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FIDUCIA CUM CREDITORE RISK MANAGEMENT AND “DOUBLE OWNERSHIP”*

Credit risk represents one of the many problems that the legal profession is called upon to solve. It has been so from ancient times and the instruments used to deal with it then are applied even today. One of them, experiencing a renaissance in the last 20 years, is fiducia cum creditore. It has been introduced into Croatian law in 1996, followed by discussions about the nature of ownership transfer it is founded on. In an effort to provide a historical basis for further argument, the author investigated the patrimonial positions of creditor and debtor in Roman law fiducia cum creditore. In these considerations, emphasis is put on the parties' interests and the internal element of risk, especially elaborated in the matter of furtum fiduciae.

Key words: *Fiducia. Fiducia cum creditore. Risk Management. Credit Risk. Divided Ownership. Double Ownership.*

I

One of the very popular terms in modern business world is risk management. The abundant literature on the topic is growing almost daily. One can see all around posters for conferences held by famous manager-gurus. They offer to instruct people involved in decision making processes on how to predict, perceive and handle risk in their businesses. Solutions are sought as the problem becomes ever more prominent with the economic crisis taking its toll on world markets. Among its causes,

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credit risk and its improper handling have often been pinpointed as the prime culprit.¹

Credit risk is the principal form of risk the legal order is concerned with. It has been so for centuries and is the same nowadays. Legal systems introduced long ago instruments to mitigate it and prevent losses in business operations. Offhand, the instruments by which the obligation is strengthened fall into mind: fiduciary transfer of ownership, pledge, hypothec and surety.

Although they represent elementary tools in providing security for contractual obligations, their importance remains unparalleled up to today. Moreover, one of them, fiduciary transfer of ownership, either in the forms derived from Roman *fiducia cum creditore* or in the form of trust,² experienced a renaissance in the last 20 years and is still on the rise.³ This especially applies in post-socialist countries in Central Europe. With the reinstatement of the Roman law based private law system and private ownership, *fiducia cum creditore* found its way into these systems almost from the outset. Primarily, the process occurred by the scholarly transposition of German *Sicherungsübereignung* as a natural result of the great influence German legal literature and doctrine have had in central Europe. In some countries, it resulted in legislative changes, creating closed and defined set of rules as in Croatia;⁴ in others, it relied on accepted practice, with partial regulation in the codes.⁵

The strongest possible security ensured by the transfer of title on the property corresponded with the initial insecurity within the new markets and the need to secure the interests of wanted foreign investors.⁶ The

¹ On deficiencies in securitisation practice see e.g. Greenspan Testimony on Sources of Financial Crisis (before the House Committee of Government Oversight and Reform), October 23, 2008, *Wall Street Journal*, source: <http://blogs.wsj.com/economics/2008/10/23/greenspan-testimony-on-sources-of-financial-crisis/>, last visited March 19, 2009.

² The use of trust for security purposes on the continent is limited to Luxembourg, one of the European financial centres. Amp. eds. A. Prüm, C. Witz, *Trust & fiducie. La Convention de La Haye et la nouvelle législation luxembourgeoise*, Paris 2005.

³ It has been in use also outside the continent, e.g. in South Africa, in practice, until the judicial decision in 1998. See C.G. van der Merwe, "Modern Application of the Roman Institution of *Fiducia Cum Creditore Contracta*", ed. L. Vacca, *La Garanzia nella prospettiva storico comparatistica*, Torino 2003, 327 etc.

⁴ The Law of Enforcement, *Official Gazette of the Republic of Croatia*, No. 57/96, 29/99, 42/00, 173/03, 151/04, 88/05 and 67/08; see also for Montenegro, Law on the Fiduciary Transfer of Ownership, *Official Gazette of the Republic of Montenegro*, No. 23/96; and Slovenia, with restriction to movables and rights, Law of Property Code, *Official Gazette of the Republic of Slovenia*, No. 87/02.

⁵ One example represents Poland, see P. Stec, "Fiducia in an Emerging Economy", ed. W. E. Cooke, *Modern Studies in Property Law*, vol. 2, Oxford 2003, 43.

⁶ To tackle these questions the European Bank for Reconstruction and Development proposed the Model Law on Secured Transactions in 1994 with the single debt security instrument (charge). It primarily influenced legislation in Hungary and Slovakia.

financial power and influence of major banks guaranteed its spreading and survival, but the trend was not restricted to new economies. The use of the fiducia model was implemented in European law with the Financial Collateral Directive (47/2002/EC) as well.⁷ One of the two modes of security it envisaged was the transfer of title of the financial collateral to the collateral taker (*fiduciary*).

II

The structure, by which the inherent risk of non-payment is diminished to the greatest extent, makes *fiducia cum creditore* such an exceptional instrument. It plays a decisive role in its choice, reflecting the active element in risk management. The selection of specific remedy, *fiducia*, also represents the external element of risk regarding the instrument, as it serves the purpose of security.

On the other side, the rules on the duty to take account of the risk outcome, in regard to the collateral itself, are equally important factors in the overall management policy and represent the internal element of risk. They provide the basis upon which actions can be programmed. They regulate the authority of both parties in regard to the fiduciary property, prior to and after the default.

The key element that defines both risks lies in the nature of the ownership transfer. In Croatian law two approaches to this problem have been applied. The first one, which was introduced through legislation in 1996, and is also valid at the moment, gives the fiduciary unlimited powers in regard to the transferred property.⁸ He has the right to sell the object even before default and can also acquire “full” ownership through prescribed procedure in the event of default.

The second approach, closer to the traditional mechanisms of real property law, in force from 2003 to 2005, envisaged fiduciary transfer as more similar to other forms of security rights (pledge and hypothec).⁹ It made a shift from greater protection of the creditor to the protection of the debtor with respect to cases of abuse of right in practice. Thus, the

⁷ This directive has been implemented in Croatian law by the Law on Financial Securities, *Official Gazette of the Republic of Croatia*, No. 76/97.

⁸ See J. Barbić, “Sudsko i javnobilježničko osiguranje tražbine vjerovnika pri jenosom vlasništva na stvari i prijenosom prava” [The Judicial and Notarial Debt Security by the Transfer of the Property and Rights], *Novo ovršno i stečajno pravo*, Zagreb 1996, 99 etc.; M. Dika, *Gradansko ovršno pravo* [The Law of Civil Enforcement], I, Zagreb 2007, 797 etc.

⁹ See N. Gavella *et al.*, *Stvarno pravo* [The Law of Real Property], Zagreb 1998, § 14, 592 etc.

transfer of possession to the fiduciary was forbidden and the possibility of enforcement was restricted to sale.

The change of the Law of Enforcement in 2003, while falling in line with the Law on Ownership and Other Property Rights,¹⁰ and its doctrinal explanations,¹¹ introduced the division into prior and posterior ownership. The fiduciary held prior ownership, as it was deemed to end after the payment of debt, and the fiduciary debtor had registered posterior ownership, as he was supposed to regain the full title to the object after he would defray the debt. With this, the emphasis in Croatian *fiducia cum creditore contracta* was put on the patrimonial relationship regarding the object of *fiducia*, as opposed to the previously, and subsequently reinstated in 2005, purely obligatory concept of fiduciary agreement.

The arguments put forward in this exchange are however strictly doctrinal and practical. They lack a deeper historical perspective we find indispensable for proper understanding of the institution. With respect to this, our effort is aimed at the inspection of the structure of Roman *fiducia cum creditore* and the mutual relationship of *fiduciant* and fiduciary to find confirmation/refutation on the topic of “double ownership” in *fiducia*. In these deliberations, special attention will be given to the problem of risk which is particularly revealing for the patrimonial positions of the parties. With this said, we turn our attention to the sources of Roman law.

III

Questions regarding the proprietary aspect of fiduciary relationship in Roman law have been rather often argued in the literature.¹² As the

¹⁰ The Law on Ownership and Other Property Rights, *Official Gazette of the Republic of Croatia*, No. 91/96, 68/98, 137/99, 22/00, 73/00, 114/01, 79/06, 141/06, 146/08 and 38/09.

¹¹ Main interest was to harmonize the regulation in the Law of Ownership and Other Real Rights, Article 34, and the Law of Land Registry, Article 32, with the rules on fiduciary ownership in the Law of Enforcement. In theoretical conception there is a visible influence of German *Anwartschaftsrecht*. See N. Gavella, 604, 610.

¹² Cf. the literature on *fiducia*: H. Dernburg, *Das Pfandrecht nach den Grundsätzen des heutigen römischen Rechts*, I., Leipzig 1860; H. Degenkolb, “Ein pactum fiduciae”, *Zeitschrift für Rechtsgeschichte* [hereinafter ZRG] 9/1871; P. Oertmann, *Die Fidejuzia im römischen Privatrecht*, Berlin 1890; R. Jacquelin, *De la fiducia*, Paris 1891; Manigk, “Fiducia”, *Pauly Wissowa, R.E.*, VI, 2, Stuttgart 1909; C. Longo, *Corso di diritto Romano, La fiducia*, Milano 1933; W. Erbe, *Die fiducia im römischen Recht*, Weimar 1940; M. Kaser, “Geteiltes Eigentum im älteren römischen Recht”, *Festschrift Paul Koschaker*, I., Berlin 1939, 445 etc.; *idem*, “Die Anfänge der manumissio und das fiducia risch gebundene Eigentum”, *Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung* [hereinafter SZ] 61/1941; *idem*, “Neuen Studien zum altrömischen Eigentum”, SZ 68/1951, 131; *idem*, *Eigentum und Besitz im älteren römischen Recht*,

foundation for classical law seemed firmly established, and widely accepted, in the form of unitary ownership on the side of *creditor fiduciarius*, the focus has mostly switched to the early development of the institution. In the archaic era, the time before and around the enactment of Law of XII Tables, with enough space for various conjectures, the lack of sources spurred the development of a number of different theories. The evidence for the debtor's patrimonial position was sought in the legal protection he would be granted after the payment of debt. Therefore, deciding on the right to sue and the existence of appropriate *actio* defined the outline of legal relationships and proprietary powers.¹³ If the debtor could claim the object, missing *remancipatio*, with special *legis actio*, or *rei vindicatio*, it would be a proof of his ownership rights or divided ownership. Also from another angle, the creditor's authority in the case of default, if it is taken that he couldn't take or sell the object without the special clause, would witness the same.¹⁴

Considering risk, it is extremely difficult to make any propositions concerning cases from classical law. Exception could be made for the possible loss of an object which would fall on the creditors account, specifically in line with older theories on primal *fiducia* as sale-for-repurchase.¹⁵

Köln Graz 1956; *idem*, "Studien zum römischen Pfandrecht", *Tijdschrift voor Rechtsgechiedenis* [hereinafter TR] 44/1976, 233–289; *idem*, "Studien zum römischen Pfandrecht II, Actio pignoratitia und actio fiduciae", TR 47/1979, 195–345; *idem*, "Besitzpfand und 'besitzloses' Pfand (Studien zum römischen Pfandrecht III)", *Studia et Documenta Historiae et Iuris* 45/1979, 1–92; *idem*, "Über relatives Eigentum im ältrömischen Recht", SZ 102/1985; A. Burdese, *Lex commissoria e ius vendendi nella fiducia e nel pignus*, Torino 1949; F. Wubbe, "Usureceptio und relatives Eigentum", TR 28/1960, 13 etc.; P. Frezza, *Le garanzie delle obbligazioni, II. Le garanzie reali*, Padova 1963; G. Diósi, *Ownership in Ancient and Preclassical Roman Law*, Budapest 1970, 116 etc.; N. Bellocci, *La struttura del negozio della fiducia nell'epoca repubblicana, I. Le nuncupationes*, Napoli 1979; *idem*, *La struttura della fiducia, II. Riflessioni intorno alla forma del negozio dall'epoca arcaica all'epoca classica del diritto romano*, Napoli 1983; B. Noordraven, *Die Fiduzia im römischen Recht*, Amsterdam 1999; J. P. Dunand, *Le transfert fiduciaire: "donner pour reprendre"*, *Mancipio dare ut remancipetur*, Bâle Genève Munich 2000.

¹³ It is surely one of the most debatable questions in the scope of *fiducia*, although recent authors hold the line of classical approach with strictly morally obligation to remancipate. Hence, the last big upheaval in the literature was caused almost 50 years ago by Wubbe's article on *usureceptio* and *relatives eigentum*. See F. Wubbe, 2 etc.; B. Noordraven, 286 etc. For older literature and proposed solutions see P. Oertmann, 215 etc.

¹⁴ For so called "Bewahrungs" Theorie see H. Dernburg, 19; A. Pernice, *Labeo* 3/1892, 139; P. Oertmann, 196 etc.; A. Burdese, 10 etc.; J. P. Dunand, 125 etc.

¹⁵ Cf. J. Wigmore, "The Pledge Idea: A Study in Comparative Legal Ideas", III, *Harvard Law Review* 11/1897 1898, 31; *idem*, "The Pledge Mortgage Idea in Roman Law: A Revolutionary Interpretation", *Illinois Law Review* 36/1941 1942; 376 etc.; M. Kaser, (1976), 234, fn. 8.

This development is however temporally limited with the introduction of obligatory *actio fiduciae* and consolidation of procedure, and as we have already tackled the problem in another place, we shall not dwell on it any further here.¹⁶ In regard to the text that follows, as historical continuation of early developments, we can conclude that it seems very probable that in the early stages the debtor kept a high level of rights towards the object of *fiducia*, limiting the creditor in his dispositions, especially after payment.

IV

The other approach to the problem of double ownership relied more on the surviving sources and thus focused on the classical development. It tried to incorporate the implications of obligatory duties on patrimonial positions of the parties. Doing so, it envisaged two sorts of ownership, or more correctly two forms of patrimony – legal and economical.¹⁷ While the person who gave the thing remained the nominee of its economic substance, the other who has accepted it by *mancipatio* or *in iure cessio*, had legal title to it.

At first sight, it resembles the duality existing in common law jurisdictions between legal and equitable title. It even falls in line with Pringsheim's observations on similarities in Roman and English property law and the fact that the notion of ownership, so familiar to us today, defined by classical jurisprudence and transferred to our days by Justinian, was nonetheless actual and lived to its full extent for only a relatively short time in Roman history.¹⁸ Roman *fiducia* however misses the duality of regulation in English law so there couldn't be such strong comparisons, but the economical element of a debtor's position cannot be dismissed.

Consequently, the legal effects and authorities coming from the economical substance pertaining to the debtor will be scrutinized, although with the necessary previous overview of the creditor's stance. The analysis, dealing at the same time with the problem of risk, focuses on the elements of legal relationship between the transfer of ownership in the form of *mancipatio* or *in iure cessio* and its end.

¹⁶ Cf. T. Karlović, "Okolo pravne zaštite fiducije rimskog civilnog prava" [On the Legal Protection of Fiducia in *ius civile*], *Zbornik Pravnog fakulteta u Splitu* 4/2008, 885 etc.

¹⁷ See, also for earlier literature, J. P., Dunand, 193 etc.

¹⁸ See F. Pringsheim, "Legal Estate and Equitable Interest in Roman Law", *Law Quarterly Review* 59/1943 (reprint: *Gesammelte Abhandlungen*, I., 1961), 244.

V

After the transfer has taken place, the fiduciary acquires *dominium ex iure quiritium* on the object. Accordingly, he is supposed to have all the rights a usual owner has. The first and foremost entitlement is the right to use *rei vindicatio*. It is attested in D. 24.3.49.1. where Paulus writes that the creditor can obtain the possession of the transferred thing with success, even though it has been afterwards given as dowry.¹⁹ The formal requirement that stands on the creditor's side, the formal transfer of ownership, will prevail over the debtor's disposition.

Also, the fiduciary has the right to use *condictio furtiva*, pertinent to the owner, witnessed by Ulpianus, D. 13.7.22.pr.²¹ It states that the creditor can use not only the *actio furti*, but *condictio* as well. Since it will be seen later on that the debtor can use *actio furti* as well, the second sentence, expressly mentioning *condictio*, points to the right exclusively reserved for the owner.²²

This text is valuable for the estimation of risk. Even though the creditor is liable for the theft and loss of thing, the debtor will not be absolved from his debt, but has the right to sue the creditor. The creditor has the right to sue the thief and get the fine, because if he doesn't suc-

¹⁹ D. 24.3.49.1: *Fundus aestimatus in dotem datus a creditore antecedente ex causa pignoris <fiduciae> ablatus est.* The same in *Frag. Vat.* 94, only with words "*ex causa fiduciae*", by which there is no doubt to its authenticity. More on the rest of the text of *Frag. Vat.* 94 see B. Noordraven, 168 etc.

²⁰ Also, one more text by Paulus can be mentioned in this context. It is the commentary on the application of *lex Iulia de vi privata* in P.S. 5.26.4. Some older authors, Oertmann and Jacquelin, had held that it proves the right to *rei vindicatio*, but Noordraven elaborately explained to the contrary that it doesn't warrant a right to *rei vindicatio*, but only a physical seizure. See P. Oertmann, 165; R. Jacquelin, 173; Manigk, 2306; W. Erbe, 31; E. Levy, *West Roman Vulgar Law, The Law of Property*, Philadelphia 1951, 214 etc.; B. Noordraven, 160 etc.

²¹ D. 13.7.22pr.: *Si pignore subrepto <fiducia subrepta> furti egerit creditor, totum, quidquid percepit, debito eum imputare Papinianus confitetur, et est verum, etiamsi culpa creditoris furtum factum sit. Multo magis hoc erit dicendum in eo, quod ex condictione consecutus est.* ... For its original relation to *fiducia* see O. Lenel, "Quellenforschungen in den Edictcommentaren", SZ 3/1882, 108; also, especially on the problem of interpolation regarding "*etiamsi factum sit*", further C. Longo, 802; W. Erbe, 33, 54 etc., 79; H. Kreller, "Formula fiduciae und Pfandedikt", SZ 62/1942, 198; H. Ankum, "Furtum pignoris and furtum fiduciae im klassischen römischen Recht I", *Revue internationale des droits de l'antiquité* [hereinafter RIDA] 26/1979, 127 etc.; *idem*, "Furtum pignoris and furtum fiduciae im klassischen römischen Recht II", RIDA 27/1980, 123 etc.; M. Kaser, "Furtum pignoris" und "furtum fiduciae", SZ 99/1982, 233 etc.; B. Noordraven, 208 etc.; J. P. Dunand, 205.

²² On the use of *condictio ex causa furtiva* M. Kaser, *Das römische Privatrecht*, I, 618 (also for further literature see fn. 49, 50, 51); W. Pika, *Ex causa furtiva condictio im klassischen römischen Recht*, Berlin 1988; R. Zimmermann, *The Law of Obligations*, Cape Town 1990, 941 etc.

ceed in the proceedings he will have completely lost the security. This follows the reasoning *cuius periculum, eius commodum*, but as Lenel has pointed out, the duty to compensate the amount of punitive damages he received mitigates the application of the rule to prevent an unjust result where the creditor would pay normal damages to the debtor and later collect multiple amounts from the thief.²³ For any such *superfluum*, the debtor would have *actio fiduciae*.²⁴

Regarding the position of the fiduciary, it can be furthermore pointed to the texts by Paulus, *Sententiae*, 2.13.6, and Papinianus, D. 33.10.9.2.,²⁵ confirming the right of the creditor to grant the object of fiducia by *legatum per vindicationem*.²⁶ Even though the right of legatees is restricted by *actio fiduciae* available to the debtor, this restriction is strictly obligatory in effect. Of the other powers, these are the right to free a slave, D. 19.1.23.,²⁷ and a disputed right to sell a thing given in fiducia before the debt is due, *Fragmenta Vaticana* nr. 18.²⁸

VI

Regarding the position of the debtor, if we speak in terms of patrimonial attribution, there is a list of powers he can exercise regarding the object of fiducia. The question here is how they reflect his proprietary position. Mainly, even surprisingly taking account of the time of their origin, the sources convey an impression of underlying duality of ownership rights. With settled procedure, it cannot be expected to find expressly stated true divided ownership; however, the authority of debtor is quite wide.

For one, he has the right to sell the object of fiducia, as stated in P.S. 2.13.3.²⁹ This sale is under condition and will be perfect when the

²³ Cf. O. Lenel, 110; W. Erbe, 54, H. Ankum, (1979), 153, and (1980), 125.

²⁴ In relation to P.S. 2.13.1.

²⁵ There is a strong controversy about the underlying range of interpolations in the text. It goes to the mid 19th Century German scholarship, so already Oertmann notifies us about this as contentious matter. See further O. Geib, "Actio fiduciae und Realvertrag", SZ 8/1887, 140; P. Oertmann, 37 etc.; C. Longo, 57; W. Erbe, 14, fn. 6 (exhaustingly on other older literature on the problem); Talamanca, *Rezension of Frezza*, IURA 15/1964, 375 etc.

²⁶ See P. Frezza, 19.

²⁷ See Lenel, *Palingenesia iuris civilis*, I, 354 pp; C. Longo, 804.

²⁸ *Frag. Vat. 18: ...secundum ius in facin<orosos>... <emptores> inquietari, sed actione fidu<ciae>... Valeriano III et <Gallieno II cons>*. This fragment is seriously damaged so it has been mostly taken with great caution and added only as supplementary evidence when speaking of fiduciary's capacities. See FIRA II, 466; C. Longo, 804; W. Erbe, 191; J. P. Dunand, 207; for different reconstruction see P. Oertmann, 164 etc.

²⁹ P.S. 2.13.3: *Debitor creditori vendere fiduciam non potest: sed alii si velit vendere potest, ita ut ex pretio eiusdem pecuniam offerat creditori, atque ita remancipatam sibi rem emptori praestet.*

debt is paid and the property restored,³⁰ but the mere fact of regular sale is a clear indication of his authority. On the other hand, the text says that the object cannot be sold to the creditor as he is the owner already. In our opinion, this must not be understood only in relation to inability to buy one's own thing,³¹ but more as the limitation imposed in regard to *lex commissoria*.³²

In the law of succession, the debtor is permitted to grant *legatum per preceptionem* according to Gaius, in *Institutiones*, 2.220,³³ and in D. 10.2.28.,³⁴ under the condition of the payment of the debt, so the legacy can be effected. In that aspect he controls the economical substance of the transferred object. Additional evidence to this represents his right to compensate the fruits for debt, P.S. 2.13.2. Although without any special clause to this effect, he is in the position as any other debtor who has given security and remained its owner, concerning the progeny and any other income from the object of security, namely slaves.³⁵

When speaking of slaves, the debtor is also noxally responsible for crimes committed by those he gave in *fiducia*. It mirrors his patrimonial position and is witnessed by Paulus, D. 9.4.22pr, 1 and 2, where he explained why the debtor is called *dominus*.³⁶ He has the right to get the thing back, pending ownership, contingent on the payment of the debt. It especially applies, *maxime*, if he has the money, but the same must be

³⁰ The same could be stated in relation to already quoted D. 24.3.49.1. where the son in law would become an owner if the father got the object of security back. In both situations, the alienation of *res aliena* is valid, as is the rule expressed in D. 18.1.25 and 28, subject to eviction. See e.g. J. Mackintosh, *The Roman Law of Sale*, Edinburgh 1907, 50, 54 etc.

³¹ Cf. D. 12.6.37, D. 18.1.16pr. and D.50.17.45. See W. Erbe, 32; B. Noordraven, 166 etc.

³² In connection with P.S. 2.13.4.

³³ Gaius, Inst., 2.220: *...aliquo tamen casu etiam alienam rem per praeceptionem legari posse fatentur: ueluti si quis eam rem legauerit, quam creditori fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant soluta pecunia luere eam rem, ut possit praecipere is, cui ita legatum sit.*

³⁴ The problem of the interpolation is present here as well. The source itself gives no solid indication to *fiducia*, only the textual interpretation and similarity to previous fragment. See P. Oertmann, 34; Manigk, 2288; M. Kaser, (1979a), 329, fn. 274.

³⁵ See P. Frezza, 58; J. P. Dunand, 223.

³⁶ D. 9.4.22pr.: *Si servus depositus vel commodatus <fiduciae datus> sit, cum domino agi potest noxali actione: ei enim servire intellegitur et, quod ad hoc edictum at tinet, in potestate eius est, maxime si copiam habeat recipiendi hominis. 1. Is qui pignori accepit vel qui precario rogavit non tenetur noxali actione: licet enim iuste possideant, non tamen opinione domini possident: sed hos quoque in potestate domini intellegi, si facultatem repetendi eos dominus habeat. 2. Quid est habere facultatem repetendi? Haec beat pecuniam, ex qua liberari potest: nam non debet cogi vendere res suas, ut solvat pecuniam et repetat servum.* He is called *dominus* also in D. 13.7.37 and D. 47.2.14.6. See W. Erbe, 82 etc.; P. Frezza, 22 etc.; B. Noordraven, 178 etc.

deduced if he hasn't. As this applies for the third parties, there must be mentioned Africanus, D.13.7.31, who discussed the risk of *furtum* the slave perpetrated against the creditor. Of the two situations he described, the first one is more significant where the slave has committed a theft without the debtor's knowledge of the slave's nature. The debtor has the possibility to evade the penal action and the penalty by relinquishing the object of *fiducia* in the interest of creditor.³⁷ In that way his position is pretty much the same as of any other's owner, only the formal element whereby he doesn't need to transfer ownership is different.

VII

Furtum is the question within which responsibility is mostly explored and explained. It is the primary form of risk in *fiducia*. In this area, the limit of responsibility has been set and the entitlement to the thing and its value can be estimated as well.

Apart from the already cited text D.13.7.22 pr., *furtum fiduciae* is the object of D.47.2.80 and D. 47.2.14.5–7.³⁸ Thoroughly discussed, in the exchange between Ankum and Kaser, the question is investigated in detail in the text of Ulpianus, D.47.2.14.5–7, with accent on par. 6 and 7.³⁹ The main problem treated here is to what amount the creditor has the right to sue, and when he will have this right. The rule is that he has the right to sue until the debt is settled. When he obtains the fine by *actio furti*, or restitution by *condictio*, he will have to set the fine off against the debt.

In the cases where the debt is already paid by a previous fine (par. 6), if there were consecutive thefts, he will not have the right to use *actio furti* since he has no interest in that. In that case, the debtor will sue, and in regard to that entitlement he is called *dominus*, the holder of the economical value of the object. The only exception to the benefit of the creditor is that he can sue if he is liable to the debtor by *actio fiduciae*. If he will have to pay the damages for the value of thing, since he is unable to return it and the debt is already settled, he has the right to claim the fine.

³⁷ Under different circumstances, when he knowingly, *sciens*, has given in *fiducia* a stealing slave, he cannot redeem himself simply with *pro noxae relinquere*, but the creditor can additionally use *actio fiduciae contraria* for full interest.

³⁸ The first text, D. 47.2.80, is quite short and it corroborates the second part of D.13.7.22pr. that the penalty given by debtor thief will not be compensated with his secured debt. See B. Noordraven, 210.

³⁹ According to the limited space we shall give only a summary view of consequences important for the estimation of risk and patrimonial position of debtor. For detailed analysis see H. Ankum, (1979), 127 etc. and (1980), 95 etc.; M. Kaser, (1979b), 63 etc.; *idem*, (1982), 249 etc.

If there were two objects (slaves) given in *fiducia* for one debt (par. 7), and both were stolen, if taken together, the fiduciary can sue for each proportionally to the debt. If taken separately, the damages received for one, covering the whole debt, restrain creditor from any further actions. Thus, the creditor has the right to sue to the amount of his interest, and the residue should be claimed by the debtor.

The general positions regarding risk are pretty clearly set here. The debtor is considered as *dominus*, whereas the creditor, albeit a formal owner, is limited with the amount of debt he can sue from the thief. The risk for the loss of object is shared between them according to the interest they have in the object. If there is no guilt on either side for the loss (theft), they both lose; the fiduciary the security, and the *debitor* the object, so they can both seek for punitive damages. The important thing is, that opposite to other cases where person *cuius interest rem salvam esse* is the party who holds the object under obligation, here it is the owner whose position is judged by his interest.

VIII

To conclude with, the entitlements of creditor and debtor in *fiducia cum creditore*, reflecting the interplay of two divergent forces, the transfer of ownership and its function as security, show the division of powers pertinent to the owner in two persons. This especially applies for the bearing of risk, most notably elaborated in the matter of *furtum fiduciae*. Here the debtor is also called *dominus*, as having the right to the value of thing surpassing the creditor's interest. In that manner, although the creditor is formal owner of the thing, the debtor's position to its economical substance implies the duplicity of proprietary rights which can be described as "double" ownership.

In contemporary law, the land registry system offers a possibility to formalize and publicize these double entitlements, as to protect the interests of both parties, but also those of third persons. Legal positioning of the debtor as an owner under the condition of payment of his debt, though partially limiting the creditor in his dispositions, could thus ease the problem of taking and managing of risk, especially with regards to the factual situation where the debtor stays in control of the object.⁴⁰

⁴⁰ For the problem of responsibility for the damages owed to the third side injured on the slippery sidewalk in front of the fiduciary transferred house see The Decision of the Croatian Constitutional Court U III 10/2003 of 13 March 2008., *Official Gazette of the Republic of Croatia*, No. 50/08.

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FIDUCIA CUM CREDITORE RISIKOMANAGEMENT UND “DOPPELEIGENTUM”

Zusammenfassung

*Unter den zahlreichen Fragen aus dem Bereich der fiducia cum creditore sticht besonders das Problem des Risikos und dessen Verantwortung hervor. Die Situation wird nur noch zusätzlich kompliziert durch die Dualität der Befugnisse auf Seiten des Fiduzianten und des Fiduziars, die aus der Natur des Rechtsgeschäftes der Übertragung von Eigentum zum Zweck der Sicherung der Gläubigerforderungen entsteht. Die Verknüpfung der zwei Sachenrechte in einem Rechtsverhältnis führte zur Trennung der rechtlichen und wirtschaftlichen Inhalte des Eigentums und der entsprechenden Befugnisse der beteiligten Parteien. Rechtlich gesehen ist der Fiduziar nach außen, also gegenüber Dritten, als vollrechtlicher Eigentümer dargestellt, mit allen Verfügungsrechten über den Vermögensgegenstand. Zwei Bereiche insbesondere Schutz des Eigentums und Legat bestätigen die Macht des Fiduziars, wie auch die konkreten Fälle der Anwendung der *condictio furtiva* und der *actio furti*, die am plastischsten die Frage des Risikos darstellen. Auf diese haben die römischen Juristen mit der ihnen eigenen Genauigkeit im Wesentlichen beantwortet, wer denn in einzelnen Situationen das Risiko zu tragen hat. Die Anwendung der *actio furti* weist auch auf die Lage des Fiduzianten als Träger der “wirtschaftlichen” Macht hin, genauer gesagt auf den Fiduzianten als Verfügungsberechtigten über den ökonomischen Wert der Sache, was auch die Möglichkeit der Aussetzung eines Legats *per praeceptionem* bestätigt, also den Verkauf und die Übergabe der Sache aufgrund eines *Schadenersatzanspruchs*. Durch die Darstellung und Analyse einzelner Stellen aus den *Digesten* und Teilen der *Sentenzen des Paulus*, die sich auf die Stellung der Parteien in einem fiduziarischen Verhältnis beziehen, vor allem die Frage des *furtum* und der *noxalen Haftung*, ist das “Doppeleigentum” als Form der Befugnisse des Fiduzianten über den wirtschaftlichen Wert der übergebenen Sache als einer der Gründe determiniert, direkt auch als Folge der Teilung des Risikos zwischen dem Fiduzianten und dem Fiduziar.*

Schlüsselwörter: *Fiducia. Fiducia cum creditore. Risikomanagement. Kreditrisiko. Geteiltes Eigentum. Doppeltes Eigentum.*