



***Societas* and its Management**

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Abstract. The present paper analyses the rules of management of *societas* in Roman law. The first and basic situation is when the administration is operated jointly by all members. The agreement can also entrust the administration to one *socius* (or several partners). The main rule says that the *socius*-manager is acting in his own name (*societas* as internal relation). Special rules on this issue are applied in case of *societates publicanorum*, *societates argentarii*, *exercitores* and *venaliciarii*. In the second situation the management is entrusted to a *servus communis* on the basis of a so called *praepositio*. In that case the slave in co-ownership of partners becomes *institor* or *magister navis*. The third situation is when the administration is governed by a *servus communis* with *peculium*. Finally, the administration can be entrusted to a free man, who is not a *socius*, or to the slave of someone. The complexity of legal solutions leads to the conclusion that the weak points of the *societas* as internal relation were eliminated quite successfully.

Keywords: management of *societas*

Introduction

Societas is effectively a relationship involving management of business. In this respect it is akin to tutorship, mandate and *negotiorum gestio*. This is why the issue of management of business in a partnership is one of the most important issues of the legal system governing it.

Societas is joint entrepreneurship. It is considered to have been the first form of enterprise. Moreover, according to the prevalent opinion, *societas* was the only legal and organisational form of joint entrepreneurship and the nucleus of the enterprise as such.

At the same time, partnership is being criticised for its organisational inadequacy.¹ *Societas* does not have the feature of a legal entity, therefore it does not have any bodies either, or any specific property separate from that of the partners. Apart from that, *societas* lacked continuity. Its organisation is further destabilised by the

¹ Porto 1984. 13 ff.; Arbatino–Dari-Mattiaci–Perotti 2011. 3 ff.

fact that it ceased to exist when one of the partners died or in the event of a change occurring in the legal or economic status of any of the partners.

Among the objections, the ones that are particularly serious are those referring to the management of business. *Socius* as the manager, in the formal and legal sense of the term, does not undertake any business in the name of the association as a whole, or in the name of the partners individually. There was no direct agency. That is why *societas* has an internal character. The *socius* who enters into an agreement does not bind the other partners in relation to third parties, and vice versa. Any right or obligation vis-à-vis third parties was imputed to the individual partner who contracted it, and had no direct consequences for the other partners individually conceived, nor for the company as a whole. Likewise, contracts between a partner and a third party could not have direct effects for other partners, even if concluded in the interest of the company. There are exceptions to this rule, and they will be mentioned later.

The legal limitations of *societas* were overcome by the phenomenon of business management by a jointly owned slave,² which was frequently encountered in practice. Apart from this case, management of business can be entrusted, in certain cases, even to another person's slave, as well as to free persons who are not partners.

The managing of business in collective entrepreneurship in Roman law can be reduced to the following forms:

- 1) Entrepreneurs are two or more partners who jointly carry on their business or who have entrusted the management of business to one of them.
- 2) Entrepreneurs are two or more partners who have entrusted the management of their business to their jointly owned slave on the basis of the so called *praepositio* with their jointly owned slave acting as the *institor* or *magister navis*.
- 3) Entrepreneurs are two or more partners who have entrusted the management of their business to their jointly owned slave who has *peculium*.
- 4) Entrepreneurs are two or more partners who have entrusted the management of their business to another person's slave or to a free person who is not a partner.

I. Partners as Managers

Partners were managing a business personally. They could do it all together or separately. As an example based on casuistics is well-known the text discussing cloth merchants (*sagaria negotiatio*).³ One of the partners went to buy merchandise but he was attacked by robbers, who stole his money. His slaves were wounded, and he lost some of his own things. The text discusses the bearing of risk.

² Porto 1984. 19 ff.; Arbatino–Dari–Mattiacci–Perotti 2011. 5; Nótári 2011. 325 f.

³ Ulp. D. 17, 2, 52, 4.

However, viewed from the aspect of management of business and agency, one of the partners acts as the manager in the partnership for the purpose of trading in fabrics. The manager partner neither binds the society as a whole, nor the partner individually. He acquires and assumes in his own name the obligations deriving from the business transactions he has negotiated with third parties. He shares the effects of such transactions, both the profit and the loss, with the other partner based on their internal relationship which is regulated by their partnership agreement. The following text explicitly discussed this point: D. 17, 2, 74. (Paul. 62 ad edictum) *Si quis societatem contraxerit, quod emit ipsius fit, non commune: sed societatis iudicio cogitur rem communicare.* (If somebody makes a contract of partnership, anything he buys becomes his own and is not shared; but he can be compelled to share it by an action on partnership.)⁴

There are also several important exceptions to this internal effect of a partnership, even though not all the details are absolutely clear and undisputable.⁵

The best known case is that of the government leaseholders (*societates publicanorum*) engaged in tax collection and public works. Evidence corroborating the specificity of the legal structure of a publican's company can be found prevalently in literary and epigraphic sources. The *manceps* and/or *redemptor* enter into a rental contract with the state. What is disputable is whether the *manceps* enters into the contract in his own name, thus not making it binding upon the partners, or whether this is a case of direct agency.⁶ The first view is supported by the fact that the partners are responsible for the obligations assumed by the *manceps* that have an outward effect, however, in the capacity of sureties (*praedes*) and not as members of the partnership that the *manceps* has bound directly.

In the legal sources, there are numerous special rules pertaining to *argentarii*, and one of them is the liability *in solidum* of the partners in relation to third parties.⁷

Societas venaliciaria is under a question mark. Paulus' text discussing the edict referring to slave merchants and *actio redhibitoria* seems to allow liability *in solidum* on the part of merchant-partners, which is not possible within the framework of the regular *actio empti*.⁸

4 Translation edited by Alan Watson (Philadelphia, 1998). The following translations of fragments from the *Digest* are based on the same edition.

5 Serrao 1971. 743 ff.

6 Badian 1972. 67 ff.; Cimma 1981. 275.

7 *Rhet. ad Her.* 2, 3, 19; Paul. D. 2, 14, 27 pr.; Petrucci 1991. 5; Bürge 1987. 519.

8 Serrao 1971. 744; Paul. D. 21, 1, 44, 1. (Paul. 2 ad ed. *aedilium curulium*): *Proponitur actio ex hoc edicto in eum cuius maxima pars in venditione fuerit, quia plerumque venaliciarii ita societatem coeunt, ut quidquid agunt in commune videantur agere: aequum enim aedilibus visum est vel in unum ex his, cuius maior pars aut nulla parte minor esset, aedilicias actiones competere, ne cogeretur emptor cum multis litigare, quamvis actio ex empto cum singulis sit pro portione, qua socii fuerunt: nam id genus hominum ad lucrum potius vel turpiter faciendum pronius est.* (This edict proposes an action against the one who has the greatest part in the sale:

An interesting case is that of a partnership by maritime entrepreneurs (*societas exercitores*).⁹ The partners, *exercitores* can appoint the captain (*magister navis*), who will be the manager of the vessel. The *magister navis* can be one of the partners, a free man outside the partnership, a jointly owned slave or even another person's slave. The basic rule set in the text by Ulpian specifies that where there are several ship-owners, in the event of a breach of contract by the captain (*magister navis*), whom they have jointly appointed, each one of them can be liable on the basis of *actio exercitoria*, *in solidum*.

In the case of a ship-owners' partnership, it is essential to establish whether the partners have appointed the captain based on joint agreement or not. If they have, then it is their joint and several liability based on *actio exercitoria*.¹⁰

This applies in the case where one partner has been appointed captain – *magister navis*: D. 14, 1, 4, 1. (Ulp. 29 ad ed.) *Sed si plures exerceant, unum autem de numero suo magistrum fecerint, huius nomine in solidum poterunt conveniri*. (If one of a number of ship-owners is appointed captain of a ship by the rest, they may each be sued for the full amount.) The rule shows that *societas*, though not directly, has an outward effect (*Aussenwirkung*).¹¹

The same is true of the case where the vessel was managed by a jointly owned slave.¹² Another variant has been described in the text D. 14, 1, 4 pr. Here, several ship co-owners undertake to provide transport (*per se navem exerceant*). There was no appointed captain but the partners *exercitores* manage their maritime business directly. In this case, partners are not subject to joint and several liability but rather *pro parte* because they do not mutually consider themselves as captains but, rather, act in their own names and on their own behalves.¹³ This solution is not in conformity with the general rules governing *societas*. Also, this special rule is not favourable to creditors.

for slave dealers generally so enter into partnership that whatever they do, they are deemed to do jointly. That who had a major or, anyhow, an equal share in the partnership so that the purchaser would not be obliged to litigate with a number of people, even though the action on purchase lies against each partner to the extent of his share in the partnership; for this class of persons is more concerned with making profit or with underhand dealing.)

9 Serrao 1971. 744 ff.; Meissel 2004. 176 ff.

10 Ulp. D. 14, 1, 1, 25. (Ulp. 28 ad ed.).

11 Meissel 2004. 178.

12 Paul. D. 14, 1, 6, 1.

13 Ulp. D. 14, 1, 4 pr (Ulp. 29 ad ed.): *Si tamen plures per se navem exerceant, pro portionibus exercitionis conveniuntur: neque enim invicem sui magistri videbuntur 'videntur'*. (But if a ship is being managed personally by several owners, they are liable in proportion to their shares in the management; for they are not treated as being each other's captain).

II. A Jointly Owned Slave as Institor or *magister navis*

The slave has been appointed manager of the business on land (*institor*)¹⁴ or captain (*magister navis*). By making business deals within the limits of his authority (*prepositio*), the slave has bound his owner in relation to third parties on the basis of the praetorian *actio institoria* and *actio exercitoria*. The owner's responsibility was unlimited, forming the basis for an unlimited liability company.¹⁵ The same rule applied also in the case when the slave was owned by several co-owners in unequal shares:¹⁶ D. 14, 3, 13, 2. (Ulp. 28 ad ed.): *Si duo pluresve tabernam exerceant et servum, quem ex disparibus partibus habebant, institorem praeposuerint, utrum pro dominicis partibus teneantur an pro aequalibus an pro portione mercis an vero in solidum, Iulianus quaerit. Et verius esse ait exemplo exercitorum et de peculio actionis in solidum unumquemque conveniri posse, et quidquid is praestiterit qui conventus est, societatis iudicio vel communi dividundo consequetur, quam sententiam et supra probavimus.* (If two or more people have a shop and appoint as manager a common slave whom they own in unequal shares, should they be liable in proportion to their shares in the slave or in equal shares or in proportion to their shares in the business or should they be held liable in full? Julian, who raised the question, said that each may be sued for the full amount by analogy with the action against the ship-owner and the action on the *peculium*. The person sued can recover part of what he is made to pay by an action on the partnership or for the division of property. This view we have already endorsed above.)

As evident from the text, there are four theoretical possibilities of regulating the co-owner entrepreneurs' liability in relation to third parties; in proportion to their shares in the slave, into equal parts, in proportion to their shares in business or *in solidum*. The latter possibility suggested by Julian and adopted also by Ulpian – joint and several liability of entrepreneurs-partners – is the most favourable solution for third parties, ensuring the highest degree of security in business. With regard to internal relations among entrepreneurs-partners and resolving the issue of recourse among them, the available action was *actio pro socio* or *actio communi dividundo*.

In reference to transacting business via a slave who is under co-ownership, the question arises as to the manner of acquisition in favour of several owner-partners. The acquisition is direct in view of the fact that the slave, in this case, is considered as an extended arm of his owners. *Servus communis* in this case acquires *pro*

¹⁴ Aubert 1994. 520.

¹⁵ Paul. D. 14, 1, 6, 1. (Paul. 6 brevium): *Si communis servus voluntate dominorum exercent navem, in singulos dari debet in solidum actio.* (If a slave owned in common manages a ship with the consent of his masters, each of them may be sued in full).

¹⁶ Porto 1984. 63–65.

parte, therefore in accordance with the shares that each of the co-owners has in their jointly owned slave (*pro dominica portione*). This is also the case where *servus communis* acquires by using money belonging to one owner, with the possibility for such owner whose money has been used in the purchase to sue the other partners by *actio pro socio* or *actio communi dividundo*.¹⁷ This principle of acquisition can be changed by means of the instrument called *nominatio*.¹⁸

A specific subjective presumption regarding the liability of co-owners, entrepreneurs, who do business by means of their jointly owned slave refers to the issue of whether all of them, or just some of them, have consented to the business (*voluntas*), or whether they have allowed the transaction of the business without being explicitly opposed (*scientia*), or whether they were ignorant of the business being performed (*ignorantia*). Within the framework of this form of organisation of an unlimited company, *in solidum*, the sources raise this issue only in principle with regard to *actio exercitoria*, where the jointly owned slave has been appointed captain (*magister navis*).¹⁹ However, there are no obstacles preventing this from being extended to include other business transacted on land.

III. A Jointly Owned Slave as the Manager with *peculium*

The third type of company organisation is entrusting the managing of business to a jointly owned slave who has *peculium*. This has created a collective company with limited liability, requiring a jointly owned slave and certain identified assets – *peculium*. Partners, co-owners of the slave are subject to limited liability, up to the amount of the *peculium*, on the basis of the *praetor's actio de peculio*. This type of company has its simpler and more complex forms allowing for a large scope of business in terms of the territory and type of activity.²⁰ For instance, Mevius and Titius are partners. They have two slaves, Stychus and Pamphilus. Each one of them has a *peculium* and each one of them performs a different job. The more complex form is the one where Stychus, as the chief slave (*servus ordinarius*), has two vicarious slaves in his *peculium* (*servi vicarii*) Dama and Pamphilus, who have their *peculia*, which they perform different jobs with. In addition to this, a part of the *peculium* can be singled out as specific property for a specific activity, for instance, for the managing of a merchant ship. In such a case, the property has three separate parts; *res domini*, property owned and managed by the owner, *peculium*, property owned by the master,

17 Iul. D. 10, 3, 24 pr.; Gai. D. 41, 1, 45; Iul. D. 41, 1, 37, 2.

18 Gai. *Inst.* 3, 167–167a

19 Paul. D. 14, 1.6 pr (*Paul. 6 brevium*): *si servus non voluntate domini navem exercuerit, si sciente eo, quasi tributoria, si ignorante, de peculio actio dabitur. 1. Si communis servus voluntate dominorum exerceat navem, in singulos dari debet in solidum actio.*

20 Porto 1984. 54 ff; 207 ff.

which is managed by the slave independently and *merx peculiaris*, the part of property within the framework of the *peculium*, having a specific purpose, where creditors have the possibility of satisfaction only from that specific part on the basis of *actio tributoria*.

A specific presumption regarding liability is also the subjective relationship of the owner towards the management of the slave. All of these issues are complex and the best way to proceed is to get an insight into their general aspects on the basis of the texts:²¹ D. 14, 1, 1, 22. (Ulp. 28 ad ed.) *Si tamen servus peculiaris volente filio familias in cuius peculio erat, vel servo vicarius eius navem exercuit, pater dominusve, qui voluntatem non accommodavit, dumtaxat de peculio tenebitur, sed filius ipse in solidum. Plane si voluntate domini vel patris exerceant, in solidum tenebuntur et praeterea et filius, si et ipse voluntatem accommodavit, in solidum erit obligatus.*

This text refers to maritime entrepreneurship. It is evident that the company concerned has ‘two or more tiers’. *Filius familias* has a *peculium*, individual property managed by himself, including a slave. The *filius* has used the *peculium* he received from his father, for maritime business. If the *peculium* includes money in addition to the slave, it is possible to assume that he has chartered a ship, and perhaps even bought it. The *filius* now appears as an entrepreneur in maritime trade (*exercitor*). He has entrusted the activities of managing the ship and related activities to the slave, who is *magister navis*. However, it is evident from the text that the so called *servus peculiaris* can also have a *peculium* which includes a slave (*servus vicarius*) onto whom the managing of the business has been transferred. This is how a two-tier company is formed.

This text raises the issue as to the subjective relationship between the *filius familias* as an entrepreneur (*exercitor*), and his father, who is, ultimately, the owner of the entire property. Namely, where maritime business cases are concerned, the *exercitor* is subject to unlimited liability *in solidum* for the transactions contracted by the *magister navis*, on the basis of *actio exercitoria*. It is evident from the text that this requires the consent (*voluntas*) of the entrepreneur. This consent is expressed by means of *praepositio*, an act determining the scope of the business activity and the *magister's* authority. As a result, the *filius* is subject to unlimited liability on the basis of *actio exercitoria*. Of course, such a solution is only theoretical because he does not have any property of his own. On the other hand, *pater familias*, who has not been involved in the business, his *voluntas* not existing, and who need not even know anything about the maritime business undertaken by his son to whom he has given the *peculium*, is subject to limited liability up to the level of the *peculium*. If he has also given approval to the slave for doing business with his son, then the owner, i.e. *pater familias*, will be subject to unlimited liability, *in solidum*, on the basis of *actio exercitoria*.

21 E.g. Ulp. D. 14, 4, 1, 3; 14, 4, 5, 1.

However, this text speaks about the individual entrepreneurship where the entrepreneur is one person, however, this rule is applicable *mutatis mutandis* also to joint enterprises, where internal relations among the entrepreneurs are regulated by a partnership agreement.

IV. *Extraneus* as the Manager

Partners can also appoint a free person as their manager, who is not a partner but *extraneus*. There is a contractual relationship between the partners and this free person, who is in the position of manager and agent. If he performs the managing of the business for free, what is concerned is a mandate, and if such services are provided for a fee, what is concerned most often is *locatio conductio*. On the other hand, in order for this relationship to produce outward effects, the manager, a free man, has to be appointed and authorised for the managing of the business. Therefore, there must be a *praepositio* based on which a free man may become an *institor* or *magister navis*. The deals that he makes are prosecutable based on *actio institoria* and *actio exercitoria* filed by the partners directly.²² That is a large step towards direct agency and close to modern agency.²³ Still, this is not entirely so, for two reasons. One is that the third contractual party only has the praetorian action, and not the civil action available against the principal. On the other hand, the praetorian action system provides for an action only for the third contractual party who has entered into a contract with the agent, and not for the principal. Some lawyers, for instance, Paulus and Marcel,²⁴ have noticed this misbalance, being of the opinion that, in this case, the activity of the *praetor* in favour of the principal was necessary in order to protect the latter's rights.

Conclusions

Roman law developed, although in a radically different way compared to modern law, very efficient forms of business management; those were mainly different types of *negotiationes per servos communes* actionable by praetorian remedies. They come close to the functional equivalent of the modern corporate form.²⁵

22 Gai. *Inst.* 4.71.

23 Watson 1984. 80.

24 Ulp. D. 14, 3, 1; Paul. D. 46, 5, 5.

25 Arbatino–Dari-Mattiacci–Perotti 2011. 6; ; Nótári 2009. 485.

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