

## THEORETICAL AND PRACTICAL ASPECTS REGARDING VALUE DEBTS

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**ABSTRACT:** *Value debts are obligations whose object is the payment or delivery of a sum of money. The aim of this paper is to study the legal nature of this category of obligations. During this process we shall consider from the start that value debts represent an intermediary category between monetary obligations and obligations in kind. The difficulty of grouping value debts into one of the already created categories of civil law emerges from their structure and functioning.*

*Our conclusion regarding the legal nature of this type of obligation is the following: until future legal modifications we will consider that value debts are part of obligations to do, i.e. intermediary obligations between monetary obligations and obligations in kind*

**KEYWORDS:** *value debts, the object of the provision, comminatory damages, comminatory penalties*

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*Value debts*, namely obligations whose object is to pay or remit a sum of money, represent an interesting problem related to the topic of our paper<sup>1</sup>.

In the following, we shall try to analyse the *legal nature* of value debts.

These have been considered obligations to do, an intermediary category between obligations in kind and pecuniary obligations. Legal doctrine generally delimits the object of a contract (the legal operation the parties have in mind) from the point of view of what the debtor has to fulfil (to give, to do or not to do). Services, in turn, have their own object called the „derived object” of a legal relationship.

In the process of researching the legal nature of this category of obligations, the classification of obligations proposed by the Civil code has been criticised as insufficient and useless<sup>2</sup>.

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<sup>1</sup> Liviu Pop, *Drept civil roman. Teoria generală a obligațiilor*, Editura Lumina Lex, București, 2001, pp. 64-69.

<sup>2</sup> Felicia Roșioru, *Accepțiunea clasică asupra naturii juridice a datoriilor de valoare*, in *Revista română de Drept al afacerilor* no.

Insufficient as there are obligations susceptible of dual qualification. All obligations may apparently be included into the category of obligations *to do*, as long as ultimately any service consists of doing something. *To do* represents an action, *not to do* represents an abstention, but from a structural point of view they are similar.

Starting from the criterion used – the object of obligations, the cited author considers that obligations may be grouped into two groups: the first one, construed around the transfer of a good, the other one, circumscribed to the action of a person. In order to be in the presence of a service *to give*, the presence of a good is essential, while in the case of obligations *to do* and *no to do* the activity of a person is essential.

The inaccuracy that characterizes the classification from the Civil code entails the difficulty to group pecuniary obligations into one of the categories stated. An obligation *to give* (to transfer the property over a good) specifically manifests itself only when it concerns determined goods. Monetary obligations suppose the transfer of property rights over a sum of money – generic goods, which also render necessary the debtor's activity of individualizing transferred goods. The nature of the obligation changes according to the analysis and importance of one of these two inherent aspects (the transfer of property and the individualization of goods): if property transfer is essential, the monetary obligation is to give, or the debtor's activity to individualize, to remit a sum of money is the principal one and it determines the *to do* nature of a monetary obligation.

Given that pecuniary obligations cease through payment and this assumes the transfer of property rights over remitted goods (sum of money), the majority of authors have qualified them as obligations *to give*. The idea that monetary obligations are either obligations to give or obligations to do according to the payment method used, the creditor's will or the title that comprises it, has also been advanced. For example, cash payments may be obligations *to give*, but they may also be obligations *to do* when payment is made by scriptural money – bank transfer, credit cards, and electronic money.

The classification from the Civil code would be – according to the author of the study – useless, at least in certain situations. The major difference between an obligation *to give* and an obligation *to do* (or *no to do*) consists, according to the Civil code, in the possibility to always fulfil the obligation *to give* in kind, while non-fulfilment of the obligation *to do* (or *not to do*) may only entail the creditor's obligation to pay damages.

The fragility of this classification is very clear in the case of obligations assumed within a pre-contract. This results in the obligation to transmit a right in rem to the benefit of the creditor.

The Civil code lays down the rule of consensualism (art. 971, 1295 para. 1) in the field of sales, i.e. the transfer of property rights simultaneously with the agreement. The agreement of the parties regarding the transfer of such a right produces, *ex lege*, a translative effect.

Thus, no obligation proper *to give* would exist as long as according to the Civil code the transfer of property over individually determined goods operates as of right, *solo consensu*. Therefore, we could not talk about an obligation proper of the seller to transfer property because this is a legal effect the respective agreements produce. Consequently, at least for determined goods, the seller could not be accused of non-fulfilment regarding the transfer of property rights. Moreover, this obligation could not be enforced.

Thus, the obligation *to give* appears useless: if the transfer of property is a legal effect of certain agreements, it may not form the object of one of the parties' obligations at the same time.

The author makes an observation we agree with, i.e. that the non-existence or the uselessness of obligations to give, which is founded in contractual matter, is not always real as for obligations *to give* resulting from licit or illicit acts.

Because the distinction from the (French) Civil code has proved mostly useless in French law, J. Carbonnier pleaded for the autonomy of obligations regarding sums of money and their transformation into a pivot for a new classification. These are founded on the presence of fluctuant money. Monetary obligations are independent and may not be reduced to other obligations, while their distinctive characteristics are individualized through correlation with obligations in kind. The object of these latter ones is represented by any positive service, except the one to pay a sum of money; *per a contrario*, the object of pecuniary obligations is the payment or material remittance of a number of nominal monetary instruments.

The distinctive criterion between the two types of obligations is the sensitivity of obligations to monetary depreciation. Obligations in kind are indifferent to economic phenomena, while pecuniary obligations are sensitive to them in the sense that the purchasing power incorporated by the sum of money owed varies according to economic development. Pecuniary obligations are always of result, they may be fulfilled in kind and, in case of responsibility, the debtor's fault and the extent of the prejudice do not have to be proved.

Considering that the transfer of property rights may not be the object of the obligation, but it represents the effect of a category of contracts, B. Stark proposes a classification according to the object of the service, outlining four categories: obligations whose object is to pay a sum of money or to deliver a certain quantity of generic goods; obligations whose object is a determined good; services and obligations not to do.

We turn back to what we have asserted at the beginning, i.e. that, "classically", value debts have been qualified as obligations *to do*. The example that has allowed us to establish this legal nature is represented by the obligation to remedy prejudices through monetary equivalent. In this case, the debtor has the obligation to provide the creditor a certain result which gains concrete monetary expression at the time of effective payment (the reasoning is also identical for support obligations if the court or the parties proceed to the transformation of the obligation to do into an obligation to pay a sum of money, or in the case of returning bearings to possessors).

Including value debts into the category of obligations *to do* was predictable due to their origin and finality. Value debts have developed, at least in France, in the context of hostility towards indexation clauses and in order to substract a series of receivables from monetary nominalism. Consequently, any possible reference to money in the object of a service, compromised to alter its finality, i.e. maintaining its value in time. Thus, the formulation according to which – in such cases – a debtor owes not so much sums of money as the value of a service, for which money only represents an imperfect means of fulfilment, appears as a logical consequence.

At the beginning of this section, we have also asserted that value debts are an intermediary category between monetary obligations and obligations in kind, because they

borrow characteristics from both: through their object they resemble pecuniary obligations, as their forced execution is always possible. Unlike pecuniary obligations, where money appear both *in obligatione* and *in solutione*, according to the classic conception they do not incorporate money into their object, but they only cease by paying the appropriate quantity of money.

Thus, the category of monetary obligations whose *direct object (in obligatione)* is a sum of money, payment being made through payment of the appropriate number of monetary units, on the one hand, would be delimited from another category (sub-category) of obligations whose initial material object is not a sum of money, but another good or value, which also ceases by monetary payment. These obligations, which result in sums of money, initially start from a value in order to get to money. Thus, part of the doctrine has asserted that value debts are monetary obligations but not only due to the equivalence that comes into the process of reducing them from “value” to money. Besides this equivalence, they would be obligations in kind.

The structure and functioning of value debts entails the difficulty to include them into one of the already crystallized categories of civil law. The analysis of classifications considered classical seems to take us to the conclusion of the existence of a new category. This, on the one hand, because value debts, although they cease through payment of a sum of money, marking a transfer of the property right, is considered an obligation to do. On the other hand, it finds its place with difficulty in the classification proposed by J. Carbonnier, which opposes pecuniary obligations to obligations in kind. Structurally, the apparent change in the object of the obligation within its interior, the relationship *good-value*, entails the difficulty of including it into a category or the other.

Our conclusion regarding the legal nature of this type of obligations is the following: until further legislative modifications we shall consider value debts as being part of obligations *to do*, intermediary obligations between monetary obligations and obligations in kind. However, those related also raise two questions: is it necessary to state the existence of a new category of obligations? Or would a new perspective on the classification of obligations according to the criterion of the incidence of monetary depreciation, adding to pecuniary obligations and obligations in kind a new category, namely that of value debts, be more useful?

As for the category of value debts, problems appear when re-balancing pecuniary obligations becomes necessary due to monetary fluctuations (caused by inflationist processes or by measures taken by the state in order to combat inflation). In these cases, intervention is possible through imperative legal provisions, indexing contractual clauses<sup>3</sup> or, as the case may be, *hardship* clauses. In the absence of these means, the parties may alone re-evaluate receivables through their agreement. But what if our situation is not one of the situations listed above? In practice, courts of justice and bailiffs proceed to the monetary re-evaluation of certain receivables and even interests, based on the provisions of art. 371<sup>1</sup> para. 2 and 3 of the Civil Procedure Code and art. 1 para. 2 of Government

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<sup>3</sup> S. A. Mekki, B. Fauvarque-Cosson, *Droit des contrats*, in Dalloz no. 41/2005, p. 2840. In the cited article, as for indexation clauses, the idea of analyzing the common intention of the parties regarding the introduction of such a clause into the agreement is emphasized.

Ordinance no. 5/2001<sup>4</sup>. There are authors<sup>5</sup> who consider that the legal interest covers both the inflation rate and the value of not being able to use the money. We do not agree with these opinions because, by putting the problem this way, the different legal nature of the two elements that make up a prejudice is ignored: *damnum emergens* (actual loss) and *lucrum cessans* (unrealized benefit). Even the Constitutional Court<sup>6</sup> has stated its opinion on the constitutionality of the texts (art. 371<sup>1</sup> para. 2 and 3 of the Civil Procedure Code and art. 1 para. 2 of Government Ordinance no. 5/2001) quoted as legal ground for the monetary re-evaluation of certain receivables and found them constitutional and in accordance with the evolution of our country's economic and social life. Even arbitration jurisprudence<sup>7</sup> has considered that such re-evaluation is necessary and it is most often carried out through comparison with the inflation rate or the RON – USD or RON – EUR exchange rate.

The problem of comminatory damages in current Romanian law is another interesting problem, with serious practical implications, we assert, from the perspective of our topic.

In 2000, a new regulation, much simplified in our opinion, has been introduced into the Civil Procedure Code by means of Emergency Government Ordinance no. 138<sup>8</sup>, for the forced execution of obligations to do or not to do (art. 580<sup>2</sup>-580<sup>5</sup>). This new regulation has been realized in order to adapt and harmonize our domestic legislation with international regulations, especially EU regulations.

In our opinion, the procedure set up in art. 580<sup>2</sup>-580<sup>5</sup> of the Civil Procedure Code is clear, accessible and efficient. Thus, upon a creditor's request, enforcement courts may authorize – through irrevocable sentence, given with the summoning of the parties – creditors and other persons to fulfil the obligation in the account and at the expense of the debtor. If the obligation supposes the debtor's personal deed, upon request of the creditor, the court – after summoning the parties – shall establish the extent to which the debtor's refusal has caused damages to the creditor, by means of enforceable judgement subject to appeal, granting damages to the latter one.

It follows, therefore, that in an energetic and sufficient way, a creditor may obtain the execution of an obligation by his/her debtor through a shorter procedure (irrevocable

<sup>4</sup> Art. 371<sup>1</sup> para. 2: "If interests, penalties or other sums have been granted in the enforceable title without establishing their quantity, they shall be calculated by the enforcement body according to law". Para. 3: "If the enforceable title contains sufficient criteria according to which enforcement bodies may update the value of an obligation determined in money, irrespective of its nature, updating shall be carried out. According to the exchange rate of the payment currency, determined at the date of effective payment of the obligation comprised in the title". Art. 1 para. 2 of Government Ordinance no. 5/2001 published in the Official Monitor of Romania, Part I, no. 422 of July 30, 2000: "The sum that represents the obligation provided in para. 1, as well as the interests, increases or penalties owed according to law are updated according to the inflation rate that applies at the date of effective payment". See also Vasile Pătulea, Corneliu Turianu, *Instituții de drept economic și comercial. Practică judiciară*, Editurile Continent și Universul, București, 1994, p. 171-174; Decision no. 2729/2001, Supreme Court of Justice, Civil section, quoted in Nicolae Crăciun, *Practică judiciară civilă 2001-2002*. Curtea de Apel București, Editura Brilliance, București, 2003, p. 211.

<sup>5</sup> C. Alexandru, *op. cit.*, p. 232-239. See also Decisions no. 1258/2002, 4700/2002, Supreme Court of Justice, Commercial section, quoted in *Revista de Drept Comercial* nr. 7-8/2002, p. 375, 381.

<sup>6</sup> Decision no. 72/2002, published in the Official Monitor of Romania no. 266 of April 22, 2002; Decision no. 317/2002, published in the Official Monitor no. 930 of December 19, 2002.

<sup>7</sup> I. Băcanu, *op. cit.*, pp. 79-87.

<sup>8</sup> Published in the Official Monitor of Romania, Part I, no. 479 of October 2, 2000.

sentence or sentence subject to appeal, but enforceable), which however respects the rights of the parties (given with their summoning), as well as realization of the aim for which the conflict between them has been initiated and solved.

In addition, the efficiency of the procedure set up in art 580<sup>3</sup> of the Civil Procedure Code is given by the civil fine (comminatory) that a debtor who refuses fulfilment may be constrained to pay to the benefit of the state, which has to be established for each default day, its minimum limit of 20 RON being sufficiently burdening in order to convince any debtor not to oppose resistance to the execution of a court decision. Thus, respect for the law and the supremacy of the law are ensured. These arguments are complemented by the fact that by means of art 580<sup>5</sup> of the Civil Procedure Code, through a bailiff, a creditor may obtain the contribution of police bodies, gendarmerie or other public force agents for the fulfilment of an obligation in place of and at the expense of the debtor.

We would like to mention that until the amendment of the Civil Procedure Code, forced execution of obligations to do or not to do formed the exclusive object of the regulation from the Civil code (art. 1073-1078). Besides the means of coercion that result from the provisions of the Civil code (compensation, executing certain works at the debtor's expense), judicial practice has created another means of coercing debtors to fulfil their obligations in kind, namely *comminatory damages*.

These are understood as sums of money debtors have to pay for postponing the fulfilment of their obligations (for default day, week and month) and they constitute an indirect modality to ensure fulfilment of their obligations in kind, a means of coercion, of threatening even in the case of obligations *intuitu personae*. In judicial practice, comminatory damages do not have remedial character, but the character of a civil punishment, they have an undetermined character (because it is not known for how long debtors will not fulfil their obligations) and they are only applied for obligations to do or not to do, except: when their fulfilment is no longer possible, because the aim they have been granted for may not be attained any more; when forced execution of obligations in kind is possible and when the debtor's refusal to fulfil an obligation is unequivocal.

Judicial practice has also stated that comminatory damages have a provisional character and courts have the obligation – that after fulfilment of an obligation at the creditor's request, given the uncertain and non-liquid character of such receivables – to transform comminatory damages into compensation damages according to the rules of common law regarding civil responsibility, establishing the sum which represents the creditor's damage caused by non-fulfilment of the obligation.

This time, legal literature excludes obligations to give from the sphere of application of comminatory damages, considering that they represent specific means of coercion only for those cases when the debtor's obligation consists of a service *to do* or *not to do*.

Comminatory damages may not be applied to obligations whose object is a sum of money, because as it has been decided in judicial practice and also sustained in legal literature<sup>9</sup>, they produce interests in case of late fulfilment and because they may be the object of forced execution as provided by law. We agree with these, yet, there are authors<sup>10</sup>

<sup>9</sup> Republished in the Official Monitor of Romania, Part I, no. 33 of January 29, 1998, ulteriorly modified and amended.

<sup>10</sup> Republished in the Official Monitor of Romania, Part I, no. 33 of January 29, 1998, ulteriorly modified and amended.

who assert that comminatory damages may also be applied in this case as long as it is admitted that they are not granted to cover the damages caused as a result of non-fulfilment. Therefore, the existence of a legal evaluation of the damages caused as a result of non-fulfilment of obligations whose object is a sum of money is not important. On the other hand, there is no reason to constrain the creditors of non-fulfilled obligations to resort to forced execution procedures – a rather strenuous procedure sometimes – in order to materialize their receivables, when a possible threat weighing on the debtor might determine them to fulfil their obligations and thus forced execution would become unnecessary. Therefore, the author argues that only creditors may choose the legal means at hand because they are the ones who are able to evaluate their interests best, while an a priori solution might put them at disadvantage.

The same author upholds an idea that we do not agree with, namely that comminatory damages are possible even when obligations are accompanied by a penal clause. We agree with the opinion also shared by judicial practice, i.e. that this is not possible because by conventionally accepting in-advance evaluation of damages, creditors have clearly manifested their option for fulfilment through equivalent, thus giving up to fulfil in kind the principal obligation, as granting comminatory damages is not possible when the debtor would be sentenced in advance to remedy damages caused through late fulfilment either, by establishing a sum of money for each default day, because in such a case – being in the presence of moratory damages – their comminatory and temporary character is missing. Therefore, we can not agree with the idea advanced by the author of the cited paper, which is centred around the creditor's right of option, given that in these cases as well the creditor has initially made a choice and he/she may not reconsider it because it is also necessary to have in mind the debtor's position and interests.

Likewise, we do not agree with the creditor's right of option (the fulfilment of the agreement through constraint or its dissolution) when the agreement contains a 4<sup>th</sup> degree commissary pact likely to lead to the dissolution of this agreement as of right and without any formality. We consider that in this case also, the creditor has initially opted for a modality of contract dissolution.

Whether comminatory damages may be established in the case of *intuitu personae* obligations to do is another controversial problem. Thus, according to certain authors this is not possible since comminatory damages are incompatible with this type of obligations, because no one may be obliged against his/her will to fulfil a personal deed, which would be incompatible with the principle of contractual freedom. On the contrary, other authors consider that the *pacta sunt servanda* principle imposes exact compliance with the obligations undertaken in these agreements as well, given that contractual liberty is manifested at the moment of the conclusion of an agreement, not in the phase of fulfilling an obligation. We uphold this opinion and we do not agree with the somehow mean solution either (J. Kocsis), which argues that certain *intuitu personae* obligations to do would be susceptible of execution by means of comminatory damages, while others not (for ex. the execution of a painting under constraint) with judges having to evaluate every single situation. We consider that this way arbitrariness would become emphasized and contradictory and inequitable solutions might appear.

Taking into consideration the new provisions of the Civil Procedure Code (including civil comminatory fines) and those regarding comminatory damages, as well as the doctrine

and jurisprudence in the field, we argue that, even after the entry into force of art. 580<sup>3</sup> and art. 580<sup>4</sup> of the Civil Procedure Code, the fulfilment of obligations to do or not to do consisting of a debtor's personal deed is ensured by means of comminatory damages inclusively, irrespective of the fine established in art. 580<sup>3</sup> of the Civil Code, this also due to the fact that *comminatory damages* are an alternative way of coercing debtors to fulfil their obligations.

In the following, we shall present our arguments for the coexistence of the two institutions.

First, because comminatory damages are explicitly regulated, by means of special norms.

For example, art 48 para. 2 of the Law on companies no. 31/1990, republished, with ulterior modifications and amendments<sup>11</sup>, provides that „in case of irregularities established after registration, if the company does not comply by providing against them, any interested person may request the court to oblige the bodies of the company to correct them under the sanction of paying *comminatory damages*...”.

Or, another example, art. 24 para. 2 of Law no 554/2004 on administrative litigation, which provides that „when the term is not complied with (this is the term established by the court, or – in the absence of such a term defined in the court decision – a term of 30 days since the decision of the first instance court for the substitution and modification of the administrative act, or for issuing a certificate, confirmation or any other document has remained final), the claimant may be granted *default damages*”. (*comminatory*)

And finally, after the entry into force of the amendments to the Civil Procedure Code, comminatory damages are explicitly regulated in Law no. 161/2003 on certain measures for ensuring transparency in exercising public dignity, public functions and within the business environment, as well as on preventing and sanctioning corruption<sup>12</sup>, in relation to economic interest groups (art. 135), that have to correct certain irregularities established after registration, under the sanction of paying *comminatory damages*.

A supplementary argument, in the sense that the special norms for the explicit regulation of comminatory damages presented above are still in force, is also conferred by the jurisprudence of the Constitutional Court. In this respect, we would like to remind that the above cited provisions of art. 48 para. 2 of Law no. 31/1990 on companies have been subjected to constitutional control in June 2002, so after the entry into force of the amendments to the Civil Procedure Code. Or, according to art. 23 para. 1 of Law no. 47/1992 on the organization and functioning of the Constitutional Court<sup>13</sup>, the Court „decides on the exceptions raised before courts of justice regarding the unconstitutional character of a law or a provision of a law in force which has a bearing on the solution of the case”.

*Comminatory fines* represent *procedural pecuniary sanctions* applied by judicial bodies. These fines, however, are not only applied in order to ensure the fulfilment of an obligation to do or not to do consisting of a debtor's personal deed (the case regulated in

<sup>11</sup> Republished in the Official Monitor of Romania, Part I, no. 33 of January 29, 1998, ulteriorly modified and amended.

<sup>12</sup> Published in the Official Monitor of Romania, Part I, no. 279 of April 21, 2000, ulteriorly modified and amended.

<sup>13</sup> Republished in the Official Monitor of Romania, Part I, no. 187 of August 7, 1997, ulteriorly modified and amended.

art. 580<sup>3</sup> and 580<sup>4</sup> of the Civil Procedure Code), but generally to ensure the fulfilment of any measure ordered by a judicial body.

The aim of these sanctions is also to constrain debtors to fulfil their obligations, they are always provided by law and they represent an amount that becomes income to the state budget.

In our legislation there are a series of norms for the regulation of comminatory fines. For example, art. 55 of Decree no. 31/1954, which provides that „if the author of a deed committed unlawfully (against a personal non-patrimonial right – our note S.C.) does not fulfil the acts aimed at re-establishing the offended right within the term established in the court decision, the court of justice could oblige him/her to pay – *to the benefit of the state – a fine for every default day*, calculated from the expiry of the above term. This fine may also be pronounced in the decision given on the request submitted according to art. 54.” We may see that in this case the law does not stipulate that comminatory fines are applied at the request of the owner of the injured non-patrimonial right. Consequently, it may be ordered by the court „ex officio”.

Another regulation regarding comminatory fines, this time provided by constitutional jurisdiction, is the one contained in art. 52 of Law no 47/1992 on the organization and functioning of the Constitutional Court, according to which „the refusal of an authority or organization to communicate the information, documents and papers it possesses, requested by the Constitutional Court, shall be punished by fine of 10.000 lei for each default day”.

From those presented above, it follows that the essential elements that differentiate the institution of comminatory damages from comminatory fines rely in the fact that the *beneficiary* of the amounts established as comminatory damages is the creditor, while in the case of comminatory fines, the beneficiary is the state, as well as in the different *finality* of these two institutions: comminatory damages refer to the fulfilment of obligations established in the document of the judicial body, primarily for realizing a creditor’s particular interest to obtain the satisfaction of his/her right, while fines refer exclusively to the public interest of complying with court decisions.

As we have already stated before, we consider that the institution of comminatory damages has not been abolished.

In specialty literature<sup>14</sup>, in order to sustain the thesis that comminatory damages have been abolished when comminatory fines were regulated in the Code, it has been argued that „the thesis on the coexistence of two modalities to ensure forced execution in kind, when their object and finality coincide, is unacceptable”. In the same sense, it has been argued that „taking into consideration that these two modalities are concurrent, the principle of immediate application of a new law imposes without any doubt the exclusive applicability of the solution regulated by the new law”.

As for the inadmissibility of the coexistence of comminatory damages and comminatory fines, the law itself offers arguments for confuting this thesis. And, in our opinion, the coexistence of these two institutions is natural, exactly because there are differences between them. The coexistence of comminatory fines and comminatory

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<sup>14</sup> Bogdan Dumitrache, Probleme privind executarea silită în natură a obligației de a face, in Analele Universității din București, no.

damages is established in the already cited art. 24 of the Law on administrative litigation (para. 2 grants comminatory damages, while in para. 3 comminatory fines apply).

The text of art. 580<sup>3</sup> provides for the *possibility* of courts to order that debtors pay a comminatory fine („the court notified by the creditor *may* oblige the debtor to [...] pay a civil fine to the benefit of the state...”). If the creditor has requested that the debtor be obliged to comminatory damages, and the court does not decide to apply comminatory fines, if we consider that the institution of comminatory damages is abolished, we would be in the presence of a decision regarding the fulfilment of an obligation to do or not to do consisting of the debtor’s personal deed, missing any comminatory effect.

As for the immediate applicability of a new law, which would impose the exclusive applicability of comminatory fines to the detriment of the „former” institution of comminatory damages, we shall remind that after the introduction of art. 580<sup>3</sup> the lawmaker considered that it should explicitly provide for comminatory damages in art. 135 of Law no. 161/2003. Only by taking into consideration this example it becomes clear that we may not talk about an exclusive application of comminatory fines.

The followers of the thesis on the implicit abolishment of comminatory damages argue that the new mechanism of forcing debtors to pay a fine to the state is much more efficient, exactly through its threatening effect, as compared to comminatory damages. As we have already shown, both the mechanism of comminatory damages and that of comminatory fines have a threatening effect on debtors, through increasing the amounts owed as comminatory damages/fines for each default day. Both decisions are enforceable, given that the debt is liquid and its quantity may be determined by bailiffs during the phase of forced execution, according to art. 379 para. 4 and art. 371<sup>2</sup> para. 2 of the Civil Procedure Code.

Moreover, by comparison with those previously stated on the regulation of the quantity of comminatory damages, we could assert that in the context of a depreciation of the domestic currency this mechanism of comminatory fines provided for in art. 580<sup>3</sup> of the Civil Procedure Code may prove less efficient than that of comminatory damages. If the limits of comminatory damages are not permanently correlated with the evolution of the domestic currency, nothing else than a „purely theoretical” comminatory effect will be attained.

From the same perspective of the efficiency of these two systems, it is very likely that within the framework of certain legal relationships (for example, delivery of a purchased valuable object), when a debtor persists in refusing to remit the object, the application of comminatory fines may prove less efficient than the establishment of comminatory damages. Otherwise, if we take into consideration the provisions that explicitly regulate comminatory damages (previously cited), we may observe that in all these cases, given the importance of the fulfilment of obligations, the lawmaker preferred the system of comminatory damages as opposed to that of comminatory fines.

However, starting from the same difference between comminatory damages and fines, regarding the beneficiary of the amounts established as comminatory damages/fines, it is clear that the formulation of a request for comminatory damages is of much more interest to creditors than the application of comminatory fines which benefit the state.

Finally, we consider that it is necessary to also analyse the situation of including a „comminatory clause” into agreements that provide for obligations to do or not to do. Although comminatory damages are granted by courts, there are no legal provisions that prohibit their inclusion into a contract, and where the law does not prohibit, it means that it allows. Moreover, similarly to damages, the mechanism of *stipulatio* (provided for in art. 1066-1072 of the Civil Code) allows the parties to quantify in advance the value of damages, in the case of comminatory damages (unprovided for in legal provisions), in-advance evaluation of the amount granted for each default day/month appears as possible and the amount is subject to censorship of the court. If in the contract there is a „comminatory clause”, in our opinion courts will not be able to ignore it because indirectly this would infringe upon the principle of the mandatory force of agreements, established in art. 969 of the Civil Code. Courts would be able to reduce the quantity of comminatory clauses if they were contrary to morality and public order through their extremely onerous character (art. 5, correlated with art. 966 and art. 968 of the Civil Code). In addition to these damages, following a creditor’s notification, courts could also order that the debtor be forced to pay comminatory fines, in the quantity provided by art. 580<sup>3</sup> of the Civil Procedure Code.

Likewise, we would like to emphasize that when a dispute is solved by *arbitration*, either *ad hoc* or institutionalized, it is clear that arbitration courts – as non-state jurisdictions (like courts of justice) – if such a court orders that a debtor be forced to an obligation to do or not to do, and the debtor does not fulfil this obligation, the court may not oblige this debtor to pay a civil fine to the benefit of the state for each default day until fulfilment of the obligation provided for in the enforceable title, it may only oblige the debtor to comminatory damages.

In conclusion, we have tried to argue that comminatory damages still represent means of coercing debtors of obligations to do or not to do consisting of a personal deed. Arguments for the non-abolishment of this institution are offered both by the differences between comminatory damages and comminatory fines, as well as by the existence of certain legal provisions that explicitly regulate comminatory damages. Although at first sight the mechanism of comminatory fines may seem more efficient, in reality it may prove to only have theoretical efficiency, without presenting any real threat to debtors. In addition, it may prove inefficient even at this date in certain legal relationships. Starting exactly from the differences between these two institutions, nothing prohibits creditors to request that their debtors be obliged to pay comminatory damages even these days. If the court considers that comminatory damages should also be imposed in addition to the requested damages, it will also order this measure, i.e. the payment of a sum to the state.

Cumulating interests and default interest represents another interesting and current problem related to value debts<sup>15</sup>.

The principle of the certitude of taxation, which assumes the elaboration of clear legal norms that would not lead to arbitrary interpretations, and that terms, payment modalities and sums to be paid should be precisely established for each taxpayer, as well as that they should be able to follow-up on and understand fiscal burdens that are incumbent on them, is among the new provisions of the Fiscal Code.

<sup>15</sup> Lucian Cristea, Cumulul dobânzilor cu penalitățile de întârziere, in Revista de Drept Comercial no. 6/2004, pp. 85-98.

In the following, we will analyse the extent of taxpayers' fiscal obligations who have not complied with payment terms, as well as the determined character of this obligation.

In this respect, we indicate art. 108 para. 1 of the Fiscal Procedure Code, which provides that if debtors do not pay their fiscal obligations on due date, interests and default interests are owed after this term.

We consider that the introduction of a sanction that comprises both interests and default interests in the fiscal field is exaggerated and for bolstering this character we will briefly examine the regulation of penalties and that of legal interests in civil, commercial and fiscal law.

In *civil law*, interests represent not only sums of money paid with this title, but also other services paid with any title or under any name and which debtors undertake as equivalent for the use of capital. Its character of legal interest is given by art. 1088 of the Civil Code, which provides that for obligations whose object is a sum of money, damages for non-fulfilment may only comprise the legal interest, except for the special rules in the field of commerce, surety and companies.

Assimilating interests and moratory damages, most authors consider that damages received by creditors may only be default damages<sup>16</sup>, given that interests have remuneratory and reparatory character, as well as the character of unrealized benefits. The quantity of interests in civil law is established in Government Ordinance no. 9/2000<sup>17</sup> on the level of legal interest for monetary obligations. In our opinion it is not possible to cumulate interests and penalties. However, the capitalization of interests is possible if three conditions provided by art. 8 para. 2 are complied with, namely: there shall be a special convention in this respect, the interests shall be outstanding and they shall be owed for at least one year.

In *commercial law*, the quantity is established by Government Ordinance no. 9/2000 and it is situated at the level of the interest of the National Bank of Romania, except foreign business relationships.

As for the interest provided for in agreements, the law does not contain any limitations but we consider that cumulating interests and penalties shall not be allowed for the same reasons as in civil law.

Interests in the *Fiscal Code* shall be understood as sums of money that have to be paid or received for using the money, whether they have to be paid or received within a debt, in relation to a deposit or according to a financial lease agreement, purchase by instalments or deferred payment.

As for the provision of art. 108 para. 1 of the Fiscal Procedure Code, which stipulates that both interests and penalties are owed for default payment, we consider that it is possible

<sup>16</sup> Decision no. 3311/2002, Supreme Court of Justice, Commercial section, quoted in Pandectele Române no. 6/2003, pp. 66-67. NOTE: In this case, moratory damages requested for late transfer of dividends corresponding to the financial year 1996 are not calculated at the level of the B.R.D. bonus interest for deposits established by legal entities for a year. The appellant may only request interests granted by the bank for the amounts that exist in the current account, namely the sight interest practiced by the bank that administers the account, but as she has not proved the loans, to request the interest for the current account, the appeal in this case is unfounded and shall be dismissed.

<sup>17</sup> Published in the Official Monitor of Romania, Part I, no. 26 of January 25, 2000. See also A. I. Țuca, Regimul juridic al dobânzilor în contractul de împrumut din perspectiva noilor reglementări cuprinse în O.G. nr. 9/2000, in Juridica no. 6/2000, pp. 228-231.

to be the result of confusion in terms, taking into consideration that both words, *interest and penalty*, express the compensatory character, but ignore the sanction character specific to fiscal law.

Cumulating interests and penalties also assumes that penal clauses shall be understood in civil, commercial and fiscal law.

Based on penal clauses, in civil law the parties have the possibility to determine the quantity of damages owed by debtors as a result of non-fulfilling contractual obligations. Therefore, penal clauses have a guarantee function, a function of mobilizing debtors, and also a compensatory function. Conventional interests may not exceed the legal interest with more than 50% a year, and in our opinion the possibility of cumulating penalties and the legal interest is not excluded.

For *commercial law*, the definition and functions of penal clauses are identical, and the sum of penalties may not exceed the sum they are calculated upon<sup>18</sup>. We consider that cumulating penalties and the legal interest is not possible in the commercial field either. Not even cumulating penalties and conventional interests is allowed because both have the same finality. In the *Fiscal code*, penalties are of 0,5% for each month or/and fraction of a month, according to art. 114 para. 1 of the Fiscal procedure code, and after due date both interests and default interests will be owed.

We consider that in spite of the terminology used, the compensatory character specific to interests from civil and commercial law better corresponds to penalties from fiscal law. If “fiscal interests” are applied for each default day, penalties – in fiscal law – are calculated per month or fractions of a month, which corresponds to the situation when the state, as fiscal creditor, suffers damages because it may not use the money owed by taxpayers. Therefore, we consider that in order to respect the principle of the certitude of taxation, a form of sanction which corresponds to the legal nature specific to fiscal law should be chosen and which would also ensure the efficiency of taxation. The most suitable name would be that of *default fees*. They are, in our opinion, both a sanction for late payment and a compensation of the state for late reception of its rights.

In conclusion, we propose the return to the term “*default fees*” (*majorări de întârziere*) in fiscal law, in order to avoid the confusion of fiscal law terms on the one hand and civil and commercial law terms on the other hand, as well as to limit their maximum amount.

As for the exaggerated character of cumulating interests and default penalties, for 2004, 1<sup>st</sup> semester, the legal interest in *civil* matters was of 4,25%, in *commercial* matters of 21,25% per year, while in *fiscal law* of 21,96% per year. If to the latter one we also add the penalty of 0,5% per month or fraction of a month, we have 6% per year. Given that default penalties are added to interests, the final rate of a default sanction shall be of 27,96% per year in fiscal law, which we consider too much. Due to this aspect, taxpayers will turn to payment facilities (deferrals, payment schedules), which is not beneficial to the state as creditor.

<sup>18</sup> Decision no. 3629/1999, Supreme Court of Justice, Commercial section, quoted in Revista de Drept Comercial no. 10/2002, p. 256. NOTE: In commercial law, penalties are owed for the entire period from expiry until the debt is paid. They may also be increased during the trial in first instance of the case.