

ACTIO EXERCITORIA ET INSTITORIA OR DIRECT REPRESENTATION IN ROMAN COMMERCIAL LAW

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The aim of this contribution is to clarify and explain the institutes of *actio exercitoria* and *actio institoria*, which belong to the group of so called adjective actions (*actiones adiecticiae qualitatis*). Although these actions are interesting from many points of view, textbooks and brochures on Roman law devote to them a maximum of two pages. These are interesting not only dogmatically, because they are in fact an exception to the *obligatio est vinculum iuris* rule, i.e. that the obligation is purely personal relation and as a principle cannot be effective towards third persons concerned on the contractual relationship. Furthermore, the introduction of adjective actions by the praetor has affected theoretically-legally political postulate, that a slave is res, not a person, able to act and enter into contracts on the basis of his own will. Thirdly, the existence of adjective actions clearly demonstrates that social and economic evolution of antique Rome, based exclusively on a slave society, was reflected also in social differentiation of bond persons, i.e. *alieno iuri subiectae*.

On the basis of exegesis of the texts of Digesta and Gaius Institutions, as the case may be on the basis of interpretation of particular parts thereof on *actiones exercitoria et institoria*, one may reach an opinion that although Roman lawyers did not know an institute of direct representation; it can be said that *actio exercitoria* and *actio institoria* constitute, from the present view, a typical legal institute of direct representation in Roman law.

Both actions were accepted by the praetor as a consequence of development of commercial relations and trade as such, perhaps in 2nd century BC. First of these actions has its basis in a circumstance, where a ship-owner (exercitor) authorizes his agent (magister navis) to command his ship, while the agent may be both, a free person, filius familias, or a slave. The

situation is analogical as regards *actio institoria*, when an owner of a trade or craftsman enterprise authorizes a person *alieno iuris*, i.e. so called institor, to manage his enterprise.

The basis of the power-holder's (*dominus*) liability is an authorization, so called *praepositio*, that sets the limits of this liability. Exercitor is thus liable only for acts within the authorization. In the case law of Roman lawyers there are instances, where the *dominus negotii*'s liability is extended to cover those acts, which are not so narrowly covered by *praepositio*. Based on this, the opinion that the *praepositio* is the only source and extent of the liability of the power-holder can be denied – as follows from the traditional doctrine. The overall extent and content of *praepositio* is not determined a priori and thus is not dependent exclusively on the will of the power-holder, but it can be created in the course of negotiations.

The IV. chapter of this contribution compares exercitorial/instutorial authorization to an authorization within a contract of mandate, where as regards a mandate the will of a client, which determines the contents of the authorization, is decisive. The authorization shall be detailed, because it shapes the limits of the mandatary's powers, and at the same time as regards a client represents the scope and limits of his liability towards third persons. In case of *praepositio institoria* or *exercitoria* the will of the power-holder is just an initial act of authorization and only one of the limitations to the execution of the commercial activities. This primary will can be modified by particular circumstances arising out of acts of the authorized party (slave). Consequently it can be said that the amplitude of authorizations in case of *praepositio exercitoria* or *institoria* is bigger than in case of contract of mandate (*mandatum*). At the end of this contribution the liability and suability of the power-holder (*dominus*) is analyzed.

At the conclusion, one can observe that through the adjective actions, including *actio exercitoria* and *actio institoria*, the praetor actively intervened to the evolution of commercial relations in antique Rome and endeavoured to regulate contractual relations, which upon authorization (*praepositio*) of the power-holder (*dominus, paterfamilias*) were entered into on his behalf by *alieno iuri subiectae*. *Dominus* was liable for these obligations *in solidum*.

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