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A BRIEF REVIEW OF SOURCES ON *EMENDATIO MORAE* IN THE DIGEST OF JUSTINIAN*

Abstract: *Purgatio or emendatio morae would in the literal translation into English mean purging the default. In Roman classical law, it amounted to the possibility of the debtor in default, firstly, to fulfil the primary obligation and, secondly, to remediate potential legal effects of the consequences of mora debitoris. There were other ways of purging the default as well. As a consequence of emendatio morae, debtor's obligations, both primary and secondary ones, would cease to exist and the consequences of mora debitoris would cease to produce legal effects. Therefore, purgatio morae consisted of two elements: debtor's offer to completely fulfil the prestation owed as well as his offer to remediate the legal effects of the consequences of the default.*

Keywords: *debtor's default purging, purgatio morae, emendatio morae, debtor's default, mora debitoris, mora solvendi.*

* This article is the result of research on the Project "Legal Tradition and New Legal Challenges" in 2023, which is conducted by the University of Novi Sad, Faculty of Law Novi Sad. (Рад је резултат истраживања на Пројекту „Правна традиција и нови правни изазови“ у 2023. чији носилац је Универзитет у Новом Саду Правни факултет у Новом Саду.)

1. INTRODUCTION

Debtor's default is an unfulfilment of a possible, due and actionable obligation for which the debtor is responsible. In other words, there are five cumulative conditions for the occurrence of *mora debitoris*: the fulfilment of the prestation owed must be (1) due, (2) possible, (3) actionable and (4) unperformed and the debtor must be (5) responsible for it.

The debtor in default had at his disposal the possibility to fulfil the original prestation, remediate the effects of the consequences of *mora debitoris* which had already occurred and to prevent the further ones. In Roman classical law, this possibility was called *purgatio*¹ or *emendatio*² *morae*, which in a literal translation into English would mean purging, i.e., correcting the default. Apart from that, default purging occurred in case of the creditor's refusal to receive the prestation fulfilment, as well as in case of a novation of the original obligation.

2. PURGATIO THROUGH FULFILMENT OF PRIMARY AND SECONDARY OBLIGATIONS

Default purging implied the debtor's offer to fulfil the prestation and remediate any damage the creditor suffered due to his delay. Therefore, in order for the debtor to purge the default, his offer must include the compensation of both the original debt and every subsequently arising claim on that basis.³

2.1. Prestation Fulfilment

In classical law, the fulfilment of a prestation is denoted by the expression *solutio*.⁴ It is a regular way of extinguishing the obligation.⁵ In Roman classical law, issues related to the fulfilment of prestations were regulated in great detail,

¹ On the term *purgare*, v. reference to „Purgare“ in Hermann Heumann, Emil Seckel, *Handlexikon zu den Quellen des römischen Rechts*, Graz 1958.

² On the term *emendatio*, v. reference to “*emendation*”, Charlton T. Lewis, Charles Short, *A Latin Dictionary*, Oxford. Clarendon Press. 1879, available at <https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Demendatio>, accessed on 3rd November, 2023.

³ V. sources in the Chapter 2.2. Remediation of the effects of the consequences of *mora debitoris*.

⁴ On the term *solutio*, v. reference to „Solutio“ in H. Heumann, E. Seckel, *op. cit.*

⁵ Due to the historical development that preceded the determination of the rules on payment, in the minds of classical lawyers, it was inseparable from the extinguishment of the obligation by means of an apparent payment (*imaginary solutio*). By apparent payment, classical jurists meant the performance of actions prescribed by law that give the appearance of performance of prestation and lead to the extinguishment of the obligation. A. Маленица, В. Цветковић-Ђорђевић, *Римско право – инстинктивни приватној праву*, Нови Сад 2018, 174.

as evidenced by the fact that the section on fulfilments and liberations (from obligation) with 108 fragments is among of the most extensive ones in the Justinian's Digest.⁶

The fact that fulfilment of prestation is a regular way of extinguishing the obligation could easily be found in classical sources.⁷ All issues related to the fulfilment of the prestation can be classified into the following questions: 1) who performs the prestation, 2) to whom, 3) what is its content, 4) when, 5) where and 6) how is it performed.

2.1.1. Active Subject of the Fulfilment

The person who fulfils the prestation must have the business capacity or must have the consent of the tutor or curator to fulfil it. The fulfilment of the prestation is usually performed by the debtor. However, fulfilment can also be performed by a third party, except in case of the *intuitu personae* obligations. A third party can perform the performance at the debtor's behest, at his own discretion, and even against the debtor's will.⁸

2.1.2. Passive Subject of the Fulfilment

The fulfilment of the prestation is by the nature of things done to the creditor. However, it can also be performed to others: to a person authorised by the creditor with a power of specific action of fulfilment reception, to a person who is generally authorized to manage his affairs, to the *adstipulator*, i.e. the person to whom the debtor undertakes to fulfil the same performance which he owes to the creditor,⁹ to the creditor's tutor and guardian, and even to a person without

⁶ Max Kaser, *Roman Private Law*, 2. edition, translated by Rolf Dannenbring, London 1968, 218; *ibid.*

⁷ Gai. Inst. 3.168

Tollitur autem obligatio praecipue solutione eius, quod debeatur...

D. 50.16.176 Ulpianus libro 45 ad Sabinum

"Solutionis" verbo satisfactionem quoque omnem accipiendam placet. "Solvere" dicimus eum, qui fecit quod facere promisit.

⁸ M. Kaser, 218-219; А. Маленица, В. Цветковић-Ђорђевић, 174.

D. 3.5.38 Gaius libro tertio de verborum obligationibus

Solvendo quisque pro alio licet invito et ignorante liberat eum: quod autem alicui debetur, alius sine voluntate eius non potest iure exigere. Naturalis enim simul et civilis ratio suavit alienam condicionem meliorem quidem etiam ignorantis et invito nos facere posse, deteriolem non posse.

⁹ V. an interesting text on the position of the creditor posterior to the prestation fulfilment done to the *adstipulator*.

D. 45.1.131.1 Scaevola libro 13 quaestionum

Qui fundum sibi aut Titio dari stipulatur, quamvis fundus Titio traditus sit, nihilo minus petere fundum potest, ut sibi de evictione promittatur: nam interest eius, quia mandati actione

any authority (*negotiorum gestor*).¹⁰ The prestation fulfilment cannot be performed against the creditor's will, but if the creditor subsequently approves it, the performance is valid. This results, among other things, from the just mentioned text D. 3.5.38. Furthermore, if the creditor denies the previously given authorisation, and the debtor, not knowing about it, fulfils the prestation to that unauthorised person, he is released from the obligation. Fulfilment by deposit is also valid, if the creditor is unknown, absent or refuses to receive it.¹¹

The death of the creditor, except in the case of *intuitu personae* obligations, did not extinguish the debtor's obligation to fulfil the prestation, but instead of making it to the creditor, the fulfilment was made to his heir, both before and after the occurrence of *mora debitoris*.¹² The same conclusion is reached in one of the texts by *Sextus Pomponius*, in which one of the two creditors is no longer alive, so his heir enters into his rights and obligations.¹³

2.1.3. Content of the Fulfilment

The debtor is obliged to fulfil the prestation in full. The creditor does not have to receive partial or in any way deficient fulfilment and such a refusal does

fundum recepturus sit a Titio. Sed si donationis causa Titium interposuit, dicetur traditione protinus reum liberari.

¹⁰ This was explained in detail by prof. Valentina Cvetković-Dorđević, referring to Julian's text D. 46.3.34.3 in which the collection is carried out by an authorised procurator. V. Валентина Цветковић-Ђорђевић, *Negotiorum gestio у римском њраву с осврћом на српско њраво*, Београд 2020, 72.

¹¹ M. Kaser, 219; A. Маленица, В. Цветковић-Ђорђевић, 174.

D. 46.3.12 Ulpianus libro 30 ad Sabinum

pr. Vero procuratori recte solvitur. Verum autem accipere debemus eum, cui mandatum est vel specialiter vel cui omnium negotiorum administratio mandata est.

1. *Interdum tamen et non procuratori recte solvitur: ut puta cuius stipulationi nomen insertum est, si quis stipuletur sibi aut Titio.*

2. *Sed et si quis mandaverit, ut Titio solvam, deinde vetuerit eum accipere: si ignorans prohibitum eum accipere solvam, liberabor, sed si sciero, non liberabor.*

3. *Alia causa est, si mihi proponas stipulatum aliquem sibi aut Titio: hic enim etsi prohibeat me Titio solvere, solvendo tamen liberabor, quia certam condicionem habuit stipulatio, quam immutare non potuit stipulator.*

4. *Sed et si non vero procuratori solvam, ratum autem habeat dominus quod solutum est, liberatio contingit: rati enim habitio mandato comparatur.*

¹² D. 22.1.27 Africanus libro octavo quaestionum

Cum patri familias mora facta sit, iam in herede eius non quaeritur mora: nam tunc heredi proximo hereditario iure ea competet ideoque ad ceteros quoque deinceps transmittitur.

¹³ D. 38.1.4 Pomponius libro quarto ad Sabinum

A duobus manumissus utrique operas promiserat: altero ex his mortuo nihil est, quare non filio eius, quamvis superstite altero, operarum detur petitio. Nec hoc quicquam commune habet cum hereditate aut bonorum possessione: perinde enim operae a libertis ac pecunia credita petitur. Haec ita Aristo scripsit, cuius sententiam puto veram: nam etiam praeteritarum operarum actionem dari heredi extraneo sine metu exceptionis placet. Dabitur igitur et vivo altero patrono.

not constitute grounds for creditor's default (*mora creditoris, mora accipiendi*). If, on the other hand, he receives it, he does not lose the right to settle the difference until full fulfilment.¹⁴

2.1.3.1. Partial fulfilment

There were exceptions to the rule that the creditor did not have to receive a partial fulfilment. In case of some obligations, the debtor's financial circumstances were taken into account, so the creditor had to settle for partial fulfilment. Such was the case with obligations based on gifts. The gift-giver could refuse to give the entire promised gift on the grounds that it would put him in a difficult financial situation (so-called *beneficium competentiae*). Furthermore, the creditor could not refuse partial payment even when successive obligations were in question, because payments arrival at time intervals was normal for them.¹⁵

2.1.3.2. *Datio in solutum*

The debtor can offer to fulfil some other prestation instead of the one owed. The creditor is not obliged to accept it. If he does so, a *datio in solutum* occurs and the obligation is extinguished. According to the lawyers of the Proculian school, that extinguishment is a consequence of the application of the existing law (*ipso iure*), while according to the Sabinian school, extinguishment occurs only after an objection (*ope exceptionis*) to the lawsuit in which the creditor demands the fulfilment of the original obligation.¹⁶

2.1.3.3. Eviction

In terms of fulfilment, complications may arise if an eviction occurs, i.e. if the third party, proving its right, takes away the thing that was given in the name

¹⁴ D. 46.3.27 Ulpianus libro 28 ad edictum

Etiam circa stipulationem et ex testamento actionem, si res tradita fuerit quae debebatur, quamdiu aliquid iuri rei deest, adhuc tamen ipsa res petenda est: ut puta possum fundum petere, licet mihi traditus sit, si ius quoddam cautionis supererit.

¹⁵ M. Kaser, 220; A. Маленица, В. Цветковић-Ђорђевић, 174-175.

D. 12.1.21 Iulianus libro 48 digestorum

Quidam existimaverunt neque eum, qui decem peteret, cogendum quinque accipere et reliqua persequi, neque eum, qui fundum suum diceret, partem dumtaxat iudicio persequi: sed in utraque causa humanius facturus videtur praetor, si actorem compulerit ad accipiendum id quod offeratur, cum ad officium eius pertineat lites deminuerere.

¹⁶ M. Kaser, 220; A. Маленица, В. Цветковић-Ђорђевић, 174-175.

Gai. Inst. 3.168

Tollitur autem obligatio praecipue solutione eius, quod debeatur. unde quaeritur, si quis consentiente creditore aliud pro alio soluerit, utrum ipso iure liberetur, quod nostris praeceptoribus placuit, an ipso iure maneat obligatus, sed aduersus petentem per exceptionem doli mali defendi debeat, quod diuersae scholae auctoribus uisum est.

of payment. Classical jurists believe that in such a case the obligation is not extinguished, because, as Marcian says, the creditor would not have taken the thing if he knew that it would not belong to him in its entirety. The creditor had to receive a payment different from what was owed only in the case of *facultas alternativa*.¹⁷

2.1.3.4. Debt on Several Grounds

When the debtor owes on more than one basis, and then makes the payment, classical law regulates which prestation is considered fulfilled. The basic rule is that the prestation determined by the debtor is considered fulfilled.¹⁸

If he has not made the determination, prestation determined by the creditor is considered fulfilled, although he must take into account the debtor's interest according to the following rules: interest is charged before the principal, earlier due claims before the later ones, those that are more difficult for the debtor before the easier ones. These solutions show how much classical law takes fairness into account.¹⁹

¹⁷ M. Kaser, 147; A. Маленица, В. Цветковић-Ђорђевић, 174-175.

D. 46.3.46 Marcianus libro tertio regularum

pr. Si quis aliam rem pro alia volenti solverit et evicta fuerit res, manet pristina obligatio. Etsi pro parte fuerit evicta, tamen pro solido obligatio durat: nam non accepisset re integra creditor, nisi pro solido eius fieret.

1. Sed et si duos fundos verbi gratia pro debito dederit, evicto altero fundo remanet integra obligatio. Tunc ergo res pro re soluta liberationem praestat, cum pro solido facta est suscipientis.

¹⁸ *Ibid.*

D. 46.3.101.1 Paulus libro 15 responsorum

Paulus respondit aliam causam esse debitoris solventis, aliam creditoris pignus distrahentis: nam cum debitor solvit pecuniam, in potestate eius esse commemorare, in quam causam solveret: cum autem creditor pignus distraheret, licere ei pretium in acceptum referre etiam in eam quantitatem, quae natura tantum debebatur, et ideo deducto eo debitum peti posse.

¹⁹ *Ibid.*

D. 46.3.1 Ulpianus libro 43 ad Sabinum

Quotiens quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis dicere, quod potius debitum voluerit solutum, et quod dixerit, id erit solutum: possumus enim certam legem dicere ei quod solvimus. Quotiens vero non dicimus, in quod solutum sit, in arbitrio est accipientis, cui potius debito acceptum ferat, dummodo in id constituat solutum, in quod ipse, si deberet, esset soluturus quoque debito se exoneraturus esset, si deberet, id est in id debitum, quod non est in controversia, aut in illud, quod pro alio quis fideiusserat, aut cuius dies nondum venerat: aequissimum enim visum est creditorem ita agere rem debitoris, ut suam ageret. Permittitur ergo creditor constituere, in quod velit solutum, dummodo sic constituamus, ut in re sua constitueret, sed constituere in re praesenti, hoc est statim atque solutum est:

D. 46.3.97 Papinianus libro secundo definitionum

Cum ex pluribus causis debitor pecuniam solvit, utriusque demonstratione cessante potior habebitur causa eius pecuniae, quae sub infamia debetur: mox eius, quae poenam continet: tertio quae sub hypotheca vel pignore contracta est: post hunc ordinem potior habebitur propria quam aliena causa, veluti fideiussoris. Quod veteres ideo definierunt, quod verisimile videretur diligentem debitorem admonitum ita negotium suum gesturum fuisse. Si nihil eorum interveniat, vetustior contractus ante solvetur. Si maior pecunia numerata sit, quam ratio singulorum exposcit,

2.1.4. Time of Fulfilment

Regardless of the default, the time of fulfilment of the performance is either determined by the parties²⁰, or it is determined by the nature of the matter (for example grapes²¹ and grain are delivered after harvest, the time required to arrive at the agreed place of performance is taken into account,²² time required for the

nihilo minus primo contractu soluto, qui potior erit, superfluum ordini secundo vel in totum vel pro parte minuendo videbitur datum.

D. 46.3.5pr. Ulpianus libro 43 ad Sabinum

In his vero, quae praesenti die debentur, constat, quotiens indistincte quid solvitur, in graviorem causam videri solutum, si autem nulla praegravet, id est si omnia nomina similia fuerint, in antiquiorem. Gravior videtur, quae et sub satisfactione videtur, quam ea quae pura est.

D. 46.3.8 Paulus libro decimo ad Sabinum

Illud non ineleganter scriptum esse Pomponius ait, si par et dierum et contractuum causa sit, ex omnibus summis pro portione videri solutum.

²⁰ Examples of parties agreeing upon the deadline of performance fulfilment are numerous.

D. 45.1.49.3 Paulus libro 37 ad edictum

Si promissor hominis ante diem, in quem promiserat, interpellatus sit et servus decesserit, non videtur per eum stesisse.

D. 45.1.41 Ulpianus libro 50 ad Sabinum

pr. Eum, qui "kalendis ianuariis" stipulatur, si adiciat "primis" vel "proximis", nullam habere dubitationem palam est: sed et si dicat "secundis" vel "tertiis" vel quibus aliis, aequae dirimit quaestionem. Si autem non addat quibus ianuariis, facti quaestionem inducere, quid forte senserit, hoc est quid inter eos acti sit (utique enim hoc sequimur quod actum est), easque adsumemus. Si autem non appareat, dicendum est quod Sabinus, primas kalendas ianuarias spectandas. Plane si ipsa die kalendarum quis stipulationem interponat, quid sequemur? Et puto actum videri de sequentibus kalendis.

1. Quotiens autem in obligationibus dies non ponitur, praesenti die pecunia debetur, nisi si locus adiectus spatium temporis inducat, quo illo possit perveniri. Verum dies adiectus efficit, ne praesenti die pecunia debeatur: ex quo apparet diei adiectionem pro reo esse, non pro stipulatore.

2. Idem in idibus etiam et nonis probandum est et generaliter in omnibus diebus.

²¹ D. 18.6.1.4 Ulpianus libro 28 ad Sabinum

Si doliare vinum emeris nec de tradendo eo quicquam convenerit, id videri actum, ut ante evacuantur quam ad vindemiam opera eorum futura sit necessaria: quod si non sint evacuata, faciendum, quod veteres putaverunt, per corbem venditorem mensuram facere et effundere: veteres enim hoc propter mensuram suaserunt, si, quanta mensura esset, non appareat, videlicet ut appareret, quantum emptori perierit.

²² D. 45.1.137.2 Venonius libro primo stipulationum

Cum ita stipulatus sum "Ephesi dari?" inest tempus: quod autem accipi debeat, quaeritur. Et magis est, ut totam eam rem ad iudicem, id est ad virum bonum remittamus, qui aestimet, quanto tempore diligens pater familias conficere possit, quod facturum se promiserit, ut qui Ephesi daturum se sponderit, neque diplomate diebus ac noctibus et omni tempestate contempta iter continuare cogatur neque tam delicate progredi debeat, ut reprehensione dignus appareat, sed habita ratione temporis aetatis sexus valetudinis, cum id agat, ut mature perveniat, id est eodem tempore, quo plerique eiusdem condicionis homines solent pervenire. Eoque transacto, quamvis Romae remanserit nec possit Ephesi pecuniam dare, nihilo minus ei recte condicetur, vel quia per ipsum steterit, quo minus Ephesi daret, vel quoniam per alium Ephesi possit dari vel quia ubique potest solvere: nam et quod in diem debetur, ante solvi potest, licet peti non potest. Quod si diplomate

construction of a building,²³ etc.), or the performance is immediately due for collection²⁴. Of course, when prestation fulfilment consists in inaction, one cannot speak of the time of fulfilment in the abovementioned sense. An example of this is obliging the debtor not to build anything on his land. Fulfilment of this prestation lasts as long as the obligation does.²⁵ However, the question of the time of prestation fulfilment becomes less important after the occurrence of the default and the debtor should offer to fulfil the prestation as soon as possible if he wants to purge it.

2.1.5. Place of Fulfilment

The place of fulfilment, just like the time of fulfilment, is determined by the contract. If nothing is agreed, the place is determined according to the nature of the performance – eg. if a worker is being hired to extract stone, he is obliged to come to the quarry from which the stone is extracted. If the nature of the fulfilment does not determine the place of fulfilment, generic items are submitted to the place of the competent court where the creditor would have the right to sue the debtor, which is usually the debtor's domicile, and individual items where they are located. The type of claim by which the right is protected also has an influence on the place of performance.²⁶ If the creditor will not or cannot receive the fulfilment, the fulfilment is valid when its object is deposited in the temple or in another place designated by the judge.²⁷

usus aut felici navigatione maturius quam quisque pervenerit Ephesum, confestim obligatus est, quia in eo, quod tempore atque facto finitum est, nullus est coniecturae locus.

²³ D. 45.1.14 Pomponius libro quinto ad Sabinum

Si ita stipulatus essem abs te “domum aedificari?” vel heredem meum damnvero insulam aedificare, celso placet non ante agi posse ex ea causa, quam tempus praeterisset, quo insula aedificari posset: nec fideiussores dati ante diem tenebuntur:

²⁴ V. D. 45.1.41, but also:

D. 50.17.14 Pomponius libro quinto ad Sabinum

In omnibus obligationibus, in quibus dies non ponitur, praesenti die debetur.

²⁵ M. Kaser, 220; A. Маленица, В. Цветковић-Ђорђевић, 174-175.

²⁶ *Ibid.*, 220; *ibid.*, 175. V. again D. 50.17.14 Pomponius libro quinto ad Sabinum (fn. 25) as well as

D. 5.1.38 Licinius libro quarto regularum

Quod legatur, si quidem per personalem actionem exigetur, ibi dari debet ubi est, nisi si dolo malo heredis subductum fuerit: tunc enim ibi dari debet ubi petitur. Praeterea quod pondere aut numero aut mensura continetur, ibi dari debet ubi petitur, nisi si adiectum fuerit “centum modios ex illo horreo” aut “vini amphoras ex illo dolio”. Si autem per in rem actionem legatum petetur, etiam ibi peti debet ubi res est. Et si mobilis sit res, ad exhibendum agi cum herede poterit, ut exhibeat rem: sic enim vindicari a legatario poterit.

²⁷ *Ibid.*

D. 13.4.2.8 Ulpianus libro 27 ad edictum

Nunc de officio iudicis huius actionis loquendum est, utrum quantitati contractus debeat servire an vel excedere vel minuere quantitatem debeat, ut, si interfuisset rei Ephesi potius solvere

2.1.6. Manner of Fulfilment

The debtor is obliged to fulfil the prestation in the agreed manner, and if nothing is specified in terms of the manner, then in such a way that the creditor realises his right in full. That is why when the *res mancipi* handover is agreed upon, the informal handover of the thing is not enough, but the debtor has the obligation to make the creditor the owner through *mancipatio* or *iniurecessio*.²⁸

2.2. Remediation of the Effects of the Consequences of *Mora Debitoris*

If there were no consequences of debtor's default, the debtor would, by fulfilling the prestation, i.e. the original obligation, purge the default. However, in case consequences of *mora debitoris* occurred, in order to purge the default, the debtor was obliged to remediate the effects of the consequences of *mora debitoris*.

Contrary to popular opinion, *perpetuatio obligationis* was not a consequence of debtor's default. The consequences of *mora debitoris* were (1) transfer of risk of the occurrence of damage caused by *casus* or *vis maior* from the creditor to the debtor, (2) transfer of risk of the impossibility of prestation fulfilment caused by *casus* or *vis maior* from the creditor to the debtor as well as (3) the occurrence of debtor's obligation for which it had previously been agreed that *mora debitoris* would present its suspensive condition.²⁹

Precisely because of the fact that damage due to debtor's default does not have to occur, the consequence of *mora debitoris* is not the debtor's obligation to compensate for damage, but the transfer, from the creditor to the debtor, of the risk of damage occurrence caused by non-fulfilment of performance. The same argument applies to the second consequence as well: the impossibility of performance does not even have to occur in case of a default, which is why the consequence of debtor's default is not the perpetuation of the obligation, but the transfer, from the creditor to the debtor, of the risk of the impossibility of performance caused by *casus* or *vis maior*. Only the consequence of the passing of the risk can, by the realization of that eventuality, be the *perpetuatio obligationis*. The third consequence

quam eo loci quo conveniebatur, ratio eius haberetur. Iulianus Labeonis opinionem secutus etiam actoris habuit rationem, cuius interdum potuit interesse Ephesi recipere: itaque utilitas quoque actoris veniet. Quid enim si traiecticiam pecuniam dederat "dederit" Ephesi recepturus, ubi sub poena debebat pecuniam vel sub pignoribus, et distracta pignora sunt vel poena commissa mora tua? Vel fisco aliquid debebatur et res stipulatoris vilissimo distracta est? In hanc arbitriam quod interfuit veniet et quidem ultra legitimum modum usurarum. Quid si merces solebat comparare: an et lucri ratio habeatur, non solius damni? Puto et lucri habendam rationem.

²⁸ *Ibid.*

²⁹ Милан Милутин, „Дужничка доцња у римском класичном праву“, докторска дисертација, (Milan Milutin, „*Mora Debitoris* in Roman Classical Law“, doctoral dissertation) 166-171 and 220-224, available at <https://nardus.mpn.gov.rs/handle/123456789/18339?locale-attribute=en>, accessed 8th December, 2023.

of *mora debitoris* is less controversial: it amounts to contracting either a *stipulatio poenae* or an interest in case of debtor's default. If and when *mora debitoris* occurs as a suspensive condition, this debtor's obligation also arises.³⁰

Anyhow, default purging implied the debtor's offer to fulfil the prestation and remediate any damage the creditor suffered due to his delay.³¹ The confirmation of this assertion could be found in the following text by Quintus Cervidius Scaevola, which is included in the 1st Title of the 45th Book of Digest, named "*De verborum obligationibus*".

D. 45.1.135.2 Scaevola libro quinto responsorum

Seia cavit Lucio Titio, quo mandante eo hortos emisset, cum pretium omne cum usuris ab eo recepisset, se in eum proprietatem hortorum translaturam: deinde in continenti inter utrumque convenit, ut intra kalendas apriles primas universam summam mandator numeraret et hortos acciperet. Quaeritur, cum ante kalendas apriles non omne pretium cum usuris a Lucio Titio Seiae solutum sit, interposito tamen modico tempore reliquum pretium cum usuris Seiae Titius solvere paratus fuerit neque Seia accipere voluit et usque in hodiernum per Titium non stet, quo minus reliquum solveret, an nihilo minus Lucius Titius, si Seiae universam pecuniam solvere paratus sit, ex stipulatu agere possit. Respondit posse, si non multo post optulisset nec mulieris quicquam propter eam moram interesset: quod omne ad iudicis cognitionem remittendum est.

Therefore, in order for the debtor to purge the default, his offer must include the compensation of both the original debt and every subsequently arising claim on that basis. This is particularly evident from the part of the text in which it is stated that "*si non multo post optulisset nec mulieris quicquam propter eam moram interesset*".

Paul is consistent in his stance:

D. 45.1.91.3 Paulus libro 17 ad Plautium³²

³⁰ *Ibid.*

³¹ M. Kaser, 160. On *purgatio morae*, v. also a text from the time of the European *ius commune*, Stephano Forcatulo, *De mora, et eius effectibus, ac purgatione, tripertita tractatio*, Paris 1578, 35 ff.

³² This text was exposed to serious criticism. A colorful debate developed around it, especially in connection with the term *culpa*: Alfred Pernice, „Verschulden und Verzug“, *Marcus Antistius Labeo: das römische Privatrecht im ersten Jahrhundert der Kaiserzeit*, II-2, (8th Book) Halle 1900, 132 ff.; Otto von Gradenwitz, „Quotiens culpa intervenit debitoris, perpetuari obligationem“, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung (ZSS)*, 34/1913, 259 ff.; Erich Genzmer, „Der subjektive Tatbestand des Schuldnerverzugs im klassischen römischen Recht“, *ZSS*, 44/1924, 99 ff., 118 ss.; Hans Niedermeyer, „Studie zu wissenschaftlichen Grundlagen der Lehre von der Mora seit Sabinus“, *Festschrift Fritz Schulz*, I, Weimar 1951, 448 ff.; Andrea Guarneri Citati, „Contributi alla dottrina della mora“, *Annali del seminario giuridico dell'Università di Palermo*, 11/1923, 230; Theo Mayer-Maly, „Perpetuatio obligationis D. 45.1.91“,

Sequitur videre de eo, quod veteres constituerunt,³³ quotiens culpa intervenit debitoris, perpetuari obligationem, quemadmodum intellegendum sit. Et quidem si effecerit promissor, quo minus solvere possit, expeditum intellectum habet constitutio: si vero moratus sit tantum, haesitatur, an, si postea in mora non fuerit, extinguatur superior mora. Et Celsus adulescens scribit eum, qui moram fecit in solvendo Sticho quem promiserat, posse emendare eam moram postea offerendo: esse enim hanc quaestionem de bono et aequo: in quo genere plerumque sub auctoritate iuris scientiae perniciose, inquit, erratur. Et sane probabilis haec sententia est, quam quidem et Iulianus sequitur: nam dum quaeritur de damno et par utriusque causa sit, quare non potentior sit qui teneat, quam qui persequitur?

One can draw more than one conclusion on *mora debitoris* from this text. Firstly, the debtor in default can purge his *mora* by a subsequent offer to fulfil the prestation. In support of this, Paul presents the identical position of Celsus. Secondly, this appears to be a question of goodness and equity. This, actually, confirms the conclusion from a text of *Aelius Marcianus* from the 1st Title of the 22nd Book of Digest, entitled “*De usuris et fructibus et causis et omnibus accessionibus et mora*”. Marcian states that the default is determined on a case-to-case basis, without rigid rules, as it is more of a factual than a legal matter.

D. 22.1.32pr. Marcianus libro quarto regularum

Mora fieri intellegitur non ex re, sed ex persona, id est, si interpellatus oportuno loco non solverit: quod apud iudicem examinabitur: nam, ut et Pomponius libro duodecimo epistularum scripsit, difficilis est huius rei definitio. Divus quoque Pius Tullio Balbo rescripsit, an mora facta intellegatur, neque constitutione ulla neque iuris auctorum quaestione decidi posse, cum sit magis facti quam iuris.³⁴

In the previously displayed text, the one by Paul (D. 45.1.91.3 Paulus libro 17 ad Plautium), an attentive reader did not fail to notice that in terms of this question, *in quo genere plerumque sub auctoritate iuris scientiae perniciose, inquit, erratur.*

IVRA – Rivista internazionale di diritto romano e antico (IVRA) 7, 1956, 17 ss.; Salvatore jr. Riccobono, “Profilo storico della dottrina della mora nel diritto romano, sino all’età degli Antonini”, *Annali del seminario giuridico dell’Università di Palermo*, 29/1962, 121.

³³ The first sentence of the available text raises the question of meaning of the *constitutio veterum*. During the exegesis, the first question that arises is how this *constitutio veterum* (i.e. the rule of pre-classical jurists) was worded. It is traditionally accepted that it probably read like this: *Quotiens culpa intervenit debitoris, perpetuatur obligatio*. A. Pernice (1895), 22, 23 and 109, v. T. Mayer-Maly, 17 as well. A special impact on the development of this topic was made by Gradenwitz (259 ff.), who went even further, claiming that the whole concept of *constitutio veterum* is inauthentic. V. H. Niedermeyer, 448.

³⁴ For the analysis of the 3rd paragraph of this fragment, v. Contardo Ferrini, „La consunzione processuale dell’ „actio de peculio““, *Opere di Contardo Ferrini*, 3: „Studi vari di diritto romano e moderno (sulle Obbligazioni, sul Negozio giuridico, sulle Presunzioni)“, Milano 1929, 293.

The fact that mistakes in practice were common in terms of this issue, especially under the influence of distinguished jurists, was not only natural and logical, but also a confirmation of the absence of firm rules on *mora debitoris* and the responsibility for its occurrence. It was reasonable to expect that various factual circumstances led to different adjudications and that there was a significant disagreement regarding the correctness of the arguments used.

This appears to have been a major topic, because, according to Paul, Julian wrote about it as well. He poses the following question: why should the creditor be favoured when the responsibilities for the non-fulfilment of the prestation were equal. It is plausible that, in various factual descriptions of specific disputes regarding default, one could find the contributions of both the debtor and the creditor to the occurrence of *mora*. In other words, *mora debitoris* and *mora creditoris* were intertwined, and the advantage was indeed given to the debtor who had, after offering the fulfilment, been refused by the creditor. Although Paul does not indicate in which text Julian follows this view, support for this view can be found in two subsequent texts, one by *Pomponius* and the other by *Marcellus*.

18.6.18 Pomponius libro 31 ad Quintum Mucium

Illud sciendum est, cum moram emptor adhibere coepit, iam non culpam, sed dolum malum tantum praestandum a venditore. Quod si per venditorem et emptorem mora fuerit, Labeo quidem scribit emptori potius nocere quam venditori moram adhibitam, sed videndum est, ne posterior mora damnosa ei sit. Quid enim si interpellavero venditorem et non dederit id quod emeram, deinde postea offerente illo ego non acceperim? Sane hoc casu nocere mihi deberet. Sed si per emptorem mora fuisset, deinde, cum omnia in integro essent, venditor moram adhibuerit, cum posset se exsolvere, aequum est posteriorem moram venditori nocere.

Pomponius explains this rule with a temporal argument, although its essence remains the same. In his text on default in sales, he states that when both parties are in *mora*, the party who later fell into default is liable. This is natural considering the fact that the refusal to accept the prestation fulfilment, turns *mora* from *debitoris* to *creditoris*.³⁵

D. 46.3.72pr. Marcellus libro 20 digestorum

Qui decem debet, si ea optulerit creditori et ille sine iusta causa ea accipere recusavit, deinde debitor ea sine sua culpa perdiderit, doli mali exceptione potest se tueri, quamquam aliquando interpellatus non solverit:

³⁵ This text begins with an important incidental observation that when one party defaults, the other is only liable for intent. This, of course, refers to the topic of the consequences of debtor's default (and not its purging), which, apart from a review at the beginning, this paper does not deal with.

Three paragraphs further, Paul specifies the ways of purging the default in the mentioned case. If it is a prestation that is possible, the slave can still be surrendered. If he is no longer alive, its value can be claimed. Claims security and even novation can be contracted for it, provided that it is done between the original contracting parties.

D. 45.1.91.6 Paulus libro 17 ad Plautium

Effectus huius constitutionis ille est, ut adhuc homo peti possit: sed et acceptum ei posse ferri creditur et fideiussorem accipi eius obligationis nomine. Novari autem an possit haec obligatio, dubitationis est, quia neque hominem qui non est neque pecuniam quae non debetur stipulari possumus. Ego puto novationem fieri posse, si hoc actum inter partes sit, quod et Iuliano placet.

The information in the following text by Labeo is unusual. When both the buyer and the seller are in default in terms of delivery and receipt, only the buyer is considered in default.

D. 19.1.51pr. Labeo libro quinto posteriorum a Iavoleno epitomatorum

Si et per emptorem et venditorem mora fuisset, quo minus vinum praeberetur et traderetur, perinde esse ait, quasi si per emptorem solum stetisset: non enim potest videri mora per venditorem emptori facta esse ipso moram faciente emptore.

Unfortunately, while waiting for clarification of this position, the reader is left without an answer, because in the next sentence the position is practically repeated, without presenting any argumentation. The perplexity becomes even greater by the fact that *emptio-venditio* was a consensual contract during the classical period, which means that prestation is not conditioned by the counterprestation.

3. PURGATIO THROUGH NOVATION AND OTHER ACTIVE CREDITOR'S CONTRIBUTIONS TO THE PURGING

Purgatio morae did not always have to be done by the debtor, or at least not only by the debtor. Thus, an example of default purging by means of novation can be found in the following text by *Venonius*, in which it is learned that the destruction of the thing owed after the debtor's default occurrence did not prevent novation, which, due to the termination of the previous obligation, led to the *purgatio morae*.

D. 46.2.31pr. Venonius libro tertio stipulationum

Si rem aliquam dari stipulatus sum, deinde eandem sub condicione novandi animo ab eodem stipuler, manere oportet rem in rebus humanis, ut novationi locus sit, nisi si per promissorem steterit, quo minus daret. Ideoque si hominem mihi dare

te oporteat et in mora fueris, quo minus dares, etiam defuncto eo teneris: et si, priusquam decederet, cum iam mora facta sit, eundem a te sub condicione stipulatus fuero et servus postea decesserit, deinde condicio exstiterit, cum iam ex stipulatu obligatus es mihi, novatio quoque fiet.

In a little more detail, this issue is explained in the following text by Ulpian, in which he gives an example of a novation of an obligation by adding conditions, and compares two situations. In one, the slave owed dies before the condition occurs, which means that the default does not even occur. However, in the other, the debtor falls into default, a novation is carried out by adding conditions, and the slave dies before the fulfilment of the condition. Ulpian has no doubt that the default has been purged and that the slave owed has not become the subject of a conditional obligation, because the condition was not fulfilled before the impossibility of performance occurred. Therefore, the novation clears the default.

D. 46.2.14pr. Ulpianus libro septimo disputationum

Quotiens quod pure debetur, novandi causa sub condicione promittitur, non statim fit novatio, sed tunc demum, cum condicio extiterit. Et ideo si forte Stichus fuerit in obligatione et pendente condicione decesserit, nec novatio continget, quia non subest res eo tempore, quo condicio impletur. Unde Marcellus et si post moram Stichus in condicionalem obligationem deductus sit, purgari moram nec in sequentem deduci obligationem putat.

Debtor's default could also be purged by the creditor granting the debtor additional time to fulfil the prestation. This practically meant that the deadline for fulfilment has been moved, that is, it has not yet occurred, so that one condition³⁶ is missing for the delay to occur. An example of purging the default by giving additional time for fulfilment is discussed in detail in the following text by Proculus.

D. 45.1.113pr. Proculus libro secundo epistularum

Cum stipulatus sim mihi, procule, si opus arbitrato meo ante kalendas iunias effectum non sit, poenam, et protuli diem: putasne vere me posse dicere arbitrato meo opus effectum non esse ante kalendas iunias, cum ipse arbitrio meo aliam diem operi laxiorem dederim? Proculus respondit: non sine causa distinguendum est interesse, utrum per promissorem mora non fuisset, quo minus opus ante kalendas iunias ita, uti stipulatione comprehensum erat, perficeretur, an, cum iam opus effici non posset ante kalendas iunias, stipulator diem in kalendis augustis protulisset. Nam si tum diem stipulator protulit, cum iam opus ante kalendas iunias effici non poterat, puto poenam esse commissam nec ad rem pertinere, quod aliquod tempus ante kalendas iunias fuit, quo stipulator non desideravit id ante kalendas iunias effici, id est quo non est arbitratus ut fieret quod fieri non poterat. Aut si hoc falsum

³⁶ Stated at the beginning of this paper as condition number 1.

est, etiam si stipulator pridie kalendas iunias mortuus esset, poena commissa non esset, quoniam mortuus arbitrari non potuisset et aliquod tempus post mortem eius operi perficiendo superfuisset. Et propemodum etiam si ante kalendas iunias futurum esse coepit opus ante eam diem effici non posse, poena commissa est.

However, the default could also be purged by the fact that creditor had agreed to the same prestation with another debtor.

D. 46.3.72.2 Marcellus libro 20 digestorum

Sed quid si ignorante debitore ab alio creditor eum stipulatus est? Hic quoque existimandus est periculo debitor liberatus, quemadmodum si quolibet nomine eius servum offerente stipulator accipere noluisse.

Similarly, according to Ulpian, the consequence of re-contracting the fulfilment of the same prestation with the same debtor, was equated with purging of default.

D. 46.2.8pr. Ulpianus libro 46 ad Sabinum

Si Stichum dari stipulatus fuerim et, cum in mora promissor esset, quo minus daret, rursus eundem stipulatus fuero, desinit periculum ad promissorem pertinere quasi mora purgata.

It can be assumed that all the elements of the obligation would remain the same, except perhaps the deadline, which is why this example becomes similar to novation, but also to the example in which the creditor gives the debtor additional time to fulfil the performance.

Last, but not least, default purging also occurred when the creditor refused the offer of regular payment.³⁷ The confirmation of this assertion from the previous paragraph (namely that default purging also occurred when the creditor refused the offer of regular payment), as well as the general contention that the debtor cleanses the default by offering the payment, could be found in the following text by *Julius Paulus Prudentissimus*, located in the same Title of the Digest.

D. 45.1.73.2 Paulus libro 24 ad edictum

Stichi promissor post moram offerendo purgat moram: certe enim doli mali exceptio nocebit ei, qui pecuniam oblatam accipere noluit.

4. CONCLUSION

The debtor in default could remedy the default and prevent further effects of the consequences of *mora debitoris*, i.e. purge the default. He could do this by fulfilling

³⁷ M. Kaser, 160. On *purgatio morae*, v. also a text from the time of the European *ius commune*, S. Forcatulo, 35 ff.

the primary obligation and repairing any damage that may have occurred, as well as by paying the default interest or contractual penalty, in case they had been agreed upon. However, the default could have been purged in other ways as well: when the creditor refused the offer of regular payment, by novation, release from debt, postponement of the date of fulfilment, by agreeing on conditions, etc. Not only is life wider than legal norms, but the freedom of the contracting parties is also wider than them. Respecting the principle that he who can do more, can also do less, it was possible to purge the default, not only by the debtor's actions, but also by the good will of the creditor.

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Кратак преглед извора о *emendatio morae* у јустинијановим дигестама

Сажетак: *Purgatio* или *emendatio morae* би у дословном преводу на српски језик значило чишћење доцње. У римском класичном праву, под овим терминима се подразумевала моћност задоцнелој дужника, прво, да испуни примарну пресјацију и, друго, да ојклони пошеницијална правна дејства последица дужничке доцње. Појавили су и други начини чишћења доцње. Као последица насупротности *emendatio morae*, дужникове облигације, како примарна, тако и секундарна, пресјале би да постоје, и последице дужничке доцње би пресјале да производе правна дејства. Дакле, *purgatio morae* састојала се из два елемента: дужникове понуде да у попуноспу испуни дуговану пресјацију и његове понуде да ојклони правна дејства последица дужничке доцње.

Кључне речи: чишћење дужничке доцње, *purgatio morae*, *emendatio morae*, дужничка доцња, *mora debitoris*, *mora solvendi*.

Датум пријема рада: 22.12.2023.
Датум прихватања рада: 30.01.2024.