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## Liability for Failure to Supply a Specific Item: From a Non-Roman Rule to a Virtually Universal Success Story

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**Abstract:** Will a debtor, who is due to supply a specific object but fails to meet his obligation in due time, be considered liable for non-performance if this object is later destroyed by *force majeure*? Roman law answers positively to this question, as it is always the debtor in *mora debitoris* who bears the risk, but almost all modern codifications release the debtor from his obligation, if the item that the debtor was due to supply would have been destroyed anyway, if it had been supplied in due time. The present article will try to explain how the Roman rule has been changed and whether this modification was an improvement or not. In the conclusion, the solution prevailing in the Draft Common Frame of Reference (DCFR) will also briefly be discussed.

**Résumé:** Un débiteur, qui est tenu de fournir un certain bien mais ne s'exécute pas en temps voulu, sera-t-il tenu pour responsable de cette inexécution si le bien en question est ensuite détruit par force majeure? Le droit romain donne une réponse positive à cette question, car c'est toujours le débiteur en *mora debitoris* qui supporte le risque, mais presque toutes les codifications modernes libèrent le débiteur de son obligation, si le bien qui était dû par le débiteur aurait été détruit également, même si il avait été fourni en temps voulu. Le présent article tentera d'expliquer comment la règle romaine a été changée et si ce changement est une amélioration ou non. Dans la conclusion, la solution prônée par le DCFR sera également brièvement discutée.

**Zusammenfassung:** Ist ein Schuldner, der es nicht schafft seiner Pflicht, einen bestimmten Gegenstand zu liefern, fristgemäß nachzukommen, wegen Nichterfüllung haftbar, auch wenn der Gegenstand später durch *force majeure* zerstört wird? Das Römische Recht beantwortet diese Frage positiv, weil immer der Schuldner in *mora debitoris* das Risiko trägt; fast alle modernen Kodifikationen hingegen befreien den Schuldner von seiner Haftung, wenn der Gegenstand, zu dessen Lieferung der Schuldner verpflichtet war, auch im Falle der rechtzeitigen Lieferung zerstört worden wäre. Der vorliegende Artikel versucht zu erklären, wie die römischrechtliche Regel verändert wurde und ob die Modifikation eine Verbesserung darstellt oder nicht. Im Rahmen der Konklusion wird auch die hierzu im DCFR vorgesehene Lösung kurz erörtert.

### 1. Introduction

The case I wish to discuss<sup>1</sup> is that which involves a debtor who is due to supply a specific object but fails to meet his obligation in due time. Will this debtor be considered liable for non-performance if this object is later destroyed by *force majeure*?

Let us, for example, imagine that John is contractually bound to supply Peter with a horse named Fury. John is supposed to supply Fury in 1 March but fails to do

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<sup>1</sup> This text is a revised version of the Article I gave at the Inaugural Conference of the European Society for Comparative Legal History in Valencia, Spain on 6 Jul. 2010. The author would like to thank Walter Cairns for his valuable help in revising the English.

so. In 10 March, Fury dies unexpectedly but from natural causes. The question then becomes – is John liable for the loss of the horse or is it Peter who will bear the risk?

This case seems to have received a similar solution under most European civil codes.

## 2. The Rule as Featured in the Modern Civil Codes

If we formulated the question in codified law terms, we could frame it as follows: Where a debtor finds himself in *mora debitoris*, can he still be released by virtue of *force majeure*?

In almost all modern civil codes, the answer is in the negative, and the debtor can no longer be freed from his debt.

However, these codes make provision for an exception – if the item that the debtor was due to supply would have been destroyed anyway, even if it had been supplied in due time, then the debtor will be released from any obligation.

In the *Code Napoléon* (and therefore also in the French, Belgian, and Luxembourg Civil Codes), Article 1302 reads as follows:

De la perte de la chose due

Lorsque le corps certain et déterminé qui était l'objet de l'obligation, vient à périr, est mis hors commerce, ou se perd de manière qu'on en ignore absolument l'existence, l'obligation est éteinte si la chose a péri ou a été perdue sans la faute de débiteur et avant qu'il fût en demeure.

Lors même que le débiteur est en demeure, et s'il ne s'est pas chargé des cas fortuits, l'obligation est éteinte dans le cas où la chose fût également périée chez le créancier si elle lui eût été livrée. (...)

Translation: Loss of the item owed

Where a real and ascertained object, which was the subject-matter of the obligation, is destroyed, is no longer capable of being transacted, or becomes lost in such a way that its whereabouts become entirely unknown, the obligation shall be extinguished where the object in question has been destroyed or lost without any error on the debtor's part and before the latter was in default of performance.

Even where the debtor was in default of performance, and he had not assumed liability for acts of *force majeure*, the obligation shall become extinguished where the object would also have been destroyed when in possession of the creditor, having been supplied to the latter.<sup>2</sup>

The wording of Article 287 of the German Civil Code (BGB) is nothing vastly different:

Der Schuldner hat während des Verzugs jede Fahrlässigkeit zu vertreten. Er ist auch für die während des Verzugs durch Zufall eintretende Unmöglichkeit

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<sup>2</sup> Translation by the author.

der Leistung verantwortlich, es sei denn, daß der Schaden auch bei rechtzeitiger Leistung eingetreten sein würde.

Translation: Whilst in default, the debtor shall be liable for any negligence which may occur. He shall also be liable for any absence of performance caused by *force majeure* whilst in default, unless the resulting loss would also have occurred if the debtor's obligation had been performed in due time.<sup>3</sup>

Although it is worded in similar terms, the German rule is slightly different, since it does not exactly state that the debtor shall be released if the object would also have been destroyed had it been in the creditor's possession. Here, it is asked whether it would have made a difference if the debtor had supplied the object before being in *mora debitoris*. Ultimately, however, this factor does not seem to make any practical difference.

A similar rule can also be found in Article 103 of the Swiss Code of Obligations (German and French versions):

## II. Wirkung

### 1. Haftung für Zufall

1) Befindet sich der Schuldner im Verzuge, so hat er Schadenersatz wegen verspäteter Erfüllung zu leisten und haftet auch für den Zufall.

2) Er kann sich von dieser Haftung durch den Nachweis befreien, dass der Verzug ohne jedes Verschulden von seiner Seite eingetreten ist oder dass der Zufall auch bei rechtzeitiger Erfüllung den Gegenstand der Leistung zum Nachteile des Gläubigers betroffen hätte.

## II. Effets

### 1. Responsabilité pour les cas fortuits

1) Le débiteur en demeure doit des dommages-intérêts pour cause d'exécution tardive et répond même du cas fortuit.

2) Il peut se soustraire à cette responsabilité en prouvant qu'il s'est trouvé en demeure sans aucune faute de sa part ou que le cas fortuit aurait atteint la chose due, au détriment du créancier, même si l'exécution avait eu lieu à temps.

### Translation: II. Effects of Obligations

#### 1. Liability for *force majeure*

1) Where the debtor is in default, he shall be obliged to pay compensation for late performance, and shall even be held liable in cases of *force majeure*.

2) The debtor may secure release from such liability by proving that he had become in default without any error on his part, or that *force majeure* would have affected the item due, to the creditor's disadvantage, even if the obligation had been performed in due time.<sup>4</sup>

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<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

The Italian Civil Code, in Article 1221, says nothing different:

Effetti della mora sul rischio

Il debitore che è in mora non è liberato per la sopravvenuta impossibilità della prestazione derivante da causa a lui non imputabile, se non prova che l'oggetto della prestazione sarebbe ugualmente perito presso il creditore.

Translation: Effects of default on the risk of loss

Where the debtor is in default, he shall not be released from his obligation on the basis that performance had become impossible because of circumstances beyond his control, unless he can prove that the object involved in the obligation would also have been destroyed when in the creditor's possession.<sup>5</sup>

In more recent codifications, the rule remains the same, as we can see in the Netherlands Civil Code (Article 84 of Book 6):

Elke onmogelijkheid van nakoming, ontstaan tijdens het verzuim van de schuldenaar en niet toe te rekenen aan de schuldeiser, wordt aan de schuldenaar toegerekend; deze moet de daardoor ontstane schade vergoederen, tenzij de schuldeiser de schade ook bij behoorlijke en tijdige nakoming zou hebben geleden.

Translation: The debtor shall be held liable for any impossibility of performance which arises whilst the debtor is in default, and which cannot be attributed to the creditor. The debtor shall compensate any loss which arises therefrom, unless the creditor would also have incurred such loss had the obligation been performed properly and in due time.<sup>6</sup>

In this respect, the Netherlands Civil Code is in line with the pandectist tradition of the Swiss and German codes.

The same rule can also be found in the major South American codes, such as those of Chile,<sup>7</sup> Argentina,<sup>8</sup> and Brazil.<sup>9</sup>

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<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> Article 1547 Chilean Civil Code: 'El deudor no es responsable sino de la culpa lata en los contratos que por su naturaleza sólo son útiles al acreedor; es responsable de la leve en los contratos que se hacen para beneficio recíproco de las partes; y de la levisima, en los contratos en que el deudor es el único que reporta beneficio. El deudor no es responsable del caso fortuito, a menos que se haya constituido en mora (siendo el caso fortuito de aquellos que no hubieran dañado a la cosa debida, si hubiese sido entregada al acreedor), o que el caso fortuito haya sobrevenido por su culpa. La prueba de la diligencia o cuidado incumbe al que ha debido emplearlo; la prueba del caso fortuito al que lo alega. Todo lo cual, sin embargo, se entiende sin perjuicio de las disposiciones especiales de las leyes, y de las estipulaciones expresas de las partes.'

<sup>8</sup> Article 892 Argentinian Civil Code: 'El deudor cuando no es responsable de los casos fortuitos sino constituyéndose en mora, queda exonerado de pagar daños e intereses, si la cosa que está en la imposibilidad de entregar a consecuencia de un caso fortuito, hubiese igualmente perecido en poder del acreedor.'

<sup>9</sup> Article 399 Brazilian Civil Code: 'O devedor em mora responde pela impossibilidade da prestação, embora essa impossibilidade resulte de caso fortuito ou de força maior, se estes ocorrerem durante

As we can see from these major civil codes, the same rule applies everywhere. The debtor who is in default can still be released from liability for acts of *force majeure* where the object in question would have been destroyed when in the possession of the creditor, having received the thing before default had set in.

One way of interpreting this rule is to describe it as a mere exception to the general principle, which states that the debtor who is in default has to bear the entire risk linked to the accidental destruction of the object owed.

Another way of analysing this rule could be to regard it as indulgent treatment of a debtor who failed to fulfil his obligations. One might well wonder whether it is at all appropriate to give the debtor so much leeway. It is the debtor's own fault if he is late in performing – does he truly deserve to be rescued by mere chance? Should the destruction of the object through *force majeure* not benefit the creditor, who committed no error and was not late in meeting his obligations?

As is highlighted in the title, this rule is definitely not derived from Roman law. In order to gain a better understanding of this phenomenon, let us attempt to trace its history.

### 3. Roman Law

In Roman law, the rule is clear: The debtor may only be released from his obligation through *force majeure* if he is not yet in default – as can be seen from several passages of Justinian's Digest:

Paul., *lib. 5 ad Plautium* (D.44.7.45)

*Is, qui ex stipulatu Stichum debeat, si eum ante moram manumiserit et is, priusquam super eo promissor conveniretur, decesserit, non tenetur: non enim per eum stetisse videtur, quo minus eum praestaret.*

Translation<sup>10</sup>: Paul, Plautius, book 5: A person who owes Stichus in terms of a stipulation is not liable if he manumitted the slave being in delay, and the slave died before the promisor was sued in respect of him; for it does not appear to be due to his fault that he did not hand over the slave.

What does this text tell us? John promise – by *stipulatio* – to supply the slave Stichus to Peter. Before being in *mora* (in default) of supplying the slave, he emancipates him. Then – still prior to John being in *mora debitoris* the freed slave dies from natural causes. Paul decrees that John shall be released from his obligation, as it was not due to him that he failed to hand over the slave.

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o atraso; salvo se provar isenção de culpa, ou que o dano sobreviria ainda quando a obrigação fosse oportunamente desempenhada.<sup>7</sup>

<sup>10</sup> The translation is by Ben Beinaert and taken from A. WATSON (ed.), *The Digest of Justinian* (with Latin text edited by Th. Mommsen & P. Krüger), University of Pennsylvania Press, Philadelphia, PA 1985.

It has, of course, been alleged that Paul's text was interpolated.<sup>11</sup> The main reason why many authors considered that this was the case is that, according to these authors, he who freed the slave should not have been released from his obligation by the later death of the slave. In their view, this was contrary to the *perpetuatio obligationis* rule. As I have indicated in previous writings,<sup>12</sup> these authors confuse two very different phenomena – a contractual fault does not equate to *mora debitoris*. Although it is true that both have the *perpetuatio obligationis* as a consequence, Paul's text shows us that it is only the *mora debitoris* that transfers the risk from the creditor to the debtor.

It is only where the *mora debitoris* arises that the debtor can no longer be released from his obligation by *force majeure*. Prior to this – and even where a contractual fault occurs by which the debtor renders himself unable to meet his obligation – the sole consequence will be that the obligation will be perpetuated, that is, that the obligation will not become extinguished just because it has become impossible to fulfil.

This interpretation is the only possible way of reading Paul's text, since Paul emphasizes the fact that the slave has been freed *ante moram*, that is, before being in default. If the *perpetuatio* had the same effect as the *mora*, there would have been no reason for Paul to emphasize this, nor would it have been possible to release the debtor in the circumstances described in the passage.

Returning to our initial question, the passage from Paul tells us that the debtor *in mora* can never be released by *force majeure*. Paul does not consider the possibility of an exception such as that which exists in the modern civil codes.

The same conclusion can be reached from another passage from the same legal scholar:

Paul., *lib. 16 Quaestiones* (D.18.4.21)

*Venditor ex hereditate interposita stipulatione rem hereditariam persecutus alii vendidit: quaeritur, quid ex stipulatione praestare debeat: nam bis utique non committitur stipulatio, ut et rem et pretium debeat. et quidem si, posteaquam rem vendidit heres, intercessit stipulatio, credimus pretium in stipulationem venisse: quod si antecessit stipulatio, deinde rem nactus est, tunc rem debeat. si ergo hominem vendiderit et is decesserit, an pretium eiusdem debeat? non enim deberet Stichus promissor, si eum vendidisset, mortuo eo, si nulla mora processisset.<sup>13</sup> sed ubi hereditatem vendidi et postea rem ex ea vendidi, potest videri, ut negotium*

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<sup>11</sup> For a detailed analysis of the interpolationist critique, see my book: J.F. GERKENS, *Aequè perituris... Une approche de la causalité dépassante en droit romain classique*, Liège 1997, pp. 211-213.

<sup>12</sup> *Ibid.*, pp. 213-218.

<sup>13</sup> In some older editions – as the Haloander edition – we find *praecessisset*. In the Padova manuscript (Biblioteca Universitaria di Padova, Ms. 941), *processisset* is shortened as *pcessisset*.

*eius agam*<sup>14</sup> *quam hereditatis. sed hoc in re singulari non potest credi: nam si eundem hominem tibi vendidero et necdum tradito eo alii quoque vendidero pretiumque accepero, mortuo eo videamus ne nihil tibi debeam ex empto, quoniam moram in tradendo non feci (pretium enim hominis venditi non ex re, sed propter negotiationem percipitur) et sic sit, quasi alii non vendidissem: tibi enim rem debebam, non actionem. (...)*

Translation<sup>15</sup>: Paul, Questions, book 16:

A vendor who had given a stipulation on account of an inheritance brought an action for a thing which was part of the estate, and sold it to another; the question is what he should make good on the stipulation; for the stipulation cannot be twice brought in issue so that he is liable for both the thing and its value. We, indeed, believe that if, after the heir's selling the thing, the stipulation becomes operative, the price or value is comprised in the stipulation; but if the stipulation became operative first and the vendor then acquired the thing, he must deliver the thing. Now if he should sell a slave who dies, is he liable for the slave's rule? For one who promises Stichus should not be liable in respect of Stichus's death in the event of his having sold Stichus, unless he be in wrongful delay in performing his obligations. But where I sell an inheritance and, subsequently, something which is part of it, it can be seen that I am dealing with that thing and not the inheritance. This, though, is not to be accepted in relation to a specific item. For if I sell you this slave and, before he is delivered, I sell him to someone else and receive the price, let us consider whether, on his death, I owe you anything in the action on purchase; assuming that I was not in delay in delivering him (for the price of a slave sold is accepted by virtue of the transaction, not the circumstances) and the case is such as though I had not sold to someone else; for I owed you the thing, not the right of action. But when an inheritance is sold, it is assumed that, whatever I do as heir, I must make good to the purchaser as if I were conducting his affairs; in the same way, good faith requires the vendor of land to account for its produce, if he ignores it as belonging to another; no liability attaches to him unless he be shown to have been at fault. But if I claim the thing that I have sold from another in possession of it and accept a money judgment in respect of it, am I liable to the purchaser for the thing or for its price? It is always the thing and not actions in respect of it for which I am liable. But if, being forcibly ejected or through the action for theft, I recover twofold the value of the thing, that in no way goes to the purchaser.

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<sup>14</sup> In the Ms. 372 manuscript (Erlangen), on p. 230 verso, we read *agam potius*. This is a thirteenth century *Digestum vetus cum Glossis*. The same *lectio* can be found in the manuscript of Padova. However, the writing is a little hesitant, since the 't' of *potius* looks more like a 'c'. See also J. CUIACIUS, *Operum postumorum*, T. 5, Neapoli 1722, *In Lib. XVI Quaest. Pauli, ad L. XXI de Hered. vel act. vend.*, col. 1123.

<sup>15</sup> The translation is by J.A.C. Thomas and taken from WATSON.

Again, if the vendor, without fault on his part, ceases to possess the thing, he will have to make over his rights of action in respect of it, not the thing itself, and also the value placed upon it; for if a building be burned down, he must deliver its site.

The case discussed by Paul is quite complicated. In the interests of brevity, I will only explain the case that interests us here.

A vendor (let us call him John) sells a slave to a buyer (Peter) and, before being in *mora tradendi* (default of performance), sells him on to another buyer (Jack). If the slave dies from natural causes before John is in default, Peter will be unable to sue him nor will he receive the price paid by Jack.

This text, like the first (D.44.7.45), has long been criticized by the interpolationists. Again, it is said that the death of the slave that happens before the *mora debitoris* releases the debtor of the slave from his obligation.<sup>16</sup> The similarity with the first text resides, of course, in the fact that, whereas the vendor emancipated the slave in the first case, this time he sells him on. Here again, Paul explains the solution and appears to indicate that it is the obvious one.<sup>17</sup> The scholar justifies this solution on the basis that John only owed the slave and not the price paid by Jack. It is almost as if John had never sold the slave to Jack except that John will retain the price paid by Jack.

### 3.1 *The Perpetuatio Obligationis*<sup>18</sup>

There is a difference between the two cases discussed by Paul. In the case of the double sale, it is not being claimed that the second sale made it impossible for the vendor to supply the slave to Peter.<sup>19</sup> So it is not even certain that there is a

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<sup>16</sup> For a complete study of this text, see GERKENS, *supra*, pp. 219–232.

<sup>17</sup> This is also the opinion advanced by I. REICHARD, *Die Frage des Drittschadensersatzes im klassischen römischen Recht*, Köln 1994, pp. 82 and 84.

<sup>18</sup> First of all, we should note that it is not self-evident that the obligations that flow from a contract of sale are subject to *perpetuatio obligationis*. Kaser (M. KASER, *Mora*, RE 31, Stuttgart 1933, col. 262 sqq.; M. KASER, *Perpetuari Obligationem*, 46. *SDHI* 1980, p. 139. See also F. HARTING, ‘Die “positiven Vertragsverletzungen” in der neueren deutschen Privatrechtsgeschichte’, Diss., Hamburg 1967, pp. 19 *et seq.*) writes that for the *iudicia incerta*, which contain the *quidquid . . . dare facere oportet* formula, the *perpetuari obligationem* rule does not apply. On the other hand, Kaser has had to admit that, in certain cases, implementation of the rule was, nevertheless, extended to the *iudicia incerta*. He also quotes our text as an example of the rule being implemented in relation to the *actio empti*. In fact, Paul writes that the vendor is not liable for the loss of the slave because he was not in *mora tradendi* (*videamus ne nihil tibi debeam ex empto, quoniam moram in tradendo non feci*). *A contrario* he would have been liable, had he been in default. The *mora* would, thus, have prevented John from being released of his obligation to supply the slave. In my opinion, Paul was, thus, applying the *perpetuari obligationem* rule to the *actio empti*.

<sup>19</sup> However, it is also true that, elsewhere, Paul writes (*lib. 17 ad Plaut.*, D.45.1.91.3–6) that the obligation of the debtor must be perpetuated whenever this debtor makes it impossible for himself to transfer the property of a *certa res*. The object of this perpetuation is to avoid that the debtor

*perpetuatio obligationis* in the case of the double sale. However, what is certain is that the death of the slave releases the vendor from his obligations because this occurred before the *mora debitoris*.

### 3.2 *Periculum est Emptoris*

Paul's solution can be explained on the basis of the *periculum est emptoris*<sup>20</sup> rule.

Peter bought a slave who dies accidentally before receiving it, at a time when the vendor was not in *mora tradendi*. At this stage in the contractual relationship, the risk of loss in respect of a *certa res* falls on the buyer. Consequently, the vendor is released and Peter still has to pay the price for the slave.

As we can see, the Roman law solution is different from that which we find in most civil codes, that is, once the debtor is in default, nothing is capable of releasing him any longer.

How come that the Roman law rule does not seem to admit of any exception, whereas all modern codes, on the contrary, all seem to allow the same exception?

### 4. The Glossators<sup>21</sup>

It appears that the notion of adding an exception to the *mora debitoris* rule can be attributed to the glossators. In fact, this issue has been the subject matter of a profound disagreement between Joannes Bassianus and Martinus Gosia. Whereas Bassianus adheres to the Roman rule, stating that once he finds himself in *mora debitoris*, the debtor was always liable for the loss of the object, Martinus Gosia gives preference to what he regards as a more equitable rule. According to Martinus, the debtor should be released – even where he is in *mora* – if the object would have been destroyed even if it had been handed over to the creditor in due time. As it is often the case, Bassianus' solution has earned greater acclaim than that of

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might be released from his obligation to transfer ownership of the object. However, this perpetuation does not have the same effect as the *mora*, as it does not transfer the risk.

<sup>20</sup> Cf. E. RABEL, 'Gefahrtragung beim Kauf', 42. ZSS 1921, p. 547 *et seq.*; E. SECKEL & E. LEVY, 'Die Gefahrtragung beim Kauf im klassischen römischen Recht', 47. ZSS 1927, p. 261 *et seq.*; P. KRÜCKMANN, 'Periculum emptoris', 60. ZSS 1940, p. 54; ST. WEYAND, 'Kaufverständnis und Verkäuferhaftung im klassischen römischen Recht', 51. TR 1983, p. 261 *et seq.*; J. SCHMIDT-OTT, *Pauli questiones*, Berlin 1993, p. 139. For a questioning of the rule *periculum est emptoris*, see particularly PH. MEYLAN, *Periculum est emptoris*, Festschrift Guhl, Zürich 1950, p. 9 *et seq.*; M. TALAMANCA, *Vendita*, ED T. 46, Milano 1993, p. 449 *et seq.* However, these two authors do not question the fact that this rule has been applied to the sale of slaves in classical Roman law, even though the second author (TALAMANCA, *supra*, p. 453 *et seq.*) considers that there might have been disagreement between Sabinians and Proculians on this matter. TALAMANCA (p. 457) stresses also the fact that Paul is probably a forerunner in generalizing the *periculum est emptoris* rule.

<sup>21</sup> The position of the glossators on the question of the *mora debitoris* has been discussed by E.J.H. SCHRAGE & R.P. SCHOEN, 'Mora debitoris dans le droit savant avant Accurse', 57. TR 1989, pp. 87-105.

Martinus. Hugolinus, Azo, and Accursius followed Martinus in adhering to the strictly Roman rule.

Actually, however, Martinus' position was not without its merits. There is at least one interesting text by Gaius that could be interpreted in favour of his position:

Gaius, *lib. 9 ad edictum provinciale* (D.16.3.14.1):

*Sive autem cum ipso apud quem deposita est actum fuerit sive cum herede eius et sua natura res ante rem iudicatam interciderit, veluti si homo mortuus fuerit, Sabinus et Cassius absolvi debere eum cum quo actum est dixerunt, quia aequum esset naturalem interitum ad actorem pertinere, utique cum interitura esset ea res et si restituta esset actori.*

Translation<sup>22</sup>: Whether, in fact, suit is brought against the person with whom a deposit was made, or against his heir, and before the property has been adjudged it is lost through the natural order of things; for example, if a slave dies, Sabinus and Cassius said that he against whom suit was brought ought to be absolved, because it was just that the natural loss fall on the plaintiff, especially since that property would have perished even if it had been returned to the plaintiff.

Does this text provide a decisive argument in favour of Martinus Gosia's position? Accursius does not think so. In his glossa *Rem iudicatam*,<sup>23</sup> he avers that the person to whom the deposit was made was not in *mora debitoris* and that this is why he is released. Had he been in *mora*, there would have been no doubt about his liability. It is true that in this text, the depositary is faced with several owners. The fact that he has not yet handed over the deposited object can be considered as logical, as he could not be certain who was the owner to whom he had to supply it. Therefore, it was prudent to retain it and one should not assume that he was acting in bad faith by so doing.

## 5. The Humanists

Martinus' isolated position could have disappeared with the glossator himself - if Jacques Cujas<sup>24</sup> had not advanced the same theory some centuries later. On the subject of the passage from Gaius cited above, the great scholar from Bourges

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<sup>22</sup> The translation is by Robin Evans Jones and taken from WATSON.

<sup>23</sup> Glossa *Rem iudicatam*, in GOTHOFREDUS, *Digestum Vetus I*, Lugduni 1604, ad D.16.3.14.1.

<sup>24</sup> J. CUIACIUS, *Opera Omnia*, vol. 1, Neapoli 1722; *Commentarius ad Titulum de Verborum Obligationibus*, Ad L. Si ex legati 23; cols 1179-1180: '(...) si res debita post moram debitoris interierit, debitor non liberatur. Id ita Martinus accipit, nisi omnimodo e ares fuerit peritura apud creditorem: quod verissimum esse arbitror. Id probat *l. Si plures, Sult. Sup. depos*' (scil. D.16.3.14.1).

concludes from the circumstance that the object was destroyed after the *litiscontestatio* that the debtor (who was also defendant in the legal proceedings) was already in *mora debitoris*. Where such is the case, Cujas suggests that a distinction be drawn between two situations. Either the object would also have been destroyed when in possession of the claimant, in which case the defendant should be released, or the claimant could have sold the item before it was destroyed and receive its price – in which case the defender should not be released from his obligation.

The notion that the defendant could have sold the item is identified by Cujas in a different passage, that is:

Ulpian, *lib. 22 ad Sabinum* (D.30.47.6):

*Item si fundus chasmate perierit, Labeo ait utique aestimationem non deberi: quod ita verum est, si non post moram factam id evenerit: potuit enim eum acceptum legatarius vendere.*

Translation<sup>25</sup>: Again, if a farm is engulfed in an earthquake, Labeo says its value is not due. This is correct, provided that the earthquake did not occur after delay caused by the heir in which case the legatee could have received the land and sold it.

In order to find an additional argument for his thesis, Cujas proposes an *a contrario* interpretation of the last sentence of Ulpian's text. He concludes that where legatee has not sold the land, the heir should be released. Furthermore, Cujas considers that this solution can be extended to the scenarios involving the stipulation and the *rei vindicatio*.

Even though Cujas' views have proved highly influential, the viewpoint that he shared with Martinus Gosia remained the position of a small minority. Hughes Donneau (Donnellus) and Antoine Favre (Faber) continued to defend the Roman rule.

Donnellus<sup>26</sup> writes that the rule should be that the plaintiff must invariably bear the risk of accidental loss of the object to which the legal action relates. The fact that this item would also have been destroyed when in the claimant's possession is a specious argument designed to justify this allocation of risk. Still according to Donnellus, Gaius' text is irrelevant to the *mora debitoris*, because where the latter arises, the creditor will have been able to sell the object in question.

Favre<sup>27</sup> also considers that, in the event of default, the debtor should be held unconditionally liable. His interpretation of Gaius' text is highly critical. He considers the phrases '(...) *et sua natura res ante rem iudicatam interciderit, veluti si*

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<sup>25</sup> The translation is by Tom Braun and taken from WATSON.

<sup>26</sup> H. DONELLUS, *Opera omnia*, vol. IV, Macerata 1830, col. 619 *et seq.* (De jure civili. Lib. XVI, Caput 2, n. 15).

<sup>27</sup> A. FABER, *De erroribus pragmaticorum*, Lugduni 1658, p. 245 (Decad. XVIII, Err. X, p. 3).

*homo mortuus fuerit* and *‘utique cum interitura esset ea res et si restituta esset actori’* to be not only highly unsound intellectually but even verging on the idiotic. He writes that even if the object had been destroyed when in the claimant’s possession, he would have been able to sell it and receive the price. In this respect, the possibility of selling the object should not be regarded as an added condition; instead, it should represent the reason why the debtor in *mora* can never be released by *force majeure*.

This article has featured just some of the authors who participated in this debate during Cujas’ lifetime. Of course, there were many more, and this controversy was not limited to the question of whether or not the debtor in default could still be released in cases of *force majeure*. For the authors who followed Cujas’ theory, there was yet another problem to solve – who will have the burden of the proof of ascertaining that the creditor would or would not have sold the object? Cujas<sup>28</sup> writes that it is the claimant who must prove that he would have sold the thing before it was destroyed, had he received it. Others, like Brunnemann,<sup>29</sup> state that, on the contrary, it is the debtor in *mora* (*in dubio contra morosum*) who is bound to prove that the claimant would not have sold it in time. Others still<sup>30</sup> consider that this issue should be left to the court’s discretion.

We can conclude this section dealing with humanists by noting that, with the assistance of Cujas, Martinus Gosia’s position has become more popular but certainly not dominant.

## 6. Domat and Pothier

The controversy did not end with the humanists but continued for a considerable period thereafter, more particularly in the shape of Domat and Pothier, who did not share the same position on this question.

Domat<sup>31</sup> writes that the debtor in default must be held liable without exception, since it was ultimately due to him that he failed to meet his obligations in due time. In this sense, Domat can be regarded as following the tradition set by Favre, Accursius, and Bassianus on this question.

Pothier<sup>32</sup> sees things differently. He explains that, even where the object is destroyed, the *mora debitoris* perpetuates the obligation only in the shape of the compensation payable (*dommages et intérêts*). Therefore, if the *mora* does not cause any loss to the debtor, there is no reason why he should receive any compensation.

For Pothier, it is obvious that a creditor experiences no loss where the object would have been destroyed even if it were in his possession. As for the burden of

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<sup>28</sup> CUIACIUS, *supra* n. 24.

<sup>29</sup> BRUNNEMANN, *Jurisconsulti commentarius in Pandectas*, Lugduni 1714, ad D.16.3.14.1, p. 497.

<sup>30</sup> GIPHANIUS, *Lecturae altorphinae*, Francofurti 1605, pp. 804–805, ad D.45.1.23, n. 17.

<sup>31</sup> J. DOMAT, *Les loix civiles dans leur ordre naturel, le droit public, et legum delectus*, vol. 1, Paris 1745, p. 41.

<sup>32</sup> R.J. POTHIER, *Traité des obligations, uvres complètes*, Paris 1830, p. 514, num. 664.

proof that the creditor would have sold the object, Pothier concedes that one should assume that, if the creditor was a merchant who had bought the item for resale, he would definitely have resold it.

Pothier accordingly assumes the same position as Martinus Gosia and Jacques Cujas. It would appear that this position started to prevail<sup>33</sup> during Pothier's lifetime. This also serves to explain why this rule was incorporated not only into the Napoleonic Code but also into the majority of the codes that were subsequently enacted.

## 7. Conclusion

In conclusion, three final questions present themselves:

- (1) How should the interpretations of Martinus Gosia and Ioannes Bassianus be assessed? Whose interpretation of the Roman rule regarding the *mora debitoris* in general, and the passage from Gaius in particular, was correct?
- (2) Which of these two solutions is the best in legal terms?
- (3) How could we draft the Roman rule in modern law and especially in the Draft Common Frame of Reference (DCFR)?

As to the first question, the controversy surrounding the *perpetuatio obligationis* has continued to rage in the course of the twentieth century. Did this exception apply from the outset or not? The current dominant position<sup>34</sup> is that this exception was devised by Martinus Gosia and has no basis whatsoever in Roman law. The passages from the Digest that deal with the *mora debitoris* and *perpetuatio obligationis* are quite numerous, and therefore, the Roman law rules are not too difficult to understand. In this context, the passage from Gaius' writing is generally<sup>35</sup> accepted as failing to deal with the eventuality of *mora debitoris*.

Let us now turn to the second question - which deserves our preference, the Roman law rule or that which we find in the majority of present-day civil codes? Should we take account of the circumstance that the object would have been destroyed anyway, even if it were in the creditor's possession, or should we concede that, had the creditor received the item in due time, he would have been able to sell it?

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<sup>33</sup> Cf. MADAI, *Die Lehre von der Mora*, Halle 1837, p. 296. See also MATTHIAE, *Controversen-Lexikon des römischen Civilrechts*, Leipzig 1856, p. 72.

<sup>34</sup> KASER, 1980, p. 143; A. WACKE, *Gefahrerhöhung als Besitzverschulden*, FS Hübner, Berlin/New York 1984, pp. 682-683; C.A. CANNATA, 'Atto giuridico e rapporto giuridico', 57. *SDHI* 1991, p. 361, n. 91.

<sup>35</sup> M. KASER, *Aktivlegitimation zur actio furti, Festgabe von Lübtow zum, 80. Geburtstag*, Berlin 1980, pp. 301-302, R. CARDILLI, *L'obbligazione di 'praestare' e la responsabilità contrattuale in diritto romano*, Milano 1995, p. 424, n. 23 and the literature quoted there.

There are many difficulties surrounding this issue. Ultimately, it all depends on the question of whether the creditor would have sold the thing or not. However, how can the certainty of this sale be proved? Likewise, who is bound to prove it? It does not seem equitable to expect from the creditor that he would have sold the thing, had he received it in due time. Asking the debtor to prove that the creditor would not have sold the thing, had he received it, seems almost impossible, as it is difficult to imagine how he would be able to prove this.

Ultimately, we all benefit by admitting that the debtor in *mora debitoris* is always liable regardless of whether the object in question was subsequently destroyed or not by *force majeure*. In the end, it remains his fault if he was unable to supply the item in due time!

Finally, the third question: What is the position of the DCFR on the issue before us and how could we improve it if necessary?

Understanding the DCFR's position in relation to our case is not as easy as it was for the modern civil codes that I quoted at the beginning of this text. Unlike most of these civil codes, the DCFR has opted to regard delayed performance as just one of the instances of non-performance stipulated in the relevant Article:

III. - 1:102: Definitions (3) Non-performance of an obligation is any failure to perform the obligation, whether or not excused, and includes delayed performance and any other performance which is not in accordance with the terms regulating the obligation.

To discover how the DCFR would solve the first case - that is, that of the horse dying unexpectedly while the debtor is late in performance - we also need to interpret the following article of the DCFR:

Art. III 3:104: (1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.

This means that, like the solution provided by the codes mentioned above, if the unforeseeable event impeding the performance of the obligation would not have affected the obligation had the debtor not been late, non-performance would not be excused. In such cases, non-performance is a consequence of the debtor's behaviour: had he not been late, performance would not have been affected by the unforeseeable event. Conversely, if the debtor's default was irrelevant to the impediment, the default would be excused.

Thus, the DCFR has also opted for Martinus' rule - non-performance is excused whenever it is the consequence of an unforeseeable event, even if this event happens when the debtor is already late in performance.

As I mentioned earlier when answering the second question in my conclusion, I prefer the Roman rule to that of Martinus. I would, thus, make non-performance impossible to excuse, once the debtor is late in performance and amend the relevant Article (III 3:104) to read as follows:

Where non-performance is the consequence of delayed performance on the debtor's part, such non-performance may at no time and under no circumstances be excused, and the debtor will be held liable for any loss incurred, even those resulting from events beyond his control, unless the delay itself was the consequence of an event beyond his control.

*In any other cases of non-performance of an obligation by the debtor, non-performance shall be excused where this is due to an impediment beyond the debtor's control and where the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.*

I am naturally aware that in reformulating the rule in this manner, I have added a distinction between non-performance and delay. However, is the DCFR not somewhat superficial where it stipulates that delayed performance is just one instance of non-performance? I tend to think that it is!



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