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DOCTORAL THESIS SUMMARY

THE REMUNERATIVE INTEREST AND THE PUNITIVE INTEREST IN THE MONEY LOAN AGREEMENT

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THESIS SUMMARY

Choosing this subject for the doctoral project was suggested by the difficulties the author met in his professional life, when confronted with the two stances in which interest can appear in civil legal relationships, i.e. the remunerative interest and the moratory (or punitive) interest.

It was said that interest relates to the "legal time" and it expresses the monetary value of time. We started this science project motivated by the thought that, in light of the economic and social importance of the money loan agreement, such an analysis of the remunerative and punitive interest is justified, both from a scholar and a practical perspective; our decision was also influenced by the fact that we only identified a single related monography in the recent Romanian legal literature – which, however, only refers to the legal regime of punitive interest for generic monetary obligations, and which was published before the new Civil Code entered into force[1].

The study – for a period of almost 11 years – of the various manifestations of these two stances of interest when associated with money loans, as well as the critical analysis of the evolution of regulations regarding interest, allowed the author to learn and to expose in a monographical manner the essence, the functioning mechanisms and the purposes of this institution of private law which is interest, along with its special applications within the money loan agreement. In order to complete the image we used as well a presentation of the evolution of interest from a historical perspective, but also repeated incursions in comparative law. We also presented a few case studies, selected form the author's current attorney activity.

[1] Maria DUMITRU, *The legal regime of the moratory interest*, Universul Juridic, Bucharest, 2010.

I. Before starting to articulate a general theory of interest within the money loan agreement, we considered useful, in the first part of our thesis, to set the place of the loan for consumption within the panoply of named civil contracts. For this purpose, the first chapter of this project realizes a comparison between the loan for use and the loan for consumption, only to reach the conclusion that these two are varieties of a single contract, governed by mainly common rules; this conclusion is also confirmed by the regulation comprised in the new Civil Code of 2011, which provides, in a very suggestive manner, that "*loan is of two kinds : loan for use, also known as commodate, and loan for consumption*".

At this point, by rigorously examining the regulation of the loan for use and of the loan for consumption in the new Civil Code (but also in the comparative law), we were able to affirm – with text arguments, as well as historical arguments – that, in reality, the two are merely varieties of the same one agreement, originally generated by the will to do good. Both the commodate and *mutuum* share, most of the times, the notion of gratuity, like any friendly service given without the intention to obtain something in return. This gratuitous character is more obvious in the case of loans for use – whereas, in the case of loans for consumption, the gratuity is an attribute which pertains only to the nature, not to the essence of the contract. Only the German Civil Code has a different vision on this issue, while firmly separating the money loans both from the commodate, as well as from loans for consumption of any other generic goods.

Out of the legal characteristics that we analysed, we chose to outline the real character and the unilateral character of the loan, because of the important consequences which these two have for the valid conclusion of the contract. We specially commented on the legal meaning of handing over the lent goods, and we found out that the formality of handing over the goods from the lender to the borrower is never a contractual obligation per se (and, as such, an effect of the contract), but merely a condition (previous or simultaneous) necessary for a valid conclusion of the contract. One cannot neglect the importance of a correct determination, if we take into consideration that the lack of a condition for the valid conclusion of a contract generates the inexistence (or nulity) of the contract, while

the breach of a presumtive contractual obligation could lead the other party towards a claim for termination based on breach of contract.

As for the presumption of gratuity of the loan for consumption, instated by the old Civil Code of 1864, it was replaced in the new regulation – only regarding money loans – with a relative presumption of onerosity, starting at the time when the new Civil Code came into force. This new rule is harmonized with the contemporary economic and social environment, considering that most national laws admit that lending money with interest on a large scale is not only acceptable, but also necessary.

In this project we also approached some practical issues generated by lending or borrowing amounts of money by two spouses together, or only one of them in lack of the other ; in this last case, we concluded that the obligation to reimburse the loan will be the contracting spouse's own obligation, or a common obligation of both spouses, based on the correct application of article 351(c) NCC (correspondinng to the old article 32(c) of the ex Family Code): "*The spouses are liable with their common assets for [...] a) obligations contracted by any one of the spouses in order to cover usual costs of the household*". If both spouses conclude the contract, then the obligation to refund the loan is common without any doubt, as indicated by article 351(b) NCC.

On the other hand, we analysed the opinions expressed by some authors regarding loans granted by one of the spouses in lack of the other – loans regarding common assets of the spouses, including amounts of money – which are valid because they fall under the presumption of a reciprocal implied mandate between the spouses. These opinions were confirmed by the jurisprudence of Romanian courts, which ruled as admissible the claim for reimbursement of a loan granted by one spouse, without even asking the non-contracting spouse to actively be a part of the court proceedings.

We filled a separate sub-section with a comparative analysis between the money loans and the irregular deposits of amounts of money, as we considered important to present comprehensive criteria to distinguish the two – given the possible confusions (often met in real life), generated when an interest is stipulated in such cases. Considering the present regulation is not sufficient, *de lege ferenda* we

proposed this new phrasing for article 2105 NCC " *(1) A contract providing for the transfer of money or other generic and consumptible goods, which become property of the receiver and must not be refunded in the same state as received, being allowed to be used according to its economic purpose, shall be deemed as a loan for consumption each time when the parties concluded the contract mainly in the interest of the receiving party. This intention is presumed whenever the parties agreed that reimbursement cannot be requested before the term of contract expired. (2) In all other cases the contract shall be deemed as an irregular deposit, and the following provisions shall apply*".

The primary criteria used in order to determine the nature of the analysed agreement, resulting from the above-mentioned definition, relates the the *causa remota* of the party disposing of the goods : if the purpose of the contract is to provide a free service (or even paid service) in the benefit of the receiving party, such that the latter can use and/or dispose of the received goods in his own interest until the term set for reimbursement, then the agreement shall be a loan for consumption; but if the main purpose was for the receiving party to merely provide a custody service in the benefit of the creditor (and the receiving party's right to use the goods is an accesory to that), then the agreement shall be an irregular deposit.

In the last section of the thesis' first part, we tried to argument the inexistence of a real incompatibility between the rule of monetary nominalism – a basic rule applying to the debtor in a money loan contract – and the theory of contractual hardship, even more now that the new Civil Code regulated the latter for the first time in Romanian legislation. To this aim, we identified and presented solid and plausible arguments that demonstrate that the theory of contractual hardship can be successfully applied to money loan agreements affected by a firm reimbursement term (by definition, a longer reimbursement term), no matter if an interest is stipulated or not, whenever a serious depreciation of the payment currency occurs before the due date : in theory, in such cases the lender should be entitled to ask – in court, if needed – for a re-examination of the amount to be received on the due date from the borrower.

Without the intention to justify brutal and uncalled for intervention of the courts in the mandatory effect of contracts, we think that the arguments found by us

in favor of contractual hardship can relate to concepts such as contractual solidarity, performance of contractual obligations in good-faith and defence of the social utility of contracts; only time will demonstrate if the courts will accept this modern vision on the effect of agreements between contracting parties.

II. In the second part of this study we tried to build a general theory of interest (section 1), and then, operating with the concepts already defined, to present all the conditions requested for the birth, exercise and termination of the right to claim interest – in short, to present the legal regime of the remunerative interest (section 2) and of the punitive interest (section 3) – within the money loan agreement. By analysing these conditions we concluded that, even if originally the interest was an economic concept requested by the circulation of monetary mass, it now has multiple and consistent legal implications.

In the beginning, we criticised the lack of a general legal definition for interest, and therefore made the following proposal : "*Interest is the amount of money, determined by applying a rate to the amount of the capital, the payment of which the debtor undertakes as an equivalent for the right to use the capital, or which the debtor is obliged to pay for not performing in due time a monetary obligation*". Then we presented in detail the economic and legal functions of the interest, insisting on the two main legal functions (remuneration for granting the right to use an amount of money, and reparation of damages provoked by not paying an amount of money in due time).

We also offered a division for the different types of interest – and provided arguments that the Romanian legislation does not allow or justify categories of interest other than remunerative, punitive and restitutory interest (we also criticised authors who imported other categories from foreign literature without any necessary adjustments and without relating to the different regulations in force).

We listed the main regulations that represent the legal basis of interest in Romania, and showed that the common law of interest can be found in the Civil Code's provisions related to punitive interest (moratory damages for late completion of an obligation to pay an amount of money) and related to loan with interest, as well

as in the Government's Ordinance no. 13/2011 regarding legal remunerative and punitive interest for monetary obligations.

There's a whole sub-section dedicated to an ample overview of the way in which the society, the philosophers and religion perceived interest along history (starting with the Roman Law and going on with the medieval times); the purpose of such an approach is to help better understanding of the modern anatomy of the interest, which is surprisingly still bearing the marks of many centuries when its legitimacy was under intense debate – either completely denied, or strictly regulated and controlled.

Finally, the last two sections of our project are dedicated to the detailed analysis of present regulations applicable to interest within money loan agreements. For the beginning, we argued that the State should intervene in this sensitive matter, because we think that contractual freedom should not be unlimited when it comes to conventional interest. In order to protect the debtor in an adequate manner, the legislative requests that any conventional interest must respect multiple conditions : some relate to the form of the agreement, and others relate to the rate (the amount) of the interest and the ways to determine it ; therefore, a whole array of regulations were instated in order to protect the debtors from abusive interest, such as: the provision of a maximum amount for the remunerative interest and a strict sanction for not observing it; usury was incriminated as a crime; special regulations for the protection of consumers in credit agreements concluded with banks or other loan institutions etc.

We described the common techniques used to avoid, in real life, these restrictions (especially the maximum amount permitted for conventional interest); we presented possible solutions to detect and combat such illegalities. In this context, we made a critical analysis of usury, which is incriminated by Law no. 216/2011 regarding prohibition of usuruy as a profession ; we think that, in its present (incomplete) wording, this regulation is almost ineffective and requires considerable amendments.

We saluted the elements of modernity brought by the new Civil Code entered into force in 2011 (especially with regard to the punitive interest, which was granted with some new features allowing it to be more effective), and by the Government's

Ordinance no. 13/2011 – but we also indicated some inadvertencies or less-than-ideal wording in these regulations, making some proposals *de lege ferenda* where we considered that a step forward could be taken for a better protection of the creditors' rights, as well as the debtors', especially when the latters are private individuals who enter into contract with a professional operating a lucrative enterprise.

Special attention was granted to the study of legal interest; its importance was capital until not so long ago, considering that the amount of legal interest was the absolute limit for claiming damages for late performance of a monetary obligation (and, implicitely, for late reimbursement of money loans). We demonstrated the perfect identity between punitive interest and the moratory damages referred to by article 1535 NCC as an element of contractual liability.

While doing this, we criticised the ridgid and restrictive regulation included in the previous Civil Code, which limited the amount of damages to be granted in such situation – arguing such limitation disregarded the contemporary social and economic reality, especially affecting professionals, because *plus valet pecunai mercatoris quam pecunia non mercatoris.* We saluted a few bold solutions in the jurisprudence of the 1990s and up to 2011 which respected this old Roman rule, but we must admit the jurisprudence of the time was far from being consistent and/or predictable.

In this context, the replacement of the old Civil Code of 1864 and of the ex Government's Ordinance no. 9/2000 regarding legal interest, in the second half of the year 2011 (during the final stages of finishing this thesis) proved to have a positive impact (in the end!) for the author; of course, large sections of the project needed to be written again, but the new regulations became reason for comparative analysis with the old ones.

We saluted the new features adding more rigour and safety to the general legal environment, as well as some specific instruments helping the lender who was not refunded in due time (start of the punitive interest *ex lege* immediately after the due date, without any other notification; the possibility to obtain moratory damages in excess of the legal punitive interest, the possibility to enforce a loan agreement if it was authenticated by a notary public or in other ways permitted by law; instating a

legal punitive interest at a rate larger than the rate of the legal remunerative interest etc.)

However, we had to admit that even the new system used to determine the rate of the legal punitive interest (a fixed margin above the interest of reference published by the National Bank) remains insufficient and ineffective, at least by comparison to the real inflation of the last few of years. This has negative impact not only on individuals, but also for the economy itself : not only credit is discouraged, but, even worse, all debtors are implicitely stimulated to be late in executing their monetary obligations, since paying a small punitive interest is still more attractive (and less costly) than getting a loan.

Therefore I proposed a couple of remedies *de lege ferenda*, with the aim of bringing more balance between an interest to be really remunerative (or reparatory, as the case may be) for the lender, and at the same time not to be hard (or even ruinous) on the debtor.

Last but not least, I presented technical issues related to the "police" of interest, as French authors like to say : I determined the term when interest starts and stops to accrue; the method to calculate the interest; the due date for payment of interest and how payment can pe proven; anticipated payment of interest and retrictive regulation of interest producing interest; statute of limitations regarding the right to claim interest.

This project was drafted based on legislation, legal literature and jurisprudence published before 30.11.2013