannot be accepted, because it is not contemplated by any rule of law, let alone by any contractual source.

The conclusion therefore appears arbitrary.

5. – At this point, let us now go on to deal with the compensation of that diseconomy of the damaged party which is caused by delay. This is correctly identified in the failure to enjoy that *utilitas* that the creditor would otherwise have had, in the period of the delay, from the pecuniary equivalent, if this had been paid in time. This proposition, with which we agree - clearly shows that the function of discounting is proper to monetary interest and not monetary revaluation which, on the contrary, appears pleonastic.

Where however, we disagree with the decision under examination, is in the point where it relates the indemnifiable prejudice to the mere delay and not to default and thus qualifies the interest as compensatory and not default. The cases in which a delay separate from default can be hypothesized are absolutely marginal (38), and the prejudice can be indemnified only if it derives from a guilty and qualified delay, such as default. The start of the delay in paying the indemnity coincides with the start of the default, in the damage due to illegal action or non-fulfilment of *portables* obligations, under art. 1219, section 2, no. 1 and 3 Civil Code, whilst in the *querables* obligations, it starts from the written demand under art. 1219, section 1, Civil Code, which is referred to the mere will of the creditor. The compensation of the delay of delay is identified, in the final analysis, with that of default.

The Supreme Court recognizes in this decision that the addition of the so-called compensatory interest is not contemplated by any rule and that their justification can be identified only in equity. The reference to equity is this considered as fundamental both of the revaluation and of the so-called compensatory interest, This appears on the one hand too general and on the other, frankly excessive.

In this regard, we have to underline that the illiquid credits do not admit any other type of interest except default interest (39). On the contrary, the compensatory interest is proper of only liquid and uncollectible credits, under article 1499 Civil Code and liquid and collectable credits under article 1282 Civil Code. Above we mentioned that legal interest at 5% is absolutely inadequate to compensate the prejudice due to delay, according to criteria of normality. Legal interest is in fact less than the normal *utilitas* that the creditor would have gained from the equivalent, expressed in national currency during the monetary delay. The inadequacy is then obvious in the event that the damaged party resides abroad, in which any difference

(38) BIGLIAZZI-GERI, *Mora accipiendi e mora debendi*, Milan, 1975, pp. 229 ff.

(39) G. VALCAVI, *L'indennizzo del mero lucro cessante*, cit., in *Foro it.*, 1990, I, pp. 220 ff.

in exchange rate is to be recognised as well as the normal yield of the currency, into which he would have changed it.

The possibility of obtaining the compensation of the greater damage due to delay can by hypothesized only by recourse to article 1224, section 2, Civil Code. The Supreme Court excludes here the applicability of article 1224, section 2, Civil Code because it is not contemplated by article 2056 Civil Code. This remark however does not appear well-founded, because article 2056 Civil Code does not even contain a reference to section 1 of article 1224 Civil Code, which, on the contrary, is used by the decision under examination.

The greater damager as per article 1224, section 2, Civil Code. after the increase of the legal interest to 10%, can be identified in the possible difference between this and the current rate, due to its variable nature and in particular in that with interest on bank loans, for those who normally have recourse to these. Similarly, in the case in which the damaged party resides abroad, both any difference in the exchange rate during the default must also be taken into account and the normal yield of the currency into which he would have made the exchange.

In the final analysis, all this corresponds overall with the *quod interest* according to the *quod plreumque accidit.*

6. – Lastly, let us look at the results of the sum of the annual revaluation rate and the legal interest with respect to the normal yield of money. This sum has been calculated by the author at 22.58% for the period 1979-84, with respect to the normal yield of money equal to 17-09% and in different percentages, for the subsequent periods. The calculation of the legal interest on the revalued capital, leads to a percentage of 26.93% for the period 1979-83, with respect to that 17.09% of the normal yield considered in the same period, and in different and diverging percentages for the subsequent periods.

This decision shows that it is concerned with moderating this last clear excess, where it suggests the calculation of legal interest on a capital which is «gradually revalued».

In this regard, the Supreme Court writes that legal interest must be related to the value of the commodity at the time the damage occurred, «taking into consideration any subsequent changes in the purchasing power of the money until the time of the decision».

The calculation accepted by the Supreme Court is however greater than the same sum of the revaluation and legal interest.

The increase in legal interest from 5 to 10% exaggerates the results of these methods and shows, in short, how far these are wrong and unacceptable. It is hardly necessary here to consider that the sum of the current devaluation calculated on average at 6.5% and of legal interest, will lead to

an indemnity equal to 16.5% with respect to the normal yield of money, equal to 12.58% and the calculation of legal interest on a revalued capital is destined to procure an even more obvious profit.

All this, moreover, is considered net of taxes. To conclude, it appears to the author that the only acceptable criterion is to consider the creditor who is awaiting the fulfilment of a sum to be liquidated, in the same way as a pecuniary creditor and calculate the indemnity for the delay on the basis of the normal *quod interest* under article 1224, sections 1 and 2, Civil Code, which represents the only anchor of definite reference.

Lastly, this also corresponds to the general orientation today of the legislator that is contrary to the cost of living sliding scale and indexations.

Also by this author on the same subject:

– « *In material di criteri di liquidazione del danno in genere ed interessi monetari* » in *Foro Italiano* 1990, I, 933 and in *L'Espressione monetaria nella responsabilità civile*, Cedam, 1994, p. 269.