50 Years of Alan Watson's Legal Transplants:
A look from across the Channel/Ocean

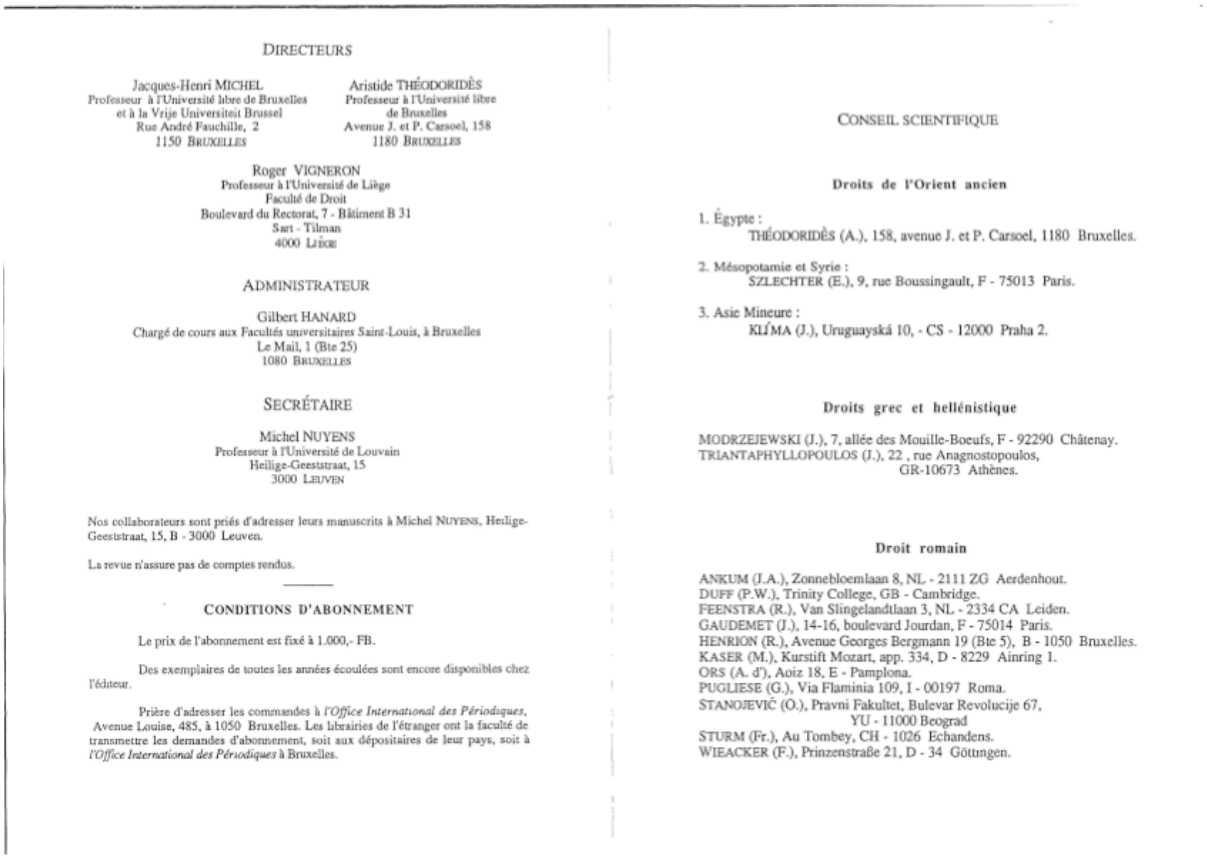
Abstract:

Alan Watson's book on Legal Transplants has had quite a success within the Anglo-American Academy, but is far less known outside of it. In a conference paying tribute to the great scholar, it is important to evaluate how much it is still valuable, especially outside the Common Law Legal Systems.
In this keynote Lecture, I offer to go through the main issues discussed by Alan Watson, trying to transpose to the legal systems of the Western European Continent.

Praise of the Belgrade Law Faculty and thanks for the invitation

It is an enormous honour and pleasure at the same time for me to have been invited to Belgrade for the Iustoria conference of 2024.

I have had very friendly contacts with colleagues from your law faculty for many years and this increases my pleasure of course. It is always tricky to make names in this context, but I see that many are here. I wish to make one particular name though, and that would be Obrad Stanojevic, who has been member of the scientific board of the RIDA, the journal I have been running for more than 20 years now. He entered the board for RIDA 37 (1990) until his death in 2011. It was Milena Polojac who commemorated him together with his friend Keith Vetter



DIRECTEURS

Jacques-Henri MICHEL
Professeur à l'Université libre de Bruxelles
et à la Vrije Universiteit Brussel
Rue André Fauchille, 2
1150 BRUXELLES

Aristide THÉODORIDÈS
Professeur à l'Université libre
de Bruxelles
Avenue J. et P. Carsoel, 158
1180 BRUXELLES

Roger VIGNERON
Professeur à l'Université de Liège
Faculté de Droit
Boulevard du Rectorat, 7 - Bâtiment B 31
Sart - Tilman
4000 LIÈGE

ADMINISTRATEUR

Gilbert HANARD
Chargé de cours aux Facultés universitaires Saint-Louis, à Bruxelles
Le Mail, 1 (Bte 25)
1080 BRUXELLES

SECRÉTAIRE

Michel NUYENS
Professeur à l'Université de Louvain
Heilige-Geeststraat, 15
3000 LEUVEN

Nos collaborateurs sont priés d'adresser leurs manuscrits à Michel NUYENS, Heilige-Geeststraat, 15, B - 3000 Leuven.

La revue n'assure pas de comptes rendus.

CONDITIONS D'ABONNEMENT

Le prix de l'abonnement est fixé à 1.000,- FB.

Des exemplaires de toutes les années écoulées sont encore disponibles chez l'éditeur.

Prière d'adresser les commandes à *l'Office International des Périodiques*, Avenue Louise, 485, à 1050 Bruxelles. Les librairies de l'étranger ont la faculté de transmettre les demandes d'abonnement, soit aux dépositaires de leur pays, soit à *l'Office International des Périodiques* à Bruxelles.

CONSEIL SCIENTIFIQUE

Droits de l'Orient ancien

1. Égypte :
THÉODORIDÈS (A.), 158, avenue J. et P. Carsoel, 1180 Bruxelles.

2. Mésopotamie et Syrie :
SZLECHTER (E.), 9, rue Boussingault, F - 75013 Paris.

3. Asie Mineure :
KLÍMA (J.), Uruguayská 10, - CS - 12000 Praha 2.

Droits grec et hellénistique

MODRZEJEWSKI (J.), 7, allée des Mouille-Boeufs, F - 92290 Châtenay.
TRIANTAPHYLLOPOULOS (J.), 22 , rue Anagnostopoulos,
GR-10673 Athènes.

Droit romain

ANKUM (J.A.), Zonnebloemlaan 8, NL - 2111 ZG Aerdenhout.
DUFF (P.W.), Trinity College, GB - Cambridge.
FEENSTRA (R.), Van Slingelandtlaan 3, NL - 2334 CA Leiden.
GAUDEMET (J.), 14-16, boulevard Jourdan, F - 75014 Paris.
HENRION (R.), Avenue Georges Bergmann 19 (Bte 5), B - 1050 Bruxelles.
KASER (M.), Kurstift Mozart, app. 334, D - 8229 Ainring 1.
ORS (A. d'), Aoiz 18, E - Pamplona.
PUGLIESE (G.), Via Flaminia 109, I - 00197 Roma.
STANOJEVIĆ (O.), Pravni Fakultet, Bulevar Revolucije 67,
YU - 11000 Beograd
STURM (Fr.), Au Tombey, CH - 1026 Echandens.
WIEACKER (F.), Prinzenstraße 21, D - 34 Göttingen.

And these short commemorations happened during the SIHDA 2011 in Liège.

Alan Watson and his legal transplants

I must confess that I did not read Alan Watson's book before the invitation to Belgrade. Nothing to be proud of, on the contrary! But at least, you gave me the opportunity to correct this terrible failure of mine. So, I obviously have to thank you for that too!

Because of the little time I had to send in a title, I said I would give you my impression on a book, that seemed primarily written for an Anglo-Saxon readership. Particularly when it is about Law in Scotland, Massachusetts or New Zealand, but the book is of course much more than that! It is even much more than a book on Legal Transplants! It is a very on Comparative Law as such.

As for the introductive chapters on Comparative Law as an Academic Discipline, and the Perils and Virtues of Comparative Law: I liked it very much! The number

of topics he writes about in a little more than 100 pages is impressive. It is therefore impossible to comment on all his ideas, which is why I will do some cherry-picking. I will put forward some topics, commenting them either with comments on Roman Law, either with comparisons with Belgian Law.

Plan of todays talk: 3 parts

1. *The first point I will address, is the question of the Volksgeist*

The question of the Volksgeist is addressed in several parts of his book (Chapter 4: Introduction to Legal Transplants).

Even if Alan Watson does not reject the idea of the existence of a Volksgeist, decisive for the content of our legal systems, he gives many examples showing that the similarity between the donor system and the receiving legal system are not necessary to allow a legal transplant. And in his concluding reflections (p. 96) he writes "It follows from our reflections to this point that usually legal rules are not pecularly devised for the particular society in which they now operate and also that this is not a matter for great concern". (And in p. 97) "Speaking broadly though, if one were trying to discover 'the Spirit of a people' from its law, one should look not at the overall system but to the details where it diverges from other systems".

I will say it right away: My impression is that that Watson is right, when he dismisses great part of the idea of a Volksgeist, even if he does so without a frontal attack! In my view, the idea that a legal system is very much linked with the history and the culture of a people is mainly an idea of the 19th century, when modern states established and felt that establishing a national legal system, was the complement to a national flag, a national constitution and a national anthem! This is at least very much how Belgium look at it in 1831!

Just a few words to remind you how that happened (and actually Alan Watson tells part of the story (in his second afterword – 2000, III).

Belgium was invaded and annexed by France in 1797. It was still French territory in 1804, which is why the French civil code has been applied in Belgium since the beginning, as a part of France. After Waterloo and the defeat of Napoleon's France in 1815, Belgium has been merged with the Netherlands for 15 years. Between 1815 and 1830, they worked on the drafting of new codes. In those years, a new civil code has been written, but it came into force only in the Netherlands, because Belgium separated from the Netherlands in 1830. At that time, the project was ready but not in force. So, the Dutch went on with it, whereas the Belgians didn't want to have anything to do with the Dutch anymore and didn't seem to consider transforming the project into a Belgian civil code. The paradox is that this project, that became the Dutch civil code of 1838, was actually first written in French, by a Belgian, a judge from Liège: Pierre-Thomas Nicolaï. This means that While the Netherlands had a "Belgian code", the Belgians decided not to take it, and decided to temporarily keep the French code.

To ascertain the existence of the newly founded Belgium, it has been decided to chose a new flag, a new national anthem and to write a very modern constitution. The Belgians wanted to show to the world that they existed as a people and country. In those years, existing as a people also meant existing as an individual legal system. For this reason, the Belgian Constitution of 1831 stated in article 139, 11°: "The French codes must be changed as soon as possible (dans les plus courts délais possibles)".

What I mean with this example is that, even if at first, a new civil code was inherent with the very existence of a new country, with the time, it became less and less urgent. The Belgians tried several times to draft a new civil code, but with the time, they tried less and less hard to do so. During the 20th century, nothing has happened in that field. In part, the Belgian legislator also thought that

the European Union might draft a common civil code and therefore do the job in place of the Belgian legislator... [Alan Watson himself, before the Brexit (in his Maastricht speech of 2000, IV) seems to believe that such a common code could be written rather shortly]. But when it appeared that the European Union would probably not be able to offer a common civil code, the Belgian legislator finally woke up in 2014 a started to work at the drafting of a new civil, that is now half-way through. It will be made out of 10 books and half of them is already in force. What does that say about the Volksgeist? I'd say that even though modern countries have legal systems that do not really rely on a separate Volksgeist, there are very often sensibilities, relying on some national sentiment, that is an obstacle to a broader unification of the private law. But I would not say that a legal system is the product of a Volksgeist. Therefore, Legal Transplant are too numerous and don't seem to depend on anything like the Volksgeist.

2. *The second point I would like to address is the question of authority in Legal Transplants*

(The questions of Authority are to be found in chapters 8 and 15 of Alan Watson's booklet).

Alan Watson discusses the question of Authority by reminding that in ancient legal systems, the set of rules was often a gift of god, like the Ten commandments given by Yahweh immediately to Moses. Then the authority could also come from national heroes, like Napoleon, just to name one. It is of course true that the existence of a strong authority helps the code to come into force, as it is less discussable. Who can argue with God or Napoleon? But, as Watson puts it, legal transplants also happen without such an authority. He gives the example of the influence of Roman law on Scottish law (p.48). In his "Institutions of the Laws of Scotland", Stair cites the Roman sources directly, but does not consider Roman

law binding for its authority, yet being, as a rule, followed for its equity. This of course makes us think of the famous position in Western Europe.

Within the Holy Roman Empire of the Germanic nations, the Emperor opted for Roman law. This choice created stress among the jurists of the principalities and other states integrated into the empire. If Roman law was the Emperor's law, then it had to be distinguished from it and set aside within the principality. From then on, when a Roman rule was nevertheless accepted at local level, it was by virtue of the justification: "*non ratione imperii, sed imperio rationis*!". It is the quality of the Roman law that makes is necessary, not the authority of the Emperor. The same idea has been applied in the Principality of Liège, where an opposition between customary law of Frankish origin and Roman law could be found. Very often, Roman rules were integrated into the legal system of the Principality, as long as the substance was in concordance with customary law... I'd like to give you an example:

My PhD student – Marie-Sophie Silan – who is now finishing a PhD on the legal position of women in the Principality of Liège in Modern Times found out an interesting evolution about the *patria potestas*. Actually, it is more a reintroduction of the Roman *patria potestas* to replace the precedent system. So, they changed the terminology, but also the rules. As for the terminology, they returned to the translation of "*patria potestas*" in French, which is "puissance paternelle", instead of "mambournie", the previous terminology. As for the rules and especially the stages, it was back to Roman law: Legal capacity in absence of a *pater familias*: 14 years. 12 and 14 years were also the ages from which you were allowed to marry. The protection for minors was until 25 years. The married women had the equivalent of a *manus*, which they escaped once marriage was finished by divorce, or more likely by death of the husband. As you probably realise: the system is extremely roman, but yet this has been contested then and even recently by legal historians. But for the latter, it is mainly because of a misrepresentation of the Roman law. The argument being that it could not be

Roman, as the roman pater had the right to kill their children. This again shows that we should never trust legal historians, especially when they claim that a rule is not roman, even though the terminology is very roman. It is funny how for them, the use of roman terminology is often pure chance and has nothing to do with roman law...

Now my conclusion here is that in the Principality of Liège too, Roman law found its way back through its own qualities. It was the law that lawyers and judges would learn at the university and so much easier to implement in the end. Is it a matter of quality of authority? It might be that the reason was not the same for everyone, but in the end, Roman law prevailed!

More recently, with the new Belgian civil code, the question of the authority has been put in a new way with the introduction of article 5.1.

Half of the ten books are already in force as of today.

Book 5 of the new Belgian civil code is on obligations. In the French civil code, there was no definition of the obligation and we have lived without such a legal definition of the obligation for more than two centuries. For some reason, the Belgian legislator included many definitions in the books of the code already in force. And in Article 5.1, there is for the first time in our codes, a definition of the obligation.

Livre 5. Les obligations
Titre 1er. Dispositions introductives
Article 5.1. Obligation
L'obligation est un lien de droit en vertu duquel un créancier peut exiger, si nécessaire en justice, d'un débiteur l'exécution d'une prestation.

I don't know how familiar you are with the French language, but it is very obvious that the definition of the obligation is an almost letteral translation of a passage of Justinian's Institutes!

Article 5.1. Obligation

L'obligation est un lien de droit en vertu duquel un créancier peut exiger, si nécessaire en justice, d'un débiteur l'exécution d'une prestation.
Inst. Iust. (*de obligationibus*) 3.13pr :
Nunc transeamus ad obligationes. Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura.

Why is it, that the Belgian legislator felt the need to add a definition of the obligation in the new code? To be honest, there were already definitions in the Napoleonic code, but less than in the new Belgian code. But this definition is new in our code! How comes that such a very Roman definition entered the code? You could imagine that it shows the good knowledge of Roman law by our legislator. The reality is more complex and certainly a bit disappointing!

Without questioning the erudition of the Belgian author of this translation, I can unfortunately assure you that he did not know that the proposed Article 5.1 was a translation of a text from Justinian's Institutions. I know this because I had the opportunity to put the question to him personally and was very surprised to learn this. For him it was simply a traditional definition! One can see the glass half empty: modern jurists - even the best - know nothing about Roman law! But one can also see the glass half full: Roman law is stronger than anything else and endures despite the ignorance of the lawmakers!

However, one may wonder by what miracle the text of Article 5.1 is so close to its Justinian original. One clue might lie in the fact that the author of the article studied law at my faculty and took Roger Vigneron's Roman law course. Vigneron, who is also my teacher, always used the text of the Institutions to teach the nature of obligation. And in his collection of Roman law texts, he offered the following translation[1].

Institutes de Justinien, 3.13pr. :
Passons maintenant aux obligations. L'obligation est un lien de droit en vertu duquel nous sommes nécessairement contraints de payer quelque chose, selon les droits de notre État.

[1] It is different from the translation written by Hulot : « Nous devons maintenant passer aux obligations. L'obligation est un lien de droit qui nous impose la nécessité de payer quelque chose, conformément aux droits établis dans notre patrie ».

Maybe – and despite the fact that our students tend to forget a lot of the Roman law they learn in our lessons – once they graduate, their fundamental knowledge is still there somehow. This should be an encouragement for our Roman law classes!

3. *My third and last point will be about the transfer of ownership and risk in sale (chapter 14 of the book)*

The reconstruction proposed by Alan Watson is really well done is a such limited number of pages (5 and a half). To summarise this even more, Alan Watson shows how the system of transfer of ownership and risk in sale finished by becoming different from Roman law, but also from each other, in legal systems that derive from Roman law though!

In Roman law, the transfers of risk and ownership happen separately. The risk is immediately transferred by the consent on the contract of sale, whereas the ownership is transferred only with the *traditio* (or *mancipatio*).

In French and in German law, both transfers happen at the same time, the difference being that in French law, these transfers happen already at moment of the consent on the contract of sale, and in German these transfers come with the *dingliche Einigung*, let's call it the German *traditio*.

And then, there is the Swiss law, which follows the Roman pattern: the buyer bears the risk even if the thing is still in the hands of the seller.

I have again two comments on this. The first is that the situation in Roman law, even if rule of *periculum est emptoris* finally prevailed, has probably not always been this easy and clear. The second will be on modern law, meaning French, German, Swiss and also some other systems, including Quebec law.

3.1. Roman Law – *periculum est emptoris*

In order to clarify the matter - and I apologise for the elementary nature of what follows - I shall begin by recalling that when we speak of risk in the contract of sale, we are referring to the following situation: The problem of *periculum rei venditae* arises, in a contract of sale, when the object of sale is not handed over to the buyer at the time of the conclusion of the contract but at a later time.

This situation gives rise to a risk with regard to the proper performance of the contract, insofar as it is possible that the thing may perish before being handed over to the buyer. The impossibility of handing over the thing to the buyer does not make it impossible to pay the price. Indeed, it goes without saying that the buyer's obligation to pay the price is not subject to this hazard, since money is a thing of kind (*genus*) and is preserved by the *genera non pereunt* rule.

If we schematise, there are therefore two possibilities: either the buyer must pay the price in spite of everything, we will say that it is he who bears the risk and we will speak of *periculum emptoris*; or on the contrary, the buyer is released from his obligation to pay the price, we will say that it is the seller who bears this risk and we will speak of *periculum venditoris*.

In theory, a legal system can choose between *periculum emptoris*, *periculum venditoris* or even a blend of both systems, depending on the specific situation.

The analysis of the Roman legal system on this problem has been in the middle of endless debates. These debates have also evolved with the evolution of methods in the field of Roman law.

Globally, the scholars of Roman law agree on the principle of *periculum emptoris ante traditionem*. In other words, once the parties have agreed on the object of the sale and its price, the risk relating to this object is borne by the buyer even before he has received it and therefore even before he has physical control and ownership.

An important testimony in this sense can be taken from a text of the jurist Paul, in the Digest:

Paul. l.36 ad ed. (D.18.6.8pr.)
Necessario sciendum est, quando perfecta sit emptio: tunc enim sciemus, cuius periculum sit: nam perfecta emptione ***periculum ad emptorem respiciet****. et si id quod venierit appareat quid quale quantum sit, sit et pretium, et pure venit, perfecta est emptio (...)*

It is essential to know when a sale is perfect because we then know who bears the risk in the thing; for one the sale is perfect, **risk is on the purchaser**. And if the thing sold be identified, what it is, its nature, and quantity, the price be fixed, and the sale be subject to no condition, the sale is perfect (...)

A minority of authors disagrees on this and considers that the risk was borne by the seller in Roman law: *periculum est venditoris*! This solution implies that if the thing perishes, the purchaser does not have to pay it anymore; or that if he had paid it already, he may obtain it back.
Even if this second position is clearly in the minority, we have to admit that some fragments of the Digest seem to contradict the principle of *periculum emptoris ante traditionem*. An example of this can be read in another famous text of the same jurist Paul, about the beds destroyed by an aedile on the street[2].

Paul. *l.3 Alfeni Epit.* (D.18.6.13):
The aedile destroyed beds wich had been bought and which were left in the street; if they had been delivered to the purchaser or if it was his fault that they had not been delivered, it is clear that the risk is on the purchaser,
Jul. l.3 ad Urs. Ferocem (D.18.6.14):
and he can bring an *actio legis Aquiliae* against the aedile if the latter acted wrongfully, or at least can he proceed against the seller with the *actio empti* to require the seller to cede to him the actions he would have against the aedile.
Paul. *l.3 Alfeni Epit.* (D.18.6.15pr.)

[2] D.18.6.13 Paul. (3 Alfeni Epit.) *Lectos emptos aedilis, cum in via publica positi essent, concidit: si traditi essent emptori aut per eum stetisset quo minus traderentur, emptoris periculum esse placet.* D.18.6.14 Iul. (3 ad Urs. Ferocem.) *Eumque cum aedili, si id non iure fecisset, habiturum actionem legis Aquiliae: aut certe cum venditore ex empto agendum esse, ut is actiones suas, quas cum aedile habuisset, ei praestaret*. D.18.6.15pr. Paul. (3 EPIT. ALF.) *Quod si neque traditi essent neque emptor in mora fuisset quo minus traderentur, venditoris periculum erit*.

But if the beds had not been delivered and it was not due to the purchaser that the delivery had not taken place, the risk will be on the seller (*periculum est venditoris*).

In this text, Paul clearly writes: "*si neque traditi essent neque emptor in mora fuisset quo minus traderentur, venditoris periculum erit*". If the traditio of the beds did not find place, the risk will lie on the seller!
Much has been written on this text. It has been used in turn to justify both rules: either *periculum emptoris*, or *periculum venditoris*. My idea today is not to offer you a brand-new theory on this. I chose to remind the reconstruction proposed by Mario Talamanca.

Talamanca's proposal is to move away from the monistic solution and try to analyse the texts of the Digest within the framework of the *ius controversum*.
He notes that the earliest testimonies in the Digest accredit the possibility of recourse to the *periculum venditoris*. Thus the text of Paul that I mentioned earlier, with the aedile destroying the beds, is taken from the epitome of Alfenus Varus. The example commented on by Paul therefore probably dates from the end of the republican period or the beginning of the imperial period.
Alfenus Varus might have prefered the *periculum venditoris* and only later, Labeo (that's to say still at the beginning of the imperial period) would have prefered the *periculum emptoris*, but only for the sales of slaves, in case the slave died *ante traditionem*.
And this is how the controversy between Sabinians and Proculians started: The Sabinians wanted to go on with the *periculum venditoris* rule, whereas the Proculians from then on wanted the *periculum emptoris* rule to prevail.
And finally, it seems that the *periculum emptoris* of the Proculians has generalised and prevailed in the Digest.

The state of the law in the late classical period can be read in Paul's fragment. (D.18.6.8pr[3].) He writes that since the perfection of the contract of sale, the risk lies on the buyer or purchaser (*periculum ad emptorem respiciet*).

This risk goes from the *commodum* until the extreme *incommodum*, that would result in a complete loss of the thing.

The breakthrough of the *periculum emptoris* principle was probably favoured by the affirmation of the liability for *custodia* as a natural element of the contract of sale.

For those who might have forgotten, I recall that *custodia* was for the seller an obligation to preserve the thing sold until delivery to the buyer, guaranteeing also against fortuitous cases that came within his sphere of control, such as theft by a thief.

Mario Talamanca, again, speculates that the initial *periculum venditoris* could be explained by the fact that, initially, buying and selling constituted an exchange of a thing for a price and that payment of the price could only be justified in exchange for the thing. Then the evolution would occur with the special sale of slaves, for which *periculum emptoris* was admitted, in the case where the slave had died after the sale.

Why put the risk on the buyer in this case? One of the arguments was probably the inclusion of *custodia* in the contract of sale. *Custodia* places an important liability on the seller which could also be analysed as a partial persistence of the *periculum venditoris*.

In Justinian law, the Institutes[4] confirm the *periculum emptoris* rule. The terminology on changes a little by saying that the *emptio venditio* must be "*contracta*" instead of the usual "*perfecta*".

[3] See above.

[4] I.3.23.3 : Cum autem emptio et venditio contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si homo mortuus sit vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex

This was, summarised in a few minutes, what I think is the very seductive reconstruction proposed by Mario Talamanca. Of course, the doctrine did not stop with the great Roman author! Other authors have pointed out since that while this reconstruction was attractive, it was also based on a great deal of conjecture.

For instance, Martin Pennitz[5], in his book "Das *periculum rei venditae*. *Ein Beitrage zum aktionenrechtlichen Denken*" proposes a procedural analysis of the problem of *periculum* and reaches different conclusions. For him, the word *periculum* must be taken in the sense of the risk within the trial. For Pennitz, synallagmatic character of the contract is secondary to the effect of the *actiones empti* and *venditi*. These actions are actions in good faith, which implies that they have some limits.

If we take the rather simple case of a sale of a slave that dies naturally before the *traditio*, the risk falls on the buyer because he will be granted the *actio empti* only if he paid the price, but this action will not allow him to obtain the *traditio* of the slave from the seller, because the latter did not commit any *culpa* or *dolus*.

I don't have the time to go any deeper in the details of the global explanation offered by Martin Pennitz, that is also of great interest.

I would rather like to turn to the third part of my paper and compare the Roman law rules I just discussed with the solutions we find in modern codifications.

parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arboribus turbine deiectis longe minor aut deterior esse coeperit: emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet: nam et commodum eius esse debet, cuius periculum est. Quod si fugerit homo qui veniit aut subreptus fuerit, ita ut neque dolus neque culpa venditoris interveniat, animadvertendum erit, an custodiam eius usque ad traditionem venditor susceperit. Sane enim, si susceperit, ad ipsius periculum is casus pertinet: Si non susceperit, securus erit. Idem et in ceteris animalibus ceterisque rebus intellegimus. Utique tamen vindicationem rei et condictionem exhibere debebit emptori, quia sane, qui rem nondum emptori tradidit, adhuc ipse dominus est. Idem est etiam de furti et de damni iniuriae actione.

[5] Martin Pennitz, *Das periculum rei venditae. Ein Beitrag zum « aktionenrechtlichen Denken » im römischen Privatrecht,* Böhlau Verlag Wien 2000.

3.2 The modern law of *periculum*

Alan Watson shows clearly the evolution from Roman the different in French and German law, calling the German approach "more logical" (p.85). I fully agree to that in modern law: as for the transfer of risk, it is logical that the buyer will bear the risk starting from the moment when he actually possesses the thing he bought. Can we consider that the differences between French and German law are expressions of different "Volksgeists"? Maybe partially, but it is also partially a matter of chance. If we take the case of the Swiss law, it is similar to the Roman law rule, but only by chance. It seems that when the author of the Swiss code discussed this matter, the German speaking jurists wanted the German rule and the French speaking jurist the French rule. So, it has been decided that the transfer of ownership would be German, but the transfer of risk French! It is a bit like the Swiss have a divided Volksgeist on *periculum*.

But there is also another way to separate the transfer of ownership and the transfer of risk. Regularly, like in Québec, Louisiana or the Arabic codes, the choice is made to have the French system of transfer of ownership[6], automatically linked with the consensus on the contract, but they also refuse to burden the risk on the buyer and chose for the *periculum venditoris*. In other words, the buyer becomes owner before the delivery of the thing[7]. The delivery is thus not a transfer of ownership, but if the thing perishes before the delivery, it is the seller who will bear the risk[8].

So, in the end, we have 4 possibilities:

---

[6] CCQ (1991) art. 1433. Le contrat crée des obligations et quelquefois les modifie ou les éteint.
En certains cas, il a aussi pour effet de constituer, transférer, modifier ou éteindre des droits réels.

[7] CCQ (1991) art. 1453. Le transfert d'un droit réel portant sur un bien individualisé ou sur plusieurs biens considérés comme une universalité, en rend l'acquéreur titulaire dès la formation du contrat, quoique la délivrance n'ait pas lieu immédiatement et qu'une opération puisse rester nécessaire à la détermination du prix.
Le transfert portant sur un bien déterminé quant à son espèce seulement en rend l'acquéreur titulaire, dès qu'il a été informé de l'individualisation du bien.

[8] CCQ (1991) art. L'attribution des fruits et revenus et la charge des risques du bien qui est l'objet d'un droit réel transféré par contrat sont principalement réglées au livre Des biens.
Toutefois, tant que la délivrance du bien n'a pas été faite, le débiteur de l'obligation de délivrance continue d'assumer les risques y afférents.

On the one hand, the buyer may bear the risk as the owner (France) or even if he is not yet the owner (Switzerland); on the other hand, the seller may bear the risk because he is still the owner (Germany) or even if he is no longer the owner (Quebec).

Anyway, it must be decided who will bear the risk between the sale and the delivery: the seller or the buyer?

Of course, the solution will always be a little unfair for the party bearing the risk, because she will not receive what she expected when concluding the contract.

How can we solve this injustice? There is probably no perfect solution, because a certain injustice is inevitable.

Here we turn to the controversy between Sabinians and Proculians (at least if we follow the reconstruction of Talamanca): Should we favour the buyer of the seller? By answering this question, the legal systems have made different choices, favouring the first or the latter.

What is striking about this allocation of risk, is that it is probably classical Roman law that offered the most balanced solution, by burdening both the seller and the buyer with the risk.

So, of course, Paul affirms the rule of *periculum emptoris*, but the automatic inclusion of the seller's liability for *custodia* has mitigated this risk, since now the seller will also be required to bear some of this risk, at least that which falls within his sphere of control.

Was it possible to imagine a more balanced system? Could one imagine a better conclusion than that which pays tribute to the genius of the Roman jurists?

You can guess my conclusion.

Apparently, Alan Watson did not consider this, when he quotes David Daube (p.87, n.27), saying: "David Daube points out that in no system is any loss before delivery divided between seller and buyer".

It is true that Roman law did not divide the loss, but they seem to be the only system who divided the risk.

4. And finally, just a word of conclusion.

Alan Watson's book is brilliant in my eyes. It is very inspiring and full of interesting insights. You certainly did very well in organising a conference in honour of this book! I will certainly take it with me and seek for more inspiration in it, for my classes of comparative law!

Thank you very much for your kind attention!

Jean-François Gerkens
Professor at the University of Liège