

Some remarks on “*mandatum incertum*” in Byzantine law

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1. Introduction

A *mandatum* is the contract by which one party, the mandatary (*mandatarius*), undertakes for another party, the principal (*mandator*), to do something. The *mandatum* is a consensual contract and thus arises by pure consensus. The most common cases of mandate are where the *mandatarius* is to enter into contractual relationship with a third party. The *mandatum* may consist of selling or buying a plot of land, or borrowing or lending money¹. If the terms of the mandate are left imprecise by the *mandator*, the mandate is a *mandatum incertum*². This article will examine one of the imprecise elements of the object of the contract. Alan Watson refers to D.17.1.48.2 in this context³:

D.17.1.48.2:

But [if I give you a mandate] to manage your own affairs, [so] that the loan is at your discretion (that is, you may lend to whom you like) and you receive the interest and only the risk falls on me, [the contract] is now outside the scope of a mandate, just as if I were to give you a mandate to buy yourself [*HdJ* for me] any farm you like⁴.

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¹ See for example Inst.3.26.1.

² A.WATSON, *Contract of mandate in Roman law*, Oxford 1961 (repr. Aalen 1984), p.79ff.

³ This Digest fragment is also interesting because of the choice of Mommsen (Mo. I 494,5 krit. App. for *mihi* in *ut mihi quem vis fundum emas* in place of *tibi* (see H.DE JONG, Ἄνθρωπος ἀγαθός (*vir bonus*). *Eine byzantinische Interpretation des Digestfragments 17.1.48.2*, SZ (2013), (in the press) n.3)).

⁴ D.17.1.48.2 *Celsus libro septimo digestorum: Ceterum ut tibi negotium geras, tui arbitrii sit nomen, id est ut cuivis credas, tu recipias usuras, periculum dumtaxat ad me pertineat, iam extra mandati formam est, quemadmodum si mandem, ut mihi*

The mandate to lend to anyone at all or to buy for the principal an unspecified farm is void⁵. Somehow or other, the object of the mandate is uncertain. According to Watson, this is the only text which appears to restrict the discretion which can be given to the *mandatarius*⁶. In some cases, a certain discretion could be left to the mandatary, for example in D.17.1.46⁷:

D.17.1.46:

If someone gives a *sponsio* [as surety] for another who made a promise in these terms: “If you do not hand over Stichus, will you give [me] one hundred thousand?” And he buys Stichus at a lower price and hands him over so that the stipulation of one hundred thousand may not be incurred, it is agreed that he can raise an action on mandate. It is therefore most convenient to observe this practice in mandates that as long as the mandate is for something definite, there should be no departure from its scope; but whenever [it is] indefinite or [deals with] more than one matter, then, even though the terms of the mandate were discharged by acts other than those included in the mandate itself, yet provided that this was in the mandator’s interest, there will be an action on mandate⁸.

quemvis fundum emas. Translations from the Digest are based on A.WATSON, *The Digest of Justinian*, Philadelphia 1985. In the second case Watson reads *tibi* in place of *mihī*. See *supra*, n.3.

⁵ Cf. also Gai.3.156 and Inst.3.26.6. In the Paraphrasis Institutionum, this fragment is explained in more detail: Th.3.26.6: [...] ἐπειδὴ γὰρ CERTON ὑπεθέμην πρόσωπον Τίτιου, διὰ τοῦτο κατέχομαι τρόπον τινὰ μιμούμενος ἐγγυητήν. εἰ μὲν γὰρ εἶπω ἀπροσδιορίστως “δάνεισον τὰ σὰ χρήματα”, ἐνοχοποιὸν οὐκ ἔστιν, ὡς εἴρηται, τὸ ΜΑΝΔΑΤΟΝ· εἰ δὲ ῥητὸν ὑπόθωμαι πρόσωπον, κατὰ τὸ κρατήσαν ἔθος ὑπεύθυνος ἔσομαι τῇ ΜΑΝΔΑΤΙ. “[...] for, since I specified a definite person, Titius, I am therefore also under obligation, being in a manner assimilated to a surety. For if I said indefinitely “Put out money on loan”, the mandate, as has been said, is not obligatory, but if I specified a definite person, I shall, according to the prevailing custom, be liable to the *mandati actio*”. The translation is based on J.H.A.LOKIN, R.MEIJERING, B.H.STOLTE, N.VAN DER WAL (eds.), *Theophili Antecessoris Paraphrasis Institutionum*. With a translation by A.F.MURISON, Groningen 2010.

⁶ WATSON, *Contract of mandate* (*supra*, n.2), pp.96-97. For the various substantive and textual interpretations of D.17.1.48.1 and 2, see *ibidem* pp.97-99, pp.121-124.

⁷ See D.17.1.59.6. In this fragment, a certain discretion may be left on incidental points. See R.ZIMMERMANN *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford 1996, p.421-422 and Watson, *Contract of mandate* (*supra*, n.2), p.92ff. See also ACCURSIUS, glosse *accepta sint* ad D.17.1.59.6, which refers to *arbitrium viri boni*. Cf. also D.17.1.22.7.

⁸ D.17.1.36: *Paulus libro quinto ad Plautium*: “*Si quis pro eo sponderit, qui ita promisit: “si stichum non dederis, centum milia dabis? et stichum redemerit vilius et*

At the beginning of this fragment, the mandatary may have an alternative. Apparently, he can make a choice. Nevertheless, the mandate is valid, although the mandatary has a *certain* discretion. The object of the two alternatives is incidentally sufficiently precise in content and scope⁹. In this fragment is also an example of a *mandatum incertum*. With a view to D.17.1.48.2 this is not a case of a mandated purchase of an unknown, and therefore a not well-defined thing. Consideration should be given to other imprecise elements, such as a purchase price that is not yet determined¹⁰. This gives rise to an *incertum* mandate. According to the Digest, it can be concluded that a *complete* discretion may not be left to the mandatary. The mandate will be void¹¹. On the other hand, a mandate with a *certain* discretion for a mandatary may be valid, as far as the alternatives are sufficiently specified.

In the literature on Byzantine law after 1885, D.17.1.48.2 and D.17.1.46 are often discussed because of the question whether *mandatum incertum* exists. According to Guido Donatuti the Byzantines would have introduced the *mandatum incertum* as a new category¹², but other jurists, such as Giannetto Longo and Vincenzo Arangio-Ruiz, disagreed. Longo claimed that “*mandatum incertum*” existed in Justinian law and was not even unknown to the classical

solverit, ne centum milium stipulatio committatur, constat posse eum mandati agere. igitur commodissime illa forma in mandatis servanda est, ut, quotiens certum mandatum sit, recedi a forma non debeat: at quotiens incertum vel plurium causarum, tunc, licet aliis praestationibus exsoluta sit causa mandati quam quae ipso mandato inerant, si tamen hoc mandatori expedierit, mandati erit actio”.

⁹ See M.KASER, *Das römische Privatrecht I* [= RP I], Munich 1971², p.577: “Gegenstand des Auftrags können Tätigkeiten aller Art sein, rechtliche wie faktische, sofern sie erlaubt und nach Inhalt und Umfang hinlänglich bestimmt sind”.

¹⁰ It is striking that Accursius suggests both a non-specific thing and a specific thing, but with an undetermined element: ACCURSIUS, glosse *incertum* ad D.17.1.46: de re incerta: ut emas servuum in genere. Vel etiam de re certa. Sed incerto modo: puta de Sticho emendo: sed non taxato pretio: ut supra eod. l. prateria (D.17.1.3.1).

¹¹ With a *complete* discretion the boundary of the contract lacks or is exceeded. Cf. also Gai.3.161, Inst.3.26.8, Th.3.26.8, D.17.1.5pr.-1, D.17.1.41 and D.17.1.48.2.

¹² G.DONATUTI, *Mandato incerto*, BIDR 33 (1923), p.182. This article is also published in G.DONATUTI, *Studi di diritto romano I*, Milan 1976, pp.159-193. Remarkably, the edition of Scheltema was not used. Parts A and B of the Basilica of Scheltema et al. on D.17.1 respectively in 1956 and 1954 released.

jurists¹³. Arangio-Ruiz believed that the determination of the object is essential for the validity of the “*mandatum*” as with other contracts¹⁴. In his article from 1973 Nevio Scapini gives a historical overview of the different interpretations of *mandatum incertum*¹⁵. He believes that a *mandatum incertum* in Byzantine law only exists in case the mandatary is subjected to the clause “οἶον ἄν θέλῃς”.

In the last fifty-five years, a big step forward has been taken as regards editing the Byzantine legal sources. The older editions of the sources by e.g. C.E. Zachariä von Lingenthal, C. Heimbach etc., at least many of these, have now been superseded. For instance, a complete, authoritative edition of the main source in Byzantine legal literature, the Basilica (circa 900), was published by H.J. Scheltema et al¹⁶. This has given the research into Byzantine law and the Roman law of the Justinian codification a new impetus. It justifies to investigate once again the question whether “*mandatum incertum*” in Byzantine law exists, and it enables us to adopt a better considered viewpoint than previously.

In (2.), the various Byzantine interpretations of Basilica at D.17.1.48.2, in combination with the above interpretations of “*mandatum incertum*” in Byzantine law in the literature after 1885, are discussed. In so doing a distinction is made between different types of interpretations. The remarks at other Digest fragments are also raised for discussion. They refer to D.17.1.48.2 and discuss its contents. In (3) a remark at D.17.1.46 will be examined. This is a “new” scholion. This will be followed by concluding remarks (4.).

¹³ G.LONGO, *Sul mandato incerto*, Scritti in onore di Contardo Ferrini 2 (1947) p.138ff., especially p.145. This article is also published in G.LONGO, *Ricerche Romanistiche*, Milan 1966, pp.506-521. See *supra*, n.12.

¹⁴ V.ARANGIO-RUIZ, *Il mandato in diritto romano*, Naples 1949, p.109ff.

¹⁵ N.SCAPINI, *Appunti per la storia del mandatum incertum*, in: G.DONATUTI (ed.), *Studi in memoria di Guido Donatuti*, Milan 1973, pp.1195-1225. This author still uses, like the other Italian jurists, the edition of Heimbach, although parts of the Basilica of the edition of Scheltema et al. for the book D.17.1 (B.14.1) then had already been published. See also *supra*, n.12.

¹⁶ H.J.SCHELTEMA et al., *Basilicorum libri LX*, Groningen 1953-1988: A (text) I-VIII, B (scholia) I-IX.

2. *The Basilica and D.17.1.48.2*

In the Basilica text D.17.1.48.2 is expressed as follows:

BT.754/12-15:

[...] εἰ δὲ ἵνα ᾧτινι θέλης δανείσης καὶ σοιπραχθῆ καὶ τοὺς τόκους λάβῃς, μόνος δὲ ὁ κίνδυνος εἰς ἐμὲ φέρεται, ὑπὲρ τὴν φύσιν ἐστὶ τῆς ἐντολῆς, ὥσπερ ἐὰν ἐντείλωμαί σοι ἀγοράσαι μοι ἀγρόν, ὃν ἂν θελήσῃς.

[...] But when I give you a mandate to lend money to whom you want, and that you manage your own affairs and that you receive the interest, and that only I take care of the risk for my account, then it goes beyond the nature of the mandate, just as if I give you a mandate to buy a plot of land that you would like.

The words ᾧτινι θέλης from the first case and ὃν ἂν θελήσῃς from the second case create an invalid mandate because the object, the person who borrows and the plot of land to be purchased, is not sufficiently specified. The Basilica text differs from the Digest text, not juridically, but linguistically. In both cases the Digest text has an indefinite pronoun, a compound of *qui* and *vis*. In the first case in the Basilica text an indefinite relative pronoun is used, and so the complement is missing¹⁷. In the second case, a relative pronoun is used in conjunction with ἂν and the (ingressive) aorist subjunctive, in an iterative-distributive meaning¹⁸.

At this Basilica text the “old” and “new” scholia are handed down in two different manuscripts¹⁹. Most scholia are from the Codex Graecus Coislinianus 152 (second half 12th century)²⁰, not specified further below. The other scholia are from the Codex Parisinus Graecus 1352 (early 13th century)²¹, which will be referred to as P. In the scholia D.17.1.48.2 is interpreted in three different ways. The first interpretation is purely juridical and concerns the determination of the

¹⁷ See *infra*, n.26.

¹⁸ Cf. the use of the present subjunctive, in an iterative-distributive meaning in *infra*, BS.779/23-31 [Enantiophanes].

¹⁹ See for the “old” and the “new” scholia H.DE JONG, *Stephanus on the condictio de bene dependis* (ὁ ἀπὸ καλοῦ δαπανήματος κονδικτίκιος), TvRG 78 (2010), p.16.

²⁰ See L.BURGMANN, M.TH.FÖGEN, A.SCHMINCK, D.SIMON, *Repertorium der Handschriften des byzantinischen Rechts, Teil I: Die Handschriften des weltlichen Rechts [Nr 1-327]* (= RHBR I), Frankfurt 1995, nr.203. See also F.H.LAWSON, *Bemerkungen zur Basiliken Handschrift Coislinianus 152*, ZSS 49 (1929), pp.202-229.

²¹ See BURGMANN et al., RHBR I (*supra*, n.20.), nr.166.

object. In the second interpretation the focus is on the linguistic choice that is made. This choice causes the juridical interpretation. In both interpretations the focus is on the object of *mandatum*. The third interpretation combines both the juridical and linguistic interpretation. In view of the linguistic distinction between *quemvis* and *quem vis* the discretion of the mandatary is examined²². At this, the focus lies on the degree of the discretion of the mandatary.

a) Juridical interpretation: determination of the object

In the purely juridical interpretation of D.17.1.48.2 the jurist refers repeatedly to the fact that the object of the contract is not sufficiently specified for a valid *mandatum*. Concerning the three interpretations, this is the most common interpretation among the jurists in the Basilica. On the one hand, it is remarkable that the above mentioned Italian jurists did not note this interpretation in their Byzantine research. On the other hand, it should be noted that most of the comments are elsewhere in D.17.1 and are therefore not evident at D.17.1.48.2 itself. In other words, they are difficult to find.

In a remark at D.17.1.2.6²³ antecessor Stephanus refers to the first case of D.17.1.48.2²⁴ in his paragrafai²⁵. Here Stephanus reads the compound *cuivis*²⁶, that is οἰοσδήποτε²⁷:

²² One must remember that the ancient texts were written without space and that in the manuscript only *quemvis* is found.

²³ D.17.1.2.6: *Gaius libro secundo cottidianarum*: “*Tua autem gratia intervenit mandatum, veluti si mandem tibi, ut pecunias tuas potius in emptiones praediorum colloces quam faeneres, vel ex diverso ut faeneres potius quam in emptiones praediorum colloces: cuius generis mandatum magis consilium est quam mandatum et ob id non est obligatorium*”, *quia nemo ex consilio obligatur, etiamsi non expediat ei cui dabatur, quia liberum est cuique apud se explorare, an expediat sibi consilium*”. * The remark by Stephanus is placed at ἀνένοχος: ὅπερ οὐκ ἐντολή, ἀλλὰ συμβουλή ἀνένοχος.

²⁴ See Mo. I 494.3, krit. app.: arbitri-i-] *F*^b | cuiuis *PV*^b*U*^b cum *B* (Anon): ἴν' ὧτινι θέλης δανείσης *et B* (πλ): ὧτινι (οὖν *cod.*) ἐὰν βουληθῆς δανείσας. *Cuius F?V^aU^a*.

²⁵ See for Stephanus H.DE JONG, *Stephanus en zijn Digestonderwijs*, Den Haag 2008. *Paragrafai* (παρᾶγραφᾶι) are remarks of either a juridical or a linguistic nature to explain the Latin Digest text. These remarks were made in the second lecture, after the first lecture this text was treated on the basis of a free Greek translation, the *index* (ὁ ἴνδιξ). (see N.VAN DER WAL and J.H.A.LOKIN, *Historiae iuris graecoromani delineatio. Les sources du droit byzantin de 300 à 1453*, Groningen 1985, p.39ff.).

²⁶ Zachariä says about the first case of D.17.1.48.2 that he would prefer to read *cui vis* than *cui cuivis*. Implicitly he says he does not agree to the choice of Stephanus:

BS.703/26-704/9 [Stephanus]:

Στεφάνου. [...] Τὸ οὖν εἰρημένον τῷ Κέλσῳ πρὸς τῷ τέλει τοῦ μη'. διγ., ὅτι ἐάν σοι ἐντείλωμαι δανείσαι οἰοσθήποτε θέλεις, κὰν εἶπω, κινδύνῳ ἐμῷ δάνεισον ὀνόματι σῶ, οὐ κατέχομαι, νόησον, ὅτι ἀμφέβαλες, εἴτε δεῖ αὐτῷ δανείσαι, εἴτε καὶ μή. [...] οὔτε γὰρ διὰ τὸ ἐπαγαγεῖν με, κινδύνῳ ἐμῷ, ἐπὶ τοῦ θέματος τοῦ ὑπεξουσίου κατέχομαι [...], ἀλλ' ἐπειδὴ ῥητὸν ὑπόκειται πρόσωπον τοῦ ὑπεξουσίου καὶ τὸ μέλλον δανείζεσθαι.

By Stephanus. [...] What is said by Celsus at the end of fragment 48, namely that when I give you a mandate to lend out money, to whomever you like, even if I would say, “lend out at my risk in your name”, I am not liable, understand that you doubted whether you had to lend to him, or not; [...]. For not by the fact that I add the words “at my risk”, I am liable in this case of the son under paternal control [...], but because the son under paternal control is a specific person and the intention to lend out is present.

Stephanus refers specifically to fragment D.17.1.48.2. Then he gives an example in which the mandatary doubts if he should lend money to the son under paternal control, where the principal assumes the risk. In the remainder of the remark he explains that the addition of “lend out at my risk” does not determine whether the *mandatum* is valid or not. For the validity of the *mandatum* the intention to lend to a *specific* person is decisive²⁸. Stephanus does not further explain his choice of the word οἰοσθήποτε for *cuivis* from the first case of fragment D.17.1.48.2.

“Wohl besser *cui vis*. Anonymus und die παραγραφή zu demselben haben ὅτινι θέλῃς oder ὅτινι θέλεις” (C.E.ZACHARIÄ VON LINGENTHAL, *Die Meinungsverschiedenheiten unter den justinianeischen Juristen*, ZSS 6 (1885), p.27 (repr. in: C.E.ZACHARIÄ VON LINGENTHAL, *Kleine Schriften zur römischen und byzantinischen Rechtsgeschichte* 2, Leipzig 1973, p.212 nt.1)). It should be noted that the Basilica text reads precisely ὅτινι (indefinite relative pronoun) θέλῃς, which refers to *cuivis*. For the reading of the second case see *infra*, n.31.

²⁷ At D.17.1.48.1 and 2 Watson observes: “The distinction between the two cases does not seem to be on the question of uncertainty. [...] Rather the distinction is that in the second case, but not in the first, the mandate is *tua tantum gratia*, and therefore void and *extra mandati formam*. It is difficult to see how *quemadmodum si mandem, ut mihi quemvis fundum emas* fits in, [...] Thus there would seem to be general agreement among modern jurists that the text is no evidence for holding *mandatum incertum* invalid”. (WATSON, *Contract of mandate* (*supra*, n.2.), p.97ff.; see also p.121ff.).

²⁸ Cf. also BS.710/ 32-711/1 [Stephanus] at D.17.1.6.6.

In an anonymous remark at D.17.1.12.13 the previous remark at D.17.1.2 is almost literally referred to²⁹. The reason for the invalidity of the *mandatum* is also indicated³⁰:

BS.736/8-14 [anonymous]:

Μέμνησο τῆς ἐν τῷ β. διγ. παραγραφῆς, καὶ μὴ εἴπῃς, ὅτι διὰ τοῦτο, κὰν ἀμφιβάλλοντί σοι δανείσαι τῷ ὑπεξουσίῳ ἐνετειλάμην, κατέχομαι, ἐπειδὴ οὐ μόνον ἐνετειλάμην, ἀλλὰ καὶ ἐπήγαγον, κινδύνῳ ἐμῷ δάνεισον. Ἐνταῦθα γὰρ οὐ διὰ τὸ εἰπεῖν, κινδύνῳ ἐμῷ, κατέχομαι, ἀλλ' ἐπειδὴ ῥητὸν ὑπόκειται πρόσωπον τὸ τοῦ ὑπεξουσίου τὸ μέλλον δανείσασθαι. Ῥητοῦ γὰρ μὴ ὑποκειμένου προσώπου, κὰν ἀμφιβάλλοντί σοι εἶπω, δάνεισον οἷῳ θέλεις κινδύνῳ ἐμῷ, οὐ κατέχομαι, ὡς ὁ Κέλσος παρὰ τῷ τέλει τοῦ μῆ. διγ. φησίν.

Remember also the paragraph at fragment 2, and you should not say that, if I give you who has doubts a mandate to lend money to the son under paternal control, therefore, I am liable, because I not only give a mandate, but urge to lend at my risk. Because in this case I'm not, so to say, "at my risk", liable, but because the person of the son under paternal control is specified to lend money in the future. Since there is no specific person alleged, I am not liable when I say to you who doubt "lend to whom you want at my risk", just as Celsus says at the end of fragment 48.

The first case of D.17.1.48.2 is referred to at the end of the fragment. Since it is an unspecified person, the mandate is not valid. In this fragment, the combination οἷῳ θέλεις is used for *cui vis*. The word οἷος is a pronominal adjective, a definite relative pronoun that is used as the relative pronoun *quis*. It is unclear whether the anonymous author refers to the remark of Stephanus –or even if it originates from

²⁹ D.17.1.12.13: *Ulpianus libro trigensimo primo ad edictum: "Si quis mandaverit filio familias credendam pecuniam non contra senatus consultum accipienti, sed ex ea causa, ex qua de peculio vel de in rem verso vel quod iussu pater teneretur, erit licitum mandatum. hoc amplius dico, si, cum dubitarem, utrum contra senatus consultum acciperet an non, nec essem daturus contra senatus consultum accipienti, intercesserit qui diceret non accipere contra senatus consultum, et "periculo meo crede", dicat, "bene credis": arbitrator locum esse mandato et mandati eum teneri"*. The reason for this is the commonly used verb in BS.703/26-704/9 ἀμφιβάλλω. BS.736/8-14 [anonymous] is next to ἀμφιβάλλοντός (BT.744/14).

³⁰ See also WATSON, *Contract of mandate* (*supra*, n.2), p.67 n.2. Watson says that the scholiast did not understand the text. According to him, this is indeed about the expression "lend out at my risk".

Stephanus—, but it is not obvious. Unlike Stephanus, who reads *cuivis*, the anonymous author reads this as *cui vis*.

In a remark of Enantiophanes at D.17.1.48.2 Theophilus and Dorotheus are mentioned. Both jurists give an interpretation of the words *quem vis fundum* from the second case³¹:

BS.779/23-31 [Enantiophanes]:

Τοῦ Ἐναντιοφανοῦς. Τὸ παρὸν θέμα Θεόφιλος ἐξηγούμενος τὸ ἐμοὶ ἀντὶ τοῦ σοὶ παρέλαβε καὶ φησιν· ἀχρηστῶς σοι ἐντέλλομαι ἀγοράσαι, οἷον ἂν θέλῃς ἀγρὸν. Δωροθέος δὲ λέγει [...] ἀλλὰ πρὸς τὸ α΄, ὅτι ἔρρωται, ἔνθα ἐμὴ ἢ ζημία καὶ τὸ κέρδος, ὧν δανείζομαι ὡσπερ ἔρρωται καί, ἔνθα εἶπω· ἀγοράσόν μοι ἀγρὸν, ὃν θέλεις. Ἔστιν δὲ ἀπλούστερον τὸ θέμα δέξασθαι κατὰ τὸ μανδάτον ἄκυρον ὡς τῆς ὀνομασίας τοῦ ἀγροῦ μὴ ἐντεθείσης κατὰ τὸ εἰρημένον ἐπὶ προικὸς βιβ. κγ΄. τιτ. γ΄. διγ. σ΄. [...].

By Enantiophanes. In the explanation of the case at hand Theophilus adopts *mihi* rather *tibi* and says: it is invalid if I give you a mandate to buy a plot of land that you would like. But Dorotheus says [...] but in the case of the first case [D.17.1.48.1] that the *mandatum* is valid, I borrow assuming the risk and profit myself, equally valid, in case I say: buy me a plot of land that you want. The case is better to accept on the basis of an invalid *mandatum*, because the name of the plot of land is not recorded corresponding the text about dowry, book 23 title 3 fragment 70 [...].

Theophilus says that the mandate σοι ἐντέλλομαι ἀγοράσαι, οἷον ἂν θέλῃς ἀγρὸν is invalid. The reason is not given but appears to be in agreement with the following³². Then Dorotheus is cited. He explains why the mandate the case of fragment 1 of D.17.1.48 is valid and connects to this the validity of the second case in fragment 2. The mandate ἀγοράσόν μοι ἀγρὸν, ὃν θέλεις can only be considered valid if the plot of land is sufficiently described. The remark refers to

³¹ See ZACHARIÄ, *Die Meinungsverschiedenheiten* (supra, n.26), p.213: “Endlich es haben Alle gelesen: *ut mihi quem vis fundum emas* (Theophilus ὃν βουληθῆς ἀγρὸν, Dorotheus ἀγρὸν ὃν θέλεις, Anonymus ἀγρὸν ὃν ἂν θέλῃς, Cyrillus ὃν θέλῃς ἀγρὸν). Nur Stephanus will lieber *quemvis* lesen, indem er οἰονδήτινα vorzieht. Ob seine Gründe stichhaltig sind und ob mithin die Lesart *quemvis* von Mommsen mit Recht befolgt ist, mag dahingestellt bleiben”. Zachariä appears to attribute the words from BS.778/25-33 ὃν βουληθῆς ἀγρὸν to Theophilus, and not οἷον ἂν θέλῃς ἀγρὸν, although via Enantiophanes from BS.779/24-25. These words of Enantiophanes (ἀγρὸν ὃν ἂν θέλῃς) he attributes to Anonymus(!). This Anonymus we find in the second interpretation. See *infra* 2.b).

³² Cf. also Th.3.26.6. *supra*, n.5.

D.23.3.70. This is likely a reference to D.23.3.69.4³³. This fragment indicates the failure of a stipulation or bequest if the land is not specified. The interpretation of the invalidity of the contract in each case lies in the fact that the land is not specified. The object of the mandate is not adequately defined and therefore fails to be successful as a contract.

Thus in no way does the juridical interpretation produce evidence of the existence of a *mandatum incertum*.

b) Linguistic interpretation: determination of the object

Two remarks are handed down from jurists in the Basilica that interpret the first case of D.17.1.48.2 linguistically³⁴. With this linguistic viewpoint, they in fact offer, although not purely, a juridical interpretation. The remarks are from the jurist Anonymous and an anonymous author. They argue their choice for the Greek indefinite relative pronoun ὅστις as the translation for the Latin word *cuius*, by referring to an incorrect Greek equivalent³⁵. This interpretation is also ignored by the above mentioned Italian jurists.

Ὅδε or ὅστις

By choosing the pronoun Anonymous makes a linguistic distinction in his analysis. To distinguish a valid *mandatum*, Anonymous chooses the demonstrative pronoun ὅδε (*this*). If the indefinite relative pronoun ὅστις (*anyone who*) is used, he considers the *mandatum* is invalid:

BS.779/6-7 [Anonymus]:

Τοῦ Ἀνωνύμου. Οὔτε γὰρ γρατούιτόν ἐστιν· λοιπὸν γὰρ οὐκ εἶπε, δάνεισον τῷδε, ἀλλ' ὅτινι θέλεις.

By Anonymus. Because it is not for nothing; for subsequently neither did he say “lend out to this person”, but “to whom you like”.

Anonymus shows indirectly in his linguistic distinction that the

³³ See *supra* 2.c).

³⁴ Cyril interprets this case very differently, because he reads εἰ δὲ σὺ κινδύνη καὶ κέρδει, οὐκ ἐστὶ μανδάτον. Zachariä says: “Entweder liegt hier eine Corruptel vor, oder Cyrillus hat einen verschiedenen Text vor Augen gehabt” (ZACHARIÄ, *Die Meinungsverschiedenheiten* (*supra*, n.26), p.213). This will not be explored in this article.

³⁵ According to Zachariä, Theophilus reads in the first case of D.17.1.48 *cum*. There is in fact BS.778/25-33 ἵνα οὖν ἐὰν βουληθῆς δανείσης (see ZACHARIÄ, *Die Meinungsverschiedenheiten* (*supra*, n.26), p.212).

indefinite relative pronoun ὅστις is too indefinite, making the *mandatum* invalid. This is the correct choice for *cui vis* from the Digest fragment. With the demonstrative pronoun ὅδε the object for the *mandatum* is apparently sufficiently definite³⁶. The word ὅδε refers indeed to *what is present*, to *what can be seen or pointed out*³⁷. Anonymous does not further explain the degree of definiteness.

Ὁ δεῖνα or ὅστις

The remark in the manuscript P by an anonymous author also points to a linguistic distinction. He clearly indicates that the first case of D.17.1.48.2 also concerns the (same) indefinite relative pronoun ὅστις (as Anonymus does).

BS.833/1-2 (P) [anonymous]:

Ζήτει βιβ. ιγ. τιτ. β. κεφ. α. θέμ. ζ. καὶ τὴν ἐκεῖ παραγραφὴν. Καλῶς τό, ὅτινι θέλεις· εἰ γὰρ εἶπον, τῷ δεῖνι³⁸, ἐνέχομαι.

³⁶ See also Th.3.26.8 Ὁ τὸ ΜΑΝΔΑΤΟΝ ὑποδεξάμενος οὐκ ὀφείλει τοὺς ὅρους ὑπερβῆναι τοῦ ΜΑΝΔΑΤΟΥ. οἷον ἐντειλάμην σοι, ὥστε μέχρι ἑκατὸν νομισμάτων ἀγοράσαι μοι τόνδε τὸν ἀγρὸν [...] He who undertakes the mandate must not exceed the terms of the mandate. For example: I commissioned you to purchase a plot of land for me at not more than 100 *solidi* [...]. Cf. also BS.703/26-704/9 [Stephanus] [...] εἰ γὰρ μηδένα σκοπὸν μήτε ἔννοιαν ἔχοντί σοι τότε πράξει ἐντείλωμαί σοι τοῦτο, ὅπερ οὐκ ἂν ἐποίησας, εἰ μὴ τὸ ἡμέτερον παρετέθη μανδάτον, τότε κατέχομαι τῇ μανδάτῃ [...]. [...] Because if I give you, even though you do not have the intention to or the thought to, a mandate to do this, what you would not have done if our mandate had come into being, then I am liable to the *actio mandati* [...].

³⁷ Cf. also Th.3.15pr: [...] καὶ εἰ μὲν CERTON [...] εἶπον γὰρ “ὁμολογεῖς διδόναι μοι τόνδε τὸν ἀγρὸν”; ἢ “τόδε τὸ βιβλίον;”. εἰ δὲ INCERTON ἦ (εἶπον γὰρ “ὁμολογεῖς διδόναι μοι τὰ ἐν τῇ κιβωτῷ”; ἢ “τὰ ἐν τῷ ὠρεῖῳ”; [...].] If the object of the stipulation is certain [...] I said, for instance: “Do you engage to give me such-and-such a piec of land”, or “such-and-such a book?” But if it is uncertain – I said, for instance, “Do you engage to give me what is in the chest”, or “what is in the warehouse?” [...] Cf. also Th.4.6.32.

³⁸ Cf. D.40.5.46.3: *Ulpianus libro sexton disputationum*: “*Quod si ita scriptum sit “si heres voluerit”, non valebit, sed ita demum, si totum in voluntate fecit heredis, si ei libuerit. ceterum si arbitrium illi quasi viro bono dedit, non dubitabimus, quin libertas debeatur: nam et eam libertatem deberi placuit “si tibi videbitur, peto manumittas”: ita enim hoc accipiendum “si tibi quasi viro bono videbitur”. nam et ita relictum “si voluntatem meam probaveris” puto deberi: quemadmodum “si te meruerit” quasi virum bonum vel “si te non offenderit” quasi virum bonum vel “si comprobaveris” vel “si non reprobaveris” vel “si dignum putaveris”. nam et cum quidam graecis verbis ita fideicommissum dedisset: τῷ δεῖνι, ἐάν δοκιμάσης, ἐλευθερίαν δοθῆναι βούλομαι, a divo severo rescriptum est fideicommissum peti posse”.*

Look for book 13, title 2, paragraph 1, casus 7 and the remark there³⁹. Rightly it reads, “to whom you like”, because if I had said, “to him”, then I am liable.

In the words τῷ δεῖνι (*such an one, so-and-so*) the person who borrows appears to be clearly enough defined⁴⁰. This remark (ὧτινι θέλεις) –if not made on Anonymus’–probably refers to the above Basilica text (ὧτινι θέλης) of D.17.1.48.2. Also on the basis of the reference with κεφ. one can suppose that this is a “new” scholion⁴¹.

The linguistic interpretation also indicates no *mandatum incertum*.

c) Linguistic juridical interpretation: discretion of the mandatary

In Stephanus’ third interpretation, a linguistic distinction is made. In his paragrafai he points to the difference between the Greek varieties of *quem vis* and *quemvis* which each have a different juridical meaning. It is interesting that this linguistic distinction, and therefore also the juridical distinction, is not dealt with in the same way by the Byzantine scholars. Stephanus shifts the perspective of the

³⁹ The question is what the anonymous author refers to. It is likely the Basilica reference B.13.2.1.7 which corresponds to D.16.3.1.7 Ulpianus libro trigensimo ad edictum: “Illud non probabis, dolum non esse praestandum si convenerit: nam haec conventio contra bonam fidem contraque bonos mores est et ideo nec sequenda est”. It is supposed to think of BS.673/20-21 [anonymous]: τὸ ἀπὸ δόλου - Οὐκ ἔρρωται γὰρ τὸ σύμφωνον διὰ τὸ ἐναντιοῦσθαι τῇ καλῇ πίστει καὶ τοῖς χρηστοῖς μάχεσθαι τρόποις. At *dolos*. Because the contract is not valid unless it contradicts good faith and it is contrary to good manners. See also BS.833/3-4 [anonymous]. Cf. also Th.3.26.6 (fine) and 7.

⁴⁰ The reference to Basilica 13.2.1.7 and the paragrafè there are remarkable. It is probably about the scholion BS.674/25-675/3 [anonymous] (P), which corresponds partially to BS.640/22-641/2 [anonymous]. This remark relates to B.13.2.1 (12) (D.16.3.1.12). Cf. the reference of [...] Ὅτι δὲ οὕτως ἔχει καὶ τὸ ἀκριβές, ζητεῖ βιβ. ιγ. τιτ. β. κεφ. α. θεμ. ζ., οὐ ἢ ἀρχή· εἰ δὲ εἰπόν σοι φυλάξαι τὸ πρᾶγμα μὴ δεχομένου Πέτρον. [...] in BS.484/20-21 [anonymous]. This beginning corresponds to the Basilica text (BT.721/12). With this reference, the author probably indicates a case in which the person named Titius is explicitly stated.

⁴¹ The word κεφ. is an abbreviation for κεφάλαιον, which referred to *Basilica fragments* (see H.J.SCHELTEMA, *Over de tijdsbepaling der vroeg-Byzantijnsche juristen*, TvRg 74 (1956), pp.277-284 (repr. in: *Historische Avonden. Vierde bundel geschiedkundige opstellen, uitgegeven door het Historisch Genootschap te Groningen ter gelegenheid van zijn vijfenzestigjarig bestaan*, Groningen 1961, pp.5-12; VAN DER WAL et al., *H.J. Scheltema Opera minora*, pp.307-314), p.6 nt. 4; H.J.SCHELTEMA, *Subseciva III. Die Verweisungen bei den frühbyzantinischen Rechtsgelehrten*, TvRg 30 (1962), pp.355-357 (repr. in: N.VAN DER WAL et al., *H.J. Scheltema Opera minora*, pp.116-118), p.356.).

object of the *mandatum* to the discretion of the mandatary.

We return briefly to the literature on Byzantine law after 1885, because the Italian jurists Donatuti, Longo, Arangio-Ruiz and Scapini, have attempted in their theories on *mandatum incertum* to fathom this third interpretation⁴². Though they find indications for the existence or non-existence of a *mandatum incertum*, they fail to distinguish between the different interpretations of the linguistic distinction between *quemvis* and *quem vis* as Stephanus does. They demonstrate the reference to this distinction which Zachariä in 1885 indicated not to have noticed⁴³. Only Scapini points to a juridical difference. While Arangio-Ruiz and Scapini do not report the “new” scholion, Donatuti and Longo do not distinguish between “old” and “new” scholia in their theories. With a reference to *arbitrium viri boni* they conclude *mandatum incertum* must have existed in the Byzantine law. Based on D.17.1.48.2 Arangio-Ruiz believes that *mandatum incertum* simply did not exist, but notes that the *mandatum* of the sale of a plot of land, under the condition that it is purchased by a *vir bonus*, was, according to the Byzantines, valid. Scapini focuses precisely on the clause “οἷον ἄν θέλῃς” it must have been present in order to have a *mandatum incertum*. Remarkably, these scholars ignore the first two, the juridical and linguistic, interpretations of fragment D.17.1.48.2. A broad survey of the scholia with their references to the Digest fragments is avoided. What does the theory of Stephanus really include?

Οἰοσδήποτε and ὡς θέλεις

Stephanus especially discusses the last case of D.17.1.48.2. The difficulty of the second case in fragment D.17.1.48.2 is of a linguistic nature according to Stephanus, and thus presents semantic interpretations of the words *quemvis* and *quem vis*. The result is that the choice of a particular linguistic variant determines the juridical meaning of the word:

⁴² DONATUTI, *Mandato incerto* (*supra*, n.12), p.183ff.; LONGO, *Sul mandato incerto* (*supra*, n.13), p.139, pp.143-144 and ARANGIO-RUIZ, *Il mandato* (*supra*, n.14), pp.113-114; pp.124-125. For a brief (and more detailed) history of the different views on *mandatum incertum*, see SCAPINI, *Appunti per la storia del mandatum incertum* (*supra*, n.15), pp.1195-1198.

⁴³ See *supra*, n.31.

BS.779/8-22 [Stephanus]:

Στεφάνου. Σημείωσαι, ὅτι οὐκ ἔρρωται τὸ μανδάτον, ἐὰν εἶπω σε ἀγοράσαι μοι ἀγρὸν οἰονδήποτε⁴⁴. Ἐτερόν ἐστιν, εἰ ἐνετειλάμην σοι εἰπών, ὡς βούλη, διοίκησόν μου τὰ πράγματα· ἔρρωται γὰρ ἐνταῦθα τὸ μανδάτον καὶ ἀγαθὴν ἀπαιτεῖ τὸν ἐνταλθέντα πίστιν, ὡς ἐν τῷ ξ'. μανθάνεις διγ. Καὶ δῆλος ὁ λογισμὸς. Ἐνθα μὲν γὰρ εἶπον σοι, ἀγόρασόν μοι ἀγρὸν οἰονδήποτε, αὐτὸ τὴν ἀρχὴν ἀδηλὸν ἐστὶ τὸ τοῦ ἐνταλθέντος πρᾶγμα ἢ σῶμα· ἐνθα δὲ εἶπον, ὡς θέλεις, διοίκησον μου τὰ πράγματα, τέως μὲν τὸ τῶν ἐνταλθέντων σῶμα δῆλόν ἐστιν, τῆς δὲ τοῦ ἐνταλθέντος ἡρηται γνῶμης ἢ διοίησις. Πρὸς δὲ τούτοις ἕτερόν ἐστιν, εἰ μὴ ἐπήγαγον τὸ οἰονδήποτε, ἀλλὰ μόνον εἶπον, ἐντέλλομαί σοι ἀγοράσαι ἀγρὸν, οἶον ἂν θέλῃς· τότε γὰρ ἔδοξα αὐτῷ ἐντέλλεσθαι *bonu arotatu* τὸν ἀγρὸν ἀγοράσαι⁴⁵. Καὶ τὴν τοιαύτην σημασίαν ἔχεις ἐν τῷ ἐξῆς βιβ. τιτ. α'. διγ. ζ'. καὶ ἐν τῷ πρώτῳ βιβ. δελεγάτις διγ. οε'. καὶ βιβ. ν'. τιτ. ιζ'. διγ. κβ'. Ἄμεινον οὖν τὸ *sebemuis* μὴ οὕτως εἰπεῖν, ὄν βούλη, ἀλλ' οἰονδήποτε⁴⁶ ἀγρὸν, διὰ τὸ κείμενον ἐν τῷ ζ'. διγ. τοῦ παρόντος τιτ. οὕτως παραδόντος τὸ νόμιμον.

By Stephanus. Notice that the mandate is void, when I said to you “buy for me any plot of land”. It is different, when I gave you a mandate with the words: “Manage my affairs as you like”; because in the latter case the mandate is valid and he claims from the mandatary in good faith, as you learn in fragment 60. And the reasoning is clear. Because in case I said: “Buy for me any plot of land”, then firstly the thing or object of the *mandatum* itself is unclear, and in case I said, “as you like, manage my affairs, as long the object of the *mandatum* is determined”, then the management depends on the judgment of the mandatary. Moreover, it is different, as I did not say “any”, but only “I give you a mandate to buy a plot of land as you like”; because then I am supposed to have given him a mandate to buy a plot of land according to the judgment of a reasonable man. You also have a similar meaning in the next book, title 1, fragment 7 and in the first book *de legatis* fragment 75 and book 50, title 17, fragment 22. Therefore, it is better not to understand *quemvis* in the sense of “as you like”, but as “any plot of land” seen in connection with the text of this title, that the rule in this way hands down.

⁴⁴ Cf. HB II 129 *quemlibet fundum*.

⁴⁵ It is striking that in the discussion of this fragment Donatuti ends here. The rest of the fragment is missing, without any indication that the fragment in fact continues (also in Heimbach (HB II 129)). See also ARANGIO-RUIZ, *Il mandato* (*supra*, n.14), p.113, nt.2. The following scholion too is not quoted by Donatuti in its entirety (HB II 69). See DONATUTI, *Mandato incerto* (*supra*, n.12), pp.184-185.

⁴⁶ Cf. HB II 129 *quemcunque fundum*.

Stephanus begins with the correct Greek rendering of *quemvis fundum* for fragment D.17.1.48.2, namely ἀγρὸν οἰονδήποτε. The *mandatum* in this form is not valid. With a reference to D.17.1.60 Stephanus shows that the wording ὡς βούλη, διοίκησόν μου τὰ πράγματα imply that the mandatary does in fact have a valid *mandatum*⁴⁷. What relevant in this fragment?

D.17.1.60.4⁴⁸:

Scaevola, Replies, book 1 I entrust you with the management of all that is mine to deal with as you see fit, whether you wish to sell, to pledge, to buy or to any [other] thing, as master of my affairs. All that is done by you will be regarded as authorized by me, and I shall not countermand you in any matter. [...] I gave the opinion that the person who was the subject of the inquiry had indeed given the mandate in very broad terms, but within [the assumption] that his affairs should be managed in good faith. [...] ⁴⁹

In this fragment it is clear that the mandatary is mandated to manage the business as he wishes (ὡς θέλεις⁵⁰). The mandatary may act at his own discretion (εἴτε [...] εἴτε [...] εἴτε [...] εἴτε [...]). Although the mandate is set in broad terms (*plene (quidem)*), the mandate is only valid as long as the mandatary acts in good faith (*ex fide*). This condition is made clear by the word *quatenus*. The discretion of the mandatary is thus restrained. He has not received a *unlimited* discretion. Stephanus concludes that *quemvis fundum* should be interpreted as ἀγρὸν οἰονδήποτε and not as ὄν βούλη. The word οἰονδήποτε is a translation of *quemvis*, which is a compound of *qui* and *vis* (from *volo*) meaning *any that you please, no*

⁴⁷ It should be noted that Stephanus does not refer to the one and only specific fragment with *virī boni arbitratum* in D.17.1, but it is there, namely fragment 35: *Neratus libro quinto membranarum*: “[...] *sin autem nullo libro pretio constituto emere tibi mandaverim tuque ex diversis pretiis partes ceterorum redemeris, et tuam partem viri boni arbitratu aestimato pretio dari oportet*”.

⁴⁸ Cf. D.34.1.5. In this fragment, the amount of the distribution of food products is not mentioned. It is the insight of a reasonable man to decide.

⁴⁹ D.17.1.60.4 *Scaevola libro primo responsorum*: “ἐπιτρέπω σοι περὶ πάντων τῶν ἐμῶν ὡς θέλεις πραγματεῦσθαι, εἴτε πωλεῖν θέλεις εἴτε ὑποτίθεσθαι εἴτε ἀγοράζειν εἴτε ὀτιοῦν πράττειν, ὡς κυρίῳ ὄντι τῶν ἐμῶν· ἐμοῦ πάντα κύρια τὰ ὑπὸ σοῦ γινόμενα ἡγουμένου καὶ μηδὲν ἀντιλέγοντός σοι πρὸς μηδεμίαν προὔξιν. [...] *respondi eum, de quo quaeretur, plene quidem, sed quatenus res ex fide agenda esset, mandasse*. [...]”

⁵⁰ Cf. also BS.802/25-803/3 [anonymous] and BS.836/14-15 [anonymous] (P).

matter what. The indefinite pronoun οἰονδήποτε is a compound of οἶος and the particle δῆποτε⁵¹. The particle δῆποτε reinforces οἶος. It strengthens the indefiniteness. The combination of the words ὄν βούλη is the literal translation of the words *quem vis*. The words are not written as a single word. Linguistically ὄν (*quem*) is a relative pronoun. According to Stephanus this translation is incorrect, because the connotation of ὄν βούλη is that the mandatary (by analogy with D.17.1.60) acts accordingly to good faith or that the mandatary acts in the opinion of a [*vir*] *bonus*⁵². Only then the *mandatum* is valid. Donatuti and Longo discuss only Stephanus' explanation of latter, without referring the difference between *quemvis* and *quem vis*. They conclude that this explanation permits a *mandatum incertum*⁵³. Arangio-Ruiz contests precisely the existence of a *mandatum incertum*. He believes that the latter variant is not *incertum*⁵⁴. Scapini only makes a distinction and recognizes a *mandatum incertum*. The clause “οἶον ἄν θέλησ” is important for the validity of the *mandatum incertum*. He does not explicitly point out the linguistic distinction between *quemvis* and *quem vis*⁵⁵. In a remark at D.17.1.2.2⁵⁶ Stephanus also points to the indefiniteness of the mandate⁵⁷. He makes clear which element is important for the validity of the contract. He refers to the reason behind the formulation of the contract with the same

⁵¹ The word οἰοσδήποτε is translated as *of such and such a kind*. It concerns the indefinite pronoun οἶος (see ii, 7), which is reinforced by the particle δῆποτε (see LIDDELL & SCOTT οἶος vi).

⁵² For the meaning of *virī boni arbitratum* see: “ma occorre sempre quello che i Romani dicevano *arbitrium boni viri*, cioè un arbitrio che risponde a certi concetti di equità” (E.ALBERTARIO, *L'«Arbitrium boni viri» del debitore. Nella determinazione della prestazione*, Milaan 1924, p.6).

⁵³ DONATUTI, *Mandato incerto* (*supra*, n.12), p.185ff. and LONGO, *Sul mandato incerto* (*supra*, n.13), pp.143-144.

⁵⁴ ARANGIO-RUIZ, *Il mandato* (*supra*, n.14), p.113.

⁵⁵ SCAPINI, *Appunti per la storia del mandatum incertum* (*supra*, n.15), p.1222-1223: “Stefano, nella parte finale del testo, fa una distinzione sottilissima tra il mandato ad acquistare un fondo qualunque e il mandato ad acquistare il fondo che vorrà il mandatario [...] Unico limite alla validità del mandato con oggetto indeterminato è dunque, nei Basilici, che la determinazione dell'attività da compiere sia rimessa al mandatario con la clausola «οἶον ἄν θέλησ»”.

⁵⁶ D.17.1.2.2 *Gaius libro secundo cottidianarum*: “*Aliena tantum, veluti si tibi mandem, ut Titii negotia gereres vel ut fundum ei emeris vel ut pro eo fideiubeas*”.

⁵⁷ Albertario points out with reference to Donatuti that Justinian sought to keep the validity in case the object of a *mandatum* is indefinite, the so-called *mandatum incertum*. (ALBERTARIO, *L'«Arbitrium boni viri»* (*supra*, n.52), pp.18-19).

distinction as, in the remark discussed above. He only formulates this distinction here differently:

BS.703/13-24 [Stephanus]:

Στεφάνου. Σημείωσαι, ὅτι, κὰν γενικῶς ἢ τὸ ἴγκερον καὶ ἀπροσδιοριστῶς ἐντέλλωμαί σοι ἀγρὸν ἀγοράσαι, ἔρρωται τὸ μανδάτον. Ἐν γὰρ τῷ δὲ πονσαλίβους μονοβιβ. τιτ. γ'. διγ. ξβ'. (69) φησὶν ὁ Παπιανός, ὅτι ἔάν τις ἐπερωτηθῆ διδόναι ἀγρὸν μὴ σημάνας ποῖον ἀγρὸν, ἄχρηστος ἢ ἐπερώτησις. Ὡσαύτως κὰν ληγάτου, ἄχρηστος ἐν ᾧ δηλονότι μὴ ἔχων ἀγρὸν ὁ διατιθέμενος ἐληγάτευσεν. Οὕτω γὰρ λέγων οὐκ ἐναντιοῦσαι τοῖς εἰρημένους ἐν τῷ—διγ. τοῦ <δὲ> λεγάτις τοῦ πραττομένου. Ἴσθι δὲ καὶ ἐπὶ μὲν τοῦ μανδάτου, εἰ μὲν εἶπω, ἀγοράσον μοι ἀγρὸν⁵⁸, ἄχρηστον τὸ μανδάτον, ὡς ὁ Κέλσος ἐν τῷ τέλει τοῦ μῆ'. διγ. φησιν. Εἰ μέντοι ἀγοράσον μοι ἀγρὸν, οἷον ἂν δοκιμάσῃ ἀνὴρ ἀγαθός, <ἔρρωται τὸ μανδάτον>⁵⁹. Καὶ τὴν τοιαύτην σημασίαν ἔχεις ἐν τῷ ἐξῆς βιβ. τιτ. α'. διγ. ζ.'. καὶ ἐν τῷ πραττομένῳ δὲ λεγάτις. διγ. οθ'. (75) καὶ βιβ. ν'. τιτ. ιζ'. διγ. κε' (22).

By Stephanus. Notice that when I give you a mandate, even though the mandate was in general indefinite and without specification, to buy a plot of land, the mandate is valid. Because in the monobiblion *de sponsalibus* title 3 fragment 69 (§4) Papinianus says that, when someone promises by stipulation to give a plot of land without further specification which plot it is, the stipulation is void. In the same way the legacy would be invalid if as he would bequeath a legacy, unless of course the testator has bequeathed a plot of land, of which he is not the owner. Because if you say this, you must not contradict yourself through the words in the fragment [...] of *de legatis* of the book to be studied. Also be aware that in case of mandate, when I said “buy for me a plot of land” the mandate is void, as Celsus says at the end of fragment 48. But when I say: “Buy for me a plot of land, of which a reasonable man would approve”, <then

⁵⁸ Cf. D.17.1.2.1 *Gaius libro secundo cottidianarum*: “*Mea tantum gratia intervenit mandatum, veluti si tibi mandem, ut negotia mea geras vel ut fundum mihi emeris vel ut pro me fideiubeas*” with BT.737/13-15: Ἐντέλλομαί σοι χάριν ἐμοῦ μόνου, ἵνα διοικήσῃς τὰ ἐμὰ ἢ ἀγοράσῃς μοι ἢ ἵνα ὑπὲρ ἐμοῦ ἐγγυήσῃ. I give you a mandate only in my interest to manage my business or to sell it or to stand guarantee for me. There are numerous examples where the object of the *mandatum* is not specified. The legal question in the case is not specifically about the object. See for example for an indefinite object: D.17.1.3.1 with BT.738/3 and BS.705/14. And an example for a particular object: D.17.1.6.2 with BT.738/9 and BS.708/1. All other examples I leave unmentioned.

⁵⁹ Krit. app. <ἔρρωται τὸ μανδάτον>: supplere vult HB. Zie HB.II69: Deesse nonnulla videntur, verbi causa, ἔρρωται τὸ μανδάτον.

the mandate is valid>. You find such a meaning in the next book, title 1, fragment 7 and in the book to be studied *de legatis* fragment 89 (75) and also book 50 title 17 fragment 25 (22).

Stephanus begins by noting that the mandate to buy a plot of land in general (γενικῶς) is indefinite (ἄγχεστον). It should be noted that the word χεστον is written in the manuscript⁶⁰. Above this word is written -ἴγ-. It is unclear whether this is an improvement in a later hand. It may have been from the same hand. Scheltema makes no mention of this in the critical apparatus. In my view, the correction is applied correctly, as will become clear later. At the beginning of the remark, there is no further indication (ἀπροσδιορίστως) made in the mandate what land should be purchased. Yet this contract is valid. The reference to D.23.3.69.4 makes clear what he meant:

D.23.3.69.4:

A son-in-law stipulated with his father-in-law for the payment of a dowry at a fixed date, without specifying its nature or quantity, but leaving this for the father-in-law to decide. This stipulation is held to be valid, without considering the father-in-law's decision, unlike cases involving land which is not specified. A legacy or a stipulation of land is held to be void here, because there is great difference between constituting a dowry and providing an unspecified piece of property; the amount of the dowry can be fixed on the basis of father's resources and the husband's rank⁶¹.

In this fragment it is clear that there is a big difference (*differentia magna*) between a stipulation of an (as yet undetermined) *dos* and a *corpus ignotum*. The two stipulations are different, *nec videri simile*. Contrary to the *corpus ignotum*, the size of the dowry may still be determined (*constitui potest*). Apparently the moment in which the exact size of the dowry is determined is not important for the validity. There seems no need for an exact definition of every detail since it

⁶⁰ See Codex Coislinianus 152 fol. 129v, see BURGMANN et al., RHBR I (*supra*, n.20), nr.203.

⁶¹ D.23.3.69.4 *Papinianus libro quarto responsorum*: “*Gener a socero dotem arbitrato soceri certo die dari non demonstrata re vel quantitate stipulatus fuerat: arbitrio quoque detracto stipulationem valere placuit, nec videri simile, quod fundo non demonstrato nullum esse legatum vel stipulationem fundi constaret, cum inter modum constituendae dotis et corpus ignotum differentia magna sit: dotis etenim quantitas pro modo facultatum patris et dignitate mariti constitui potest*”.

limited by external factors⁶². It can also take place *after* the stipulation and makes the stipulation thus, in principle, not invalid on account of uncertainty. With reference to this fragment Stephanus shows that the land with the addition ὄν βούλη, just as the said dowry, can still be determined, even though the date of that determination falls *after* the entering into the contract⁶³. The missing details do not invalidate the contract. It should be noted that this case involves an *objective* valuation of the dowry⁶⁴.

After the general introduction and reference to D.23.3.69.4 Stephanus continues his remark on D.17.1.48.2, though this is found at D.17.1.2.2. There he states the distinction between an undetermined ἀγρόν without adding a pronoun and ἀγρόν, οἶον ἂν δοκιμάσῃ ἀνήρ ἀγαθός with the indefinite relative pronoun οἶος. The specific characterization of the mandatary as ἀνήρ ἀγαθός (*vir bonus*⁶⁵) qualifies the contract as valid. This distinction is similar to the difference between οἰονδήποτε ἀγρόν and ὄν βούλη, discussed above. At the end of his remark Stephanus refers to the same Digest

⁶² WATSON, *Contract of mandate* (*supra*, n.2), p.96: “At the very least, therefore, *mandatum*, need not be *certum* in every detail”. See also ZIMMERMANN *The Law of Obligations* (*supra*, n.7), pp.421-422 with a reference to D.17.1.46 and 59.6.

⁶³ Cf. BS.2063/20-2064/4 [anonymous]. In a remark at this fragment (BS.2064/5-19 [anonymous]) and a reference to D.30.75 states that if someone other than the father stipulates the dowry and the size is unknown, the judgment of a reasonable man is also decisive. See also C.5.11.3 (in a remark (BS.2086/24-29) at this fragment is referred to D.23.3.69.4).

⁶⁴ Albertario connects D.23.3.69.4 to Codex fragment 5.11.3. He is demonstrating that the objective measurement of performance at the time of Justinian changed in the judgment of a reasonable man (*virī boni arbitrium*) (ALBERTARIO, *L'«Arbitrium boni viri»* (*supra*, n.52), p.8-10); cf. also Albertario's conception of the Digest fragments D.38.1.30*pr.* and D.38.1.16 (see p.11ff.). Later Albertario says that the Byzantine jurists the Justinian texts add new dogmas and new trends. They broaden the range of the Justinian texts (see p.28-29). He concludes in this way (see p.29 ff.). This will not be explored in this article. See also D.32.43. In the same manner as in D.23.3.69.4 in this fragment the question of how one finds the size of a dowry for one's daughter is answered, if it must be established in the judgment of a reasonable man. Cf. also D.34.1.10. In the present case it concerns the scope of livelihood which is bequeathed.

⁶⁵ For the application of *virī boni arbitrium/arbitratum* see for example: D.3.3.33.3; D.7.1.9*pr.*; D.7.9.1.6; D.17.2.76; D.27.10.8 etc. Most examples of using *virī boni arbitrium/arbitratum* concern the doctrines on legal representation, bequest, fideicommiss and usufruct. See for fideicommiss and *arbitrium boni viri* S.RICCOBONO, *L'arbitrium boni viri nei fedecommissi*, in: E.ALBERTARIO (ed.), *Mélanges de droit romain dédiés à Georges Cornil*, vol. II, pp.310-371.

fragments as the remark at D.17.1.48.2, using almost the same words, though with some mistakes. These three fragments have “such a meaning” (τὴν τοιαύτην σημασίαν)⁶⁶. The similarity in the “same meaning” lies in the application of an objective qualification to the person who has to *decide*: it must always concern the judgment of a reasonable man (*virī boni arbitrium*).

The question is how the indeterminacy in a contract is to be construed. I believe that the correction in the manuscript of κέρτον to ἴγκερτον is therefore correct. Stephanus says namely that although in general (γενικῶς) the *mandatum* is undetermined, it is valid. In my view, the word γενικῶς should be understood as “abstractly”. In abstracto speaking, the object is indeterminate (ἴγκερτον), it concerns the object of an indeterminate thing or an indeterminate act. But if one looks at the case being considered “in concreto”, then there is a case of definiteness. The complete determination of the object is achieved only *after* entering into the contract. The object is not determined in all details at an earlier stage. The moment that the object becomes concrete does not stand in the way of the existence of the *mandatum*. In addition, the choice is left to a *vir bonus*. This is a compulsory condition for the success of the contract with a yet undetermined object. In my view, one can infer that Stephanus himself understood such a mandate as in D.17.1.48.2 not as a *mandatum incertum*. The other (early) Byzantine jurists, with their different interpretations, also did not.

3. The Basilica and D.17.1.46

In D.17.1.46, a certain discretion could be left to the mandatary⁶⁷. The Basilica text gives D.17.1.46 as follows⁶⁸:

BT.753/21-23:

Ὅτε μὲν γὰρ φανερά ἐστιν ἡ ἐντολή, οὐ δεῖ παρεξιέναι· ὅτε δὲ ἀφανῆς ἢ πολλῶν αἰτιῶν, δύναται ὁ ἐνταλθεὶς καὶ δι’ ἐτέρων δόσεων ἐπὶ συμφέροντι τῷ ἐναγομένῳ πληροῦν αὐτὸ καὶ κινεῖν τὴν περὶ ἐντολῆς ἀγωγὴν.

⁶⁶ In all these fragments there are unfortunately no Basilica scholia handed down. See also DE JONG, Ἀνὴρ ἀγαθός (*vir bonus*) (*supra*, n.3).

⁶⁷ See *supra*, paragraph 1.

⁶⁸ Cf. BS.775/29-776/12 [anonymous].

When the mandate is well defined, it cannot be deviated; if it is not well defined or consists of many performances, then the mandatary can fulfill by other actions in favour of the mandator and the *actio mandati* arises.

The Basilica text is shorter than the Digest text, but does not deviate from it juridically. Next to this text, the following *new* scholion at D.17.1.46 is placed⁶⁹. Here the remark of Stephanus above is (probably) referred to⁷⁰:

BS.776/19-26 [anonymous]:

Σημείωσαι τὸν βασιλικὸν λέγοντα, ὅτι ὁ ἐνταλθεὶς ῥητὸν τι ἐκεῖνο ὀφείλει ποιεῖν καὶ μὴ παρεξίεναι τὴν ἐντολὴν. Ἀνάγνωθι καὶ τὸ ε'. κεφ. καὶ τὸν ἐκεῖ παλαιόν⁷¹. Ζήτει καὶ τὸ μα'. κεφ. καὶ τὸν παλαιόν⁷². Ὅτε μέντοι ἀφανὴς ἐστὶν ἢ πολλὰς αἰτίας ἔχει προκειμένας, τότε δύναται ὁ ἐνταλθεὶς καὶ διὰ τρόπου μὴ ἐκφωνηθέντος ἐν τῇ ἐντολῇ πληροῦν ταύτην ἐπὶ συμφέροντι τοῦ ἐντεταμένου. Τὸ αὐτὸ κρατεῖ, καὶ ὅτε ἀφανὴς ἐστὶν, καθὼς καὶ οἱ ἐνταυθά

φασιν παλαιοί, καὶ τὸ β'. θεμ. τοῦ β'. κεφ. καὶ ἡ ἐκεῖ πρώτη παραγραφὴ τοῦ Στεφάνου.

Notice that the Basilica fragment reads, that when something well-defined is mandated, it should be done, and one should not deviate from the contract. Reads also fragment 5 and the old commentary there. Also look at fragment 41 and the old commentary. But when the mandate is indefinite or includes more performances, than the mandatary can comply in a way not mentioned in the mandate in the mandator's interest. The same applies too when the mandate is indefinite, as its old commentaries maintain there, and the second casus of fragment two and the first remark there by Stephanus.

Fragments 5 and 41 refer to the limits of *mandatum* which may not be exceeded. The anonymous author refers twice –in my opinion erroneously– to the validity of the *mandatum* in which the contract is

⁶⁹ See Codex Graecus Coislinianus 152 fol.142v (see *infra* n.20). The scholion is on the inside of the leaf and is (therefore) framed. Besides the *old* scholia, which come from the Justinian period, *new* scholia, which *after* the creation of the Basilica are written were also inserted around the Basilica text [see DE JONG, *Stephanus* (*supra*, n.25), p.4].

⁷⁰ See BS.703/13-24 (*supra* 2.c). See for the interpolation discussion WATSON, *Contract of mandate* (*supra*, n.2), p.94ff. This will not be explored in this article.

⁷¹ The anonymous author probably refers to BS.708/1-20 [anonymous].

⁷² There are no scholia handed down at BT.14.1.41.

not well defined (καὶ ὅτε ἀφανής ἐστίν). He certainly implies by this the *mandatum incertum*, and refers to the “old” commentary, and especially to Stephanus. His remark on the “old” commentary, and in particular on Stephanus, shows that he must have misunderstood this. He does not qualify his remarks as Stephanus does, at least he does not make that evident in his remark. If one were to read these remarks of Stephanus without the complete explanation –such as Donatuti and Longo do⁷³– one would surely conclude that a *mandatum incertum* exists, which would be a misconception.

4. Conclusion

In the Italian legal Byzantine literature after 1885 the scholia at the Basilica text, B.14.1.48.2, corresponding to D.17.1.48.2, are employed in a too limited and one-sided way to provide an answer to the question whether *mandatum incertum* existed in Byzantine law. Scholia at other fragments related to D.17.1.48.2 –if they already were used– were often misinterpreted. There is a shift in understanding relating to the existence of *mandatum incertum* and the argumentation for it by the various Italian jurists, but a complete and thoughtful interpretation is lacking to date.

In the remarks at D.17.1.48.2 in the Basilica different interpretations as to the possible existence of *mandatum incertum* are found, namely the juridical, the linguistic, and a combination thereof. The juridical interpretations always concern the indication that the determination of the object of the *mandatum* is missing. This explanation is the most common of the three interpretations. In the linguistic interpretation in each case the appropriate choice of the indefinite relative pronoun (ὅστις) for *cuivis* is referred to. Anonymus indirectly explains that the choice of the demonstrative pronoun ὃδε is not correct, because the object then obviously is too specific, but the indefinite relative pronoun ὅστις is. In another manuscript (P) by an anonymous author there is a linguistic distinction, reminiscent of the distinction of Anonymus. This also emphasizes the indefinite relative pronoun ὅστις as correct form for D.17.1.48.2, because there is no person to be invoked. The third interpretation combines both the juridical and linguistic interpretation. Through the choice of the

⁷³ DONATUTI, *Mandato incerto* (*supra*, n.12), p.185ff. and LONGO, *Sul mandato incerto* (*supra*, n.13), p.145ff.

correct Greek translation it is juridically explained the object is not well-defined. Stephanus is the only Byzantine jurist who offers in this interpretation a clear linguistic distinction between *quemvis* and *quem vis* in the second case of D.17.1.48.2. He explains the difference regarding the content. Only the variant οἰονδήποτε for *quemvis* can in this case be intended according to Stephanus. A plot of land is undetermined and the contract is not valid. If *quem vis* is intended and is translated into ὄν βούλη, then there is a legal *mandatum*. Stephanus qualifies the mandatary in this case as a *vir bonus*, i.e. a ἀνὴρ ἀγαθός. In the execution of the mandate the judgment of this man (*viri boni arbitratumi*) is of interest. This means that the mandatary must fulfill the contract in good faith. The distinction between οἰονδήποτε and ὄν βούλη indicates according to Stephanus a different degree of discretion of the mandatary. Complete discretion (οἰονδήποτε) in case of entering into a stipulation, a legacy or mandate is not possible. Only limited discretion in the form of *virī boni arbitrium* can qualify the contract. The *virī boni arbitrium* is decided by the choice for ὄν βούλη. Stephanus himself is aware of the fact that a contract, as in D.17.1.48.2, generally resembles a *mandatum incertum*. In this context, he explains the difference between choosing *quemvis* and *quem vis*. With reference to fragment D.23.3.69.4 he shows clearly what it means when *quem vis* is chosen. In this fragment there are two different cases, a yet undetermined object and an entirely unknown object (*corpus ignotum*). The fact that the object, as yet undefined, can be determined in one way or another in the future, that is to say the choice of *quem vis*, makes a *mandatum* not *incertum*.

Based on the fragments from the Basilica it can be concluded that there is no indication that a *mandatum incertum* existed in Byzantine law.