Remarks on the legal structure of enterprises in Roman law (*)

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1. The problems of the legal structure of enterprises in Roman law represent a relatively new subject in the science of Roman law. This modern aspect has been highlighted especially by Feliciano SERRAO and by his disciples Andrea DI PORTO and Aldo PETRUCCI (1). It is of course impossible to analyse the problems of Roman enterprises in this short article as thoroughly as it has been done in the books of the mentioned Italian scholars or in other detailed works. My purpose is not more than to give an overall and clear picture of the various enterprise types in ancient Rome by analysing the legal sources *quasi more geometrico*. Furthermore I hope that this concise analysis is able

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1) For SERRAO's conception see comprehensively his *Impresa e responsabilità a Roma nell'età commerciale*, Pisa 1989; see furthermore A. DI PORTO, *Impresa collettiva e schiavo 'manager' in Roma antica*, Milano 1984, A. PETRUCCI, *Mensam exercere*, Napoli 1991.

to throw light on some aspects which are generally neglected in the modern literature.

2. The late emergence of this subject in the science of Roman law is due to the fact that the notion of enterprise itself is not an old one. This word as well as its equivalents in other languages (*entreprise*, *impresa*, *Unternehmen*, etc.) are often used nowadays when referring to a 'unit of economic organization or activity' (2). However, this interpretation does not go back very far (3). Until the end of the 19th century the word 'enterprise' as well as its equivalents in other languages, if at all used in the

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2) This definition is given by *Webster's New Collegiate Dictionary*, Springfield 1980, s.v. 2a. American jurists prefer the term 'corporation' to 'enterprise', nevertheless also the latter appears sometimes in the American legislation, see e.g. *Black's Law Dictionary*, St. Paul 1991, s.v. *enterprise*.

3) Searching for the roots of the word enterprise it can be mentioned that the civil codes specified the *conductor operis* from the beginning with the terme '*entrepreneur*' (*Unternehmer, imprenditore* etc.). The French Code civil of 1804 introduced the term "*entrepreneurs d'ouvrages par suite de devis ou marchés*" in relation to the third sub-type of "*louage d'ouvrage*" (comprising otherwise the labour contract and carriage as well) in the art. 1779. The same construction was admitted in the Italian Codice civile of 1865 (art. 1627). The Austrian ABGB of 1811 created, as compared with the mixed construction of the Code civil, clearer notions, when regulating the independent *Werkvertrag* and using thereby the notion of *Unternehmer* (§ 1165). This solution and terminology were followed also by the Swiss OR of 1881 (§ 363) and the German BGB of 1896/1900 (§ 631). A similar solution was admitted by the new Codice civile of 1942 which created the contract of *appalto*, whereby the entrepeneur is named *appaltatore* (art. 1655). I think, however, that the notion of entrepreneur used by the civil codes had no direct impact on the formation of the concept of enterprise.

economic sense, meant business activity only (4), but this word was not used in the legal terminology for a long time (5).

It was only at the very end of the 19th century that the term enterprise gradually turned into an economic and legal category (6) and at the same time its meaning became wider both in the economic and in the legal science : it was namely interpreted more and more frequently as business organization (7). The development of the new concept was due to the massive emerging of public utility companies making contracts with the State or with public bodies, or even being owned by the State since the last decades of the 19th century (8). For a certain period

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4) See e.g. *Dictionnaire du commerce, de l'industrie et de la banque*, Chalon sur-Saône 1900 s.v. *Entrepreneur* etc., whereby enterprise means activity or contract of entrepreneurs made with the public administration. This interpretation of enterprise survives in French economic and legal thinking to some extent up to the present.

5) Neither F. VON HOLTZENDORFF (ed.), *Rechtslexikon*, Leipzig 1881, nor the Hungarian Encyclopaedia of Law (*Magyar Jogi Lexikon*) vol. VI, Budapest 1907 had such an entry.

6) As for the slow diffusion of the new meaning it is characteristic that LEGRAND's *Dictionnaire usuel de droit*, Paris 1923 does not have an entry '*entreprise*'.

7) See T. SÁRKÖZY, *A szocialista vállalatelmélet jogtudományi alapjaihoz* [= Some remarks on the legal foundations of the socialist theory of enterprises], Budapest 1981, p. 132.

8) One of the first steps in this direction was made by the German Commercial Code promulgated in 1897 in which the notion of *gemeinnütziges Unternehmen* appeared (HGB § 180). Some time later public corporations in France were named more and more frequently *entreprise publique*.

of time the term 'enterprise' stood for such public corporations in contradistinction to the traditional firms (9).

However, the meaning of the word 'enterprise' was soon extended both in the economic and in the legal science to the private sphere. In this way enterprise gradually turned into an *Oberbegriff* of every kind of economic organization in many countries (10). In the course of the 20th century enterprise became a more and more important legal category (11), it even appeared in some civil codes (12). This generalization of the notion is due to

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9) The public law conception is displayed by the *Dictionnaire du commerce* quoted above, see furthermore FEHNER - HERRMANN, *Dictionnaire juridique et administratif*, Strasbourg-Paris 1920, s.v. *entreprise*. It is worth quoting RIGUTINI - FANFANI, *Vocabolario italiano della lingua parlata*, Firenze 1921, s.v., according to which "impresa... oggi dicesi in linguaggio economico una compagnia, la quale prenda in appalto alcuni lavori che concernono il pubblico, come Impresa di gas, Impresa della nettezza pubblica ecc."

10) This is already attested e.g. by F. STIER-SOMLO - A. ELSTER (edd.), *Handwörterbuch der Rechtswissenschaft*, Berlin-Leipzig 1929, s.v. *Unternehmen*. As for the modern economic notion of enterprise, see e.g. T. FÖLDI (Ed.), *Marktwirtschaft und Planwirtschaft: Ein Enzyklopädisches Wörterbuch*, München-London-New York-Paris 1992, s.v. *Unternehmen*.

11) However, enterprise does not always mean business organization in present day legal usage, either. The German term 'Unternehmen' often means *obiectum* of law, while the French term 'entreprise' often stands for a special kind of *locatio conductio operis* named also *contrat d'entreprise*.

12) It was the Soviet Russian Civil Code of 1922 which first used the term enterprise (*predpriyatie*) for denominating the industrial units owned by the state, having — even if there were exceptions — juristic personality (SÁRKÖZY, *op. cit.*, p. 193). Following the Soviet pattern the system of state enterprises with juristic personality was also admitted by the (former) communist countries and the term enterprise appeared in the civil codes as well (as for Hungary, see the Civil Code of 1959, §§ 31ff.). The notion of *impresa* (with different contents) appeared also in the Italian *Codice civile* of 1942.

the decline of traditional one-man firms, to the emergence of new economic organizations (e.g. the various types of company, co-operatives etc.) ([13]) and not less to the demand of an *Oberbegriff* comprising the various units of economic life.

3. It seems to be too audacious to speak about the germs of the modern notion of enterprise in Antiquity. However, this assertion is not as absurd as it may seem *prima facie*. Of course, words like '*interpre(he)ndere*' dit not exist in ancient Latin ([14]). Nevertheless, business activity was expressed with the words *negotiari* and *negotiatio* referring to the lack of tranquillity (*otium*), and this idea is not far from that of *enterprise* (as well as that of *business, venture*): the '*negotiator*' just like the 'entrepeneur' is a man who leaves off a comfortable life in order to carry out business activity ([15]). I admit that this analogy is not relevant as the notion of '*negotiatio*' had probably no impact on the formation of the notion of enterprise. I am convinced, however, that in terms of facts it is justifiable to speak about enterprises in the sense 'business organization' in ancient Rome as well. In Rome there was not only a brisk business life but

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13) Cf. T. SÁRKÖZI, *Állami vállalat* [= state enterprise], in *Állam- és jogtudományi enciklopédia*, Budapest 1980, pp. 272ff.

14) Words like '*interprendere*' (= to falsify) and '*interprisa*' (= enterprise, attack) occur in medieval Latin, see e.g. C. DU CANGE, *Glossarium mediae et infimae Latinitatis*, Lutetiae 1883-1883; J. F. NIERMEYER, *Mediae Latinitatis Lexicon Minus*, Leiden 1976; R.E. LATHAM, *Revised Medieval Latin Word-List from British and Irish Sources*, London 1965, s.vv.

15) Cf. W.H. HARRIS - J.S. LEVEY (ed.), *The New Columbia Encyclopedia*[4], New York-London 1975, s.v. *entrepreneur*.

there were also a number of various business organization types ([16]). Some of them show a rather complicated structure. In this article I wish to demonstrate that these organizations deserve the name 'enterprise' even if evaluated with modern standards.

It has to be mentioned in advance that in the ancient Roman society characterized by the predominance of landowning aristocracy, entrepreneurs were not very prestigious people. Even if being eventually freeborn Roman citizens, they were despised persons and, at least in the late Empire, they were not *cives optimo iure* ([17]). A considerable part of entrepreneurs was constituted, however, by freedmen (*libertini*) or foreigners (*peregrini*) having *ab ovo* limited or no civil rights.

Ancient Roman rules concerning the enterprise can be searched under different aspects. Primarily we can distinguish between public law and private law aspects. The activity of the *corpora* was regulated by the public law. I deal now, however, with private law institutions only ([18]). Furthermore we can also distinguish between static and dynamic aspects. As for the

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16) *Realgeschichte* of this subject is recently treated in a comprehensive monograph of J.-J. AUBERT, *Business Managers in Ancient Rome*, Leiden-New York-Köln 1994.

17) R. BRÓSZ, *Nem teljes jogú polgárok a római jogforrásokban* [= Citizens without full legal capacity in the sources of Roman law], Budapest 1964, pp. 136ff.

18) For the Roman public law concerning the corporations see, first of all, F.M. DE ROBERTIS, *Storia delle corporazioni* I-II, Bari 1971. Also important recently B. SIRKS, *Food for Rome*, Amsterdam 1991. A modest contribution is given by myself in *Acta Fac. Pol.-Iur. Univ. Budapest*, 32 (1990).

dynamic aspect, first of all I mean the contracts made between entrepreneurs and their partners. In this respect a number of general contract types were applied, like *emptio venditio*, *locatio conductio*, *mutuum*, *stipulatio*, etc., but there were also some contract types applied especially by businessmen like *foenus nauticum*, *receptum argentarii*, *receptum nautarum cauponum stabulariorum* etc. As for the contract of partnership, there was also a businesslike form of it, the *societas negotiationis*. Partnership, however, is not merely a contract but also an institution of static character. The subject of this article is constituted just by such "static", or more precisely, organizational institutions of private law. But it is not only, even not firstly the *societas negotiationis* that has to be dealt with in this respect but much more the so called *actiones adiecticiae qualitatis*.

These actions can be approached under many different aspects. It was already Gaius who distinguished between *actiones superiores* and *inferiores* (D. 14.5.1). It is underlined in many textbooks of Roman law that the *actiones adiecticiae qualitatis* represent vicarious liability for persons under power as well as for free persons ([19]). In the modern literature VALIÑO specifies the *actio exercitoria*, *institoria* and *tributoria* as "acciones mercantiles" ([20]), while SERRAO and his disciples stress the

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19) See e.g. R. SOHM - L. MITTEIS - L. WENGER, *Institutionen. Geschichte und System des römischen Rechts*[17], Berlin 1939, pp. 469ff.

20) E. VALIÑO, *Las «actiones adiecticiae qualitatis» y sus relaciones básicas en derecho romano*, *AHDE* 37 (1967), p. 356. Forerunners of this conception were J. BARON, *Die adjecticischen Klagen*, Berlin, 1882, pp. 183ff (speaking in this respect about "*Handels- und gewerberechtliche Bestimmungen*"); O. KARLOWA, *Römische Rechtsgeschichte* II, Leipzig

distinction between limited and unlimited liability (21). But the *actiones adiecticiae qualitatis* can also be regarded as legal reflections of various types of ancient Roman enterprises. Regarding the fact that enterprise in a modern sense, in contradiction to the simple one-man-firm, "evidences a minimal internal differentiation of functions" (22), this approach seems to be justifiable, since the actions in question were based *per definitionem* upon a differentiation, whereby at least the entrepreneur and the manager were different persons.

4. The simplest enterprise form in modern sense (which has namely a minimal organization structure) can be specified as **one level enterprise** (23). In this case a *magister navis* or an *institor* was appointed as manager by means of *praepositio* by the entrepreneur (*exercitor* or *negotiator* (24)) *sui iuris*. I define these

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1901, p. 1121 (according to him these three actions: "*gehören dem römischen Handels- und Gewerbsrecht an*"); P. FABRICIUS, *Der gewaltfreie Institor im klassischen römischen Recht*, Würzburg 1926, p. 9 (mentioning "*gewerbliche Klagen*").

21) See e.g. SERRAO, *op. cit.*, especially pp. 330ff; DI PORTO, *op. cit.*; PETRUCCI, *op. cit.*, pp. 314ff.

22) R.M. BUXBAUM, *Enterprise Form and Economic Function: A View from the United States of America*, in F. MÁDL (ed.), *The Legal Structure of the Enterprise*, Budapest 1985, p. 23.

23) For this qualification see *infra*, sub 5.

24) Maritime and certain overland entrepreneurs (namely *nautae, caupones, stabularii* and *argentarii*) are named in the sources *exercitor*, while for other overland entrepreneurs "*hat das römische Recht keine allgemeine technische Bezeichnung ... entsprechend der des exercitor*" (KARLOWA, *op. cit.*, II, p. 1126). The term *exercitor tabernae* used by many authors (e.g. E. COSTA,

persons as managers — to some extent differently as compared with DI PORTO's usage (25) — because they were not merely employees insofar being entitled, on the basis of the special act named *praepositio*, to make contracts *suo nomine* and in this way they were just those who had primarily legal relationship with third persons, although if being slaves they might not have sued or have been sued. On the other hand, I do not think that either the *magister navis* or the *institor* could be regarded as entrepreneurs since they were not independent businessmen, their *raggio d'azione* was determined by the *exercitor/negotiator* who preposed them (26). This special construction of Roman law is not to be scrutinized here as being reflected by the well-known *actio exercitoria* and the *actio institoria* respectively. It is enough to refer to the notorious fact that these actions involved, on the

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Le azioni exercitoria e institoria nel diritto romano, Parma 1891, p. 32; S. SOLAZZI, *Scritti di diritto romano* IV, p. 250; G. HAMZA, *Aspetti della rappresentanza negoziale in diritto romano*, *Index* 9 (1980), p. 204) cannot be found in the sources. I do not agree therefore with A. WACKE, *Die adjektizischen Klagen im Überblick*, *SZ* 111 (1994), p. 299, saying that "*exercitor heißt jeder, der ein Gewerbe betreibt*". Cf. my *Entwicklung der sich auf die Schiffer beziehenden Terminologie im römischen Recht*, *TR* 63 (1995), pp. 3f. It is perhaps better, *à faute de mieux*, to name these entrepreneurs, like also DI PORTO does, with the term *negotiator*, what occurs often in the sources, even if not being a technical term, either.

25) See *infra*, sub 5.

26) Some authors (e.g. T.J. CHIUSI, *Contributo allo studio dell'editto de tributoria actione* [= *Atti dell'Accademia Nazionale dei Lincei. Classe di Scienze Morali, Storiche e Filologiche. Memorie.* Serie IX, vol. III, fasc. 4], Roma 1993, p. 278; AUBERT, *op. cit.*, p. 71) speak about the tendency of growing autonomy of businessmen in power. However, the difference between the entrepreneurs in power and the managers (*magistri navis*, *institores*) should also be taken into account in this respect.

basis and in the sphere of the *praepositio*, unlimited (*in solidum*) liability of the entrepreneur.

5. In the one level enterprise the entrepreneurs (*exercitor*, *negotiator*) were persons *sui iuris* being in this way also owners of the enterprise ([27]), while their managers (*magister navis*, *institor*) could either be free persons outside of the family or sons or slaves ([28]). There were, however, also further enterprise types characterized by an **entrepreneur (*exercitor, negotiator*) *in potestate* doing business with his own *peculium***. Sons and slaves in question were of course no legal owners of their enterprise but they can be named entrepreneurs and *quasi owners*, and not simple managers as having considerable autonomy in their business activities ([29]). The *praepositus* was merely an employee of the entrepreneur, carrying out business activity with the *merx dominica* as a simple manager, while the *exercitor* and *negotiator in potestate* did it with their own *peculium* or *merx perculiaris* ([30]) and therefore their business

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27) The *exercitor navis* was not necessarily owner of the ship, he could be *conductor per aversionem* as well, see D. 14.1.1.15 - Ulp.

28) Many authors, e.g. G. MANDRY, *Das gemeine Familiengüterrecht* II, Tübingen 1876, pp. 212ff; P. FABRICIUS, *Der gewaltfreie Institor im klassischen römischen Recht*, Würzburg 1926, p. 15; E. VALIÑO, *op. cit.*, p. 384; DI PORTO, *op. cit.*, pp. 37ff) suppose that *magisters* or *institors* could originally be persons in power only, against this view see A. BÜRGE, *SZ* 106 (1988), p. 856 and WACKE, *op. cit.*, p. 296.

29) See similarly CHIUSI, *op. cit.*, p. 387; AUBERT, *op. cit.*, p. 9.

30) Cf. D. 14.3.11.7 - Ulp. ("*Si institoria recte actum est, tributoria ipso iure locum non habet: neque enim potest habere locum tributoria in merce*

activity was not controlled by the father or master. Liability for the contracts made by the *praepositus* depended upon the *praepositio*, while in the case of the *exercitor/negotiator in potestate* upon the degree of awareness (*voluntas*, *scientia*, *ignorantia*) of the father or master (31).

Sometimes these sons and slaves had a quite simple firm only, whereby not having appointed a manager (*magister navis* or *institor*) they fulfilled every function. However, the appointing of a manager by the entrepreneur (*exercitor*, *negotiator*) *in potestate* was the case regarded as typical by the pretorian edict as well as by the classical jurists (32). In both cases we can speak about a **two level enterprise** formed by the father/master and the entrepreneur under his power having usually also a manager. This construction is to be distinguished from the above treated one level enterprise characterized by an *exercitor/negotiator sui iuris*. It was also possible that a *servus peculiaris* of the son or a *servus vicarius* of the ordinary slave acted as entrepreneur, namely as *exercitor* or *negotiator*. This is a different form again

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dominica. quod si non fuit institor dominicae mercis, tributoria superest actio").

31) Consequently I disagree with DI PORTO's view who names managers also such sons and slaves (*op. cit.*, passim, see especially p. 387).

32) See D. 14.1.1.19 ("*Si is, qui navem exercuerit, in aliena potestate erit eiusque voluntate navem exercuerit, quod cum magistro eius gestum erit, in eum, in cuius potestate is erit qui navem exercuerit, iudicium datur*"); *eod.* 23 - Ulp. ("*Quamquam autem, si cum magistro eius gestum sit, dumtaxat polliceatur praetor actionem, tamen, ut Iulianius quoque scripsit, etiamsi cum ipso exercitore sit contractum, pater dominusve in solidum tenebitur*"); cf. also D. 14.1.5.1 - Paul, D. 14.4.1.pr., D. 14.4.5.3 - Ulp.

which can be named **three level enterprise**, formed by the father/master as legal owner, the son/ordinary slave as primary quasi owner and the peculiar/vicarious slave as entrepreneur and consequently secondary quasi owner (33). This structure can be even more complicated, when the slave entrepreneur (*exercitor/negotiator servus peculiaris/vicarius*) preposes an own manager (*magister navis / institor*).

On the basis of the sources, the two and three level enterprises can be divided, as it has already been demonstrated by DI PORTO (34), in three main groups, depending upon the degree of awareness of the father/master: he could have either *voluntas* or *scientia* or *ignorantia*. According to the sources, *voluntas* does not mean a will of initiative but an agreement concerning the son's or slave's business activity (35). In the case of his *voluntas*

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33) I follow the terminology of SERRAO, *op. cit.*, pp. 29ff. A different terminology is used by DI PORTO, *op. cit.*, p. 214 etc. who defines the enterprise of *servus peculiaris/vicarius exercitor/negotiator* as an '*impresa a due piani*'. I think, however, that the number of levels attributed to the various enterprises should be rather increased. Namely SERRAO's 'one level enterprise' could also be named 'two level', and the 'two level enterprise' could also be named 'three level' one etc., if also the managers (*magister navis* or *institor*) are regarded as an independent level of the structure.

34) DI PORTO, *op. cit.*, passim, especially pp. 235ff.

35) Cf. H.E. DIRKSEN, *Manuale Latinitatis fontium iuris civilis Romanorum*, Berolini 1837, s.v. *voluntas* 4; H. HEUMANN - E. SECKEL, *Handlexikon zu den Quellen des römischen Rechts*, Jena 1907, s.v. *voluntas*, c. It can be observed that will is conceived, in contradistinction to desire, as an ability to accept or deny also by B. SPINOZA, *Ethica ordine geometrico demonstrata*, 2.48. Nevertheless there are also other interpretations of *voluntas* in the sources (cf. Gai *Inst.* 4.72a), consequently this conception was not yet crystallized in Roman legal thinking, just like the conception of *scientia* was not crystallized, either, cf. D. 14.4.1.3 - Ulp.

the father/master of the *exercitor navis in potestate* was liable *in solidum*. The *actio in solidum* that could be instituted in this case is not identified in the sources with any special name, I refer to it "*utilitatis causa*" with the term '*actio quasi exercitoria*' (36). Consequently the *voluntas patris/domini* involved his unlimited liability. In other cases (namely when the father/master was merely *sciens* or even *ignorans*) only limited liability was imposed upon him. As for the *scientia*, it means mere awareness without consent, it could have also been named *patientia* (37). Having been the father/master *sciens*, it was the *actio tributoria* or *actio quasi tributoria* that could be applied, while in the case of his *ignorantia* the third person had to rest satisfied with the subsidiary actions *de peculio* or de *in rem verso* respectively.

6. In order to illustrate the complicated system of these variations I have attached a **synoptic table**. Though this table *prima facie* may seem much more complicated than the explications of the sources or those of the modern literature, I think, it helps to understand the problem.

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36) On the basis of the passages D. 14.1.1.20 (Ulp.) and D. 14.1.6.1 (Paul) DI PORTO specifies this action simply as *actio in solidum*. Though this term is used in the sources, I do not prefer it as it stands also for the *genus proximum* of the *actio exercitoria* and *institoria*.

37) Cf. note 35 and CHIUSI, *op. cit.*, pp. 337ff.

Table 1: Types of Individual Maritime Enterprises in Roman Law

	Structure	1 level ent.	2 level enterprise			3 level enterprise								
Hierarchy	*pater / dominus*	*exercitor* sui iuris	*pater / dominus*			*pater / dominus*								
	filius / servus ord.	[magist.er navis]	*exercitor in potestate*			*filius / servus ordinarius*								
	servus pec. / vicarius	[magister substitutus]	[magister navis]			*exercitor in potestate* (servus peculiaris / vicarius having an own peculium)								
	[manager]	—	[magister substitutus]			[magister navis]								
Master's awareness	*p. / d.*	[praepositio]	VOLVNTAS	SCIENTIA	IGNORANTIA	VOLVNTAS			SCIENTIA			IGNORANTIA		
	f. / s. ord.					voluntas	scientia	ignorantia	voluntas	scientia	ignorantia	voluntas	scientia	ignorantia
Unlimit. liability	*actiones in solidum*	exercitoria D. 14, 1 passim	*quasi exercitoria*[1] D. 14, 1, 1, 19—20. 23			*quasi exercitoria*[2] D. 14, 1, 1, 22	*quasi exercitoria* D. 14, 1, 1, 22	*quasi exercitoria* D. 14, 1, 1, 22	*quasi exercitoria* against filius only D. 14, 1, 1, 22			*quasi exercitoria* against filius only D. 14, 1, 1, 22		
Limited liability	*actio tributoria, actio quasi tributoria*		?	*quasi tributoria* D. 14, 1, 6 pr.		?	?	?	?	*quasi tribut.* de merce pec. servi pec./ vicarii ?	*quasi tribut.* de merce pec servi pec./ vicarii ?	?	?	
	*actio de peculio (or de in rem verso)**			D. 47, 2, 42 pr.	D. 14, 1, 6 pr. D. 47, 2, 42 pr.				de peculio filii /servi ordinarii D. 14, 1, 1, 22	de peculio filii /servi ordinarii ?	de peculio servi pec. / vicarii ?	de peculio filii servi ordinarii D. 14, 1, 1, 22	de peculio filii servi ordinarii ?	de peculio servi pec. / vicarii ?

* According to general rules found in D. 15, 1 and D. 15, 3 as well as in other sources, *actio de peculio* and *actio de in rem verso* respectively could always be instituted against the father or master when a *filius* or *servus* having *peculium* was obligated or *in rem versio* took place. According to Gai 4, 74 and 4, 74a, in the cases, in which *actio exercitoria*, *actio institoria* or *actio tributoria* could be instituted, both *actio de peculio* and *actio de in rem verso* were at the plaintiff's disposal. Therefore only the relevant passages are referred to in this table.

[1] The term *'actio quasi exercitoria'* is used in lack of a specific name concerning the *actio in solidum* against the father / master *volens* of an *exercitor navis in potestate*. — According to *Paul. sent.* 2, 6. also assumption of *receptum* liability by a *filius exercitor navis* renders the *pater familias volens* liable *in solidum*. According to G. PUGLIESE, *In tema di 'actio exercitoria'*, Labeo 3 (1957) p. 336, the same type is dealt with in the passage of D. 4, 9, 3, 3 (Ulp.). — According to D. 4, 9, 7, 6, it was possible to bring against the master *volens* of an *exercitor navis cauponae* or *stabuli* the *actio damni adversus nautas caupones stabularios*.

[2] The *'actio quasi exercitoria'* could also be instituted against the *filius volens*.

Table 2: Types of Individual Overland Enterprises in Roman Law

	Structure	1 level ent.	2 level enterprise			3 level enterprise								
Hier archy	*pater / dominus*	*negotiator* sui iuris	*pater / dominus*			*pater / dominus*								
	filius / servus ord.	[institor]	*negotiator in potestate*			*filius / servus ordinarius*								
	servus pec. / vicarius	—	[institor]			*negotiator in potestate* (servus peculiaris / vicarius having an own peculium)								
	[manager]	—	—			[institor]								
Master's awareness	*p. / d.*	[praepositio]	VOLVNTAS	SCIENTIA	IGNORANTIA	VOLVNTAS			SCIENTIA			IGNORANTIA		
	f. / s. ord.					voluntas	scientia	ignorantia	voluntas	scientia	ignorantia	voluntas	scientia	ignorantia
Unlimit. liability	*actiones in solidum*	institoria D. 14, 3 passim	—[1]			—[1]	—	—	—[1]			—[1]		
Limited liability	*actio tributoria, actio quasi tributoria*		—[1]	tributoria D. 14, 4 passim		—[1]	?	?	—[1]	*tributoria* de merce pec. servi pec. / vicarii[2] D. 14, 4, 5, 1[3]	*tributoria* de merce pec. servi pec. / vicarii[2] D. 14, 4, 5, 1[3]	—[1]	?	
	actio de peculio (or *de in rem verso*)*		—[1]		D. 14, 4, 3 pr.[3]	—[1]			—[1]	de peculio filii /servi ordinarii D. 14, 4, 5, 1[3]	de peculio servi pec. / vicarii[4] D. 14, 4, 5, 1[3]	—[1]	de peculio filii / servi ordinarii[5] D. 14, 4, 5, 1[3]	de peculio servi pec./ vicarii ?

* According to general rules found in D. 15. 1 and D. 15. 3 as well as in other sources, *actio de peculio* and *actio de in rem verso* respectively could always be instituted against the father or master when a *filius* or *servus* having *peculium* was obligated or *in rem versio* took place. According to Gai. 4. 74 and 4. 74a. in the cases, in which *actio exercitoria, actio institoria* or *actio tributoria* could be instituted both *actio de peculio* and *actio de in rem verso* were at the plaintiff's disposal. There fore only the relevant passages are referred to in this table

[1] According to D. 4, 9, 7, 6, it war possible to bring against the master *coloni* of an *exercitor navis cauponae* or *stabuli* the *actio damni adversus nautas caupones stabularios*.

[2] During the *tributio* also the claims of the *dominus* and the *servus ordinarius* are taken into account

[3] These passages speak about the liability for a *servus communis*.

[4] In this case all claims of the *servus ordinarius* can be deducted.

[5] Claims of the *servus ordinarius* cannot be deducted from the *peculium* of the *servus vicarius*, whereas those of the *dominus* can

In the table first of all maritime and overland "**sectors**" are distinguished ([38]). All other distinctions are of course made both within the maritime and within the overland sector. The table shows each possible variation, although, as a matter of course, not every one of them is documented in the sources ([39]).

The next distinction is made from the point of view of the **vertical structure** of enterprises: under this aspect the one level, the two level and the three level enterprises are distinguished as explained above.

The corresponding **hierarchy** is also shown in the table. There are two aspects of the hierarchy: from the point of view of the *status* you find in the table from above downwards the level of father/master — son/[ordinary] slave — peculiar/vicarious slave, while from the point of view of enterprise structure the levels of *exercitor/negotiator* — *magister navis/institor* — "*magister substitutus*" ([40]) are indicated, similarly from above downwards.

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38) DI PORTO distinguishes between *impresa di navigazione* and *impresa commerciale*. With regard to the fact that also maritime enterprises carried out generally commercial activity (see e.g. L. CASSON, *Ancient Trade and Society*, Detroit 1984, p. 27), I prefer the contradistinction made in the text.

39) The theoretically possible variations which cannot be documented with the sources are marked in the table with interrogation mark (if application of an action can be supposed e.g. with an *argumentum a minori ad maius*) or with a short rule (if a hypothesis is hazardous). Headings of variations being even theoretically impossible are hatched. See also the notes added to the table itself.

40) The *magister navis* had the right to appoint a further *magister*, see D. 14.1.1.5 - Ulp., this second *magister* is referred to as '*magister substitutus*'. This position is indicated in the table at the one level enterprise only. It is probable that the *institors* were not entitled to appoint a 'sub-

The subjective position ("**awareness**") of the father/master — and eventually of the son/ordinary slave — is displayed in a separate heading constituting the basis of distinction of the simple enterprise types. Besides the awareness degrees *voluntas*, *scientia*, *ignorantia* also the *praepositio* is included in this category being namely to some extent similar to the *voluntas*. *Praepositio* is in this respect the highest awareness degree as being a will of initiative (41).

As a result of all these distinctions (especially in consequence to a subtle distinguishing of awareness degrees) there are theoretically not less than 13 variations of enterprises both in the maritime and the overland sector respectively. Within these variations displayed in the table beside each other there is also a vertical distinction in terms of the father's/master's **liability**, which can be, as being determined by the degree of the father's/master's awareness, either unlimited (*actio exercitoria*, '*actio quasi exercitoria*', *actio institoria*) or limited (*actio tributoria*, *actio quasi tributoria*, *actio de peculio*).

The table renders obvious that the traditional conception of *actiones adiecticiae qualitatis* is somewhat simplified. The special

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institor', cf. HAMZA, *op. cit.*, p. 205. As for the structure of maritime enterprises, there was a differentiated hierarchy also under the *magister*, see for the details e.g. J. ROUGÉ, *Recherches sur l'organisation du commerce maritime en Méditerranée sous l'Empire Romain*, Paris 1966, pp. 218ff.

41) Nevertheless, the analogy of *praepositio* and *voluntas* should not be overestimated because there is a relevant difference between the entrepreneurs in power and the managers. This difference is somewhat neglected by CHIUSI, *op. cit.* (especially pp. 278, 342 and 386) and by AUBERT, *op. cit.*, pp. 60ff.

actio in solidum (named by me '*actio quasi exercitoria*') against the father/master of an *exercitor navis in potestate* is generally not mentioned in the handbooks of Roman law (42), moreover it is sometimes neglected even in the specialized literature.

On the other hand, the position of *actio tributoria* can be regarded from a new aspect as compared with the traditional conception. There are many discussions in the literature about the very character of this action but it is more useful to study the sources themselves without preconceptions. Studying the sources I cannot agree with the prevailing view in modern literature (43) according to which the *actio tributoria* was not an actual *actio adiecticiae qualitatis*. Some sources attest that this action was given in the case of bankruptcy only. The *tributio* was really a specific feature of *actio tributoria* in contradistinction to every other *actio adiecticiae qualitatis*. There are great many sources, however, which do not treat the *actio tributoria* as an eventual remedy (44) but as a normal, usual consequence of the *scientia patris dominive* (e.g. D. 14.1.1.20 - Ulp., D. 14.1.6.pr. - Paul.; D. 14.3.11.7 - Ulp.; D. 14.4.5.1 - Ulp.; Schol. *ad* Bas. 18.2.1 Steph. 8, etc.).

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42) As far as I know, of the contemporary handbooks of Roman law it is only M. KASER, *Das Römische Privatrecht* I[2], München 1971, p. 608[26] and G. PUGLIESE, *Istituzioni di diritto romano*[3], Torino 1991, p. 251, that mention this problem.

43) See e.g. KASER, *op. cit.*, I, p. 609. Against this view see CHIUSI, *op. cit.*, especially p. 374.

44) See e.g. DI PORTO, *op. cit.*, p. 54 ("*l'a. tributoria rappresenta soltanto l'ultima ed eventuale fase*").

I think that there are three grounds of the seemingly strange regulation concerning the *actio tributoria*: 1) liability is hereby *pro* (or rather *cum*) *viribus mercis peculiaris* (45) and this circumstance requires *in se* the procedure of *tributio*; 2) since the father/master is not entitled to deduct his claims as being one of the creditors (*primus inter pares*) only, also the correct distribution requests a bankruptcy procedure; 3) being hereby the son or slave, in contradiction to the *actio exercitoria* and *institoria*, not a manager but an entrepreneur, being therefore directly interested in the due fulfilment, his non-fulfilment was normally a consequence of bankruptcy. I think otherwise that actual bankruptcy was not a precondition of the *actio tributoria* and also a single creditor could bring this action (46).

In any case it is to be emphasized that *actio tributoria* as an action against the father/master of a *negotiator in potestate*, is similar to the above mentioned *actio in solidum* ('*actio quasi exercitoria*') against the father/master of an *exercitor navis in potestate*. This analogy is clearly expressed in the table (47).

Finally the table shows the *actio de peculio*, regarded usually as a general and subsidiary remedy against the masters having

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45) Gai. 4.74a.; D. 14.4.5.5sqq. - Ulp. Cf. E.G. HEUMANN, *De tributoria actione*, Ienae 1836, p. 53.

46) Cf. DI PORTO, *op. cit.*, p. 55.

47) This analogy is neglected in the literature. On the contrary, CHIUSI, *op. cit.*, p. 386 and AUBERT, *op. cit.*, p. 55 stress, not quite justly, the analogy between the *actio institoria* and the *actio tributoria*, leaving out of consideration the relevant difference between the entrepreneurs in power and the managers.

given *peculium* to their sons or slaves, from a relatively new side, namely as a legal reflection of a certain type of the limited liability enterprise. In this way also this action can be regarded as a commercial one.

7. Let us see more details now. As for the **one level enterprise**, it could be more complicated if being a **collective** one. In this case there are more than one entrepreneur appointing the same manager, namely a *magister* or an *institor communis*. This form is treated in the Digest both in the title about *actio exercitoria* and in that about *actio institoria*. First let us see two passages concerning the *actio exercitoria*:

> "*Si plures navem exerceant, cum quolibet eorum in solidum agi potest* [D. 14.1.1.25 - Ulp.], *ne in plures adversarios distringatur, qui cum uno contraxerit* [D. 14.1.2 - Gaius]: *nec quicquam facere, quotam quisque portionem in nave habeat, eumque qui praestiterit societatis iudicio a ceteris consecuturum* [D. 14.1.3 - Paul.]".
>
> "*Si tamen plures per se navem exerceant, pro portionibus exercitionis conveniuntur: neque enim invicem sui magistri videntur. Sed si plures exerceant, unum autem de numero suo magistrum fecerint, huius nomine in solidum poterunt conveniri*" [D. 14.1.4.pr.-1 - Ulp.].

These texts show clearly that *plures exercitores* were normally — except the case when the *exercitors* were at the same

time also *magisters* of their ship (*per se navem exerceant*) — liable *in solidum.* This rule of solidarity, which can be regarded exceptional as compared with most of the other entrepreneurs ([48]), was not based either upon the *societas* or upon the eventual co-ownership of *servus magister communis* but upon the joint *praepositio.* This solution is in accordance with the general rules relating to the *praepositio*: it is namely just the *praepositio* which determines the liability of the entrepreneur *praeponens* ([49]). It is another matter that *regressus* can be based either upon *societas* or *condominium.*

Let us see now the emergence of the problem in the *sedes materiae* of the *actio institoria* :

> "*Si duo pluresve tabernam exerceant et servum, quem ex disparibus partibus habebant, institorem praeposuerint, utrum pro dominicis partibus teneantur an pro aequalibus an pro portione mercis an vero in solidum, Iulianus quaerit. et verius esse ait exemplo exercitorum et de peculio actionis in solidum unumquemque conveniri posse, et quidquid is praestiterit qui conventus est, societatis iudicio vel communi dividundo consequentur, quam sententiam et supra probavimus*" (D. 14.3.13.2 - Ulp.).

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48) Also *socii argentarii* were probably liable *in solidum,* see PETRUCCI, *op. cit.*, pp. 313, ss. o.; see, however, against this view A. BÜRGE, *Fiktion und Wirklichkeit: Soziale und rechtliche Strukturen des römischen Bankwesens*, *SZ* 104 (1987), p. 526.

49) Cf. G.G. ARCHI, *La funzione del rapporto solidale,* now see in his *Scritti di diritto romano* I, Milano 1981, p. 399.

As attested by this text, in the sphere of the *actio institoria* solidarity was not as unanimously recognized as it was in the sphere of the *actio exercitoria*. Speaking about the liability for a *servus institor communis* preposed by more than one entrepreneur, Ulpian sketches, with reference to Julian, four variations: liability divided according to the co-ownership concerning the common slave, equally divided liability, liability divided according to the proportions in business property (determined by the different "investments" of the parners, i.e. by the different *peculia* given to the slave) and finally solidarity. Ulpian, following Julian's view, declared for the solidarity. It is interesting that in this respect both Julian and Ulpian referred to the example of the *actio exercitoria* and the *actio de peculio*. The mentioning of variations and the application of analogy was probably due to a controversy in classical law about solidarity in this case. Considering, however, the fact that Paulus did not hesitate any more to declare the solidarity in a similar case (50), we can conclude that this dispute was closed in the late classical law. The background of the long hesitation concerning the solidarity in the sphere of *actio institoria* in contradiction to the *actio exercitoria* is worth searching. In any case, the lack of solidarity meant a milder treatment of the overland entrepreneurs as compared to the maritime ones.

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50) "*Idem erit et si alienus servus communi merci praepositus sit: nam adversus utrumque in solidum actio dari debet et quod quisque praestiterit, eius partem societatis vel communi dividundo iudicio consequetur.* [...]" (D. 14.3.14 - Paul.).

It should also be cleared, what proportion was applied in the course of *regressus*. Obviously the variations mentioned by Ulpian are to be taken into account, namely the partners could theoretically be sued either *pro dominicis partibus* or *pro portione mercis* or eventually *pro aequalibus partibus* (this solution might have been applied, when the exact proportion could not be ascertained).

As for the **two level enterprises**, there are two aspects to be highlighted. On the one hand, I can refer to the fact revealed by SERRAO, namely that masters — entrepreneurs (*exercitor* or *negotiator*) also themselves, doing business with their *merx dominica* — often had more slaves doing business as entrepreneurs (*exercitor/negotiator in potestate*) with their separate *peculia*. In this way various horizontal and vertical structures came into being, characterized by divided and therefore limited liability (51). A further form of the division and limitation of liability was constituted by the *negotiator in potestate* who invested his *peculium* in various enterprises and therefore even he could have more separate *merces peculiares*. In such cases each creditor was entitled to the respective *merx peculiaris* only (52).

On the other hand, it is important to deal with the **collective two level enterprises**. This type is characterized by a slave entrepreneur being under the power of more than one master

51) See SERRAO, *op. cit.*, pp. 29ff.

52) See D. 14.4.5.15sq.; cf. DI PORTO, *op. cit.*, pp. 340f.

(*servus communis exercitor*, *servus communis negotiator*). Let us see two passages in this respect.

> "*Sed si servus plurium navem exerceat voluntate eorum, idem placuit quod in pluribus exercitoribus. plane si unius ex omnibus voluntate exercuit, in solidum ille tenebitur, et ideo puto et in superiore casu in solidum omnes teneri*" (D. 14.1.4.2 - Ulp.).

The co-owners having *voluntas* concerning the maritime enterprise activity of their common slave are liable *in solidum*, that means they are liable for the total debt and at the same time in form of solidarity.

> "*Sed si servus communis sit et ambo sciant domini, in utrumlibet ex illis dabitur actio: at si alter scit, alter ignoravit, in eum qui scit dabitur actio, deducetur tamen solidum quod ei qui ignoravit debetur. quod si ipsum quis ignorantem convenerit, quoniam de peculio convenitur, deducetur etiam id quod scienti debetur et quidem in solidum: nam et si ipse de peculio conventus esset, solidum quod ei deberetur deduceretur, et ita Iulianus libro duodecimo digestorum scripsit.*" (D. 14.4.3.pr. - Ulp.)

Here Ulpian speaks about a common slave having an overland enterprise. His co-owners may be sued either with the *actio tributoria* (in the case of *scientia*) or the *actio de peculio* (also in the case of *ignorantia*). It is a striking phenomenon that neither the unlimited liability nor the *voluntas* appear in these texts.

As far as the **three level enterprises** are concerned (namely when the entrepreneur was a *servus peculiaris* or a *servus vicarius*), the most striking feature is the high number of liability variations determined by the degree of the masters' awareness. In this sphere the awareness of both the *pater/dominus* and the *filius/servus ordinarius* was considered. In this sphere, with regard to the three degrees of awareness of both principals, nine variations are theoretically possible. As for the *exercitor navis servus peculiaris/vicarius*, Ulpian treats two of these variations:

> "*Si tamen servus peculiaris volente filio familias in cuius peculio erat, vel servo vicarius eius navem exercuit, pater dominusve, qui voluntatem non accomodavit, dumtaxat de peculio tenebitur, sed filius ipse in solidum. plane si voluntate domini vel patris exerceant in solidum tenebuntur et praeterea et filius, si et ipse voluntatem accomodavit, in solidum erit obligatus*" (D. 14.1.1.22).

If both principals had *voluntas*, both were liable *in solidum* (namely for the total debt and at the same time on the basis of solidarity), while if the son/ordinary slave had, but the father/master did not have *voluntas*, the latter was liable *de peculio* only, while the *filius volens* could be sued *in solidum*. It is remarkable that the case of *scientia* is not mentioned by Ulpian.

A more detailed analysis is given in another passage of Ulpian concerning the liability for *servus vicarius negotiator in potestate*:

"*Si vicarius servi mei negotietur, si quidem me sciente, tributoria tenebor, si me ignorante, ordinario sciente, de peculio eius actionem dandam Pomponius libro sexagensimo scripsit, nec deducendem ex vicarii peculio, quod ordinario debetur, cum id quod mihi debetur, deducatur. sed si uterque scierimus, et tributoriam et de peculio actionem competere ait, tributoriam vicarii nomine, de peculio vero ordinarii: eligere tamen debere agentem, qua potius actione experiatur, sic tamen, ut utrumque tribuatur, et quod mihi et quod servo debetur, cum, si servus ordinarius ignorasset, deduceretur integrum, quod ei a vicario debetur*" (D. 14.4.5.1 - Ulp.).

In this analysis there are three variations distinguished: 1) if the master is *sciens* and the *servus ordinarius* is (probably, on the basis of the context) *ignorans*, it is the *actio tributoria* that can be instituted against the master, and namely to the extent of business property (*merx peculiaris*) of the *servus vicarius* (53); 2) if the *dominus* is *ignorans*, however the *servus ordinarius* is *sciens*, the plaintiff can institute the *actio de peculio* against the *dominus* to the extent of the ordinary slave's *peculium* (54), whereby the master is entitled to deduct his claims against the vicarious slave; 3) if both the master and the ordinary slave have *scientia*, there

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53) The expression "*de peculio eius*" has been discussed in the literature since the glossators, see DI PORTO, *op. cit.*, pp. 315ff.; CHIUSI, *op. cit.*, pp. 383f.

54) DI PORTO names this action *actio tributoria de peculio ordinarii*. The ordinary slave's *peculium* contains, of course, the *vicarius* himself and his *peculium* as well, see D. 15.1.4 - Pomp., D. 15.1.6 - Cels., D. 15.1.17 - Ulp.; cf. DI PORTO, *op. cit.*, pp. 272ff., 292.

are two alternative actions at the plaintiff's disposal: namely either the *actio tributoria* can be instituted to the extent of the vicarious slave's business property or the *actio de peculio* can be chosen to the extent of the whole *peculium* of the ordinary slave, hereby, however, deduction is again possible.

As for the passage analysed above, it can also be observed that Ulpian gives here a clear evidence of the existence of **collective three level enterprises**. I think, this type represents, *dans son genre*, the most complicated enterprise structure in ancient Rome. The quantitative level of abstraction reached hereby could hardly be increased.

8. The complicated but logical system of the legal structure of the enterprises in ancient Rome is imposing, like a crystal-lattice. The number of variations attested by the sources — not striving otherwise to reach the totality of the possible combinations — is surprisingly high. This *embarras de richesse* is only partly illustrated by the synoptic table as it is only the individual enterprise types that are indicated there (55). As asserted justly by Henri ERMAN, *actiones adiecticiae qualitatis* concerning the vicarious slave "*ont au plus haut degré ce*

55) It is difficult to ascertain the exact number of variations as the calculation can be executed on the basis of different considerations. According to the table there are — from the point of view of the liability determined by the degree of the master's awareness — theoretically 26 variations of the individual enterprise, and one half of them is explicitly documented in the sources. It is a further question, to what extent the various collective, vertical and horizontal structures and their combinations are to be considered in the calculation.

caractère quasi mathématique, que Leibniz attribuait aux créations juridiques des Romains" (56). There are, however, some minor blemishes, so to say, *Schönheitsfehler* of the logic of this regulation.

The most striking problem is the lack of unlimited liability in the sphere of the two and three level overland enterprises. This anomaly is in a way hidden by the rational system of awareness degrees (*voluntas — scientia — ignorantia*) determining the liability with a strict and coherent logic (57). By virtue of this system the lack of unlimited liability appears as a natural consequence of the lack of *voluntas patris/domini*. Indeed, in the texts treating the two and three level overland enterprises, there is only a quite exceptional trace of *voluntas patris/domini*: according to a passage of Ulpian (D. 4.9.7.6) it was possible to bring the *actio damni adversus nautas caupones stabularios* against the master *volens* of an *exercitor navis*, *cauponae* or *stabuli* (58).

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56) H. ERMAN, *Servus vicarius*, Lausanne 1896, p. 392. According to LEIBNIZ (quoted by E. ALBERTARIO, *Il diritto romano*, Roma 1940, p. 17) "*Post scripta geometrarum nihil exstare, quod vi ac subtilitate cum Romanorum iuris consultorum scriptis comparari possit: tantum nervi inest, tantum profunditatis*".

57) Nevertheless Ulpian sincerely discloses the social motivation for the more strict regulation concerning the maritime enterprises, see D. 14.1.1.20 (*quia ad summam rem publicam navium exercitio pertinet*). Cf. D. 4.9.1.1, D. 4.9.3.1, D. 14.1.1.pr., D. 14.1.1.5 (Ulp.). Cf. C. FADDA, *Istituti commerciali del diritto romano*, Napoli 1903, p. 148.

58) It is probably not a mere chance, that the only overland entrepreneurs in relation to whom *voluntas patris/domini* is mentioned are just the *exercitores cauponae stabuli*. Under many aspects these entrepreneurs are close to the maritime ones (*exercitor navis*). It is relevant in this respect that *caupones stabularii* and *argentarii* were named *exercitor*, and that there were two edicts relating to *nautae caupones stabularii* imposing just upon these

The rules concerning the *scientia patris/domini* are not less strange or they are perhaps even stranger. As shown above, *scientia* involved as an appropriate consequence the *actio tributoria*. Although this action is whithout any doubt an appropriate, *sui generis* consequence of the *scientia*, it does not seem to be an ordinary institution of liability. Nevertheless, as I have already referred to it above, I do not join the *communis opinio doctorum* in this respect. I do not think that the *actio tributoria* should be expelled from the group of *actiones adiecticiae qualitatis*. I think to have rendered plausible that the bankruptcy procedure, namely the *tributio mercis peculiaris* was an appropriate, even a more or less necessary consequence of the liability of *pater/dominus sciens*. No doubt, *actio tributoria* had originally a quite narrow sphere of application. It was originally an action for the case of *dolus* committed by the *pater/dominus* during the *tributio* which took place in consequence to the bankruptcy of an overland *negotiator in potestate* carrying out commercial activity *sciente patre/domino* with the *merx peculiaris*. After a long-lasting and gradual development, however, *actio tributoria* became a general action against the *pater/dominus sciens* of overland *negotiator in potestate*. At this

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categories special liability (namely *receptum* and quasidelictual liability, not speaking about the *receptum argentarii*). Considering these circumstances it is imaginable that the *actio in solidum* (named by myself '*actio quasi exercitoria*'), which is mentioned in the sources in relation to *exercitor navis* only (D. 14.1.1.19ff), could originally be instituted against the father/master *volens* of *exercitor cauponae stabuli in potestate* as well. This hypothesis, however, cannot be proved. Cf. my *Entwicklung der sich auf die Schiffer beziehenden Terminologie im römischen Recht*, *TR* 63 (1995), p. 4.

stage of the development (reached in the classical law) (59) it is neither the ancient requirement of *dolus patris/domini* nor the requirement of bankruptcy procedure named *tributio* that represent the actual problem of the *actio tributoria* (60), but rather the fact that even when the *actio tributoria* was already extended to every kind of overland enterprises (D. 14.4.1.1 - Ulp.), the jurists dit not want to apply it against the *pater/dominus sciens* of an *exercitor navis in potestate* (61). Also Ulpian hesitated to do so (62). It was only Paulus who inclined to extend the *actio tributoria* to maritime enterprises, he named, however, this action *actio quasi tributoria*:

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59) I suppose that the stages of this development were as follows: 1) it was already Labeo who gave the *actio tributoria* also against the *pater/dominus* refusing to carry out the *tributio* (D. 14.4.7.4 - Lab.-Ulp.); 2) Pedius extended the field of application of the *actio tributoria "ad omnes negotiationes"* (D. 14.4.1.1 - Ped.-Ulp.); 3) as attested by Julian (D. 14.4.8), the *actio tributoria* became an *actio rei persecutoria*; 4) some passages (D. 14.4.1.pr., D. 14.4.5.6, D. 14.4.7.pr. - Ulp.) speak about the father/master as a *creditor extraneus* invited to the *tributio*; 5) *tributio* appears in the D. 14.4.5.5 (Ulp.) as a consequence of the *actio tributoria*. Cf. the somewhat different opinion of CHIUSI, *op. cit.*, pp. 347ff.

60) As for the necessity of the *tributio*, see *supra*, sub 6.

61) Cf., somewhat differently, PUGLIESE, *op. cit.*, p. 331 and CHIUSI, *op. cit.*, p. 333.

62) "[...] *sed si sciente dumtaxat, non etiam volente cum magistro contractum sit, utrum quasi in volentem damus actionem in solidum an vero exemplo tributoriae dabimus? in re igitur dubia melius est verbis edicti servire et neque scientiam solam et nudam patris dominive in navibus onerare neque in peculiaribus mercibus voluntatem extendere ad solidi obligationem. et ita videtur et Pomponius significare, si sit in aliena potestate, si quidem voluntate gerat, in solidum eum obligari, si minus, in peculium*" (D. 14.1.1.20 - Ulp.).

"*Si servus non voluntate domini navem exercuerit, si sciente eo, quasi tributoria, si ignorante, de peculio actio dabitur*" (D. 14.1.6.pr.).

The cautious treatment of the awareness degrees and especially of the *actio tributoria* discloses the *reservatio mentalis* of the whole regulation. Formally there was a uniform system of criteria, namely the awareness degrees of the father/master (*voluntas*, *scientia*, *ignorantia*), upon which his liability relied. This logical system, however, hides in a sophisticated way the different treatment of overland and maritime enterprises, whereby the latter were judged more severely (63). It is hardly a mere chance that the sources avoid speaking about *voluntas* of the father/master of *negotiator in potestate*, and that the *scientia* of the father/master of *exercitor navis in potestate* is not mentioned in the sources but rather seldom. Obviously the verifying of the exact degree of awareness did not depend upon the actual *voluntas* or *scientia*, but upon the type of enterprise in order to agree to the corresponding action. In conformity with this differentiation, *voluntas*, if it was necessary, could easily be judged as *scientia* and *vice versa*. I suppose that also the verifying of *ignorantia* was so flexible, or if you prefer, so arbitrary (64).

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63) Cf. note 57.

64) As for the arbitrary interpretation of *scientia*, see the passage D. 14.1.1.20 i.f. (Ulp.). It is a realistic conclusion that is drawn in a scholion of the Basilica (*ad* B. 18.2.1 - Steph. 8), according to which in the sphere of maritime enterprises *voluntas* implies the liability *in solidum*, while in the case of overland enterprises only the *tributio* is implied. (Cf.

References to the awareness of the father/master are therefore somewhat hypocritical. Their actual function was to give an acceptable and *prima facie* reasonable motivation of the different treatment. Awareness, as a merely subjective, hardly provable fact, was very suitable for such purposes also in the practice. This point of view can help to understand the actual background of controversies concerning the extension of *actio tributoria* to maritime enterprises. I think that the *actio tributoria* could have been an easy way for the maritime entrepreneurs to limit their liability and the jurists' hesitation aimed to exclude this opportunity.

There is also a further *Schönheitsfehler* in the logical system. For the case of *negotiator in potestate sciente patre/domino* a special action was given by the praetor, the *actio tributoria*, while for the case of *exercitor navis in potestate volente patre/domino* only a special kind of the *actio exercitoria* was applied. Moreover, as far as the *actio exercitoria* is concerned, Ulpian declared that it was not relevant (*parvi autem refert*) whether the *exercitor* was *pater familias* or *filius familias* or even *servus* (D. 14.1.1.16). He did not consider the *actio in solidum* against the father/master of an *exercitor navis in potestate* as a different action or at least a special kind as compared to the habitual *actio exercitoria*. I consider the underestimation of the difference between the two forms of *actio exercitoria* problematical,

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P. HUVELIN, *Études d'histoire du droit commercial romain*, Paris 1929, p. 167; ROUGÉ, *op. cit.*, p. 390; CHIUSI, *op. cit.*, p. 325.

especially with regard to the independent existence of an action concerning the *negotiator in potestate*, namely the *actio tributoria*. In any case it is a problem which is extremely seldom studied, however worth researching.

Let me make two short final remarks. Firstly, I agree with the Romanists quoting the adage *nihil* (or at least *parum*) *novi sub sole*. I think there are quite few modern jurists who know e.g. that limited liability company — as it has been imposingly demonstrated by DI PORTO — existed also in ancient Rome, namely in the form of *exercitor servus communis non volentibus dominis* as well as of *servus communis negotiator*. The limitation of the entrepreneur's liability by means of complicated enterprise structures is not an invention of modern business law. On the other hand, outsiders but sometimes also the Romanists themselves think that there is nothing to be discovered in the field of Roman law, having not changed for one and a half thousand years, having, however, continuously been studied by scholars for more than 900 years. I hope to have shown at least that there are great many crucial problems even within the *institutiones* of Roman law which deserve the attention of the present day scholars.