Mora Creditoris

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In civil law systems, the word *mora* means a culpable delay in making or accepting performance (*mora est iniusta dilatio in adimplenda obligatione*). This definition includes both *mora debitoris* and *mora creditoris*. The debtor who fails to perform a duty timeously is liable for breach. When the creditor obstructed performance or made it impossible by not accepting though it was properly tendered, *mora creditoris* or *mora accipiendi* arises[1].

Before the Classical Lawyers, Romans didn't know the concept of *mora*, when they reached the concept of modern obligatio, they thought about failing performance or dereliction of duty. So they reached the *mora* concept. The Classical Roman Lawyers could differ *mora debitoris* and *mora creditoris*, but *mora* was the cause of liability only for the debtor. *Mora creditoris* also wasn't a dereliction of duty, it was only the consequences of non acceptance of the performance. And the fault of the debtor was necessary for *mora creditoris*. In Corpus Iuris Civilis we can find a new *mora* concept. If the creditor refuse the performance, it must be

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[1] Rado, T., *Roma Hukuku Dersleri, Borçlar Hukuku*, 1982, 228; Tandoğan, H., *Türk Mes'uliyet Hukuku- Akit Dışı ve Akdi Mes'uliyet*, 1961, 469; Oğuzman, M. K., *Borçlar Hukuku Dersleri, Borçların İfası-İfa Edilmemesi-Sona Ermesi*, 1979, 79

accept that he refuses also his performance. And also there has to be an interpellatio[2].

Until the 20th century, *mora creditoris* was thought just like *mora debitoris* and the creditor was responsible for not acceptance of the performance. Fault as a requirement for *mora creditoris,* in turn, had lost its basis when it came to be recognised in the second half of the 19th century, that the creditor is not obliged to receive performance but merely entitled to do so. The debtor, in the other words, does not have a claim against the creditor to make him accept performance, even where it has been duly tendered. The institution of *mora debitoris* is merely designed to releive in certain respects the position of a debtor who has done whatever one could reasonably expect him to do[3]. Since the time of Diocletian, *obsignatio* and *deposito* had the effect of releasing the debtor from his obligation[4]. The authors of the *ius commune*, incidentally, received this institution, a fact which probably goes some way towards explaining their lack of interest in *mora creditoris*. However, down to the days of codification, a debtor was able to place his creditor in mora by offering performance, but he could effect complete release by following up *oblatio* by *obsignatio* and *deposito.*

The Code Civil abandoned the institution of *mora creditoris* complately and merely provided a number of rules for what it refers to as "*consignation*"[5]. In contrast to modern German law, the mere offer of performance does not have any consequences; the debtor must go through the whole cumbersome procedure of consignation if he wants to safeguard his position. What was once devised as a means of protecting the interests of

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[2] Lee, R.W., *An Introduction to Roman Dutch Law*, 1946, 445; Kaser M., *Römisches Privatrecht I*, 1981, 155 sq.; Mayer-Maly, T., *Römisches Privatrecht*, 1991, 143; Buckland-Stein, *A Text Book of Roman Law*, 1963, 551; Apathy, P., *Mora Accipiendi und Schadenersatz*, ZSS 101, 1984, 191 sq; Vaanzyl, D.H. *History and Principles of Roman Private Law*, 1983, 273; Umur, Z. *Roma Hukuku Lügatı*, 1985, 188, *Roma Hukuku Ders Notları*, 1987, 331-332; Rado, T., *Borçlar Hukuku*, 1992, 30

[3] Zimmerman, R., *The Law of Obligations*, 1995, 819; Koç, N., *İsviçre-Türk Hukukunda Alacaklının Temerrüdü*, 1992, 18

[4] C.8.42.9

[5] Artt.1257 sqq.; Zimmerman, 821

the debtor has thus been strangely turned into an entirely unnecessary burden. This doctrine, again, goes back to Friedrich Mommsen, was reasserted by Josef Kohler[6]. Of course, both Mommsen and the earlier authors of the ius commune claimed that their views were derived from, or at least reconcilable with, the sources of Roman Law. Contemporary Romanist doctrine tends to side with Mommsen and to attribute the modern, objective construction of *mora creditoris* to the Roman lawyers.[7]

In BGB, the debtor in a case of *mora creditoris* does not have a right to sue for damages. The reason is that *mora creditoris* under the BGB is not based on fault but merely on the fact that the creditor does not accept performance offered to him in the proper manner[8].

In Turkish Civil Code, *mora* of the *creditoris* is in the part of performance of the duty but it is in fact a typical performance obstacle.[9] Also, in Turkish Law, mora creditoris is not based on the creditor's *culpa* and it is not the breach of duty (BK 91-96). Accepting of the performance is a right for the creditor, so if he don't accept the performance, this is only an obligation that isn't the cause of responsibility. BK 208/1, and 309 rule that accepting the performance is both a right and an obligation[10]

In English Comman Law *mora creditoris* is unknown as a specific legal institution. Two different types of *mora* are therefore based on fault *(culpa)*. Where there is fault , there must also be the breach of a duty, for fault can be attributable only to someone who has done what he should not have done or who has failed to do what he should have done; hence the general assumption that the creditor is obliged to receive performance and that *mora* on his part constitutes a culpable breach of this obligation[11].

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[6] Zimmerman, 819
[7] Zimmermann, 819; Kaser, RPR, 517 sqq.; Buckland-Stein, 551; Koç, 218
[8] BGB 293
[9] Serozan, 105
[10] Koç, 17 sqq.
[11] Zimmerman, 818

In Classical Roman Law *mora creditoris* arises because of the failure to accept a properly tendered performance that has to be offered to the creditor at the right time, in the rigt place and in proper manner[12].

D.17.1.37 Africanus libro octavo quaestionum

Hominem certum pro te dari fideiussi et solvi: cum mandati agatur, aestimatio eius ad id potius tempus, quo solutus sit, non quo agatur, referri debet, et ideo etiamsi mortuus fuerit, nihilo minus, utilis ea actio est. Aliter in stipulatione servatur: nam tunc id tempus spectatur quo agitur, nisi forte aut per promissorem steterit, quo minus sua die solveret, aut per creditorem, quo minus acciperet: etenim neutri eorum frustratio sua prodesse debet[13].

D.19.1.38.1 Celsus libro octavo digestorum

Si per emptorem steterit, quo minus ei mancipium traderetur, pro cibariis per arbitrium indemnitatem posse servari Sextus Aelius, Drusus dixerunt, quorum et mihi iustissima videtur esse sententia[14].

D.46.3.9.1 Ulpianus libro vicensimo quarto ad Sabinum

Sed si debitor reliquam partem Stichi solverit vel per actorem steterit, quo minus accipiat, liberatur[15].

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[12] Zimmerman, 819; Apathy, 194; Vaanzyl, 273;

[13] AfricanusD.17.1.37 I gave a verbal guarantee on your behalf that a particular slave be handed him over in performance of the obligation : when an action on mandate is raised. His value must be related rather to the time at which he was handed over than to that at which the action is raised. And accordingly, even if he has died there is nonetheless an effective action. A different practice is observed in the case of stipulation: for then regard is had to the time at which the action is raised, unless it happened to be the fault either of the person giving the undertaking that he failed to perform his obligation on the due day or of the creditor that he failed to receive performance: for neither of them ought to benefit from his own underhanded behavior.

[14] Celsus D.19.1.38.1 If the buyer is responsible for non delivery of a slave to him. Sextus Aelius and Drusus said that compensation for his board can be recovered through a judgment: their opinion seems to me entirely iust.

[15] Ulp.D.46.3.9.1 However, if the debtor gives up the rest of Stichus or it is the claimant's fault that he does not accept. The debtor will be released.

Mora accipiendi isn't breach of duty, because to accept performance is not the duty of the creditor. So the debtor can't sue the creditor for failing to accept performance. *Mora creditoris* arises when a creditor refused the tender of performance without good reason But the debtor must do all that can be expected of him.[16] This is depended on the circumstances of the individual case. General rule is that the debtor had to do whatever he was able to do without the co-operation of the creditor. The debtor had to bring the things he owed to the place where according to the contract performance had to be rendered at the creditor's premises and to offer it there. If however, the creditor was required to collect the object of performance from the debtor's premises, a verbal offer was sufficient[17].

If on the other hand, the creditor had to co-operate in the performance, for example, by collecting the object from the debtor, an oral tender sufficed. Even this was unnecessary if a day for performance had been fixed[18].

D.18.6.5 Paulus libro quinto ad Sabinum

Si per emptorem steterit, quo minus ad diem vinum tolleret, postea, nisi quod dolo malo venditoris interceptum esset, non debet ab eo praestari. Si verbi gratia amphorae centum ex eo vino, quod in cella esset, venierint, "si admensum est", donec admetiatur, omne periculum venditoris est, nisi id per emptorem fiat[19].

On the other hand, the failure of the debtor's attempt to render performance had to be attributable to the creditor. "*Si per creditorem steterit quo minus accipiat*" [20].

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[16] Kaser M., 155 sqq.; Buckland-Stein, 551; Rado, 30

[17] Pomp.D.19.1.3.4 Even that appears to have been dispensable, where a spesific time had been fixed when the creditor was supposed to come around to collect whatever was due to him., Paul.D.18.6.5

[18] Celsus D.19.1.38.1; Paul.D.18.6.5

[19] Paul.D.18.6.5 If it be the purchaser's fault that the wine is not removed by the appointed time, the vendor is, thereafter, no longer responsible for it. unless there be any bad faith on his part. Suppose, say that there be sold a hundred jars of that wine in that cellar, once it has been measured out; than until such measuring, the risk is on the vendor, unless the purchaser be at fault.

[20] Africanus D.17.1.37; Celsus D.19.1.38.1; Ulp.D.46.3.9.1

D.45.1.73.2 Paulus libro vicensimo quarto ad edictum

Stichi promissor post moram offerendo purgat moram: certe enim doli mali exceptio nocebit ei, qui pecuniam oblatam accipere noluit[21].

D.46.3.30 Ulpianus libro quinquagensimo primo ad edictum

Si debitor offerret pecuniam, quae peteretur, creditor nollet accipere, praetor ei denegat actiones[22].

This was a very broad and general expression, so it is very difficult to say under which circumstances a certain event was to be attributed to the creditor's sphere of risk.

D.46.3.72 pr. Marcellus libro vicensimo 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: etenim non est aequum teneri pecunia amissa, quia non teneretur, si creditor accipere voluisset. Quare pro soluto id, in quo creditor accipiendo moram fecit, oportet esse. Et sane si servus erat in dote eumque optulit maritus et is servus decessit, aut nummos optulit eosque non accipiente muliere perdiderit, ipso iure desinet teneri[23].

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[21] Paul.D.45.1.73.2 One who promised Stichus atones for his delay in delivery: certainly, the defence of fraud will be available in case of refusal to accept the proffered money.

[22] Ulp.D.46.3.30 Should the creditor refuse to accept the money claimed when offered by the debtor, the praetor will refuse him an action.

[23] Marcellus D.46.3.72 pr. Suppose that one owing ten offers the money to his creditor who unreasonably refuses to accept and than the debtor, without fault on his part, loses the money, he can protect himself by the defence of bad faith although, when called upon to pay. He does not do so: it is quite unfair that he should be answerable when the money is lost because he wouldn't have been liable. If the creditor had been willing to accept. Hence, there should be deemed to be payment of that over the acceptance of which the creditor was in culpable delay. And certainly, if a slave died or if the husband offered money, which the wife refused and than he lost the money. The husband would be automatically free from liability.
Marcellus refers to a "iusta causa" which might entitle the creditor to refuse payment from his debtor.

But only a hitch in the performance itself could constitute such a *iusta causa*: the fact that it was not tendered at the right time, at the right place or in the right manner.

D.13.5.18 pr. Ulpianus libro vicensimo septimo ad edictum

Item illa verba praetoris "neque per actorem stetisse" eandem recipiunt dubitationem. Et Pomponius dubitat, si forte ad diem constituti per actorem non steterit, ante stetit vel postea. Et puto et haec ad diem constituti referenda. Proinde si valetudine impeditus aut vi aut tempestate petitor non venit, ipsi nocere Pomponius scribit[24].

Thus it is widely accepted today that a creditor in Roman law-unlike a debtor- could be in mora, irrespective of whether he had been at fault or not[25]. *Mora* of the creditor, like of the debtor requires fault[26], but he is in default, even if he is innocently unable to accept performance, for example if he was ill or was prevented, for reasons beyond his control, to accept performance.[27] If refusal is due to resonable doubt of the sufficiency of the tender or if he *bonae fidei* believed that the tendered performance was not a proper one, he is not fall into default[28]

D.13.5.17 Paulus libro vicensimo nono ad edictum

Sed et si alia die offerat nec actor accipere voluit nec ulla causa iusta fuit non accipiendi, aequum est succurri reo aut exceptione aut iusta interpretatione, ut factum actoris usque ad tempus iudicii ipsi noceat: ut illa

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[24] Ulp.D.13.5.18 pr. Again, when the praetor says, "the plaintiff is not sure whether they apply when there is something to make him responsible, not indeed in the period up to the day fixed in the constitutum, but earlier or later. And I think these words too must refer to the time fixed by the constitutum. In this connection, Pomponius writes that the plaintiff must bear the consequences of being prevented from appearing even by reasons of health, violence, or whether.

[25] Zimmerman, 820 n.8

[26] Africanus D.17.1.37; Pomp.D.19.1.3.4; Celsus D.19.1.38.1; Ulp.D.46.3.9.1

[27] Ulp.D.13.5.18 pr. ; Kaser, 162

[28] Paul.D.13.5.17; Marcellus D.46.3.72 pr.

verba "neque fecisset" hoc significent, ut neque in diem in quem constituit fecerit neque postea.[29]

In most instances it did not suffice that the debtor simply declared his willingness to perform; in addition to this, he had to tender his performance actively and in obligations for generic goods and money, to ascertain the spesific things. Performance had to be made at creditor's premises, the debtor had to carry the object to the place.

The first important consequences of *mora creditoris* is that the debtor doesn't release from his obligation. He has to do what he is expected to do and if he cannot discharge his obligation because of a reason is attributable to the creditor, he no longer had to carry the risk of accidental destruction. Moreover, his liability is alleviated, he is now liable only for *dolus*[30].

D.18.6.18(17) Pomponius libro trigesimo primo 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[31].

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[29] Paul.D.13.5.17 However, if he tenders on another day and the plaintiff will not accept and there is no lawfully sufficient reason for refusing, it is fair to relieve the defendant either by a defence or by legitimate construction to ensure that the plaintiff's conduct adversely affects himself right up to judgement with the effect these words "and has not performed" mean that he has not done so either on the day fixed by the constitutum or subsequently.; Buckland, 551; Marcellus D.46.3.72 pr.,

[30] Paul.D.18.6.5; Pomp.D.24.3.9

[31] Pomp.D.18.6.18 It should be known that once the purchaser is in delay, the vendor is no longer liable for negligence, but only for bad faith. But if both vendor and purchaser are in delay, Labeo writes that the delay should count against the purchaser rather than the vendor, but that it should be ascertained which was the later in falling into delay. For what if I give

D.24.3.9 Pomponius libro quarto decimo ad Sabinum

Si mora per mulierem fuit, quo minus dotem reciperet, dolum malum dumtaxat in ea re, non etiam culpam maritus preastare debet, ne facto mulieris in perpetuum agrum eius colere cogatur: fructus tamen, qui pervenissent ad virum, redduntur[32].

Thus, if he owed a specific thing and this thing perished due to anything but his own dolus, he became free.

D.45.1.105 Iavolenus libro secundo epistularum.

Stipulus sum Damam aut Erotem servum dari: cum Damam dares, ego quo minus acciperem, in mora fui: mortuus est Dama: an putes me ex stipulatu actionem habere? Respondit: secundum Massurii Sabini opinionem puto te ex stipulatu agere non posse: nam is recte existimabat, si per debitorem mora non esset, quo minus id quod debebat solueret, contunio eum debito liberari [33].

If fungibles or money were owed , the solution was slightly different; the debtor is still both bound and able to deliver another one. The jurists helped by granting an exceptio doli:[34]

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notice to the vendor and he does not give me thing I have bought; and than, when he does offer it, I will not accept it? In such case, certainly, it counts against me. But if the purchaser was in delay and than, before anything had been done, the vendor became guilty of delay, when it was in his power to perform. It is equitable that the later delay should count against the vendor.

[32] Pomp.D.24.3.9 If a women delays in receiving her dowry, her husband will only be responsible for fraud and not negligance over this, so as to avoid his being compelled by his wife's behavior to cultivate her land indefinitely. But the profits which fall into the husband's hands must be restored.

[32] Iavolenus D.45.1.105; Marcellus D.46.3.72 pr.

[33] Iavolenus D.45.1.105 I stipulated for Dama or Eros, slaves, to be conveyed. You offered Dama, and I delayed accepting him. Dama died. Do you think I have an action on stipulation? Modestinus replied: Following the view of Massurius Sabinus, I think you cannot sue on the stipulation. For he rightly argued that if the failure to perform was not due to delay on the part of the debtor, the latter was at once discharged.

[34] Iul.D.30.84.3; MarcellusD.46.3.72. pr.

Moreover, a debtor who had unsuccessfully tendered a sum of money must deposit it at a public place[35].

D.22.1.7 Papinianus libro secundo responsorum

Debitor usurarius creditori pecuniam optulit et eam, cum accipere noluisset, obsignavit ac deposuit: ex eo die ratio non habebitur usurarum. Quod si postea conventus ut solveret moram fecerit, nummi steriles ex eo tempore non erunt[36].

The spesific advantages of an offer followed by *obsignatio*(seal) and *deposito* were, firstly, that the accrual of interest was suspended and, secondly, that it relieved the debtor of the risk of not being able to prove that their disappearance was not due to his *dolus malus*.

The alleviation of the debtor's liability sometimes don't solve the debtor's problems. Sometimes he has to pay the expenses for looking after and maintining the object that he had been unable to transfer. The debtor was allowed to abandon the object in order to avoid such expenses.

D.18.6.1.3 Ulpianus libro vicesimo octavo ad Sabinum

Licet autem venditori vel effundere vinum, si diem ad metiendum praestituit nec intra diem admensum est: effundere autem non statim poterit, priusquam testando denuntiet emptori, priusquam testando denuntiet emptori, ut aut tollat vinum aut sciat futurum, ut vinum effunderetur. Si tamen, cum posset effundere, non effudit, laudandus est potius. Ea propter mercedem quoque doliorum potest exigere, sed ita demum, si interfuit eius inania esse vasa in quibus vinum fuit (veluti si locaturus ea fuisset) vel si necesse habuit alia conducere dolia. Commodius est autem conduci vasa nec reddi vinum, nisi quanti conduxerit ab emptore reddatur, aut vendere vinum bona fide: id est quantum sine ipsius incommodo fieri potest operam dare, ut quam minime detrimento site a res emptori[37].

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[35] C.4.32.19 pr.; Kaser, RPR I, 639 sqq.

[36] Pap.D.22.1.7 A debtor at interest offered to pay his creditor and when the latter refused, sealed and deposited the money. No interest is claimable from that day. If however he is sued later and delays. the money will from then on be productive (of interest).

[37] Ulp.D.18.6.1.3 Now the vendor may legitimally pour the wine away. İf he has set a time

Or if he choose to keep the thing, the vendor was able to claim the damages he had suffered as a result of non acceptance in all those cases where he did not have the option of abandoning the object sold[38]. This was the case, for instance, where the object concern was a slave[39]. The slave has to be fed during the time of the purchaser/creditor's *mora* and, according to Sextus Aelius, Livius Drusus and Celsus, the vendor could recover the respective expenses.This claim is based on the *bona fides* inherent in the contract of sale The purchaser's behaviour must based on a good cause and must, at least typically, have constituted dolus. It appears to be likely, therefore, that the debtor's claim for damages on account of *mora creditoris* was based on fault and that, at least in the context, the "*si per creditorem steterit*" has to be interpreted in a narrower sense than for the other consequences of *mora creditoris*[40].

This way of looking at things would, incidentally, also bring the requirements for *mora creditoris* and *mora debitoris* into better harmony. Both institutions are sometimes hardly distinguisable[41].

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for its measuring out and it is not measured within that period. He can not, however, thus pour it away. So to speak, out of hand; he must first warn the purchaser, before witnesses, that he should remove the wine or realise that if he does not, the wine will be poured away. All the same, if he does not pour it away when he would be entitled to do so. He is to be commended; he can further charge rent for his casks, so long as he has an interest in the vessels which hold the wine being empty (as, for instance, if he would have let them out) or if he would have to hire other containers. It is, though, the more appropriate course for him the rent thereof or else to sell the wine in good faith: in short, he should mitigate the purchaser's loss so far as he can without detriment to himself.

[38] Zimmerman, 822; The debtor has a *ius retentionis* which he was able to assert by way of an *exceptio doli*, Kaser, RPR, 518; Apathy, 199 sqq

[39] Celsus D.19.1.38.1

[40] Zimmerman, 822

[41] Gai.D.19.1.9