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‘PERICULUM VERBUM GENERALE EST’: RISK
ALLOCATION IN THE COMMENTARIES OF JACQUES
CUJAS

1. INTRODUCTION

Attention and interest in the life and work of Jacques Cujas has been growing in recent years.¹ Notwithstanding, his commentaries, especially those focused on innovative interpretations and dogmatic

¹ X. PRÉVOST, *Jacques Cujas (1522-1590). Jurisconsulte humaniste*, Genève 2015; J.-L. CHARTIER, *Cujas, l'oracle du droit et de la jurisprudence*, Paris 2016; X. PRÉVOST, *Reassessing the Influence of Medieval Jurisprudence on Jacques Cujas' (1522–1590) Method*, [in:] *Reassessing Legal Humanism and its Claims: Petere Fontes?*, eds. P. DU PLESSIS & J. CAIRNS, Edinburgh 2015, pp. 88-107; IDEM, *Jacques Cujas: (1522–1590)*, [in:] *Great Christian Jurists in French History*, eds. O. DESCAMPS & R. DOMINGO, Cambridge 2019, pp. 134-148; IDEM, *Between Practice and Theory: Succession Law According to Jacques Cujas (1522–1590)* [in:] *Succession Law, Practice and Society in Europe across the Centuries. Studies in the History of Law and Justice 14*, ed. DI RENZO VILLATA M., Cham 2018, pp. 359-379; IDEM, *Observationum et emendationum libri XXVIII (Twenty-eight Books of Observations and Emendations) 1556-1595* [in:] *The Formation and Transmission of Western Legal Culture 150 Books that Made the Law in the Age of Printing*, eds. S. DAUCHY, G. MARTYN, A. MUSSON, H. PIHLAJAMÄKI, A. WIJFFELS, Cham 2016, pp. 110-113; N. DE BRUIJN, „No one is a better jurist than Accursius?. Medieval Legal Scholarship as the Fountainhead of Inspiration for Jacques Cujas and Hugues Doneau?», «Tijdschrift voor Rechtsgeschiedenis» 82.1-2/2014, pp. 72-99.

choices, have remained somewhat overlooked. And yet these very same commentaries can bring to light a development of legal theories based on Roman sources – theories that resulted in creative solutions, sometimes deviating quite far from what the classical jurists had proposed.

The notion of risk (*periculum*) is a fundamental concept in the European legal tradition. This paper analyses how one of the most prominent legal scholars of the 16th century solved the problem of optimal risk distribution between parties; and it will aim to arrive at a better understanding of the complex legal problems discussed by both practitioners and academics over the centuries, i.e. should the buyer pay if the object which has been sold is lost before delivery?² This study fills an important gap in the field of legal history, as the literature on liability rules in Cujas' commentary is limited.

This vast topic is part of an ongoing research project which I have undertaken; thus I need to define the boundaries of the present contribution.³ First of all, I will examine Cujas' commentary. My discussion of Roman sources is limited to what is necessary to elucidate Cujas' explanations. Secondly, I will focus on Cujas' writings but not look at the interpretations of risk in the works of other French legal

² On a case from 2002 cf. P. PICHONNAZ, *Periculum emptoris und das schweizerische Recht: Ein Fall des Rückgriffs auf römisches Recht durch das Schweizerische Bundesgericht* [in:] *Kaufen nach Römischem Recht*, eds. E. JAKAB, W. ERNST, Berlin/Heidelberg 2008, doi: 10.1007/978-3-540-71193-3, pp. 183-201.

³ I presented my first contribution, "*Cuiacio e le regole della responsabilità*," in Naples at the 68th session of SIHDA (Société Internationale Fernand De Visscher pour l'Histoire des Droits de l'Antiquité) "*Regulae iuris. Their roots in experience and legal logic, their practical consequences*," 16-20 September 2014. The present paper develops ideas presented under the same title ("*Risk allocation in the commentaries of Cujas*") at the 70th session of SIHDA in Paris, 13-17 September 2016, "*Ius et periculum. Law as confronted to risk in the Antiquity period*." I have recently published an introductory study of liability rules in the contract of loan for use and pledge, S. KORDASIEWICZ, *Odpowiedzialność kontraktowa w pismach Cuiaciusa – wybrane zagadnienia*, «Czasopismo Prawno-Historyczne» 72.1/2020, pp. 137-157. Text available at: <https://pressto.amu.edu.pl/index.php/cph/article/view/24089/22466>. I intend to continue this research and conclude it with a monograph on the liability rules in the commentaries of Cujas.

humanists⁴ or the evolution of the legal concept up to the time of the modern codifications.⁵ A comprehensive judgment about Cujas's level of innovation in respect of earlier doctrines will have to be postponed, as this paper offers an in-depth consideration of only two important cases.⁶

The first intriguing example concerns an *inspector*, that is a person who received an object for valuation. According to Cujas, risk was a complex notion. Sometimes *periculum* had a general meaning and embraced all types of loss, irrespectively of their origin, e.g. fire, earthquake, or an attack by mercenary soldiers. On other occasions it was limited to very precise events, such as theft. Thus it is crucial to distinguish which type of risk and liability was present in each specific legal situation.

The second case I am going to analyse is the oft-discussed problem of risk in the contract of sale. Cujas is known for having queried the traditional rule of *periculum emptoris*, which allocated the consequences

⁴ The need to focus on individual contributions has often been expressed in the literature, cf. P. ŚWIĘCICKA, *Prawo rzymskie w okresie Renesansu i Baroku. Humanistyczny wymiar europejskiej kultury prawnej*, «Czasopismo Prawno-Historyczne» 64.1/2012, p. 35 n.131. Text available at: <https://pressto.amu.edu.pl/index.php/cph/article/view/15291>. It holds true also for the works of Cujas, as Xavier Prevost wrote “His fame does not prevent his work from being partly misunderstood”, X. PRÉVOST, *Between Practice and Theory...*, p. 359.

⁵ For an excellent example of this approach, see, N. JANSEN, *Die Struktur des Haftungsrechts: Geschichte, Theorie und Dogmatik außervertraglicher Ansprüche auf Schadensersatz*, Tübingen 2003; L. MAGANZANI, *La „diligentia quam suis” del depositario dal diritto romano alle codificazioni nazionali: Casi e questioni di diritto civile nella prospettiva storico-comparatistica*, LED Online 2006, <https://www.ledonline.it/rivistadirittoromano/index.html?/rivistadirittoromano/maganzanidiligentia.html>

⁶ For the development of liability rules in European legal history, see H. DILCHER, *Die Theorie der Leistungsstörungen bei Glossatoren, Kommentatoren und Kanonisten*, Frankfurt am Main 1960; H.-J. HOFFMAN, *Die Abstufung der Fahrlässigkeit in der Rechtsgeschichte: Unter besonderer Berücksichtigung der culpa levissima*, Berlin 1968; M.J. SHERMEIER, § 326. *Gefahrenverteilung im gegenseitigen Vertrag* [in:] *Historisch-kritischer Kommentar zum BGB, II. Schuldrecht: Allgemeiner Teil 2. Teilband §§ 305-432*, ed. M. SCHMOCKEL, J. RÜCKERT, R. ZIMMERMANN, Tübingen 2007, pp. 1900-1912. On the influence of medieval doctrine on Cujas's work, see X. PRÉVOST, *Reassessing the Influence...*, p. 88 ff.; N. DE BRUIJN, *op. cit.*, p. 72 ff.

of the eventual loss of the object sold to the buyer.⁷ Nonetheless, in one of his earlier commentaries he confirmed the validity of this fundamental principle. As it turns out, Cujas was flexible on the distribution of various types of risk: either to the vendor or to the buyer. Specific arrangements between the parties, as well as their actions, could lead to different solutions in terms of liability.

2. PERICULUM INSPECTORIS: RISK IN GENERAL OR LIMITED TO ONE SPECIFIC EVENT?

The first particular case of Cujas' interpretation of risk refers to an *inspector*, a person who receives an object for valuation. Before I proceed to analyse the commentary, I will present the solutions proposed by Roman jurists. The problem was important for at least two reasons. (1) It was not clear what type of contract was concluded with an *inspector*, as neither deposit nor loan for use fully responded to the needs of the parties. (2) In consequence, the standards of liability had to be determined on a case-by-case basis.

Ulpian examines the problem of liability and risk allocation in the following text:

D. 13,6,10,1 (Ulp. 29 *ad Sab.*): *Si rem inspectori dedi, an similis sit ei cui commodata res est, quaeritur. et si quidem mea causa dedi, dum volo pretium exquirere, dolum mihi tantum praestabit: si sui, et custodiam: et ideo furti habebit actionem. sed et si dum refertur perit, si quidem ego mandaveram per quem remitteret, periculum meum erit: si vero ipse cui voluit commisit, aequae culpam mihi praestabit, si sui causa accepit.*⁸

⁷ M. BAUER, *Periculum emptoris: eine dogmengeschichtliche Untersuchung zur Gefahrtragung beim Kauf*, Berlin 1998, pp. 121-133.

⁸ Translation by ALAN WATSON, *The Digest of Justinian*, Philadelphia 1998, further cited as Translation A. WATSON: "Suppose I give something to an expert. Is his case the same as that of a borrower for use? If, indeed, I give in my own interest, as because I want to discover the thing's value, he will only be liable for willful conduct. If in his interest, for safe-keeping, whence the action for theft will be his. But suppose it is lost

Roman jurists discussed the position of the *inspector*. His contract shared some similarities with the loan for use and deposit contract. If the object was given for valuation in the interest of only one party who wanted to have an expert opinion, the liability of the valuator was limited to fraud (*dolus*). On the other hand, if both parties were interested in the contract, the liability extended to fault (*culpa*) and even included the obligation of safekeeping (*custodia*). A typical example would be a valuation which was only the first step towards a commission of sale, as the *inspector* would obtain some profit from the final transaction.

Ulpian provides a detailed description of the liability rules for this case in his commentary to the edict, taking a quote from Papinian as a starting point for further discussion:

D. 19,5,17,2 (Ulp. 28 *ad ed.*): *Papinianus libro octavo quaestionum scripsit, si rem tibi inspiciendam dedi et dicas te perdidisse, ita demum mihi praescriptis verbis actio competit, si ignorem ubi sit: nam si mihi liqueat apud te esse, furti agere possum vel condicere vel ad exhibendum agere. secundum haec, si cui inspiciendum dedi sive ipsius causa sive utriusque, et dolum et culpam mihi praestandam esse dico propter utilitatem, periculum non: si vero mei dumtaxat causa datum est, dolum solum, quia prope depositum hoc accredit.*⁹

According to Papinian, if an object given for valuation was lost and the owner was not aware of its whereabouts, the *inspector* could be prosecuted on the grounds of *actio praescriptis verbis*. If the owner knew

while being brought back to me? If the carrier was appointed by my mandate, I must bear the risk, but if he entrusted it to a person of his choice, he must still answer for fault if he had the thing in his own interest.”

⁹ Translation A. WATSON: “Papinian, in the eighth book of his Questions, wrote: „If I gave you an object for your inspection and you say you had lost it, I have the *actio praescriptis verbis* provided that I do not know where it is; for if it should be clear to me that it is in your house, I can bring an action for theft or a *condictio* or an action for production.” Accordingly, if I gave a thing to someone for his inspection, whether in his own interests or in that of us both, I rule that for practical reasons he is held responsible to me for his fraud and fault, but not for the risk; but if it was given in my own interests, [he is held responsible] only for fraud because this is virtually a deposit.”

that the inspector was still in possession of the object, he could bring a case against him either for theft or on the grounds of *condictio* or *actio ad exhibendum*. Ulpian continues by setting out the rules for liability. If the contract was in the sole interest of the *inspector* or of both parties, the standard of fault (*culpa*) and fraud (*dolus*) would apply, but not risk (*periculum*). If the agreement was only in the interest of the owner, then the valuator's liability would be limited to fraud, as it would be similar to a contract of deposit.

With this background knowledge of Roman legal principles, we can proceed to the passage from Papinian for which Cujas provided a commentary:

D. 42,2,79 (Pap. 8 *quaest.*): *Rem inspiciendam quis dedit: si periculum spectet eum qui accepit, ipse furti agere potest.*¹⁰

Papinian analyses the availability of an *actio* for theft in the case of an object stolen from the person who had received it for valuation. The solution seems straightforward. If the *inspector* had to bear the risk, he would also have the possibility of suing for theft.

In the commentary to this passage, Cujas explains the legal provisions applicable. What is even more interesting is that he includes an additional interpretation of the term *periculum*:

*Si periculum spectet inspectorem, quod scilicet in ea re utilitas ejus aliqua fuerit, vel ut dicam apertius, quod ei expediret eam rem inspicere, dum forte eam emere vult: & periculum non oportere accipere pro casu fortuito, ut in d. § Papinianus [D. 19,5,17,2], ubi ait inspectorem nunquam praestare periculum, hoc est, casum maiorem: sed cum illius gratia res inspicienda illi data est, **periculum eum spectabit, veluti periculum furti, quod intelligitur plerumque contingere culpa possessoris, vel ejus, qui rem naturaliter tenet.** Concludamus ergo: si periculum furti ad*

¹⁰ Translation A. WATSON: A person gave another something to inspect; if the thing were at the recipient's risk, he could bring the action for theft if the thing were taken.

*inspectorem pertinent, quoniam tenetur domino actione praescr. verbis: ergo dabitur actio furti adversus furem, non domino. (...).*¹¹

Translation: “If the risk is on the part of the inspector, that is if he had some interest in the object, or to put it clearly, he examined the object because he wanted to sell it; and here the risk should not be understood as an unpredictable event, as in D. 19,5,17,2 which says that the inspector is never liable for risk, that is for an unavoidable loss; but because the object was given to him in his own interest, **the risk falls on him, that is the risk of theft, which is usually related to some kind of negligence on the part of the possessor** or simply the one who has the object. So we can conclude that if the risk of theft falls on the inspector, because he is liable to the owner on the grounds of an *actio praescriptis verbis*, he (not the owner) can prosecute for theft.”

The first issue that required clarification was the risk allocation between the parties. Cujas provides significant new background information in this regard. If the *inspector* had an interest of his own in the transaction, i.e. if he wanted to sell the object, he would also bear the risk. The principle of *utilitas contrahentium* was used most probably because it was also present in the passage from Papinian (D. 19,5,17,2). What follows is an interesting distinction between two types of risk (*periculum*).

The first is general risk, which covers any type of loss, especially by a *casus fortuitus*. Cujas explains that this is the way we should understand the passages in Ulpian which refer to Papinian’s opinion on the situation when the *inspector* was liable for fraud and fault, but not for risk (D. 19,5,17,2).¹² There is also a different, far narrower meaning of risk. The second interpretation of *periculum* is limited to the particular event of theft.

¹¹ J. CUJAS, *In Lib. VIII Quest. Papin*, [in:] *Opera omnia*: vol. IV, c. 161 (https://reader.digitale-sammlungen.de/de/fsl/object/display/bsb10494306_00093.html). All the passages by Cujas are from the reference edition of Charles-Annibal Fabrot, Cujas, Jacques, *Opera omnia*. Venice-Modena 1758–1783. This edition may be readily consulted at <https://opacplus.bsb-muenchen.de/title/BV035547117> (accessed 4 Sept. 2020). For different editions, see X. PRÉVOST, *Jacques Cujas (1522-1590). Jurisconsulte...*, pp. 123-133.

¹² See above, p. 297.

Cujas declares that if an *inspector* had to bear this type of risk, he would also be able to bring an *actio furti*. According to Cujas, the liability for losing an object because it was stolen was often based on fault (*culpa*). The passage concludes with a brief clarification of the relation between *periculum* and the *inspector's* possibility to sue for theft. He would be able to sue if the risk of theft was upon him (*si periculum furti ad inspectorem pertinent...ergo dabitur actio furti*). On the other hand, the owner of the stolen object would be able to recover his loss on the grounds of an *actio praescriptis verbis* against the valuator.

In this commentary Cujas distinguishes between the two meanings of risk. Sometimes *periculum* is used as a broad term, covering different sources of loss, even unpredictable events. In other cases, it can be used to indicate the very specific risk of theft, often associated with some type of negligence. The interpretation of the two types of risk is shown in Figure 1.

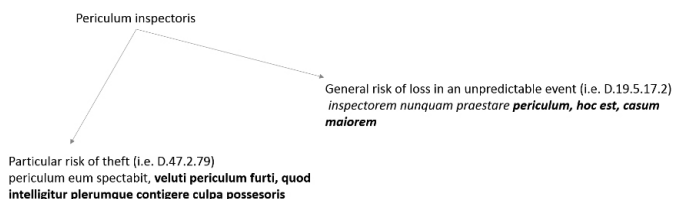


Figure 1. *Periculum inspectoris* according to Cujas

Cujas focuses on finding coherent and precise explanations of Roman legal principles. Papinian states that an *inspector* is liable for fraud or fault, but never for risk (D. 19,5,17,2). In another passage, the same jurist claims that if the risk was on the valuator, he could sue for theft (D. 47,2,79). In order to find a convincing interpretative solution, Cujas differentiates between the general notion of *periculum*, which covers all unavoidable losses (*casus major*), and a particular type of risk related only to one event.

Cujas identifies and allocates the risk of theft (*periculum furtis*) to the *inspector* if he had some interest in the contract. Even more importantly, he associates most cases of theft with some degree of negligence on the

part of the *inspector*, thus steering clear of a potential conflict between the contradictory statements in Papinian. At the same time, Cujas interprets the notion of risk (*periculum*) in a flexible way, depending on the particular context of the legal situation.

3. PERICULUM EMPTORIS OR PERICULUM VENDITORIS?

Jacques Cujas has a reputation for querying the traditional rule of *periculum emptoris*. His opinion was important in the European legal tradition, as it led to the need to justify the Roman principle.¹³ What has usually been discussed in the literature is Cujas's commentary to the famous case from Book 8 of Africanus's *Quaestiones* (D. 19,2,33).¹⁴ One of his later works (published in 1573)¹⁵ is based on this text. Cujas uses impressive interpretative skills to allocate the general risk of sale to the vendor (*periculum venditoris*).¹⁶

The second part of this paper discusses the meaning of risk in Cujas' less known commentary to Book 4 of Justinian's Code, or more precisely to its Title 48, on the risks and benefits associated with objects put up for sale. In an earlier work published in 1561,¹⁷ Cujas affirmed the principle of *periculum emptoris*, though this text may also contain the seeds of his future change of opinion.

Before I embark on the territory of 16th-century French legal humanist doctrine, I will need to assess the underlying Roman principles relating to risk in the contract of sale. This task is quite difficult, as there is a copious amount of literature written on the basis of only 25 sources that mention *periculum emptoris* or *periculum venditoris*. Thus, what follows is an introductory note: one that will allow for a reading of

¹³ M. BAUER, *op. cit.*, p. 123.

¹⁴ For further references on Roman law, see *Ibidem*, p. 56.

¹⁵ X. PREVOST, *Jacques Cujas (1522-1590). Jurisconsulte...*, p. 58.

¹⁶ J. CUJAS, *Ad Africanum Tractatus VIII*, [in:] *Opera Omnia*, vol. 1., c. 1294, (https://reader.digitale-sammlungen.de/de/fs1/object/display/bsb10494303_00698.html)

¹⁷ X. PREVOST, *Jacques Cujas (1522-1590). Jurisconsulte...*, p. 51.

Cujas's commentaries with some preliminary knowledge focused on the controversies around the Roman law of sale.¹⁸

One of the most prominent issues which have been discussed concerns the consequences of the loss of the object of the sale prior to its transfer to the new owner. It seems that in general the risk would be on the buyer (*periculum emptoris*); thus, he would have to pay for the goods even without having received them. To balance the position of the contracting parties, the seller had a very strict obligation to protect the merchandise until delivery (*custodia venditoris*).¹⁹ There is no straightforward solution to this question; so perhaps it will be useful to examine the most important sources alongside their different interpretations.²⁰ For instance, Martin Pennitz's detailed work dedicated to the problem of *periculum rei venditae* does not mention a general obligation of safekeeping on the part of the vendor. Pennitz assumes that it applied only in relation to particular objects of sale (i.e. *materia empta*) or as a consequence of an additional agreement between the

¹⁸ For Roman law with further references, see M. CARBONE, «Hac lege...venire oportet». *Alcuni riflessioni sui formulari di vendita in Catone*, «Rivista di Diritto Romano», XVI-XVII/2016-2017, <https://www.ledonline.it/rivistadirittoromano/allegati/dirittoromano16-17-Carbone-HacLege.pdf>; A. CORBINO, La risalenza dell'emptio-venditio consensuale e i suoi rapporti con la mancipatio, «IURA» LXIV/2016, pp. 9-100; E. JAKAB, *Risikomanagement beim Weinkauf...*; eds. E. JAKAB, W. ERNST, *Kaufen nach Römischem Recht*, Berlin/Heidelberg 2008; R. YARON, *Remarks on Consensual Sale (with special attention to 'periculum emptoris')*, «Roman Legal Tradition» 59/2004, (<https://romanlegaltradition.org/contents/2004/RLT-YARON1.PDF>).

¹⁹ C.A. CANNATA, *Ricerche sulla responsabilità contrattuale nel diritto o I*, Milano 1966, p. 134 n.49; M. KASER, *Die actio furti des Verkäufers*, «ZSS» 96/1979, pp. 89-128; W. ERNST, *Periculum est emptoris*, «ZSS» 99/1982, pp. 216-248; G. THIELMANN, *Traditio und Gefahrübergang*, «ZSS» 106/1989, pp. 292-326; M. TALAMANCA, *Considerazioni sul periculum rei venditae*, «Seminarios Complutense de Derecho Romano» 7/1995, pp. 217-296; M. PENNITZ, *Das 'Periculum rei venditae'. Ein Beitrag zum "actionenrechtlichen Denken" im römischen Privatrecht*, Wien 2000, pp. 380-408.

²⁰ W. ERNST, *Neues zur Gefahrtragung bei emptio venditio und locatio conductio?*, «ZSS» 121/2004, p. 367.

parties.²¹ As this issue is strongly related to the general problem of risk allocation in the contract of sale, they should be analysed together.²²

Paulus formulates the famous legal principle as follows:

D. 18,6,8 pr. (Paul. 33 *ad ed.*): *Necessario sciendum est, quando perfecta sit emptio: tunc enim sciemus, cuius periculum sit: nam perfecta emptione periculum ad emptorem respiciet. (...)*²³

We have to know when exactly the sale was concluded, because only then will we know for certain who should bear the risk.²⁴ Once the sale is concluded (*emptio perfecta*), the risk is on the buyer. Thus, he will have to pay for the object of the sale even if it has been lost.²⁵ There are two main theories about the origin of this rule.

The first assumes that the earliest sales (before they became consensual contracts) were concluded with two separate stipulations. As a consequence, there would be two independent obligations legally not correlated with each other: one to make the payment, and the second to transfer ownership.²⁶ If the object of the sale was lost, the obligation to transfer the property could not be fulfilled, but the obligation to pay still remained intact.

The second theory assumes that the contract was originally a “hand to hand” or *Barkauf* sale.²⁷ Payment and transfer of ownership occurred at the same time. The allocation of risk to the buyer at the moment the contract was concluded would be justified, as he would be the new owner.²⁸ The roots of the *periculum emptoris* rule will probably remain

²¹ M. PENNITZ, *op. cit.*, p. 386.

²² W. ERNST, *Neues zur Gefahrtragung ...*, p. 367.

²³ Translation, A. WATSON: “It is essential to know when a sale is perfect because we then know who bears the risk in the thing; for once the sale is perfect, risk is on the purchaser.”

²⁴ For further literature on this passage, see W. ERNST, ‘*Periculum est emptoris*’..., p. 225 ff.; M. TALAMANCA, *op. cit.*, p. 241 ff.

²⁵ Unless the seller was liable for the loss; see further analysis of D. 18,6,13-15.

²⁶ G. THIELMANN, *op. cit.*, p. 296.

²⁷ P. PICHONAZ, *op. cit.*, p. 195.

²⁸ M. KASER, *Das römische Privatrecht* I 2, München 1971, p. 552. TALAMANCA is right to point out that the *Barkaufgedanke* could easily explain the *periculum est*

obscure due to lack of sources, but it is certain that it had a profound impact on the perception of the contract as such.²⁹ In the eyes of the parties, the time when the contract was concluded was defined as the anticipated definitive transfer of the goods, even though from the legal point of view another action (i.e. *traditio*) was still necessary. From the moment the contract was concluded, the buyer had to bear the risk of loss; and the seller had to keep the object safe, almost as if it were no longer his own property.

It is striking that Paulus explains the vendor's obligation of safekeeping with an analogy to the contract of loan for use (*commodatum*):

D. 18,6,3 (Paul. 5 *ad Sab.*): *Custodiam autem venditor talem praestare debet, quam praestant hi quibus res commodata est, ut diligentiam praestet exactiorem, quam in suis rebus adhiberet.*³⁰

According to Paulus, the vendor had to keep the object of the sale safe, just like a person who borrows something for use. This means that he would have to be more diligent with the merchandise than with other things he owned. It seems that for Paulus an object designated for sale was in some way no longer the property of the seller. After the sale had been concluded, but before the legal transfer, the vendor was expected to behave in a different way with respect to the goods put up for sale. From the dogmatic point of view, he was still the only owner. The analogy with the contract of *commodatum* is more interesting, because it was generally accepted that the seller could use the object put up for sale until its definitive transfer.³¹ Roman jurists considered the very complex problems that arose in this situation.³²

venditoris rule: "il pagamento del prezzo stesso in tanto è giustificato in quanto la cosa sia pervenuta nella disponibilità del compratore", M. TALAMANCA, *op. cit.*, p. 293.

²⁹ W. ERNST, '*Periculum est emptoris*'..., pp. 243-248.

³⁰ Translation A. WATSON: "The vendor has to observe the same degree of diligence as does a person who borrows something for use and return; thus, he has to display greater care than he might show in his own affairs."

³¹ According to FRANCESCO DE ROBERTIS it was a "prassi negoziale del epoca", F.M. DE ROBERTIS, *La responsabilità contrattuale nel diritto romano*, Bari 1994, p. 160.

³² See, for example, Labeo (libro secundo pithanon) D. 19,1,54 pr.: *Si servus quem vendideras iussu tuo aliquid fecit et ex eo crus fregit, ita demum ea res tuo periculo non*

As far as the contracting parties are concerned, on concluding the sale, the buyer was perceived as the new owner. According to Ulpian, he had to bear the risk of loss just like any other *dominus*, assuming that the seller had kept the object safe:

D. 47,2,14 pr. (Ulp. 29 *ad. Sab.*): *...et sane periculum rei ad emptorem pertinet, dummodo custodiam venditor ante traditionem praestet...*³³

Yet there are also some passages which can be interpreted in a completely different way and could indicate that the risk of losing an object before delivery was not on the buyer, but on the vendor.

The following texts, which are probably some of the earliest examples of the idea of *custodia venditoris*,³⁴ are fundamental for the discussion on risk attribution in the Roman contract of sale:

D. 18,6,13 (Paul. 3 *epit. Alf.*): *Lectos emptos aedilis, cum in via publica positi essent, concidit: si traditi essent emptori aut per eum stetisset quo minus traderentur, emptoris periculum esse placet.*

D. 18,6,15 pr. (Paul. 3 *epit. Alf.*): *Quod si neque traditi essent neque emptor in mora fuisset quo minus traderentur, venditoris periculum erit.*

§ 1 *Materia empta si furto perisset, postquam tradita esset, emptoris esse periculo respondit, si minus, venditoris: videri autem trabes traditas, quas emptor signasset.*³⁵

est, si id imperasti, quod solebat ante venditionem facere, et si id imperasti, quod etiam non vendito servo imperaturus eras.

³³ Translation A. WATSON: "And, indeed, the thing is at the buyer's risk, save that the seller has the safekeeping of it until delivery."

³⁴ Both the reference to Alfenus and, even more importantly, to the actions taken by the aediles suggest that the case comes from the times of the Roman Republic.

³⁵ Translation A. WATSON: (D. 18,6,13) "The aedile destroyed couches which had been bought and which were left in the street; if they had been delivered to the purchaser or if it was his fault that they had not been delivered, it is clear that the risk is on the purchaser." D. 18,6,15 pr. "But, if they have not been delivered and there has been no delay by the purchaser in taking delivery, risk will be on the vendor. 1. He replied that

Beds which had been sold and left out on the street could be confiscated and destroyed by an aedile. If the beds had been delivered to the purchaser, or if he were to blame for non-delivery, he would have to bear the loss (*emptoris periculum esse*). On the other hand, if they had not yet been delivered and there had been no delay on the part of the purchaser, the risk would be on the vendor (*venditoris periculum erit*).

Paulus addresses a new problem in the last part of the text – the consequences of a theft after the conclusion of the sale (*materia empti*). In this case the vendor had to bear the risk before the delivery, while a loss due to *furtum* after delivery would be at the purchaser's risk. Paulus gives an example of timber regarded as delivered as soon as the purchaser had marked it.

Georg Thielmann and Mario Talamanca have analysed these texts in detail.³⁶ In Talamanca's opinion, in classical law there was a controversy between law schools regarding the *periculum emptoris / venditoris* rule. Talamanca saw the passage quoted above as an example of the general *periculum venditoris* principle expressed by Alfenus. According to this interpretation, the meaning and nature of *periculum* was exactly the same in the whole text. In particular, *periculum emptoris* and *periculum venditoris* indicate only a general allocation of risk in the contract of sale, and do not refer to questions of liability.³⁷

where materials purchased are lost by theft, risk is on the purchaser if they have been delivered, otherwise on the vendor; beams of timber are regarded as delivered if the purchaser has put his seal on them.”

³⁶ G. THIELMANN, *op. cit.*, p. 301ss; M. TALAMANCA, *op. cit.*, p. 226 ff. See also CARDILLI, R. CARDILLI, *L'obbligazione di «praestare» e la responsabilità contrattuale in diritto romano*, Milano 1995, p. 295 ss; M. PENNITZ, *op. cit.*, pp. 381-2.

³⁷ This very precise distinction between liability and the risk, presented by M. TALAMANCA, *op. cit.*, pp. 219-221 may not be useful for the interpretation of these two texts. *Periculum* can take various meanings and it may be wrong to assume that Alfenus used the term as precisely as Talamnca claims. See also Lettizia Vacca “...la netta distinzione fra le questioni di responsabilità e le questioni di rischio, dommaticamente ineccepibile per un giurista moderno, può essere in qualche modo fuorivante nella lettura di alcuni fonte romane impostate in termini di esperibilità dell'azione contrattuale...”, L. VACCA, *Considerazioni in tema di risoluzione del contratto per impossibilità della prestazione e di ripartizione del rischio nella 'locatio conductio'*, [in:] *'Iuris Vincula', Studi in onore di*

I am convinced that the circumstances of the first case allow us to interpret *periculum venditoris* in terms of liability and not risk allocation. The vendor would be liable for leaving an object which had been sold out on the street, risking its destruction by the aedile. If he left beds which had been sold but not yet delivered out on the street, his conduct would certainly not be an instance of the *diligentia* expected in a *bona fide* contract.

The second case, too, where the object which had been sold was lost through theft, is very interesting for our inquiry. Alfenus allocates the risk of this loss to the vendor before the delivery of goods, and after delivery to the purchaser. According to Talamanca, in this case the term *periculum* cannot be associated with liability for safekeeping (*custodia*).³⁸ It is true that Alfenus does not use the term *custodia*, but Kaser was right to describe the use of *periculum* in this text as the *Vorläufer des custodiam praestare*.³⁹ What Alfenus says is that the vendor had to be held liable for loss through theft, because it was his duty to keep the object safe until its transfer. For timber, this would be the moment when the buyer put his seal on it.

Quite often the questions of risk and the obligation of safekeeping would be put together. In the following text we observe an earlier jurist using *periculum* even more explicitly in a context that Ulpian would later reframe as *custodiam praestare*:

D. 13,6,5,14 (Ulp. 28 *ad ed.*): *Si de me petisses, ut triclinium tibi sternerem et argentum ad ministerium praeberem, et fecero, deinde petisses, ut idem sequenti die facerem et cum commode*

Mario Talamanca, VII, Napoli 2001, pp. 249-250. See also E. JAKAB, *Risikomanagement beim Weinkauf...*, p. 185 ff.

³⁸ The argument given is that the term *periculum* has to maintain the same meaning in every part of the analysed passage; as we cannot interpret the first part on the aedile's destruction of the beds in terms of *custodia*, there is no such possibility in the second part, either. I am not convinced by this argumentation and on one hand would be inclined to assume that leaving the beds on the street is not adequate safekeeping, and on the other allow Alfenus to use the term *periculum* in a general meaning of the risk a party has to bear irrespectively of its source. M. TALAMANCA, *op. cit.*, p. 231.

³⁹ M. KASER, *Die actio furti...*, p. 113.

*argentum domi referre non possem, ibi hoc reliquero et perierit: qua actione agi possit et cuius esset periculum? Labeo de periculo scripsit multum interesse, custodem posui an non: si posui, ad me periculum spectare, si minus, ad eum penes quem relictum est. Ego puto commodati quidem agendum, verum custodiam eum praestare debere, penes quem res relictæ sunt, nisi aliud nominatim convenit.*⁴⁰

A asked B to arrange a dining room and provide the silver for a dinner party. Then he asked for the same thing for the next day as well. Because B could not take the silver home, it was left in A's house overnight and there it went missing. The question is what *actio* can be brought and who bears the risk. Labeo states that the answer depends on whether the owner of the silver (B) set a guard. If he did, the risk would be his. Otherwise it would be on the part of A. Ulpian clarifies that an *actio* on loan for use could be brought. Clearly, A had an obligation to keep the silver safe, unless expressly agreed otherwise.

This text shows that the problem of safekeeping as formulated by Labeo in terms of risk (*periculum*) was later reframed by Ulpian as the obligation to keep the object safe (*custodiam praestare*). The solutions they proposed are very interesting, too. Labeo was reluctant to recognise the situation as a loan for use. In his opinion, A was no longer interested in keeping the object for the night after the party was over. The silver was left because B could not conveniently take it home (*cum commode argentum domi referre non possem, ibi hoc reliquero*). So for Labeo it was more of a particular contract of deposit. But the things were left also in the interest of A, as he asked for another *commodatum*. This is why he was liable for safekeeping, unless B set a guard.

⁴⁰ Translation A. WATSON: "Suppose you beg me to provide the place-settings for your dinner party and to give the silver to your servant, and then you ask the same again on the next day with the result that when I cannot conveniently take the silver back home, I leave it with you and it is lost. What action can be brought and who bears the risk? On the risk, Labeo writes that the critical question is whether or not I set a guard. If I did, the risk is mine; if not, his with whom the things were left. My view is that the action to be brought is that on loan for use, but that the person with whom the things were left must answer for safe-keeping, unless it was expressly agreed otherwise."

Later on, Ulpian sees this situation as a loan for use for the whole time, and on this basis reframes the question of *periculum* in terms of *custodiam praestare*. The ease in which this is done indicates that the obligation to keep an object safe was valued in accordance with its own rules, irrespectively of any inquiry about negligence by the person held liable.⁴¹

Returning to the main themes of *periculum emptoris* and *custodia venditoris*, it is important to ask if this obligation was inherent in the contract of sale itself or should it have been explicitly agreed by the parties. According to Talamanca, this was another controversial point between the Proculians and Sabinians.⁴² Geoffrey MacCormack points out that as a rule the vendor's liability was limited to a fault, but a higher standard could be explicitly agreed between the parties.⁴³ Martin Pennitz limits the applicability of *custodia* only to particular objects for sale, otherwise it would be based on direct agreement.⁴⁴

Many sources demonstrate a direct obligation of safekeeping on the part of the vendor.⁴⁵ Thus, it seems more appropriate to concentrate on those where an agreement is needed or even the obligation itself is not present. The first two texts have a common root in a statement made by Gaius:⁴⁶

D. 18,1,35,4 (Gai. 10 *ad ed. provinc.*): *Si res vendita per furtum perierit, prius animadvertendum erit, quid inter eos de custodia rei convenerat: si nihil appareat convenisse, talis custodia desideranda est a venditore, qualem bonus pater familias suis rebus adhibet: quam si praestiterit et tamen rem perdidit, securus esse debet,*

⁴¹ See also *periculum custodiae* in D. 19,2,40. The interpretations of *custodia* as an obligation valued on the grounds of standard criteria like *diligentia* or *culpa* are unconvincing, see, for example, G. MACCORMACK, *Custodia and Culpa*, «ZSS» 89/1972, p. 155.

⁴² M. TALAMANCA, *op. cit.*, p. 260 ff.

⁴³ G. MACCORMACK, *op. cit.*, p. 179 ff.

⁴⁴ M. PENNITZ, *op. cit.*, pp. 386-387.

⁴⁵ See above in D. 18,6,3; and also in D. 18,6,1,1, D. 18,6,2,1; D. 18,6,4,1.

⁴⁶ M. KASER, *Die actio furti...*, p. 108; M. TALAMANCA, *op. cit.*, p. 260, p. 277 n.212.

*ut tamen scilicet vindicationem rei et conditionem exhibeat emptori...*⁴⁷

Inst. 3,23,3a: *Quod si fugerit homo qui veniit aut subreptus fuerit, ita ut neque dolus neque culpa venditoris interveniat, animadvertendum erit, an custodiam eius usque ad traditionem venditor susceperit. sane enim, si susceperit, ad ipsius periculum is casus pertinet: si non susceperit, securus erit. idem et in ceteris animalibus ceterisque rebus intellegimus. utique tamen vindicationem rei et conditionem exhibere debet emptori, quia sane, qui rem nondum emptori tradidit, adhuc ipse dominus est. idem est etiam de furti et de damni iniuriae action.*⁴⁸

Both passages indicate that the obligation known as *custodia* had to be explicitly agreed by the parties. Otherwise the vendor would be liable only for negligence and would have to transfer his actions to the purchaser. In D.18.1.35.4, if the vendor had acted in accordance with the *bonus pater familias* standard and the object was lost, he would be absolved of liability. Also in the passage from Justinian's Institutions, if a slave escaped or was stolen and there was no fault on the part of the vendor, he would only have to transfer his actions to the purchaser; that is unless he had undertaken to provide custody for the slave. It may be worth noting that even in this passage the term *periculum* is used in respect of the obligation of safekeeping: *sane enim, si susceperit, ad ipsius periculum is casus pertinet.*

⁴⁷ Translation A. WATSON: "If the thing sold is lost through theft, the first thing to consider is what the parties agreed concerning its safekeeping; if they appear to have made no arrangement, such care will be required of the vendor as a good head of household would display in his own affairs. If the vendor lives up to that standard and yet the thing is lost, he will incur no liability, though he will have to make available to the purchaser his *vindicatio* and *condictio*."

⁴⁸ Translation: "If a sold slave runs away or is stolen, and there is no fraud or fault of the vendor, we need to consider if the vendor undertook the safekeeping of the slave until delivery. If he did, the risk will fall onto him. If he did not, he will be free from any liability. The same is true for animals and other things. In any case, he will have to transfer to the buyer all actions for recovery of the object, as until the moment of delivery he remains the owner. It is the same with action for theft or wrongful damage."

This atypical arrangement of a vendor's liability for safekeeping needs to be explained. The reason for this liability was the particular object of the contract, namely the sale of slaves.⁴⁹ We have to start with the problem of the safekeeping of slaves in general:

D.13, 6, 5, 6 (Ulp. 28 ad ed.): *Sed an etiam hominis commodati custodia praestetur, apud veteres dubitatum est. nam interdum et hominis custodia praestanda est, si vinctus commodatus est, vel eius aetatis, ut custodia indigeret: certe si hoc actum est, ut custodiam is qui rogavit praestet, dicendum erit praestare.*⁵⁰

Earlier jurists were in doubt as to whether *custodia* was requested for the loan of slaves.⁵¹ In principle, there was no obligation for their safekeeping. The risk of an escape was inherent and every owner had to take it.⁵² But if the slave was loaned in chains or was of an age that required custody, or it was the party's will, the borrower would also have to answer for the safekeeping of the slave. Otherwise the escape of a slave (*fuga servorum qui custodiri non solent*) was treated as *vis maior*.⁵³ In consequence, the sources discussing the sale of slaves limit the vendor's liability to a fault (*culpa*). In this particular case, there was no obligation of safekeeping, although *custodia* could still have been explicitly agreed by the parties. A good example is offered by the following passage:⁵⁴

⁴⁹ The fact that Inst.3,23,3a begins with the case of a sold slave indicates that Gaius' analysis of the sale of slaves was also used in D. 18,1,35,4. Otherwise it would be difficult to see why the compilers of the Digests should have limited Gaius' general statement to a particular case. Cfr. M. KASER, *Die actio furti* ..., p. 105 n. 109.

⁵⁰ Translation A. WATSON: "But among the earlier jurists, it was a question whether there was liability for the safe-keeping of a borrowed slave. In fact, there are times when the safe-keeping even of a slave must be answered for; as where he is lent in chains or is of an age to demand safe-keeping. Certainly, if the intention was that the one who sought to borrow should answer for safe-keeping, then it should be held that he must answer."

⁵¹ The term *veteres* indicates the Republican jurists. For this text, see R. CARDILLI, *op. cit.*, pp. 173-184.

⁵² M. KASER, *Die actio furti*..., p. 110.

⁵³ D. 13,6,18 pr.

⁵⁴ This and other texts on the sale of slaves were fundamental for MACCORMACK's interpretation of *custodiam praestare* as an obligation with standard *culpa* liability

D. 47,2,81pr. (Pap. 12 quaest.): *Si vendidero neque tradidero servum et is sine culpa mea subripiatur, magis est, ut mihi furti competat actio: et mea videtur interesse, quia dominium apud me fuit vel quoniam ad praestandas actiones teneor.*⁵⁵

The vendor's liability for a slave lost through theft after the sale is clearly limited to *culpa*. But this is only an outcome of the rule excluding the necessity of *custodiam praestare* for slaves. The text also reveals another peculiarity, namely the vendor's obligation to transfer all actions available to him to the purchaser.⁵⁶

This held whenever the seller was not liable for the loss, as for example in the following passage:

D. 19,1,31 pr. (Nerat. 3 membr.): *Si ea res, quam ex empto praestare debebam, vi mihi adempta fuerit: quamvis eam custodire debuerim, tamen propius est, ut nihil amplius quam actiones persequendae eius praestari a me emptori oporteat, quia custodia adversus vim parum proficit. actiones autem eas non solum arbitrio, sed etiam periculo tuo tibi praestare debebo, ut omne lucrum ac dispendium te sequatur.*⁵⁷

If the object was taken from the vendor by force, it was still deemed more appropriate that he should only be required to transfer all his actions for its recovery to the purchaser. The reason given for this is that safekeeping did not give sufficient protection against violence. The purchaser should be provided with the vendor's actions to use not only

rules. See G. MACCORMACK, *op. cit.*, p. 179 ff.

⁵⁵ Translation A. WATSON: "If I have sold but not yet delivered a slave and, without my fault, he has been stolen, the better view is that I have the action for theft: I should be seen as having the interest in the slave because I am his owner or because I will be liable to yield up actions I have regarding him."

⁵⁶ See also D. 47,2,14 pr. and its interpretation in G. THIELMANN, *op. cit.*, p. 321.

⁵⁷ Translation A. WATSON: "If I should be held responsible for a thing because of a sale and it is taken away from me by force, then although I should guard it, still it is better that there be no further consequence than my having to provide the buyer with the actions for recovering it; for safekeeping is of slight avail against force. I shall have to provide you with these actions to use not only at your judgment but also at your risk, so that all profit and expense fall to you."

at his discretion, but also at his risk, so that all the profit and expenses would fall to him.

Neratius analyses the question of the limits to the vendor's liability for safekeeping and states that he would not be liable if the object were taken from him by force.⁵⁸ There is no doubt about the general obligation (*quamvis eam custodiam debuerim*), but the fact that the loss was caused by a violent action changes the resulting consequences. The vendor would not be liable and would have to provide the purchaser with all the legal means available to him to recover the object. It would be the buyer's decision how to use these measures and it would be also his risk.

In Roman law the vendor had a general obligation of safekeeping from the conclusion of the sale to the final transfer of the goods. The only exception to this rule was the sale of slaves. If the object was lost and the vendor was held liable, he was entitled to take action to recover the goods.⁵⁹ If the vendor was not liable for safekeeping, the only consequence for him was the obligation to provide the purchaser with all the available actions. The strict rule of *periculum emptoris* was thus balanced by the vendor's obligation of *custodiam praestare*.⁶⁰

4. PART A – INTRODUCTION AND FUNDAMENTAL PRINCIPLES

With this understanding of the principles of Roman law and their accompanying controversies, it is possible to proceed to Cujas's extensive commentary to Title 48 of Justinian's Code on the risks and benefits of objects sold.⁶¹ It would be extremely difficult to analyse the entire text because of its size, so I have selected five extracts to show the details of Cujas' legal reasoning and interpretations of *periculum* in the contract

⁵⁸ For the limits to liability for safekeeping, see the fundamental discussion in D. 13,6,19 and D. 19,2,41, C.A. CANNATA, *op. cit.*, p. 62 ff.

⁵⁹ G. THIELMANN, *op. cit.*, p. 319 ff.

⁶⁰ Cfr. P. PICHONAZ, *op. cit.*, pp. 195-197.

⁶¹ On the medieval doctrine, cf. M. BAUER, *op. cit.*, pp. 93-112; H. DILCHER, *op. cit.*, pp. 191-199; H-J. HOFFMAN, *op. cit.*, pp. 35-67.

of sale.⁶² The introductory part is focused on general principles of risk allocation:

Primo ostenditur, ad quem pertineat periculum, vel commodum rei venditae, ad emptorem, vel venditorem, quae inspectio utilissima est: de ea tamen id vulgo traditur: Post perfectam venditionem, rei venditae periculum emptorem respicit, etiam re nondum tradita. Ideo re deteriore facta, vel perempta, ab eo pretium integrum deberi. Perficitur autem venditio solo consensu statim sine traditione, si pura sit venditio, quoniam si sit conditionalis, perficitur cum impleta fuerit conditio, l. 7. D. de contrach. empt. & vendit.⁶³ Et ideo ante conditionem impletam commodum & periculum pertinet ad venditorem; post conditionem pertinet ad emptorem, l. 5. hoc tit.⁶⁴ Dico periculum, id est, peremptionem rei venditae, interitum rei.

Translation: “At first we will show who should bear the risk and benefit ensuing from an object sold, the buyer or the vendor. This examination is extremely useful, because it is commonly said that when the sale is concluded, the risk of the object sold falls onto the buyer, even if the object has not yet been delivered. Thus, even if the object deteriorates or is destroyed, the vendor can claim the whole payment from the buyer. The sale is concluded when an agreement is reached, without the transfer of the object, if the sale was unconditional; if it was conditional, it will be concluded when the condition is fulfilled. Therefore before the condition is fulfilled, the benefits and risks are on the seller; after the condition has been fulfilled they fall onto the buyer. When I say risk, I mean the total loss of the object sold, its destruction.”

⁶² The full commentary is available at J. CUJAS, *In Liv. IV. Codicis*, [in:] *Opera omnia*, vol. 9, c. 349-351 (https://reader.digitale-sammlungen.de/de/fsl/object/display/bsb10494311_00179.html).

⁶³ D. 18,1,7 pr. (Ulpianus 28 ad Sab.): *Haec venditio servi „si rationes domini computasset arbitrio” condicionalis est: condicionales autem venditiones tunc perficiuntur, cum impleta fuerit condicio...*

⁶⁴ CJ. 4, 48,5: *Imperatores Diocletianus, Maximianus*

*Cum speciem venditam per violentiam ignis absumptam dicas, si venditionem nulla condicio suspenderit, amissae rei periculum te non adstringit. * diocl. et maxim. aa. aurelio leontio. * <a 285 pp. iii non. nov. atubino diocletiano a. ii et aristobulo cons.>*

Cujas begins his commentary with the fundamental question: who should bear the risk and take the prospective profit from the object sold, the buyer or the seller? I think it is important to note that he refers to the *periculum emptoris* rule as something that is generally accepted:

de ea tamen id vulgo traditur: Post perfectam venditionem, rei venditae periculum emptorem respicit, etiam re nondum tradita.

Cujas continues with his explanation and states that if an object has deteriorated or perished, the buyer will still have to pay the full price. What follows is a brief explanation of the circumstances in which the *periculum emptoris* rule applies.

First of all, the problem is relevant only for contracts of sale where the delivery was postponed to a later date. These were common in ancient Rome, especially for goods that were difficult or not ready for immediate transportation, and often valuable. Good examples are large quantities of grain, oil, food, textiles or other merchandise, which had to be left at a warehouse waiting for transportation. Another important object that falls into this category is wine, which could be sold but kept on the seller's premises for several months.⁶⁵

Cujas explains that a contract of sale was binding as soon as an agreement was reached, even before the goods were transferred, as long as the agreement was not conditional. If it was, the contract did not take effect until the condition was fulfilled.⁶⁶ Only then did the risk pass onto the buyer. At this point, Cujas also refers to the passage from Justinian's Code regarding an unconditional sale of goods lost in a fire at the buyers risk.⁶⁷

In Cujas' next sentence we come across his first definition of *periculum* in the contract of sale. According to him, it has to be understood as the complete loss of the object sold:

⁶⁵ E. JAKAB, *Risikomanagement beim Weinkauf...*, p. 144.

⁶⁶ Cujas indicates D. 18,1,7 pr as an example, probably because of the exact phrase "condicionales autem venditiones tunc perficiuntur, cum impleta fuerit condicio;" see above.

⁶⁷ CJ. 4,48,5, see above.

Dico periculum , id est, peremptionem rei venditae, interitum rei.

In other words, the term “risk” refers to the fact that the buyer could not receive the merchandise because it no longer existed.

5. PART B – PARTICULAR RULES AND RISKS RELATED TO THE WINE TRADE

In ancient Rome the wine trade was an extremely important commercial activity. From the legal perspective, wine was probably the most interesting object of sale because the business entailed several aspects such as quantity and quality control, and the need to delay transportation and store the consignment on the seller’s premises. This is why so many of the passages concerning risk are related to the sale of wine.⁶⁸

In the following part of his commentary, Cujas explains the particular rules related to the sale of wine:

Perficitur venditio solo consensu, nisi interveniat aliud, quod impediatur, puta, nisi vinum veneat, cujus venditio quasi imperfecta est, antequam id emptor degustarit, id est, antequam emptori placuerit venditio. Itaque nisi post degustationem, periculum ad emptorem non pertinet, quia degustatione videtur perfecta ea venditio, I. 1. D. eod. tit.⁶⁹ Hoc ita procedit, si vinum venierit aversione, quod exposui in titulo de exercit. act. ut si venierit universum vinum, quod erat in horreo vinario, nullo expresso

⁶⁸ E. JAKAB, *Risikomanagement beim Weinkauf...*, p. 187 ff.

⁶⁹ D. 18,6,1pr. (Ulpianus 28 ad Sab.): *Si vinum venditum acuerit vel quid aliud vitii sustinuerit, emptoris erit damnum, quemadmodum si vinum esset effusum vel vasis contusis vel qua alia ex causa. sed si venditor se periculo subiecit, in id tempus periculum sustinebit, quoad se subiecit: quod si non designavit tempus, eatenus periculum sustinere debet, quoad degustetur vinum, videlicet quasi tunc plenissime veneat, cum fuerit degustatum. aut igitur convenit, quoad periculum vini sustineat, et eatenus sustinebit, aut non convenit et usque ad degustationem sustinebit. sed si nondum sunt degustata, signata tamen ab emptore vasa vel dolia, consequenter dicemus adhuc periculum esse venditoris, nisi si aliud convenit.*

modo, vel mensura: ita venit aversione, & periculum respicit emptorem post degustationem demum, non ante. At si vinum venierit ad mensuram, quod est contrarium aversioni, ut in singulas amphoras constituto pretio, ut plenissima sit venditio, non tantum exigimus degustationem, sed etiam admensionem, d. I. 1. & I. 2. hoc tit.⁷⁰ l. quod saepe, § in his, D de contrah. empt. & vendit.⁷¹ Et ideo nonnisi post mensuram factam periculum est emptoris, quoniam post admensionem demum perficitur ea venditio, aut perfici intelligitur. Idem est non tantum in vino, sed etiam in oleo, frumento & similibus.

Translation: “The sale is concluded in the moment of the agreement unless something intervenes to impede it. For example, the sale of wine is incomplete until the buyer has tasted the wine, that is until he accepts the merchandise. Thus, prior to degustation the risk is not on the buyer, because the sale is only regarded as concluded once he has tasted the wine. The same is true also if the wine is sold at a lump sum price, as I explained in the title on the action against shipmasters, so if someone sold all the wine he had in his wine cellar without other agreements or

⁷⁰ D. 18,6,1 pr. (see above)

D. 18,6,1,1 (Ulpianus 28 ad Sab.): *Sed et custodiam ad diem mensurae venditor praestare debet: priusquam enim admetiatur vinum, prope quasi nondum venit. post mensuram factam venditoris desinit esse periculum: et ante mensuram periculo liberatur, si non ad mensuram vendidit, sed forte amphoras vel etiam singula dolia.*

⁷¹ D. 18,1,35,5 (Gaius 10 ad ed. provinc.): *In his quae pondere numero mensurave constant, veluti frumento vino oleo argento, modo ea servantur quae in ceteris, ut simul atque de pretio convenerit, videatur perfecta venditio, modo ut, etiamsi de pretio convenerit, non tamen aliter videatur perfecta venditio, quam si admensa adpensa adnumeratae sint. nam si omne vinum vel oleum vel frumentum vel argentum quantumcumque esset uno pretio venierit, idem iuris est quod in ceteris rebus. quod si vinum ita venierit, ut in singulas amphoras, item oleum, ut in singulos metretas, item frumentum, ut in singulos modios, item argentum, ut in singulas libras certum pretium diceretur, quaeritur, quando videatur emptio perfici. quod similiter scilicet quaeritur et de his quae numero constant, si pro numero corporum pretium fuerit statutum. sabinus et cassius tunc perfici emptionem existimant, cum adnumerata admensa adpensave sint, quia venditio quasi sub hac condicione videtur fieri, ut in singulos metretas aut in singulos modios quos quasve admensus eris, aut in singulas libras quas adpenderis, aut in singula corpora quae adnumeraveris.*

measure – that is if he sold it at a lump sum, the risk would still fall onto the buyer only after he had approved the quality of wine, not earlier. If the wine is sold in certain measured units of volume, that is the opposite of a lump sum sale, as for example if the price is agreed per amphora, what is required to conclude the sale is not only a degustation, but also the precise measure. Thus the risk falls onto the buyer only after the amount being sold has been measured, because that is when the sale is concluded or is regarded as concluded. This is so not only for wine, but also for oil, grain and similar commodities.”

Cujas explains that for the sale of wine, the contract was fully binding only after the quality of the product had been tasted (*degustatio*). He introduces the notion of a quasi-imperfect (not completed) sale; one which reflects the terms used by Ulpian in D.18.6.1.pr: *videlicet quasi tunc plenissime veneat, cum fuerit degustatum*. The risk would pass onto the buyer only after he had approved the quality of the merchandise. Cujas states that this held true if the wine was sold *per aversionem*. The problem has been discussed in the literature for many years. The majority of scholars maintain that it has to be understood as selling a certain quantity of wine for a lump sum. The risk would pass onto the buyer immediately on reaching the agreement. The feasibility of quality control (*degustatio*) in this type of setting was hard to explain, as the buyer would still have to pay no matter what the outcome of the test was.⁷² According to Cujas, the risk would pass only after the quality of the merchandise had been verified, even if the wine had been sold *per aversionem*. If, for example, a vendor sold all the wine from his wine cellar, the risk related to the poor quality of the goods would be on him until the agreed degustation.⁷³

The other type of contract relates to the selling of an agreed quantity of wine by defining the standard measure and the number of units sold. An example would be the sale of 10 amphorae or barrels of wine. Cujas explains that in this case, what was required for the contract to be

⁷² E. JAKAB, *Risikomanagement beim Weinkauf...*, p. 243 ff.

⁷³ Eva Jakab reached very similar conclusions based on an analysis of both juridical texts and examples of documents used in the practice, E. JAKAB, *Risikomanagement beim Weinkauf...*, p. 259 ff.

fully binding was not only a quality control test but also the measuring procedure. Thus the risk would pass to the buyer only after the amount wine had been specified. Some doubt as to the dogmatic qualification of the measurement may be observed in the way the risk allocation is described:

post mensuram factam periculum est emptoris, quoniam post admensionem domum perficitur ea venditio, aut perfici intelligitur.

Here Cujas keeps as close to the Roman jurists as possible and does not resolve their doubts as to whether the measuring should be regarded as a quasi-condition or whether it was a way of actually identifying the object sold.⁷⁴ The important point was to identify the moment risk was transferred, and in both interpretations it would only pass to the buyer once the measurement had been completed.

6. PART C – THE MEANING OF PERICULUM AND THE CONSEQUENCES OF DELAY

In the following part of his commentary, Cujas explains the consequences of risk attribution as well as the issue of delay. On one hand, the vendor could be late with the transfer of the goods; on the other, the seller could delay with the quality control or the transport arrangements.

Cum dico periculum esse emptoris, hoc dico, pretium integrum ab eo deberi, seu res sit perempta, seu diminuta. Cum dico periculum esse venditoris, dico ei pretium non deberi. Et quo casu dico periculum esse emptoris, hoc ita procedit, nisi venditor moram

⁷⁴ D. 18,6,1,1 (Ulpianus 28 ad Sab.): ...*priusquam enim admetiatur vinum, prope quasi nondum venit...* D.18.1.35.5 (Gaius 10 ad ed. Provinc.): *Sabinus et Cassius tunc perfici emptionem existimant, cum adnumerata admensa adpensave sint, quia venditio quasi sub hac condicione videtur fieri, ut in singulos metretas aut in singulos modios quos quasve admensus eris, aut in singulas libras quas adpenderis, aut in singula corpora quae adnumeraveris.*

*tradendae rei fecerit, l. 4 & ult. hoc. tit.*⁷⁵ *quia ex mora venditor periculum sustinet, etiam perfecta venditione: ante moram, & perfecta venditione, emptoris est periculum indistincte. Contra, quo casu dico periculum esse venditoris, hoc ita procedit, nisi emptor moram interposuerit, l. 2. hoc. tit.,*⁷⁶ *l. si per emptorem, D. eod.,*⁷⁷ *ut si vino vendito ad mensuram, emptor mensura faciende, & tollendi vini moram fecerit: ex emptore morae periculum erit emptoris, id est, periculum acoris, mucoris, & fusionis, & fortuitum, aut fatale, ut ostenditur in d. l. si per emptorem, D. eod.*

Translation: “When I say the risk is on the buyer, I mean that he has to pay the full price, even if the object is lost or diminished. When I say the risk is on the seller, I mean that he is not entitled to the payment. Whenever the risk is on the buyer, this happens unless the seller is not late with the transfer of the goods, because if he is late, he assumes the risk even after the sale has been concluded. The risk falls on the buyer after the sale has been concluded, unless the seller is overdue. On the other hand, whenever we say the risk is on the seller, it is so unless the buyer is not overdue, as would be the case if the agreed quantity of wine

⁷⁵ CJ. 4,48,4: *Imperator Gordianus: Cum inter emptorem et venditorem contractu sine scriptis inito de pretio venit moraque venditoris in traditione non intercessit, periculo emptoris rem distractam esse in dubium non venit. * gord. a. silvestro mil. * <a 239 pp. xv k. ian. gordiano a. et aviola cons. >*

CJ. 4,48,6: *Imperatores Diocletianus, Maximianus: Mortis casus ancillae distractae etiam ante traditionem sine mora venditoris dilatam non ad venditorem, sed ad emptorem pertinet, et hac non ex praeterito vitio rebus humanis exempta solutionem emptor pretii non recte recusat. * diocl. et maxim. aa. et cc. aurelio cyrillo. * <a 294 s. xv k. ian. nicomediae cc. cons. >*

⁷⁶ CJ. 4,48,2 pr.: *Imperator Alexander Severus*

*Cum convenit, ut singulae amphorae vini certo pretio veneant, antequam tradantur, imperfecta etiam tunc venditione periculum vini mutati emptoris, qui moram mensurae faciendae non interposuit, non fuit. * alex. a. gargilio iuliano. * <a 223 pp. v k. april. maximo ii et aeliano cons. >*

⁷⁷ D. 18,6,5 (Paulus 5 ad Sab.): *Si per emptorem steterit, quo minus ad diem vinum tolleret, postea, nisi quod dolo malo venditoris interceptum esset, non debet ab eo praestari. si verbi gratia amphorae centum ex eo vino, quod in cella esset, venierint, si admensum est, donec admetiatur, omne periculum venditoris est, nisi id per emptorem fiat.*

were sold but the buyer postponed measurement and transportation: owing to delay on the part of the buyer, the risk would be on him, that is the risk of the wine turning sour or musty; having been spilled or lost by chance or in an unpredictable event, as shown in D. 18,6,5.”

Here Cujas discusses the practical consequences of *periculum emptoris* or *periculum venditoris* in the contract of sale. The buyer’s risk meant that he would have to pay the full price, even if the object were not delivered. The vendor’s risk meant that he would not be able to claim payment for the goods sold. The general rules of risk attribution could be altered if either of the parties delayed. If the seller did not transfer the object by the agreed deadline, he would have to bear the risk. Cujas explains the consequences of delay in very simple words: *quia ex mora venditor periculum sustinet, etiam perfecta venditione*. The general rule of risk being on the buyer would change in his favour if the vendor did not fulfil his part of the contract.

The same would hold if there was a delay on the part of the purchaser. If the sale required a measurement, the vendor would normally have to bear the risk until that time. Cujas maintains that on the other hand, whenever we say the risk is on the seller, this is so unless the buyer does not delay, as would happen if the right quantity of wine was ready but the buyer delayed with the measurement and transportation. In that case risk would be on the buyer because of his delay. It is noteworthy that Cujas identifies several specific instances of *periculum* that would pass onto the buyer in the event of a delay. They include risks related to the quality of the wine:

ex emptore morae periculum erit emptoris, id est, periculum acoris, mucoris, & fusionis, & fortuitum, aut fatale.

7. PART D – PRINCIPLES GOVERNING PERICULUM AND LIABILITY IN THE CONTRACT OF SALE

In the following part of his commentary, Cujas continues to examine the question of *periculum* in the contract of sale. He analyses the influence of the general liability principles on risk allocation.

Rursus quo casu dico periculum esse emptoris, ita procedit, nisi dolo vel culpa venditoris rei periculum contigerit: venditor ante traditionem alias praestat dolum tantum, ut si emptor moram interposuerit, tum venditor non praestat culpam, sed dolum tantum, d. l. si per emptorem,⁷⁸ & l. illud, ff. eod. tit.⁷⁹ Vel si apud emptorem sit possessio rei venditae precaria, vel conditionis jure, non emptionis jure, eo etiam casu venditor praestat dolum tantum, non culpam, I. servi emptor., D. eod.⁸⁰ Alias venditor praestat dolum & culpam, id est diligentiam boni patrisfamilias, l. si res, D. eod. tit. l. quod saepe, § si res., D. de contr. Empt. & vendit.⁸¹ Culpam cum dicimus, levem dicimus: lata culpa est proxima dolo, levissima est proxima casui, igitur culpa absolute est levis culpa. Alias venditor praestat etiam levissimam culpam, id est, extremam diligentiam, ut si vinum venierit ad mensuram, ante mensuram

⁷⁸ D. 18,6,5 (Paulus 5 ad Sab.): *Si per emptorem steterit, quo minus ad diem vinum tolleret, postea, nisi quod dolo malo venditoris interceptum esset, non debet ab eo praestari.*

⁷⁹ D. 18,6,18 (Pomponius 31 ad Q. Muc.): *Illud sciendum est, cum moram emptor adhibere coepit, iam non culpam, sed dolum malum tantum praestandum a venditore...*

⁸⁰ D. 18,6,17 (Iavolenus 7 ex Cass.): *Servi emptor si eum conductum rogavit, donec pretium solveret, nihil per eum servum acquirere poterit, quoniam non videtur traditus is, cuius possessio per locationem retinetur a venditore. Periculum eius servi ad emptorem pertinet, quod tamen sine dolo venditoris intervenerit.*

⁸¹ D. 18,1,35,4 (Gaius 10 ad ed. provinc.): *Si res vendita per furtum perierit, prius animadvertendum erit, quid inter eos de custodia rei convenerat: si nihil apparet convenisse, **talis custodia desideranda est a venditore, qualem bonus pater familias suis rebus adhibet**: quam si praestiterit et tamen rem perdidit, securus esse debet, ut tamen scilicet vindicationem rei et conditionem exhibeat emptori...*

*factam venditor praestat custodiam, l. I. §. sed & custodiam, D. eod. tit.*⁸²

Translation: “On the other hand, whenever I say the risk is on the buyer, this is so unless the risk was caused by the vendor’s fraud or fault. Sometimes the seller is liable only for fraud before he transfers the goods. This is so if the buyer is overdue with his part of the contract, in which case the seller will not be liable for fault, but only for fraud; or if the object sold was already in the hands of the buyer, because it was granted by petition or given conditionally, not because of the sale. In those cases, too, the vendor will be liable only for fraud, not for fault. At other times the seller is liable both for fraud and fault, that is he will have to be as diligent as a good paterfamilias. When we say fault we mean slight negligence. Gross negligence is like fraud, slightest negligence is like random chance, thus fault in general is slight negligence. Sometimes the vendor is liable even for the slightest negligence, that is he has to be extremely diligent, as with wine considered sold once its volume has been measured; prior to the measurement he is liable for safekeeping.”

Using a series of examples from Roman sources, Cujas gives additional information about the rules governing risk allocation and liability. His first clarification is that the general *periculum emptoris* principle would apply only if the seller had not committed a fault (*culpa*) or fraud (*dolus*). In other words, the vendor’s careless or wrongful conduct could lead to the attribution of the risk to him.

The second case shows that sometimes the vendor’s liability was limited only to fraud (*dolus*). Thus, the risk would remain with the buyer, even if the seller had committed a fault (*culpa*). This could happen if the object sold was already in the purchaser’s possession for other reasons (i.e. it was given *in precario* or the contract was conditional). Also the vendor could be held accountable only for fraud owing to delay on the purchaser’s part.

Cujas examines the rules for liability in the contract of sale. In most cases, the seller’s conduct would have to be free of fault and fraud. This

⁸² D. 18,6,1,1 (Ulpianus 28 ad Sab.): *Sed et custodiam ad diem mensurae venditor praestare debet.*

has to be understood as his being as diligent as a good paterfamilias. Hence Cujas arrives at an important clarification of the meaning of *culpa* in the context of the vendor's liability. He uses the term fault (*culpa*) in his commentary to indicate slight negligence (*culpa levis*), because gross negligence (*culpa lata*) was practically like fraud (*dolus*); and very slight negligence (*culpa levissima*) was practically like an unpredictable event (*casus*). Cujas also indicates that there were cases in which the latter standard applied. The vendor would have to act with extreme diligence if the price per unit of the wine had been agreed. In such a case, he would have been liable for safekeeping (*custodia*) of the merchandise until the day of the measurement.

8. PART E – A MYRIAD RISKS AND A PRACTICALLY INCOMPLETE CONTRACT

Cujas continues his commentary by identifying the specific risks related to the wine trade and analysing who had to cover them, depending on the particular type of contract of sale. He shows that the term *periculum* could be used very flexibly. Importantly, both parties could bear different types of risk simultaneously:

Itaque ante mensuram venditor praestabit periculum acoris, & mucoris, quod tamen est proximum fatali periculo. Quoniam sunt quedam remedia acescentis, & mucescientis vini: ideoque hoc praestat. Idem praestat periculum effusionis, ut si vinum sit effusum vasis pertusis, casu quodam: nam debuit vasa lustrare, picare, ut diligentissimus paterfam. Denique omnem culpam praestat ante mensuram, & omne periculum, excepto casu majore, ut chasmate, & latronum impetu. Igitur multum interest, an imperfecta sit venditio, vel quasi imperfecta. Est quasi imperfecta si vinum venierit ad mensuram, & nondum sit admensum: illa venditio est quasi imperfecta, d. l. l. § sed & custodiam. Priusquam vinum admetiatur, quasi nondum veniit. Si venditio sit penitus imperfecta, & res perierit casu majore, periculum est venditoris, & pretium ei non debetur. Si sit quasi imperfecta, & res casu majore,

sive damno fatali perierit periculum est emptoris, & ab eo pretium peti potest.

Translation: “So before the measurement, the vendor is liable for the risk of the wine turning sour or going musty, which would be pretty close to a disastrous risk. There are certain precautions he could have taken to prevent the wine turning sour or going musty, so he would be liable. Likewise, he would be liable for the risk of spilling the wine, i.e. if the wine was spilled because the barrels leaked or by accident: he should have taken due care of the barrels just as a diligent paterfamilias would have. Indeed, he would be liable for any and every negligence that occurred before the measurement, and borne all the risks, except the risk of an unpredictable event, such as an earthquake or an attack by mercenary soldiers. Thus, it is very important to know if the sale was incomplete or practically incomplete. The sale would be practically incomplete if the wine were sold during the measurement procedure but before all of it had been properly measured, that would be a practically incomplete sale. The wine cannot be properly sold until all of it has been duly measured. If the sale was incomplete and the object was lost in an unpredictable event, the risk would be on the vendor and he could not claim payment. If the sale had not been fully completed and the object was lost in an unpredictable event or by force majeure, the risk would be on the buyer and he would still have to pay.”

For a wine sale involving measurement, the vendor would have to bear the risk related to the quality of the product (*periculum acoris & mucoris*). Another type of risk that Cujas allocates to the seller is the possibility of his loss of the wine due to inadequate storage (*periculum effusionis*). It was his duty to check if the barrels were good for use, as a diligent paterfamilias would have done. Hence there is a clear distinction between risks related to the quality and quantity of wine, and the risks related to an external, irresistible force.

Cujas explains that before the completion of the measurement, the vendor would be liable for any and every kind of fault as well as for all the risks, with the exception of force majeure, such as an earthquake or an attack by mercenary soldiers: *omnem culpam praestat ante mensuram, & omne periculum, excepto casu majore, ut chasmate, & latronum impetu.*

In Cujas' commentary the answer to the problem of risk allocation is based on the difference between a practically incomplete sale (*quasi imperfecta venditio*) and an incomplete sale (*imperfecta venditio*). The former means a sales contract with a measurement clause which must be carried out before the procedure is deemed complete. The latter is a standard conditional sale made before the condition has been fulfilled.

If the sale was conditional and the object was lost due to force majeure (*casus major*), the vendor would have to bear the risk and could not claim payment. In such a case, the contract did not enter into force and was not legally binding until the condition was fulfilled. On the other hand, if it was "a practically incomplete sale" (*quasi imperfecta venditio*, i.e. the sale of the wine before all of it had been properly measured, as Cujas terms it), the risk of force majeure would be on the buyer; he would have to pay even if he had not received the right merchandise.

9. PART F – PERICULUM EVICTIONIS: THE VENDOR'S ONLY REAL RISK

A further examination of the different meanings of the term *periculum* in relation to the contract of sale leads us to consider the last sentence of this part of Cujas' commentary:

Praecipua sententia legis primae haec est, post perfectam venditionem ad venditorem non pertinere nisi periculum evictionis, alia pericula respicere emptorem.

Translation: "The principal legal provision is that once the sale has been concluded, the only risk for the seller is eviction, other risks falling on the buyer."

According to Cujas, the most important provision is that once the contract of sale is binding, the vendor bears only the risk of eviction (*periculum evictionis*), all other risks falling upon the buyer. Should a third person claim the property rights to the object which has been sold, the vendor would have to cover this loss.

10. CONCLUSION

Cujas uses the concept of risk in many different ways in order to explain the legal provisions governing sales in a very systematic and organised manner. His in-depth knowledge of the Roman sources serves as a solid basis for his interpretations. In the first case I have analysed, of a person who received an object for valuation, the distinction between risk in general (i.e. fire, earthquake, attack by mercenary soldiers) and the risk of a specific event (theft) was the decisive factor. If a valuer had an interest in the transaction, i.e. if he wanted to sell the object in the future, he would bear the risk of theft, but not the risk of force majeure.

In the second example, Cujas gives a detailed explanation for the different aspects of risk allocation in a contract of sale. He looks at the traditional doctrine of *periculum emptoris* as well as alternative scenarios in which the risk passed either to the buyer or to the vendor. It is possible to imagine that the risk of eviction, indicated as the most dangerous for the vendor, was later associated with the famous case discussed in D. 19,2,33; and was thus the first step towards the formulation of a general reservation about the validity of the traditional principle of *periculum emptoris*.

'PERICULUM VERBUM GENERALE EST': RISK ALLOCATION IN THE COMMENTARIES OF JACQUES CUJAS

Summary

Jacques Cujas was a French humanist and one of the most distinguished 16th-century legal experts. This paper analyses the rules governing liability and the meaning of *periculum* (risk) in his commentaries to Roman law.

My study is focused on two examples which offer surprising interpretations of risk. The first case concerns a person who lost an object given for valuation. Here Cujas uses the term *periculum* in two different meanings. The first is general and covers all types of irresistible events. The second is limited to only one type of event – theft. This distinction

is fundamental for the evaluation of the legal consequences arising from the loss of the object. The *inspector* would have had to bear the risk of theft (*periculum furti*), but not other risks, especially not those related to force majeure.

The second case I discuss deals with the complexities of risk allocation in the contract of sale. In one of his earlier commentaries, Cujas accepted the Roman legal principle of *periculum emptoris* – that the risk of the loss of the object sold should be on the buyer. At the same time, in his discussion of particular cases Cujas was flexible in allocating various risks to either of the parties, thus paving the way for his future change of mind on *periculum venditoris*.

‘PERICULUM VERBUM GENERALE EST.’ ZNACZENIE RYZYKA
W KOMENTARZACH CUJACIUSA

Streszczenie

Jacques Cujas był jednym z najwybitniejszych znawców prawa w XVI wieku. Artykuł analizuje zasady odpowiedzialności oraz znaczenie ryzyka (*periculum*) w komentarzach do prawa rzymskiego, napisanych przez tego francuskiego humanistę.

Tekst koncentruje się wokół dwóch zaskakujących interpretacji ryzyka. Pierwsza z nich dotyczy osoby (*inspector*), która utraciła rzecz przyjętą do wyceny. W tym przypadku Cujas posługuje się terminem ryzyka w różnych znaczeniach. Jedno jest ogólne i obejmuje wszystkie zdarzenia, którym nie da się zapobiec. Drugie zaś ogranicza się wyłącznie do kradzieży. Rozróżnienie to jest fundamentalne dla oceny skutków prawnych utraty rzeczy. *Inspector* będzie musiał ponosić ryzyko kradzieży (*periculum furti*), ale nie ryzyko innych zdarzeń, w szczególności stanowiących siłę wyższą.

Drugi omawiany przykład dotyczy złożonej problematyki rozkładu ryzyka w kontrakcie sprzedaży. W jednym z wczesnych komentarzy Cujas zgadza się z rzymską zasadą *periculum emptoris*, nakładającą ryzyko utraty rzeczy na kupującego. Zarazem jednak, omawiając poszczególne przypadki, przypisuje ryzyko różnym stronom transakcji,

co otwiera mu drogę do późniejszej całkowitej zmiany stanowiska (*periculum venditoris*).

Keywords: Jaques Cujas, risk, liability rules.

Słowa kluczowe: Jaques Cujas, ryzyko, zasady odpowiedzialności.

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