BULGARIAN NATIONAL BANK

Money and Monetary Obligations: Nature, Stipulation, Fulfilment

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SUMMARY. The subject of this publication covers the legal aspects of the economic phenomenon called "money", its functions, monetary obligations and usage as legal tender. The authors accept a new approach in defining money as official certification tokens. The main components of the legal term "legal tender" are outlined. The authors also make a situational analysis of the stipulation of monetary obligations and their fulfilment and put forth *de lege ferenda* proposals. In conclusion electronic money is examined in connection with the future "use" of money.

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1. Introductory Notes

Many theories exist concerning the origin, functions and nature of money. They are as old as money is. Economics, law, history, numismatics and philosophy have all contributed to such theories over time.

The initial understanding about money has a wholly practical origin: it is that particular commodities or tokens are used as a measure of value and a medium of exchange. In the history of humankind cattle, salt, shells, beads, and most often precious metals have been used as money. On the island of Yap in the Western Pacific obligations were fulfiled by transferring the ownership of big immovable round stone plates, and their function was not impeded by the fact that the place where they were situated was permanently under the ocean waters and the access to the stone plates was not possible.[1] However, we can say that what is important is not just the specific commodity or token but the existing mutual agreement for its use and common acceptance in the course of carrying out obligations.[2] These commodities have given their names to the first monetary units. An example: the *talentum* of Babylon was equal to the weight of an ox and the word *talent* literally means "weight."[3] Today we can see weight measures in the names of many currencies (lira, pound, peso). So these names derive from there.

In this etymological context we can add that the Bulgarian word for money – *pari*, derives from the name of a coin used in the Turkish Empire – *para*, which was initially put into circulation in 1623 and was struck periodically and used until the 1930s. The Latin word *moneta* has the meaning of *coin* in many modern languages and derives from the name of the Goddess *Juno* – the Roman equivalent of the Greek Goddess *Hera*. Romans used to call Juno Moneta, which meant *tutoress*. Her temple was situated on the Capitoline Hill in Rome and the metal money that was struck at the mint in the temple began to be named after her.[4]

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[1] Isn't it a noncash payment?

[2] *The New Palgrave Dictionary of Money and Finance*. The Macmillan Press Limited, 1992, London, p. 770; *Encyclopedia of Banking and Finance*, 9th edition; **Munn, G. G., F. L. Garcia and C. J. Woelfel**. B*ankers Publishing Company*. Probus Publishing Company, Chicago, Illinois, Cambridge, England, 1993, p. 668.

[3] **Zvarich, V. V.** *Dictionary of Numismatics*. Vishta Shkola, Lvov, 1980, **Bozhkov, H., V. Peykov**. *Coins and Coin Mintage During the Centuries*. Narodna Prosveta, Sofia, 1988.

[4] **Zvarich, V. V.** *Dictionary of Numismatics*. Vishta Shkola, Lvov, 1980.

This practically derived notion of money has been enriched and developed to reach such a modern understanding of money as a "network good."[5] The key point here is that the more people log on and participate in the use of money (in the meaning of units of a certain currency), the higher its value for any participant logged on to the network. Using this sign we can successfully compare money with language: the more people speak a language, the higher its value.[6] A comparison with language can be made by using another common sign: a common practice based on a mutual agreement in society. Thus, money is a social institution.[7]

Money as a national currency unit exists in the form of a symbol as well. It symbolizes different, often even controversial things: national independence and sovereignty, integration and autonomy, cultural and civilizational belonging, economic stability and welfare, inflation and poverty.[8] This symbology is connected to and derives directly from the society that uses money, from its civilization level, economic development and freedom.

In conclusion to the foregoing ideas we can say that the notion of money does not have a uniform content. We can discover the richness of its semantics by changing the points of view and the approaches to it.

2. The Functions of Money

Subject of this publication are the legal aspects of money, monetary obligations and legal tenders. These aspects are in a very close connection to the functions of money formulated by economics. Law introduces some important features into these terms, but it is in a subordinated position to their economic nature that holds the leading position.

We can say that the economic science measures money. It measures its quantity and how fast it moves. It measures also the money in circulation (the number of banknotes and coins, and their value), the quan-

[5] For details on the property and the access, markets and networks, sellers and suppliers, buyers and consumers see **Rifkin, J.** *The Age of Access. The New Culture of Hypercapitalism Where All of Life Is a Paid-for Experience*, published in Bulgarian by ATIKA, Sofia, 2001.

[6] **Nenovsky, N., K. Hristov and B. Petrov.** *From Lev to Euro: Which is the Best Way Through?* Ciela, Sofia, 2001, p. 139.

[7] *The New Palgrave Dictionary of Money and Finance.* The Macmillan Press Limited, 1992, London, p. 770.

[8] Concerning money as a symbol, see also **Nenovsky, N., K. Hristov and B. Petrov.** *From Lev to Euro: Which is the Best Way Through?* Ciela, Sofia, 2001, p. 23.

tity of money outside the central bank, the quantity of money in the population and the commercial banks, the money in the economy denominated in local and foreign currency. By measuring money the economic science actually measures the economy itself and defines its substantial parameters.

According to the economists money is a means of facilitating the turnover of goods and services and of fortune accumulation and is widely known as banknotes, coins and bank deposits. This definition is based on the three main functions of money: 1) medium of exchange, 2) unit of value and unit of account, and 3) store of value and fortune, or treasure, hoard.[9]

The first function of money (medium of exchange) results from its ability to substitute easily for all goods and services and thus vastly facilitate exchange instead of exchanging goods and services. It should be mentioned here that with this major invention people aimed at exactly the same: facilitating exchange. Metals (and especially gold, silver and copper) processed in a proper way proved practically the most suitable to play this role of an intermediary. It was easy to process the metal, it had its own value, it was hard to wear away and convenient for carrying and storing.

The second function of money (unit of value, unit of account) allows, by dividing it into convenient units, to mark goods and services by a specific quantity of money. This function characterizes money as a measure, which facilitates the expression of a specific quantity of goods and services delivered or received.

The third function is the use of money to accumulate and store fortune. However, money is not the only means to store value. In the past cattle and land were used as an alternative and nowadays – buildings, machines, equipment, precious metals, shares, bonds and other securities.

These functions have an important impact on the legal issues of stipulation and fulfilment of monetary obligations. They are a direct result of the so called *microeconomic choice* of economic agents. Without these functions we cannot define any token or commodity as money.

[9] **Bannock, G., W. Manser.** *International Dictionary of Finance,* p. 175, published in Bulgarian by Delfin Press, Bourgas, 1991; *The World Dictionary of Banking and Insurance*. Volume 1, p. 340, published in Bulgarian by Delfin Press, Burgas, 1994; *The New Palgrave Dictionary of Money and Finance*. The Macmillan Press Limited, 1992, London, p. 771.

3. Legal Definitions of Money

The Bulgarian legal doctrine does not provide a uniform definition of money. The existing opinions put the accent on one characteristic or feature of money or another, or on its material substance and are prone to criticism.

Some authors[10] assert that money is materializing rights bearer securities issued by the state or by an issuing institution designated by the state. Money is a security only when it is tangible and it always materializes value – universal equivalent, legal tender.

This opinion has been criticized by other authors.[11] They adduce arguments to support the stand that securities are private documents containing a statement of will and that money is an official document. After the end of the gold standard age (when the opportunity to receive gold against banknotes existed) money does not materialize rights but only value. In addition, the rights alleged are written neither in the law nor upon money.

What is common between these two views is that they consider money as a document. We do not support these stands. Banknotes and coins withdrawn from circulation are no longer legal tender. Possession of such banknotes and coins is a *conditio sine qua non* for exercising *ex lege* rights, connected with them: for instance to receive banknotes and coins in circulation from the issuing authority.

It is accepted in civil law that a document is a material thing (the electronic document makes an exception) upon which by means of written signs a statement is materialized.[12] In documents are materialized different in their type but concrete, explicit and clear statements of their issuer. On banknotes and coins just an abstract statement of their issuer concerning the nominal value is materialized. That is why they cannot be treated as documents. The explicit statement of the issuer of banknotes and coins is included in the administrative act by which specific banknotes and coins are put into circulation and become by virtue of the law legal tender. In addition, this administrative act describes the material banknotes and coins are made of, their artistic design and

[10] **Tadjer, V.** *Civil Law of Bulgaria.* General Section, 2nd volume, NI, 1973, pp. 156–157; **Pavlova, M.** *Civil Law.* General Section, 2nd volume, Sofi-R, 1996, p. 27.

[11] **Kalaydjiev, A.** *The Noncash Payment*. Sibi, 1999, p. 124.

[12] **Stalev, Zh.** *Bulgarian Civil Litigation Law*. 2000, p. 227.

partly their security features. This act – the resolution of the Managing Board of BNB, adopted under Article 16, item 9 of LBNB, represents a general constitutive administrative act.[13]

From the point of view of criminal law a clear difference between documents and certifying tokens is drawn in the Supreme Court of the Republic of Bulgaria Plenary Session Decree No. 3 of 1982, item 2. The official certifying tokens are not documents. They are abstract and tacitly expressed statements in a standardized form. Digits, letters and even separate words are necessary elements and characteristics of their form. Only a few certifying tokens materialize rights and obligations. They cannot be a subject of documentary offences. All this explains why in Articles 243–245 in the Bulgarian Penal Code the lawgiver has used the term "monetary tokens" and has formulated separately different types of offences against money.

Therefore by comparing different view-points on the term "document" we can conclude that money is not a document but represents a special kind of official certifying tokens, which are acknowledged as legal tender.

In all cases money expresses value. There are many rights related to it, proclaimed by laws for the holders of money. For example, such is the right to exchange mutilated banknotes and coins for new ones or the right to exchange banknotes and coins that in a certain period of time will be withdrawn from circulation (because of the change in design, the necessity to introduce new security features or for another reason) for banknotes and coins in circulation. We have to add to these rights the rights that arise in cases of redenomination, monetary reform or in other cases (for example a change of the currency unit): to obtain new banknotes and coins for old ones at a fixed exchange rate or to change the digital entry in bank accounts liabilities. Their existence (even formally or for a short period of time) is beyond any doubt, at least in the context of current world practices. The contrary would mean expropriation without compensation.

In countries where currency board arrangements exist there is another important right. This is the right to exchange the local currency without any restrictions for the reserve currency at the fixed exchange rate. The prohibition for the aggregate amount of liabilities to exceed the aggregate amount of assets of the central bank guarantees the real-

[13] **Kalaydjiev, A.** *The Noncash Payment*. Sibi, 1999, p. 122.

ization of this right and creates full coverage of the local currency with liquid foreign assets (Article 28, para. 1 and Article 30 of LBNB).

In our opinion a relatively precise and general definition of money is the following:

Official certifying tokens (signs), indicating a different nominal value, representing legal tender, issued by an authorized institution, used for making payments and hoarding fortune, and as a unit of account, made of different material (tangible) or intangible (in digital form in bank accounts liabilities).

This definition includes cash (tangible money), intangible money and their three main functions. Intangible, noncash money exists in bank accounts as liabilities of banks.

The text of Article 25, para. 2 of LBNB represents a partial definition of money. It is limited to banknotes and coins only – the material expression of money. As a definition it is pragmatic but imperfect. It does not mention the other form of banknotes and coins – intangible, noncash money. This is money in deposits and accounts with banks that the latter owe to depositors on demand or on maturity date. We think it also has to be put into the general definition of money. Being in bank accounts it has all of the above-mentioned functions of money and entirely manifests them. Beyond any doubt bank deposits are correctly classified as contracts and the right of the depositor – as claims. This classification is important from the view-point of the legal ground justifying the disposition of the amount in the account of the owner. An important role here is played by the digital expression of this intangible money in the account. It could be changed depending on the instructions to the specialized financial institution called "bank" to make a payment (to fulfil a monetary obligation of a depositor), or intangible money is converted into tangible – banknotes and coins.

Money could be examined as movable and replaceable material properties with certain design and form, that are issued by the BNB and have by virtue of the law the status of legal tender.[14] This definition is entirely correct and valid for banknotes and coins. Modern times however put the accent not only on the material substance of money but also on its functional characteristics and purpose.

[14] In this meaning is the definition of money of Prof. Alexander Kozhuharov in: *Law of Obligation*. A Brief Course, new edition by Petko Popov, Juris Press, Sofia, 2000, p. 47.

4. Kinds of Money

Money could be classified according to different criteria:

1) The first criterion takes into account what the material substance of money is. Money having material substance could be defined as tangible, material, cash money. Banknotes and coins are tangible money. They are also chattels. The substance of tangible money is mainly paper and metal with special chemical and physical characteristics.[15] Intangible money is money in bank accounts that is entered in the bank's liabilities (i.e. it represents obligations of a bank to its customers). Intangible money does not have its own material carrier, its quantity is marked with digits and the currency unit that it is denominated in – with a sign in the account number. For keeping such accounts lots of legal and accountancy rules exist.
2) Money could be classified on the basis of whether it has intrinsic value or not. Money having intrinsic value (commodity money) is very close to goods and commodities. Money without intrinsic value (fiat money) does not have any practical usage for customers. Goods have such usage.[16] Even in the case of commemorative coins made of precious metals, the price of the metal does not correspond to their nominal value.
3) Money could also be divided into collateralized and noncollateralized. Government securities, gold reserves or other general assets are usually used as collateral. Nowadays most of the money is noncollateralized and without intrinsic value.
4) Fourth, money exists as local money (local currency) and foreign money (foreign currency). These two terms derive from the circulation of money as "world money" and are connected with

[15] Recently banknotes made of polymer were introduced. Australia was the first country that between 1992 and 1996 replaced its paper banknotes with polymer ones. The technology has been developed with the involvement of the Reserve Bank of Australia (see www.rba.gov.au). The adduced arguments pro are that polymer banknotes have many advantages in comparison with paper ones: higher security against counterfeiting, longer life, cleanness and hygiene, easier processing by banknotes processing devices, easier recycling after wearing out. Polymer banknotes exist in circulation in Brazil, China, Indonesia, Northern Ireland, Singapore and Romania (five of Romania's nine banknotes in circulation are made of polymer – see www.bnro.ro) and other countries. That is why we consider the classification of money into paper money and metal money as outdated.

[16] *The New Palgrave Dictionary of Money and Finance*. The Macmillan Press Limited, 1992, London, p. 770.

worldwide trade. This is a relative division of money as legal tender in countries and monetary unions. In its existence as "world money", money has the same economic and legal functions that have already been discussed. It expresses value that does not depend on its usage in international trade and payments. This meaning is also found in the legal definition of foreign money given in § 1, item 4 of the Additional Provision of the Bulgarian Foreign Exchange Law.

5) The fifth division is into convertible and nonconvertible money by using the strictly economic criteria of demand and usage worldwide. Justifiably, the new Bulgarian Foreign Exchange Law does not contain the term "foreign convertible currency" that was used in the repealed Regulation of Export and Import of Foreign Exchange Valuables. In this Regulation, the foreign convertible currency was defined as currency for which the BNB announces a central exchange rate every day. This definition represented a delegation of discretional powers to the central bank to fix the currencies without a guarantee of any objectivity. Convertibility should be perceived entirely as an economic category. It is first of all a matter of trust in a currency, its purchasing power and the power of the economy or economies that it services, its acceptance by a broad range of people, even by people outside the country whose official currency it is.
6) The sixth division is into basic money (or definitive money) and derivative money (or representative money). Derivative money represents a promise to pay basic money on demand. Derivative money could be used as a means of payment without having the status of legal tender. The creditor accepts a payment in such derivative money as far as he has agreed to do so. From a historical point of view modern money had a status of derivative money: when the gold standard was used it represented a promise to pay to the bearer a certain quantity of gold.[17]
7) The last division, and we will end with it, is between money (having in mind the definition above) and its alternative – electronic money. We will discuss electronic money in the last part of this paper.

In the above classification the division into tangible and intangible,

[17] *The New Palgrave Dictionary of Money and Finance*. The Macmillan Press Limited, 1992, London, p. 772.

local and foreign, convertible and nonconvertible money is of practical significance.

5. The Value of Money

Money is not only a unit of value. It has its own value, which is:

1) **Internal (intrinsic) value.** It is the value of the material that tangible money is made of. Nowadays it is very small but nevertheless it exists. The intrinsic value of money does not correspond to the nominal value put on it. There was such correspondence only when the intrinsic value had essential importance and played a leading role. In the case of collateralized money the intrinsic value could be regarded in a slightly different light: as corresponding to the assets of the issuing institution.[18]
2) **Nominal value** is the value marked on money by the issuer. It is the value by which the functions of money (medium of exchange, measure of value, store of value) objectively exist and by which tangible money converts into intangible money in bank accounts and vice versa.
3) **Exchange rate value** is the value that certain money has against other money issued by another institution. This value is a market ratio between different monetary units and between their banknotes and coins.

The exchange rate value of the Bulgarian lev is set by the market. And this is valid for the euro/lev ratio, too. The text of Article 29 of LBNB that fixes the official exchange rate of the lev against the reserve currency (euro) does not represent a legally fixed exchange rate value of the Bulgarian lev against the euro.[19] This text should be interpreted systematically having in mind the next one – Article 30 of LBNB, that constitutes a responsibility for the BNB (but not for the other economic agents) to buy and sell without limitations on territory of the country the reserve currency on the basis of spot exchange rates which do not depart from the official exchange rate by more than 0.5 percent. This responsibility of the BNB and its practical implementation maintain the exchange rate value of the lev against the reserve currency close to the

[18] Compare **Kozhuharov, A.** *Law of Obligation*. A Brief Course, Juris Press, Sofia, 2000, p. 48, and **Apostolov, I.** *Law of Obligation*. Part 1, General Doctrine of Obligation, published by BAN, Sofia, 1990, p. 69.

[19] For the opposite opinion see prof. P. Popov's comments in **Kozhuharov, A.** *Law of Obligation*. A Brief Course, Juris Press, Sofia, 2000, p. 49.

official exchange rate. Without the obligation under Article 30, the official exchange rate could not be practically implemented. The market exchange rate is set by the participants in that market.

The different kinds of money value have practical importance mainly in the process of issuing (the seigniorage – the difference between the intrinsic and the nominal value). The exchange rate value can be used when the economic agents choose a certain currency to stipulate and fulfil their obligations.

6. Money as Legal Tender

Money as legal tender has three main aspects: 1) when the monetary obligation is stipulated in a certain currency unit the creditor is obliged to accept the payment if it is made in the same currency notwithstanding the nominal of money (nominal of banknotes and coins), 2) obligations of the issuing institution to the currency unit, 3) a minimum normative level of usage of the currency unit.

A very important characteristic of money is that it is legal tender. As such, its function of medium of exchange emerges while its characteristic as a currency unit shows its function of a unit of account.

Bulgarian banknotes and coins have the status of legal tender pursuant to Article 25, para. 2 of LBNB. We have to mention again that intangible money is not included in this article and this makes the text incomplete. The status of "legal tender" means that by using money physical persons and legal entities can carry out their monetary obligations denominated in Bulgarian levs (i.e. in the same currency in which the banknotes and coins are denominated). The creditor cannot refuse to accept Bulgarian lev banknotes and coins when the obligation is stipulated in Bulgarian levs. The verbal expression "shall be accepted for payments" means that a mutual consent already exists between parties, concerning the currency of the obligation and it is Bulgarian levs. Article 25, para. 2 of LBNB does not require the parties to stipulate the Bulgarian lev as a currency of an obligation but only to accept banknotes and coins denominated in levs in the course of the fulfilment of monetary obligations denominated in levs. That is why the creditor cannot refuse to accept lev banknotes and coins alleging that they are not in a nominal value convenient for him, or that they are mutilated, or dirty, or that they are new banknotes or coins recently put into circulation with security features not very well-known to the creditor or because they will be withdrawn from circulation soon. Such objections

are probably justifiable by life experience but they are not legally valid and are inadmissible. They could lead to a delay for the creditor.

It should be mentioned here that foreign banknotes and coins should be treated as legal tender – in the same way local banknotes and coins are treated. Foreign banknotes and coins completely match the above definition of money. The only difference is that a foreign institution issues it. Foreign banknotes and coins are legal tender in their country of origin (where they are issued) by virtue of local laws in force. They retain their status when they circulate outside the country. Physical persons and legal entities can validly carry out their obligations denominated in foreign currency by banknotes and coins of the same currency.[20]

Since they are foreign banknotes and coins the Bulgarian institutions have no legal obligations with regard to them. But the situation is different concerning the local currency. For example the BNB has the following obligations regarding the Bulgarian levs as their issuer: it ensures the printing of banknotes and striking of coins, keeps the banknotes and coins not put into circulation yet or withdrawn from circulation, informs the society about the design of the banknotes and coins and some of their security features, destroys banknotes and coins, informs the public and specialized financial institutions about counterfeits detected, exchanges mutilated or out-of-circulation banknotes and coins for banknotes and coins in circulation.

The BNB does not have any obligations concerning any foreign currency.[21]

From view-point of positive law the term "legal tender" implies that every legislation creates a minimum normative level of usage of the national currency justifying its issue. The lev as official legal tender leads to the adoption of certain obligations of governmental institutions and

[20] A slightly different stand is shared by **Nenovsky, N., K. Hristov and B. Petrov.** *From Lev to Euro: Which Is the Best Way through*? Ciela, Sofia, 2001. They consider as equal the terms "legal tender" and "official currency unit" and agree that both a legal and political act is needed for them to be accepted in Bulgaria. We believe that such an act is necessary only for the acceptance in Bulgaria of a foreign currency unit as an official currency, parallel to the lev or instead of the lev, but not for the acceptance of "foreign" legal tender.

[21] The obligation that the central bank undertook to exchange banknotes of Deutsche Marks against euro within the period 1 January – 28 February 2002, in connection with the introduction of banknotes and coins of euro was in favor of society; it did not derive from the law, where the obligations of the central bank were limited as of 1 January 2002 only to the exchange of Bulgarian levs against euro at the fixed rate.

agencies as well as of physical persons and legal entities: the budget of the country is in levs, the shareholders' capital is in levs, the national and local taxes are calculated on the basis of a declaration of incomes in levs and have to be paid in levs, accountancy is kept in levs, etc.

7. Stipulation of Monetary Obligations

Having in mind that the law doctrine considers two kinds of monetary obligations – essential and nonessential, we will specify here that we will examine only essential monetary obligations as obligations of value.[22] We think that the stipulation of monetary obligations rests on the same principles as the stipulation of nonmonetary obligations and there are no legal grounds for the opposite thesis. Particularities of both are featured in the laws.

Stipulation of monetary obligations poses different issues depending on the currency unit of the obligation and its quantity. These are the two fundamental elements of monetary obligation. In the following situational analysis we will consider the possible issues, questions and scenarios.

The **first issue** concerns the currency unit stipulated between the parties.[23]

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[22] **Kozhuharov, A.** *Law of Obligation.* General Doctrine of the Obligatory Relations, Sofia, 1958, NI, p. 195; **Kalaydjiev, A.** *Law of Obligation.* General Part, Sibi, Sofia, 2001, p. 162.

[23] Statistical data shows that the usage of foreign currency in Bulgaria is considerable – in 2000 more than 60 percent of banking deposits in Bulgaria were denominated in foreign currency. In economic literature the choice of currency in which transactions between legal entities and individuals are stipulated and fulfiled is called "microeconomic choice." Translated into legal language this is the proclaimed in Article 9 of the Bulgarian Law on Obligations and Contracts (LOC) principle of freedom of negotiating and contracting for the entities of the civil law. (See **Nenovsky, N., K. Hristov and B. Petrov**. *From Lev to Euro: Which is the Best Way through?* Ciela, Sofia, 2001, p. 37.) We would like to go further in defining the right of an individual or legal entity to choose the currency unit in which to make payments, to store their fortune and to measure the value of goods and services. We think this is a fundamental right included in the right of sacred private property and proclaimed in many local and international legal acts: Article 17 of the Universal Declaration of Human Rights, 1948, according to which "(1) everyone has the right to own property alone as well as in association with others, (2) no one shall be arbitrarily deprived of his property"; Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, according to which "every physical person or legal entity is entitled to peaceful enjoyment of his possessions and no one shall be deprived of his possessions except where it is to the benefit of society and subject to the conditions provided for by a law and by the general principles of international law;" and Articles 17 and 19 of the Constitution of the Republic of Bulgaria.

Some authors (*Apostolov*) examine this issue against the background of contractual autonomy and others (*Kalaydjiev*) – as a mechanism for overcoming the principle of nominalism. Notwithstanding the approaches used, we think the problem has not been properly examined so far.

1) The first possibility here is a matter of explicit choice of the monetary obligation currency unit made by individuals and legal entities. In the contract the parties can stipulate to fulfil the obligation in certain currency irrespective of the place of conclusion, fulfilment, residence or place of incorporation. The stipulated currency unit is mandatory for the parties.

When Article 10, para. 1 of LOC was in force (repealed as of 1 January 2000 by § 7 of the Transitional and Final Provisions of the Bulgarian Foreign Exchange Law) it obligated physical persons and legal entities to stipulate monetary obligations in local currency. This imperative provision did not allow agreements in a foreign currency unit and hence – fulfilment in such currency. If clauses were stipulated against this rule, they were treated as null and void pursuant to Article 26, para. 1 of LOC. Article 10, para. 1 of LOC was then implemented concerning the obligation and it was payable in Bulgarian levs according to the foreign currency/lev exchange rate at a specified moment. The practice of courts entirely supported the rule of Article 10, para. 1 of LOC. The exceptions to this imperative provision were described in detail in Interpreting Decision No. 2/1997 of the General Assembly of the Civil Committee at the Supreme Court of the Republic of Bulgaria (hereinafter ID 2/1997), and they were in some special laws, regulations and international contracts and conventions, foreign trade transactions and in cases where the contract was proclaimed null and void or was broken and the parties owed one another restitution of what was given in foreign currency under the contract.

Article 10, para. 1 of LOC was the only legal provision in Bulgarian legislation that imposed stipulation in local currency of the monetary obligations. After its repeal in Bulgarian civil legislation a ban to stipulate and fulfil obligations in foreign currency does not exist. Furthermore, there is a lack of legal provisions regulating this matter. We think this is a serious omission. Since we are in the field of civil law where there is a rule in force according to Article 9 of LOC, it follows that parties can freely determine the content of the contract as far as it does not contradict the imperative legal provisions and morals. Having

in mind this fact we can make the indisputable conclusion that stipulation and fulfilment of monetary obligations in foreign currency is now possible, notwithstanding the opinions in the Bulgarian law doctrine to the opposite.[24] Fulfilment in tangible or intangible money that is different from the stipulated currency represents in our view a full failure to carry out the obligation and the creditor may refuse to accept the payment without being in delay. The principle of correctness and *bona fide* in carrying out the obligations (Article 63 of LOC) is in force for monetary obligations too.

We agree with the view-point that monetary obligations are obligations of value,[25] but we disagree that the interest of the creditor is to receive only the value notwithstanding the nature and type of the currency units in which the obligation is expressed.[26]

The creditor's interest is based at least on two economic arguments: (i) the need to do his best in managing his liquidity – i.e. to foresee the terms, time limits, type and volumes of his cash flows in order to make payments to his own creditors without storing money longer than necessary, and (ii) nonexposure to foreign exchange risk (the risk of fluctuations of foreign exchange rates) as regards another currency, different from the currency in which the fulfilment of monetary obligation is stipulated and whose foreign exchange risk the creditor carries intentionally.

Another legal provision, connected with a specific case of stipulating monetary obligations, is the single article of the Law on Paying the Obligations Stipulated in Gold, published in the State Gazette, issue 184 of 14 August 1946. This provision reads: "All obligations in Bulgarian levs, stipulated to be paid in gold or at the exchange rate of gold or at the exchange rate of any foreign currency shall be paid in such quantity of Bulgarian lev banknotes as stated in the obligations." This text represents a legal provision in force[27] although it is outdated and has no practical importance whatsoever. The general aim of this law was to support banknotes, paper money (thus supporting its issuer) at the expense of gold metal money which at that moment still played an

[24] *P. Popov* in his comments in: **Kozhuharov, A.** *Law of Obligation*. A Brief Course, Juris Press, Sofia, 2000, p. 47.

[25] **Apostolov, I.** *Law of Obligation*. Part 1, General Doctrine of Obligations, published by BAN, Sofia, 1990, p. 68.

[26] Ibid., p. 67.

[27] The opposite opinion is held by **Kalaydjiev, A.** *Law of Obligation.* General Section, Sibi, Sofia, 2001, p. 183.

important role as legal tender. The risk of depreciation was to be run by the creditor. The text of the law does not expect the parties to stipulate monetary obligations in a certain way; it just indicates how they should fulfil already stipulated agreements – in banknotes of Bulgarian levs. The law is applicable to monetary obligations where in addition a certain numerical amount in levs exists and is stipulated.[28] We consider legally groundless opinions claiming that this law was repealed by the LOC (and especially by its Article 10, para. 1) when coming into force in 1951.[29] Article 10, para. 1 has a different area of applicability and a different purpose.

In all cases when a stipulation in foreign currency exists the parties should have in mind the provisions of the applicable to the contract legislation concerning the field of stipulation and fulfilment of monetary obligations. A case is possible where the aplicable law restricts agreement on using local currency and allows it only when parties are residents of the country. Issues connected to the validity and carrying out of monetary obligations in this case will be settled according to the provisions of the applicable law.

2) The second possible situation is when parties have omitted to stipulate the currency unit of the monetary obligation but a numerical indication of its volume exists.

In this case arguments could be brought in favor of the statement that the contract is valid, as well as in favor of the statement that it is null and void. The contract shall be construed null and void only if we consider a lack of mutual agreement between the parties concerning the currency of the monetary obligation. We think, however, that the existence of the monetary obligation is beyond any doubt. The will of the parties to enter into certain agreement is explicitly manifested. And it could be an agreement to which a monetary obligation is a characteristic (lending, buying or selling, leasing, hiring, license agreement, etc.).

Often expressions in the text of the contract concerning cash or noncash payment of a certain amount represent a clear indication of the parties' intention to create a monetary obligation. One could find grounds for invalidity in the lack of consent related to the currency unit of the monetary obligation that could lead to invalidity of the obligation and of the contract as a whole.

[28] See more in: **Apostolov, I.** *Law of Obligation*. Part 1, General Doctrine of Obligations, published by BAN, Sofia, 1990, pp. 76–77.

[29] **Kalaydjiev, A.** *Law of Obligation.* General Section, Sibi, Sofia, 2001, p. 183.

Reasons could be given, however, in favor of the statement that the type of currency is subject to specification. In the case of a lending agreement a proof has to be adduced concerning the currency of the money given by one of the parties to the other. Beyond this case, however, the unit of the monetary obligation should be the Bulgarian lev where the Bulgarian law is applicable to the agreement. This conclusion comes from the text of Article 24 of LBNB, that defines the Bulgarian lev as a currency unit of Bulgaria. This imperative text substitutes for the missing content between the parties.

Notwithstanding the prevailing arguments, we would have fully equivalent final results: paying of an amount in levs. This would be the case when by virtue of an invalid agreement a certain work has been done or a material thing given has been given: a claim for unjust enrichment would be filed in levs and awarded in levs.

3) The third possible scenario is when the monetary obligation is stipulated in a currency unit that does not exist anymore.[30] This case has a huge practical importance in the context of the euro banknotes and coins recently put into circulation. It is practically possible for individuals and legal entities, due to inertia or ignorance, to stipulate after 1 January 2002 an obligation in Deutsche Marks, French Francs, etc. Here arguments could be adduced again for and against the validity of the contract as in the preceding case. When arguing in support of the validity of the obligation in nonexisting currency we should add that it should be deemed concluded in the currency unit that, by virtue of an internal act of the respective countries, has replaced the currency unit stipulated by the parties. In our opinion the contract has to be considered valid. Such a solution is in favor of the legal safety and the economic turnover. As far as the quantity of the obligation is concerned it should also be recalculated according to the official exchange rate between the old and the new currency.
4) The fourth scenario examines the possibility of legal entities to stipulate a monetary obligation in a currency that shall be introduced in the future. The reasons to create such an obligation could be different: the agreement has a long term of validity, an uncertainty exists concerning the legal provisions of implemen-

[30] Here we do not include the case in which the currency unit itself makes it clear that the parties do not intend to create a valid monetary obligation – when they stipulate it in Roman sesterces.

tation of the new currency, etc. Of course the clause could be conditional – the monetary obligation is fixed in such a currency only after its introduction, but such a clause may not exist. In the latter case the obligation will be valid when the maturity date comes after introduction of the new currency. Before that, the monetary obligation should be fulfiled in banknotes and coins of the currency existing at the moment.

5) The case in which parties have mentioned different currencies in different parts of the document and there is no certainty about the really stipulated monetary currency, is the fifth possible situation. Here the nullity of the contract due to the lack of consent between the parties prevails.

6) The last scenario is when the parties have stipulated a monetary obligation in a certain currency, but during the period of validity of the monetary obligation there exists one more official currency in the country. We think that here a priority should be given to the stipulated currency no matter that one more currency has an official character and its banknotes and coins could be provided by the debtor. Fulfilment in another currency will be equal to nonfulfilment. The debtor's conduct is similar to *aliud* because a different thing is given and not the thing stipulated. That is why the creditor has the right not to accept the payment.[31, 32]

The questions examined in the above situational analysis could be applied to commercial agreements too. We have to bear in mind however, that here parties have the quality of dealers and there is a special regulation to this effect in the Bulgarian Commercial Law (hereinafter CL). One of its specific points is that some commercial contracts should not be considered invalid, even if an essential element (such as the monetary obligation) is not stipulated. The lack of explicit will is filled in with provisions of the law in order to ensure the stability of the commercial legal relations. Some legal norms connected to the mon-

[31] **Kozhuharov, A.** *Law of Obligation.* Types of Relations, S., NI, 1965, pp. 158–159; A hypothetical parallel circulation of two currencies in one country is examined by **Hanke, S., K. Schuler** in: *Currency Boards for Developing Countries*, No. 9, ICEG Sector Studies Series, 1994.

[32] Apart from the above classification we ought to mention the possible case of foreign exchange diversification of the debt, similar to "diversification of liquid assets" (*English – Russian Economic Dictionary*. Moscow, 1981, p. 243) where parties can stipulate or restipulate the debt in different units. Such a clause would protect the creditor during periods of economic crises.

etary obligations we can find in some commercial contracts where a price or a fee is due: Article 37, Article 326, para. 2, Article 356, para. 2, Article 494, para. 1, Article 506, para. 1, item 4, etc. of the CL. They regulate in a practical manner questions concerning the type of the currency or the quantity of the obligation. Criteria are rather objective or too relative: for example what is due is the usual fee or the price that is habitually paid. In a case of dispute the court will use the provision of Article 130 of the Bulgarian Civil Litigation Code where the claim is proved on its own merits.

The conclusion that follows is that in some commercial contracts nonstipulation of the type of the currency or the quantity of the monetary obligation does not render them invalid. The missing elements of such obligations are replaced by the respective provisions of the law, if any, and by the usual commercial norms.

The **second issue** concerns the quantity of the monetary obligation as its essential element. Where it is specified clearly and undoubtedly by parties, problems do not arise.

Quite interesting, however, is the case where the parties have stipulated the monetary obligation as an amount in Bulgarian levs equivalent to a certain amount of foreign currency. Such clauses were called "clauses of value"[33] and were widespread when the text of Article 10, para. 1 of LOC was in force. Such clauses were used with the purpose of eluding the legal provision to stipulate obligations only in local currency in order to protect the creditor against inflation and unfavorable exchange rate fluctuations. Such a practice was confirmed by the Bulgarian Supreme Court in its ID 2/1997.

In "gold value clauses" there is ambiguity about the quantity of the monetary obligation at the moment of its establishing. But the quantity could be specified and it depends on the exchange rate of the local currency against the foreign currency at a specified moment.

The doctrine and the practice of courts consider seriously the question about the moment at which the exchange rate value of the local currency against the foreign currency should be specified if the parties have not made any stipulations concerning this issue. Examining this question two main cases should be marked off depending on whether the parties have stipulated this moment or not.

[33] In less recent literature such agreements are called "gold value clauses" **– Apostolov, I.** *Law of Obligation.* Part 1, General Doctrine of Obligation, published by BAN, Sofia, 1990, p. 74.

1) When a debtor fulfils his obligation on the maturity date, he fulfils it exactly and the exchange rate at this moment (day) should be used. Exchange rates could be specified before the maturity date as well as after it, for example on the day of payment (when the debtor would already be in default). The argument that the compensation for the default could be used to equalize the exchange rate is groundless because the role of that compensation is to indemnify the creditor for the late payment.
2) Problems arise when parties have not stipulated anything concerning this question. The theory and practice point to different possibilities:[34] the moment of the conclusion of the contract, the maturity date, the moment of the fulfilment of the obligation. We think that none of these has any normative ground.[35]

In our opinion if nothing is stipulated, the equivalent in levs should be calculated on the maturity date. This opinion is confirmed by practice: item 3 of ID 2/1997. In this way an objective criterion is established making the interests of the creditor and the debtor clear and well-balanced. The maturity date could always be specified using the provisions of Article 69, para. 1, item 2 of LOC. The obligation is stipulated in levs and in a case of default the so-called "legal interest" for late payment should be accrued on the amount in levs, but not on the amount in foreign currency. This means that on the date of the payment the debtor has to pay an amount in levs calculated by using the exchange rate on the maturity date, plus compensation equal to the accrued "legal interest" on this amount in levs (Article 86, para. 1 of LOC). If we accept the exchange rate on the day of the payment as relevant, that would encourage the debtor not to pay on the maturity date but to wait until a day with a favorable exchange rate comes. On the other hand, to accept that the exchange rate at the moment of establishing the monetary obligation could be used, would mean to stultify the "clause of value." This is because in this way the foreign exchange risk could not be avoided, as far as the parties think such a risk exists. The parties could stipulate the monetary obligation in local currency

[34] Review of the opinions could be found in **Kalaydjiev, A.** *Law of Obligation.* General Section, Sibi, Sofia, 2001, pp. 184–187.

[35] The opinion that the exchange rate should be specified at the moment of the payment (**Kalaydjiev, A.,** op. cit., pp. 186–188) according to Article 494, para. 1 of CL, accepted by Mr. Kalaydjiev as a legal principle, cannot be supported. We could hardly view as a principle a norm found in a legal act containing specific matter of civil law – commercial issues and more specifically, provisions regulating promissory notes and bills of exchange.

and they would have the same effect. All other possible dates between the date of establishing the monetary obligation, the maturity date and the date of the effective payment bear the shortcomings that have already been outlined.

In cases where there is no maturity date mentioned according to the provisions of Article 69, paras. 1 and 2 of LOC, the exchange rate at the moment when the creditor has requested the debtor to pay should be used (including the moment of filing a claim) or after the term given by the court expires. The maturity date could always be specified and this allows the creditor to estimate the moment of the request. However we think in this case the interest of the creditor should be supported.

Therefore we consider as appropriate *de lege ferenda* to create a legal provision that could fill in a possible lack of explicit agreement between the parties. According to such a provision the exchange rate on the maturity date should be used. Further in this discussion paper in part 10, item 3 we offer a text of such a provision. Until the adoption of a provision the law enforcement institutions should take into account the provisions of the cited ID 2/1997 concerning the moment of specifying the exchange rate.

The third issue is connected with the interest.

We think that no legal obstacles exist for the parties to stipulate a contractual (not "legal," i.e. imposed directly by virtue of the law) interest in a currency different from the currency of the monetary obligation. In order to calculate the amount of the interest, the principal amount should be changed into the currency in which the interest is. Where there is no agreement between the parties concerning the moment of such a change, the exchange rate on the day of establishing the obligation should be used because from this date the creditor is not in possession of his money and cannot use his funds.

As for the "legal" interest, owing to practical needs, legal provisions concerning interest rates on delayed payments in foreign currency have been created in Council of Ministers' Decree No. 72/1994.

8. Fulfilment of Monetary Obligations

The time, place, amount and currency unit of the fulfilment of monetary obligations should be stipulated by the parties or specified by the applicable law. We will examine below several issues connected with the fulfilment of monetary obligations.

1. Despite the serious legislative amendments concerning the repeal of Article 10, para. 1 of LOC, Article 2 of Regulation No. 3 on Payments has remained unchanged. Under Article 2 of the Regulation, the payments within Bulgaria should be made in Bulgarian levs cash or noncash. Para. 2 of the same article adds that payments could be made also in foreign currency cash or noncash if only it was allowed by other Bulgarian laws and regulations related to the foreign exchange regime. The text of Article 2 was formulated in 1992 under totally different foreign exchange provisions. In our opinion this text has appeared to be too archaic over the last several years and mostly since the introduction of the new liberal Foreign Exchange Law. The formulation of Article 2 of the Regulation was strongly influenced by Article 10, para. 1 of LOC (in force at that time). The only difference between them was that the text of the LOC concerned the stipulation of monetary obligations and the text of the Regulation concerned payments (i.e. the fulfilment of monetary obligations). If the principles of correctness and goodwill in fulfilment of contractual obligations (Article 63 of LOC) were followed strictly, it would be easy to conclude that the parties could freely stipulate a monetary obligation in foreign currency and the fulfilment of such an obligation could be done in the same currency. Laws and regulations of the foreign exchange regime do not interdict this, so the norm of Article 2 was not imperative and interdictory anymore. The exception was so broad that in fact it represented a rule and became a principle.[36]

   By virtue of § 3 of the Transitional and Final Provisions of Regulation No. 3 on Noncash Payments and the National Payment System, adopted on 27 June 2002, Regulation No. 3 on

[36] We will remind here that at the beginning of 2000, when the Foreign Exchange Law came into force, the foreign exchange regime was based on the principle that anything that is not explicitly forbidden, is allowed. This principle is radically different from the principle in force until that moment. In this way the foreign exchange legislation has become closer to the Bulgarian general civil legislation.

Payments of 1992 was repealed. The new regulation solved in a decisive way the issue of the freedom of payments in levs and in foreign currency: Article 2 of the former regulation does not exist anymore.

2) Concerning the time exactness of the noncash payment all physical persons and legal entities should consider the legal definition of the term "value date," given in § 1, item 17 of Additional Provisions of the new Regulation No. 3. This definition makes it clear that from a technical point of view the moment of remitting an amount by the debtor may not coincide with the moment of receiving that amount by the creditor. From the point of view of contractual relations between the parties the fulfilment of the obligation ends when the account of the creditor is credited with the amount in question and he has a full legal possession of it. Therefore the starting moment of the fulfilment is not relevant to the exactness of the fulfilment and the debtor could not adduce arguments connected with the mode of functioning of the settlement system in order to support his delay. The debtor should also take into account the provision of Article 11, para. 1 of the Law on the Measures against Money Laundering. This provision binds banks to delay a suspicious money transfer within the admissible time limit in compliance with the legal acts regulating bank payments.

3) Concerning the place of fulfilment of noncash payments, problems may arise where the parties have not stipulated on which account, in which bank, and on the territory of which country the creditor should receive the payment. In the case of noncash payments, the bank account fixes the place of payment. If the creditor has specified an account on which the payment could not be received because of an objective reason, beyond the will and the control of parties, the debtor could not be held responsible for nonfulfilment. In this case, in order to discharge himself, he can act according to the provisions of Articles 95–97 of LOC. When the creditor's account is not mentioned in the contract, the debtor could use the account mentioned in the commercial correspondence, connected to the contract (Article 13, para. 1 of CL). If such an account cannot be found, then again rules of LOC are applicable.

4) A specific case of fulfilment of monetary obligations is the bankruptcy procedure against the debtor. This is one of the cases where the creditor may not receive the payment in the stipulated currency. By virtue of § 2 of the Additional Provisions of the Law on Amendments of the Commercial Law (State Gazette, issue 63 of 1994) the obligations have to be converted into Bulgarian levs using the exchange rate of the Bulgarian National Bank as of the day of the decision for opening the bankruptcy procedure.

9. *De Lege Ferenda* Proposals

Following the possible situations of monetary obligations stipulation and fulfilment examined above, a few proposals *de lege ferenda* should be made:

1) It is necessary to create a provision that would supplement agreements lacking a stipulation concerning the monetary obligation. We propose the following text: "*Where the parties have not stipulated the currency unit of the monetary obligation, it shall be deemed to have been stipulated in Bulgarian levs.*"

2) It is necessary to create a provision allowing the parties to stipulate monetary obligations in currency unit other than the national one. We propose the text: "*Parties can freely stipulate the currency of a monetary obligation.*"

3) It is necessary to create a provision that would specify the exchange rate as of which day should be used in calculating an amount in Bulgarian levs in cases of "clause of value." We propose the text: "Where the parties have stipulated that the amount of the monetary obligation shall be specified as an amount of a specified currency equal to a specified amount of another currency at a specified exchange rate between these two currencies, but the parties have not mentioned in the contract the day of such an exchange rate, then in order to determine the amount of the debt the exchange rate on the maturity date shall be used, and in cases where the obligation does not have a stipulated maturity date – the day of the legal request from the creditor or after the term given by a court of justice in connection with Article 69 of LOC expires."

10. Electronic Money and the Future of Money

As we mentioned in the part examining the kinds of money, the electronic money could be considered as an alternative to the well-known classic money. Electronic money (e-money, network money, cyber money) is defined as a monetary value that is electronically stored on a technical device in possession of the client.[37, 38]

It should be distinguished from similar terms – the so called "electronic access products" – debit cards and credit cards. The specific issue about the electronic access products is that they allow customers to use electronic communication devices in order to access money held at a bank account.

Electronic money has to be distinguished also from the products which allow for the stored monetary units to be used only to pay goods or services and the issuer of monetary units and their recipient is one and the same person (a typical example here are the phone cards). This is not electronic money.

As we can see from the definition, electronic money exists only in an intangible form and not in bank accounts but is stored on technical devices. It is not issued following a procedure and by an institution authorized by law, there are no imperative legal provisions for its mandatory acceptance for payments and it does not represent legal tender. Parties make payments on the basis of mutual agreement, but even in this case it could not be accepted by one party in return for delivered goods and services.

Notwithstanding its common features with money, the electronic money by its nature represents a commercial product the use of which should be paid for with classic money.

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[37] **Drehmann, M., C. Goodhart and M. Krueger.** The Challenges Facing Currency Usage: Will the Traditional Transaction Medium Be Able to Resist Competition from the New Technologies? *Economic Policy*, April 2002, p. 201.

[38] The definition of the European Central Bank for electronic money is: an electronic store of monetary value on a technical device that may be widely used for making payments to entities other than the issuer without necessary involving bank accounts in the transaction, but acting as a prepaid bearer instrument, *European Central Bank*, 1998, *Report on Electronic Money*, Frankfurt/Main, August, p. 6, cited after **Kabelac, G.** Cyber Money as a Medium of Exchange, *Discussion Paper* 5/99, Economic Research Group of the Deutsche Bundesbank, p. 3.

The future of electronic money will depend exclusively on its demand and its use by legal end economic entities. Nowadays, however, the demand for cash money (banknotes and coins)[39] is still predominant. This is due to the fact that banknotes and coins ensure considerable convenience: banknotes (especially with high nominal value) give anonymity in transactions in the gray and dark economy;[40] there is a demand for banknotes of developed industrial economies in countries with high inflation and political and economic uncertainty about accumulation of savings, seigniorage is earned and hence – income for the state. In its turn, electronic money at least for the time being leaves traces on technical devices and cannot provide with anonymity the parties making the settlement. Besides, the charges for its use are relatively high due to the introduction of new technological solutions in order to increase security requirements and protection against fraud. All this leads to storage of a comparatively small quantity of monetary value on technical devices. In addition, there are some obstacles in performing payments. For example some schemes used in the market, such as electronic purses *Proton* and *GeldKarte,* do not allow the funds received to be spent immediately and the receiver of the electronic money should return it to the issuer that validates it and then credits the account of the receiver of the payment. Therefore electronic money today possesses, although not to the full extent, only one of the classic functions of money – it is used mainly as a medium in the process of exchanging goods of small value.[41] It is not used for hoarding or as a measure of value. Electronic money will convert into real money only when it starts to prevail with its better practical qualities over classic money.

To wind up, let us point to one general conclusion and it is that the disappearance of money will be delayed[42] and money will for a long time continue to serve people the way it has done so far.

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[39] For some concrete economic figures see the tables in the cited material of Drehmann.

[40] For examples see Drehmann.

[41] The same in: **Kabelac, G.** Cyber Money as a Medium of Exchange, *Discussion Paper* 5/99, Economic Research Group of the Deutsche Bundesbank, p. 18.

[42] In the economic literature, however, many authors support the opinion of the inevitable disappearance of money – see the authors cited by **Drehmann, M., C. Goodhart and M. Krueger.** The Challenges Facing Currency Usage: Will the Traditional Transaction Medium Be Able to Resist Competition from the New Technologies? *Economic Policy*, April 2002, p. 195.

ABBREVIATIONS

BNB – Bulgarian National Bank
CL – Bulgarian Commercial Law
ID – Interpreting Decision
LBNB – Law on the Bulgarian National Bank
LOC – Law on Obligations and Contracts

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