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EXCESS OF MANDATE AND THE ALLEGED STRICTNESS OF THE SABINIANS

The well-known controversy between the Sabinians and the Proculians concerning the consequences of the contravention of mandate is one of the problems which has been discussed for a long time by Roman law scholars.¹ As we all remember, the topic of this famous dispute was what to do in a situation when the mandatary pays for the item he was asked to buy more than the price specified by the mandator. According to the Sabinians, in this situation the mandatary could not claim a refund of any costs, even if he was prepared to give the mandator the item for the specified price.² The Proculians, on the other hand, held that the

¹ For the complete bibliography for this controversy see T.G.LESSEN, *Gaius meets Cicero: Law and Rhetoric in the School Controversies*, Leiden, Netherlands-Boston, Massachusetts 2010, p. 246 n. 465.

² G. 3,161: *Cum autem is, cui recte mandaverim, egressus fuerit mandatum, ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest implere eum mandatum, si modo implere potuerit; at ille mecum agere non potest. Itaque si mandaverim tibi, ut verbi gratia fundum mihi sestertiis C emeris, tu sestertiis CL emeris, non habebis mecum mandati actionem, etiamsi tanti velis mihi dare fundum, quanti emendum tibi mandassem; idque maxime Sabino et Cassio placuit. Quod si minoris emeris, habebis mecum scilicet actionem, quia qui mandat, ut C milibus emeretur, is utique mandare intellegitur, uti minoris, si posset, emeretur; D. 17,1,3,2 (Paulus, 32 ad ed): *Quod si pretium statui tuque pluris emisti, quidam negaverunt te mandati habere actionem, etiamsi paratus esses id quod excedit remittere: namque iniquum est non esse mihi cum illo actionem, si nolit, illi vero, si velit, mecum esse.**

mandatary could claim costs up to the limit specified in the contract of mandate.³

The Proculian arrangement appears to fit in much better with the modern sensibility,⁴ whereas the Sabinian view amazes contemporary scholars, who feel compelled to find motives for such inexplicable strictness. Several explanations have been offered. Most of them relate to the Roman concept of friendship and its social implications. It was claimed, for example, that an act against the will of the mandator must have been perceived as an unforgivable disloyalty, serious enough to break the bonds of friendship;⁵ or that accepting the good for less than the mandatary had actually paid would have been perceived as an unwanted donation, and therefore an insult to the mandator.⁶

Recently a very interesting hypothesis has been proposed, according to which the controversy between the Sabinians and the Proculians as to

³ D. 17,1,4 (Gaius, 2 *rerum cottid.*): *Sed Proculus recte eum usque ad pretium statutum acturum existimat, quae sententia sane benignior est; I. 3.26.8: Is qui exsequitur mandatum non debet excedere fines mandati. Ut ecce si quis usque ad centum aureos mandaverit tibi, ut fundum emeris vel ut pro Titio sponderes, neque pluris emere debes neque in ampliorem pecuniam fideiubere; alioquin non habebis cum eo mandati actionem: adeo quidem, ut Sabino et Cassio placuerit, etiam si usque ad centum aureos cum eo agere velis, inutiliter te acturum. Diversae scholae auctores recte te usque ad centum aureos acturum existimant: quae sententia sane benignior est. Quod si minoris emeris, habebis scilicet cum eo actionem, quoniam qui mandat, ut sibi centum aureorum fundus emeretur, is utique mandasse intellegitur, ut minoris si posset emeretur.*

⁴ The Proculian solution is usually interpreted as progressive and modern, in opposition to the Sabinian view, generally perceived as traditional and conservative (cf. D.NÖRR, *Mandatum, fides, amicitia*, [in:] *'Mandatum' und Verwandtes. Beiträge zum römischen und modernen Recht*, Berlin 1993, pp. 13-37, eds D. NÖRR, S. NISHIMURA; O. BEHREND, *Die 'bona fides' im 'mandatum'. Die vorklassischen Grundlagen des klassischen Konsensualvertrags Auftrag*, [in:] *'Ars boni et aequi'. Festschrift für Wolfgang Waldstein*, eds M.J. SCHERMAIER, Z. VÉGH, Stuttgart 1993, pp. 48-51. The most emblematic interpretation within this tendency is the one proposed by B.J.CHOE (*Die Schulkontroverse bei Überschreitung des Auftrages zum Grundstückskauf*, [in:] *'Mandatum' und Verwandtes...*, pp. 132-139), who regards the Sabinian solution as a manifestation of their severity and rigour, whereas he declares the opinion of their opponents rational and modern.

⁵ D. NÖRR, *op. cit.*, pp. 14, 31-32.

⁶ V. ARANGIO- RUIZ, *Il mandato in diritto romano*, Napoli 1949, p. 171

the effects of the excess of mandate would have depended on a different application of the *a maiori ad minus* topos. According to this hypothesis the Sabinians based their conclusion on the observation that the price higher than specified in the mandate could not have been understood as comprised therein, since more is not included in less. Hence, a mandate to purchase a given good for a specified price did not authorise the mandatary to buy the item for a higher price (although it did authorise him to buy it for a lower price). In consequence, a purchase for the price higher than specified by the mandator could not have been regarded as performance of the mandate at all. On the other hand, the Proculians would have observed that a mandatary who bought the item for more than the specified price could still offer it to the mandator in return for the price determined in the mandate, since less is included in more (*in maiore et minus est*), and if he did so he would be acting within the limits of the mandate.⁷ It should be noted, however, that in this interpretation the difference between the two schools rests in the fact that they apply topos *a maiori ad minus* to two different phases of performance of mandate (for the Sabinians it is the moment of purchase, but for the Proculians the moment when the item is handed over to the mandator), rather than on a different interpretation of the topos itself. The question still needs to be clarified why the two schools chose a different moment of performance of mandate as relevant for deciding if it was carried out properly.

In the following considerations I will argue that the Sabinian position is fully understandable and based on strictly dogmatic grounds – that is to say, we can defend it without recourse to equitable or social grounds. On the other hand, the Proculian opinion, while more beneficial for the mandatary, is more troublesome from the dogmatic point of view.

The circumstance that contemporary scholars seem to underestimate in their commentary on the dispute is the fact that once it turned out that the item the mandatary was to buy cost more than the price specified in the mandate, the mandatary was released from the duty to perform it. As Gaius clearly states, if the mandatary had the choice to buy the

⁷ T.G. LESSEN, *op. cit.*, pp. 256-260.

item for the price specified in the mandate, but decided to pay more, the mandator could claim compensation for damages: *ego quidem eatenus cum eo habeo mandati actionem, quatenus mea interest implere eum mandatum, si modo implere potuerit* (G. 3,161). Hence, if there was no such possibility, the mandator had no claim against the mandatary, which implies that the latter was released from the duty to perform the mandate.⁸ In consequence, he was free to buy the item for himself, if he wanted to. But he had no such option if he could buy it for the specified price.⁹

An important implication of the fact that the mandatary was allowed to buy the item for himself if the price was objectively higher than that specified by the mandator is the difficulty to decide what his real intention was in buying the item: did he still intend to give it to the mandator, or was he acting on his own behalf? Theoretically there are three possibilities:

1. He considered the item worth its actual price (even though it was more than the mandator had specified) and decided to buy it for himself.
2. He considered the item worth its actual price, (even though it was more than the mandator had specified) and thought that the mandator would be interested in obtaining it anyway. Thus he expected the mandator to be willing to purchase it even at a higher price.
3. The least probable (but practically the only option considered by contemporary commentators) is the hypothesis that once the mandatary realised that the price was higher than that specified by the mandator, he nonetheless decided to do a favour to his mandator; to do so he would purchase the item at any cost and settle with his mandator for the reimbursement of the price specified in the mandate.¹⁰

⁸ V. ARANGIO-RUIZ, *op. cit.*, p. 170.

⁹ In this case the mandatary was obliged to buy the item (D. 17,10,8,1) and subsequently deliver it to the mandator (D. 17,1,20); cf. V. ARANGIO-RUIZ, *op. cit.*, p. 159, 165.

¹⁰ V. ARGANIO-RUIZ suggests that the mandatary might have taken such a decision out of friendship, or in order to avoid potential liability for not having performed the mandate (*op. cit.*, p. 170). The second alternative seems improbable, considering the mandatary's standard of liability – see below.

The answer to the question whether the mandatary was performing the mandate is obvious for the first situation: he was not. His intention was to buy the item for himself.

In the second case, the mandatary was deliberately acting against the mandator's clearly declared will. Therefore, even if he expected the mandator to accept the purchase for more than had been specified, this can hardly justify the opinion that he was actually performing the mandate. Even if the mandator decided afterwards to take the item at a higher price than what had been specified, it would be a matter of his new decision, independent of the previous mandate.

Only in the third situation – the least probable of the three – can we consider the possibility that the mandatary was indeed performing the mandate.

We might argue that the fact of the mandatary finally offering the item to the mandator and claiming only the sum specified in the mandate may suggest that he had intended to do so from the very beginning. However, this need not be the case. Actually, it is not at all unlikely that the mandatary changed his decision from 1 to 3 (i.e. at the beginning he wanted to keep the item for himself, but finally decided to give it to the mandator, and thus recover at least part of the price), or from 2 to 3 (he hoped that the mandator would pay him the full price, but when he realised that he would not get all of what he had paid, he now wanted to recover at least part of it). A possible motive for his change of mind might have been the fact that the value of the good purchased turned out to be less than expected – perhaps even less than the price specified in the mandate. Actually, this hypothesis would also explain why the mandator did not want to keep the item, even though it was offered to him at a price he was initially prepared to pay. However, as I'll try to show below, this is not the only possible explanation.

There are several passages from Cicero's *de officiis* that can be referred to for possible reasons why the mandatary could have changed his mind and offered the mandator the item he had initially bought for himself, for a lower price than he had actually paid. In these passages Cicero describes situations when the value of a purchase turns out to be far less than the buyer expected when he was concluding the contract of

sale. They are passages on the moral and legal responsibility of a seller who wanted to sell a good with a hidden defect he knew of without informing the purchaser of that fact. Cicero cites two cases of the sale of a house, one of which turns out to be pestilent,¹¹ and the other has to be demolished because of an augurs' order.¹² Cicero also discusses the behaviour of a merchant who wanted to sell the Rhodians cereals from Alexandria at an exorbitant price, having concealed the fact that there were other ships carrying cereals already on their way to Rhodes.¹³ In the first two cases, given the fact that the seller had acted with intent, the purchaser could claim damages against him, at least from the beginning of Principate.¹⁴ However, it is easy to imagine analogous situations in which the seller would have been ignorant of the defect of the goods he

¹¹ Cic., *de off.* 3,12,54: *Vendat aedes vir bonus, propter aliqua vitia, quae ipse norit, ceteri ignorent, pestilentes sint et habeantur salubres, ignoretur in omnibus cubiculis apparere serpentes, sint, male materiatae et ruinosae, sed hoc praeter dominum nemo sciat; quaero, si haec emptoribus venditor non dixerit aedesque vendiderit pluris multo, quam se venditurum putarit, num id iniuste aut improbe fecerit?*

¹² Cic., *de off.* 3,16,66: *Ut, cum in arce augurium augures acturi essent iussissentque Ti. Claudium Centumalum, qui aedes in Caelio monte habebat, demoliri ea, quorum altitudo officeret auspiciis, Claudius proscripsit insulam [vendidit], emit P. Calpurnius Lanarius. Huic ab auguribus illud idem denuntiatum est. Itaque Calpurnius cum demolitus esset cognossetque Claudium aedes postea proscripsisse, quam esset ab auguribus demoliri iussus, arbitrum illum adegit QUICQUID SIBI DARE FACERE OPORTERET EX FIDE BONA. M. Cato sententiam dixit, huius nostri Catonis pater (ut enim ceteri ex patribus, sic hic, qui illud lumen progenuit, ex filio est nominandus)is igitur iudex ita pronuntiavit, cum in vendendo rem eam scisset et non pronuntiasset, emptori damnum praestari oportere.*

¹³ Cic., *de off.* 3,12,50: *Sed incidunt, ut supra dixi, saepe causae, cum repugnare utilitas honestati videatur, ut animadvertendum sit, repugnetque plane an possit cum honestate coniungi. Eius generis hae sunt quaestiones: Si exempli gratia vir bonus Alexandria Rhodum magnum frumenti numerum advexerit in Rhodiorum inopia et fame summaque annonae caritate, si idem sciat complures mercatores Alexandria solvisse navesque in cursu frumento onustas petentes Rhodum viderit, dicturusne sit id Rhodiis an silentio suum quam plurimo venditurus? Sapientem et bonum virum fingimus; de eius deliberatione et consultatione quaerimus, qui celaturus Rhodios non sit, si id turpe iudicet, sed dubitet, an turpe non sit.*

¹⁴ For a detailed discussion of the seller's liability in the cases described by Cicero cf. L. SOLIDORO, *Sulle origini storiche della responsabilità precontrattuale*, pp. 15, 19-24.

was selling, which would prejudice his potential liability. In those cases, if the purchaser were acting as someone else's mandatary, he might have been interested in recovering from the mandator at least part of what he had paid the seller. That would explain his decision to offer the goods to the mandator, even though he had purchased them with the intention of keeping them.¹⁵

Suppose that in situation 3 the mandatary's intention from the very beginning was to hand the goods over to the mandator in return for the price specified in the mandate. Even then it is still far from obvious that he should be considered to have performed the mandate. Actually, he was deliberately acting against the mandator's will, which had been clearly defined.¹⁶

As we know, the mandate was strictly dependent on the will of the mandator: once his authorisation was withdrawn, the contract was automatically dissolved (except for the situation in which the mandatary had not been informed of the withdrawal).¹⁷ The mandate could also have been dissolved without being explicitly cancelled by the mandator, namely in consequence of his loss of the capacity to conduct legal transactions (i.e. if he became *furiosus*). This outcome shows even more clearly that the contract depended on the constant will of the mandator:

¹⁵ According to A. WATSON, *Contract of mandate in Roman Law*, Oxford 1961, pp. 188-190, the Sabinians would have formulated their opinion precisely in order to eliminate this kind of abuse.

¹⁶ This is the trend in the solution proposed by G.L. FALCHI, *Le controversie tra Sabiniani e Proculiani*, Milano 1981, pp. 177-179. According to this author the Sabinians held that a mandatary who paid more for the item than the price specified by the mandator, could not have been considered as having performed the mandate at all, precisely because when he was concluding the purchase he was deliberately acting against the mandator's will, which had been clearly defined. G.L. Falchi also holds that the Sabinian solution was more progressive than the Proculian view, insofar as it was inspired by respect for the will of the parties to the contract. However, as T.G. LESSEN has rightly pointed out (*op. cit.*, p. 251), the Sabinian solution shows respect to the will of the mandator, rather than to the will of both parties to the contract.

¹⁷ D. 46,3,12,2 (Ulp. 30 *ad Sab.*): *Sed et si quis mandaverit, ut Titio solvam, deinde vetuerit eum accipere: si ignorans eum prohibitum accipere solvam, liberabor, sed si sciero, non liberabor.*

it was in force only if he wanted it carried out.¹⁸ Hence the indispensable condition for the contract to be binding was the mandator wanting it to be in force.

In the situation we are considering, the mandator's will – clearly declared to the mandatary – was neither to pay more, nor to be benefited by the mandatary, but just to have the item bought at the price specified (or at least not for more) – and the mandatary had no reason to believe otherwise. In consequence, once the mandatary realised that he would not be able to buy the item at the price specified by the mandator, he should not have bought it at all. If he decided to buy it nevertheless, he would be acting on his own behalf, *i.e.* at his own risk, and to his own potential benefit.

It should be stressed that, contrary to the opinion held by some scholars,¹⁹ a mandatary who withdrew from the purchase because he realised that the price was more than the mandator had specified would hardly be liable for non-performance of the mandate. It is hard to believe that the mandatary's liability would go that far, considering the fact that the mandate was gratuitous and as such to the exclusive benefit of the mandator.

The standard of the mandatary's liability in Roman law is subject to on-going scholarly debate.²⁰ According to the view prevailing in the literature for a long time, his liability was restricted to *dolus*, insofar as the mandatary had no interest in the contract of mandate, the latter being gratuitous. According to some sources, however, *culpa* seems to have been sufficient in order to make the mandatary liable.²¹ The supporters of the *dolus* theory say these sources have been interpolated. There

¹⁸ D. 29,2,48 (Paul. 1 manual.): *Si quis alicui mandaverit, ut, si aestimaverit, peteret sibi bonorum possessionem ... si antequam ille petat, is qui mandavit petendum furere coeperit, dicendum est non statim ei adquisitam bonorum possessionem: igitur bonorum possessionis petitio ratihabitione debet confirmari.* For an interpretation of the text, cfr. A. KACPRZAK, *La 'ratihabitione' nel diritto romano classico*, Napoli 2002, pp.126-129.

¹⁹ V. ARGANIO-RUIZ, *op. cit.*, p. 171

²⁰ For a detailed presentation of this debate and its outcome hitherto, cf. D. SCHUBERT, *Die Mandatarhaftung im Römischen Recht*, Berlin 2014, pp. 60-69.

²¹ For the list of sources supporting *culpa* as the mandatary's liability, cf. A. WATSON, *op. cit.*, p. 210-215.

have also been attempts to reconcile apparently contradictory sources without recourse to an interpolation hypothesis. Thus, Watson distinguished three groups of mandataries: the *procurator* mandatary, who would have been liable both for *dolus* and for *culpa*; the *fideiussor*, liable only for *dolus*; and a third group comprising all the other mandataries. Members of the third group could be liable for *culpa* as well, depending on the circumstances of the case and the decision of an individual jurist: there was no general standard of liability for them.²² On the other hand Rundel claims that *culpa* applied only within *a mandati contraria*, i.e. when it came to the question whether the mandatary was entitled to the restitution of costs even though he could not complete the mandate (e.g. he had lost the item he was to deliver to the mandator). However, the mandatary could be sued for damages only if he was guilty of *dolus*.²³ Recently Schubert proposed a hypothesis that liability for *culpa*, which appears in some sources, would have held in the earlier, Republican phase of development of the mandate, in which the mandatary's standard liability amounted to *culpa* in the sense of negligence.²⁴ The followers of the Sabinian school would have still supported this standard throughout the Principate, notwithstanding the fact that liability restricted to *dolus* became predominant in this period.²⁵

Without pretending to resolve this controversy, I would like to concentrate on the sources directly relevant to the problem of the mandatary's liability for non-performance. A question which is very important in the context of this discussion is whether the mandatary could have been sued for damages if he failed to perform the contract due to his own negligence and what standard of diligence could have been expected of him.

In his commentary on the provincial edict Gaius considers the liability of a mandatary who has not even begun to perform the mandate:

²² A. WATSON, *op. cit.*, p. 215.

²³ T. RUNDEL, 'Mandatum' zwischen 'utilitas' und 'amicitia'. *Perspektiven zur Mandatarhaftung im klassischen römischen Recht*, Münster 2005, pp. 50-51, 55.

²⁴ D. SCHUBERT, *op. cit.*, pp. 70-100.

²⁵ D. SCHUBERT, *op. cit.*, pp. 231-232.

D. 17,1,27,2 (Gai. 9 *ad ed. prov.*): *Qui mandatum suscepit, si potest id explere, deserere promissum officium non debet, alioquin quanti mandatoris intersit damnabitur: si vero intellegit explere se id officium non posse, id ipsum cum primum poterit debet mandatori nuntiare, ut is si velit alterius opera utatur: quod si, cum possit nuntiare, cessaverit, quanti mandatoris intersit tenebitur: si aliqua ex causa non poterit nuntiare, securus erit.*

Having said that the mandatary was obliged to perform the mandate once he has accepted it, Gaius gives him the possibility to withdraw from its performance if he discovers he is no longer able to carry it out. But he should withdraw immediately, to let the mandator provide for the performance of the transaction in some other way (e.g. by carrying it out himself or with the help of another person). If the mandatary neither performed the mandate nor withdrew in due time, he was liable to the amount of the mandator's interest, unless it was impossible for him to withdraw. It follows that the mandatary was liable only in the event of unjustifiable failure to withdraw, since an objective impossibility to withdraw exempted him from liability. In Gaius' view unjustified failure to withdraw, meaning that the mandatary did not inform the mandator that he would not be able to perform the mandate although he could inform him, as opposed to justified failure to withdraw (he could not inform the mandator), seems to be a type of fraudulent conduct (*dolus*), or at least similar to it.

Paulus considers the same problem in his commentary on the praetorian edict:

D. 17,1,22,11 (Paul. 32 *ad ed.*) *Sicut autem liberum est mandatum non suscipere, ita susceptum consummari oportet, nisi renuntiatum sit (renuntiari autem ita potest, ut integrum ius mandatori reservetur vel per se vel per alium eandem rem commode explicandi) aut si redundet in eum captio qui suscepit mandatum. Et quidem si is cui mandatum est ut aliquid mercaretur mercatus non sit neque renuntiaverit se non empturum idque sua, non alterius culpa fecerit, mandati actione teneri eum convenit: hoc amplius tenebitur, sicuti Mela quoque scripsit, si eo tempore per fraudem renuntiaverit, cum iam recte emere non posset.*

Like Gaius, Paulus allows the mandatary to withdraw from a mandate he had accepted, provided he informed the mandator immediately, thus giving him an opportunity to arrange for its performance in some other way. In what follows Paulus concentrates on the mandate of purchase: if the mandatary neither bought the item he was supposed to buy nor informed the mandator that he would not buy it, the latter could claim damages provided that it was the mandatary's *culpa*. The usage of the term *culpa* may suggest that according to Paulus the mandatary was liable for negligence, at least in the case described. As a matter of fact, Schubert argues on this basis that Paulus, a Sabinian, would have generally held the mandatary liable not only for fraud (*dolus*) but also for negligence (*culpa*), in contrast with the Proculian opinion, which had become predominant in his time and which made mandatary liable only for fraud.²⁶ However, as Rundel observes quite rightly, Paulus might well have used the term *culpa* in the broad sense, actually thinking of *dolus* or something close to *dolus*.²⁷ Nevertheless, even if we suppose that Paulus used the notion of *culpa* in its technical sense of negligence, it does not follow that he would have advocated an equally high standard of the mandatary's liability in all cases. As a matter of fact, the problem Paulus considers in this text is of a very particular kind – it concerns withdrawal from a valid contract by one of its parties. The possibility to withdraw from the performance of a validly concluded contract, to the detriment of the other party, was in itself an advantage for the mandatary. Hence, it is not difficult to imagine that he was expected to make an additional effort in such a case, at least to inform the mandator of his withdrawal. However, this does not imply that he would have been liable if he had tried to perform the mandate and failed to complete it because of an external obstacle, e.g. because the item he was to buy had been sold to someone else.

This is the problem discussed by Ulpian:

D. 17,1,8,10 (Ulp. 31 *ad ed.*): *Proinde si tibi mandavi, ut hominem emereres, tuque emisti, teneberis mihi ut restituas. Sed et si dolo emere*

²⁶ D. SCHUBERT, *op. cit.*, pp. 215-221.

²⁷ T. RUNDEL, *op. cit.*, p. 50.

neglexisti (forte enim pecunia accepta alii cessisti ut emeret) aut si lata culpa (forte si gratia ductus passus es alium emere), teneberis. Sed et si servus quem emisti fugit, si quidem dolo tuo, teneberis, si dolo non intervenit nec culpa, non teneberis (...).

A mandatary was commissioned to buy a slave. He did not, because the slave had been sold to someone else. The situation is clear: the mandatary attempted to complete the transaction but failed, because the item he was to buy became unavailable. Ulpian's conclusion is clear enough: only if the slave had been sold to another person due to the mandatary's fraud (*dolus*) or gross negligence (*culpa lata*), would he have been liable for damages. Ulpian's examples are self-explanatory. The mandatary allowed someone else to buy the slave: if it was in return for money (bribery), he committed *dolus*; if he did it out of kindness to the purchaser, he was guilty of *culpa lata*. In both cases the common factor is that the mandatary acted with intent, deliberately refraining from purchase for somebody else's sake, the only difference being that he drew a profit from his withdrawal in the former case, but not in the latter case. Whatever his reason, he deliberately withdrew from the transaction to the detriment of the mandator. His lack of loyalty to the mandator is patent in both situations, and disloyalty provides the grounds for his liability. Had he simply been beaten to the deal by someone else, perhaps because he was too slow in making an offer, he could certainly not have been accused of disloyalty to his mandator. It is highly unlikely therefore that in Ulpian's view he would have been liable for damages in the latter case as well: such behaviour as a matter of fact could not have been qualified as intentional, as opposed to Ulpian's other examples.

The same conclusion follows from Gaius' text cited above (G. 3,161): a mandatary who failed to buy an item for the price specified in the mandate was liable only if he had a real possibility to buy it for such a price. Hence, if the price was higher he was released from the duty to perform the contract.

To sum up, none of the texts from the Digest, including those stating the mandatary's liability for *culpa*, justify a conclusion that he would be risking a verdict against him on the grounds of *actio mandati directa* if the item he was to buy was not available other than at a price higher

than what the mandator had specified. Hence, the mandatary would not have been liable if he withdrew from the purchase in such a situation. In the Sabinian view it was actually his duty to withdraw.

Moreover, the Sabinian solution is fully comprehensible from the psychological point of view as well. A mandator who asked someone to buy him a certain item at the specified price might not have been prepared to pay more. On the other hand, he could have felt uneasy about paying the mandatary less than the mandatary actually paid. If so, he could easily have been accused of taking advantage of the situation and trying to unjustly enrich himself at the mandatary's expense.

Let's now take a closer look at the Proculian view and its possible justification. As we remember, according to the Proculians the mandatary could claim the restitution of his costs up to the price specified in the mandate. The most probable justification of this opinion seems to be the idea that in this situation the mandator's interest had been fully met. At the end of the day, he wanted to have the item at the price specified, and that was exactly what the mandatary was offering him. Therefore, his refusal to accept the item for the price specified in the mandate could have been perceived as a fraud – even more so since he was the only beneficiary of the contract, and as such liable for every kind of guilt (*omnis culpa*).

Given that the performance of the mandate of purchase was not completed until the mandatary delivered the item purchased to the mandator, the Proculians could have argued that the mandatary should be considered as having fulfilled the mandate properly provided he was prepared to hand the item over to the mandator for the price specified in the mandate. From this point of view any intention the mandatary might have had when he purchased the item was irrelevant. In this way the Proculians could avoid the question – very difficult to resolve in practice, as we have seen – whether the mandatary was acting in the interest of the mandator, or rather on his own behalf, when he purchased the item. From this point of view the mandatary's intention at the time of purchase was irrelevant.

However, the Proculian solution has two snags. First of all, it implies that the mandatary is free to choose whether the mandate is to be

performed or not: if the item to be purchased costs more than the price determined in the mandate, he may buy it and keep it for himself, or offer it to the mandator and claim the reimbursement of costs up to the limit specified in the mandate. The mandator on the contrary could not insist on the delivery of the item in such situation, even though he were prepared to pay the whole price. Therefore the Sabinian objection that this solution would render the position of the parties unequal seems entirely justified. The idea that a contract's binding force is entirely dependent on the will of the commissioned party seems contrary to the very concept of a contract.

In addition, the Proculian solution generates a difficulty of a practical kind. Suppose that the mandatary bought the item for more than the mandator specified and subsequently lost it through no fault of his own.²⁸ What would the Proculian view be on the reimbursement the mandatary could claim? Should it be up to the amount specified in the mandate (i.e. up to the amount the mandator had been willing to pay)? And another question: given the fact that the mandatary was no longer able to offer the item to the mandator, on what grounds should we decide whether he had performed the mandate at all: would he have really given the purchased item to the mandator at the price lower than he paid, had he not lost it? This question seems insoluble based on the Proculian view.

As I have already said, many contemporary scholars perceive the Proculian arrangement as self-evident and fairer. As we can see, it is in fact far less satisfactory than it appeared at the first glance. Not only does it stray from the dogmatic way of thinking – making the validity of the contract dependent exclusively on the will of the commissioned party – but, as I have shown, it is also impracticable.

²⁸ As T. RUNDEL has recently shown (*op. cit.*, p. 36), the mandatary would not recover his expenses with recurs to *actio mandati contraria* if the object of the mandate was damaged or lost in effect of his negligence (*culpa*), although on the basis of *actio mandati directa* he was obliged to compensate only the damages which were due to his *dolus*.

PRZEKROCZENIE GRANIC ZLECENIA I RZEKOMA SUROWOŚĆ SABINIANÓW

Streszczenie

Prezentowany artykuł dotyczy słynnej kontrowersji między Sabinianami a Prokulianami dotyczącej przekroczenia granic zlecenia. Zleceniobiorca, który zapłacił za przedmiot, jaki polecono mu kupić, cenę wyższą, niż określona w zleceniu, zgodnie z poglądem Sabinianów nie mógł dochodzić od zleceniodawcy zwrotu jakichkolwiek kosztów, nawet do wysokości kwoty, wynikającej ze zlecenia. Zdecydowanie korzystniejsza dla zleceniobiorcy była opinia Prokulianów: jeśli był on gotów przekazać zleceniodawcy kupiony przedmiot po cenie, określonej w zleceniu, to zleceniodawca nie mógł odmówić jego przyjęcia. W takiej sytuacji miał on obowiązek zwrócić zleceniobiorcy część kosztów zakupu, tj. do wysokości kwoty, określonej w zleceniu.

W literaturze przedmiotu opinia Prokulianów traktowana jest jako oczywista i nie wymagająca szerszych wyjaśnień. Tym, co wciąż budzi ciekawość uczonych jest pogląd Sabinianów, na ogół postrzegany jako nadmiernie surowy dla zleceniobiorcy.

W prezentowanym artykule przedstawiam argumenty na rzecz tezy, że opinia Sabinianów jest w pełni zrozumiała zarówno z dogmatycznego, jak i z praktycznego punktu widzenia. To opinia Prokulianów, wbrew temu, co może się na pierwszy rzut oka wydawać, prowadzi do bardziej kłopotliwych konsekwencji.

Jedną z takich kłopotliwych konsekwencji jest nierówna pozycja prawna zleceniodawcy i zleceniobiorcy, a konkretnie uprzywilejowanie tego drugiego względem pierwszego. W sytuacji gdy cena przedmiotu, który zleceniodawca miał kupić, okazała się wyższa, niż określona w zleceniu, miał on prawo kupić go dla siebie (G.3,161). Zleceniodawca nie mógł w takiej sytuacji żądać od zleceniobiorcy wydania mu przedmiotu. Zleceniobiorca natomiast zgodnie z poglądem Prokulianów mógł podjąć decyzję, że odda przedmiot zleceniodawcy po kosztach, określonych w zleceniu. W takiej sytuacji zleceniodawca nie mógł odmówić.

W efekcie, to czy zlecenie zostanie wykonane czy nie, zależało wyłącznie od woli zleceniobiorcy.

W artykule stawiam hipotezę, że jednym z głównych powodów rozwiązania, przyjętego przez Sabinianów, była chęć uniknięcia powyższej nierówności. Z tekstu Paulusa, przekazanego w D.17,1,3,2 wynika, że takie właśnie zastrzeżenie podnosili oni względem poglądu Prokulianów. Rozwiązanie Sabinianów zabezpieczało ponadto zleceniodawcę przed ewentualnymi nadużyciami ze strony zleceniobiorcy, który mógłby kupić przedmiot dla siebie a następnie, odkrywszy jego wady, chcieć się pozbyć kłopotu, odzyskując od zleceniodawcy przynajmniej tę część kosztów zakupu, jaka była określona w zleceniu.

EXCESS OF MANDATE AND THE ALLEGED STRICTNESS OF THE SABIINIANS

Summary

This paper concerns the famous controversy between the Sabinians and the Proculians on the consequences for the mandatary if he exceeded the limit of his mandate. According to the Sabinians, if a mandatary commissioned to buy a given good paid more than the price specified by the mandator, he could not claim the restitution of any costs, not even to the limit specified by the mandator. The Proculians' opinion on the issue was more favourable to the mandatary, they permitted him to claim restitution of the costs up to the limit specified in the mandate, provided he was prepared to hand the purchased item over to the mandator for the specified price, viz. less than what he actually paid.

In the literature on the subject the Proculians' opinion is usually treated as self-evident. Most scholars tend to be surprised by the alleged strictness of the Sabinians.

This paper argues that the Sabinian position is fully understandable both from the dogmatic and practical point of view, and that contrary to appearances the Proculian opinion leads to more troublesome consequences.

One was the unequal status of the parties to the contract. The mandatary was free to buy the item and keep it for himself if it turned out to be more expensive than the mandator was willing to pay (G.3,161). Yet from the Proculian point of view, he could also decide to hand the item over to the mandatary for the price specified in the mandate. Hence, it depended solely on the mandatary's decision if the mandate was to be completed or not.

In this article I suggest that one of the main reasons underlying the Sabinian position was to avoid this inequality. It follows from D. 17,1,3,2 that they actually raised this objection against the Proculian view. Their solution also protected the mandator from possible abuses on the part of the mandatary, who could have purchased the item for himself, and only on having discovered defects in it decided to hand it over to the mandator, thus recovering at least part of the price.

Słowa kluczowe: Prawo rzymskie; zlecenie; zlecenie kupna; przekroczenie granic zlecenia, Sabinianie, Prokulianie, kontrowersja między szkołami; odpowiedzialność zleceniobiorcy; dolus; culpa.

Keywords: Roman law; contract of mandate; purchase mandate; excess of mandate; the Sabinians; the Proculians; controversy between different schools; mandatary's liability; *dolus*; *culpa*.

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